NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 158

20 MAY 2003

1 JULY 2003

RALEIGH
2004

CITE THIS VOLUME
158 N.C. APP.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

SIDNEY S. EAGLES, JR.

Judges

JAMES A. WYNN, JR.
JOHN C. MARTIN
LINDA M. McGEE
PATRICIA TIMMONS-GOODSON
ROBERT C. HUNTER
J. DOUGLAS McCULLOUGH
ROBIN E. HUDSON
JOHN M. TYSON
WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
SANFORD L. STEELMAN
MARTHA GEER
ERIC L. LEVINSON

Emergency Recalled Judges

DONALD L. SMITH
JOSEPH R. JOHN, SR.
JOHN B. LEWIS, JR.

Former Chief Judges

R. A. HEDRICK
GERALD ARNOLD

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
JAMES M. BALEY, JR.
DAVID M. BRITT
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
RICHARD C. ERWIN
EDWARD B. CLARK
HARRY C. MARTIN
ROBERT M. MARTIN
CECIL J. HILL
E. MAURICE BRASWELL
WILLIS P. WHICHARD
JOHN WEBB
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
CLIFTON E. JOHNSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS

Administrative Counsel
FRANCIS E. DAIL

Clerk
JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
Daniel M. Horne, Jr.

Staff Attorneys
John L. Kelly
Shelley Lucas Edwards
Brenda D. Gibson
Bryan A. Meer
David Alan Lagos

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ralph A. Walker*

Assistant Director
David F. Hoke

APPELLATE DIVISION REPORTER
Ralph A. White, Jr.

ASSISTANT APPELLATE DIVISION REPORTERS
H. James Hutcheson
Kimberly Woodell Sieredzki

---

*Appointed by Chief Justice I. Beverly Lake, Jr. effective 2 August 2004 to replace John Kennedy who retired.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. Richard Parker	Manteo
	Jerry R. Tillett	Manteo
2	William C. Griffin, Jr.	Williamston
3A	W. Russell Duke, Jr.	Greenville
	Clifton W. Everett, Jr.	Greenville
6A	Alma L. Hinton[1]	Halifax
6B	Cy A. Grant, Sr.	Windsor
7A	Quentin T. Sumner	Rocky Mount
7B	Milton F. (Toby) Fitch, Jr.	Wilson
7BC	Frank R. Brown	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	Kenneth F. Crow	New Bern
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry	Jacksonville
5	Ernest B. Fullwood	Wilmington
	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
8A	Paul L. Jones	Kinston
8B	Jerry Braswell	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith III	Yanceyville
10	Donald W. Stephens	Raleigh
	Narley L. Cashwell	Raleigh
	Stafford G. Bullock	Raleigh
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Evelyn W. Hill	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	A. Leon Stanback, Jr.	Durham
	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
15A	J. B. Allen, Jr.	Burlington
	James Clifford Spencer, Jr.	Burlington
15B	Wade Barber	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	Fourth Division	
11A	FRANKLIN F. LANIER	Buies Creek
11B	KNOX V. JENKINS, JR.	Smithfield
12	E. LYNN JOHNSON	Fayetteville
	GREGORY A. WEEKS	Fayetteville
	JACK A. THOMPSON	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
13	WILLIAM C. GORE, JR.	Whiteville
	OLA M. LEWIS	Southport
16A	B. CRAIG ELLIS	Laurinburg
16B	ROBERT F. FLOYD, JR.	Lumberton
	GARY L. LOCKLEAR	Pembroke
	Fifth Division	
17A	MELZER A. MORGAN, JR.	Wentworth
	EDWIN GRAVES WILSON, JR.	Eden
17B	A. MOSES MASSEY	Mt. Airy
	ANDY CROMER	King
18	W. DOUGLAS ALBRIGHT	Greensboro
	CATHERINE C. EAGLES	Greensboro
	HENRY E. FRYE, JR.	Greensboro
	LINDSAY R. DAVIS, JR.	Greensboro
	JOHN O. CRAIG III	Greensboro
19B	RUSSELL G. WALKER, JR.	Asheboro
	JAMES M. WEBB	Whispering Pines
21	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM Z. WOOD, JR.	Winston-Salem
	L. TODD BURKE	Winston-Salem
	RONALD E. SPIVEY	Winston-Salem
23	MICHAEL E. HELMS	North Wilkesboro
	Sixth Division	
19A	W. ERWIN SPAINHOUR	Concord
19C	LARRY G. FORD	Salisbury
20A	MICHAEL EARLE BEALE	Wadesboro
20B	SUSAN C. TAYLOR	Monroe
	W. DAVID LEE	Monroe
22	MARK E. KLASS	Lexington
	KIMBERLY S. TAYLOR	Hiddenite
	CHRISTOPHER COLLIER	Mooresville
	Seventh Division	
25A	BEVERLY T. BEAL	Lenoir
	ROBERT C. ERVIN	Lenoir
25B	TIMOTHY S. KINCAID	Hickory
	NATHANIEL J. POOVEY	Hickory
26	ROBERT P. JOHNSTON	Charlotte
	MARCUS L. JOHNSON	Charlotte
	W. ROBERT BELL	Charlotte

DISTRICT	JUDGES	ADDRESS
	RICHARD D. BONER	Charlotte
	J. GENTRY CAUDILL	Charlotte
	DAVID S. CAYER	Charlotte
	YVONNE EVANS	Charlotte
27A	JESSE B. CALDWELL III	Gastonia
	TIMOTHY L. PATTI	Gastonia
27B	FORREST DONALD BRIDGES	Shelby
	JAMES W. MORGAN	Shelby
	Eighth Division	
24	JAMES L. BAKER, JR.	Marshall
	CHARLES PHILLIP GINN	Marshall
28	DENNIS JAY WINNER	Asheville
	RONALD K. PAYNE	Asheville
29	ZORO J. GUICE, JR.	Rutherfordton
	E. PENN DAMERON, JR.	Marion
30A	JAMES U. DOWNS	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGES

STEVE A. BALOG	Burlington
ALBERT DIAZ	Charlotte
RICHARD L. DOUGHTON	Sparta
THOMAS D. HAIGWOOD	Greenville
D. JACK HOOKS	Whiteville
CLARENCE E. HORTON, JR.	Kannapolis
JACK W. JENKINS	Raleigh
JOHN R. JOLLY, JR.	Raleigh
CHARLES C. LAMM, JR.	Boone
RIPLEY E. RAND	Raleigh
BEN F. TENNILLE	Greensboro
GARY TRAWICK, JR.	Burgaw

EMERGENCY JUDGES

HENRY V. BARNETTE, JR.	Raleigh
ANTHONY M. BRANNON	Durham
ROBERT M. BURROUGHS	Charlotte
GILES R. CLARK	Elizabethtown
C. PRESTON CORNELIUS	Mooresville
JAMES C. DAVIS	Concord
WILLIAM H. FREEMAN	Winston-Salem
HOWARD R. GREESON, JR.	Greensboro
DONALD M. JACOBS	Goldsboro
ROBERT W. KIRBY	Cherryville
JAMES E. LANNING	Charlotte
ROBERT D. LEWIS	Asheville
JAMES D. LLEWELLYN	Kinston

DISTRICT	JUDGES	ADDRESS
	JERRY CASH MARTIN	King
	PETER M. MCHUGH	Reidsville
	F. FETZER MILLS	Wadesboro
	HERBERT O. PHILLIPS III	Morehead City
	JAMES E. RAGAN III	Oriental
	J. MILTON READ, JR.	Durham
	JULIUS ROUSSEAU, JR.	North Wilkesboro
	THOMAS W. SEAY, JR.	Spencer
	CLAUDE S. SITTON	Morganton
	JAMES R. VOSBURGH	Washington

RETIRED/RECALLED JUDGES

C. WALTER ALLEN	Fairview
HARVEY A. LUPTON	Winston-Salem
LESTER P. MARTIN, JR.	Mocksville
HOLLIS M. OWENS, JR.	Rutherfordton

SPECIAL EMERGENCY JUDGES

MARVIN K. GRAY	Charlotte
HOWARD R. GREESON, JR.	High Point
JOSEPH R. JOHN, SR.	Raleigh
JOHN B. LEWIS, JR.	Farmville
DONALD L. SMITH	Raleigh

1. Appointed and sworn in 30 August 2004 to replace Dwight L. Cranford who retired 1 August 2004.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	GRAFTON G. BEAMAN (Chief)	Elizabeth City
	C. CHRISTOPHER BEAN	Edenton
	J. CARLTON COLE	Hertford
	EDGAR L. BARNES	Manteo
	AMBER MALARNEY	Wanchese
2	JAMES W. HARDISON (Chief)	Williamston
	SAMUEL G. GRIMES	Washington
	MICHAEL A. PAUL	Washington
	REGINA ROGERS PARKER	Washington
3A	DAVID A. LEECH (Chief)	Greenville
	PATRICIA GWYNETT HILBURN	Greenville
	JOSEPH A. BLICK, JR.	Greenville
	G. GALEN BRADDY	Greenville
	CHARLES M. VINCENT	Greenville
3B	JERRY F. WADDELL (Chief)	New Bern
	CHERYL LYNN SPENCER	New Bern
	PAUL M. QUINN	New Bern
	KAREN A. ALEXANDER	New Bern
	PETER MACK, JR.	New Bern
4	LEONARD W. THAGARD (Chief)	Clinton
	WAYNE G. KIMBLE, JR.	Jacksonville
	PAUL A. HARDISON	Jacksonville
	WILLIAM M. CAMERON III	Richlands
	LOUIS F. FOY, JR.	Pollocksville
	SARAH COWEN SEATON	Jacksonville
	CAROL A. JONES	Kenansville
	HENRY L. STEVENS IV	Kenansville
5	JOHN J. CARROLL III (Chief)	Wilmington
	JOHN W. SMITH	Wilmington
	ELTON G. TUCKER	Wilmington
	J. H. CORPENING II	Wilmington
	SHELLY S. HOLT	Wilmington
	REBECCA W. BLACKMORE	Wilmington
	JAMES H. FAISON III	Wilmington
6A	HAROLD PAUL MCCOY, JR. (Chief)	Halifax
	W. TURNER STEPHENSON III[1]	Halifax
6B	ALFRED W. KWASIKPUI (Chief)	Jackson
	THOMAS R. J. NEWBERN	Aulander
	WILLIAM ROBERT LEWIS II	Winton
7	JOHN L. WHITLEY (Chief)	Wilson
	JOSEPH JOHN HARPER, JR.	Tarboro
	JOHN M. BRITT	Tarboro
	PELL C. COOPER	Nashville
	ROBERT A. EVANS	Rocky Mount
	WILLIAM G. STEWART	Wilson
	WILLIAM CHARLES FARRIS	Wilson
8	JOSEPH E. SETZER, JR. (Chief)	Goldsboro
	DAVID B. BRANTLEY	Goldsboro
	LONNIE W. CARRAWAY	Goldsboro

DISTRICT	JUDGES	ADDRESS
	R. LESLIE TURNER	Kinston
	ROSE VAUGHN WILLIAMS	Goldsboro
	ELIZABETH A. HEATH	Kinston
9	CHARLES W. WILKINSON, JR. (Chief)	Oxford
	J. LARRY SENTER	Franklinton
	H. WELDON LLOYD, JR.	Henderson
	DANIEL FREDERICK FINCH	Oxford
	J. HENRY BANKS	Henderson
	GAREY M. BALLANCE	Pelham
9A	MARK E. GALLOWAY (Chief)	Roxboro
	L. MICHAEL GENTRY	Pelham
10	JOYCE A. HAMILTON (Chief)	Raleigh
	JAMES R. FULLWOOD	Raleigh
	ANNE B. SALISBURY	Raleigh
	WILLIAM C. LAWTON	Raleigh
	MICHAEL R. MORGAN	Raleigh
	ROBERT BLACKWELL RADER	Raleigh
	PAUL G. GESSNER	Raleigh
	ALICE C. STUBBS	Raleigh
	KRISTIN H. RUTH	Raleigh
	CRAIG CROOM	Raleigh
	KRIS D. BAILEY	Raleigh
	JENNIFER M. GREEN	Raleigh
	MONICA M. BOUSMAN	Raleigh
	JANE POWELL GRAY	Raleigh
11	ALBERT A. CORBETT, JR. (Chief)	Smithfield
	EDWARD H. MCCORMICK	Lillington
	MARCIA K. STEWART	Smithfield
	JACQUELYN L. LEE	Sanford
	JIMMY L. LOVE, JR.	Sanford
	ADDIE M. HARRIS-RAWLS	Clayton
	GEORGE R. MURPHY	Smithfield
	RESSON O. FAIRCLOTH II	Lillington
12	A. ELIZABETH KEEVER (Chief)	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	ROBERT J. STIEHL III	Fayetteville
	EDWARD A. PONE	Fayetteville
	C. EDWARD DONALDSON	Fayetteville
	KIMBRELL KELLY TUCKER	Fayetteville
	JOHN W. DICKSON	Fayetteville
	CHERI BEASLEY	Fayetteville
	DOUGALD CLARK, JR.	Fayetteville
13	JERRY A. JOLLY (Chief)	Tabor City
	NAPOLEON B. BAREFOOT, JR.	Supply
	THOMAS V. ALDRIDGE, JR.	Whiteville
	NANCY C. PHILLIPS	Elizabethtown
	DOUGLAS B. SASSER	Whiteville
	MARION R. WARREN	Exum
14	ELAINE M. O'NEAL (Chief)	Durham
	RICHARD G. CHANEY	Durham
	CRAIG B. BROWN	Durham

DISTRICT	JUDGES	ADDRESS
	ANN E. MCKOWN	Durham
	MARCIA H. MOREY	Durham
	JAMES T. HILL	Durham
15A	J. KENT WASHBURN (Chief)	Graham
	ERNEST J. HARVIEL	Graham
	BRADLEY REID ALLEN, SR.	Graham
	JAMES K. ROBERSON	Graham
15B	JOSEPH M. BUCKNER (Chief)	Hillsborough
	ALONZO BROWN COLEMAN, JR.	Hillsborough
	CHARLES T. L. ANDERSON	Hillsborough
	M. PATRICIA DEVINE	Hillsborough
16A	WARREN L. PATE (Chief)	Raeford
	WILLIAM G. MCILWAIN	Wagram
	RICHARD T. BROWN	Laurinburg
16B	J. STANLEY CARMICAL (Chief)	Lumberton
	HERBERT L. RICHARDSON	Lumberton
	JOHN B. CARTER, JR.	Lumberton
	WILLIAM JEFFREY MOORE	Pembroke
	JAMES GREGORY BELL	Lumberton
17A	RICHARD W. STONE (Chief)	Wentworth
	FREDRICK B. WILKINS, JR.	Wentworth
17B	OTIS M. OLIVER (Chief)	Dobson
	CHARLES MITCHELL NEAVES, JR.	Elkin
	SPENCER GRAY KEY, JR.	Elkin
18	JOSEPH E. TURNER (Chief)	Greensboro
	WILLIAM L. DAISY	Greensboro
	LAWRENCE MCSWAIN	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	WENDY M. ENOCHS	Greensboro
	SUSAN ELIZABETH BRAY	Greensboro
	PATRICE A. HINNANT	Greensboro
	A. ROBINSON HASSELL	Greensboro
	H. THOMAS JARRELL, JR.	High Point
	SUSAN R. BURCH	Greensboro
	THERESA H. VINCENT	Greensboro
	WILLIAM K. HUNTER	Greensboro
19A	WILLIAM G. HAMBY, JR. (Chief)	Concord
	DONNA G. HEDGEPETH JOHNSON	Concord
	MICHAEL KNOX	Concord
	MARTIN B. MCGEE	Concord
19B	WILLIAM M. NEELY (Chief)	Asheboro
	VANCE B. LONG	Asheboro
	MICHAEL A. SABISTON	Troy
	JAYRENE RUSSELL MANESS	Carthage
	LEE W. GAVIN	Asheboro
	SCOTT C. ETHERIDGE	Asheboro
19C	CHARLES E. BROWN (Chief)	Salisbury
	WILLIAM C. KLUTTZ, JR.	Salisbury
	BETH SPENCER DIXON	Salisbury
	KEVIN G. EDDINGER	Salisbury
20	TANYA T. WALLACE (Chief)	Rockingham

DISTRICT	JUDGES	ADDRESS
	JOSEPH J. WILLIAMS	Monroe
	CHRISTOPHER W. BRAGG	Monroe
	KEVIN M. BRIDGES	Albemarle
	LISA D. THACKER	Wadesboro
	HUNT GWYN	Monroe
	SCOTT T. BREWER	Albemarle
21	WILLIAM B. REINGOLD (Chief)	Winston-Salem
	CHESTER C. DAVIS	Winston-Salem
	WILLIAM THOMAS GRAHAM, JR.	Winston-Salem
	VICTORIA LANE ROEMER	Winston-Salem
	LAURIE L. HUTCHINS	Winston-Salem
	LISA V. L. MENEFEE	Winston-Salem
	LAWRENCE J. FINE	Winston-Salem
	DENISE S. HARTSFIELD	Winston-Salem
22	SAMUEL CATHEY (Chief)	Statesville
	JAMES M. HONEYCUTT	Lexington
	JIMMY L. MYERS	Mocksville
	WAYNE L. MICHAEL	Lexington
	L. DALE GRAHAM	Taylorsville
	JULIA SHUPING GULLETT	Mooresville
	THEODORE S. ROYSTER, JR.	Lexington
	APRIL C. WOOD	Statesville
	MARY F. COVINGTON	Mocksville
23	EDGAR B. GREGORY (Chief)	Wilkesboro
	DAVID V. BYRD	Wilkesboro
	JEANIE REAVIS HOUSTON	Wilkesboro
	MITCHELL L. MCLEAN	Wilkesboro
24	ALEXANDER LYERLY (Chief)	Banner Elk
	WILLIAM A. LEAVELL III	Bakersville
	KYLE D. AUSTIN	Pineola
	BRUCE BURRY BRIGGS	Mars Hill
25	ROBERT M. BRADY (Chief)	Lenoir
	GREGORY R. HAYES	Hickory
	L. SUZANNE OWSLEY	Hickory
	C. THOMAS EDWARDS	Morganton
	BUFORD A. CHERRY	Hickory
	SHERRIE WATSON ELLIOTT	Hickory
	JOHN R. MULL	Hickory
	AMY R. SIGMON	Hickory
26	FRITZ Y. MERCER, JR. (Chief)	Charlotte
	YVONNE M. EVANS	Charlotte
	H. WILLIAM CONSTANGY	Charlotte
	JANE V. HARPER	Charlotte
	PHILLIP F. HOWERTON, JR.	Charlotte
	ELIZABETH M. CURRENCE	Charlotte
	RICKYE MCKOY-MITCHELL	Charlotte
	LISA C. BELL	Charlotte
	LOUIS A. TROSCH, JR.	Charlotte
	REGAN A. MILLER	Charlotte
	NANCY BLACK NORELLI	Charlotte
	HUGH B. LEWIS	Charlotte

DISTRICT	JUDGES	ADDRESS
	AVRIL U. SISK	Charlotte
	NATHANIEL P. PROCTOR	Charlotte
	BECKY THORNE TIN	Charlotte
	BEN S. THALHEIMER	Charlotte
	HUGH B. CAMPBELL, JR.	Charlotte
	THOMAS MOORE, JR.	Charlotte
27A	DENNIS J. REDWING (Chief)	Gastonia
	JOYCE A. BROWN	Belmont
	ANGELA G. HOYLE	Gastonia
	JOHN K. GREENLEE	Gastonia
	JAMES A. JACKSON	Gastonia
	RALPH C. GINGLES, JR.	Gastonia
	THOMAS GREGORY TAYLOR	Belmont
27B	LARRY JAMES WILSON (Chief)	Shelby
	ANNA F. FOSTER	Shelby
	K. DEAN BLACK	Denver
	CHARLES A. HORN, SR.	Shelby
28	GARY S. CASH (Chief)	Asheville
	PETER L. RODA	Asheville
	SHIRLEY H. BROWN	Asheville
	REBECCA B. KNIGHT	Asheville
	MARVIN P. POPE, JR.	Asheville
	PATRICIA A. KAUFMANN	Asheville
29	ROBERT S. CILLEY (Chief)	Pisgah Forest
	MARK E. POWELL	Hendersonville
	DAVID KENNEDY FOX	Hendersonville
	LAURA J. BRIDGES	Hendersonville
	C. RANDY POOL	Marion
	C. DAWN SKERRETT	Cedar Mountain
30	DANNY E. DAVIS (Chief)	Waynesville
	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS	Sylva
	MONICA HAYES LESLIE	Waynesville

EMERGENCY JUDGES

ABNER ALEXANDER	Winston-Salem
CLAUDE W. ALLEN, JR.	Oxford
PHILIP W. ALLEN	Reidsville
E. BURT AYCOCK, JR.	Greenville
SARAH P. BAILEY	Rocky Mount
LOWRY M. BETTS	Pittsboro
RONALD E. BOGLE	Raleigh
DONALD L. BOONE	High Point
JOYCE A. BROWN	Belmont
DAPHENE L. CANTRELL	Charlotte
SOL G. CHERRY	Fayetteville
WILLIAM A. CHRISTIAN	Sanford
SPENCER B. ENNIS	Graham

DISTRICT	JUDGES	ADDRESS
	J. PATRICK EXUM	Kinston
	J. KEATON FONVIELLE	Shelby
	GEORGE T. FULLER	Lexington
	RODNEY R. GOODMAN	Kinston
	ADAM C. GRANT, JR.[2]	Concord
	LAWRENCE HAMMOND, JR.	Asheboro
	ROBERT L. HARRELL	Asheville
	JAMES A. HARRILL, JR.	Winston-Salem
	PATTIE S. HARRISON	Roxboro
	ROLAND H. HAYES	Winston-Salem
	ROBERT E. HODGES	Morganton
	ROBERT W. JOHNSON	Statesville
	WILLIAM G. JONES	Charlotte
	LILLIAN B. JORDAN	Asheboro
	ROBERT K. KEIGER	Winston-Salem
	JACK E. KLASS	Lexington
	C. JEROME LEONARD, JR.	Charlotte
	EDMUND LOWE	High Point
	JAMES E. MARTIN	Ayden
	J. BRUCE MORTON	Greensboro
	DONALD W. OVERBY	Raleigh
	L. W. PAYNE, JR.	Raleigh
	STANLEY PEELE	Chapel Hill
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia
	EARL J. FOWLER, JR.	Asheville

RETIRED/RECALLED JUDGES

WILLIAM A. CREECH	Raleigh
T. YATES DOBSON, JR.	Smithfield
ROBERT T. GASH	Brevard
HARLEY B. GASTON, JR.	Gastonia
WALTER P. HENDERSON	Trenton
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed and sworn in 24 September 2004.
2. Deceased 7 June 2001.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
JULIA S. WHITE

Deputy Chief of Staff
KRISTI J. HYMAN

Director of Administrative Services
STEPHEN C. BRYANT

Deputy Attorney General for Policy and Planning
KELLY CHAMBERS

General Counsel
J. B. KELLY

Chief Deputy Attorney General
GRAYSON G. KELLEY

Senior Deputy Attorneys General

WILLIAM N. FARRELL, JR.
JAMES COMAN
REGINALD L. WATKINS
JAMES C. GULICK
ANN REED DUNN
JOSHUA H. STEIN

Special Deputy Attorneys General

STEVEN M. ARBOGAST
JOHN J. ALDRIDGE III
HAL F. ASKINS
JONATHAN P. BABB
DAVID R. BLACKWELL
ROBERT J. BLUM
WILLIAM H. BORDEN
HAROLD D. BOWMAN
CHRISTOPHER P. BREWER
JUDITH R. BULLOCK
MABEL Y. BULLOCK
JILL L. CHEEK
LEONIDAS CHESTNUT
KATHRYN J. COOPER
JOHN R. CORNE
ROBERT O. CRAWFORD III
FRANCIS W. CRAWLEY
TRACY C. CURTNER
GAIL E. DAWSON
ROBERT R. GELBLUM
GARY R. GOVERT
NORMA S. HARRELL
WILLIAM P. HART
ROBERT T. HARGETT
E. BURKE HAYWOOD
JILL B. HICKEY
KAY HOBART-MILLER
J. ALLEN JERNIGAN
DOUGLAS A. JOHNSTON
FREDERICK C. LAMAR
CELIA G. LATA
ROBERT M. LODGE
KAREN E. LONG
JAMES P. LONGEST
JOHN F. MADDREY
AMAR MAJMUNDAR
T. LANE MALLONEE, JR.
GAYL M. MANTHEI
RONALD M. MARQUETTE
ALANA D. MARQUIS
ELIZABETH L. MCKAY
BARRY S. MCNEILL
W. RICHARD MOORE
THOMAS R. MILLER
G. PATRICK MURPHY
DENNIS P. MYERS
LARS F. NANCE
SUSAN K. NICHOLS
SHARON PATRICK-WILSON
TERESA H. PELL
ALEXANDER M. PETERS
THOMAS J. PITMAN
GERALD K. ROBBINS
CHRISTINE M. RYAN
BUREN R. SHIELDS III
RICHARD E. SLIPSKY
TIARE B. SMILEY
VALERIE B. SPALDING
W. DALE TALBERT
DONALD R. TEETER
MELISSA L. TRIPPE
VICTORIA L. VOIGHT
JOHN H. WATTERS
KATHLEEN M. WAYLETT
EDWIN W. WELCH
JAMES A. WELLONS
THEODORE R. WILLIAMS
THOMAS J. ZIKO

Assistant Attorneys General

DANIEL D. ADDISON
DAVID J. ADINOLFI II
MERRIE ALCOKE
JAMES P. ALLEN
SONYA M. ALLEN
STEVEN A. ARMSTRONG
KEVIN ANDERSON
KATHLEEN BALDWIN
GRADY L. BALENTINE, JR.
JOHN P. BARKLEY
DANA BARKSDALE
JOHN G. BARNWELL, JR.
VALERIE L. BATEMAN
SCOTT K. BEAVER
MARC D. BERNSTEIN
BARRY H. BLOCH
KAREN A. BLUM
RICHARD H. BRADFORD
DAVID P. BRENSKILLE
CHRISTOPHER BROOKS
ANNE J. BROWN
JILL A. BRYAN
STEVEN F. BRYANT
HILDA BURNETTE-BAKER
SONYA M. CALLOWAY
JASON T. CAMPBELL
STACY T. CARTER

LAUREN M. CLEMMONS
JOHN CONGLETON
SCOTT A. CONKLIN
LISA G. CORBETT
DOUGLAS W. CORKHILL
ALLISON S. CORUM
JILL F. CRAMER
LAURA E. CRUMPLER
WILLIAM B. CRUMPLER
JOAN M. CUNNINGHAM
ROBERT M. CURRAN
NEIL C. DALTON
LISA B. DAWSON
CLARENCE J. DELFORGE III
KIMBERLY W. DUFFLEY
PATRICIA A. DUFFY
BRENDA EADDY
MARGARET P. EAGLES
JEFFREY R. EDWARDS
DAVID L. ELLIOTT
JOHN C. EVANS
CAROLINE FARMER
JUNE S. FERRELL
BERTHA L. FIELDS
SPURGEON FIELDS III
JOSEPH FINARELLI
WILLIAM W. FINLATOR, JR.
MARGARET A. FORCE
NANCY L. FREEMAN
VIRGINIA L. FULLER
KATHERINE C. GALVIN
EDWIN L. GAVIN II
LAURA J. GENDY
JANE A. GILCHRIST
LISA GLOVER
CHRISTINE GOEBEL
MICHAEL DAVID GORDON
LISA H. GRAHAM
RICHARD A. GRAHAM
ANGEL E. GRAY
LEONARD G. GREEN
WENDY L. GREENE
MYRA L. GRIFFIN
KIMBERLY GUNTER
MARY E. GUZMAN
PATRICIA BLY HALL
RICHARD L. HARRISON
JANE T. HAUTIN
JOSEPH E. HERRIN
CLINTON C. HICKS
ALEXANDER M. HIGHTOWER
JAMES D. HILL
CHARLES H. HOBGOOD
JAMES C. HOLLOWAY
DANIEL S. JOHNSON
LINDA J. KIMBELL
CLARA D. KING
ANNE E. KIRBY
DAVID N. KIRKMAN
BRENT D. KIZIAH
TINA A. KRASNER
LORI A. KROLL
AMY C. KUNSTLING
KRISTINE L. LANNING
DONALD W. LATON
PHILIP A. LEHMAN
ANITA LEVEAUX-QUIGLESS
FLOYD M. LEWIS
AMANDA P. LITTLE
SUSAN R. LUNDBERG
JENNIE W. MAU
MARTIN T. MCCRACKEN
J. BRUCE MCKINNEY
GREGORY S. MCLEOD
MICHELLE B. MCPHERSON
QUINITA S. MARTIN
ANN W. MATTHEWS
SARAH Y. MEACHAM
THOMAS G. MEACHAM, JR.
MARY S. MERCER
ANNE M. MIDDLETON
DIANE G. MILLER
EMERY E. MILLIKEN
ROBERT C. MONTGOMERY
THOMAS H. MOORE
CHARLES J. MURRAY
JOHN F. OATES
DANIEL O'BRIEN
JANE L. OLIVER
JAY L. OSBORNE
ROBERTA A. OUELLETTE
ELIZABETH L. OXLEY
SONDRA C. PANICO
ELIZABETH F. PARSONS
LOUIS PATALANO
BRYAN PAXTON
JOHN A. PAYNE
CHERYL A. PERRY
ELIZABETH C. PETERSON
DONALD K. PHILLIPS
STACEY A. PHIPPS
ALLISON A. PLUCHOS
WILLIAM M. POLK
DIANE M. POMPER
KIMBERLY D. POTTER
DOROTHY A. POWERS
NEWTON G. PRITCHETT, JR.
ROBERT K. RANDLEMAN
ASBY T. RAY
DIANE A. REEVES
RUDOLPH E. RENFER
YVONNE B. RICCI
JOYCE S. RUTLEDGE
KELLY SANDLING
GARY A. SCARZAFAVA
JOHN P. SCHERER II
NANCY E. SCOTT
BARBARA A. SHAW
CHRIS Z. SINHA
BELINDA A. SMITH
DONNA D. SMITH
ROBERT K. SMITH
MARC X. SNEED
M. JANETTE SOLES
RICHARD G. SOWERBY, JR.
JAMES M. STANLEY
IAIN M. STAUFFER
WILLIAM STEWART, JR.
MARY ANN STONE
LASHAWN L. STRANGE
ELIZABETH N. STRICKLAND
SCOTT STROUD
KIP D. STURGIS
SUEANNA P. SUMPTER
DAHR J. TANOURY
KATHRYN J. THOMAS
JANE R. THOMPSON
MARY P. THOMPSON
DOUGLAS P. THOREN
JUDITH L. TILLMAN
BRANDON L. TRUMAN
BENJAMIN M. TURNAGE
RICHARD JAMES VOTTA
ANN B. WALL
SANDRA WALLACE-SMITH
GAINES M. WEAVER
MARGARET L. WEAVER
ELIZABETH J. WEESE
HOPE M. WHITE
NORMAN WHITNEY, JR.
BRIAN C. WILKS
MARY D. WINSTEAD
DONNA B. WOJCIK
THOMAS M. WOODWARD
PATRICK WOOTEN
HARRIET F. WORLEY
CLAUDE N. YOUNG, JR.
MICHAEL D. YOUTH

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	Frank R. Parrish	Elizabeth City
2	Seth H. Edwards	Washington
3A	W. Clark Everett	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	Dewey G. Hudson, Jr.	Jacksonville
5	Benjamin David	Wilmington
6A	William G. Graham	Halifax
6B	Valerie M. Pittman	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	C. Branson Vickory III	Goldsboro
9	Samuel B. Currin	Oxford
9A	Joel H. Brewer	Roxboro
10	C. Colon Willoughby, Jr.	Raleigh
11	Thomas H. Lock	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Rex Gore	Bolivia
14	James E. Hardin, Jr.	Durham
15A	Robert F. Johnson	Graham
15B	Carl R. Fox	Chapel Hill
16A	Kristy McMillan Newton	Raeford
16B	L. Johnson Britt III	Lumberton
17A	Belinda J. Foster	Wentworth
17B	Clifford R. Bowman	Dobson
18	Stuart Albright	Greensboro
19A	Roxann L. Vaneekhoven	Concord
19B	Garland N. Yates	Asheboro
19C	William D. Kenerly	Salisbury
20	Michael Parker	Monroe
21	Thomas J. Keith	Winston-Salem
22	Garry N. Frank	Lexington
23	Thomas E. Horne	Wilkesboro
24	James T. Rusher	Boone
25	David T. Flaherty, Jr.	Lenoir
26	Peter S. Gilchrist III	Charlotte
27A	Michael K. Lands	Gastonia
27B	William Carlos Young	Shelby
28	Ronald L. Moore	Asheville
29	Jeff Hunt	Hendersonville
30	Charles W. Hipps	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3A	DONALD C. HICKS III	Greenville
3B	DEBRA L. MASSIE	Beaufort
12	RON D. MCSWAIN	Fayetteville
14	ROBERT BROWN, JR.	Durham
15B	JAMES E. WILLIAMS, JR.	Carrboro
16A	J. GRAHAM KING	Laurinburg
16B	ANGUS B. THOMPSON	Lumberton
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27A	KELLUM MORRIS	Gastonia
28	J. ROBERT HUPSTADER	Asheville

GENERAL STATUTES CITED

RULES OF EVIDENCED CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF CIVIL PROCEDURE CITED

CONSTITUTION OF THE UNITED STATES CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. ROBERT ANTHONY DAVIS

No. COA02-401

(Filed 20 May 2003)

1. Confessions and Incriminating Statements— statements by Marine to Platoon Commander—Miranda warnings

Statements made by a Marine to his Platoon Commander without Miranda warnings were inadmissible as the product of a custodial interrogation, but admission of the statements was harmless in light of other testimony. Under the totality of the circumstances, including the rules and regulations governing the military, a reasonable person in defendant's circumstances would have believed that he effectively had no freedom of movement.

2. Kidnapping— first-degree—removal—fraudulent representations

The trial court properly denied defendant's motion to dismiss a first-degree kidnapping charge, and consequently a felony murder charge, where the State presented evidence that defendant obtained consent from the victim by falsely telling the victim that he was stranded and needed a ride; defendant confessed that he had tricked the victim into giving him a ride; the victim had been following his routine, which would have taken him to his home; and the shooting did not occur on the way to the victim's home. The jury could infer that the scene of the shooting was not a place to which the victim would normally have gone

willingly absent defendant's fraudulent representations, and the State is not required to exclude all other possible inferences to defeat a motion to dismiss.

3. Constitutional Law— effective assistance of counsel—factual issues—motion for appropriate relief

An assignment of error alleging ineffective assistance of counsel was dismissed without prejudice to a subsequent motion for appropriate relief where there were factual issues to be more fully developed before a proper review of the claim could be undertaken.

4. Homicide— first-degree murder—short-form indictment

The trial court did not err by denying a motion to dismiss a first-degree murder charge which was based on a short-form murder indictment.

Judge BRYANT concurring in the result.

Appeal by defendant from judgments entered 1 June 2001 by Judge Donald M. Jacobs in Wayne County Superior Court. Heard in the Court of Appeals 28 January 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley, for the State.

Paul M. Green for defendant-appellant.

GEER, Judge.

Defendant Robert Anthony Davis appeals from judgments filed 1 June 2001 entered consistent with jury verdicts finding him guilty of first-degree murder and first-degree kidnapping. The issues before this Court are: (I) whether defendant's statements to his Platoon Commander, Chief Warrant Officer Brown, were the product of a custodial interrogation and/or not voluntarily given; (II) whether there was sufficient evidence that defendant kidnapped the victim through use of fraud or misrepresentation; (III) whether the record is sufficient to determine if defendant received ineffective assistance of counsel at trial; and (IV) whether the trial court erred in not dismissing the short-form indictment or forcing the State to elect one theory of first-degree murder. We find no prejudicial error in defendant's trial, but dismiss defendant's ineffective assistance of counsel assign-

ment of error without prejudice to its being asserted in a later motion for appropriate relief.

The State's evidence tends to show that in February 1999, defendant was serving in the United States Marine Corps and stationed at Twenty-Nine Palms in California. Prior to returning to North Carolina on leave, defendant showed Anthony Knight, a member of his platoon, a Taurus 9mm handgun that he had purchased. Knight and defendant then made targets to practice shooting in the desert surrounding Twenty-Nine Palms. Three days before going on leave, defendant told Knight and several other people that he "was going to beat the crap out of a guy for raping his wife."

While defendant was on leave in Goldsboro, North Carolina, he and his wife went to the bakery where the ultimate victim, Milton Williams, worked. Defendant asked to speak to Sheila Small, his first cousin, but when Small came out, defendant asked her to get James Foster, who also worked at the bakery. Defendant told Foster that he wanted to see Williams. When Foster asked why, defendant said that Williams had raped defendant's wife. Defendant announced to Foster that he was going to "kick [Williams'] ass." Defendant asked Foster to tell Williams that Foster had seen defendant. In later conversations with Foster, defendant also talked about beating up Williams.

At one point during the following days, defendant and Foster asked Small to call Williams and pretend to arrange a meeting with him at which defendant would appear instead. Small, however, refused.

On 11 March 1999, Williams left work at the bakery between 3:30 and 4:00 a.m. As he did every day, he gave Robert Reddick a ride home from work. Usually, when Williams left work, he would continue home to his trailer after dropping off Reddick. Williams was supposed to pick Reddick up at 7:30 a.m. that same morning to get their paychecks.

At about 5:30 a.m., Williams entered a Pantry convenience store in Goldsboro. A second man walked in shortly after Williams, the two men talked a bit, and then they left together. These events were captured by the store's security camera.

Sometime after Douglas Macklin got up at 5:20 a.m., he heard ten gunshots. He looked out of his window in the Edwards Mobile Home Park and saw a car moving slowly towards his home with a second

car following behind. Macklin then saw a person fall into the street beside the first car, get up, and jump into the second car, which drove away. Wayne County Sheriff's deputies and emergency medical technicians arrived at the scene and found Williams' dead body inside the car in the driver's seat. Teresa Watkins, the victim's sister, confirmed that the Edwards Mobile Home Park was not on a direct route between the Pantry convenience store and the victim's home, but rather required turning in the opposite direction at a particular intersection.

Williams had been shot numerous times at close range from the passenger side of the car. A number of 9mm Federal brand bullet cartridge cases—all fired from the same gun—were found around the crime scene. This brand of bullets was available at the same store where defendant had purchased the 9mm Taurus handgun.

Later on the day of the shooting, Foster, who was at Sheila Small's house, was paged by defendant. Defendant reported vaguely to Foster: "I had to do that." It was not until 30 or 45 minutes later that Foster learned that something had happened to Williams.

Foster and Small went to defendant's parents' house, where defendant had been staying. Small went inside, but Foster spoke with defendant in the yard. Foster asked defendant what had happened, and defendant stated, "he did what he had to do." When Small came back outside, she asked defendant: "Did you do it?" Defendant again said that he did what he felt like he had to do. Defendant asked Small to keep the information to herself and she agreed.

Later that day, Small talked again with defendant and his wife. Defendant explained that he got a ride from Williams at a store and had his wife follow them:

> [Davis] told me that he met [Williams] at a store. He asked him for a ride. Said he was stranded. I don't know if he asked him where he was going or whatever, but he wound up in the car with him, said he would give him a ride. They was heading wherever they wound up at. He said that [Williams knew] . . . that he was being followed and he said he was like, "What?" And he said that [Williams] leaned down, reached down as if he was going to get something from under his seat, he didn't know what, and he shot him. He jumped out of the car, he said.

Defendant's wife then suggested that it was good that they had not reported the rape since that "would have led right back to them."

Rodney Atkinson, also defendant's first cousin, testified that he too asked defendant whether he had killed Williams. Although at first, defendant said no, he then broke down and said, "Yeah, I done it." Later, defendant explained to Atkinson in greater detail that while defendant was riding with Williams, defendant's wife had pulled up beside Williams' car and defendant asked whether Williams knew who she was. When Williams reached under his seat, "everything just happened," according to defendant.

On 24 March 1999, after returning to California, defendant asked his sergeant, Howard Crosby, if he knew how to dispose of a 9mm handgun. Sergeant Crosby offered to buy the gun, but a few minutes later, defendant stated that he could not sell the gun because he had already dismantled it and thrown it away in the desert. Later that same day, defendant took a phone call. When he returned, he told Crosby that he needed to telephone a lawyer. Crosby asked him why, but defendant refused to talk about it. Crosby took defendant to see his Platoon Sergeant, Lieutenant Scott Cavenaugh, because Cavenaugh had authority to give defendant permission to leave his station to make a telephone call.

After speaking to Cavenaugh, defendant was escorted by both Cavenaugh and Crosby to see Chief Warrant Officer Kenneth Lee Brown, the Platoon Commander. Cavenaugh told Brown that defendant had received a phone call indicating that the sheriff's department was on the way to arrest him and that Brown would want to hear what defendant had to say. Defendant confirmed to Brown that his mother had called and warned that a detective from North Carolina was on the way because defendant was a suspect in a murder case. Brown asked defendant if he was involved in the murder and defendant replied "sort of." Brown then said: "Well, are you involved or not involved? Yes or no question." Defendant replied, "Yes, I am involved." He explained that he did not know the murdered man, but that he had been told that the man raped his wife in North Carolina while defendant was in California. Defendant was then allowed to make his telephone call.

I

[1] Defendant argues first that his statements to Chief Warrant Officer Brown, defendant's Platoon Commander, were the product of a custodial interrogation. Because, prior to making these statements, defendant was not given his *Miranda* warnings, we hold that

these statements were inadmissible. We conclude, however, that any error in admitting the statements was harmless beyond a reasonable doubt.

The Importance of the Military Context of the Interrogation

In deciding whether the Platoon Commander's questioning of defendant constituted a custodial interrogation, we must consider the realities and necessities of military life. We cannot disregard the military context. The United States Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743, 41 L. Ed. 2d 439, 450 (1974). Requiring a member of the armed forces to choose either to disregard a direct question of a commanding officer or forego his or her Fifth Amendment rights, will risk undermining the discipline and order that is the necessary hallmark of our military. Those members of the armed forces who commendably act in accordance with their training should not, for their reward, be punished by being stripped of their Fifth Amendment rights.

Although the Court in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), recognized that the Fifth Amendment prohibits the use only of "compelled" testimony, it concluded that custodial interrogations are so inherently compelling that an individual is entitled to be warned in advance of his or her rights. The critical holding of *Miranda* is that " ' "custodial situations" create[] a presumption of compulsion which would exclude statements of a defendant' " if unwarned. *State v. Buchanan*, 353 N.C. 332, 336-37, 543 S.E.2d 823, 826 (2001) (quoting *Oregon v. Elstad*, 470 U.S. 298, 306-07, 84 L. Ed. 2d 222, 230-31 (1985)). Concerns about inherent compulsion are ultimately at the heart of *Miranda*. In the military, interrogation by a superior officer raises a substantial risk of inherent compulsion.

The United States Supreme Court has observed that the " '[military's] law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.' " *Parker*, 417 U.S. at 744, 41 L. Ed. 2d at 451 (quoting *In re Grimley*, 137 U.S. 147, 153, 34 L. Ed. 636, 11 S. Ct. 54 (1890)). Indeed, the military can only function with "strict discipline and regulation that would be unacceptable in a civilian setting." *Chappell v. Wallace*, 462 U.S. 296, 300, 76 L. Ed. 2d 586, 590 (1983).

A superior officer must be assured that a soldier will react immediately and without question to a command on the battlefield. That

instinctive reaction has to be instilled in a soldier long before he goes to war: "The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Id.* at 300, 76 L. Ed. 2d at 590-91. *See also Goldman v. Weinberger*, 475 U.S. 503, 507, 89 L. Ed. 2d 478, 484 (1986) (emphasis added) ("[T]o accomplish its mission the military must foster *instinctive* obedience, unity, commitment, and esprit de corps").

The relationship between the superior officer and those under his command is key:

> The Court has often noted "the peculiar and special relationship of the soldier to his superiors," and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty. . . ." This becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.

Chappell, 462 U.S. at 300, 76 L. Ed. 2d at 591 (citations omitted).

The United States Court of Appeals for the Armed Forces has recognized that the unique environment of the military must be taken into account when determining, under *Miranda*, the admissibility of statements made to commanding officers. In *United States v. Swift*, 53 M.J. 439, 445 (2000), *cert. denied*, 531 U.S. 1150, 148 L. Ed. 2d 966 (2001), the court stated: "In the armed forces, a person learns from the outset of recruit training to respond promptly to the direct orders and the indirect expectations of superiors and others, such as military police, who are authorized to obtain official information. Failure to respond to direct orders can result in criminal offenses unknown in civilian life. . . ."

Thus, under 10 U.S.C. §§ 889 and 890, a man or woman in the service "shall be punished" by court-martial for behaving with disrespect toward his superior commissioned officer or for willfully disobeying a lawful command of his superior commissioned officer. 10 U.S.C. §§ 889, 890 (2003). As a result of these criminal provisions and the training instilled in members of our armed forces from the earli-

est point of service, "a question from a superior or an investigator is likely to trigger a direct response without any consideration of the privilege against self-incrimination." *Swift*, 53 M.J. at 445.

Because of this possibility, Congress—fifteen years before *Miranda*—passed legislation, codified at 10 U.S.C. § 831 (2003), containing a warning requirement almost identical to *Miranda*. *Swift*, 53 M.J. at 445. While it is not entirely clear why Congress required warnings in the military long before civilians were entitled to such protections, "it may be assumed that Congress believed that in the military, warnings were essential to the effective exercise of the right against self-incrimination. Pressures of rank and duty position are not a problem in civilian law enforcement activities." M. Supervielle, *Article 31(b): Who Should be Required to Give Warnings?*, 123 Mil. L. Rev. 151, 186 (Winter 1989).

The Supreme Court has stressed that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, *and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.*" *Burns v. Wilson*, 346 U.S. 137, 140, 97 L. Ed. 1508, 1514 (1953) (emphasis added). Only Congress has the authority to decide how to balance the rights of men and women in the service with the needs of the armed forces: "The Framers expressly entrusted that task to Congress." *Id.*

Yet, if civilian courts may hold—contrary to military law—that unwarned questioning by superior officers is not custodial interrogation and does not violate *Miranda* in the civilian courts, then that balance will be substantially disrupted. Although a member of the armed forces should not be encouraged to debate whether or not to answer his superior's question, a rule making his responses admissible would effectively mandate that he do so. On the other hand, a man or woman in the service who acts instinctively and answers automatically—as he or she has been trained—can hardly be considered to have acted voluntarily to the same extent as a civilian. We do not believe that this unsettling of the balance struck by Congress is wise or consistent with the mandate of the United States Supreme Court: "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." *Chappell*, 462 U.S. at 300, 76 L. Ed. 2d at 591.

Custodial Interrogation Under *Miranda*

In deciding whether defendant Davis was subjected to a custodial interrogation, the trial court was required to determine whether defendant's statements were the result of " 'questioning initiated by law enforcement officers after [defendant had] been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *State v. Gaines*, 345 N.C. 647, 661-62, 483 S.E.2d 396, 405 (quoting *State v. Phipps*, 331 N.C. 427, 441, 418 S.E.2d 178, 185 (1992)), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). The court applies an objective test: "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. In other words, the question in this case is whether a reasonable Marine in the circumstances confronting defendant Davis would have believed that his freedom of movement was limited to the same degree as a formal arrest.

a.

The first question arising in this appeal is whether defendant Davis was subjected to questioning by a law enforcement officer. In concluding that he was not, the trial court overlooked the Uniform Code of Military Justice. That Code, at 10 U.S.C. § 809 (2003) (emphasis added), provides:

> (a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
>
> (b) *An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter* [10 USCS §§ 801 et seq.]. . . .

In short, Brown—who was both a commissioned officer and Platoon Commander—had authority to order the arrest of defendant.[1]

1. Although Brown testified that he could not arrest an individual, it is apparent from his testimony that he was referring to the ability to perform a physical arrest, a power lodged in the Military Police, and was not addressing his authority under the Code of Military Justice to order a person's arrest or confinement. Brown did admit that he had authority to force defendant to remain in one place until Brown chose to release him.

Brown's authority to order that someone be placed under arrest is sufficient to invoke the protections of *Miranda*. *See Commonwealth v. McGrath*, 508 Pa. 250, 262-63, 495 A.2d 517, 523 (1985) (finding that the defendant's superior officers were law enforcement officers within the meaning of *Miranda* based on the fact that they had the ability to order defendant into arrest). *See also Swift*, 53 M.J. at 445 ("Another special feature of military life is the blending of both administrative and law enforcement roles in the performance of official duties."); M. Supervielle, *Article 31(b)*, 123 Mil. L. Rev. at 187 ("Military leaders often perform law enforcement functions as part of their duties.") Indeed, the hybrid nature of military superior officers was one of the reasons Congress needed to require warnings long before police officers were required to give them to civilians. M. Supervielle, *Article 31(b)*, 123 Mil. L. Rev. at 205 ("Only by requiring warnings could Congress be assured that a suspect would be put on notice that a military superior asking him questions did so in a law enforcement capacity, and not in a personal capacity or in one of his many other official, non-law enforcement capacities.").

b.

The second question for this appeal is whether defendant Davis, when being questioned, was in custody within the meaning of *Miranda*. The trial court should have considered what a reasonable Marine in defendant's position, under the totality of the circumstances, would have believed. A court may make this determination only by reviewing the expectations governing Marines. As explained above, a reasonable Marine would have believed that he was required to answer the questions of his commanding officer and that he was not free to leave until he had done so. This reality was in fact born out by the evidence.

Here, defendant Davis did not voluntarily subject himself to questioning by his commanding officer. *See United States v. Tempia*, 16 C.M.A. 629, 636 (1967) ("It ignores the realities of [military life] to say that one ordered to appear for interrogation has not been significantly deprived of his freedom of action."). The trial testimony reveals that defendant informed his immediate supervisor Crosby that he needed to call a lawyer. Crosby escorted defendant to the Platoon Sergeant, Lieutenant Scott Cavenaugh, because Cavenaugh had the authority to authorize defendant's requested phone call. Cavenaugh and Crosby then escorted defendant to Platoon Commander Brown. There is no evidence in the record that de-

fendant was escorted to see Brown for any reason other than to inform Brown that a Marine under his command was a murder suspect. On *voir dire*, Brown testified that Cavenaugh told him that he might want to hear what defendant had to say about events that had happened while defendant was on leave. Cavenaugh then told Brown that defendant had received a phone call stating that a member of the Wayne County Sheriff's Department was on the way to arrest defendant. According to Brown, Cavenaugh was obligated to report such information to his commanding officer, Platoon Commander Brown.

As Brown repeatedly testified, defendant Davis could not, while he was being questioned, leave Brown's office without Brown's permission. In fact, Brown specifically stated that Davis was not allowed to leave his office until Brown had obtained the information that he needed to make a report to his own commanding officers.

Brown testified that he asked defendant whether he was involved in the murder to which defendant replied, "Sort of." Brown asked what defendant meant and defendant replied that he did not want to go into details. Brown then asked, "Well, are you involved or not involved? Yes or no question"—a question that sounds remarkably like an order. Defendant replied that he was involved. Only after Brown received the information he wanted from defendant did Brown "let him go." Even so, when the sheriff's deputies arrived at the base, the Marine Corps already had defendant in custody.

This is precisely the type of inherent compulsion that *Miranda* was designed to address, as other civilian courts have found. In *United States v. Shafer*, 384 F. Supp. 486, 489 (N.D. Ohio 1974), the court reasoned that for military personnel, custody does not require the same level of restraint as would be required for civilians. The *Shafer* court added that " 'interrogation' takes on a far different meaning in a military environment, where any superior officer has the right to demand that his questions be answered." *Id.* The court, therefore, held that handwritten statements made in response to a request by military superiors were inadmissible. *Id.* at 490.

Under circumstances parallel to those here, the Pennsylvania Supreme Court likewise found that when a defendant was ordered to report to his commanding officer for questioning and was required to remain and answer his superior's questions, he was "clearly in custody . . . ." *McGrath*, 508 Pa. at 264, 495 A.2d at 524. As a result, "his confession should have been suppressed as taken in violation of his

Fifth Amendment right against self incrimination." *Id.* at 269, 495 A.2d at 526. We reach the same conclusion in this case.

Brown was effectively functioning as a law enforcement officer at the time that defendant's statements were elicited. Under the totality of the circumstances surrounding Brown's questioning—including the rules and regulations governing the military—a reasonable person in defendant's circumstances would have believed that he was required to answer Brown's questions and that he effectively had no freedom of movement. We, therefore, conclude that a custodial interrogation occurred and that defendant's statements to Brown should not have been admitted into evidence.

The Harmlessness of the Error

Nevertheless, we find that the admission of defendant's statement to Brown—that defendant was "sort of" involved and that the victim had raped defendant's wife—was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2001). Apart from the statement to Brown, the jury heard testimony from other Marines that defendant was showing off a gun of the type used to kill Williams, that he intended while on leave to assault the man who had raped his wife, and that, when he returned from leave, he needed to and did dispose of his handgun.

Other witnesses, including Foster and two of defendant's first cousins, likewise testified that defendant wanted physical revenge on Williams for raping his wife. They further testified that defendant had confessed to them in great specificity about having shot Williams, with details that were consistent with the actual facts observed by other witnesses. Because the information received from Brown was duplicative of extensive other testimony, we hold that this error was harmless beyond a reasonable doubt.

II

[2] Defendant next contends that the trial court should have granted his motion to dismiss the first-degree kidnapping charge and consequently also the felony murder charge based on first-degree kidnapping. A motion to dismiss should be denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is that relevant evidence which a reasonable mind would find sufficient to support a conclusion." *State v. Carr*, 122 N.C. App. 369,

372, 470 S.E.2d 70, 72 (1996). In determining whether there is evidence sufficient for a case to go to the jury, the trial court must consider the evidence, both direct and circumstantial, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *Id.*

In order to obtain a conviction for first-degree kidnapping, the State was required to present substantial evidence that defendant unlawfully confined, restrained, or removed the victim Williams from one place to another without the victim's consent for the purpose of doing serious bodily harm to the victim and that the victim was in fact seriously injured. *See* N.C. Gen. Stat. § 14-39 (2001). Defendant contends only that there was insufficient evidence of the victim's lack of consent to his confinement, restraint, or removal.

Under N.C. Gen. Stat. § 14-39, " 'where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim.' " *State v. Jackson*, 309 N.C. 26, 40, 305 S.E.2d 703, 714 (1983) (quoting *State v. Gough*, 257 N.C. 348, 356, 126 S.E.2d 118, 124 (1962)). The State must prove, however, that the fraud or trickery directly induced the victim to be removed to a place other than where the victim intended to be. *State v. Sexton*, 336 N.C. 321, 365, 444 S.E.2d 879, 904 (defendant's lie to victim caused her to drive down nearby road rather than return home), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994); *State v. Sturdivant*, 304 N.C. 293, 306-07, 283 S.E.2d 719, 729 (1981) (defendant's "chicanery" caused victim to be in deserted rural location in North Carolina rather than at her home in South Carolina).

Here, the State presented substantial evidence that defendant obtained consent from the victim by falsely telling the victim that he was stranded and needed a ride. Defendant confessed he had tricked the victim into giving him a ride and that defendant's wife was following behind. Prior to defendant's approaching him in the convenience store, the victim Williams had been following his routine, based on Robert Reddick's testimony, of dropping off Reddick on his way home from the bakery after work. The evidence also indicated that typically Williams would then continue on to his own home. The scene of the shooting was not, however, on the way to the victim's home, but was in fact in a different direction. From this evidence, the jury could infer that the scene of the shooting was not a place to

which the victim would normally have gone willingly absent defendant's fraudulent representations.

Similarly, in *State v. Cobb*, 150 N.C. App. 31, 41-42, 563 S.E.2d 600, 608, *disc. review denied*, 356 N.C. 169, 568 S.E.2d 618 (2002), this Court held that a motion to dismiss a first-degree kidnapping charge was properly denied when the evidence showed that the victim left his home with the intention of traveling to Raleigh, that the victim stopped at a rest area as was his habit, and that his body was found two miles away on a road not within his course of travel. This Court concluded: "From this evidence, it is reasonable for a jury to infer the victim had been forced to abandon his plan to drive to Raleigh and drive to the location where his body was found." *Id.* at 41, 563 S.E.2d at 608. The evidence in this case is at least equal to that in *Cobb*.

While defendant points to alternative inferences that the jury could draw, the State is not required to exclude all other possible inferences in order to defeat a motion to dismiss. "In considering a motion to dismiss, the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn therefrom." *Jackson*, 309 N.C. at 40, 305 S.E.2d at 714.[2] Accordingly, the trial court's denial of the motion to dismiss was proper.

III

[3] Defendant next contends he received ineffective assistance of counsel because his trial attorneys had lost all credibility with the jury by promising in the opening statement evidence of numerous facts and theories that counsel was later unable to support with admissible evidence, by presenting evidence in conflict with the forecast of the evidence given in defendant's opening statement, and through emotional outbursts in reaction to the trial court's rulings. In addition, defendant points to an anonymous letter that the trial court read into the record following the sentencing hearing, which expressed concern that one of defendant's attorneys suffered from a substance abuse problem and referenced the attorney's volatile outbursts during the trial. The trial court did not conduct any hearing to

2. In *Jackson*, the Supreme Court found insufficient evidence of kidnapping when the evidence showed only that defendant entered the victim's car for purposes of robbery and there was no evidence at all to suggest where the victim was going or that he ended up somewhere other than along his intended course of travel. 309 N.C. at 41, 305 S.E.2d at 714.

determine whether defendant's attorney had been impaired during defendant's trial and no further action was taken on the matter.

"Attorney conduct that falls below an objective standard of reasonableness and prejudices the defense denies the defendant the right to effective assistance of counsel. An IAC claim must establish both that the professional assistance defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance." *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). Ineffective assistance of counsel claims are usually raised in post-conviction proceedings and not on direct appeal. Such claims may, however, be raised on direct appeal when the cold record reveals that no further factual development is necessary to resolve the issue. *Id.* at 166, 557 S.E.2d at 524. If the record reveals that factual issues must be developed, the proper course is for the appellate court to dismiss those assignments of error without prejudice to the defendant's right to raise an ineffective assistance of counsel claim in a later motion for appropriate relief. *State v. Long*, 354 N.C. 534, 539-40, 557 S.E.2d 89, 93 (2001).

In this case, our review of the record and the claims made by defendant reveals that there are in fact factual issues which must be more fully developed before a proper review of defendant's ineffective assistance of counsel claim may be undertaken. Accordingly, we do not address the merits of this claim and dismiss this assignment of error without prejudice to defendant's right to raise this issue in a subsequent motion for appropriate relief.

IV

[4] Defendant finally argues that the trial court erred under both the federal and North Carolina Constitutions by denying his motion to dismiss the first-degree murder charge based on a short-form indictment and his motion to compel the State to disclose the theory that the State would pursue to convict defendant of first-degree murder. Defendant raises these arguments to preserve them for possible future proceedings, but acknowledges that the North Carolina Supreme Court has previously rejected both of defendant's contentions. *See State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000) (approving short-form first-degree murder indictment), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Clark*, 325 N.C. 677, 684, 386 S.E.2d 191, 195 (1989) (holding that the State is not required to make an election regarding first-degree murder

theory). Accordingly, we overrule defendant's assignments of error on these issues.

No error.

Judge WYNN concurs.

Judge BRYANT concurs in result only with separate opinion.

BRYANT, Judge, concurring in the result.

I fully concur in the result reached by the majority that there was no error in defendant's trial. However, I write separately as I conclude defendant's statements to Chief Warrant Officer Brown were not the product of a custodial interrogation and therefore the admission of those statements was not error, rather than harmless error.

A

The majority first states public policy mandates that, in order to uphold military discipline and order, members of the armed forces should never be forced to choose between either disregarding a direct question from a superior officer or subjecting themselves to self-incrimination in a later criminal trial. Under the majority's analysis, however, a superior officer would be required to give Miranda warnings and/or Article 31(b) warnings before asking any question under any circumstances of someone under his or her command out of concern that the response might possibly be incriminating. In so doing, the majority is creating what amounts to a limited "soldier-commanding officer" privilege, whereby no statement given by a member of the armed forces to a commanding officer would be admissible in a civilian court absent Miranda warnings. This ignores the reality that military officers perform many different roles: they are not always disciplinarians. The better rule is that a superior officer need only give the appropriate warnings to someone under his command that he suspects has committed an offense and when the questioning is for disciplinary purposes, and not merely administrative reasons. In fact, this is the exact rule adopted by military law. *See United States v. Good*, 32 M.J. 105, 108 (C.M.A. 1991) (a member of armed forces is entitled to warnings only if he is a suspect at the time of the questioning and the questioning itself is part of an official law-enforcement investigation or disciplinary inquiry); *see also United States v. Swift*, 53 M.J. 439, 446 (C.A.A.F. 2000) (proper warnings

must be given to members of the armed forces before questioning about an offense where there is no evidence to overcome the presumption that questioning is law enforcement related and not solely for administrative reasons).[3]

B

I also disagree with the majority's conclusion under civilian law that a reasonable person in defendant's position would have believed he was under arrest or was restrained in his movement to the degree associated with a formal arrest.

The evidence in this case reveals that defendant, after having received a telephone call, voluntarily requested permission to leave his station. As a result of this request, defendant was ultimately escorted to Chief Warrant Officer Brown. Lieutenant Cavenaugh stated defendant had something that Brown might want to hear. Before this meeting, Chief Warrant Officer Brown had no prior knowledge of the crime and only learned of it when defendant told him that there had been a murder in North Carolina, which led to Chief Warrant Officer Brown asking defendant if he was involved. Defendant eventually responded he was "involved," and at that point the questioning ceased. As he had requested, defendant was then given permission to leave his work station to telephone a lawyer. No arrest order was given and Chief Warrant Officer Brown was neither acting as a member of military law enforcement, nor did he assert his rank to force or threaten defendant to answer any questions.[4]

Every indication from this record is that defendant was not being questioned for disciplinary purposes. Instead, defendant was questioned because it was Chief Warrant Officer Brown's administrative duty as a platoon commander to be aware of potential legal troubles of the men under his command and, in this particular instance,

---

3. The majority also cautions against altering the balance between the needs of the armed forces and the rights of their members. Yet, in ignoring the rule already set by military courts, by forcing an officer to hesitate and debate whether to even ask a simple question of those under his command, the majority does precisely that. Nevertheless, this case actually presents the reverse question: to what extent should military practices alter the balance between the needs of the prosecution and the rights of a criminal defendant in a civilian court.

4. The arrest warrant for defendant was not issued until 26 March 1999, two days after defendant's statements to Chief Warrant Officer Brown, and defendant was not arrested until 8 April 1999. Thus, the fact defendant was in Marine "custody" at the time of his arrest by Wayne County sheriff's deputies is not relevant to any analysis of whether he was in custody at the time he gave the statements.

to determine whether defendant should be permitted to leave his station. There is no evidence to support a contention that defendant's statement was anything other than the product of his voluntarily seeking permission to leave his station in order to telephone a lawyer.

The majority also asserts that defendant was subjected to custodial interrogation because Chief Warrant Officer Brown was defendant's commanding officer and had the authority to order an arrest. Here again, this would have the effect of requiring a superior officer to give Miranda and Article 31(b) warnings before asking any question of a service member under his command. Even if the questioning could be said to have occurred in a coercive environment, it does not automatically convert this non-custodial situation into one in which *Miranda* applies. *See State v. Buchanan*, 353 N.C. 332, 337, 483 S.E.2d 823, 826-27 (2001); *see also Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (voluntary appearance at police station). Instead, the correct test to be uniformly applied is "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828.

The trial court in this case found that defendant "received a telephone call . . . at his work location . . . and told [his sergeant] that he needed to go home." The trial court also found "defendant voluntarily went with the officer . . . to . . . Brown's office" and "[Chief Warrant] Officer Brown was not a military policeman . . . did not have the authority to arrest and was not functioning as a police officer in any respect." As to Chief Warrant Officer Brown's questioning of defendant, the trial court found, "at all times while . . . defendant was in . . . Brown's presence he could refuse to answer any questions . . . and he could walk out of the office at any time." The trial court further found, "at one point at the end of the conversation . . . defendant said he didn't want to talk anymore and at that point [Chief Warrant Officer] Brown asked no further questions" and "defendant was never told that he had to answer any questions, was not threatened in any way, coerced in any way and from his conduct . . . appeared to be in the possession of his mental and physical faculties." These findings are supported by the evidence presented by the parties during *voir dire* and are thus conclusive on appeal. *See Buchanan*, 353 N.C. at 336, 483 S.E.2d at 826.

On these facts, a person voluntarily requesting to leave his station would not reasonably have believed that he was under arrest or that his freedom of movement was being restrained to the same degree as that of a formal arrest.[5] Defendant's statement was, therefore, not the product of a custodial interrogation, and thus, defendant was not entitled to Miranda warnings prior to questioning for administrative purposes by his superior officer. Accordingly, I conclude it was not error to admit defendant's statement to Chief Warrant Officer Brown.

J. RICHARD SULLIVAN, PLAINTIFF v. MEBANE PACKAGING GROUP, INC., JOSEPH G. ANDERSEN, DUSTIN McDULIN AND DONNA I. WILSON, DEFENDANTS

No. COA02-762

(Filed 20 May 2003)

1. Fraud— company buy-back of stock—purchase price

The trial court correctly granted summary judgment for defendants on plaintiff's claims for fraud arising from his former employer's purchase of his company stock where company policy was to limit stock ownership to employees, plaintiff attempted to negotiate a higher price for the stock than that offered by the company, an arrangement was worked out whereby an officer of the company bought the stock for more than the company was willing to pay, and the company was subsequently sold at a share price significantly higher than plaintiff was paid. Plaintiff did not exercise reasonable diligence, did not produce evidence that the company's board was contemplating the company's sale before plaintiff agreed to sell his stock, did not produce evidence that the price he was offered was not reasonable as of the valuation date, and much of the evidence to which plaintiff pointed was immaterial to his decision to sell.

2. Fiduciary Relationship— benefit to superior party—presumption of fraud—rebutted by outside advice

The presumption of fraud from a benefit to the superior party in a fiduciary relationship was rebutted by evidence that plaintiff

5. As the majority acknowledges, military law provides explicit definitions as to what it means to be under arrest or ordered into confinement, neither of which occurred in this case.

obtained independent advice before selling company stock to his former employer.

3. Fraud— negligent misrepresentation—company buy-back of stock—reliance not reasonable

Plaintiff's reliance on any misrepresentations or concealments in a company buy-back of stock was not reasonable and the trial court correctly granted summary judgment for defendants on plaintiff's negligent misrepresentation claim. Moreover, plaintiff cannot establish that he relied on representations or decisions made after he decided to sell, and plaintiff presented no evidence that the information provided by the company was prepared without reasonable care.

4. Securities— buy-back of company stock—material facts—misstatements or omissions—not shown

Summary judgment was correctly granted for defendants on a claim for violation of the North Carolina Securities Act, N.C.G.S. § 78-56(b), arising from the purchase of company stock from a former employee where plaintiff did not establish that defendants actively misstated any material facts and plaintiff did not establish the presence of an omission of which he was unaware.

5. Damages and Remedies— punitive—judgment for defendant on compensatory claims

Defendants were entitled to summary judgment on plaintiff's punitive damages claims where they were entitled to judgment in their favor as a matter of law on the underlying claims.

Appeal by plaintiff from orders entered 22 February 2002 by Judge Orlando F. Hudson, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 25 March 2003.

Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by John H. Vernon, III, Mark A. Jones, and Benjamin D. Overby, for plaintiff-appellant.

G. Wayne Abernathy, and Alston & Bird LLP, by Mary C. Gill, for defendant-appellees Mebane Packaging Group, Inc. and Joseph G. Andersen.

MARTIN, Judge.

Plaintiff J. Richard Sullivan appeals the entry of summary judgment in favor of defendants Mebane Packaging Group, Inc. ("MPG"), and Joseph G. Andersen. Plaintiff, a former MPG employee, filed his complaint in this action on 12 October 2000 alleging claims of fraud, constructive fraud, negligent misrepresentation, and a violation of the North Carolina Securities Act arising out of his sale of MPG stock to defendant Joseph G. Andersen. Plaintiff voluntarily dismissed defendants Dustin McDulin and Donna I. Wilson from the suit on 10 January 2002.

The materials before the trial court at the summary judgment hearing established that plaintiff worked for MPG from 1978 until mid-February 1999. In 1994, plaintiff acquired 2,000 shares of company stock from MPG. When plaintiff left MPG in February 1999, his stock was governed by an Amended and Restated Shareholders' Agreement (the "Agreement"). Under that Agreement, within 90 days of his termination, plaintiff had a so-called "put right" to require MPG to buy back his shares. In the event plaintiff did not exercise his put right during those 90 days, MPG would have a "call right" to require that plaintiff sell his shares back to the company. If either the put right or call right were exercised, the shares would be sold for a price equal to the greater of fair value or book value as of the end of the fiscal month immediately preceding plaintiff's termination date. Fair value was defined by the Agreement as the price agreed upon by the parties, or in the absence of agreement, as determined by an independent investment banking firm. MPG could also elect not to exercise its call right, in which event plaintiff would not be required to sell the stock.

Plaintiff testified he knew MPG could require that he sell back his 2,000 shares of MPG stock upon his leaving the company. Plaintiff testified that in mid-February, he met with McDulin and Wilson about leaving MPG. During that meeting, plaintiff asked what MPG was going to do about his shares, because he was aware it was MPG's policy that only employees were to own stock in the company. Sometime thereafter, McDulin explained to plaintiff that he would need to sell his shares back to MPG, and that the value of the stock as of the end of January 1999 was $17 per share based upon an MPG formula set forth in the company's monthly financial package. Shortly thereafter, Wilson delivered to plaintiff a promissory note dated 18 February 1999 stating that plaintiff would sell his shares to MPG for $17 a share, and containing a place for plaintiff's signature. Wilson

testified she instructed plaintiff to consult with his attorney about the promissory note. Defendant Andersen, MPG's Chief Financial Officer, instructed Wilson to present the promissory note to plaintiff because it was MPG policy that only employees were entitled to be stockholders. Andersen testified that MPG's Board of Directors set the price of the shares at $17 each based upon a stock valuation model and the value of MPG stock as of the closest month-end to plaintiff's termination date.

Plaintiff testified that he did consult with his attorney about the promissory note and sale of his stock and concluded that while he "didn't have any objection to selling the stock," he did not want to sell for $17 per share. Plaintiff testified he had no basis for seeking to sell the stock at more than $17 per share, other than his opinion that he "just thought it was worth more than that." Plaintiff did not act on the promissory note, and was subsequently contacted independently by Wilson and McDulin, who each informed plaintiff that he needed to sell his stock to MPG and that $17 was the value per share of the stock. Plaintiff told McDulin that he would sell his stock to MPG for $26 per share. Plaintiff testified that throughout this negotiation process, he requested a copy of the Agreement more than once from McDulin, yet never received such a copy. Andersen testified he was never told that plaintiff wished to have a copy of the Agreement.

Andersen further testified that he met with plaintiff between 4 May and 24 May 1999 to assist him in understanding how MPG had valued his stock at $17 per share, including the fact that it was based on the value of MPG shares as of January 1999, the month ending just prior to plaintiff's termination, as required by the Agreement. Andersen provided plaintiff with MPG's March financial package, which was completed 4 May 1999, and was the most recent financial package available. The package showed the value of plaintiff's stock to be $17 per share as of the end of January 1999, as well as an increase in the value of the stock in the following months. Andersen told plaintiff to take the materials home to review, to consult with his attorney about the information, and to call Andersen if he had any questions. Plaintiff testified that he took the information home, and after showing it to his business partner, simply put it away and never looked at it again because he "wouldn't have understood it." Plaintiff did not consult with his attorney or an accountant about the materials, and never called Andersen with any questions.

Following the meeting with Andersen, plaintiff spoke to McDulin and suggested splitting the difference between $17 and the $26 price,

which plaintiff had demanded earlier. Plaintiff told McDulin he would sell his stock to MPG for $22 a share. McDulin communicated plaintiff's offer to MPG. Andersen testified the discussions within MPG over plaintiff's offer took place in May 1999. Andersen testified that MPG decided it was not willing to pay $22 per share since MPG valued the stock at $17 per share. Instead, MPG offered Andersen the right to purchase plaintiff's stock for $22 a share. Andersen was informed he was under no obligation to purchase plaintiff's shares and that if he did not desire to do so, MPG would require plaintiff to sell his stock to the company at $17 per share. George Krall, MPG's President and Chief Executive Officer, testified that he approved allowing Andersen to purchase plaintiff's shares because it would allow plaintiff to receive the price he desired for the shares while rewarding Andersen for his work at MPG. Garrison Kitchen, a member of MPG's Board of Directors, likewise testified it was his understanding that both Andersen and plaintiff desired such an agreement because it was mutually beneficial and would allow plaintiff to receive a higher price for his stock. Andersen agreed to purchase plaintiff's shares for $22 a share, and plaintiff was informed that his offer had been accepted.

As a result, on 1 June 1999, MPG's Board of Directors executed a consent action finding that plaintiff desired to sell his stock shares, that Andersen desired to buy plaintiff's shares of stock, and that it was in MPG's best interest to allow Andersen to purchase plaintiff's 2,000 shares. The Board accordingly waived its call right in favor of Andersen. Immediately thereafter, Andersen applied for a bank loan for the purchase price. On 15 June 1999, Andersen obtained a bank line of credit in the amount of $44,000, the total purchase price for 2,000 shares at $22 per share.

On 8 August 1999, plaintiff met with McDulin to sign over his stock. Plaintiff testified that when he arrived for the closing, he was informed that Andersen had agreed to purchase the stock. Plaintiff testified that he had assumed MPG's majority shareholder, Cravey, Green and Whalen, Inc. ("CGW"), would be purchasing the stock. Plaintiff did not object to selling the stock to Andersen, and he testified it made no difference to him who was purchasing his stock, so long as he would receive $22 a share.

On 24 November 1999, MPG was sold to Westvaco Corporation through execution of a stock purchase agreement. Plaintiff's former 2,000 shares were sold to Westvaco at a price significantly higher than the $44,000 plaintiff received for his sale to Andersen. Plaintiff testi-

fied that he first heard rumors about a sale of MPG in July, but that he never asked Wilson, Andersen or McDulin about the rumors, and that, in any event, a sale of the company did not matter to him.

Richard Cravey, an MPG director, testified that prior to the fall of 1999, MPG received several unsolicited inquiries with respect to the availability of the company for sale. Cravey testified the inquiries were simply statements of interest that if MPG were for sale, the interested party might be willing to buy the company. Cravey testified these interested parties were informed MPG was not for sale. As a result, MPG never received an actual offer to buy. Cravey reiterated that between January 1999 and the August 1999 closing on plaintiff's stock, there were no discussions with prospective purchasers.

Cravey further testified that although Donaldson, Lufkin & Jenrette ("DLJ"), an investment banking firm that had previously worked with MPG, was sending MPG financial packages and information that could be used to market the company, such information had not been requested by MPG, but was voluntarily submitted by DLJ as a means to promote the sale of MPG which would generate a fee for DLJ. Despite receiving this information from DLJ, Cravey testified that MPG directors "continued to resist . . . because we didn't think it was the right time to sell the business," and that each time MPG received packages from DLJ, there were discussions about how MPG was not ready to be sold. Cravey testified the possibility of selling MPG was not even a consideration until the third week of August 1999, when discussions took place which were prompted by MPG's increased level of profitability which might justify a sale.

Cravey's testimony was corroborated by other MPG employees, including Andersen, who confirmed that no discussions concerning a possible sale of MPG occurred between MPG and CGW until the fall of 1999, after plaintiff's sale of his stock. McDulin likewise testified that a potential sale of MPG was first discussed in late August or early September, but only to the extent of discussing whether it would be the right time to sell MPG; there were no specific offers of sale at that time, and there were no such discussions prior to that time. Wilson also testified that she did not hear rumors of an MPG sale until October or November 1999. Krall, MPG's President and CEO, confirmed that discussions of a potential sale of MPG took place in late August. Krall testified MPG directors were not sure at that point whether a sale was in the company's best interest. Kitchen also testified that the first discussions MPG had with DLJ about a possible sale took place after plaintiff's sale of his stock.

Joe King, an employee of DLJ during the relevant time period, testified it was normal practice for DLJ to send financial and industry information to clients, such as MPG, with which DLJ had done business or sought to do business. King identified a DLJ document establishing that 30 September 1999 was the first date initial calls were made to potential purchasers of MPG.

Defendants and plaintiff moved for summary judgment. The trial court concluded that plaintiff was unable to produce evidence to support each essential element of his claims, that there were no genuine issues of material fact as to the essential elements of plaintiff's claims, and that defendants were entitled to judgment as a matter of law.

Plaintiff argues the trial court erred in granting summary judgment for defendants because he produced sufficient evidence to establish genuine issues of material fact as to his claims of (1) fraud; (2) constructive fraud; (3) negligent misrepresentation; (4) a violation of the North Carolina Securities Act; and (5) punitive damages. For reasons set forth below, we affirm summary judgment in favor of defendants with respect to each of plaintiff's claims.

The standard with respect to summary judgment is well-established. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2002). "The purpose of the rule is to avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 123 (2002). " 'The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.' " *Guthrie v. Conroy*, 152 N.C. App. 15, 20, 567 S.E.2d 403, 408 (2002) (citation omitted). That burden may be satisfied by showing that an essential element of the opposing party's claim is either nonexistent or that evidence is not available to support it. *BNT Co. v. Baker Precythe Dev. Co.*, 151 N.C. App. 52, 564 S.E.2d 891, *disc. review denied*, 356 N.C. 159, 569 S.E.2d 283 (2002). "[T]he nonmovant must '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.' " *Guthrie*, 152 N.C. App. at 21, 567 S.E.2d

at 408 (citation omitted). The evidence must be viewed in the light most favorable to the non-movant. *Id.*

I. Fraud

[1] "The essential elements of fraud are: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658-59 (1992) (citation omitted). "Additionally, reliance on alleged false representations must be reasonable." *State Props., L.L.C. v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002), *disc. review denied*, 356 N.C. 694, — S.E.2d — (27 February 2003). Reliance is not reasonable where the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate. *Id.*; *Everts v. Parkinson*, 147 N.C. App. 315, 325, 555 S.E.2d 667, 674 (2001) (" 'The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is . . . not to encourage negligence and inattention to one's own interest.' " (citation omitted)). "The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *State Props., L.L.C.*, 155 N.C. App. at 73, 574 S.E.2d at 186.

Plaintiff bases his fraud claim on allegations that defendants consistently concealed and misrepresented facts material to his decision to sell his stock at $22 a share. Plaintiff maintains defendants fraudulently concealed (1) plaintiff's rights under the Agreement, including his put right and option to have fair value determined by an independent investment banking firm; (2) MPG's waiver of its call right on 1 June 1999; (3) the increase in value of MPG stock from March through July as shown in MPG's monthly financial packages; (4) MPG's financial information prior to the August 1999 closing which showed the company's improvement in performance and growth; (5) MPG's projected financial results for the fiscal year ending March 2000, an explanation of its poor performance for the fiscal year ending March 1999, and any strategic restructuring undertaken by MPG affecting its financial condition; (6) that MPG received communications from parties expressing interest in purchasing the company; and (7) that MPG received information from DLJ about the climate of the industry, potential purchasers, and a suggested sale price for MPG. Plaintiff also argues defendants actively misrepresented (1) that he

was required to sell his shares to MPG; (2) that he was required to sell at $17 per share; and (3) that the value of the shares was between $17 and $22 as shown in the March financial package.

A. Plaintiff's rights under the Agreement

To the extent plaintiff's claim is based on allegations that defendants both concealed and misrepresented his rights under the Agreement, plaintiff conceded that MPG provided him, as a shareholder, with a copy of a document (which plaintiff produced through discovery) which contained a section describing plaintiff's rights under the Agreement. That document informed plaintiff that upon termination, plaintiff had a put right to require that MPG buy back his stock; that if plaintiff did not require MPG to buy the stock, MPG would have a call right to require that plaintiff sell back his stock; that in all cases, the sale price of the shares would be the greater of fair value and book value; and that fair value would be the price agreed upon by the parties, or in the absence of an agreement, as determined by an independent investment banking firm.

Plaintiff's reliance on any misrepresentations or concealments regarding his rights under the Agreement must have been reasonable. *See State Props., L.L.C.*, 155 N.C. App. at 186, 574 S.E.2d at 186; *Everts*, 147 N.C. App. at 325, 555 S.E.2d at 674. Plaintiff was provided a document summarizing his pertinent rights under the Agreement; through reasonable diligence or minimal investigation, he could have discovered that he had a put right, that he could require that the fair value of the shares be determined by an independent banking firm, and that MPG had the right to force plaintiff to sell back his shares. Plaintiff produced no evidence showing this information was not in his possession or was otherwise unavailable to him; to the contrary, plaintiff conceded MPG had provided him with that information. Although plaintiff argues this document did not inform him that he had 90 days to exercise his put right, that MPG had 180 days to exercise its call right, and that MPG could waive its call right, plaintiff made no showing that these specific facts, even if concealed, were material to his decision to sell the stock. The only evidence of plaintiff's efforts to investigate his rights as a shareholder consisted of his testimony that he requested a copy of the Agreement from McDulin, which he never received. Such a request, absent more, does not constitute reasonable diligence. At the least, plaintiff could have ceased negotiating with MPG until he was provided a copy of the Agreement.

Accordingly, any reliance on alleged misrepresentations or concealments with respect to plaintiff's material rights under the Agreement was not reasonable and cannot form the basis of plaintiff's fraud claim. *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 341 (4th Cir. 1998) (citations omitted) ("North Carolina courts recognize that . . . if a plaintiff had an alternative source for the information that is alleged to have been concealed from or misrepresented to him, his ignorance or reliance on any misinformation is not reasonable."); *Myers v. Finkle*, 950 F.2d 165, 167 (4th Cir. 1991) ("In our view, knowledge of information should be imputed to investors who fail to exercise caution when they have in their possession documents apprising them of the risks attendant to the investments."). In any event, plaintiff knew MPG policy was that only employees of the company could own stock, and plaintiff testified he had no objection to selling his shares to MPG, but simply wanted a price higher than $17 per share.

B. Waiver of MPG's call right

Plaintiff also argues defendants fraudulently concealed the fact that MPG waived its call right on 1 June 1999. Plaintiff attempts to create an issue of fact as to the time frame in which he agreed to sell his stock at $22 a share in order to show that he had not yet agreed to sell at the time MPG waived its call right; that as a result, plaintiff would not have been required to sell the stock at all; and thus, MPG's failure to inform plaintiff that it had done so was a concealment of material fact. However, defendants presented evidence to support their position that MPG waived its call right in favor of Andersen only after plaintiff offered to sell his shares for $22 per share. MPG's subsequent waiver of its call right had no bearing on plaintiff's agreement to sell and could not have been material to that transaction.

Defendants presented evidence that plaintiff agreed to sell his stock to MPG for $22 a share in May 1999. Andersen testified that when he met with plaintiff in May 1999 to explain the valuation of the stock, he provided plaintiff with the most recent monthly financial package available at that time, which was the March package. The March package was made available on 4 May, and the subsequent April financial package was not completed until 24 May, showing that Andersen met with plaintiff between 4 May and 24 May. At that time, plaintiff had offered to sell the stock at $26 per share. Following the meeting with Andersen, plaintiff offered to split the difference between $17 and $26 and sell his shares for $22 per share. Andersen

testified that discussions within MPG about plaintiff's offer took place in May.

The consent action of the Board of Directors entered 1 June 1999 confirms this time frame, as it states that at that time, plaintiff had agreed to sell his stock, and Andersen had agreed to buy plaintiff's stock. Andersen testified that the Board waived its call right in favor of him on 1 June only after MPG determined it would not pay plaintiff $22 per share and Andersen had been presented with and accepted plaintiff's offer. Moreover, it is clear that the agreement was reached prior to the Board's entry of the consent action, for immediately thereafter, Andersen applied for a line of credit for the purchase price of plaintiff's stock. Bank documents confirmed that on 15 June 1999, Andersen obtained the line of credit in the amount of $44,000, the amount owed plaintiff for 2,000 shares at $22 per share.

Further, both parties presented evidence of MPG's policy that only employees of MPG could be stockholders in the company. MPG consistently reiterated this fact to plaintiff and continued to inform him throughout the process that he would be required to sell his stock to MPG; there is no evidence that MPG ever considered allowing plaintiff to retain his stock. This evidence supports a conclusion that MPG would waive its call right only upon an agreement for plaintiff's stock to be sold to a current employee of the company.

Plaintiff testified in his deposition that he "believ[ed]" it was sometime in June or July that he met with Andersen to review the March financial package, but later stated it took place at the end of June "or somewhere around there," and later testified it was "probably towards the middle of June." Plaintiff testified that it was "probably" around the beginning of July "or something like that" when he first suggested selling for $22 per share. When later asked about other events alleged to have occurred in July 1999, plaintiff confessed, "I have all these dates messed up." Indeed, plaintiff's complaint affirmatively alleged that he offered to sell his shares for $44,000 on 4 August 1999, four days before the transaction's closing.

Plaintiff's testimony is not only clearly an estimate as to when the relevant events took place, but is logically inconsistent with the record evidence: the Board's consent action clearly enumerated that plaintiff had agreed to sell and Andersen had agreed to buy by 1 June 1999, and Andersen obtained a line of credit for the exact $44,000 purchase price for $22 per share on 15 June 1999, long before the time at which plaintiff alleges he offered to sell at that price. Defendants pro-

duced evidence to support their position that plaintiff agreed to sell in May 1999; the burden thus shifted to plaintiff to produce concrete evidence supporting his position that he did not agree to sell until the beginning of July, as he testified, or on 4 August 1999, as he alleged in his complaint. *See, e.g., Lexington State Bank v. Miller*, 137 N.C. App. 748, 751, 529 S.E.2d 454, 456 (upon production of evidence establishing no genuine issue of material fact, burden shifts to nonmovant to show existence of such genuine issue by a showing of specific facts; mere allegations are insufficient), *disc. review denied*, 352 N.C. 589, 544 S.E.2d 781 (2000). Plaintiff has not carried that burden. Thus, MPG's waiver of its call right in favor of Andersen in June 1999 was immaterial to plaintiff's May 1999 agreement to sell, and cannot form the basis of plaintiff's fraud claim.

C. MPG financial information

Plaintiff argues defendants fraudulently concealed the increase in the value of MPG stock from March through July, as shown in MPG's monthly financial packages, and that defendants failed to disclose to plaintiff any financial information, including all of the monthly financial packages completed prior to the August closing, which showed MPG's improved financial status. However, as previously discussed, there is no genuine issue of fact that plaintiff reached an agreement with MPG to sell his shares in May 1999. The fact that the value of MPG shares increased thereafter could not have been a factor in plaintiff's decision to sell in May 1999, and thus was not material to that transaction. At the time plaintiff agreed to sell, he had been provided with financial information showing the value of the shares as of the end of January 1999, which, under the Agreement, was the date as of which the value of plaintiff's shares was to be determined.

Moreover, though plaintiff argues defendants misrepresented the value of the stock to be $17 per share and that MPG's March financial package was somehow misleading, plaintiff produced no evidence showing that the $17 per share value was not a reasonable value of the stock as of the end of January 1999. In fact, plaintiff conceded he had no basis, other than his personal opinion, for believing the stock was worth more. In any event, Andersen provided plaintiff with MPG financial information, explained its method of stock valuation, and told plaintiff to consult with an attorney regarding the information and call if he had any questions. Plaintiff neither consulted with an attorney or an accountant about the information, nor did he ever call Andersen with any questions about the information or MPG's valuation of the stock. Plaintiff's offer to sell his shares for $22 per share

was based solely on his own suggestion that the parties split the difference between MPG's $17 offer and plaintiff's demand of $26. Thus, plaintiff failed to produce evidence that he relied on any information provided by MPG, or that if he did, such reliance was justified, given his possession of a document outlining his right to have the fair value of his shares determined by an independent firm in the event he did not agree with MPG's valuation.

Plaintiff also argues defendants failed to provide him with information on MPG's projected financial results for the fiscal year ending March 2000, an explanation of its poor performance for the fiscal year ending March 1999, and any strategic restructuring undertaken by MPG to improve its financial condition. Even if plaintiff were entitled to this information as of May 1999, plaintiff failed to carry his burden of producing evidence to show that the information would have been material to his decision to sell, or that he would have relied on the information, given the evidence that he did not rely on other financial information provided by MPG in offering to sell at $22 a share.

D. Potential sale of MPG

Plaintiff's claim that defendants fraudulently concealed the contemplated sale of MPG is based solely upon evidence that prior to the sale of his stock to Andersen, MPG had received communications from parties interested in purchasing MPG, and had received information from DLJ about the climate of the industry, potential purchasers, and a suggested sale price for MPG. Plaintiff maintains this evidence establishes an inference sufficient to create a genuine issue of fact as to whether, during negotiations for his stock, MPG's board was considering a sale of the company which would have greatly affected the value of plaintiff's stock, and this fact was material to his decision to sell for $22 a share. We disagree.

Contrary to his argument, plaintiff produced no evidence that MPG was considering a sale of the company prior to the time he agreed to sell his stock. The evidence that MPG's board did not want to sell the company at that time was not controverted, and showed that information provided to MPG by DLJ was unsolicited, rather than at the request of any employee of MPG, and that DLJ's custom was to provide such a service to former and potential clients such as MPG. Cravey's uncontradicted testimony established that even though the company was receiving such information, MPG's directors continued to conclude that it was not the right time to sell the company. There was no evidence in the record to show that MPG engaged in discus-

sions of a potential sale during any time relevant to plaintiff's sale of his stock. Cravey testified that MPG received inquiries about the company from potential purchasers, but that the inquiries were simply statements of interest, and never involved actual offers to buy because all inquirers were informed that MPG was not for sale. The uncontradicted evidence established that MPG directors did not even begin discussions on the possibility of a sale of the company until late August, after plaintiff had already agreed to sell his stock for $22 per share, and after the sale of the stock had been completed.

In any event, plaintiff specifically testified that at the time of the sale, it did not matter to him whether the company was being sold. This testimony was corroborated by the fact that despite hearing rumors of a sale prior to the closing on his stock, plaintiff never asked Wilson, McDulin, or Andersen about the rumors. Therefore, even if MPG had concealed discussions of a potential sale, plaintiff's own evidence shows that such information, had it been disclosed, would not have been material to him in considering whether to sell at $22 per share.

The trial court did not err in concluding that plaintiff failed to produce evidence to support each essential element of his fraud claim, that there were no genuine issues of material fact as to the essential elements of that claim, and that defendants were entitled to summary judgment in their favor on this issue.

II. Constructive Fraud

[2] "Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less 'exacting' than that required for actual fraud." *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 206, 528 S.E.2d 372, 380, *affirmed*, 353 N.C. 257, 538 S.E.2d 569 (2000). In order to show constructive fraud, a plaintiff must establish (1) facts and circumstances creating a relation of trust and confidence; (2) which surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of the relationship; and (3) the defendant sought to benefit himself in the transaction. *Walker v. Sloan*, 137 N.C. App. 387, 401-02, 529 S.E.2d 236, 246 (2000). Where a fiduciary relationship exists between the parties, the presumption of fraud arises where the superior party obtains a possible benefit. *Cash*, 137 N.C. App. at 206, 528 S.E.2d at 380. However, this presumption may be rebutted by evidence that the other party obtained independent advice. *Id.* "Once rebutted, the presumption evaporates, and the accusing party must shoulder the burden of pro-

ducing actual evidence of fraud." *Id.*; *see also Watts v. Cumberland County Hospital Systems, Inc.*, 317 N.C. 321, 324-25, 345 S.E.2d 201, 203 (1986) (plaintiff could not rely on constructive fraud, but was required to show facts supporting claim of actual fraud where evidence demonstrated that plaintiff received outside opinions on transaction at issue).

In this case, MPG's directors and officers were fiduciaries to plaintiff, a shareholder. *See IRA for benefit of Oppenheimer v. Brenner Cos.*, 107 N.C. App. 16, 419 S.E.2d 354, *disc. review denied*, 332 N.C. 666, 424 S.E.2d 401 (1992). Plaintiff argues MPG used this relationship to its benefit to induce him to sell his shares without providing him with pertinent financial information and by misrepresenting his rights and the value of the shares. However, plaintiff's evidence showed that he obtained outside advice throughout the negotiation process, as defendants consistently advised him to do. Plaintiff testified he discussed MPG's initial promissory note with his attorney, after which plaintiff concluded that he would sell his shares, but seek a price higher than $17 per share. Plaintiff testified he met with his attorney again regarding the sale of his shares during the negotiation process, and acknowledged having shown the March financial package to his business partner to obtain his thoughts. Therefore, the evidence rebuts the presumption afforded under the theory of constructive fraud, *see Watts*, *supra*, and plaintiff must produce evidence of actual fraud. As previously discussed, plaintiff did not present evidence of each essential element of a claim of fraud, and cannot recover on that basis. Summary judgment was properly granted in favor of defendants with respect to plaintiff's claim alleging constructive fraud.

III. Negligent Misrepresentation

[3] " 'The tort of negligent misrepresentation occurs when [(1)] a party justifiably relies [(2)] to his detriment [(3)] on information prepared without reasonable care [(4)] by one who owed the relying party a duty of care.' " *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000) (citation omitted), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 18 (2001). Plaintiff argues he presented sufficient evidence of defendants' negligent misrepresentations based on the same actions and omissions alleged in Part I above. For the same reasons discussed in Part I, we hold the trial court did not err in granting summary judgment for defendants on this claim. As with fraud, plaintiff's reliance must have been reasonable in order to recover under a theory of negligent misrepresenta-

tion. We have already held plaintiff's reliance on any misrepresentations or concealments of his rights under the Agreement was not reasonable. Moreover, because the waiver of MPG's call right, the preparation of financial packages after the March 1999 package, and MPG's discussions of a potential sale of the company all occurred after plaintiff agreed to sell his stock, plaintiff cannot establish that he relied on such information in agreeing to sell. Additionally, plaintiff has presented no evidence to show that the information provided by MPG, including the March financial package and $17 valuation of plaintiff's shares, was information prepared without reasonable care. These assignments of error are overruled.

IV. North Carolina Securities Act

[4] Under G.S. § 78A-56(b), a defendant may be civilly liable where (1) the plaintiff can show the defendant (a) made an untrue statement of a material fact, or (b) omitted "to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the [plaintiff] not knowing of the untruth or omission)," and (2) the defendant cannot show that he did not know, or in the exercise of reasonable care could not have known, of the untruth or omission. N.C. Gen. Stat. § 78A-56(b) (2003). Plaintiff argues, based on his allegations set forth above, that defendants' acts and omissions constituted a violation of this statute. We disagree.

First, plaintiff did not establish that defendants actively misstated any material facts. At the time plaintiff made his decision to sell the stock in May 1999, he had been fully and correctly informed that MPG had the right to require that he sell his stock. Plaintiff testified that he knew, even prior to the commencement of negotiations for his stock, MPG policy was that only employees could own stock. Plaintiff has not produced any evidence that defendant's valuation of the stock at $17 was "untrue" or otherwise unreasonable or misleading. Second, as to defendants' alleged omissions and concealments, the statute requires that they pertain to material facts. As we have previously discussed at length, defendants' alleged concealment of the waiver of MPG's call right, various financial information about the increased value of the stock and financial status of the company, and discussions of a potential sale of MPG could not have been material to plaintiff's decision to sell in May 1999.

Moreover, we cannot agree, in light of the circumstances, that defendants omitted to state material facts regarding plaintiff's rights

under the Agreement within the meaning of the statute. To the contrary, MPG provided plaintiff with a document summarizing his material rights under the Agreement, which clearly set forth the terms material to the transaction: the put right, the call right, and the option of having fair value determined by a third party. Plaintiff has therefore not established the presence of an omission of which he was unaware, particularly in light of his testimony that he knew from the outset that a sale of the shares would have to occur once he left the company.

V. Punitive Damages

[5] Finally, because defendants carried their burden of showing there were no genuine issues of material fact and that they were entitled to judgment in their favor as a matter of law as to plaintiff's underlying claims, summary judgment will also be affirmed as to plaintiff's claim for punitive damages. *See* N.C. Gen. Stat. § 1D-15(a) (2003) (plaintiff only entitled to punitive damages where plaintiff proves defendant is liable for compensatory damages).

Affirmed.

Judges HUDSON and ELMORE concur.

IN THE MATTER OF THE TESTAMENTARY TRUST OF ETHYLENE R. CHARNOCK, DECEASED

No. COA02-820

(Filed 20 May 2003)

1. Trusts— replacement of trustee—jurisdiction

The superior court correctly dismissed for lack of subject matter jurisdiction an action to modify a trust by replacing the trustee. The more specific statute will prevail over the more general; N.C.G.S. § 36A-23.1 specifically governs removal of a testamentary trustee and grants exclusive jurisdiction to the clerk of superior court, while N.C.G.S. § 36A-125.4 refers in general terms to modification and grants jurisdiction to the superior court. Moreover, N.C.G.S. § 36A-125.4 compels modification upon consent of beneficiaries; to permit removal of trustees selected by the settlor simply upon the consent of the beneficiaries and with

no showing of incompetence or malfeasance would gut the provisions of N.C.G.S. § 36A-23.1 and its attendant statutes, as well as the common law rule of respect for the testator's intent.

2. Costs— lack of subject matter jurisdiction—jurisdiction to tax costs

A trial court order taxing costs to petitioners was remanded for a hearing and order on the amount of the costs. The court's determination that it lacked subject matter jurisdiction did not deprive it of jurisdiction to tax costs, but appellants filed notice of appeal two minutes after judgment was entered, depriving the court of jurisdiction to rule further on the issue.

Judge WYNN dissenting.

Appeal by petitioners from judgment entered 23 May 2002 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 19 February 2003.

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

Molly N. Howard, for guardian ad litem-appellee.

Schoch & Schoch, by Arch K. Schoch IV, and Robinson, Bradshaw & Hinson, P.A., by Graham D. Holding, Jr. and Edward F. Hennesey, IV, for respondent-appellee.

LEVINSON, Judge.

Petitioners-appellants appeal from an order dismissing for lack of subject matter jurisdiction their petition for modification of an irrevocable trust, and from an order taxing costs to appellants. For the reasons that follow, we affirm.

The pertinent facts are summarized as follows: On 2 February 2000, Ethylene R. Charnock (decedent) died testate, leaving a Last Will and Testament (the will) dated 8 July 1999. Item III of the will provided for the creation of an irrevocable testamentary trust (the trust) to which decedent bequeathed her entire estate. The trust named attorney Ben Farmer (respondent-appellee) as trustee for Sabrina C. Schumaker (Sabrina), decedent's sole heir and the sole principal beneficiary of the trust. The will authorized appellee, as trustee, to "hold the property . . . and to invest and reinvest the same, to collect the income therefrom, and to apply so much of the princi-

pal . . . to the support, education, welfare, and maintenance of [Sabrina] as [appellee] shall deem necessary and proper[.]" The will also provided that upon Sabrina's death the "unexpended principal, together with any accumulated trust income" should be divided among her surviving brothers and sisters and the living children of any predeceasing brother or sister. Appellee was further directed to "consider my opinions with regard to Trust disbursements as expressed in any handwritten letters of intent[.]" One such letter advised appellee to "hold as much as possible for [Sabrina's] future, but in case of medical emergency use your judgment." High Point Bank and Trust Company was named alternate Trustee, in the event appellee was unable to serve.

Following decedent's death, the trust was funded, and appellee acted as trustee. The decedent's handwritten letter gave Sabrina permission to remove desired personal items from decedent's house upon her death, and also directed appellee to pay Sabrina the sum of $500.00 a month. Appellee planned to sell the house, conceded by appellants to be a trust asset, after Sabrina removed her personal property. However, upon decedent's death, Sabrina moved into the house and refused to leave. Consequently, appellee agreed that Sabrina could remain in decedent's house, and that the trust would pay for major repairs, yard work, property taxes, and homeowners' insurance. Appellee concluded that, in view of this arrangement, Sabrina was not entitled to "occupy her mother's residence, deny the Trust the . . . investment opportunity contemplated by her mother, and receive a monthly $500.00 Trust distribution[.]" He wrote Sabrina that he would not start paying Sabrina a monthly check unless she would "vacate the residence and thus allow the Trust to receive the sale distribution originally contemplated by the Testatrix." Sabrina contended that she should receive the $500.00 a month, notwithstanding her living in the house with major expenses paid by the trust, and appellee's position in this regard led to conflict between them. In September, 2001, Sabrina filed a grievance against appellee with the North Carolina State Bar, which was dismissed 7 December 2001.

On 14 February 2002, appellants (decedent's siblings and Sabrina) filed a petition in superior court for modification of a trust, naming trustee Ben Farmer, appellee, as respondent. The sole "modification" requested by appellants was that the trial court remove Farmer as trustee, and replace him with two specific co-trustees: Wendy Ward Heafner, decedent's niece and a potential beneficiary of the trust; and

High Point Bank and Trust Company, the alternate trustee under the terms of decedent's will.

Appellee filed an answer asserting several defenses including the superior court's lack of subject matter jurisdiction over a proceeding to remove a trustee, and appellants' failure to join all necessary parties. Appellee's answer sought dismissal of appellants' petition for modification, and costs. Upon motion by appellants, a guardian *ad litem* (GAL) was appointed to represent the interests of any unknown, unborn, or potential beneficiaries. The GAL filed an answer on 3 May 2002, assenting to the proposed modification. On 13 May 2002, appellants filed a reply to appellee's response to the petition. Appellee's motion for dismissal was heard 20 May 2002. Following the hearing, appellants filed a request with the trial court, asking the court to delay its substantive ruling until appellants had determined whether any other possible future beneficiaries were required to consent to their proposed modification, and, if so, to give appellants time to obtain the necessary signatures. On 23 May 2002, the trial court dismissed appellants' petition for modification of a trust on the grounds that the court lacked subject matter jurisdiction. In its order, the court noted that as a result of its ruling, appellants' request for time to obtain the consent of additional beneficiaries was rendered moot. The court also taxed costs to appellants. From this order, the petitioners appealed.

Subject Matter Jurisdiction

I.

[1] Appellants, joined by the GAL, appeal from the trial court's dismissal for lack of subject matter jurisdiction. "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C.R. Civ. P. 12(h)(3).

Appellants contend that their petition asked the trial court to 'modify' the trust by "substitution of trustees . . . from a single individual trustee to co-trustees where one co-trustee is an institutional fiduciary and the other an individual member of a class of persons

who might constitute future beneficiaries." Appellants characterize this as a proceeding for modification of the terms of the trust instrument, in which appellee's removal is merely an incidental effect of the change. They analogize it to a petition for termination of a trust, in which the trustee is removed as a consequence of the trust's termination. On this basis, appellants assert that jurisdiction was proper under N.C.G.S. § 36A-125.4 (2001), "Modification or termination [of irrevocable trust] by consent of beneficiaries," which provides in pertinent part as follows:

> Except as provided in subsection (b) of this section, if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust in a proceeding before the superior court.

G.S. § 36A-125.4(a). Appellee, on the other hand, argues that appellants' petition is properly characterized as a proceeding to remove a trustee, and thus is in the exclusive jurisdiction of the clerk of court, pursuant to N.C.G.S. § 36A-23.1(a)(1) (2001).

This Court is not bound by appellants' characterization of their petition as one for modification of a trust, rather than for removal of a trustee. "It is the substance of the application, or petition, and the relief which is sought thereunder that determines its true nature, not the title appended thereto by the petitioner." *State v. Hamrick*, 2 N.C. App. 227, 232, 162 S.E.2d 567, 570 (1968). It has long been the law that "[t]he nature of the action is not determined by what either party calls it, but by the issues arising on the pleadings and by the relief sought." *Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E. 2d 540, 545-46 (1956). We will, therefore, undertake our own inquiry into the "the issues arising on the pleadings" and "the relief sought" in appellants' petition.

II.

Appellants' petition was confined to a specific request for removal of appellee Farmer as trustee, because "[p]etitioners . . . are dissatisfied with the conduct of Respondent as Trustee of the Trust[,]" and for replacement of appellee with a named individual, the niece of one of the appellants, who would act as co-trustee along with the bank originally named by settlor as alternate trustee. The petition is focused exclusively on replacement of appellee by a particular family member, and does not establish that the beneficiaries sought, or consented to, a general change in the terms of the trust instrument to provide for administration by any competent pair of co-trustees,

regardless of their identities. For example, the petition clearly indicates that the beneficiaries did not consent to administration of the trust by appellee and High Point Bank and Trust Company as co-trustees. G.S. § 36A-125.4 requires the consent of all beneficiaries to a proposed modification of the trust, and does not authorize the trial court to presume consent.

Further, a review of the issues raised and relief sought in appellants' petition suggests that appellants' petition was in the nature of an action to remove appellee as trustee. In their petition to modify the trust, appellants alleged in relevant part the following:

> 15. Petitioners . . . are dissatisfied with the conduct of Respondent as Trustee of the Trust and are desirous of making certain modifications to the Trust, the effect of which would be to remove Respondent as Trustee, and to establish certain new Trustees.
>
> . . . .
>
> 17. As a result of the foregoing, Petitioners desire the Trust to be modified as follows: a. All reference to Ben Farmer [respondent] as Trustee . . . shall be eliminated. b. The reference in the first full paragraph of the Trust . . . to [respondent] shall be modified to insert the following as Co-Trustees . . . in the place of [respondent]: Wendy Ward Heafner . . . and High Point Bank and Trust Company; . . .
>
> 18. a. The Modification does not effect any substantive change to the Trust[.]

(emphasis added). In their reply to appellee's answer, appellants stated:

> 4. . . . the only effect of the modification proposed by Petitioners is to remove Respondent as trustee of the Trust, and appoint High Point Bank (named as alternate trustee by Decedent in the original Trust) and Wendy Heafner (Decedent's niece and a potential remainder beneficiary under the Trust) as substitute co-trustees. . . .
>
> . . . .
>
> 6. . . . Rather than engaging in a contentious, protracted and disagreeable continuing relationship with Respondent, Petitioners

> feel it is time to have a new trustee appointed; hence their Petition in this proceeding.
>
> . . . .
>
> 9. . . . the only effect of [this] modification is to change trustees. Respondent has failed to carry out Decedent's specific written instructions. . . .

(emphasis added). No modification to the substantive terms of the trust was proposed. We also note that appellants explicitly stated that the basis for their petition was dissatisfaction with appellee as trustee. Moreover, appellants' petition provides that if either proposed co-trustee proved "unwilling" to serve, the other would act as sole trustee. The ease with which administration by the "co-trustees" could be returned to administration by a single (replacement) trustee further underscores the absence of any commitment to a genuine modification in the terms of the trust instrument. We conclude that the "substance of the . . . petition, and the relief which is sought" establish that appellants' request for "modification" of the trust is properly characterized as a motion for removal of appellee as trustee.

Appellants have urged this Court to hold that it is generally permissible to bring a proceeding under G.S. § 36A-125.4 to modify the administration of a trust from one trustee to administration by two co-trustees. However, regardless of whether or not all possible future beneficiaries executed signed consents to appellants' petition, their petition does not establish consent by the beneficiaries to a structural or substantive change in the terms of the trust, but only to the removal and replacement of a particular trustee. We conclude that this appeal does not present the general question of whether beneficiaries of a testamentary trust may properly bring an action to modify the terms of a trust instrument to provide for administration by two co-trustees, rather than by a single trustee. Nor does this appeal require us to determine whether, in the event such a proceeding is proper, it should be brought in superior court or before the clerk of court. We therefore express no opinion on these issues.

III.

We next consider whether, as a proceeding to remove or replace a specific trustee, appellants' petition could properly be brought under G.S. § 36A-125.4. The trustee of an irrevocable testamentary trust is a fiduciary. N.C.G.S. § 36A-1(a) (2001) ("the word 'fiduciary' . . . include[s] a . . . trustee[.]"); N.C.G.S. § 36A-22.1(2)

(2001) (a fiduciary "includes . . . trustees."). As a fiduciary, a trustee must "observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary[.]" N.C.G.S. § 36A-2 (2001).

Under N.C.G.S. § 7A-103(14) (2001), the clerk of superior court is generally authorized to "[a]ppoint and remove guardians and trustees, as provided by law." When the proceeding is one to remove a *testamentary* trustee, the clerk's jurisdiction is exclusive, pursuant to N.C.G.S. § 36A-23.1 (2001), which provides in relevant part that:

> The clerks of superior court of this State have original jurisdiction over all proceedings initiated by interested persons concerning the internal affairs of trusts except proceedings to modify or terminate trusts. Except as provided in subdivision (3) of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be maintained under this subsection are those concerning the administration and distribution of trusts, . . . and the determination of other matters involving trustees and trust beneficiaries, . . . includ[ing] proceedings:
>
> (1) To appoint or remove a trustee[.]

G.S. § 36A-23.1(a)(1) (emphasis added).

A trustee may be removed for a breach of fiduciary duty, or for a violation of the Uniform Trust Act. N.C.G.S. § 36A-81 (2001). "Trust beneficiaries may expect and demand the trustee's complete loyalty in the administration of any trust. Should there be any self-interest on the trustee's part in the administration of the trust which would interfere with this duty of complete loyalty, a beneficiary may seek the trustee's removal." *In re Trust under Will of Jacobs*, 91 N.C. App. 138, 143, 370 S.E.2d 860, 864, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 863 (1988) (citing *Trust Co. v. Johnston*, 269 N.C. 701, 153 S.E. 2d 449 (1967)). Likewise, a trustee may be removed for "neglect of duty and mismanagement of the trust property. . . . [W]here the acts or omissions of the trustee are such as to show a want of reasonable fidelity, a court of equity will remove him." *Cavender v. Cavender*, 114 U.S. 464, 472, 29 L. Ed. 212, 214 (1885). *See also Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 659 n.6 (4th Cir. 1996) ("Removal of trustees is appropriate when the trustees have engaged in repeated or substantial violations of their fiduciary duties."), *cert. denied*, 519 U.S. 1077, 136 L. Ed. 2d 677 (1997). Thus, in a proceeding before the clerk

to remove a trustee, the clerk should determine if the trustee has proven incompetent, neglected his fiduciary duties, or abused his discretion, before ordering him removed:

> The court will not undertake to control the trustee with respect to the exercise of a discretionary power, except to prevent an abuse by him of his discretion. The trustee abuses his discretion in exercising or failing to exercise a discretionary power if he 'acts dishonestly, or if he acts with an improper even though not a dishonest motive, or if he fails to use his judgment, or if he acts beyond the bounds of a reasonable judgment.'

Woodard v. Mordecai, 234 N.C. 463, 471, 67 S.E.2d 639, 644 (1951) (quoting 1 RESTATEMENT OF TRUSTS 2d § 187 (1971)).

In its order dismissing appellants' petition, the trial court stated that the dismissal was "without prejudice to Petitioners' rights, if any, to seek removal of the Trustee in an action before the Clerk of this Court pursuant to N.C.G.S. § 36A-23.1, *et. seq.*" Appellants acknowledge that they might have sought removal of appellee before the clerk of court, but contend that G.S. § 36A-125.4 provides an alternate mechanism to accomplish the same goal. Appellants argue that "[w]hile [appellants] may or may not have (or had) sufficient cause to justify a Petition to Remove [appellee] as trustee for cause under N.C.G.S. § 36A-23.1, they chose not to do so."

We observe that G.S. § 36A-125.4 does not set out the types of proceedings contemplated by the word 'modification,' which is a general term meaning "a change made" to something else. OXFORD ENCYCLOPEDIC ENGLISH DICTIONARY 928 (Judy Pearsall & Bill Trumble, eds., Oxford University Press 2d ed. 1995). In contrast, G.S. § 36A-23.1 specifically addresses the clerk's jurisdiction over proceedings to remove a trustee.

> [I]t 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 *Utilities Com'm v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969)). Thus, "where two statutes deal with the same subject matter, the more specific statute will prevail over the more general one." *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 533 (1993).

Because G.S. § 36A-23.1 specifically governs removal of a testamentary trustee, while G.S. § 36A-125.4 refers in general terms to "modification," we conclude that G.S. § 36A-23.1 grants the Clerk of Superior Court exclusive jurisdiction over a case such as this, in which the substance of the petition is an action to remove and replace a particular trustee with one or more trustees.

IV.

Our decision is also based in part upon the significant differences between proceedings under G.S. § 36A-23.1 and G.S. § 36A-125.4. Under N.C.G.S. § 36A-26.1 (2001), proceedings to remove a trustee require that all "known beneficiaries, trustees, or co-trustees not joined as petitioners shall be joined as respondents." The statute further confers upon "beneficiaries, creditors, or any other persons interested in the trust estate" the "right to answer the petition and to offer evidence against granting the petition." Upon receipt of the evidence the "[t]he clerk shall then proceed to hear and determine the matter as provided for in G.S. [§] 1-301.3." This statute directs the Clerk to "determine all issues of fact and law[,]" and to "enter an order or judgment . . . containing findings of fact and conclusions of law supporting the order or judgment." In entering its order, the clerk should respect the settlor's wishes regarding the choice of trustee, unless the trustee is for some reason no longer competent to serve:

> The testator has provided the method of administration of his estate desired by him, and he has entrusted that administration to those named in his will. . . . If the trustees are or become persistently disregardful of their fiduciary obligations, . . . adequate remedies are available . . . The court is not justified in altering a trust . . . [unless] it is necessary to preserve the trust and effectuate its primary purpose. This does not include the threat to the estate incident to squabbling between the trustees and beneficiaries regarding the proper administration of the trust.

Carter v. Kempton, 233 N.C. 1, 7-8, 9, 62 S.E.2d 713, 718, 719 (1950).

Thus, removal of a trustee for cause occurs in a context affording procedural safeguards and a certain measure of judicial oversight by the clerk of court. In contrast, G.S. § 36A-125.4 compels modification upon consent of beneficiaries. To permit removal of the trustee selected by the settlor, simply upon the consent of the beneficiaries and with no showing of incompetence or malfeasance, would gut the

provisions of G.S. § 36A-23.1, and attendant procedural statutes, as well as the common law rule of respect for the testator's intent. "To . . . substitute the court's discretion for that of the trustee would also undermine the intent of the testator and settlor of the trust. The intent of the testator is the polar star in the interpretation of wills." *Finch v. Wachovia Bank & Trust Co., N.A.*, 156 N.C. App. 343, 349, 577 S.E.2d 306, 310 (2003) (citing *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960)).

The dissent points out that G.S. § 36A-125.4 allows beneficiaries to bring an action for termination of a trust, and thereby frustrate the testator's intent. However, such a proceeding triggers judicial scrutiny:

> (b) Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust or modify it in a manner that affects its continuance according to its terms, and if the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court in its discretion determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

G.S. § 36A-125.4(b). Thus, proceedings to replace a trustee for cause, or to terminate a trust, are both carried out in the context of certain safeguards and judicial review. We also consider it significant that G.S. § 36A-23.1 was enacted in its present form two years after G.S. § 36A-125.4, suggesting an attempt to clarify that proceedings described in G.S. § 36A-23.1 were not within the ambit of G.S. § 36A-125.4.

V.

Further, we reject appellants' argument that their petition to replace appellee with two specific trustees merely "arises out of" the administration of the trust, but is not "a part of" trust administration. Appellants correctly state the general rule, recently expressed by this Court in *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 53, 571 S.E.2d 836, 841-42 (2002), *disc. review denied*, 356 N.C. 694, 579 S.E.2d 100 (2003):

> [T]ort claims against administrators of estates resulting from the manner in which the estate was administered are within the original jurisdiction of the trial division, not the clerk of superior court. . . . [C]laims such as breach of fiduciary duty, fraud, and

> negligence are 'justiciable matters of a civil nature,' original general jurisdiction over which is vested in the trial division. . . . [W]hile the claims arise from administration of an estate, their resolution is not a part of 'the administration, settlement and distribution of estates of decedents' so as to make jurisdiction properly exercisable initially by the clerk.'

(quoting *Ingle v. Allen*, 69 N.C. App. 192, 195-96, 317 S.E.2d 1, 3, *disc. review denied*, 311 N.C. 757, 321 S.E.2d 135 (1984)). However, the instant case is not a tort claim against the administrator of a trust, and is not the type of case addressed in *Ingles*, *id.*

We hold that, on the facts of this case, the trial court properly dismissed appellants' petition for 'modification' of a trust. This assignment of error is overruled. Because we conclude that the trial court properly dismissed appellants' petition, we need not reach appellants' remaining arguments concerning the trial court's pre-hearing rulings.

Taxing of Costs

[2] Appellants next argue that the trial court abused its discretion in taxing costs of this action to appellants. The appellants contend that if the trial court lacked jurisdiction to rule on their petition, it therefore was without jurisdiction to impose costs. However, the court's determination that an action should be dismissed does not deprive it of jurisdiction to tax costs, if appropriate. *See Locklear v. Scotland Memorial Hosp.*, 119 N.C. App. 245, 457 S.E.2d 764 (1995) (allowing defendant's motion to dismiss and taxing costs to plaintiffs).

Appellants also argue that they were not given an opportunity to be heard on the issue of costs. We note that appellants filed notice of appeal two (2) minutes after judgment was entered, thus depriving the trial court of jurisdiction to rule further on the issue. We affirm the trial court's order taxing costs to appellants, and remand for a hearing and order on the amount.

For the reasons discussed above, we hold that the trial court did not err by dismissing appellants' petition, or by taxing costs to appellants. Accordingly, the trial court's orders are

Affirmed and the matter Remanded for determination of costs.

Judge TIMMONS-GOODSON concurs in result only.

Judge WYNN dissents.

WYNN, Judge dissenting.

Because I believe that the Superior Court had subject matter jurisdiction to entertain appellant's petition regardless of whether it was characterized as a petition for modification or a petition for removing a trustee, I respectfully dissent. In my view, the General Assembly, in enacting Section 36A-125.4(a), expressly created an alternative mechanism for beneficiaries to remove a trustee: namely, removal without cause. The majority fails to reach this conclusion on the basis of two arguments premised respectively on a canon of statutory construction and our State's perceived reverence for a decedent's testamentary intentions. For the reasons stated herein, I believe these two arguments are without substance.

First, the majority holds that "because [Section] 36A-23.1 specifically governs removal of a testamentary trustee, while [Section] 36A-125.4 refers in general terms to 'modification,' that [Section] 36A-23.1 grants the Clerk of Superior Court exclusive jurisdiction over" the case *sub judice*. As noted by the majority, N.C. Gen. Stat. § 36A-23.1 provides that an "interested person" can petition the Superior Court Clerk to remove a testamentary trustee for cause. Although the majority apparently recognizes that, on its face, the provisions N.C. Gen. Stat. § 36A-125.4(a) provide an alternative mechanism of removing a trustee, the majority concludes that the specifically applicable provisions of Section 36A-23.1 control the generally applicable provisions of Section 36A-125.4(a).

Although the majority's first argument relies upon "well established principles of statutory construction," the majority does not adhere to a canon of statutory construction, often repeated by our Supreme Court, that "statutes dealing with the same subject matter must be construed in *pari materia* and harmonized, if possible, to give effect to each." *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 595, 528 S.E.2d 568, 571 (2000); *Board of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). Accordingly, this Court should first attempt to harmonize statutes dealing with the same subject matter before limiting the expanse of one to accommodate another.

In the case *sub judice*, although Sections 36A-23.1 and 36A-125.4 deal with the same subject matter, the statutes provide distinct procedures and requirements for judicially addressing that subject matter. As previously noted, under Section 36A-23.1 *any* "interested person" can bring an action before the Superior Court Clerk to

remove a testamentary trustee for cause. Pursuant to Section 36A-125.4, however, "if *all* beneficiaries of an irrevocable trust *consent*, they may compel modification or termination of the trust in a proceeding before the superior court." (emphasis supplied). Thus, under Section 36A-23.1, removal of a trustee is premised on any interested person showing *cause*, whereas in Section 36A-125.4 modification or termination of a trust, and the lesser included decision to remove a trustee, is contingent upon the *consent of all beneficiaries*. Consequently, Sections 36A-23.1 and 36A-125.4 are easily harmonized by recognizing that Section 36A-125.4 provides a method of removing a trustee without cause.

Second, the majority states that a statute which would "permit removal of the trustee selected by the [testator], simply upon the consent of the beneficiaries [] with no showing of [cause], would gut . . . the common law rule of respect for the testator's intent." Despite the majority's concern for the testator's intent, the General Assembly, in enacting Section 36A-125.4, created an unambiguous and unequivocal power, where all the beneficiaries to an irrevocable trust may by consent, terminate the entire trust. Most assuredly, termination of an irrevocable trust is the ultimate frustration of the testator's intent. Nonetheless, the General Assembly has bestowed this power upon consenting beneficiaries. It follows that the mere frustration of the testator's intent is not a sound basis upon which to prevent removal of a trustee under Section 36A-125.4.

As this is an issue of first impression, and I do not agree with the majority's holding, I respectfully dissent.

STATE OF NORTH CAROLINA v. CLARENCE GILLIS

No. COA02-638

(Filed 20 May 2003)

1. Homicide— first-degree murder—indictment—failure to include all elements

The argument that a first-degree murder conviction must be vacated because the indictment failed to list all of the elements of first-degree murder has been rejected by the North Carolina Supreme Court.

2. Appeal and Error— certified record—binding—voluntariness of statement

The Court of Appeals is bound by a certified record. Although arguments from both the State and defendant assumed that defendant said that he would not speak with investigators, testimony from officers indicates that defendant chose to make a statement rather than to remain silent. The challenged testimony does not constitute an improper comment on defendant's exercise of his rights; moreover, even if the transcript were as defendant contends, the challenged testimony would not constitute plain error in light of the overwhelming evidence of defendant's guilt.

3. Robbery— attempted—sufficiency of evidence

There was sufficient evidence of attempted armed robbery where evidence was presented of defendant's intent to rob the victim and of overt acts in furtherance of his goal.

4. Homicide— felony murder—connection between robbery and killing

There was sufficient evidence of a connection between a homicide and an attempted armed robbery to support a felony murder conviction. Defendant intended to commit armed robbery, followed the victim armed with a sawed-off shotgun, and shot and killed the victim within the next two minutes.

5. Homicide— felony murder—judgment on underlying felony—arrested

Judgment was arrested on a conviction for attempted armed robbery which served as the underlying felony for felony murder.

6. Homicide— self-defense—no instruction—evidence not sufficient

There was no plain error in not instructing the jury on self-defense where no evidence was presented that defendant had formed a belief that he was in imminent danger of great bodily harm or that he acted in self-defense when he followed the victim outside and shot him with a sawed-off shotgun. Moreover, self-defense is largely unavailable when a defendant is convicted of felony murder.

Appeal by defendant from judgment entered 25 October 2001 by Judge Clifton W. Everett, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 12 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Diana A. Reeves, for the State.

William D. Spence, for defendant-appellant.

LEVINSON, Judge.

Defendant (Clarence Gillis) appeals from convictions of first degree murder and attempted armed robbery. For the reasons discussed below, we find no error in the murder conviction, and arrest judgment on the conviction of attempted armed robbery.

In the early morning hours of 24 January 1998, Edgardo Rivera-Dones (the victim) died from a single gunshot to the abdomen. He was shot in front of a house located at 1101 North Street Extension, a residential neighborhood in Fayetteville, North Carolina. Witnesses identified defendant as the person who shot the victim, and after investigation defendant was arrested and charged with attempted armed robbery and first degree murder. Before trial, the case was determined to be non-capital.

At trial, the defendant did not present evidence. The State's evidence tended to show, in relevant part, the following: Marvin Brookins testified that in January of 1998, he was selling cocaine, using as his base of operations the 1101 North Street home of Frank McKimmon. Brookins testified that McKimmon allowed various people to sell cocaine from his house, including the defendant. On the night of 23 January 1998, Brookins, the defendant, and several others were all selling cocaine at the North Street house. The victim came to the house repeatedly that night, and bought "a substantial amount of cocaine." Following one of these visits, the defendant announced that "[t]he next time that the guy came to buy some [cocaine], that he was going to rob him." Defendant then retrieved his sawed off shotgun and concealed it in his coat, repeating that he would rob the man if he came back. In the early morning hours of 24 January, the victim returned to buy more cocaine. Brookins testified that when the victim left the house, the defendant followed him off the porch and started walking behind him. He saw defendant pull out his gun and speak to the victim, whereupon the victim turned around and brandished a small knife, asking defendant if he was trying to rob him. The defendant "jumped back" when he saw the knife, and the victim continued

walking towards his car. Before reaching his car, the victim, still holding a knife, turned around again and swore at the defendant. The defendant again "jumped back." However, the third time the victim turned around, the defendant cursed at the victim before shooting him at point blank range. The victim dropped to the ground immediately. Defendant spoke briefly with Brookins, telling him several times that he had "kill[ed] a ni—r," before fleeing into the nearby woods.

Brookins' testimony was corroborated in part by that of neighbors who were nearby when the shooting occurred, including Diedre Shepherd who lived with McKimmon at 1101 North Street, and Burnis and Dorothy Floyd, who lived next door. These three witnesses all testified generally that the defendant lived with McKimmon and sold cocaine from the house; that the victim came to the house repeatedly on 23 January to buy cocaine, some of which he bought from defendant; that defendant often carried a sawed off shotgun; and that on 23 January 1998, the victim and defendant were angry at each other about cocaine sales. Specifically, Burnis Floyd testified that the defendant was "always armed" with his "sawed off" shotgun. On 23 January 1998, defendant became very angry when the victim bought cocaine from Floyd, instead of buying exclusively from the defendant. Floyd heard defendant yelling at the victim not to return or "something [was] going to happen to him." When the victim came back to buy more cocaine, Floyd went inside because he thought "that the guy was getting ready to get robbed." A few minutes later he heard a gunshot. When he looked outside, he saw defendant standing over the victim. Floyd also testified that he had previously seen defendant rob six to eight different drug buyers; had seen defendant hit people with his gun; and that defendant had previously "pulled his shotgun on [Floyd]."

Floyd's wife, Dorothy, testified that she heard defendant curse the victim several times on 23 January, saying "you better not let me catch you back over here." After this, she saw defendant get his gun, which he had "every time [she saw] him," from his "usual" hiding place under the house. Later on, the victim returned to the house, and Dorothy went inside to watch from the window. She heard defendant yelling at the victim, and turned away to summon her husband. When she heard a shot, Dorothy returned to the window where she saw defendant turning and walking away from the victim. The victim was lying on the ground, and the defendant was the only person nearby.

Diedre Shepherd testified that she was living with McKimmon and selling cocaine in January, 1998. On 23 January, the defendant was high on cocaine and was "intimidating" their customers. He always carried his gun, and that night he was using it to threaten people who came to the neighborhood to buy cocaine. In addition, he cheated several people, including the victim, by selling them soap instead of cocaine. The victim was angry at being deceived, so Shepherd left to obtain some genuine cocaine from her supplier, who was a few blocks away. On her way back to North Street, she heard a gunshot and the sounds of an ambulance and police sirens. Shortly thereafter, she saw defendant running down the street smashing in car windows with the shotgun.

Other evidence also tended to corroborate Brookins' eyewitness testimony. Betty Crane, a vice president of the Fort Bragg Credit Union, testified that the bank's records indicated that on the night of 23 January 1998, the victim made numerous withdrawals, totaling almost $500.00, from ATM machines. Dr. John Butts, the State's chief medical examiner, testified that the victim appeared to have died from a single wound inflicted by a shotgun, from a distance of approximately a yard away. Officer Britton, an investigator with the Fayetteville Police Department, testified that when he arrived at the scene of the shooting, the victim was lying face down with a gunshot wound to the abdomen. All the witnesses in the area identified defendant as the shooter, and Dorothy Floyd picked defendant's picture from a photo lineup. Officer Murphy, another investigator with the Fayetteville Police Department, testified that the victim, who was already dead when Murphy arrived, "appeared to have been shot at close range with the intestines actually protruding through the wound." On 26 January 1998, Murphy arrested defendant. After being advised of his *Miranda* rights, defendant gave a written and verbal statement, denying any part in the shooting. In his statement, defendant claimed to have spent the night with a friend, Ronnie Owens. However, Owens testified that he had not seen defendant on the night of the shooting.

Following trial, defendant was convicted of attempted armed robbery, and first degree murder on the theory of felony murder. From these convictions, defendant appeals.

I.

[1] Defendant argues first that his conviction must be vacated on the grounds that "the murder indictment failed to allege all the elements"

of first degree murder. However, as defendant acknowledges, the North Carolina Supreme Court has previously rejected defendant's argument. *See, e.g., State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000). This Court is bound by precedent of the North Carolina Supreme Court. *See Forsyth Memorial Hospital v. Chisholm*, 342 N.C. 616, 620, 467 S.E.2d 88, 90 (1996) (where North Carolina Supreme Court had "not had occasion to reconsider" relevant issue since 1858, "the Court of Appeals . . . was required to . . . follow[] the precedent established by this Court . . . more than a century earlier"); *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 482, 528 S.E.2d 397, 399 (2000) (noting that this Court is "bound by decisions of our Supreme Court . . . [u]ntil either that body or the General Assembly acts"). Accordingly, this assignment of error is overruled.

II.

[2] Defendant argues next that the trial court committed plain error by "permitting the district attorney to elicit testimony commenting on defendant's exercise of his rights to remain silent and to have counsel."

Preliminarily, we review the standard for a finding of 'plain error.' The general rule is that "to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C.R. App. P. 10(b)(1). However, "[i]n criminal cases a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4). Regarding plain error, our appellate courts consistently have held that:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or . . . has 'resulted in a miscarriage of justice or . . . where it can be fairly said 'the . . . mistake had a probable impact on the jury's finding that the defendant was guilty.'

State v. Scott, 343 N.C. 313, 339, 471 S.E.2d 605, 620-21 (1996) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). Thus, "to prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have reached a different verdict." *State v. Smith*, 152 N.C. App. 29, 37-38, 566 S.E.2d 793, 799, *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002) (citing *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991)).

In the case *sub judice*, we find no support in the record for defendant's underlying premise, that the prosecutor elicited evidence regarding defendant's post-arrest invocation of his Fifth Amendment right to remain silent. Defendant cites the testimony of Officer Britton in support of this contention. However, a review of the cited transcript selection shows that it reads as follows:

> PROSECUTOR: And can you describe what—if you would, what rights that were read to him?
>
> OFFICER BRITTON: Yes, I can. Number one, advised him that he had the right to remain silent. Number two said that anything he said can and will be used against you in court. Then there's a question asking the individual who's been read the rights, 'Do you understand these rights?' And Mr. Gillis initialed 'CG' which indicates that he did understand the rights.
>
> Next he was asked did he want to speak to me. He again initialed 'CG.' And then number three, we advised him that he had the right to talk to a lawyer and to have one present during questioning. Number four said if you want a lawyer and can afford one—correction—and cannot afford one, one will be appointed to represent you. The next question goes, "Do you want to speak to me without a lawyer present? And he indicated that he did want to speak to us by affixing his initials to the "yes" blank."
>
> PROSECUTOR: Okay.
>
> OFFICER BRITTON: And then he signed his signature.
>
> PROSECUTOR: And did Officer Murphy also sign?
>
> OFFICER BRITTON: Officer Murphy signed it, and I witnessed it by signing it.
>
> PROSECUTOR: Now, who was doing the talking, you or Officer Murphy?

OFFICER BRITTON: Investigator Murphy.

PROSECUTOR: Thank you.

(emphasis added). Testimony was subsequently elicited from Officer Murphy as follows:

PROSECUTOR: And what is it?

OFFICER MURPHY: It's your general Adult Rights Form which is your Miranda rights.

PROSECUTOR: Were you present when those rights were given?

OFFICER MURPHY: Yes, I was. I read the rights.

PROSECUTOR: And did Mr. Gillis agree to talk with you?

OFFICER MURPHY: Yes, he did.

PROSECUTOR: Okay. And after talking with you, did he make a written statement?

OFFICER MURPHY: Yes ma'am. He made a verbal statement and a written statement.

(emphasis added). We conclude that the testimony elicited from Officers Britton and Murphy does not indicate that defendant asserted his right to remain silent, but instead establishes that he chose to make a statement. Indeed, defendant's written statement was introduced at trial without objection. Thus, the challenged testimony does not constitute an improper comment on defendant's exercise of his constitutional rights, and was neither error nor plain error.

We acknowledge that both the defendant and the State have presented arguments on appeal based on the assumption that, contrary to the contents of the certified transcript, the trial testimony of Officer Britton was that defendant stated he would not speak with the investigators. However, "[a] certified record imports verity, and this Court is bound by it. Defense counsel and the district attorney, as officers of the court, have an equal duty to see that reporting errors in the transcript are corrected." *State v. Robinson*, 327 N.C. 346, 360, 395 S.E.2d 402, 410 (1990) (citing *State v. Sanders*, 312 N.C. 318, 319, 321 S.E.2d 836, 837 (1984)). Further, this "Court is bound on appeal by the record on appeal as certified and can judicially know only what appears in it. When, . . . the trial transcript . . . is filed by appellant . . . the trial transcript must be treated as part of the record

on appeal for purposes of applying the rule that this Court is bound by what appears in the record on appeal." *State v. Lawson*, 310 N.C. 632, 641, 314 S.E.2d 493, 499 (1984). Moreover, even if the transcript were as defendant contends, the challenged testimony would not constitute plain error in view of the overwhelming evidence of defendant's guilt. This assignment of error is overruled.

III.

[3] The defendant's next argument is that the trial court erred by failing to dismiss the charges against him at the close of all the evidence. Defendant contends that the evidence was insufficient to sustain a conviction. We disagree.

In ruling on a motion to dismiss for insufficient evidence, the trial court "must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996) (citation omitted). Evidence is considered 'substantial' if it is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "The trial court's function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged." *Vause*, 328 N.C. at 237, 400 S.E.2d at 61. In making this determination, "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." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002) (citations omitted).

Defendant argues that there was insufficient evidence to support his conviction of attempted armed robbery. In general, conviction of an attempt to commit a crime requires (1) evidence that defendant intended to commit the offense, and (2) evidence of "an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (citation omitted). "An attempted robbery with a dangerous weapon occurs when a person, with the specific intent to unlawfully deprive another of personal property by endangering or threatening his life with a dangerous weapon, does some overt act calculated to bring about this result." *State v. Allison*,

319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987) (citing *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981)).

The evidence presented in the instant case, taken in the light most favorable to the State, showed the following: (1) defendant had a prior history of robbing people to whom he sold drugs; (2) on 23 January 1998, defendant told Brookins that he planned to rob the victim when the victim returned to buy cocaine; (3) after announcing that he planned to rob the victim, defendant then retrieved his sawed off shotgun from its hiding place; (4) when the victim returned to the house, defendant waited until the victim was leaving and followed him outside, carrying his gun; (5) as the defendant followed the victim towards his car, defendant did or said something which led the victim to ask if defendant meant to rob him; and (6) within two minutes of following the victim outside, defendant shot the victim and killed him. Thus, evidence was presented of defendant's intent to rob the victim (his statement to Brookins) and of overt acts in furtherance of this goal (arming himself, following the victim with the gun, shooting the victim). We conclude that there was ample evidence from which the jury could convict defendant of attempted armed robbery. This assignment of error is overruled.

[4] Defendant also argues that there was insufficient evidence of a connection between the homicide and the attempted armed robbery, and thus that his conviction for felony first degree murder must be vacated. We disagree. Felony first degree murder includes any murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" N.C.G.S. § 14-17 (2001). Accordingly, defendant may properly be convicted of first degree murder if he killed the victim "in the perpetration or attempted perpetration" of armed robbery. *State v. Oliver*, 334 N.C. 513, 521, 434 S.E.2d 202, 206 (1993) ("By statutory definition, a murder committed during the perpetration of an attempted armed robbery is first-degree murder.").

The North Carolina Supreme Court has articulated the "test for whether the felony and the murder are so connected as to invoke the felony murder rule" as follows:

> A killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial

> felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.

State v. Fields, 315 N.C. 191, 197, 337 S.E.2d 518, 522 (1985) (quoting *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E. 2d 788, 803 (1981)). In *State v. Terry*, 337 N.C. 615, 622, 447 S.E.2d 720, 723-24 (1994), the North Carolina Supreme Court again addressed the issue of the connection required between the underlying felony and the homicide to sustain a conviction of first degree felony murder, holding that:

> The law does not require that the homicide be committed to escape or to complete the underlying felony in order to apply the felony-murder principle . . . there need not be a 'causal relationship' between the underlying felony and the homicide, only an 'interrelationship.'

See also State v. Parker, 350 N.C. 411, 423, 516 S.E.2d 106, 116 (1999) (" 'This Court, on numerous occasions, has held that to support convictions for a felony offense and related felony murder, all that is required is that the elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction.' ") (quoting *State v. Wilkinson*, 344 N.C. 198, 216, 474 S.E.2d 375, 384 (1996)).

In the present case, the evidence, taken in the light most favorable to the State, showed that the defendant intended to commit armed robbery against the victim; that in furtherance of this intent, he followed the victim outside, armed with a sawed off shotgun; and that within the next two minutes the defendant shot and killed the victim. We conclude that this was sufficient evidence that the shooting was committed as part of a continuous transaction, and showed an interrelationship between the attempted armed robbery and the homicide. Accordingly, the trial court did not err by denying defendant's motion to dismiss for insufficiency of the evidence. This assignment of error is overruled.

IV.

[5] Defendant has also argued, and the State concedes, that upon his conviction of first degree murder on a theory of felony murder, judgment on the underlying felony should have been arrested. We agree. *See, e.g., State v. Wilson*, 345 N.C. 119, 122, 478 S.E.2d 507, 510 (1996) ("when the sole theory of [defendant's conviction of] first-degree murder is the felony murder rule, a defendant cannot be sentenced on the underlying felony in addition to the sentence for first-degree mur-

der"); *State v. Ocasio*, 344 N.C. 568, 581, 476 S.E.2d 281, 288 (1996) ("the trial court erred in failing to arrest judgments on the first-degree kidnapping convictions when these convictions were the underlying felonies for the felony murder convictions"). Accordingly, judgment is arrested on defendant's conviction of attempted armed robbery.

V.

[6] Defendant argues next that the trial court committed plain error by not instructing the jury on self defense. We find this argument to be without merit.

In general, an instruction on self defense is appropriate only where there is evidence that the defendant reasonably believed it was necessary to kill in order to protect himself:

> [B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?

State v. Lyons, 340 N.C. 646, 662, 459 S.E.2d 770, 778 (1995) (citation omitted). However, in the absence of such evidence, a defendant is not entitled to a jury instruction on self-defense:

> [D]efendant never presented any evidence that he acted under a reasonable belief that it was necessary to kill in order to save himself from death or great bodily harm. This is the first requirement to establish any type of self-defense, perfect or imperfect. As defendant could not meet this requirement, he was not entitled to any instruction on self-defense, perfect or imperfect.

State v. Reid, 335 N.C. 647, 672, 440 S.E.2d 776, 790 (1994). In the instant case, no evidence was presented that defendant had formed a belief, reasonable or otherwise, that he was in imminent danger of great bodily harm, or that the defendant acted in self defense when he followed the victim outside and then shot him with a sawed off shotgun.

Morever, where a defendant is convicted of felony first degree murder, self defense is largely unavailable as a defense. *State v. Richardson*, 341 N.C. 658, 668, 462 S.E.2d 492, 499 (1995) ("Self-defense, perfect or imperfect, is not a defense to first-degree murder under the felony murder theory, and only perfect self-defense is

applicable to the underlying felonies"). Thus, "the legislature has, in essence, established a *per se* rule of accountability for deaths occurring during the commission of felonies." *State v. Bell*, 338 N.C. 363, 386, 450 S.E.2d 710, 723 (1994). We conclude that on the facts of this case, the defendant failed to establish that he was entitled to an instruction on self defense, and that the court did not commit plain error by failing to so instruct. This assignment of error is overruled.

We conclude that defendant was properly convicted of first degree murder based upon the theory that the murder was committed in the course of an attempted armed robbery of the victim. We have examined defendant's remaining assignments of error and conclude that they are without merit. Accordingly, as to defendant's conviction of first degree murder we find no error. As to defendant's conviction of attempted armed robbery, judgment is arrested.

No Error as to the conviction of first degree murder.

Judgment arrested as to the conviction of attempted armed robbery.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. KENNETH KING

No. COA02-830

(Filed 20 May 2003)

1. Constitutional Law— right to counsel—waiver

A pro se defendant who had been represented by six attorneys voluntarily waived his right to counsel and elected to proceed pro se where he clearly and unequivocally expressed his desire to proceed pro se to one judge in response to questions posed in accordance with N.C.G.S. § 15A-1242, stated a week later to a different judge that he had misunderstood the first judge, and said under oath that he nonetheless wanted to waive appointed counsel and would represent himself if he did not hire a lawyer.

2. Constitutional Law— speedy trial—changing attorneys

A defendant's right to a speedy trial was not violated where the significant time between indictment and trial was largely due to several attorneys preparing for trial and then withdrawing after conflicts with defendant.

3. Possession of Stolen Property— felonious—sufficiency of evidence

The trial court correctly refused to dismiss a charge of felonious possession of stolen goods for insufficient evidence where defendant contended that a witness's answers about the value of the stolen car were contradictory, but the witness's statements on cross-examination about the value of the vehicle were a further explanation of his answer on direct examination.

4. Burglary and Unlawful Breaking or Entering— vacant house—sufficiency of evidence

There was sufficient evidence to present breaking and entering a vacant house to the jury where there was a sufficient factual basis for a latent print examiner's opinion matching defendant's shoe print impressions to those found at the scene and sufficient evidence for the jury to infer intent to commit larceny.

5. Sentencing— habitual felon—guilty plea—voluntary

A habitual felon plea was voluntary where the trial judge explained the habitual felon phase of the trial to the pro se defendant and told defendant that he would give some consideration to someone pleading guilty. The judge also said that he was not making a promise or a threat, made it clear that they would proceed before the jury if defendant did not want to plead guilty, and appointed a lawyer to confer with and represent defendant.

Appeal by defendant from judgments entered 1 November 2001 by Judge J. B. Allen in Superior Court, Wake County. Heard in the Court of Appeals 25 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.

Winifred H. Dillon for the defendant-appellant.

TYSON, Judge.

Kenneth King ("defendant") appeals from (1) his convictions for possession without lawful excuse of implements of housebreaking, felonious possession of stolen goods and three counts of felonious breaking and entering and (2) his plea to being an habitual felon. We find no error.

I. Background

At approximately 10:45 pm on 11 July 1998, a homeowner called the sheriff's department reporting suspicious activity in his subdivision. Upon the deputies' arrival, the homeowner described a man, who had run out of the homeowner's garage, and told the deputies about a vehicle parked behind a vacant house next door. The deputies determined the vehicle was stolen. Subsequently, the deputies arrested defendant when he approached the stolen car and placed his hand on the door handle. The deputies found two screwdrivers, a pair of pliers, brown gloves, and tissue paper inside a baggie during a search of defendant.

Upon further investigation, the deputies determined the screwdriver had been stolen from another resident's shed and that someone had peered into the vacant house by standing on an air conditioning unit. The latent print examiner from the City County Bureau of Identification retrieved a shoe print from the vacant house's kitchen floor and later opined, as an expert witness, that the shoe prints taken from the vacant house came from defendant's shoe soles. Nothing was taken from the vacant house.

Defendant testified that he was walking in the neighborhood after helping a friend change some door locks. He had left the friend's home and was going to walk approximately six miles to another house to buy marijuana. On the way, defendant testified his stomach became upset and needed to use the bathroom. According to defendant, he went into the subdivision to find some toilet paper, which was why he was in one of the resident's garage. He also testified he returned to the subdivision when he saw the police in order "to clear everything up."

After a jury trial, defendant was acquitted of larceny and convicted of felony possession of stolen goods, possession of implements of housebreaking, and three counts of breaking and entering. Defendant pled guilty to being an habitual felon. The trial court sentenced defendant as an habitual felon to three concur-

rent sentences of 120 to 153 months, and two consecutive sentences of the same length, for a total active sentence of 360 to 459 months. Defendant appeals.

II. Issues

Defendant contends the trial court erred by (1) denying him his right to counsel, (2) denying him a speedy trial, (3) denying his motion to dismiss for insufficient evidence, and (4) coercing him to plead guilty to being an habitual felon.

III. Right to Counsel

[1] Defendant contends his constitutional right to counsel was violated when the trial court required him to proceed *pro se* at a motion hearing and at trial. Defendant had previously been represented by six different attorneys. On 18 September 2001, defendant requested the trial court to allow him to represent himself. Before allowing a criminal defendant to waive in-court representation, a trial court must insure that constitutional and statutory standards are satisfied. *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999). "First, a criminal defendant's election to proceed *pro se* must be 'clearly and unequivocally' expressed. Second, the trial court must make a thorough inquiry into whether the defendant's waiver was knowingly, intelligently and voluntarily made." *Id.* (citations omitted).

N.C. Gen. Stat. § 15A-1242 (2001) provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

"Our Supreme Court has stated that the inquiry mandated by N.C. Gen. Stat. § 15A-1242 satisfies these requirements." *Hyatt*, 132 N.C. App. at 702, 513 S.E.2d at 94.

In this case, the transcript clearly shows Judge Stephens complied with the mandates of N.C. Gen. Stat. § 15A-1242 on 18 September 2001. Defendant clearly and unequivocally expressed his desire to proceed *pro* se through his responses to the questions posed in accordance with G.S. 15A-1242. Defendant knowingly, intelligently and voluntarily waived his right to counsel at that time. The following week before Judge Allen, defendant stated he misunderstood Judge Stephens because he thought the judge was referring to a waiver of court-appointed attorneys. Nevertheless, defendant stated under oath before Judge Allen that he was "waiving [his] right for a court-appointed lawyer" and "[i]f I don't hire a lawyer, I'll represent myself." Defendant voluntarily waived his right to counsel and elected to proceed *pro se*. The trial court did not deny him his constitutional right to counsel. This assignment of error is overruled.

IV. Speedy Trial

[2] Defendant contends his constitutional right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18 of the North Carolina Constitution were violated. There are four factors " 'which courts should assess in determining whether a particular defendant has been deprived of his right' to a speedy trial under the federal Constitution. These factors are (i) the length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of his right to a speedy trial, and (iv) whether the defendant has suffered prejudice as a result of the delay." *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 722 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001) (citations omitted). "[D]efendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution." *Id.* Defendant has not met this burden.

The record reveals defendant's trial was set three times during March, September, and November 1999. Spurgeon Fields, III, Esq. was appointed by the court to represent defendant in July 1998, shortly after defendant's arrest. In September, defendant's family hired George Currin, Esq. Mr. Currin, with defendant's permission, hired Hart Miles, Esq. as co-counsel to assist with defendant's case. Mr. Currin asked the assistant district attorney to remove the case from the March 1st calendar because pretrial motions were pending. Those motions were not reached in March 1999 due to a crowded court docket and were not resolved until September 1999. Because of the pending motions and Mr. Currin's withdrawal from the case, defend-

ant's trial was calendared for November 1999. In November 1999, defendant's new counsel, Russell Dement, Jr., Esq., requested a continuance in order to adequately prepare for trial. From November 1999 until Mr. Dement's withdrawal on 7 August 2001, the record reveals Mr. Dement prepared for the case by interviewing several witnesses, viewing the crime scene, and discussing trial strategy with defendant and defendant's family. During this time, Mr. Dement requested on several occasions that the assistant district attorney not calendar the case. After Mr. Dement's withdrawal because of a trial strategy disagreement, Cindy Popkin-Bradley, Esq. was retained as defendant's counsel. Shortly after Ms. Popkin-Bradley's retention, she withdrew on 28 August 2001 on the grounds that defendant refused to cooperate with her. On 29 August 2001, Tommy Manning, Esq. was appointed to represent defendant. The following month, defendant requested to proceed *pro se*, and the trial was eventually calendered for the week of 29 October 2001.

Although a significant amount of time lapsed between defendant's indictments and trial, the record reveals the delay was largely due to defense counsel's trial preparation and the withdrawal of several attorneys due to conflicts with defendant. Defendant has not shown the delay was caused by the neglect or willfulness of the prosecution. We hold that defendant failed to show that his constitutional right to a speedy trial was violated. This assignment of error is overruled.

V. Insufficient Evidence

Defendant contends that the charges of felonious possession of stolen goods and the vacant house breaking and entering should have been dismissed for insufficient evidence. Defendant admits in his brief that these issues were not preserved for appellate review. Defendant failed to move to dismiss the charges at the close of all evidence. We review defendant's arguments on these issues pursuant to N.C. R. App. P. 2 (2002) in the interest of justice.

"A case is properly submitted to the jury 'when there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact.' . . . If the record discloses substantial evidence of each essential element constituting the offense for which the accused was tried and that defendant was the perpetrator of that offense, then the trial court's denial of a motion to dismiss for evidentiary insufficiency should be affirmed." *State v. Alford*, 329 N.C. 755, 759-60, 407 S.E.2d

519, 522 (1991). "In measuring the sufficiency of the evidence, the reviewing court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom." *Id.* at 759, 407 S.E.2d at 522.

A. Possession of Stolen Goods

[3] Felonious possession of stolen goods requires evidence of: (i) possession of personal property; (ii) valued at greater than $1,000; (iii) which has been stolen; (iv) the possessor knowing or having reasonable grounds to believe that the property is stolen; and (v) the possessor acts with a dishonest purpose. *See* N.C. Gen. Stat. § 14-71.1. Defendant contends the State presented insufficient evidence that the value of the stolen car, a 1986 Pontiac Grand Prix, was in excess of $1,000. We disagree.

Through the testimony of Donald Sigmon, the State sought to establish the value of the car stolen from Leith Buick exceeded $1,000. On direct, Mr. Sigmon, an employee of the Leith Management Company, responded "yes, ma'am" to the question "[a]nd had you sold that car on the retail market in 1998, would it be fair to say that the value of that car would have been in excess of $1,000?" On cross-examination, Mr. Sigmon testified the car did not have a "book value" and, in response to defendant's question "So why were I saying—that car—over a—worth a thousand dollars, is that what you said, it [sic] worth or that's what you saying that you can sell it for?", he stated, "I've been doing this 30 years. In my opinion, that's the best what it was worth."

Defendant contends the witness's answers on direct and cross-examination were contradictory. Viewing the evidence in the light most favorable to the State, we disagree. This Court views the witness's statements on cross-examination as further explanation of his answer on direct by stating he based his opinion that the car was worth in excess of $1,000 upon his thirty years of experience. The trial court did not err in not dismissing the felonious possession of stolen goods charge. This assignment of error is overruled.

B. Breaking and Entering

[4] Defendant also contends there was insufficient evidence to present the breaking and entering into the vacant house charge to the jury.

1. Expert Opinion

The defendant argues the only evidence presented by the State allegedly placing him in the house was a shoe print impression from the kitchen floor, which the latent print examiner opined came from the defendant's shoe without providing a factual basis for his opinion. The latent print examiner testified regarding: (1) how the prints were lifted, (2) the comparison process, (3) how he matched the unique characteristics of defendant's shoe soles to a shoe print impression from the air conditioning unit, and (4) his opinion of whether the defendant's shoes made the prints and illustrated with a print from the air conditioning unit. The latent print examiner also testified that he used the same technique in matching the other shoe print impressions from the air conditioning unit and the kitchen to defendant's shoes. We hold that a sufficient factual basis was shown for the latent print examiner's opinion.

2. Entry to Commit Larceny

Defendant also contends the State's evidence failed to establish he entered the house to commit larceny. However, "[w]ithout other explanation for breaking into the building or a showing of the owner's consent, intent may be inferred from the circumstances." *State v. Myrick*, 306 N.C. 110, 115, 291 S.E.2d 577, 580 (1982). When people enter homes in the night, "[t]he most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also." *State v. Bumgarner*, 147 N.C. App. 409, 416, 556 S.E.2d 324, 330 (2001) (quoting *State v. Sweezy*, 291 N.C. 366, 384, 230 S.E.2d 524, 535 (1976)). The jury heard testimony that (1) defendant had entered Mr. Edward's garage that same evening and attempted to open a chest containing tools; (2) defendant entered the storage shed of Mr. Holley that evening and removed items from that storage shed, including items found on defendant's person when arrested; and (3) defendant was in possession of burglary tools at the time of his arrest. When the evidence is viewed in the light most favorable to the State, sufficient evidence was presented from which the jury could infer the defendant intended to commit larceny upon breaking and entering the vacant house. This assignment of error is overruled.

VI. Habitual Felon Plea

[5] Defendant contends his habitual felon guilty plea was involuntary. We disagree.

N.C. Gen. Stat. § 15A-1021(b) forbids any representative of the State, including a judge, from improperly pressuring a defendant into a plea of guilty or *nolo contendere*. *See also State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

After defendant's convictions on the underlying felonies and after advising the defendant of the three predicate felony convictions, the trial court advised the defendant:

> Now, the State has the burden of proving those convictions beyond a reasonable doubt. I would give you the opportunity, if you want to, to admit those violations, those convictions. I'll give you the privilege, if you want to plead guilty to being a habitual felon, and I would tell you that it is my practice that I give a lot of consideration for someone pleading guilty.

The trial court then stated, "I'm not promising you anything, I am not threatening you in any way."

The trial judge further stated to defendant, "Now, at this point, we're not talking about a lawyer. I want to know, do you want to plead guilty to being a habitual felon? You don't have to. All you've got to do is say no, I don't, and we'll proceed with this hearing." Defendant immediately stated that he wanted to plead guilty. However, before entering the plea, defendant indicated that he wanted to speak with a lawyer.

The trial court halted the proceedings and appointed a lawyer for the habitual felon phase of the trial. Defendant and his counsel left the courtroom and discussed the matter. Defendant returned to the courtroom and pled guilty to being a habitual felon. Prior to reviewing the plea transcript with defendant, the trial judge told him "Now, if you have any questions concerning—or questions about these questions I'm going to ask you, you refer to [your lawyer] before you answer." The trial judge then reviewed the transcript of plea with defendant. Defendant was advised by the trial court that he had the right to plead not guilty and have a jury trial. No plea bargain was made. In response to the question "Has anyone made any promises or threatened you in any way to cause you to enter this plea against your wishes?," defendant responded "No." The record shows that defense counsel discussed with defendant that his right to appeal the five felony convictions would be unaffected by his guilty plea to habitual felon status.

Very few cases in North Carolina hold that conduct of a trial judge rendered a defendant's plea involuntary. In *State v. Benfield*, 264 N.C. 75, 140 S.E.2d 706 (1965), the defendant was being retried for armed robbery. The trial judge told the defendant's counsel that the jury would surely convict the defendant and that if it did so, "he felt inclined to give him a long sentence[.]" *Benfield*, 264 N.C. at 76-77, 140 S.E.2d at 707-08. The defendant then changed his plea to guilty. *Id.* The defendant knew that his co-defendant had pled guilty and received a suspended sentence. *Id.* Based upon these factors, our Supreme Court held that the defendant's plea was involuntary. *Id.*

In *State v. Cannon*, 326 N.C. 37, 387 S.E.2d 450 (1990), the trial court made inquiry of defense counsel concerning the possibility of a negotiated plea after a lengthy *voir dire* hearing. Defense counsel advised the judge that their clients wanted a jury trial. *Cannon*, 326 N.C. at 38-39, 387 S.E.2d at 451. The judge then stated, in no uncertain terms, that if defendants were convicted, they would receive the maximum sentence. *Id.* Defendants were convicted of armed robbery, and received sentences of 35 years and 30 years respectively. *Id.* Our Supreme Court ordered new sentencing hearings and noted, had defendants pled guilty after they heard the judge's remarks, "serious constitutional questions would have arisen as to the voluntariness of the pleas." *Id.* at 40, 387 S.E.2d at 452.

In *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986), the defendant entered pleas of not guilty to multiple felony charges. The trial judge became "visibly agitated" and stated that he was tired of " 'frivolous pleas.' " *Pait*, 81 N.C. App. at 287, 343 S.E.2d at 575. The judge directly questioned the defendant and asked whether he had made any incriminating statements to the police. *Id.* Upon an affirmative response, the trial judge directed defendant and his counsel to confer and return with "an 'honest plea.' " *Id.* at 288, 343 S.E.2d at 575. Defense counsel advised defendant of the maximum punishment of 60 years and defendant entered guilty pleas. *Id.* This Court held that the defendant's plea was involuntary. *Id.* at 289-90, 343 S.E.2d at 576.

In each of these cases, clear, unequivocal statements by the trial judge directly resulted in the defendants' guilty pleas and rendered them involuntary. Such is not the case here. In making a determination of whether a defendant's plea was voluntary, the appellate court should look at the entire proceeding and make its decision based on the totality of the circumstances.

In this case, the trial judge explained the habitual felon phase of the trial to the *pro se* defendant and inquired as to whether defendant wished to plead guilty. The judge told defendant that he would give consideration to someone pleading guilty. However, the judge also stated that he was not promising defendant anything or threatening him in any way, and made it clear that if defendant did not want to plead guilty that the hearing before the jury would proceed. Further, the trial judge appointed a lawyer to represent defendant and defendant conferred with the attorney before he accepted the guilty plea. Taken in its totality, the evidence shows that defendant's plea was voluntary. This assignment of error is overruled.

VII. Conclusion

Defendant was not denied his constitutional right to counsel or to a speedy trial. The State presented sufficient evidence that defendant committed the crimes of breaking and entering, felony possession of stolen goods, and possession of implements of housebreaking to survive defendant's motions to dismiss. Defendant voluntarily pled guilty to being an habitual felon.

No error.

Judge STEELMAN concurs.

Judge WYNN concurs in the result.

ALBERTA McRAE, EMPLOYEE, PLAINTIFF v. TOASTMASTER, INC., EMPLOYER, SELF-INSURED (CORPORATE CLAIMS MANAGEMENT, SERVICING AGENT), DEFENDANT

No. COA02-1072

(Filed 20 May 2003)

1. Workers' Compensation— return to work—no more presumption of disability—failure to perform as required

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff constructively refused suitable employment when she did not perform as required after returning from carpel tunnel surgery. The employer provided competent evidence that plaintiff's failure to perform the task she was given was not related to her prior compensable injury, the

burden shifted to plaintiff, and she did not present evidence of disability as a result of her injury. All presumption of disability ended when plaintiff returned to work.

2. Workers' Compensation— average weekly wage—Form 21

The Industrial Commission did not err in a workers' compensation action in finding plaintiff's average weekly wage to be as listed on a Form 21. The documents cited by the employer as being contrary to that amount did not render the Form 21 incompetent.

Judge WYNN dissenting.

Appeal by plaintiff and defendant from Opinion and Award of the North Carolina Industrial Commission filed 18 April 2002. Heard in the Court of Appeals 22 April 2003.

H. Bright Lindler for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by Kirk D. Kuhns and Jaye E. Bingham, for defendant.

TYSON, Judge.

Alberta McRae ("plaintiff") appealed from the opinion and award of the North Carolina Industrial Commission ("Commission") ordering Toastmaster, Inc. ("employer") through its servicing agent Corporate Claims Management to pay plaintiff $166.67 per week for 16 weeks, medical expenses, and plaintiff's attorney fees, expert fee and costs. Employer cross-appeals. We affirm.

I. Background

In October 1996, plaintiff commenced work for employer as an assembler. During her first six months on the job, she peeled Uniform Product Code labels off of a roll and placed them onto boxes traveling on a conveyor. Employer transferred plaintiff to "dialing." Dialing required plaintiff to insert the movement into the back of a clock, turn the clock over, and install the hour and minute hands on the front of the clock. The production rate for "dialing" was one hundred twenty-five clocks per hour.

In 1997, plaintiff experienced pain and numbness in her right hand. In January 1998, plaintiff visited the plant nurse, who referred her to Occupational Health at Scotland Memorial Hospital. Plaintiff

was treated and restricted to light-duty work until February 17. Plaintiff's symptoms persisted and she obtained permission to see Dr. Brenner, an orthopaedic surgeon.

In June of 1998, plaintiff was referred to Dr. Brenner for the pain in her right hand. Plaintiff was diagnosed with carpal tunnel syndrome and was injected with medication. Plaintiff was restricted to light work, and her employer provided plaintiff other tasks in clock assembly. On 21 July 1998, plaintiff returned to Dr. Brenner and reported some improvement in her hand. Plaintiff was allowed to increase her activities but ordered not to return to dialing. On 24 September 1998, plaintiff returned to Dr. Brenner with further problems in both hands. Plaintiff's left wrist was injected, and nerve conduction studies showed plaintiff had bilateral carpal tunnel syndrome.

Dr. Brenner performed surgery on plaintiff's right carpal tunnel on 26 October 1998 and on plaintiff's left carpal tunnel on 30 November 1998. Dr. Brenner released plaintiff to light-duty work on 21 December 1998 and advised that plaintiff could return to full duty on an "as-tolerated" basis. Employer provided light-duty work to plaintiff for some time, but returned her to the dialing position. On 13 April 1999, plaintiff returned to Dr. Brenner because her hands were swelling and hurting while dialing. Dr. Brenner advised plaintiff to avoid dialing permanently.

Plaintiff returned to her original position as a UPC labeler. Plaintiff was required to place a sticker on one out of four boxes, for a total of 1,000 boxes a day. Plaintiff failed to label the boxes as required. Plaintiff was reprimanded and did not explain why she missed the boxes. Plaintiff testified that she experienced some difficulty with her hands while performing the labeling job.

On 5 May 1999, plaintiff was terminated from her job with defendant-employer. Employer admitted liability for benefits for plaintiff's carpal tunnel syndrome and paid compensation to plaintiff for temporary total disability while plaintiff was out of work for the surgery and the plaintiff's medical bills. Employer has not paid plaintiff further sums since her termination.

The Commission found that plaintiff's termination was a direct result of poor job performance and that she constructively refused suitable employment offered by her employer after the surgery. The Commission found the labeling job to be suitable for plaintiff. Plaintiff presented no evidence of disability as a result of her injury.

The Commission found that plaintiff was not entitled to disability benefits after termination of her employment. Plaintiff had an average weekly wage of $250.00, according to the Form 21. This wage yielded plaintiff a compensation rate of $166.67 per week for 16 weeks based upon an impairment rating of 4% to each hand. Employer was to provide all medical compensation arising from the injury as well as plaintiff's attorney fees and costs. Commissioner Thomas Bolch dissented from the award of the Commission because he found as fact that plaintiff's inability to perform the labeling job was caused by her occupational disease of carpal tunnel syndrome. Plaintiff appeals.

II. Issues

The issues are (1) whether the Commission erred in relying upon *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996) in holding that plaintiff "was terminated for misconduct and she thereby constructively refused suitable employment" and (2) whether the Commission erred in determining plaintiff's weekly wage and compensation rate.

III. Standard of Review

"[A]ppellate 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). Conclusions of law are reviewed *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

IV. *Seagraves v. Austin Co. of Greensboro*

[1] Plaintiff contends that the Commission erred in applying *Seagraves* to the facts at bar. The Commission found as fact that the UPC labeler position was a suitable job for the plaintiff. The Commission based this finding upon evidence that plaintiff had performed that job satisfactorily prior to working as a dialer and that plaintiff did not seek mental or physical help in undertaking this job after the surgery. Competent evidence supports the Commission's finding that the labeler position was suitable.

The Commission further found that plaintiff was capable of labeling and that plaintiff's failure to perform the labeler position constituted a failure to accept a suitable position offered by the employer.

The Commission concluded under the law of *Seagraves* that plaintiff's misconduct in failing to perform the task was a constructive refusal of employment.

Competent evidence in the record supports the Commission's finding that plaintiff was capable to perform as a labeler. The issue becomes whether plaintiff's poor performance is misconduct under *Seagraves*.

To determine whether an employee's misconduct amounts to a constructive refusal to perform work, justifying termination under N.C.G.S. § 97-32, this Court in *Seagraves* stated

> the employer must first show that the employee was terminated for misconduct or fault, unrelated to the compensable injury, for which a nondisabled employee would ordinarily have been terminated. If the employer makes such a showing, the employee's misconduct will be deemed to constitute a constructive refusal to perform the work provided and consequent forfeiture of benefits for lost earnings, unless the employee is then able to show that his or her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability.

Seagraves, 123 N.C. App. at 234, 472 S.E.2d at 401.

The employee in *Seagraves* briefly exposed her buttocks to other female workers and was terminated for gross misconduct while working. *Id.* at 229, 472 S.E.2d at 398. Plaintiff, at bar, failed to perform her duties as required. She was terminated for what she failed to do rather than for an affirmative act. Although the dissenting opinion characterizes plaintiff's failure to perform her job as negligent behavior, competent evidence in the record supports a finding of misconduct under *Seagraves*.

Employer provided competent evidence to show that plaintiff's failure to perform the labeling task was not related to her prior compensable injury. A worker's failure to perform required tasks for employer results in reprimands and eventually termination. There is no indication that employer treated plaintiff's misconduct differently than that of other employees in deciding to terminate her employment. The burden shifted to the plaintiff to show that "her inability to find or hold other employment of any kind, or other employment at a wage comparable to that earned prior to the injury, is due to the work-related disability." *Id.* at 234, 472 S.E.2d at 401.

The Commission found as fact that plaintiff failed to present any evidence of disability as a result of her injury and that all presumption of disability ended when plaintiff returned to employment. We affirm the Commission's conclusion that plaintiff constructively refused suitable employment.

V. Average Weekly Wage

[2] Employer contends that the Commission erred in finding plaintiff's average weekly wage to be $250.00 as listed on the Form 21. Employer argues that this finding is not supported by any competent evidence in the record because all competent evidence in the record is contrary. Employer submitted time charts and wage records that plaintiff's average weekly wage was $213.45 to yield a compensation rate of $142.30. Although this evidence could form the basis for a Form 22 filing, one was not submitted.

These documents do not render incompetent the Form 21 filed with the Commission which listed the average weekly wage at $250.00. "[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Deese*, 352 N.C. at 115, 530 S.E.2d at 552-53. Employer's assignment of error is overruled.

Affirmed.

Judge STEELMAN concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

Under *Seagraves v. Austin Co.*, 123 N.C. App. 228, 472 S.E.2d 397 (1996), this Court created a justifiable legal fiction that permits an employer to terminate an employee (who suffers from a compensable workers compensation injury) for intentional or gross misconduct. In this case, the majority seeks to expand the holding of *Seagraves* to allow the termination of injured employees for acts of negligence rather than intentional or gross misconduct. Because I believe such an extension fails to comport with the liberal construction accorded our Workers' Compensation Act, I dissent.

The plaintiff in this matter, Ms. Alberta McRae, functions at a fourth-grade level with an IQ of 59. Toastmasters employed her

in 1996 to place labels on clocks on a conveyer belt. According to the full Commission, this task required Ms. McRae "to pull [approximately 1000]. . . labels off a roll [a day] and place them onto boxes."

Six months thereafter, Toastmaster reassigned Ms. McRae to the clock dial and face assembly line. According to the full Commission, this task required Ms. McRae to "insert[] the movement into the back of the clock, to turn[] the clock over and then put[] the hour and minute hands on the front of the clock. The production rate was one hundred and twenty-five clocks per hour." After engaging in this task without incident for over a year, Ms. McRae complained of bilateral numbness. Ultimately, Dr. Mark E. Brenner performed a carpel tunnel release on her left and right upper extremities. Dr. Brenner ordered Toastmaster to *permanently* avoid assigning Ms. McRae to the clock dialing and face assembly line. Despite this express order, Toastmaster returned Ms. McRae to the clock dialing and face assembly position. As a direct result, Ms. McRae continued to suffer and complain of numbness and pain in her upper extremities.

Thereafter, Toastmaster reassigned Ms. McRae to her previous position as an assembly line labeler and undertook for the first time, the action of "writing-up" Ms. McRae each time she failed to affix a label to a clock. After four such "write-ups," Toastmaster terminated her employment. Three weeks after her termination, Toastmaster received a belated letter from Dr. Brenner in which he advised Toastmaster to avoid assigning Ms. McRae to tasks involving "repetitious pushing, pulling, gripping, pinching, and fingering." As noted by the full Commission, the labeling job required Ms. McRae to repetitiously pull labels off the roll. Despite this description, and Dr. Brenner's instructions, the full Commission concluded, and today the majority affirms, that Ms. McRae "was terminated for misconduct and she thereby constructively refused suitable employment." In so holding and affirming, the full Commission and the majority rely on a misapprehension of the equitable legal fiction this Court created in *Seagraves*.

In *Seagraves*, this Court addressed the question of whether an employee's termination for misconduct—exposing her "buttocks to two female co-employees"—constituted a constructive refusal to accept suitable employment a voluntary forfeiture of her workers' compensation benefits for her compensable occupational disease pursuant to N.C. Gen. Stat. § 97-32 (2002). In *Seagraves*, we recognized that the issue was one of first impression in North Carolina.

Accordingly, this Court thoughtfully analyzed the divergent views of other jurisdictions, and the liberal construction accorded to North Carolina's Workers' Compensation Act, before adopting a general rule that where an injured employee is allegedly terminated for misconduct,

> the test is whether the employee's loss of . . . wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss . . . in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability. . . . The application of this rule will, we believe, best achieve fairness to all parties by assuring that an injured employee is awarded benefits for wage loss which is clearly attributable to his or her job-related disability, *while protecting employers from liability to employees who engage in intentional, unacceptable conduct* while employed in rehabilitative or light duty settings.

Seagraves, 123 N.C. App. at 233-34, 472 S.E.2d at 401. The *Seagraves* misconduct test was devised to protect employers, and the workers' compensation system, from employees who are terminated for intentional or unacceptable conduct while occupying a rehabilitative position. Under *Seagraves*, the employer is no longer responsible for the employee's diminution in wages, because the diminution was proximately caused by misconduct rather than an occupational injury or disease.

Since our decision in *Seagraves*, we have applied the misconduct test on three occasions. In *Williams v. Pee Dee Elec. Mbrshp. Corp.*, 130 N.C. App. 298, 502 S.E.2d 645 (1998), an employee, who suffered from a compensable injury, was terminated two days after his criminal conviction for indecent exposure. Although we remanded the case for further findings of fact, we clarified our holding in *Seagraves* by noting that:

> First, there is no requirement that the employee's misconduct occur during working hours or at the workplace. Second, there is no requirement that the misconduct constitute a crime. The misconduct need only be such that a non-disabled employee would ordinarily have been discharged for it. Third, a finding that the employee was discharged for misconduct "pursuant to company policy" is not sufficient to support a conclusion that the employee has constructively refused employment. The Commission must specifically find that the employee was discharged for miscon-

duct for which a non-disabled employee would ordinarily have been terminated.

Williams, 130 N.C. App. at 302, 502 S.E.2d at 648.

Next, in *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 518 S.E.2d 200 (1999), an employee had missed a substantial number of work days because of an occupational disease. In one instance, however, the employee requested a day off for personal matters. The employer refused the employee's request and terminated the employee on the basis of misconduct for failing to attend work. Because the employer "admitted that he would not have fired an employee for taking a day off to tend to personal matters, if that employee's attendance was satisfactory," the full Commission concluded that plaintiff's "employment was terminated as a direct result of time missed from work over a period of several months due to his continuing disability caused by his compensable injury, and not for *misconduct* or other just cause." *Flores*, 134 N.C. App. at 458, 518 S.E.2d at 205. On appeal, we found no error in this finding.

Finally, in *Frazier v. McDonald's*, 149 N.C. App. 745, 562 S.E.2d 295 (2002), we addressed whether the full Commission erred in finding that an injured employee was not terminated for misconduct where the employee was allegedly terminated because her register drawer was short by $44.83. In finding no error, we noted that it was the common practice for McDonald's to suspend employees for a week without pay when their cash registers are short. Accordingly, we held that "competent evidence in the record [] support[ed] the Commission's finding and conclusion that [McDonald's] failed to show that plaintiff's termination was for misconduct or fault . . . 'for which a non-disabled employee would ordinarily have been terminated.' " *Frazier*, 149 N.C. App. at 751, 562 S.E.2d at 299.

Thus, our case law interpreting and applying the *Seagraves* misconduct test reveals that this Court has only applied that test in instances where an injured employee has engaged in intentional or gross misconduct. Under *Seagraves* this Court created a justifiable legal fiction: An injured employee who is terminated for misconduct is considered to have constructively refused suitable employment and is barred from receiving workers' compensation benefits. However, the *Seagraves* Court went to great lengths to develop a misconduct test that "comports with the underlying purpose of North Carolina's Workers' Compensation Act to provide compensation to workers whose earning capacity is diminished or destroyed by injury

arising from their employment . . . and the liberal construction which has long been accorded its provisions." *Seagraves*, 123 N.C. App. at 233, 472 S.E.2d at 401 (citations omitted). In today's decision the majority expands the *Seagraves* misconduct test to include instances where an employee is terminated for negligence rather than intentional or gross misconduct. Where *Seagraves* protected employers and the workers' compensation system from the willful or gross misconduct of employees, the rule articulated by the majority allows employers to terminate injured employees for acts of "mere negligence" in order to avoid their responsibilities under the Workers Compensation Act.[1]

In the case *sub judice*, the record shows no evidence that Ms. McRae engaged in willful or gross misconduct. In my view, the evidence is susceptible to only two interpretations: (1) pain in her upper extremities, as documented by her treating physician, prevented Ms. McRae from performing a task she previously performed without incident, or (2) Ms. McRae negligently failed to place the labels on the clock. In either case, it is error to apply the legal fiction of *Seagraves* to the facts of this case, and to deprive Ms. McRae of her right to benefits under North Carolina's Workers' Compensation Act. I dissent.

STATE OF NORTH CAROLINA v. ROBERT THOMAS SINES

No. COA02-741

(Filed 20 May 2003)

1. Criminal Law— indictment for completed offense—conviction for attempt

An indictment for a completed statutory sexual offense will support a conviction for the lesser crime of attempted statutory sexual offense.

---

1. A *per curiam* affirmance of today's decision by our Supreme Court would elevate the majority opinion to a Supreme Court opinion. In that light, *Seagraves* would be expanded to include acts of mere negligence. I believe an expansion of the legal fiction of *Seagraves* to include acts of mere negligence would be in contravention of our Workers' Compensation Act.

2. Sexual Offenses— attempted statutory sexual offense—nature of intent

The crime of attempted statutory sexual offense is valid under North Carolina law. The intent required for attempted statutory sexual offense requires only that defendant intended to commit a sexual act with the victim, not that defendant intended to commit a sexual act with an underage person.

3. Indigent Defendants— funds for DNA expert—identity not in dispute—relevance

The trial court did not abuse its discretion by refusing to give an attempted statutory sexual offense defendant funds to hire a DNA expert where defendant did not demonstrate the necessary particularized need. Neither defendant nor the State questioned the identity of the victim's attacker, and the presence or absence of defendant's DNA had no relevance to the offense.

Appeal by defendant from judgment entered 23 May 2001 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Lisa C. Glover, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defenders Julie Ramseur Lewis and Dean Loven, for defendant-appellant.

EAGLES, Chief Judge.

Defendant Robert Sines appeals from the judgment entered on a jury verdict finding him guilty of attempted statutory sexual offense. On appeal, defendant asserts that the trial court erred: (1) in denying defendant's motion to dismiss the charge of statutory sexual offense and in instructing the jury on attempted statutory sexual offense; (2) in refusing to allow the sealed juvenile records of the State's main witness into evidence for impeachment purposes; and (3) in denying defendant's motion for funds to hire an expert to conduct DNA testing for the defense. After careful consideration of the record, briefs and arguments of counsel, we find no prejudicial error.

The evidence tends to show the following. On 24 February 2000, a 14 year-old girl S.S. ("victim") was visiting her adult brother at his home in Charlotte. Victim's brother testified that he gave victim $20 and asked her to go to the store for him because he could not leave

his children alone in the house. Victim testified that she walked on a path through the woods that was a shortcut to a nearby convenience store. Victim testified that defendant grabbed her after she emerged from the woods and while she was walking towards the store. Victim stated that defendant held a knife against her neck, forced her back into the woods and threatened to kill her if she did not have sex with him. Victim removed her shoes, jeans and underwear after defendant threatened her. Defendant struggled with victim and penetrated victim's vagina briefly. Defendant demanded that victim perform fellatio on him by stating "[c]ome here, little [girl]; put this in [your] mouth," while putting his penis in front of victim's face. Victim refused and defendant penetrated her vaginally again. Victim testified that she saw a man walking down the street and screamed for help. This man was later identified as Robert Smith. Smith heard the victim screaming and saw her struggling with defendant. Smith called the police from the convenience store.

Charlotte-Mecklenburg Police Officer M.R. Grande responded between 4:30 and 5:00 p.m. on 24 February, arriving on the scene within minutes of Smith's call. Grande testified that he saw defendant on top of victim when he arrived. Victim appeared to be struggling with defendant and was screaming for help. Neither victim nor defendant was fully dressed when Grande found them. Victim warned Officer Grande as he approached that defendant had a knife. Defendant told Grande that he paid victim $25 in exchange for sex. Officer Grande called in additional police units. One of the other officers, Officer Sam Yaravitz, searched defendant for weapons and placed him in a police car. Defendant had no weapons on his person, but a knife was found at the scene in a bag he owned. Officer Yaravitz testified that while defendant was being transported to the detention center, defendant stated that he had sex with victim. Yaravitz had not been questioning defendant; defendant made this statement spontaneously. At the time of the alleged assault, defendant was 44 years old.

James Billy Freeman testified on defendant's behalf. He stated that defendant stopped by his house on 24 February 2000 to share a bottle of Wild Irish Rose wine. Freeman saw defendant and victim talking together in the street. Freeman also observed defendant and victim walking towards the store together.

Defendant testified that victim had approached him three weeks before the alleged assault. Defendant stated that victim offered to have sex with him in exchange for money but he did not have any

money on that day. Defendant testified that on the day of his arrest he arrived at Freeman's house between 9 and 11 a.m. and began drinking alcohol with the people there. Defendant testified that he had been paid earlier that day, so he had $25 to pay the victim. Defendant stated that he gave victim $25 to have intercourse with him. Then they walked together to the wooded area behind the store. Victim began taking off her clothes, but upon seeing a man on the street, she attacked defendant and began screaming for help. Defendant denies having intercourse or fellatio with victim. Defendant also stated that he never removed his knife from the plastic bag he was carrying. Defendant denied making any statement to the police other than the statement that he paid victim "$25 for it."

The jury returned a not guilty verdict on the first-degree kidnapping and statutory rape charges but convicted defendant of attempted statutory sexual offense. Defendant was sentenced to a term of imprisonment of a minimum of 151 months and a maximum of 191 months. Defendant appeals.

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss the charge of statutory sexual offense. Defense counsel moved to dismiss all charges against the defendant after the State had finished presenting its evidence and again at the close of all evidence. Defense counsel specifically requested that the statutory sexual offense charge be dismissed because the evidence did not show that the act of fellatio occurred. The trial court denied defendant's motion to dismiss because the evidence presented supported a possible conviction for attempted statutory sexual offense.

We note at the outset that defendant did not object with specificity to the inclusion of a jury charge regarding attempted statutory sexual offense. However, defendant did object to the State's presentation of evidence on an attempt rather than a completed offense at the close of State's evidence. Our Rules of Appellate Procedure state that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C.R. App. P. 10(b)(1). Here, defendant did not cite the same reasons at trial for his request to dismiss charges that he now argues on appeal. We will treat defendant's appeal as a petition for certiorari to the extent that defendant did not properly preserve this issue for appellate review. N.C.R. App. P. 21.

First, we address defendant's motion to dismiss the statutory sexual offense charge. The Supreme Court has explained our standard of review on a motion to dismiss as follows:

> In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve. The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State.

State v. Earnhardt, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982) (citations omitted). According to defendant's trial argument, the indictment accused defendant of a completed statutory sexual offense. However, the evidence presented, even if taken in the light most favorable to the State, shows that the act of fellatio was not completed. Defendant argued that the offense charged in the indictment varied from the evidence presented and therefore the motion to dismiss should have been granted. We disagree.

The true bill of indictment reads as follows, in pertinent part:

> [O]n or about the 24th day of February, 2000, in Mecklenburg County, [defendant] did unlawfully, wilfully, and feloniously engage in a sexual act with [victim], a person of the age of fourteen (14) years. At the time of the offense, the defendant was at least six (6) years older than the victim and was not lawfully married to the victim.

It is appropriate for a trial court to dismiss charges contained in a criminal pleading if the indictment fails to charge an offense or if the court does not have jurisdiction over the charged offense. *See* G.S. § 15A-954 (2001). At trial, defendant's argument was based upon the theory that an individual accused in an indictment of a completed offense could not then be convicted under that indictment for a lesser crime of attempt. We are not persuaded by this argument.

Our statutes provide that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." G.S. § 15-170 (2001). A conviction for an attempt or incomplete crime can be based upon an indictment that charges a defendant with the

completed crime. *See State v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961); *State v. Jones*, 227 N.C. 402, 42 S.E.2d 465 (1947); *State v. Batson*, 220 N.C. 411, 17 S.E.2d 511 (1941); *State v. Bennett*, 132 N.C. App. 187, 510 S.E.2d 698, *mandamus denied*, 541 S.E.2d 151 (1999); and *State v. Slade*, 81 N.C. App. 303, 343 S.E.2d 571, *disc. rev. denied and appeal dismissed*, 318 N.C. 419, 349 S.E.2d 604 (1986). Defendant's trial argument that the motion to dismiss should have been granted because defendant was indicted for a completed offense rather than an attempt is without merit.

[2] Defendant's argument on appeal is substantially different from his argument at trial. Defendant contends that the motion to dismiss should have been granted because the crime of attempted statutory sexual offense is a logical impossibility under North Carolina law. We disagree.

> The crime of statutory sexual offense is outlined as follows:
>
> A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

G.S. § 14-27.7A(a) (2001). Defendants who engage in vaginal intercourse with children as described in G.S. § 14-27.7A(a) are generally charged with the crime of statutory rape. Defendants who engage in other sexual acts with children are usually charged with statutory sexual offense. A "sexual act" as defined by the North Carolina Pattern Jury Instructions includes any act of cunnilingus, fellatio, analingus, anal intercourse, or the penetration by any object of the genital or anal opening of a person's body. N.C.P.I.—Crim. 207.15.3 (2002). Statutory sexual offense and statutory rape are categorized as strict liability crimes. *See State v. Anthony*, 133 N.C. App. 573, 516 S.E.2d 195 (1999), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000). This categorization indicates that an individual may commit the crime of statutory sexual offense regardless of the defendant's mistake or lack of knowledge of the child's age. *Id.* It also means that consent is not a defense to the crime of statutory sexual offense. *Id.*

Taking the evidence presented in the light most favorable to the State, defendant demanded that victim perform fellatio on him, but the victim refused. Therefore, defendant could not be convicted of the completed act of statutory sexual offense.

In order to prove an attempt of any crime, the State must show: "(1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (citing *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). An act must be done with specific intent to commit the underlying crime before a defendant may be convicted of an attempted crime. *See State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000). Here, the evidence in the light most favorable to the State shows that defendant committed an overt act that would have aided in the commission of statutory sexual offense. Defendant's placement of his penis in front of victim's face, coupled with his demand for oral sex, comprise an overt act sufficient to satisfy the second element of attempt. The act was not completed due to victim's refusal to perform fellatio, which satisfies the third element required to prove an attempt.

The remaining element is the intent to commit the substantive offense. Defendant argues that it is logically impossible to have the specific intent to commit a strict liability crime which does not require a specific intent. Defendant compares the attempt to commit a strict liability offense to the attempt to commit the general intent crime of second-degree murder. Our North Carolina Supreme Court has repeatedly stated that attempted second-degree murder is not a crime because "a charge of attempted second-degree murder would require a defendant to specifically intend what is by definition not a specifically intended result." *State v. Coble*, 351 N.C. 448, 452, 527 S.E.2d 45, 48 (2000). Defendant argues that since our State does not recognize attempted general intent crimes, it cannot logically recognize attempted strict liability or non-intentional crimes. We disagree.

We find the reasoning of the Washington Supreme Court in *State v. Chhom* persuasive in this case. *See State v. Chhom*, 911 P.2d 1014 (Wash. 1996). The Revised Code of Washington contains a statute which is similar in form and function to our G.S. § 14-27.7A. The crime is entitled "rape of a child" and is defined as having "sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." Wash. Rev. Code Ann. § 9A.44.073 (West 2000). A second- and third-degree level of this offense are also defined in the statutes for offenses involving children of different ages. Wash. Rev. Code Ann. §§ 9A.44.076 and 9A.44.079 (West 2000). In *Chhom*, a defendant was convicted of attempted rape of a child

after the victim refused to perform fellatio on defendant. *See Chhom*, 911 P.2d at 1015. The Washington Supreme Court held that the strict liability offense could form the basis of a conviction for attempt. 911 P.2d at 1017. The court stated: "When coupled with the attempt statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse." 911 P.2d at 1016-17. The defendant was not required to have knowledge that the victim was under the age of consent in order to be convicted of attempted rape of a child. 911 P.2d at 1017 (citing *State v. Davis*, 229 A.2d 842, 844 (N.H. 1967), *overruled on other grounds by State v. Ayer*, 612 A.2d 923 (N.H. 1992)). Requiring a defendant to have knowledge of a minor's age in order to convict him for attempt would not be logical if the defendant could be convicted of the completed crime regardless of his knowledge of the victim's age.

Applying the *Chhom* logic to our G.S. § 14-17.7A(a) statutory sexual offense, the intent required for attempted statutory sexual offense is the intent to engage in a sexual act. The intent element of attempted statutory sexual offense does not require that the defendant intended to commit a sexual act with an underage person, but only that defendant intended to commit a sexual act with the victim. Defendant's knowledge of victim's age or victim's consent are not defenses to the crime of attempted statutory sexual offense, just like these defenses are not valid if the crime of statutory sexual offense is completed. We hold that the crime of attempted statutory sexual offense is valid under North Carolina law. Here, the evidence presented in the light most favorable to the State indicates that defendant took victim to a secluded place and demanded fellatio. This evidence is sufficient to satisfy the intent element required to prove attempted statutory sexual offense. The trial court correctly denied defendant's motion to dismiss because there was evidence of each element of attempted statutory sexual offense. Accordingly, defendant's first assignment of error is overruled.

In addition, defendant asks this Court to review victim's sealed juvenile records to determine whether the records contain relevant impeaching evidence. The trial court inspected victim's juvenile records and determined that nothing in the records was relevant or admissible for cross-examination purposes. The trial court thus ruled against defendant. Following the procedure outlined in *State v. Hardy*, the trial court then ordered the sealed documents placed in the record for appellate review. *See State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977). We have reviewed the sealed evidence and hold

that the trial court did not abuse its discretion by refusing to admit this record into evidence. This assignment of error is denied.

[3] Defendant assigns error to the trial court's denial of his motion for funds to hire a DNA expert. Defendant argues that the trial court's denial of his motion for funding for a DNA test and an expert analysis of that test violated his constitutional rights.

G.S. § 7A-450(b) requires that an indigent person be provided with counsel and the "necessary expenses of representation." Also, G.S. § 7A-454 permits the payment of fees for an expert witness's services according to the regulations adopted by the Office of Indigent Defense Services. However, before a defendant is entitled to the appointment of an expert witness, the defendant must show a particularized need for that assistance. *See State v. Page*, 346 N.C. 689, 488 S.E.2d 225 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998). "To establish a particularized need for expert assistance, a defendant must show that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that the expert will materially assist him in the preparation of his case." *Page*, 346 N.C. at 696, 488 S.E.2d at 230. The appointment of an expert witness to assist an indigent in the preparation of his case is a decision within the discretion of the trial court. *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977).

Defendant here failed to demonstrate the necessary particularized need in order to qualify for funds for a DNA test or appointment of a DNA expert witness. Neither defendant nor the State questioned the identity of victim's alleged attacker. Although the State had a vaginal swab taken from the victim on the day of the attack, the State did not introduce that evidence or refer to it in any way. In fact, the State had not performed DNA analysis on that swab so it was not useful as inculpatory or exculpatory evidence. The absence of defendant's DNA would not have been an absolute defense to any of the crimes for which he was charged. Specifically the absence or presence of defendant's DNA from victim's vaginal area has no relevance to the crime of attempted statutory sexual offense for which defendant was convicted. In light of all of these circumstances, it cannot be said that the trial court abused its discretion in refusing to give defendant funds to hire a DNA expert. Therefore, this assignment of error is overruled.

Accordingly, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges HUNTER and CALABRIA concur.

STATE OF NORTH CAROLINA v. ALFRED DOMINIQUE CLIFTON

No. COA02-601

(Filed 20 May 2003)

Sentencing— habitual—felon—sentence not grossly disproportionate

A sentence of 168 to 211 months' imprisonment imposed upon defendant for each of two counts of obtaining property by false pretenses as an habitual felon was not so grossly disproportionate as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The fact that the State has the discretion to select whether it will prosecute the charge as a felony or a misdemeanor is not a determinative factor; the scales must include a defendant's history of recidivism as well as his current felonies.

Appeal by defendant from judgments entered 10 January 2002 by Judge Beverly T. Beal in Superior Court, Mecklenburg County. Heard in the Court of Appeals 20 February 2003.

Attorney General Roy Cooper, by Assistant Attorney General Stewart L. Johnson and Assistant Attorney General Amy C. Kunstling, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Dean Paul Loven, for defendant.

McGEE, Judge.

Alfred Dominique Clifton (defendant) was convicted on 10 January 2002 of two counts of obtaining property by false pretenses and of having attained the status of habitual felon. The trial court determined defendant to have a prior record level of VI and sentenced defendant to two terms of a minimum of 168 months and a maximum of 211 months active imprisonment to run consecutively. Defendant appeals.

The State's evidence at trial tended to show that on 1 August 2000 defendant purchased a 2000 Yamaha sport motorcycle and trailer from Charlotte Honda/Yamaha for $13,582.78. Defendant said he was getting a "nice size settlement" from an automobile accident in which he had been involved. Defendant gave George Dwight (Dwight), a sales department employee, a $500.00 personal check to hold the motorcycle until he could return with a certified check.

Defendant returned to Charlotte Honda/Yamaha around 3:30 p.m. Defendant and Dwight completed the bill of sale and other paperwork for the purchase. Defendant gave Dwight a certified check from Wachovia for the purchase and the $500.00 deposit was returned to defendant. When Dwight and defendant took the certified check to the cashier at Charlotte Honda/Yamaha, the cashier pointed out that the check had not been signed. Dwight gave defendant directions to the Wachovia branch located nearby. It was approaching 5:00 p.m.

Defendant later returned to Charlotte Honda/Yamaha and presented the certified check, which had now been signed. Defendant said he was able to catch a Wachovia employee just as the bank was closing. Charlotte Honda/Yamaha accepted the check; however, because it was after 5:00 p.m., Charlotte Honda/Yamaha was unable to immediately verify the check. Defendant took possession of the motorcycle and trailer that afternoon. It was later determined that the certified check was counterfeit. The Wachovia account listed did not exist and the check was not issued by Wachovia.

Two days later defendant purchased a 2000 Chevrolet Suburban from Parks Chevrolet in Charlotte. He also enrolled in the extended warranty program for the Suburban and paid for the program with a personal check from a First Union account. Defendant told Robert Mussa (Mussa), the finance director for Parks Chevrolet, that he would return later that day with a certified check for the full purchase price of $42,998.00. Mussa told defendant to bring the check by 5:00 p.m. Defendant returned to Parks Chevrolet between 6:00 and 7:00 p.m. with a certified check from Wachovia. Defendant presented the check to Mussa and the Chevrolet Suburban was released to defendant. It was later determined that the certified check had not been issued by Wachovia and that there was no such account at Wachovia. The personal check from First Union could not be verified due to problems and it was later determined that the account did not exist.

Defendant had used a similar certified check scheme on 31 July 2000 to obtain a 2000 Lincoln Navigator and a 2000 Lincoln LS from

Queen City Lincoln-Mercury in Charlotte. Defendant told the dealer that he was getting money from an automobile collision that would pay for everything. Defendant made a deposit of $5,000.00 and left to get a certified check. Defendant returned with a certified check from Wachovia in the amount of $90,065.31 and presented it to Julian McCall (McCall), general manager of Queen City Lincoln-Mercury. The Lincoln Navigator was released to defendant and defendant had another person pick up the Lincoln LS. About thirty minutes after defendant left Queen City Lincoln-Mercury, McCall discovered that the certified check could not be verified and notified the police. The police arrested the person defendant sent to pick up the Lincoln LS when the person arrived at Queen City Lincoln-Mercury. It was later determined that the certified check was counterfeit. The check was not issued by Wachovia, nor was there any such account at Wachovia.

Because the vehicle was equipped with a global positioning system, the Charlotte-Mecklenburg police located the Chevrolet Suburban defendant had obtained using the counterfeit certified check in a garage on North Tryon Street in Charlotte on 4 August 2000. When the police arrived, defendant was standing beside the Suburban with the keys in his pocket. The police discovered a helmet, several checks, and a briefcase inside the Suburban. The briefcase contained a compact disk labeled "[m]y business check writer for my software for Windows 98" and nine blank checks, purportedly certified checks from Wachovia.

Defendant admitted in a statement to the police that he obtained the certified checks from a woman he knew and that the information on the approximately $42,000.00 check and the $90,065.35 check, including the account number, came from a Wal-Mart check defendant had received from his former wife. The computer program defendant used to create these checks was the one found in his briefcase inside the Suburban. Defendant told police where to find the Lincoln Navigator, and when police went to that location, they discovered both the Lincoln Navigator obtained from Queen City Lincoln-Mercury and the Yamaha Motorcycle and trailer obtained from Charlotte Honda/Yamaha.

Defendant did not present any evidence. The jury convicted defendant of two counts of obtaining property by false pretenses.

The State presented evidence in the habitual felon proceeding tending to show that defendant had been convicted of at least three prior felonies that would qualify for habitual felon status in North

Carolina: (1) in Mecklenburg County number 92 CRS 40349, defendant was convicted on 12 August 1992 of felonious assault with a deadly weapon on a law enforcement officer; (2) in Mecklenburg County number 93 CRS 70671, defendant was convicted on 19 April 1994 of feloniously obtaining property by false pretenses; and (3) in Mecklenburg County number 95 CRS 60506, defendant was convicted on 10 April 1996 of felony escape from prison.

Defendant has failed to put forth an argument in support of assignments of error one through eleven and assignment thirteen. Those assignments of error are therefore deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

Defendant's sole argument is that the trial court erred in sentencing defendant as an habitual felon because the sentence violated the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution. We disagree. Defendant was convicted of two counts of obtaining property by false pretenses. The trial court adjudged defendant an habitual felon and sentenced him as a Class C felon. Defendant was sentenced to two consecutive terms of a minimum of 168 months to a maximum of 211 months active imprisonment. N.C. Gen. Stat. §§ 14-7.1 to -7.6 (2001) provide that a person who has three prior felony convictions may be sentenced as an habitual felon.

Defendant contends that one reason he raised this issue on appeal was to preserve the matter under *State v. Zuniga*, 336 N.C. 508, 513, 444 S.E.2d 443, 446 (1994), pending a decision of the United States Supreme Court in *Lockyer v. Andrade*, 538 U.S. 63, 155 L. Ed. 2d 144 (2003). Defendant argues that the sentence at issue in *Andrade*, 538 U.S. at ——, 155 L. Ed. 2d at 153, is similar to the sentence defendant received in the present case. However, we note the United States Supreme Court has now reversed the Ninth Circuit Court of Appeals' decision in *Andrade*. *Id.* at ——, 155 L. Ed. 2d at 154. The Supreme Court held that the Ninth Circuit erred when it granted the defendant a certificate of appealability and thereby reversed the Federal District Court for the Central District of California. *Id.* The Supreme Court stated the California Court of Appeal decision was not contrary to or an "unreasonable application" of the Supreme Court's "clearly established" law. *Id.* at ——, 155 L. Ed. 2d at 159.

The defendant in *Andrade* was convicted of two counts of felony theft for stealing less than $200.00 in videotapes from two K-Mart stores. *Id.* at ——, 155 L. Ed. 2d at 152-53. The criminal offenses in

Andrade were considered "wobbler" offenses under California law, in that they could be charged either as misdemeanors or felonies at the discretion of the prosecutor. *Id.* at —, 155 L. Ed. 2d at 152. In *Andrade*, the two counts of theft were charged as felonies. *Id.* at —, 155 L. Ed. 2d at 153. While the two predicate offenses that allow a defendant to be sentenced under California's "three strikes" law for a third felony must be serious or violent felonies, any felony could result in the "third strike." *Id.* The jury in *Andrade* found the defendant had been convicted of three counts of first degree residential burglary, which qualified as serious or violent felonies under California law. *Id.* The defendant was therefore subject to an application of the "three strikes" law for each of his subsequent convictions for petty theft. *Id.* The trial court sentenced the defendant in *Andrade* to two consecutive terms of twenty-five years to life in prison. *Id.* The California Court of Appeal affirmed the sentence in *Andrade*, citing the United States Supreme Court's decisions in *Harmelin v. Michigan*, 501 U.S. 957, 115 L. Ed. 2d 836 (1991), *Solem v. Helm*, 463 U.S. 277, 77 L. Ed. 2d 637 (1983), *and Rummel v. Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382 (1980). *Andrade*, 538 U.S. at —, 155 L. Ed. 2d at 153. The California Court of Appeal relied heavily upon the facts of the Supreme Court's decision in *Rummel* to reach its conclusion that the sentence at issue in *Andrade* was not disproportionate and did not constitute cruel and unusual punishment. *Id.* at —, 155 L. Ed. 2d at 153-54 (citation omitted). The Supreme Court of California denied discretionary review, and the Federal District Court for the Central District of California denied the defendant's petition for a writ of habeas corpus. *Id.* at —, 155 L. Ed. 2d at 154.

The Ninth Circuit, however, granted the defendant a certificate of appealability and reversed the Federal District Court for the Central District of California, stating that the California Court of Appeal decision was an "unreasonable application of clearly established Supreme Court law" because of the California Court of Appeal's disregard of *Solem*, 463 U.S. 277, 77 L. Ed. 2d 637, and thus constituted "clear error." *Andrade*, 538 U.S. at —, 155 L. Ed. 2d at 154 (citation omitted).

The United States Supreme Court reversed the Ninth Circuit; however, it did so on a jurisdictional basis, never reaching the question of whether the California Court of Appeal erred in its decision that the sentence imposed did not constitute cruel and unusual punishment. *Id.* at —, 155 L. Ed. 2d at 154-55. The Supreme Court acknowledged that its decisions in this area of the law "have not been

a model of clarity" and that the Supreme Court has "not established a clear or consistent path for courts to follow." *Id.* at —, 155 L. Ed. 2d at 155 (citations omitted). While the Supreme Court did state that "one governing legal principle emerges as 'clearly established' under [28 U.S.C.] § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years," the Court acknowledged "a lack of clarity regarding what factors may indicate gross disproportionality." *Id.* at —, 155 L. Ed. 2d. at 156. The Supreme Court did, however, reaffirm that the "gross disproportionality" principle would only be violated in the "exceedingly rare" and "extreme" case. *Id.* (citations omitted).

The Supreme Court, in deciding that the California Court of Appeal decision affirming the sentence in *Andrade* was not "contrary to, [nor] involved an unreasonable application of" the gross disproportionality principle, noted several factors relevant in both *Rummel*, 445 U.S. 263, 63 L. Ed. 2d 382, and *Solem*, 463 U.S. 277, 77 L. Ed. 2d 637, that were also present in *Andrade*, including length of sentence and availability of parole, severity of the underlying offense, and the impact of recidivism. *Andrade*, 538 U.S. at —, 155 L. Ed. 2d at 156. The Court also noted that the facts in *Andrade* were not materially indistinguishable from *Solem*. *Andrade*, 538 U.S. at —, 155 L. Ed. 2d. at 157. The Supreme Court concluded by again emphasizing that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Id.* at —, 155 L. Ed. 2d. at 159.

In *Ewing v. California*, the United States Supreme Court did reach the issue of "whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State's 'Three Strikes and You're Out' law." *Ewing v. California*, 538 U.S. —, —, 155 L. Ed. 2d 108, 113 (2003). The defendant in *Ewing* was sentenced under California's "three strikes" law to twenty-five years to life for a conviction of "one count of felony grand theft of personal property in excess of $400." *Id.* at —, 155 L. Ed. 2d at 116. Ewing had previously been convicted of four serious or violent felonies, thereby meeting the predicate for application of the "three strikes" law. *Id.* The Supreme Court denied Ewing's petition for review of the California Court of Appeal decision that had "rejected Ewing's claim that his sentence was grossly disproportionate under the Eighth Amendment." *Id.* at —, 155 L. Ed. 2d at 116-17. The California Court of Appeal reasoned that recidivist statutes such as the "three strikes" law "serve the 'legiti-

mate goal' of deterring and incapacitating repeat offenders." *Id.* at —, 155 L. Ed. 2d at 116-17.

A plurality of three Justices employed the "grossly disproportionate" analysis, finding that the sentence imposed in *Ewing* did not violate that principle. *Id.* at —, 155 L. Ed. 2d at 122-23 (noting that "Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.' "). Justices Scalia and Thomas affirmed the California Court of Appeal in separate concurrences, with each stating that there is no proportionality requirement in the Eighth Amendment. *Id.* at —, 155 L. Ed. 2d at 123-24 (Scalia, J. concurring in the judgment) (noting that out of respect for *stare decisis*, he would apply the proportionality test if he could intelligently apply it, which he could not do); *Id.* at —, 155 L. Ed. 2d at 124 (Thomas, J. concurring in the judgment). The four dissenting Justices agreed with the plurality that the "grossly disproportionate" principle applied; however, the dissenting Justices stated that the sentence in *Ewing* violated that standard. *Id.* at —, 155 L. Ed. 2d at 125 (Stevens, J. dissenting); *Id.* at —, 155 L. Ed. 2d at 126-27 (Breyer, J. dissenting). Due to the failure of a majority of Justices to reach a consensus on the basis for the result, *Ewing* does not significantly clarify the "grossly disproportionate" standard other than to reaffirm it will be violated only in the "rare" case. 538 U.S. at —, 155 L. Ed. 2d at 123; *Id.* at —, 155 L. Ed. 2d at 127-28 (Breyer, J. dissenting).

In applying the Supreme Court's decisions in *Andrade* and *Ewing*, our Court must continue to apply the "grossly disproportionate" principle, remembering that " '[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment.' " *State v. Hensley*, 156 N.C. App. 634, 639, 577 S.E.2d 417, 421 (2003) (quoting *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983)).

The facts in this case do not meet the standard of an "exceedingly rare" and "extreme" case, in which the "grossly disproportionate" principle would be violated. *Andrade*, 538 U.S. at —, 155 L. Ed. 2d. at 156; *Ysaguire*, 309 N.C. at 786, 309 S.E.2d at 441; *Hensley*, 156 N.C. App. at 639, 577 S.E.2d at 421. Defendant was convicted of two counts of obtaining property by false pretenses, being a $42,998.00 Chevrolet Suburban and a $13,582.78 motorcycle, through an elaborate scheme of counterfeit certified checks and false checking accounts. The fact that the State has the discretion to select whether it will prosecute

the charge as a felony or a misdemeanor is not a determinative factor in this analysis. *See Andrade*, 538 U.S. at —, 155 L. Ed. 2d at 152 (where the crime could have been charged as a felony or a misdemeanor); *Ewing*, 538 U.S. at —, 155 L. Ed. 2d at 122 (affirming the sentence under California's "three strikes" law for a charge that could have been charged either as a felony or a misdemeanor).

Defendant's prior convictions that served as a predicate for defendant to be charged as an habitual felon were: (1) a prior conviction for obtaining property by false pretenses, the same charge defendant has been convicted of in the present case; (2) felony escape from prison; and (3) assault with a deadly weapon on a law enforcement officer. These crimes are serious in nature and at least one is a violent offense. The fact that defendant has now been convicted of two charges of the same offense as one of his predicate offenses for habitual felon status emphasizes the purpose of the Habitual Felon Act:

> "[T]o deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation *and its duration* are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes."

State v. Aldridge, 76 N.C. App. 638, 640, 334 S.E.2d 107, 108 (1985) (quoting *Rummel*, 445 U.S. at 284, 63 L. Ed. 2d at 397).

The sentence in the presumptive range for defendant's convictions of two counts of obtaining property by false pretense in violation of N.C. Gen. Stat. § 14-100, a Class H felony, without consideration of the Habitual Felon Act, is a minimum of 16-20 months to a maximum of 20-24 months in each count, given a prior record level of VI. *See* N.C. Gen. Stat. § 15A-1340.17 (2001). Under the North Carolina Habitual Felon Act, defendant's sentence would be as a Class C felon, and the sentence in the presumptive range for defendant's convictions would be a minimum of 135-168 months to a maximum of 171-211 months, given a prior record level of VI. *See* N.C.G.S. § 15A-1340.17. Defendant argues that he should not be subject to North Carolina's habitual felon statute when the underlying felony is a Class H felony. However, as the State points out, this Court has on several occasions affirmed the sentence of a defendant as an

habitual felon where the defendant was convicted of an underlying Class H or Class I felony. *See, e.g., State v. Parks*, 146 N.C. App. 568, 553 S.E.2d 695 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 220, 560 S.E.2d 355, *cert. denied*, —— U.S. ——, 154 L. Ed. 2d 49 (2002) (where the underlying felonies were felonious larceny and felonious possession of stolen goods, Class H felonies under N.C. Gen. Stat. § 14-72); *State v. Hairston*, 137 N.C. App. 352, 528 S.E.2d 29 (2000) (where the underlying felony was felonious breaking and entering a motor vehicle, a Class I felony under N.C. Gen. Stat. § 14-56). As noted above, the underlying felonies of larceny by false pretense in the present case were Class H felonies. Further, as noted by the United States Supreme Court, when deciding whether a sentence is grossly disproportionate, "we must place on the scales not only [a defendant's] current felonies, but also his . . . history of felony recidivism." *Ewing*, 538 U.S. at ——, 155 L. Ed. 2d at 122.

We hold that the sentence imposed on defendant as an habitual felon is not so "grossly disproportionate" as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

No error.

Judges HUDSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. JERRY WILLIAM McNEILL, JR.

No. COA02-642

(Filed 20 May 2003)

1. Sentencing— prior record points—erroneous assessment

A sentence based on an erroneous prior record level was remanded. The State conceded that the trial court erroneously assessed points under provisions involving offenses committed while on probation and offenses in which all of the elements were present in a prior offense. The court also erred by assessing separate points where defendant pled guilty to two offenses on the same day but there was a discrepancy in filing dates. N.C.G.S. § 15A-1340.14(b)(6), (b)(7), and (d).

2. Sentencing— habitual felon—guilty plea—defendant's presence in courtroom

The trial court did not err by accepting a plea to being an habitual felon where defendant asserted that an exchange with defense counsel about the possible maximum sentence while the court was "at ease" suggested that defendant was not present in the courtroom during the exchange. There is nothing in the record suggesting that defendant was not present, and the transcript suggests the opposite.

3. Sentencing— habitual felon—guilty plea—defendant imperfectly informed of maximum sentence—no prejudice

There was no prejudice in the acceptance of defendant's habitual felon guilty plea where the trial judge may not have personally informed defendant of the maximum sentence. Although an exchange between defendant and the judge was an imperfect attempt to describe the maximum possible sentence; there was no suggestion before or after the plea that defendant did not understand he faced the possibility of enhanced sentences. Considering the totality of circumstances, noncompliance with N.C.G.S. § 15A-1022(a)(6) neither affected defendant's decision to plead nor undermined the validity of the plea.

Appeal by defendant from judgment entered 24 January 2002 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 12 March 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Charles J. Murray, for the State.

Jeffrey Evan Noecker, for defendant.

LEVINSON, Judge.

On 22 January 2002, defendant was tried and convicted of the following felonies: (1) attempted robbery with a dangerous weapon, (2) assault with a deadly weapon inflicting serious injury, (3) first degree burglary, and (4) conspiracy to commit robbery with a dangerous weapon. In addition, defendant was indicted as a habitual felon, and he subsequently pled guilty to his status as such. Defendant was sentenced to three consecutive active terms of imprisonment. Each sentence was for a minimum term of 116 months and a corresponding maximum of 149 months in prison. Defendant gave notice of appeal in open court on 24 January 2002.

I. DEFENDANT'S PRIOR RECORD LEVEL

[1] On appeal defendant contends the trial court erred in assessing him 3 separate points on the Prior Record Level Worksheet (AOC-CR-600) pursuant to N.C.G.S. § 15A-1340.14(b). First, defendant argues he was incorrectly assessed one (1) point under the following provision:

> (6) If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point.

N.C.G.S. § 15A-1340.14(b)(6) (2001). Defendant's prior convictions included felony forgery, felony possession of a stolen vehicle, felony possession with intent to manufacture, sell and deliver cocaine, common law robbery, and possession of stolen property. The State does not contend all of the elements of any present offense are included in the elements of any prior offense. It concedes the trial court erroneously assessed defendant one (1) point under G.S. § 15A-1340.14(b)(6).

Secondly, defendant argues the trial court erred in assessing him 1 point under the following provision:

> (7) If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

N.C.G.S. § 15A-1340.14(b)(7) (2001). There is no record evidence that supports an assessment of one (1) point under this portion of the statute. Again, the State concedes the trial court erroneously assessed defendant one (1) point under this provision.

Finally, defendant contends the trial court erred in assessing him two (2) separate points pursuant to N.C.G.S. § 15A-1340.14 (d) for offenses that he pled guilty to and was convicted of in the same Superior Court session. The relevant portion of the statute provides:

> (d) Multiple Prior Convictions Obtained in One Week.—For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during

> one calendar week, only the conviction for the offense with the highest point total is used. . . .

N.C.G.S. § 15A-1340.14 (d) (2001).

Although, on 11 January 1994 defendant pled guilty to both offenses of common law robbery and possession of stolen goods, the Judgment and Commitment form for the offense of possession of stolen goods was not filed until 14 December 2001. Apparently, this discrepancy in filing dates led the trial court to assign separate points for each offense. However, because "[f]or the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest," N.C.G.S. § 15A-1331(b) (2001), the trial court erred in assessing defendant separate points pursuant to G.S. § 15A-1340(d).

As a result of the trial court's erroneous assessment of three (3) additional points, defendant was sentenced with an erroneous prior record level. Such error requires remand. *State v. Williams*, 335 N.C. 501, 565 S.E.2d 609 (2002); *see also* N.C.G.S. § 15A-1446(d)(18) (2001).

II. DISCLOSURES NECESSARY TO PLEA PROCEEDINGS

Next, defendant contends the trial court erred in accepting his plea to the status of habitual felon. He contends (1) the defendant may not have been present in the courtroom during all relevant times; (2) the court failed to inform him of the maximum possible sentence as required by N.C.G.S. § 15A-1022(a)(6); and (3) he was prejudiced by these errors, requiring reversal. We turn first to additional facts necessary to our analysis.

Additional Facts

Out of the presence of the jury, the trial court judge endeavored to adjudicate defendant's guilty plea to habitual felon status. N.C.G.S. § 15A-1021, *et seq.* The defendant was sworn and the judge asked him whether he understood he had the right to remain silent; whether the habitual status had been explained to him by his attorney and whether he understood the nature and elements of the same; whether he was satisfied with his attorney's services; whether the attorney discussed defenses, if any, to the charge; whether defendant understood he could plead not guilty and demand a trial on the habitual status during which he would have the opportunity to confront and cross-examine witnesses; whether he understood that he gave up such

rights if he pled guilty; and whether he personally pled guilty "to the status of habitual offender should you be found guilty of the charges that are being tried now[]" (emphasis added). Defendant responded affirmatively to all these inquiries. Defendant also informed the court of his level of education and that he was not under the influence of impairing substances. Further, in response to additional inquiries of the court, defendant stated he was pleading guilty as a result of his own free will and had not agreed to do so as a result of any arrangement between he and the State or because of any threats or promises. During this exchange between the judge and defendant, the following occurred (hereinafter "first exchange"):

> THE COURT: Do you understand that habitual offender status would mean that you could be punished for the charges now before you as a Class C felon and a Class C felon and—the maximum punishment under the statute as a Class C felon is 261 months in prison? That doesn't mean that you would get 261. There are several other factors that are factored in to determine what the appropriate sentence would be, but under the law, that's the maximum for a Class C felony. That you would be punished as a Class C felon as opposed to—let's see. The charge of attempted robbery with a dangerous weapon is a Class D felony. First degree burglary is a Class D felony. Assault with a deadly weapon inflicting serious injury is a Class E felony and conspiracy to commit robbery with a dangerous weapon is a Class E felony. By being determined to be an habitual felon, instead of being punished at the levels set forth in the statute for those particular offenses, you would be punished as a Class C felony which is higher than either one of those. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

(emphasis added).

Immediately following this dialogue, the judge instructed defense counsel to "look over this form with (defendant)" and to sign the same. The transcript at this point in the proceedings indicates the court was "at ease." During this "at ease" period, the court reporter continued to record the proceedings; the trial court and assistant district attorney discussed when the State might conclude its presentation of evidence on the underlying offenses. There is no indication whatsoever that anyone left the courtroom. There is less than one full page of the transcript between the "at ease" juncture and the following exchange (hereinafter "second exchange"):

THE COURT: I would say y'all are talking about the maximum. There are four charges.

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: And all four charges could be elevated to the full 261 and then they could be [sic] run consecutively so it could be 261 times four. I guess, so the maximum, if he were to be found guilty of—if he were found guilty of everything, the maximum punishment would be 1,044 months. That's the very maximum that the law would provide in North Carolina.

(emphasis added). Immediately thereafter, defense counsel was granted permission to approach the bench. From the record it is evident the judge did not have the signed copy of the transcript of plea during the exchanges described above.[1] The transcript of plea itself states "the maximum punishment is 261 months." After the second exchange, the judge stated:

. . . I will find that there is a factual basis for the entry of this status plea, that he is satisfied with his lawyer, is competent to stand trial on this particular issue and that it is a plea of guilty to the status of habitual felon, should he be found guilty, is freely, voluntarily and understandingly given and I would accept that and record that.

Thereafter, the court announced it would "be in recess until the morning. . . ." The transcript then states "the trial adjourned at 5:20 p.m., January 23, 2002, and reconvened at 9:30 a.m., January 24, 2002."

---

[2] Defendant first contends the record fails to reflect he was in the courtroom and privy to the second exchange.

Because the transcript states the court was "at ease," defendant asserts, this suggests defendant was not present in the courtroom during the second exchange. The brief period between the first and second exchanges was to provide defense counsel an opportunity to review the transcript of plea with defendant.[2] Defendant also con-

1. This is made more evident by the fact the transcript shows defense counsel later approached the bench and retrieved the signed transcript of plea to "certify" it.

2. Though not essential to our holding, our reading of the transcript suggests neither defendant nor defense counsel left the courtroom between the first and second exchanges.

tends that the fact the judge referred to the defendant as "he" during the second exchange suggests defendant was not present or that this discussion took place at the bench, out of defendant's earshot. We do not agree.

There is nothing in the transcript or affirmatively shown in the record suggesting defendant was not present through the time the judge announced court would be in "recess." Defendant would have us presume he was not in the courtroom when the transcript clearly suggests the opposite. For example, the plea was adjudicated on the record only *after* the judge's second statement. Accepting defendant's argument would necessarily require us to find the trial judge adjudicated the plea in the absence of the defendant; this is not supported by the record. We are unpersuaded by defendant's contention that he was not in the courtroom at all relevant times or was not privy to the second exchange.

[3] Defendant next contends the trial judge did not personally inform him of the maximum sentence pursuant to N.C.G.S. § 15A-1022.

N.C.G.S. § 15A-1022(a)(6) (2001) provides:

> (a) . . . [A] superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> . . . .
>
> (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. . . .

(emphasis added). Defendant contends even if he was present in court and heard the second exchange, the court nevertheless failed to inform him "personally" of the maximum as illustrated by the transcript of plea and first exchange. The State contends the judge's first exchange with defendant, standing alone, sufficiently comports with G.S. § 15A-1022(a)(6).[3]

The State's argument is not without force. In the first exchange, after enumerating the underlying offenses and the associated, ordi-

3. As the second exchange was not directly between the judge and defendant, it is not considered when determining whether the judge addressed defendant "personally" about the possible maximum resulting from consecutive sentences.

nary Structured Sentence Levels, the judge's statement accurately explains that the "charges" (also "offenses") would be punished at the higher level. Defendant's interpretation of the first exchange suggests, in part, that defendant did not have an understanding he was on trial for (and could be sentenced for) more than one offense. This is not supported by the record. In our view, the first exchange was an attempt, albeit imperfect, on the part of the judge to describe the maximum possible sentence associated with each of the enumerated felonies for which defendant was being tried, 261 months. Defendant nevertheless contends the first exchange, considered together with a transcript of plea that asserts the "maximum [of] 261 months" demonstrates the statutory violation. Assuming, *arguendo*, the trial court did not address defendant "personally" about the maximum potential sentence and therefore failed to comply with the requirements of G.S. § 15A-1022(a)(6), we next consider whether it amounts to prejudice, requiring the plea to be set aside.

Defendant argues he was prejudiced because he "received a sentence greater than the maximum given to him by the trial judge and reflected on the transcript." He further argues that the plea was not the product of "informed choice" and that he was "induced" into entering a guilty plea "when he would not otherwise have done so had he been fully and properly informed" of the maximum possible sentence.

G.S. § 15A-1022 (a)(6) is based upon principles in *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969). *State v. Bozeman*, 115 N.C. App. 658, 661, 446 S.E.2d 140, 142 (1994). A defendant's plea must be made voluntarily, intelligently and understandingly. *Boykin*, 395 U.S. at 244, 23 L. Ed. 2d at 280. The defendant must be made aware of all "direct consequences" of his plea. *Bozeman*, 115 N.C. App. at 661, 446 S.E.2d at 142 (discussing differing standards and burdens of proof when an error is grounded in constitutional principles as opposed to violations that do not implicate the Constitution) (citations omitted). Our Courts have rejected a ritualistic or strict approach in applying these standards and determining remedies associated with violations of G.S. § 15A-1022. *State v. Richardson*, 61 N.C. App. 284, 300 S.E.2d 826 (1983). Even when a violation occurs, there must be prejudice before a plea will be set aside. *Bozeman*, 115 N.C. App. at 660, 446 S.E.2d at 141. Moreover, in examining prejudicial error, courts must "look to the totality of the circumstances and determine whether non-compliance with the statute either affected defendant's decision to plead or undermine

the plea's validity." *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000).

Because of the additional term of imprisonment associated with habitual offender status, this constitutes a direct consequence of one's plea to the same. *See State v. Williams*, 133 N.C. App. 326, 331, 515 S.E.2d 80, 83 (1999) (defining direct consequences " 'as those having a 'definite, immediate and largely automatic effect on the range of the defendant's punishment' ") (quoting *Bryant v. Cherry*, 687 F.2d 48, 50, *cert. denied*, 459 U.S. 1073, 74 L. Ed. 2d 637 (4th Cir. 1982)). As a result, the State must prove the error was harmless beyond a reasonable doubt. *Bozeman*, 115 N.C. App. at 660-61, 446 S.E.2d at 142.

In the instant case, we find an absence of prejudice. The first exchange, standing alone, contemplated that defendant would be subject to enhanced sentencing for any one or more of the offenses for which he might be convicted. In addition, the second exchange clearly stated defendant faced a maximum of 1,044 months in the event he was convicted of all underlying offenses. Significantly, the second exchange occurred before the adjudication of plea. The defendant did not object at any time contemporaneous with the adjudication of plea (or subsequently during sentencing) or contend he was not informed or aware of the maximum possible sentence. There was no suggestion before or after the plea was adjudicated that defendant did not understand he faced the possibility of enhanced sentences as to each of the underlying substantive offenses.[4] Nor did defendant file a motion to withdraw his plea before sentencing, either—something that would have given defendant an opportunity to challenge the plea on the basis he was not aware of the maximum possible sentence associated with consecutive habitual-enhanced sentences. *See State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990). Finally, considered in tandem, the first and second exchanges defeat defendant's argument. In this context, considering all the circumstances, the fact the transcript of plea noted "261 months" does not negate our conclusion.

We are unpersuaded, considering the totality of circumstances, that any noncompliance with G.S. § 15A-1022 (a)(6) either affected defendant's decision to plead or undermine the plea's validity. *Hendricks*, 138 N.C. App. at 670, 531 S.E.2d at 898. On these

4. In his brief, defendant asserts, "if he was . . . present, [he] was not given the opportunity to respond, or change or withdraw his plea, or indicate that he understood this greatly increased potential maximum sentence." This assertion is without merit.

facts, therefore, we hold there is a showing of harmless error beyond a reasonable doubt. Defendant's assignment of error is overruled.

The events associated with defendant's plea to habitual felon status are neither ideal nor preferable means for trial courts to satisfy the requirements of G.S. § 15A-1022. Trial courts should be mindful of these statutory requirements and exercise diligence and caution in their application.

III. OTHER ASSIGNMENTS OF ERROR

After careful review, we find defendant's remaining assignments of error without merit and they are, therefore, overruled.

The case is remanded for re-sentencing in conformity with Part I of this opinion. The defendant's plea to habitual felon status is affirmed. We leave undisturbed the convictions associated with the remaining offenses.

Affirmed in part, reversed and remanded in part.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. ABELARDO C. MARTINEZ

No. COA02-471

(Filed 20 May 2003)

1. Search and Seizure— investigatory stop—totality of circumstances—late night, lonely road—fleeing from officer

The trial court correctly concluded that an investigatory stop was justified by a reasonable suspicion of criminal activity where the stop occurred around 2:00 a.m.; there were no vehicles on the road other than defendant's car and patrol vehicles; a man on foot had fled from an officer a few minutes before and about fifty yards from the vehicle; and the officer inferred a connection between the two. Cocaine was found in defendant's pocket.

2. Search and Seizure— pat down—nervous defendant—object in pocket—no answer about weapons

A pat down search and the subsequent arrest of defendant and seizure of cocaine, currency, and a weapon were justified

where a nervous defendant who was reaching around inside his vehicle did not respond when asked if he had weapons; the officer then properly asked about an object in defendant's pocket; defendant's reply that the object was "dope" justified the seizure of currency and cocaine and defendant's arrest; and the search of defendant's vehicle and seizure of a weapon were incident to arrest.

Appeal by defendant from order entered 12 February 2002 by Judge W. Osmond Smith in Alamance County Superior Court. Heard in the Court of Appeals 11 February 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David L. Elliott, for the State.

Samuel L. Bridges for defendant-appellant.

HUNTER, Judge.

Abelardo C. Martinez ("defendant") appeals from an order denying his motion to suppress the alleged contraband seized during an investigatory stop. We affirm for the reasons stated herein.

Defendant was charged in true bills of indictment with felony possession of cocaine, trafficking in cocaine by possession, trafficking in cocaine by transportation, manufacturing cocaine, possession with intent to sell or deliver cocaine, maintaining a vehicle for keeping or selling cocaine, and carrying a concealed weapon. On 25 January 2002, defendant filed a motion to suppress the alleged contraband seized during an investigatory stop. A hearing was held on this motion, during which the State presented testimony from Darren Davis ("Officer Davis"), the City of Mebane police officer who had stopped and searched defendant and his vehicle. After hearing the evidence and arguments, the trial court denied defendant's motion. In its order, the trial court made extensive findings of fact and conclusions of law. Subsequent to the denial of his motion to suppress, defendant entered a plea of guilty to all charges, reserving the right to appeal the court's denial of his motion to suppress. Defendant was sentenced to seventy to eighty-four months imprisonment and was ordered to pay a $100,000.00 fine. Facts pertinent to this appeal will be included as necessary in our analysis of the issues.

[1] Defendant contends the trial court erred in denying his motion to suppress the alleged contraband seized during the vehicle stop.

Defendant specifically argues that the officer did not have a reasonable and articulable suspicion to justify an investigatory stop, and the pat-down search exceeded its permissible scope. We disagree.

At the outset, the applicable standard in reviewing 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. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994). "Conclusions of law that are correct in light of the findings are also binding on appeal." *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996). "This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

Unreasonable searches and seizures are prohibited by the Fourth Amendment to the Constitution of the United States and Section 20 of Article I of the North Carolina Constitution. *State v. Sanchez*, 147 N.C. App. 619, 623, 556 S.E.2d 602, 606 (2001), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002). "An investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). In ascertaining whether an officer had a reasonable suspicion to make an investigatory stop, the court must consider "the totality of the circumstances—the whole picture . . . ." *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968); *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979)). Our Supreme Court has acknowledged that activity at an unusual hour is a factor that may be considered by a law enforcement officer in formulating a reasonable suspicion. *Id.* at 442, 446 S.E.2d at 70.

In the instant case, in ruling upon defendant's motion to suppress, the trial court concluded that in considering the totality of the circumstances, "the stopping and detention of the vehicle and the defendant was based upon a reasonable and articulable suspicion that a crime had likely occurred, was occurring, or about to occur, that supported such action." Included in the trial court's extensive

findings were the following facts: At approximately 2:00 a.m. on 22 June 2001, while on routine patrol in a marked patrol vehicle, Officer Davis observed and drove past a white male walking north on Trollingwood-Hawfields Road towards Interstate 85. Officer Davis immediately turned around and pulled over on the side of the road behind this pedestrian who, upon seeing the officer, ran towards the woods in the direction of Village Street Mobile Home Park. About four minutes later, while Officer Davis was driving through the mobile home park in an unsuccessful attempt to locate the pedestrian, Officer Sharpe contacted Officer Davis by radio and informed him that there was a motor vehicle parked on the right shoulder of Trollingwood-Hawfields Road near the mobile home park. Officer Davis then drove out of the mobile home park and observed a white vehicle leaving the right shoulder of Trollingwood-Hawfields Road. The white vehicle was located approximately fifty yards from where Officer Davis had observed the pedestrian flee from him earlier. Officer Davis followed this vehicle driven by defendant, a Hispanic male, and then initiated an investigatory stop by activating his blue light. The trial court additionally found the following to which defendant objects:

> Officer Davis testified that his initial investigatory traffic stop of the vehicle of the defendant was pursuant to Officer Davis's thoughts and his original suspicion that the vehicle may be related to the earlier pedestrian who had fled on foot upon approach of the officer. It appeared extremely suspicious to the officer considering all of the circumstances existing at the time; that is, Officer Davis was extremely suspicious that a crime had likely occurred, was occurring, or about to occur, and that the pedestrian and the vehicle and its occupants may be related thereto.

The trial court further found that the area in which defendant was stopped generally has no foot traffic at 2:00 a.m. and that at the time of the stop, there were no other motor vehicles other than defendant's vehicle and patrol cars in that area.

After reviewing the record, we conclude the trial court's findings of facts are supported by the evidence and these findings, in turn, support the trial court's conclusion that the investigatory stop "was based upon a reasonable and articulable suspicion that a crime had likely occurred, was occurring, or about to occur . . . ." Officer Davis indicated that he connected the vehicle he stopped

to the individual who had earlier fled from his presence by the following testimony:

> My original suspicion was that [defendant] being in the same immediate area as a subject that had just fled from me, I didn't know if maybe he was there to pick up the subject, if he was somehow related to that subject. The suspicion of him being pulled off on the side of the road on a section of the roadway that is very light traffic that time of the night, there's hardly no foot traffic, it's just extremely suspicious to me.

Officer Davis further testified that "I connected that vehicle to the subject that had ran [sic] from me, being in the immediate area of where I had somebody flee from me, pulled off on the side of the road. That's how I connected this vehicle to the subject that fled and that suspicion." It was reasonable for the officer to infer that the individual who had fled from him was in some way related to the stopped vehicle located a mere fifty yards from where the fleeing individual had been spotted. Moreover, the fact that the investigatory stop occurred around 2:00 a.m. when there is generally no foot traffic and there were no vehicles on the road except defendant's vehicle and patrol vehicles contributed to the officer's suspicion. Based on the totality of the circumstances, the trial court correctly concluded that the investigatory stop was justified by a reasonable suspicion that defendant was involved in criminal activity.

[2] Having determined that the investigatory stop and detention were proper, we must now determine whether the ensuing warrantless search of defendant passed constitutional muster. "[A]n officer may conduct a pat down search, for the purpose of determining whether the person is carrying a weapon, when the officer is justified in believing that the individual is armed and presently dangerous." *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993). To determine the reasonableness of a pat-down search, the applicable standard is " 'whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger[.]' " *State v. Peck*, 305 N.C. 734, 742, 291 S.E.2d 637, 642 (1982) (quoting *Terry*, 392 U.S. at 27, 20 L. Ed. 2d at 909)). During a lawful pat-down search for weapons, if an officer discovers contraband, the officer may seize the item discovered. *State v. Benjamin*, 124 N.C. App. 734, 739, 478 S.E.2d 651, 654 (1996). This Court in *Benjamin* held that it was proper for an officer to make a brief inquiry as to the contents of an object that he felt while conducting a

lawful *Terry* search. *Id.* at 741, 478 S.E.2d at 655. This Court further held in *Benjamin* that the officer properly seized the contraband from the defendant's jacket pocket after the defendant had indicated that the pocket contained contraband. *Id.*

In the instant case, defendant argues the trial court erred in concluding that the pat-down of defendant and seizure of contraband were performed in a constitutionally permissible manner. Defendant does not, however, object to any of the court's findings pertaining to the pat-down and seizure.

The trial court found that after presenting Officer Davis with a Maryland driver's license, defendant began " 'digging' " in the glove compartment of his vehicle. Officer Davis asked defendant why he had pulled off the road and defendant responded that he was urinating. Defendant continued to "dig" in his glove compartment and reach around to several areas in the interior of the vehicle, including behind the passenger seat toward the floorboard area. Defendant exhibited a significant degree of nervousness while reaching around the interior of the vehicle. Out of concern for his own safety, Officer Davis asked defendant to exit the vehicle. While defendant was standing outside the vehicle, Officer Davis asked defendant if he had any weapons and defendant did not respond. Officer Davis then performed a pat-down search of defendant to check for weapons. During the pat-down, Officer Davis felt a large bulge in defendant's right pants' pocket and asked defendant what the object was. Defendant responded, " 'dope.' " Officer Davis retrieved a large amount of currency and two bags of cocaine from defendant's right pocket. Officer Davis testified that when he felt the large bulge in defendant's pocket, he thought it was a large amount of currency, which in his experience is often connected with illegal narcotics. Officer Davis arrested defendant and later conducted a search of defendant's vehicle.

We conclude defendant's failure to respond when he was asked if he had any weapons and defendant's nervous " 'digging' " in the vehicle provided ample justification for the limited search of his outer clothing. We additionally conclude, in following our holding in *Benjamin*, that the officer's brief inquiry as to the contents of the object in defendant's right pocket was not improper. Upon defendant's response that his right pocket contained " 'dope,' " the officer properly seized the currency and cocaine resulting in defendant's arrest. *See Benjamin*, 124 N.C. App. 734, 478 S.E.2d 651. Since we have determined that the stop and frisk were lawful, we also conclude that Officer Davis was justified in conducting a search of

defendant's vehicle incident to defendant's arrest, during which a handgun was seized. *See State v. VanCamp*, 150 N.C. App. 347, 352, 562 S.E.2d 921, 926 (2002).

For the foregoing reasons, we affirm the trial court's denial of defendant's motion to suppress the alleged contraband seized during the investigatory stop.

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

ALISHA L. MESSINA, PLAINTIFF v. JAYNE M. BELL, DEFENDANT

No. COA02-1028

(Filed 20 May 2003)

1. Costs— attorney fees—factors

The trial court did not abuse its discretion by awarding attorney fees in an automobile accident case in which there had been settlement offers where the court considered the whole record and applied the factors from *Washington v. Horton*, 132 N.C. App. 347.

2. Discovery— failure to produce medical records—sanctions denied

The trial court did not abuse its discretion in an automobile accident case by denying defendant's motion for sanctions against plaintiff for not producing medical records from an unrelated automobile accident in response to a request for the production of documents under N.C.G.S. § 1A-1, Rule 37. The documents were ultimately produced and defendant was given the opportunity to cross-examine plaintiff, who explained that she had not been seriously hurt in the other accident, had not sought treatment beyond the emergency room visit, and had forgotten about it.

3. Costs— attorney fees—for appeal

A motion for attorney fees during appeal was remanded for appropriate findings of fact and an award consistent with those findings.

Appeal by defendant from amended judgment filed 28 March 2002 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 16 April 2003.

Chesnutt, Clemmons, Thomas & Peacock, P.A., by Gary H. Clemmons, for plaintiff appellee.

Wallace, Morris & Barwick, P.A., by Edwin M. Braswell, Jr., for defendant appellant.

BRYANT, Judge.

Jayne M. Bell (defendant) appeals from an amended judgment filed 28 March 2002 awarding damages, court costs, and attorney's fees as costs to Alisha L. Messina (plaintiff).[1]

Plaintiff filed suit against defendant on 11 August 2000 alleging personal injury damages arising from an automobile accident caused by defendant's negligence. During discovery, defendant submitted a request for production of documents to plaintiff for any medical reports and other documents from any medical practitioner who had ever treated plaintiff in connection with any back or neck surgery or difficulties. Plaintiff responded that there were none. At trial, it was revealed by a doctor who had treated plaintiff, that there were medical records of an emergency room visit from a separate, unrelated automobile accident during which plaintiff had complained of neck pain. Plaintiff testified she had forgotten the emergency room visit, and the records were thereafter provided to defendant. Defendant moved for sanctions against plaintiff, including dismissal or, in the alternative, a directed verdict for nominal damages and denial of any motion to award attorney's fees to plaintiff. The trial court denied the motion for the sanctions of dismissal, or in the alternative, directed verdict, but left open the possibility of denying attorney's fees to plaintiff. Defendant was given the opportunity to cross-examine plaintiff about the records and her failure to disclose them, and was also granted last argument.

Following the trial, the jury awarded plaintiff damages in the amount of $2,000.00. After the verdict, plaintiff moved for an award of attorney's fees under section 6-21.1 of the North Carolina General

1. A consent order entered by the parties states this case should be captioned with plaintiff's name as Alisha L. Messina. Both the jury verdict and amended judgment, however, list plaintiff as Alisha M. Messina. As noted *infra*, we remand for, *inter alia*, technical correction of the amended judgment to change plaintiff's name.

Statutes. Plaintiff subsequently submitted an affidavit in support of this motion alleging that prior to filing suit, plaintiff, through counsel, sent a demand letter dated 14 March 2000 to defendant's insurance company demanding damages in the amount of $66,337.33. This figure included $2,459.18 in medical expenses, $5,000.00 for past pain and suffering, and $58,878.15 as the present value of future pain and suffering. On 1 June 2000, defendant's insurance company offered $5,500.00 to settle the case. After suit was filed, the case was sent to arbitration and plaintiff was awarded $12,829.95, including damages, interest, and attorney's fees. Defendant appealed from the arbitration award, and the case was scheduled for mediation. At the 7 June 2001 mediation, plaintiff's first offer to settle was $20,000.00 and her last offer to settle was $13,000.00. Defendant's one and only offer at mediation was $8,500.00. After mediation, defendant filed an offer of judgment in the amount of $5,501.00. Defendant made no other offers between 7 June 2001 and 11 February 2002. During trial, beginning 11 February 2002, defendant made one last offer to settle for $5,000.00.

In its amended judgment the trial court made forty-one separate findings of fact. These findings, in large part, mirrored the affidavit of plaintiff's counsel. The trial court granted plaintiff's motion and awarded a total amount of $13,475.22. This award included the jury verdict of $2,000.00 as damages, $9,172.50 in reasonable attorney's fees as costs, and $2,302.72 in incurred expenses as court costs. The trial court also denied defendant's motion for sanctions.

The issues are whether the trial court abused its discretion in (I) awarding attorney's fees to plaintiff and (II) denying defendant's motion for sanctions.

I

[1] Defendant argues that based upon the jury verdict and prior offers to settle, the trial court erred in granting plaintiff's motion for attorney's fees because the trial court's findings were not supported by the evidence and that, moreover, those findings do not support the trial court's conclusion of law.[2] We disagree.

---

2. Defendant also argues in her brief to this Court that the award of attorney's fees deprives her of both state and federal constitutional rights. We decline to address these arguments as defendant did not raise the constitutional issues in the trial court below. *See Ben Johnson Homes, Inc. v. Watkins*, 142 N.C. App. 162, 166-67, 541 S.E.2d 769, 771, *aff'd*, 354 N.C. 563, 555 S.E.2d 608 (2001) (per curiam).

In actions for personal injury where the judgment for recovery of damages is $10,000.00 or less, the trial court may, in its discretion, "allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages . . . [,] said attorney's fee to be taxed as a part of the court costs." N.C.G.S. § 6-21.1 (2001). Accordingly, a trial court's decision to award attorney's fees under this section will be reversed on appeal only upon a showing that the trial court abused its discretion. *Whitfield v. Nationwide Mut. Ins. Co.*, 86 N.C. App. 466, 469, 358 S.E.2d 92, 94 (1987). "An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Sowell v. Clark*, 151 N.C. App. 723, 727, 567 S.E.2d 200, 202 (2002) (quoting *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997)). The trial court's discretion in awarding attorney's fees under section 6-21.1 is, however, not unbridled. *Washington v. Horton*, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334 (1999). The trial court must consider the whole record and make the requisite findings, including but not limited to the following factors:

> (1) settlement offers made prior to the institution of the action . . . ; (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers; (3) whether defendant unjustly exercised "superior bargaining power"; (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose[]"; (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict; and the whole record.

Id. at 351, 513 S.E.2d at 334-35 (citations omitted).

In this case, the trial court's detailed findings, in summary, included: (1) all the offers of settlement made by both parties prior to and after suit was filed; (2) defendant's offer of judgment of $5,501.00, which was less than the "judgment finally obtained" in the amount of $13,475.22, *see Hardesty v. Aldridge*, 147 N.C. App. 776, 778, 557 S.E.2d 136, 137 (2001); (3) no findings regarding unjust exercise of superior bargaining power, although "the absence of such a finding does not require reversal when the trial court made adequate findings on the whole record to support an award of attorney's fees[,]" *Davis v. Kelly*, 147 N.C. App. 102, 108, 554 S.E.2d 402, 406 (2001) (citation omitted) (internal quotations omitted); (4) no findings regarding an

unwarranted refusal to pay an insurance policy, however, such a finding is not necessary in a suit involving an automobile accident and which is not a suit directly against an insurance policy, *see Crisp v. Cobb*, 75 N.C. App. 652, 653, 331 S.E.2d 255, 256 (1985); (5) the dates of all offers to settle by either party prior to suit, in arbitration and mediation, in offers of judgment, and during trial; and (6) the jury verdict was $2,000.00, the judgment finally obtained would be $13,475.22, and defendant offered to settle the case for $5,500.00, $5,501.00, and $8,500.00.

These findings of fact are supported by both the record and the affidavit of plaintiff's counsel. From the findings, it is clear that the trial court exercised its discretion by considering the whole record and in applying the *Washington* factors. Thus, the findings are sufficient to support the trial court's conclusion that plaintiff should be awarded attorney's fees, and therefore, the trial court did not abuse its discretion in granting plaintiff's motion.

II

[2] Defendant also contends the trial court erred in denying her motion for sanctions under Rule 37 of the North Carolina Rules of Civil Procedure for plaintiff's failure to properly respond to the request for production of documents. Rule 37(d) permits a trial court to impose sanctions for failure to serve written responses to a request for inspection under Rule 34 of the rules of civil procedure. *See Chateau Merisier, Inc. v. Le Mueble Artisanal GEKA, S.A.*, 142 N.C. App. 684, 687, 544 S.E.2d 815, 817 (2001); N.C.G.S. § 1A-1, Rule 37(d) (2001); *see also* N.C.G.S. § 1A-1, Rule 34 (2001) (production of documents). "Not every abuse of discovery merits imposition of punitive sanctions. It is well settled that Rule 37 allowing the trial court to impose sanctions is flexible, and a broad discretion must be given to the trial judge with regard to sanctions." *Rose v. Isenhour Brick and Tile Co.*, 120 N.C. App. 235, 240, 461 S.E.2d 782, 786 (1995) (citations omitted) (internal quotations omitted), *aff'd*, 344 N.C. 153, 472 S.E.2d 774 (1996). The trial court's discretion is accorded great deference and may be overturned only upon a showing that the ruling "was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 241, 461 S.E.2d at 786 (citation omitted) (internal quotations omitted).

In this case, the record shows once it was revealed that plaintiff's answer to the request for production was erroneous, plaintiff's counsel obtained and delivered the documents to defendant and defendant

was given the opportunity to cross-examine plaintiff about the documents. During this cross-examination, plaintiff admitted her response to the request for production had been untruthful. She explained, however, that when she was asked to produce documents related to other back or neck difficulties, she had forgotten the visit to an emergency room following the separate, unrelated automobile accident. She apparently had not been hurt seriously in that accident and did not seek any other medical treatment as a result of that accident. From this record, we conclude the trial court was within its discretion in denying defendant's motion for sanctions. *See id.* (even though trial court would have been justified in imposing sanctions for abuse of discovery, the trial court did not abuse its discretion by not imposing sanctions). Thus, we conclude the trial court did not err in denying defendant's motion for sanctions.

[3] We note that plaintiff has filed a separate motion in this Court, pursuant to Rule 37(a) of the North Carolina Rules of Appellate Procedure, for attorney's fees during appeal under N.C. Gen. Stat. § 6-21.1. Plaintiff requests that this Court enter an order remanding this case to the trial court for an additional hearing and findings on the motion for attorney's fees during appeal. A trial court, in its discretion and upon appropriate findings of fact, may award reasonable attorney's fees for service performed during an appeal, and we therefore remand this case to the trial court to make the appropriate findings of fact and enter an award consistent with those findings. *See Hardesty*, 147 N.C. App. at 779, 557 S.E.2d at 138; *see also Davis*, 147 N.C. App. at 109, 554 S.E.2d at 407 (remand for findings of fact on plaintiff's motion for attorney's fees on appeal); *Hill v. Jones*, 26 N.C. App. 168, 171, 215 S.E.2d 168, 170 (1975) (trial court has discretion to award attorney's fees for appellate services on remand under N.C. Gen. Stat. § 6-21.1).

We also note that at the institution of this action, the named plaintiff in the case was Alisha L. Meadows. On 24 January 2002, a consent order was filed modifying the caption in this case to reflect plaintiff's married name, Alisha L. Messina. Subsequently, both in the trial court and in this Court, plaintiff is listed as Alisha L. Messina. Both the verdict sheet and the amended judgment, however, list plaintiff as Alisha M. Messina. Accordingly, we remand this matter to the trial court for the technical correction of the amended judgment to name plaintiff as Alisha L. Messina consistent with the consent order entered by the parties.

NO ERROR resulting from the jury trial and amended judgment.

REMANDED for findings of fact on plaintiff's motion for attorney's fees on appeal and for correction of the amended judgment.

Judges TIMMONS-GOODSON and GEER concur.

STATE OF NORTH CAROLINA v. MICHAEL LANE McHONE

No. COA02-1009

(Filed 20 May 2003)

1. **Search and Seizure— search 24 hours after arrest—not incident to arrest**

A search of defendant 24 hours after his arrest was not contemporaneous with the arrest and was thus not incident to the arrest. The permissibility of a warrantless search while defendant was in custody was not raised at the suppression hearing and was not addressed on appeal.

2. **Search and Seizure— affidavit supporting warrant—insufficient**

The trial court correctly concluded that the affidavit supporting a search warrant was insufficient, and did not err by granting defendant's motion to suppress, where the affidavit referred to a lengthy interview of defendant but did not contain the substance of the interview, and concluded that probable cause existed but did not relate particular facts supporting that belief.

3. **Search and Seizure— suppression—court's evaluation of circumstances—no findings**

The trial court did not err when suppressing a search under N.C.G.S. § 15A-974(2) by not making findings of fact about its evaluation of the circumstances. That statute does not require a court to make findings with respect to its evaluation of the circumstances and the order granting the motion to suppress indicated that the court took all circumstances into account. The State presented no evidence to the contrary.

4. Search and Seizure— exclusionary rule—good faith exception—not applicable

The "good faith" exception to the exclusionary rule was not applicable where a search was suppressed under North Carolina statutes rather than on federal constitutional grounds.

Appeal by the State from an order entered 5 April 2002 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 13 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Assistant Appellate Defender Constance E. Widenhouse, for defendant-appellee.

STEELMAN, Judge.

Defendant was indicted for first-degree murder of Tammy Cush on 11 December 2000, and for armed robbery on 22 October 2001. On 15 November 2001, defendant was arrested at approximately 2:25 p.m. and placed in the Cabarrus County jail.

On 16 November 2001 at 3:10 p.m., a Cabarrus County magistrate granted Concord Police Department Detective Robert A. Ledwell's application for a search warrant for defendant's person, specifically to collect blood, hair and saliva samples. The search warrant was executed on the same day while defendant was in custody at the Cabarrus County jail. Evidence seized pursuant to this warrant included blood and hair samples and a thread obtained by combing defendant's pubic hairs.

Defendant filed a motion to suppress evidence obtained by the search warrant, contending the affidavit supporting the application for the warrant did not contain sufficient facts to establish probable cause. After hearing oral arguments from the State and defendant, the trial court granted defendant's motion to suppress. The trial court's order, citing *State v. Hyleman*, 324 N.C. 506, 379 S.E.2d 830 (1989), was based upon a violation of N.C. Gen. Stat. § 15A-244 (2001) and not upon constitutional grounds. The State appeals prior to a judgment pursuant to N.C. Gen. Stat. § 15A-979(c) (2001).

I.

[1] The State first contends the trial court erred in suppressing the thread evidence obtained by combing defendant's pubic hair because

no search warrant is required for a search while defendant is in custody of the State. The State's argument is limited to the thread evidence because the State was able to obtain additional blood and hair samples from defendant under a subsequent search warrant.

Generally, "to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[,] . . .[and must have] obtain[ed] a ruling upon the party's request, objection or motion." N.C. R. App. P. 10(b) (2003). This Court will not consider arguments on appeal which were not presented to or adjudicated by the trial court. *State v. Washington*, 134 N.C. App. 479, 518 S.E.2d 14 (1999); *see also State v. Smarr*, 146 N.C. App. 44, 551 S.E.2d 881 (2001) (finding that a party may not assert on appeal a new theory regarding suppression of evidence which was not first asserted at trial), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002).

At the suppression hearing, the State made the following argument to the trial court regarding defendant's motion to suppress the thread evidence:

> I would argue search incident to arrest. I do believe it requires an extension of current law. I've spoken with someone down at the Institute of Government and was cited a case, . . . *State versus Steen* [, 352 N.C. 227, 536 S.E.2d 1 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001)], but that was six hours. . . . This is longer, like the next day.

"For a search and seizure incident to a lawful arrest to be constitutionally permissible, it must be 'substantially contemporaneous with the arrest.' " *State v. Jackson*, 280 N.C. 122, 126, 185 S.E.2d 202, 205 (1971) (citations omitted). Although our Supreme Court has found warrantless searches up to six or seven hours after an arrest may meet the contemporaneousness requirement of a search incident to arrest, *e.g. Steen*, *supra*; *State v. Hopkins*, 296 N.C. 673, 252 S.E.2d 755 (1979), a search conducted 24 hours after an arrest, as in the instant case, is not contemporaneous with the arrest. The warrantless search was not proper under the theory of search incident to arrest.

The State did not argue at the hearing that the search was proper based on the fact that defendant was in the custody of the State at the time it was conducted, nor did it point to the portion of our Supreme Court's decision in *Steen* standing for this proposition. The trial court

did not make any ruling regarding this contention or the applicability of *Steen* either at the hearing or in its order granting the motion to suppress. The State first asserted its contention that the search was proper because defendant was in the State's custody on appeal to this Court.

Because the State failed to properly preserve for review on appeal the question of the permissibility of a warrantless search while defendant is in the State's custody, we decline to address this assignment of error.

II.

[2] The State next argues the trial court erred in granting defendant's motion to suppress for insufficiency of the affidavit supporting the search warrant. Our review of a ruling on a motion to suppress is limited to whether the trial court's findings are supported by competent evidence and whether those findings support its ultimate conclusions. *State v. Pulliam*, 139 N.C. App. 437, 533 S.E.2d 280 (2000).

A valid search warrant application must contain "[a]llegations of fact supporting the statement. The statements must be supported by one or more affidavits *particularly setting forth the facts and circumstances establishing probable cause* to believe that the items are in the places or in the possession of the individuals to be searched." N.C. Gen. Stat. § 15A-244(2) (2001) (emphasis added). Although the affidavit is not required to contain all evidentiary details, it should contain those facts material and essential to the case to support the finding of probable cause. *State v. Flowers*, 12 N.C. App. 487, 183 S.E.2d 820, *cert. denied*, 279 N.C. 728, 184 S.E.2d 885 (1971). This Court has held that affidavits containing only conclusory statements of the affiant's belief that probable cause exists are insufficient to establish probable cause for a search warrant. *Hyleman*, *supra*; *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972). The clear purpose of these requirements for affidavits supporting search warrants is to allow a magistrate or other judicial official to make an independent determination as to whether probable cause exists for the issuance of the warrant under N.C. Gen. Stat. § 15A-245(b) (2001). N.C. Gen. Stat. § 15A-245(a) requires that a judicial official may consider only information contained in the affidavit, unless such information appears in the record or upon the face of the warrant.

Here, the affidavit accompanying the search warrant application provided in pertinent part as follows:

> On Wednesday, November 15, 2000, Michael Lane Mchone, arrived at the Cabarrus County Sheriff's Department stating that he had information regarding the murder of Tammy Cush. Investigators with the Concord Police Department were contacted, and Mchone was brought to the Police Department and interviewed. *Following a lengthy interview, it was determined that Probable Cause existed which indicated that Mchone was responsible for the murder of Tammy Cush.* Mchone was later placed under arrest and placed in the Cabarrus County Jail under no bond.
>
> During the processing of the crime scene, several blood samples were collected, to wit (2) from the kitchen tile floor, and (1) from the carpet where it appears [] the body of Cush had rested. Also, several hair samples were noted, and different items that were collected which is [sic] suspected to be the hair samples of the known victim, Tammy Cush, also these items appeared to have hair of a different color contained within. During the autopsy of the victim[']s body at the Medical Examiner[']s Office in Chapel Hill, North Carolina, there were hair samples taken from her left and right hands. It was also noted that the victim had several combative wounds on her left and right hand[s]. A Rape kit was performed by the Medical Examiner[']s Office to indicated possible sexual contact between the offender and the victim. . . .
>
> The applicant respectfully request[s] the issuance of this process, in order to obtain hair (pubic and head), saliva, and blood samples to compare with evidence collected at the crime scene, and on Cush's body, to be compared with Mchone's at the State Bureau of Investigation for DNA comparison.

(emphasis added).

In its order, the trial court found this affidavit to be "woefully insufficient to establish probable cause." It further found that the affidavit contained

> nothing more than a conclusion on the part of the affiant, and gave the magistrate nothing upon which to conclude, in her independent judgment and analysis, that probable cause existed. The affidavit merely states . . . that the police believe that the defendant is guilty of murder, without saying why they hold this opinion as required by law. . . .

Based on these findings, the trial court concluded that the affidavit did not contain sufficient facts and circumstances to establish probable cause under the standard in N.C. Gen. Stat. § 15A-244 and granted the motion to suppress.

The application here contains no information regarding the substance of the "lengthy interview" of defendant conducted by the Concord Police Department. The affidavit's mere conclusion that probable cause exists is unsupported by particular facts as to the basis for the belief that defendant committed first-degree murder and, therefore, does not comply with our statutory standard in N.C. Gen. Stat. § 15A-244(2). Thus, we find sufficient competent evidence to support the trial court's findings which, in turn, support its conclusion that the affidavit did not contain sufficient information to establish probable cause. We hold the trial court did not err in granting the motion to suppress for insufficiency of the affidavit.

III.

[3] The State argues the trial court erred by failing to conduct any analysis under N.C. Gen. Stat. § 15A-974(2) (2002) since it relied on this statute, rather than constitutional provisions, in granting defendant's motion to suppress. N.C. Gen. Stat. § 15A-974(2) provides that "evidence must be suppressed if . . . [i]t is obtained as a result of a substantial violation of [N.C. Gen. Stat. Chapter 15A]. In determining whether a violation is substantial, the court must consider all the circumstances. . . ." This provision does not require the trial court to make findings of fact with respect to its evaluation of the circumstances leading to the conclusion that the violation was substantial.

The order granting the motion to suppress indicates the trial court took all circumstances into account in making its ruling, as N.C. Gen. Stat. § 15A-974 requires, and the State has presented no evidence to the contrary. Moreover, a search warrant application supported only by a conclusory affidavit constitutes a substantial violation of N.C. Gen. Stat. § 15A-244 according to the standard in N.C. Gen. Stat. § 15A-974(2). *Hyleman, supra*; *State v. Hunter*, 305 N.C. 106, 286 S.E.2d 535 (1982). Because the trial court found a substantial violation of N.C. Gen. Stat. Chapter 15A after considering all the circumstances, it properly suppressed the evidence as required by N.C. Gen. Stat. § 15A-974(2). This assignment of error is without merit.

IV.

[4] Finally, the State contends the trial court erred in failing to deny defendant's motion to suppress on the grounds of a "good faith"

exception for the seizure of evidence pursuant to a search warrant. A "good faith" exception to the exclusionary rule applies where evidence is suppressed based upon federal constitutional grounds. *United States v. Leon*, 468 U.S. 897, 82 L. Ed. 2d 677, *reh'g denied*, 468 U.S. 1250, 82 L. Ed. 2d 942 (1984); *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986). However, our State Supreme Court has declined to extend this exception to cases based upon the North Carolina Constitution, *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988), or to cases involving violations of N.C. Gen. Stat. Chapter 15A, *Hyleman*, *supra*. Since the trial court's ruling was based solely upon a violation of N.C. Gen. Stat. Chapter 15A, the "good faith" exception is not applicable in the instant case, and this assignment of error is without merit.

AFFIRMED.

Judges McGEE and HUDSON concur.

CRISTINA LYNN RUTH, PLAINTIFF v. VAUGHN ALAN RUTH, DEFENDANT

No. COA02-1129

(Filed 20 May 2003)

1. Contempt— civil—compliance by hearing

There was no authority for a district court to adjudge plaintiff in willful civil contempt or to commit her to the custody of the sheriff, even for a suspended sentence, where plaintiff did not initially return her children to her ex-husband after a scheduled visit but did return them by the time of the contempt hearing. A district court does not have the authority to impose civil contempt after an individual has complied with a court order.

2. Contempt— hearing—lost wages and attorney fees

The district court both erred and did not err in a contempt hearing arising from a visitation dispute by ordering plaintiff to pay defendant's lost wages and attorney's fees. Defendant's counsel conceded in oral argument that there was no legal basis upon which plaintiff could be required to compensate defendant for lost wages, and the award for defendant's West Virginia attorney fees was vacated because the matter before the court in the

show-cause hearing did not implicate Chapter 50A, through which the UCCJEA was adopted. However, plaintiff conceded that defendant was entitled to recover attorney fees incurred in filing the motion to show cause and in the related hearings in this state.

Appeal by plaintiff from order entered 29 April 2002 by Judge Charles E. Brown in Rowan County District Court. Heard in the Court of Appeals 16 April 2003.

Horack, Talley, Pharr & Lowndes, P.A., by Thomas R. Cannon and Kary C. Watson, for plaintiff-appellant.

Robert L. Inge for defendant-appellee.

MARTIN, Judge.

Plaintiff and defendant were married in 1992; two daughters were born of the marriage. Plaintiff and defendant separated and were subsequently divorced. By orders entered in the Rowan County District Court on 21 January 1997 and 2 June 1998, plaintiff was awarded custody of the two children and defendant was granted visitation. In March 2001, defendant moved for modification of the custody order. By order dated 13 July 2001 and amended order dated 24 July 2001, the district court awarded custody to defendant, effective 27 June 2001, and granted specified visitation to plaintiff. Plaintiff's appeal from the amended order modifying custody is currently pending before another panel of this Court.

In accordance with the visitation provisions of the amended custody order, plaintiff picked up the children for her scheduled visitation on 26 December 2001 and took them to her home in West Virginia. The following day she took the children to the West Virginia Department of Health and Human Services. After a lengthy interview of the children, the intake worker indicated a suspicion of abuse by defendant and instructed plaintiff to petition for an emergency protective order. Upon plaintiff's petition, a West Virginia magistrate entered a protective order granting temporary custody of the children to plaintiff, and she did not return the children to defendant on 3 January 2002 as scheduled.

On 10 January 2002, upon motion of defendant, the Rowan County District Court entered an order requiring plaintiff to appear on 16 January 2002 and show cause why she should not be adjudged

in contempt for her failure to abide by the terms of the July 2001 custody order. Pursuant to communication between the Rowan County District Court and the Wood County West Virginia Family Court concerning jurisdiction of the matter under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), the West Virginia court entered an order on 14 January 2002 terminating the emergency protective order and directing plaintiff to appear with the children in district court in Rowan County on 16 January.

Plaintiff complied with the orders and appeared with the children before the district court in Rowan County on 16 January. The children were returned to defendant at that time; at plaintiff's request the contempt hearing was continued to 28 March so that plaintiff's attorney could prepare.

At the conclusion of the 28 March hearing, the district court entered an order in which it found facts, concluded that plaintiff "is in willful contempt of this court and it's [sic] orders" and "has the means and ability to purge herself of contempt[,]" and adjudged her to be in civil contempt. The court ordered plaintiff committed to the sheriff's custody "until such time as she purges herself of contempt," but suspended the commitment "on the condition [she] purge herself of contempt by paying the sum of $2,637.00 into the Defendant's attorney's trust account . . . within sixty days . . . ." According to the findings of fact, this sum was composed of $252 in lost wages for defendant, $960 in fees for defendant's West Virginia attorney, and $1,425 in fees for defendant's North Carolina attorney. Plaintiff has appealed the order finding her in civil contempt.

---

[1] Plaintiff argues the district court erred by holding her in civil contempt after she had purged herself of contempt by complying with the amended custody order on 16 January 2002 and returning the children to defendant. According to G.S. § 5A-21:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and

> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.
>
> (b) A person who is found in civil contempt may be imprisoned as long as the civil contempt continues, ...

N.C. Gen. Stat. § 5A-21(a), (b) (2003). Generally, an appeal of an underlying order stays any contempt proceedings to enforce that order until the validity of the order is determined on appeal. N.C. Gen. Stat. § 1-294 (2003); *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982). However, G.S. § 50-13.3(a) authorizes the district court to enforce a custody order "by proceedings for civil contempt during the pendency of the appeal [of that order]." N.C. Gen. Stat. § 50-13.3(a) (2003). In contrast to criminal contempt which "is administered as punishment for acts already committed that have impeded the administration of justice, . . . [c]ivil contempt, . . ., is employed to coerce disobedient defendants into complying with orders of court." *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984). Thus, a district court:

> does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court.

Reynolds v. Reynolds, 147 N.C. App. 566, 573, 557 S.E.2d 126, 131 (2001) (citing *Hudson v. Hudson*, 31 N.C. App. 547, 551, 230 S.E.2d 188, 190 (1976)), *reversed on other grounds*, 356 N.C. 287, 569 S.E.2d 645 (2002).

In the present case, the district court found, based on the testimony of both parties, that "[p]laintiff returned the children to the Defendant on January 16, 2002." Therefore, its conclusion that she "is in willful contempt" is not supported by the findings or evidence. *See Walleshauser v. Walleshauser*, 100 N.C. App. 594, 397 S.E.2d 371 (1990) (in reviewing contempt proceedings, appellate court constrained to determining whether there is competent evidence to support findings of fact and findings support conclusions of law). Moreover, because there was no longer any purpose to be served by holding plaintiff in civil contempt, the conclusion was improper as a matter of law. *Reynolds*, *supra*. The district court was without authority to adjudge plaintiff "to be in willful civil contempt" or to commit her to the custody of the sheriff, even for a suspended sentence, and those portions of the order must be vacated. Because we

vacate the judgment of contempt, we need not address plaintiff's alternative argument that the evidence did not support the district court's finding that her non-compliance with the custody order was willful.

[2] Plaintiff also argues the trial court erred in ordering her to pay defendant's lost wages and attorney's fees. At oral argument, defendant's counsel conceded there is no legal basis upon which the plaintiff could be required, in the contempt proceeding, to compensate him for his lost wages. *See Atassi v. Atassi*, 122 N.C. App. 356, 470 S.E.2d 59 (1996) (compensatory damages inappropriate in contempt proceeding). Therefore, the order requiring plaintiff to pay defendant $252 for his lost wages is vacated.

In addition, plaintiff appears to have conceded, both in her brief and at oral argument, that defendant is entitled to recover his attorney's fees incurred in filing the motion to show cause and in the hearings related thereto.

> As a general rule, attorney's fees in a civil contempt action are not available unless the moving party prevails. Nonetheless, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney's fees is proper.

Reynolds, 147 N.C. App. at 575, 557 S.E.2d at 132. Therefore, that portion of the order requiring plaintiff to pay defendant's North Carolina attorney's fees in the amount of $1,425 is affirmed.

Still at issue, however, is the amount awarded defendant for attorney's fees which he incurred in West Virginia, presumably in connection with the dissolution of the temporary protective order. Generally, a court may not award attorney's fees in the absence of statutory authorization. *In re King*, 281 N.C. 533, 189 S.E.2d 158 (1972). The proceedings in West Virginia were governed by the UCCJEA as codified in that state's statutory scheme. *See* W. Va. Code § 48-20-101 *et seq.* (2003). At least two provisions of the UCCJEA address the issue of attorney's fees. *See* W. Va. Code §§ 48-20-208, 48-20-312. North Carolina has also adopted the UCCJEA and codified the same provisions relating to attorney's fees. *See* N.C. Gen. Stat. § 50A-101 *et seq.* (2003). However, the matter before the district court in this State at the show cause hearing did not implicate Chapter 50A and its provisions may not be relied upon in this case to uphold the award of attor-

ney's fees incurred by defendant in West Virginia, as any such award was within the jurisdiction of the West Virginia court. Accordingly, we hold the district court erred in ordering plaintiff to pay defendant's West Virginia attorney's fees in the amount of $960 for the UCCJEA action in that state, and such portion of the order is vacated.

Affirmed in part; vacated in part.

Judges HUDSON and ELMORE concur.

CHARLOTTE M. FOWLER, EXECUTRIX OF THE ESTATE OF RONALD W. FOWLER, DECEASED, PLAINTIFF v. WENDELL WORSLEY, R.N., IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JOANN EVERTON, R.N., IN HER INDIVIDUAL AND OFFICIAL CAPACITY; ANDREA J. BOWERS, R.N. (FORMERLY KNOWN AS ANDREA KOZAK, R.N.), IN HER INDIVIDUAL AND OFFICIAL CAPACITY; EDNA JACKSON, R.N., IN HER INDIVIDUAL AND OFFICIAL CAPACITY; BETTY WOOTEN, R.N., IN HER INDIVIDUAL AND OFFICIAL CAPACITY; CARRIE PENDER, R.N., IN HER INDIVIDUAL AND OFFICIAL CAPACITY; PATRICIA MELTON, L.P.N., IN HER INDIVIDUAL AND OFFICIAL CAPACITY; NORMA PEARSON, R.N., IN HER INDIVIDUAL AND OFFICIAL CAPACITY; AND ANWAR A. SINNO, M.D., IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEFENDANTS

No. COA02-1025

(Filed 20 May 2003)

Statutes of Limitation and Repose— medical malpractice— amendment of complaint—relation back

Plaintiff's medical malpractice claim against defendant-doctor was not barred by the statute of limitations and the trial court correctly denied defendant's motion to dismiss. Defendant argued that the amended complaint which added him to the action was outside the statute of limitations because it only stated a claim against him in his official capacity and so did not relate back to the original complaint. However, the amended complaint sought relief from the named nurses and doctors jointly and severally and stated that a separate action was being pursued against the hospital.

On writ of certiorari by defendant Anwar A. Sinno, M.D. to review order filed 3 April 2002 by Judge Milton Frederick Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 23 April 2003.

J. Michael Weeks, P.A., by J. Michael Weeks, for plaintiff appellee.

Herrin & Morano, by Mark R. Morano, for defendant-appellant Anwar A. Sinno, M.D.

BRYANT, Judge.

Anwar A. Sinno, M.D. (defendant) seeks review, upon writ of certiorari granted by this Court pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, of an interlocutory order entered 3 April 2002 denying his motion to dismiss a medical malpractice claim filed against defendant in his individual capacity.[1]

On 18 November 1999, plaintiff Charlotte M. Fowler, executrix of the estate of Ronald W. Fowler (Fowler), filed a medical malpractice action against employees of the North Carolina Special Care Center (NCSCC) for Fowler's death. Plaintiff subsequently filed an amended complaint (the amended complaint) on 21 March 2000, adding defendant to the list of defendants. The amended complaint alleged in pertinent part that:

> 3. NCSCC is an agency of the North Carolina Department of Health and Human Services, Division of Mental Health, Developmental Disabilities and Substance Abuse Services, and . . . [p]laintiff is informed and believes that it is licensed as a "Hospital" under the *Hospital Licensure Act*, Article 5, Sections 131E-75, et seq., General Statutes of North Carolina.
>
> . . . .
>
> 87. . . . Defendant . . . was employed by NCSCC and/or a member of its Medical Staff . . . and in his capacity as an employee of

1. Defendant initially appealed the trial court's order arguing it was immediately appealable because it involved the substantial right of sovereign immunity. *See Peverall v. County of Alamance*, 154 N.C. App. 426, 429, 573 S.E.2d 517, 519 (2002) ("[w]here the appeal from an interlocutory order raises issues of sovereign immunity . . . [it] affect[s] a substantial right sufficient to warrant immediate appellate review"), *disc. review denied*, 356 N.C. 676, — S.E.2d — (2003); *see also Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (the denial of a motion to dismiss is not immediately appealable without showing a substantial right is affected). Defendant's appeal, however, does not raise the issue of sovereign immunity. Instead, it requires application of the statute of limitations based on a determination of whether defendant was initially sued in his individual capacity. Accordingly, defendant's appeal would be subject to dismissal absent certiorari under Rule 21 as granted by this Court.

> NCSCC and/or as a member of its Medical Staff he provided medical care to [Fowler] as an inpatient at NCSCC.
>
> . . . .
>
> 89. The professional acts of malpractice by . . . [d]efendant . . . were a proximate cause of the injuries to [Fowler] . . . which resulted in his death on November 22, 1997.
>
> . . . .
>
> 91. On November 17, 1999, . . . [p]laintiff filed a claim under the *Tort Claims Act* to recover damages for the wrongful death of [Fowler] caused by the medical malpractice of the employee staff nurses of the [NCSCC] while providing health care for [Fowler] from August 8 through August 14, 1997.

In the amended complaint's prayer for relief, plaintiff asked to recover damages "jointly and severally" from the named defendants, none of whom included NCSCC.

Defendant filed a motion dated 20 October 2000 to dismiss the amended complaint based on the doctrine of sovereign immunity, alleging plaintiff had only sued defendant in his official capacity. Plaintiff responded on 30 October 2000 by filing a voluntary dismissal of her malpractice action pursuant to North Carolina Rule of Civil Procedure 41(a)(1). Plaintiff re-filed her action on 27 September 2001, specifically stating claims against defendant in both his individual and official capacity. This complaint was further amended on 16 November 2001. Defendant again moved to dismiss the complaint, arguing (1) the doctrine of sovereign immunity barred plaintiff's action against defendant in his official capacity and (2) the statute of limitations barred any action against defendant in his individual capacity because the amended complaint in the first action did not state an individual-capacity claim and thus the re-filed complaint did not relate back to the amended complaint. In two separate orders filed 3 April 2002, the trial court granted defendant's motion to dismiss as to claims against defendant in his official capacity but denied the motion as to claims against him in his individual capacity.

The dispositive issue is whether the amended complaint adding defendant stated a claim against him in his individual capacity so as to allow plaintiff's re-filed complaint to relate back and not be barred by the statute of limitations. Defendant argues the amended com-

plaint only stated a claim against defendant in his official capacity and, therefore, the trial court erred in denying his motion to dismiss in its entirety. We disagree.

Plaintiffs are cautioned to clearly state in their complaint the capacity in which a defendant is sued. *See Mullis v. Sechrest*, 347 N.C. 548, 554, 495 S.E.2d 721, 724 (1998); *Reid v. Town of Madison*, 137 N.C. App. 168, 171, 527 S.E.2d 87, 90 (2000); *Johnson v. York*, 134 N.C. App. 332, 336, 517 S.E.2d 670, 672 (1999); *Warren v. Guilford County*, 129 N.C. App. 836, 839, 500 S.E.2d 470, 472 (1998). When a complaint lacks such clarity, " 'it is appropriate for the court to either look to the allegations contained in the complaint to determine [the] plaintiff's intentions or assume that the plaintiff meant to bring the action against the defendant in his or her official capacity.' " *Mullis*, 347 N.C. at 552, 495 S.E.2d at 723 (citation omitted).

> "The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought . . . . If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities."

Id. (citation omitted). In *Mabrey v. Smith*, this Court further held that where the complaint did not include as a defendant the state-run entity for which the named defendant worked and did not attempt to reach the pockets of the State, the plaintiff had only stated an individual-capacity claim. *Mabrey v. Smith*, 144 N.C. App. 119, 124, 548 S.E.2d 183, 187 (noting that in the line of cases finding only official-capacity claims based on *Mullis* the governmental entities had been included as parties in the complaint), *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001).

In this case, plaintiff did not list NCSCC as a defendant in her amended complaint, and the prayer for relief only sought to recover damages jointly and severally from the nurses and doctors named in the complaint. *See id.* (listing same factors as grounds for determining claim was an individual-capacity claim). Moreover, the amended complaint specifically stated that plaintiff was pursuing a separate action against NCSCC under the Tort Claims Act. We thus conclude that plaintiff's amended complaint sought to recover from defendant

in his individual capacity only. As such, the trial court did not err in denying defendant's motion to dismiss as to any claims against him in his individual capacity.

Affirmed.

Judges TIMMONS-GOODSON and GEER concur.

STATE OF NORTH CAROLINA v. STEVEN DANIEL FISHER, DEFENDANT

No. COA01-1504

(Filed 3 June 2003)

1. Confessions and Incriminating Statements— motion to suppress—written findings of fact and conclusions of law

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress his statement to officers without first making and entering findings of fact and conclusions of law in the record, because: N.C.G.S. § 15A-977(d) does not require findings to be made in writing at the time of the ruling, and effective appellate review is not precluded by an order entered later when the trial court announces its ruling in open court on a motion to suppress and later files its written order with findings of fact and conclusions of law.

2. Confessions and Incriminating Statements— motion to suppress—custodial interrogation

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress his statement to an officer on 16 July 1999 after defendant invoked his right to counsel, because the officer's conduct did not constitute an interrogation when: (1) there was nothing to suggest the officer's words and conduct were intended to accomplish anything other than to honor defendant's rights; (2) nothing in the record suggested any knowledge on the part of the officer concerning any unusual susceptibility by defendant to any particular form of persuasion; and (3) it cannot be said that the officer should have known his conduct was reasonably likely to elicit an incriminating response from defendant.

3. Confessions and Incriminating Statements— motion to suppress—finding of fact—reinstatement of communication after invoking right to counsel

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress his statement to officers even though the trial court failed to make a specific finding of fact as to who reinitiated the communication between defendant and the officers after defendant invoked his right to counsel, because: (1) the factual evidence presented during voir dire was uncontroverted; and (2) the fact that defendant initiated further

contact with the officers may be implied from the facts found by the trial court.

4. Confessions and Incriminating Statements— motion to suppress—failure to give Miranda warnings—inmate

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress his statement to a jail sergeant given without Miranda warnings while defendant was an inmate, because: (1) defendant was at all times free not to talk and return to his cell, and defendant exercised both of these rights at different points during the interview; (2) defendant initiated the meeting with the sergeant; (3) defendant's presence was not required, and at no time was defendant physically restrained from leaving the sergeant's office; and (4) defendant was thus not in custody for purposes of Miranda.

5. Constitutional Law— right to remain silent—custody

Although defendant contends the trial court erred in a first-degree murder case by concluding that a jail sergeant was not required to terminate her interrogation of defendant once defendant invoked his right to remain silent, defendant was not in custody for purposes of Miranda and the sergeant was not prohibited from inquiring into the motivation behind defendant's sudden change of heart regarding the fact that he had previously stated he wanted to make a confession to the pertinent crime and then changed his mind.

6. Confessions and Incriminating Statements— motion to suppress—failure to give Miranda warnings

The trial court did not err in a first-degree murder case by denying defendant inmate's motion to suppress his statement to an officer on 14 July 1999 even though defendant did not receive any Miranda warnings prior to the officer interviewing him, because: (1) Miranda warnings are only required when a criminal defendant is subjected to custodial interrogation; and (2) defendant was not in custody when he asked to speak with the officer, remained at all times free to terminate the conversation with the officer, and in fact did so once he was told that another officer would take his statement the following day.

7. Confessions and Incriminating Statements— motion to suppress—mental capacity

The trial court did not err in a first-degree murder case by denying defendant inmate's motion to suppress his state-

ments to an officer and a jail sergeant without first making specific findings and conclusions concerning defendant's mental capacity, because: (1) admissibility of defendant's statements to these officers was not dependent upon the validity of any waiver of his Miranda rights when neither individual was required to give defendant his Miranda warnings; and (2) although the evidence raised a serious question as to defendant's mental capacity on 14 and 15 July 1999 and specific findings on the issue of defendant's competency at the time he confessed were a prerequisite to the admission of defendant's statements, the error in not making the findings was harmless beyond a reasonable doubt when, even in the absence of defendant's two previous confessions, defendant's 16 July confession comprehensively outlined all of the events and details that had theretofore been provided and the evidence failed to indisputably establish the strongest possibility that defendant was insane and incompetent at the time of his confession.

8. Sentencing— concurrent sentence—life sentence

The trial court did not err in a first-degree murder case by entering a written finding which failed to reflect that defendant's life sentence was to run concurrently with the sentence defendant was already serving which was a term in defendant's plea agreement, because: (1) unless a statute requires the sentences to run consecutively or the trial court's judgment specifies that the sentences shall run consecutively in the judgment, the sentences must, as a matter of law, run concurrently; and (2) defendant was convicted and sentenced for violating N.C.G.S. § 14-17, which has no provision requiring that the sentences imposed under that statute run consecutively with any other undischarged sentence.

9. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form indictment used to charge defendant with first-degree murder was constitutional and complied with the requirements of N.C.G.S. § 15-144.

Judge GEER dissenting.

Appeal by defendant from judgment entered 13 August 2001 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 10 February 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General H. Alan Pell and Special Deputy Attorney General Jonathan P. Babb, for the State.

Paul M. Green for defendant-appellant.

EAGLES, Chief Judge.

Defendant Steven Daniel Fisher appeals from judgment entered in Harnett County Superior Court upon a plea of guilty to the first-degree murder of Wanda Renee James.

The State's evidence tends to establish the following: Defendant first met Wanda Renee James ("James") in June 1995. Defendant was living in Virginia at the time, while James lived in Erwin, North Carolina. Shortly after their first meeting, defendant became romantically involved with James and began driving to Erwin on weekends to stay with James. Sometime during August or September of 1995, defendant quit his job in Virginia and moved in with James at her residence in Erwin. Defendant's romantic relationship with James continued until February 1996, when defendant arrived home from work early one day and discovered James in a state of undress in bed with her ex-boyfriend, Jerry Holder. Defendant was arrested following a brief physical altercation between him and Holder. After his release on bail, defendant returned to Portsmouth, Virginia.

On Friday, 1 March 1996, defendant returned to North Carolina to surrender himself to the bail-bondsmen who had secured his release in February. After being told he could not appear before the court until Monday, 4 March 1996, defendant went to stay with his former employer, Donnie Jacobs, in Godwin, North Carolina. On Saturday, 2 March 1996, after drinking beer and smoking marijuana over a period of approximately six hours, defendant decided to go see James. Defendant fabricated a story about why he was leaving and walked from Jacobs' house to James' house, arriving at James' house sometime between 2:00 a.m. and 3:00 a.m. on 3 March 1996.

Upon his arrival at James' house, defendant noticed that a pickup truck was parked in the yard beside James' car. Defendant entered the house through a side door he knew James always left unlocked and went into James' bedroom. Defendant found James and Holder lying beside each other across the bed. James and Holder were both fully clothed and the smell of alcohol permeated the room. Angry at seeing James and Holder in bed together again, defendant slipped James' bathrobe belt around James' throat and strangled her.

Defendant then went into the kitchen where he poured himself a glass of water, sat down at the kitchen table, drank the water and smoked a cigarette. Defendant remained in the house for approximately 45 minutes to an hour, however, Holder was never alerted to defendant's presence. Defendant left through the same door he entered, taking the glass and bathrobe belt with him, being careful not to touch anything else in the house. Defendant then walked back to Jacobs' house along the same route he had traveled on earlier, disposing of the glass and belt in a ditch along the side of the road. Defendant arrived back at Jacobs' house at approximately 6:30 a.m. on Sunday, 3 March 1996. Holder awoke later, found James dead in the bed, and immediately called police.

Lieutenant Henry Hairr ("Hairr"), of the Erwin, North Carolina Police Department, investigated James' death. Hairr initially noted that there were no signs of forced entry into the home. Hairr testified that he found James' body lying face-down, "crossways" on the bed in the first bedroom on the right as he walked down the hallway of the house. James was wearing a blue turtle neck sweater and a necklace. Hairr noted that the necklace had left an impression on James' neck, just above the top of the neck of the sweater. Also present, were hemorrhages in the whites of James' eyes, which Hairr testified he thought were consistent with strangulation. Hairr noticed that there were two opened packs of cigarettes, one Marlboro and one Winston, lying on the kitchen table. Holder told Hairr the Marlboro cigarettes belonged to him and the Winston cigarettes were James'. Holder further stated that he and James had gone to the C and G Club in Lillington the night before and that he had been drinking heavily that night. Holder said he had no recollection of anything that occurred from the time he and James left the club until he woke up Sunday morning.

From March 1996 until July 1999, defendant told no one about his role in James' death. The initial autopsy report indicated the cause of James' death was "undetermined, [but] associated with a pulmonary congestion and edema and pneumococcus pneumonia," with "underlying factors of alcohol and . . . narcotics." No charges were filed at the time in connection with James' death.

On 14 July 1999, while incarcerated in the Hampton Roads Regional Jail in Portsmouth, Virginia, defendant motioned for the jail officer in charge of his cell-block to let him out of his cell. The POD Manager, Officer Mark A. C. Glover ("Glover"), electronically opened the door to defendant's cell and allowed defendant to walk down-

stairs to the control pod where Glover was working. Defendant asked to speak to Glover in private, so Glover opened the pod door, allowing defendant to "come around and talk . . . in private."

Defendant told Glover that "[he] would like to confess a crime [he] committed because it [wa]s tearing [him] up inside." Defendant waited while Glover contacted his watch commander, Lieutenant Riggans, and relayed what defendant said. Riggans instructed Glover to ascertain whether the confession related to a current or past offense, as well as some basic factual information about the offense and call her back. When Glover asked defendant whether he was confessing to "his current crime or a prior crime," defendant responded by telling Glover that he "murdered a woman on March 3, 1996 in Erwin, North Carolina." Defendant said that once he "realized [he] was getting away with murder it started eating [him] up inside," so he felt he had to tell someone in order to "get this behind [him]." Glover was unable to reach Riggans when he called her back, so Glover relayed the information to Sergeant Edwards. Edwards told Glover that Sergeant Wilkins from internal affairs would take defendant's statement, but would not be available until the following day. Glover relayed this information to defendant, who remarked: "I hope they will come soon, I don't know how long I can take this." Defendant thanked Glover for listening to him and keeping the information confidential and returned to his cell.

On 15 July 1995, at approximately 8:45 a.m., a jail officer escorted defendant to Sergeant Angela Wilkins' office in the Hampton Roads Regional Jail. Once there, the officer waited outside Wilkins' door so that only defendant and Wilkins were present during the interview. Defendant was neither handcuffed nor restrained at any point either before, during or after the interview. The following colloquy took place between defendant and Wilkins:

Sgt: Mr. Fisher, I got word yesterday, which was July 14th, from Sgt. Edwards that you had some information about a murder. And the details that I got was that there was a murder took place, and that it took place in North Carolina. And you wanted to give information in reference to that. Is that what you want to do today?

Fisher: I don't think, I don't want to, I ain't gonna do nothing. I ain't gonna say nothing.

Sgt: Okay, you don't want to make a statement or anything?

Fisher: No.

Sgt: Okay, why'd you change your mind?

Fisher: I don't know.

Sgt: Okay, is it that you [sic] conscience is bothering you, the reason why you wanted to do this in the beginning? Or, is there, did anybody force you to say you wanted to make this statement? Or is this on your own free will?

Fisher: Alright, I'll tell you what happened. Do you want me to start from the beginning?

Sgt: Wherever you want to start it. Wherever you feel comfortable with it.

Fisher: Okay, on March 2, 1996, I was in North Carolina. I was in Cumberland County staying at my boss's house, and uh, I had been drinking and I uh, went to sleep. And I woke up about 12:00 a.m. And I walked from Cumberland County to Irwin. And I went in the side door, which is the kitchen door, of Wanda Renee James' house. The door was unlocked. I went in there, went into the bedroom. Her and this guy named Jerry were laying across the bed, uh, sideways, not, not head to toe, but across the bed. And, uh, I could tell that they had been drinking because I could smell it and they were both passed out. I reached in the uh, closet and got a bathrobe tie. And wrapped it around Wanda Renee James' neck and strangled her until she stopped breathing. And then I left and took the tie with me and uh, went back to my boss's house in Cumberland County and uh, that's pretty much it. She had on a blue turtle neck sweater, blue jeans and some brown shoes. I didn't do nothing to the guy Jerry. He didn't wake up, he didn't move, I didn't make no noise.

The interview ended at approximately 8:55 a.m. and defendant was returned to his housing unit.

Later that same morning, at approximately 11:25 a.m., defendant again attracted the attention of a jail officer by beating on his cell door and pointing at his wrist. After being let out of his cell, defendant told the officer that he had just "confessed to a murder and . . . need[ed] some help before [he] kill[ed him]self." Defendant told the officer that he had cut his wrist before and was currently "trying to

cut it again with [his] toothpaste container." Defendant also said he was "looking for other objects" with which to cut himself. Although defendant required no medical attention, he was subsequently placed on suicide watch pending further evaluation.

On 16 July 1999, defendant was interviewed by Special Agent Michael B. East ("East") of the North Carolina State Bureau of Investigation ("SBI") in the presence of Detective Hairr of the Erwin Police Department, Sergeant Wilkins of the Hampton Roads Regional Jail and Detective Turner of the Portsmouth Police Department. Before beginning the interview, Agent East informed defendant of his constitutional rights by reading them directly from a standard SBI waiver form. Defendant verbally indicated that he understood each individual right after it was read to him by East. After East read defendant his rights, he then read the waiver portion of the form to defendant. Defendant read along with East and at the end of the waiver, defendant indicated that he did not wish to sign the form. When East inquired as to the reason, defendant stated that "he wanted to talk to an attorney."

East made a notation below the signature line of the form which said: "refused to sign, 3:15 p.m." East then asked defendant if he "kn[e]w the name of his attorney . . . ." When defendant responded negatively, East told defendant that they "couldn't question him any more about it since he had requested to speak with an attorney." East then laid the waiver form and pen down on the table in front of him, reached into his pocket and removed a business card. East handed his card to defendant and told him that "after he talked to an attorney, if he still wanted to talk about this incident, either he or his attorney could contact [him] at the number on the business card." East then pointed in the direction of Detective Hairr and said "he and I are going back to Erwin . . . ." When Detective Hairr stood up and began walking toward the door, defendant "grabbed" the waiver form and pen from the desk and said "[a]ll right, I'll sign it." Defendant signed the waiver and initialed the notation of refusal East had made earlier on the form.

Thereafter defendant gave a complete account of his involvement in the death of Wanda Renee James, recounting the events exactly as he had to Sgt. Wilkins. In addition, defendant described how he had wrapped the belt around the turtle neck portion of James' sweater, which prevented the belt from touching her neck and twisted it until James stopped breathing. Defendant also provided

a detailed description of the crime scene, including accurate accounts of: (1) the position of James' body on the bed; (2) the clothes that both James and Holder were wearing that morning; (3) the position of the cigarettes on the kitchen table and that there were both Marlboro and Winston cigarettes; and (4) which lights were and were not on in the house.

On 30 August 1999, defendant was indicted for the first-degree murder of Wanda Renee James. Defendant moved pursuant to N.C. Gen. Stat. § 15A-974 to suppress all statements made by him to law enforcement officers on grounds that the statements were obtained in violation of the Fifth Amendment to the United States Constitution. On 8 August 2001, following an evidentiary hearing, the trial court denied defendant's motion to suppress per G.S. 15A-979(b). On 13 August 2001, defendant entered a plea of guilty, pursuant to a negotiated plea agreement expressly reserving his right to appeal the denial of his motion to suppress. The trial court entered judgment on defendant's plea of guilty and sentenced defendant to life in prison without possibility of parole. Defendant appeals.

I.

[1] Defendant first contends the trial court erred by denying his motion to suppress without first making and entering findings of fact and conclusions of law in the record. Defendant argues that N.C. Gen. Stat. § 15A-977(d) requires that findings of fact be made before any determination on the issue of suppression. We disagree.

G.S. 15A-977 provides that when a suppression hearing is held, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (1999). "Findings and conclusions are required in order that there may be a meaningful appellate review of the decision. [However, t]he statute does not require that the findings be made in writing at the time of the ruling." *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984). Effective appellate review is not precluded by an order being entered later when "the trial judge announce[s] his ruling in open court on a motion to suppress and later file[s] his written order with findings of fact and conclusions of law." *Id.*

Here, following a suppression hearing, the trial judge announced his ruling in open court. The trial judge later filed a written order setting forth his findings of fact and conclusions of law. Accordingly, we conclude this assignment of error is without merit.

II.

[2] Defendant next contends the trial court erred by failing to suppress the statement he made to Agent East on 16 July 1999. Defendant argues that his statement was inadmissible because Agent East continued to interrogate him after he invoked his right to counsel in violation of *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981). We disagree.

We begin by noting that " 'the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' ' " *State v. Johnston*, 154 N.C. App. 500, 502, 572 S.E.2d 438, 440 (2002) (citations omitted). However, because "[t]he determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law," this question is fully reviewable on appeal. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992).

Once an accused invokes his right to counsel during a custodial interrogation, "the interrogation must cease and cannot be resumed without an attorney being present '*unless the accused himself initiates further communication, exchanges, or conversations with the police.*' " *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000) (quoting *Edwards v. Arizona*, 451 U.S. 477, 485, 68 L. Ed. 2d 378, 386 (1981)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). However, not every statement obtained by police from a person in custody is considered the product of interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 299, 64 L. Ed. 2d 297, 307 (1980). Interrogation is defined as either "express questioning by law enforcement officers," *Golphin*, 352 N.C. at 406, 533 S.E.2d at 199, or conduct on the part of law enforcement officers which constitutes the "functional equivalent" of express questioning. *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308. The latter is satisfied by "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* "However, because 'the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.' " *Golphin*, 352 N.C. at 406, 533 S.E.2d at 199 (citation omitted) (emphasis in original). Factors that are relevant to the determination of whether police "should have known" their conduct was

likely to elicit an incriminating response include: (1) "the intent of the police"; (2) whether the "practice is designed to elicit an incriminating response from the accused"; and (3) "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . ." *Innis*, 446 U.S. at 302, 64 L. Ed. 2d at 308 (fn. 7, 8).

Defendant argues that Agent East's conduct, from the time defendant invoked his right to counsel until he signed the waiver of rights, "constitutes words and actions reasonably likely to elicit an incriminating response." However, there is nothing in the record that suggests Agent East's words and conduct were intended to accomplish anything other than to scrupulously honor defendant's rights. Considering that East had traveled from North Carolina to Virginia to speak with defendant, it was not unreasonable for East to attempt to ascertain the name of defendant's Virginia attorney in the hope that the attorney's presence could be procured promptly in order that the interview might be conducted before East returned to North Carolina. Once this effort failed, however, East unequivocally told defendant he would be willing to listen to defendant only after defendant had an opportunity to speak with his attorney. It was at this point that defendant re-initiated communication with the officers. Moreover, nothing in the record tends to suggest any knowledge on the part of Agent East concerning any unusual susceptibility by defendant to any particular form of persuasion. Therefore, we cannot say this practice was designed to elicit an incriminating response from defendant. Similarly, we cannot say that Agent East should have known his conduct was reasonably likely to elicit an incriminating response from defendant. Accordingly, we conclude that Agent East's conduct did not constitute interrogation under the Fifth Amendment.

[3] Relying on *State v. Lang*, 309 N.C. 512, 308 S.E.2d 317 (1983), defendant next argues that the order denying suppression was fatally defective for want of a specific finding of fact as to who reinitiated the communication between defendant and the officers after defendant invoked his right to counsel. We disagree.

"The general rule is that, at the close of a *voir dire* hearing to determine the admissibility of a defendant's confession, the presiding judge *should* make findings of fact to show the basis of his ruling." *Id.* at 520, 308 S.E.2d at 321.

> If there is a *material* conflict in the evidence on *voir dire* he *must* do so in order to resolve the conflict. If there is no con-

> flict in the evidence on *voir dire*, it is not error to admit a confession without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. In that event the necessary findings are implied from the admission of the confession into evidence.

State v. Riddick, 291 N.C. 399, 408-09, 230 S.E.2d 506, 512 (1976) (citations omitted).

In *Lang*, our Supreme Court construed *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981), and *Oregon v. Bradshaw*, 462 U.S. 1039, 77 L. Ed. 2d 405 (1983), to require, in cases like *Lang*: (1) "a finding of fact as to who initiated the communication between the defendant and the officers which resulted in his inculpatory statement while in custody and after he had invoked the right to have counsel present during interrogation," *Lang*, 309 N.C. at 521, 308 S.E.2d at 321-22; and (2) "findings and conclusions establishing whether the defendant validly waived the right to counsel and to silence under the totality of the circumstances . . . ." *Id.* at 522, 308 S.E.2d at 322. However, *Lang* is inapposite here because in *Lang*, material conflicts existed in the evidence presented on *voir dire*, particularly with respect to who initiated the contact between defendant and the police after defendant first invoked his right to counsel. *Id.* at 520-21, 308 S.E.2d at 321.

Here, unlike *Lang*, the factual evidence presented during *voir dire* was uncontroverted. The only conflict concerned the legal conclusions to be drawn from the evidence presented. Therefore, it was not necessary for the trial judge to make a specific finding of fact on this issue. Furthermore, the trial judge specifically found:

> 10. Agent East informed the defendant orally and in writing of his *Miranda* rights. Defendant stated that he would not sign the waiver of his rights and that he wanted to talk with an attorney.
>
> 11. Agent East gave the defendant his business card and told defendant to call him if defendant changed his mind. As Agent East and Det. Hairr were leaving the room, defendant snatched the *Miranda* rights form and signed the waiver, stating that he wanted to talk with the officers regarding the murder he committed in Erwin, North Carolina.
>
> . . . .

14. Defendant understood and waived his *Miranda* rights, and his statement to these officers was made freely and voluntarily. He was rational and coherent throughout his conversation with the officers.

We conclude that the fact that defendant initiated further contact with the officers may fairly be implied from the facts found by the trial court. Accordingly, this assignment of error is rejected.

III.

[4] Defendant next contends the trial court erred by failing to suppress the statement he made to Sergeant Wilkins on 15 July 1999. Defendant first argues that Sergeant Wilkins was required to advise him of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). We disagree.

"It is well established that *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), *disc. review denied*, 354 N.C. 578, 559 S.E.2d 549 (2001). Because the determination of whether a defendant was in custody is a question of law, it is fully reviewable here. *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000).

> "A person is in custody, for purposes of *Miranda*, when he is 'taken into custody or otherwise deprived of his freedom of action in any significant way,' " and an inmate who is subject to a custodial interrogation is entitled to *Miranda* warnings[.] An inmate, however, is not, because of his incarceration, automatically in custody for the purposes of *Miranda*; rather, whether an inmate is in custody must be determined by considering his freedom to depart from the place of his interrogation.

Id. at 129, 526 S.E.2d at 680-81 (citations omitted) (emphasis added).

Factors which bear on the determination of whether an inmate is in custody for purposes of *Miranda* include: (1) whether "the inmate was free to refuse to go to the place of the interrogation"; (2) whether "the inmate was told that participation in the interrogation was voluntary and that he was free to leave at any time"; (3) whether "the inmate was physically restrained from leaving the place of interrogation"; and (4) whether "the inmate was free to refuse to answer questions." *Id.*

In *Briggs*, the defendant inmate was under investigation for communicating threats to someone outside the institution. Defendant was placed in segregated lockup, pending the outcome of the investigation. Prior to being questioned by jail officials, defendant was escorted to an office "in waist restraints and handcuffs." *Id.* The investigating officer, Stancil, testified that defendant was "required" to come to his office and defendant remained physically restrained throughout the interrogation. However, defendant was at all times " 'free not to talk' and return to his cell." *Id.* at 129, 526 S.E.2d at 681. This Court concluded that because defendant "was free to leave Stancil's office and return to his cell at any time, [he] was not in custody for the purposes of *Miranda*." *Id.*

Here, Wilkins testified that at the time defendant was brought to her office, she "didn't have a reason to talk to him." Wilkins arranged to have defendant brought to her office only after she was informed that defendant "wanted to provide [her] with information about a murder." Defendant was escorted to Wilkins' office by one jail officer, who waited outside Wilkins' office during the interview. Defendant was neither handcuffed nor restrained and was at all times "free to quit talking and get up and walk out of [the] office." Indeed, defendant left Wilkins' office and was returned to his housing unit after the conversation.

Like *Briggs*, defendant was at all times free not to talk and return to his cell. Indeed, defendant exercised both of these rights at different points during the interview. However, unlike *Briggs*, it was defendant who initiated the meeting with Wilkins. Defendant's presence was not required. Moreover, at no time was defendant physically restrained from leaving Wilkins' office. We conclude defendant was not "in custody" for purposes of *Miranda* on 15 July 1999. Because defendant was not subjected to "custodial interrogation," Sergeant Wilkins was not required to give defendant his *Miranda* warnings prior to the interview.

[5] Defendant next argues that Sergeant Wilkins was required to terminate the interrogation once defendant invoked his right to remain silent. We disagree.

"Once [*Miranda*] warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74, 16 L. Ed. 2d at 723. However, the protections of *Miranda* and the

Fifth Amendment are only implicated when a criminal defendant is subjected to custodial interrogation. *Patterson*, 146 N.C. App. at 121, 552 S.E.2d at 253. Because we have already concluded that defendant was not in custody for purposes of *Miranda*, Sergeant Wilkins was not prohibited from inquiring into the motivation behind defendant's sudden change of heart. Accordingly, this assignment of error is rejected.

IV.

[6] Defendant next contends the trial court erred by failing to suppress the statement he made to Officer Glover on 14 July 1999. Defendant argues that Officer Glover was required to give him *Miranda* warnings prior to interviewing him. We disagree.

We reiterate that *Miranda* warnings are only required when a criminal defendant is subjected to custodial interrogation, *Patterson*, 146 N.C. App. at 121, 552 S.E.2d at 253, and the determination of whether an inmate is "in custody" for purposes of *Miranda* depends upon "his freedom to depart from the place of his interrogation." *Briggs*, 137 N.C. App. at 129, 526 S.E.2d at 681.

Here, defendant asked Officer Glover to let him out of his individual cell so he could talk with Officer Glover in private. Defendant was allowed to walk, unescorted and unrestrained, from his cell to the control pod where Officer Glover was working. Defendant remained, at all times, free to terminate the conversation with Officer Glover and return to his cell and indeed did so once he was told that another officer would take his statement the following day. Because defendant was not "in custody," Officer Glover was not required to give him his *Miranda* warnings. Accordingly, this assignment of error is rejected.

V.

[7] Defendant next contends the trial court erred by failing to suppress his statements to Officer Glover and Sergeant Wilkins without first making specific findings and conclusions concerning his mental capacity. Defendant first argues that the trial court was required to make specific findings concerning his mental capacity to validly waive his rights under *Miranda*. We disagree.

We have already noted that the trial court is required to enter specific findings only if there is a "*material* conflict in the evidence on *voir dire* . . . ." *State v. Riddick*, 291 N.C. 399, 408-09, 230 S.E.2d 506,

512 (1976). However, if the only conflict in the evidence is *immaterial*, meaning it has no effect on the admissibility of the confession, it is not error to admit the confession without specific findings. *Id.* at 409, 230 S.E.2d at 512-13.

Here, we have concluded that neither Officer Glover nor Sergeant Wilkins were required to give defendant his *Miranda* warnings. We hold it was not error for the trial court to admit defendant's confession without a specific finding on defendant's capacity to waive his rights under *Miranda* since admissibility of defendant's statements to these officers was not dependent upon the validity of any waiver of his *Miranda* rights.

Defendant next argues that because his evidence "rais[ed] a serious question" as to his mental capacity on 14 and 15 July 1999, specific findings were required before the trial court could properly admit any extra-judicial confessions made during that time. We agree. However, after careful review of the record and transcript, we conclude defendant suffered no prejudice.

Because a confession that is given while a defendant is insane is not given freely, voluntarily and understandingly, both the Fifth and Fourteenth Amendments prohibit subsequent admission of that confession against the defendant at trial. *See Blackburn v. Alabama*, 361 U.S. 199, 4 L. Ed. 2d 242 (1960); *State v. Ross*, 297 N.C. 137, 254 S.E.2d 10 (1979). Moreover, "[w]hen there is a material conflict in the evidence on *voir dire*, the judge *must* make findings of fact resolving any such material conflict." *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983) (emphasis omitted).

Here, defendant moved to suppress his confessions on grounds that *inter alia*, he was psychotic when he confessed. During *voir dire*, defendant offered the testimony of Dr. Nicole Wolfe, an expert in the field of forensic psychiatry. Dr. Wolfe testified that she had evaluated defendant in February 2001 and determined that he was competent to stand trial. Although Dr. Wolfe stated that she was unable to form an opinion concerning defendant's competence on 15 July 1999, she testified that after reviewing the record she had noted a number of contemporaneously occurring "behavioral manifestations" that made her "question his mental state." The manifestations to which Dr. Wolfe testified consisted primarily of: (1) defendant's diagnosis as suffering from Bipolar I disorder, which is characterized by "rapidly shifting mood disturbances"; (2) defendant's demonstration of the symptoms of "acute depression"; (3) defendant's confes-

sion and suicide attempt which occurred approximately one week after the discontinuance of one of his medications, Haldol, which had been prescribed "because of acute psychotic episodes"; (4) defendant's statement that he heard voices telling him to eat feces and drink urine until he died; and (5) Liberty Forensic Unit's 22 July 1999 assessment that defendant had "decompensated psychiatrically" on 15 July 1999. While the State presented no expert testimony in rebuttal, the State's witnesses, *i.e.*, the officers who questioned defendant, testified that defendant appeared rational, coherent and in full possession of his faculties throughout their conversations with him.

We conclude specific findings on the issue of defendant's competency at the time he confessed were a prerequisite to the admission of defendant's statements. However, we conclude that the absence of findings here was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (1999).

First, the trial court properly admitted defendant's 16 July 1999 confession to Agent East. In its order, the trial court specifically concluded that defendant had the mental capacity to "freely, knowingly, and understandingly waive his *Miranda* rights on July 16, 1999." As this conclusion is adequately supported by the trial court's findings of fact which are supported by competent evidence in the record, it is binding on appeal. *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). Moreover, since defendant's 16 July confession comprehensively outlined all of the events and details that had theretofore been provided, even in the absence of the two previous confessions, there is no reasonable possibility that there would have been a different result at trial.

Next, a confession must be excluded only when, after considering all of the circumstances and the entire record, " 'the evidence indisputably establishes the strongest probability that the defendant was insane and incompetent at the time he allegedly confessed.' " *Ross*, 297 N.C. at 141, 254 S.E.2d at 12 (emphasis omitted) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 207, 4 L. Ed. 2d 242, 248 (1960)).

In *Ross*, there was evidence tending to establish the following: (1) the defendant's history indicated that he had been mentally ill for the past twelve to thirteen years, which had caused defendant to be hospitalized several times; (2) the defendant had not worked for any appreciable period of time in five years; (3) the defendant had been

involuntarily committed for an unrelated incident just one week prior to the confession; (4) three days before the confession, the defendant had been taken to a mental health clinic, where he received medication and made an appointment to see a psychiatrist; (5) the therapist who spoke with the defendant that day testified that "the defendant's mood and affect were 'inappropriate,' he had 'poor judgment,' and 'there was a very high likelihood that he was suffering from psychotic conditions,' specifically schizophrenia"; (6) the defendant's brother testified that during the days immediately preceding the crime and confession, defendant was scheduled to work for him, however, defendant's condition and bizarre behavior prevented him from working; (7) the defendant's condition had deteriorated to the point that his brother had to arrange for someone to stay with the defendant during the day because he was incapable of taking care of himself; (8) the defendant's brother testified that on the day of the crime, the day before the confession, the defendant "looked like he was just off"; (9) the victim testified that at the time of the crime the defendant "looked strange"; (10) the psychiatrist who interviewed defendant three days after he made the confession testified that the "defendant was suffering from 'chronic, undifferentiated schizophrenia,' which includes delusions and a 'misinterpretation of reality' . . . and [that] the defendant is much more likely to be sane when he takes his medication"; and, (11) the evidence in the record tended to suggest that defendant had not taken his medicine for some time prior to his confession. *Id.* at 141-42, 254 S.E.2d at 12-13. The *Ross* court concluded that these facts compelled the conclusion that the confession was "made when the accused was in all probability mentally incompetent." *Id.* at 144, 254 S.E.2d at 14.

Here, the record indicates that defendant's history of mental illness began in 1990 when he was evaluated to determine whether he was "too depressed to go to court on charges of arson." Defendant was diagnosed as having an "adjustment disorder and discharged back to [the] court." Defendant next saw mental health authorities in May 1999, when he was evaluated following an arrest that stemmed from the loss of his job for bizarre behavior and an assault on his uncle. Defendant was diagnosed as having Bipolar disorder and was released with a prescription for Depakote. Defendant was evaluated again in July 1999, following his confession to Sergeant Wilkins and subsequent suicide attempt.

While defendant was found to have "decompensated psychiatrically" on 15 July, unlike *Ross*, defendant was not diagnosed as psy-

chotic at this time. On the contrary, "[h]is emotional state was thought to be affected by the possibility of additional charges." Furthermore, defendant's Haldol treatment was discontinued at his own request on 7 July after the psychiatrist noted that defendant "had been stable on [Depakote] before." Following this discontinuance, no aberrant behavior on the part of defendant was noted by anyone associated with the jail until he told a jail officer he was contemplating suicide, approximately six and one-half hours after he confessed to Sergeant Wilkins.

The record further indicates that apart from the May 1999 incident involving his uncle, defendant had no trouble securing or maintaining a job, despite his dependence on alcohol and chronic abuse of a wide variety of illegal drugs. Likewise, there is no indication that defendant had ever been involuntarily committed or evaluated psychiatrically at any time other than during periods of incarceration for various criminal charges. Finally, while Dr. Wolfe testified that certain circumstances caused her to question defendant's mental capacity on 15 July 1999, neither she nor any of the other physicians she consulted were able to formulate an opinion concerning defendant's competency during this time. In fact, Dr. Wolfe admitted on cross-examination that defendant's suicide attempt could just as easily have been attributable to depression, which is a characteristic of Bipolar I disorder.

Accordingly, we conclude that the evidence fails to " 'indisputably establish[] the strongest probability that the defendant was insane and incompetent at the time' " of his confession. *Ross*, 297 N.C. at 141, 254 S.E.2d at 12 (emphasis and citation omitted). We hold defendant suffered no prejudice by the trial court's failure to make findings concerning his competency on 14 and 15 July 1999.

The dissent maintains that defendant is entitled to a new suppression hearing, in part because "the trial court improperly shifted the burden of proof to defendant regarding the voluntariness of his confessions and his competency to waive his *Miranda* rights . . . ." We note that the scope of appellate review is "confined to a consideration of those assignments of error set out in the record on appeal," N.C.R. App. P. 10(a), and "presented in the several briefs." N.C.R. App. P. 28(a). This question was not the subject of an assignment of error and therefore is not subject to review by this Court. Indeed, because this contention is not discussed in defendant's brief, it is beyond the scope of our review.

Even if the issue were before us, based on the same reasoning applied in *State v. Cheek*, 307 N.C. 552, 299 S.E.2d 633 (1983), we hold that any error was harmless beyond a reasonable doubt. First, the trial court here made no remarks during *voir dire* that indicated the burden had been shifted to defendant. Indeed, careful review of the record and transcript reveals that the burden of persuasion remained on the State at all times during the suppression hearing. Moreover, although the trial judge concluded that defendant "failed to establish that [he] lacked mental capacity," the trial judge did not "couch his findings" in this language, *id.* at 558, 229 S.E.2d 637; rather, the trial court's findings of fact and conclusions of law affirmatively stated that defendant "was rational and coherent throughout his conversation with the officers" and "freely, knowingly and voluntarily waived his *Miranda* rights." Finally, these findings and conclusions are amply supported by the evidence, notwithstanding the existence of evidence to the contrary.

VI.

[8] Defendant next contends the trial court erred by entering a written judgment which fails to reflect that the life sentence was to run concurrently with the sentence defendant was already serving. Defendant argues that because this was an essential term of his plea agreement, the failure of the trial court to indicate it on the face of the judgment deprived him of due process of law. We disagree.

G.S. 15A-1354 gives the trial court express authority to determine whether sentences shall run concurrently or consecutively. The statute provides in part:

> When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

N.C. Gen. Stat. § 15A-1354(a) (1999).

Unless a statute requires the sentences to run consecutively or the trial court's judgment specifies that the sentences shall run consecutively in the judgment, the sentences must, as a matter of law, run concurrently. *Id.*; *State v. Wall*, 348 N.C. 671, 675, 502 S.E.2d 585, 587 (1998).

Here, defendant was convicted and sentenced for violating G.S. 14-17. There is no provision in G.S. § 14-17 requiring that sentences imposed under that statute run consecutively with any other undischarged sentences. The judgment does not specify whether defendant's sentence is to run concurrently or consecutively. By statute, defendant's life sentence must run concurrently with his remaining undischarged sentences. Accordingly, we conclude defendant suffered no prejudice as a result of the trial court's failure to have the judgment reflect this particular term of defendant's plea agreement.

VII.

[9] Defendant's final contention is that the indictment upon which his conviction is based will not support a conviction of first-degree murder because it fails to specifically allege any of the circumstances enumerated in G.S. § 14-17 that elevate second-degree murder to first-degree murder. We disagree.

Our Supreme Court has consistently held that "[a]n indictment that complies with the requirements of N.C.G.S. § 15-144 will support a conviction of both first-degree and second-degree murder." *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Moreover, because G.S. 14-17 is specifically referenced on the short-form murder indictment, it will support a conviction of first-degree murder under any theory set forth in G.S. 14-17, without the need for a separate allegation of the particular theory upon which first-degree murder is based. *Id.*

Here, the indictment upon which defendant was convicted complied in all respects with the requirements of G.S. 15-144. Accordingly, we conclude this assignment of error is without merit.

We hold that defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judge MARTIN concurs.

Judge GEER dissents in a separate opinion.

GEER, Judge dissenting.

Because I believe that the trial court improperly shifted the burden of proof to defendant regarding the voluntariness of his confes-

sions and his competency to waive his *Miranda* rights, I respectfully dissent. I would reverse and remand for a new hearing on defendant's motion to suppress.

As the majority notes, a trial court's findings of fact are conclusive on appeal as long as they are supported by competent evidence, even if the record contains conflicting evidence. *State v. Eason*, 336 N.C. 730, 445 S.E.2d 917 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995). When, however, those findings have been made under a misapprehension of the law, they must be set aside and the case remanded so that the evidence may be considered in its true legal light. *Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973). I believe that is the situation here.

The majority states that the burden of proof issue is not the subject of an assignment of error and, therefore, should not be addressed by this Court. I believe that this issue is encompassed within assignments of error 4, 5, and 6. Although those assignments of error are broad, they are no broader than assignments of error routinely assumed to pass muster by this Court in other cases. I see no reason to elect to impose a more rigorous standard for assignments of error in this case than in cases where less is at stake.

While the majority is correct that the burden of proof issue was not specifically briefed, I believe that this case presents a classic example of when this Court should suspend its rules "[t]o prevent manifest injustice to a party." N.C.R. App. P. 2. I can conceive of no more fundamental an error than placing the burden of proof on the wrong party in a criminal case. Given the fundamental nature of the error, the sparseness of the evidence presented by the State on competence when contrasted to the expert evidence of defendant, and the consequences of this error (life imprisonment without parole), I believe that the Court should address this issue.

I

In denying defendant's motion to suppress, the trial court concluded: "Defendant has failed to establish that defendant lacked the mental capacity to freely, knowingly, and understandingly waive his *Miranda* rights on July 16, 1999." The trial court thus placed the burden of proof on defendant. The law is, however, unquestionably otherwise.

Both this Court and the Supreme Court have repeatedly confirmed that the State bears the burden of proof as to the voluntariness

of a confession and as to the validity of a waiver of *Miranda* rights. *See, e.g., State v. Knight*, 340 N.C. 531, 550, 459 S.E.2d 481, 493 (1995) ("The State bears the burden of proving that a defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary."); *State v. Brown*, 112 N.C. App. 390, 396, 436 S.E.2d 163, 167 (1993) ("A defendant may waive his Miranda rights, but the State bears the burden of proving that the defendant made a knowing and intelligent waiver."), *disc. review denied*, 335 N.C. 561, 441 S.E.2d 124 (1994), and *aff'd per curiam*, 339 N.C. 606, 453 S.E.2d 165 (1995); *State v. Williams*, 59 N.C. App. 15, 24, 295 S.E.2d 493, 498 (1982) ("Upon reviewing the evidence before the court on the motion to suppress [based on incompetency], we hold that the State failed to meet its heavy burden to affirmatively demonstrate a knowing and intelligent waiver by defendant."). The trial court's requirement that defendant "establish" his lack of mental capacity cannot be reconciled with this well-established principle.

State v. Cheek, 307 N.C. 552, 299 S.E.2d 633 (1983) confirms this conclusion. In *Cheek*, the defendant argued that "the trial judge impermissibly placed the burden of proving that the statement was not voluntarily made on defendant" by stating at the beginning of the voir dire hearing on the defendant's motion to suppress, " 'The burden is on the defendant on a motion to suppress.' " *Id.* at 556, 299 S.E.2d at 636. In addressing this argument, the Supreme Court first noted that when a trial judge conducts a hearing on the voluntariness of a statement, "the burden is upon the state to demonstrate the admissibility of the challenged evidence; and, in the case of a confession, the state must affirmatively show (1) the confession was voluntarily made, (2) the defendant was fully informed of his rights and (3) the defendant voluntarily waived his rights." *Id.* at 557, 299 S.E.2d at 636. To meet this burden, "the state must persuade the trial judge, sitting as the trier of fact, by a preponderance of the evidence that the facts upon which it relies to sustain admissibility and which are at issue are true." *Id.*, 299 S.E.2d at 636-37.

In determining in *Cheek* that the trial court did not shift the burden of proof, but rather only placed on defendant the burden of going forward, the Supreme Court stressed that the trial court had not made any statement such as "defendant has failed to show that the statement was not voluntarily given." *Id.* at 558, 299 S.E.2d at 637. Such a statement "would have indicated that he impermissibly placed the burden of persuasion on defendant." *Id.* In this case, by contrast, the trial court's order includes precisely such a statement. Conclusion of

law number five establishes that the court erroneously shifted the burden of proof to defendant when our case law is clear that the State has the "heavy burden to affirmatively demonstrate a knowing and intelligent waiver by defendant." *Williams*, 59 N.C. App. at 24, 295 S.E.2d at 498.

The majority claims that *Cheek* supports the conclusion that any error was harmless beyond a reasonable doubt. I see no meaningful distinction between the conclusion of law in this case—"[d]efendant has failed to establish that defendant lacked the mental capacity" to waive his rights—and the statement used in *Cheek*—"defendant has failed to show that the statement was not voluntarily given"—as an example of a statement demonstrating that the court "impermissibly placed the burden of persuasion on defendant." *Cheek*, 307 N.C. at 558, 299 S.E.2d at 637. The lack of any reference to the burden of proof in the findings of fact is not a surprise since the burden of proof is a question of law properly included in the conclusions of law. I am not willing to assume that the trial court applied the correct burden of proof when the written conclusion of law in his order so plainly indicates otherwise.

I also cannot conclude that this fundamental error is harmless beyond a reasonable doubt. Ample evidence exists from which a trial court could have concluded that the State did not meet its burden of demonstrating that defendant properly waived his *Miranda* rights and voluntarily confessed.

The relevant evidence—left unchallenged by the State and unaddressed by the trial court—includes much of Dr. Wolfe's testimony regarding defendant and the Dorothea Dix report submitted by defendant. The Dix report was based on interviews with Fisher, review of prior hospital records, and information obtained from Fisher's attorney, the county jail, the clerk of court, and the district attorney.

The Dix report indicates that Fisher reported his first hospitalization as occurring at age 18 (approximately in 1982) for a suicide attempt. Due to suicide attempts, threats, and "women problems," he was admitted to psychiatric hospitals in Virginia on three other occasions. In addition, he was assessed at Central State Hospital in Virginia in 1990 because of a concern that he was too depressed to stand trial.

In addition to these hospital admissions, evidence in the record shows that immediately before Fisher was jailed in Virginia in May

1999, he had "a number of manic/psychotic episodes." He was admitted to the Peninsula Behavioral Center on 14 May 1999 because of bizarre behavior towards his boss, including placing three Christian crosses on his boss' desk after concluding that his boss was evil, and his becoming belligerent and assaultive in an emergency room. Around this same time, Fisher assaulted his uncle and broke his nose because a voice told Fisher that his uncle was a demon. The Dix report concludes that Fisher had engaged in bizarre behavior and was hyper-religious.

Fisher reported to the Dix team that while he was in jail in 1999 "voices were driving him crazy so he talked to a guard about what happened in North Carolina." The report also states that the voice of God always talked to Fisher while he was in Virginia.

Dr. Wolfe testified that two months before the confession, defendant was "very psychotic" and required commitment to two different psychiatric hospitals. According to Dr. Wolfe, on 7 July 1999 defendant's Haldol—an antipsychotic agent—was discontinued. Dr. Wolfe further testified that by 19 July 1999—three days after the East confession—defendant again "had become quite psychotic, talking about needing to . . . drink urine and eat feces until he died." He was put back on Haldol.

No medical records exist from 15 or 16 July 1999, but Dr. Wolfe reviewed the records from Liberty Forensic Unit, which indicated that defendant was admitted there on 22 July 1999. She noted that Liberty reported that Fisher "had decompensated psychiatrically on 7/15/99." She explained: "It means that somebody has been doing well and then pretty acutely, pretty suddenly, they're not doing well at all."

Although Dr. Wolfe desired additional information—apparently medical records from other states—in order to further assess whether or not defendant was competent when he confessed, Dr. Wolfe testified that when Fisher made his confessions, "he was not mentally stable." She explained: "That to me means within a week of getting off of the antipsychotic medication, he became psychotic. That date coincides with the date he gave his confession on the 15th. And several days later, he got admitted to the state psychiatric facility where he stayed for almost two months." The Dix report also flatly concludes: "He became psychotic again on the day of his confession." Dr. Wolfe explained that "[p]sychosis is a term that we refer to being out of touch with reality. Mr. Fisher has a lot of reli-

gious preoccupations. He has been very psychotic on several occasions to the point where he clearly did not know reality from what was in his mind."

At the hearing below, despite this extensive evidence, the State barely acknowledged the need to determine defendant's competency to confess or waive his rights. The State did not even bother to address that issue in its argument to the trial court on the motion to suppress. And, when the State's evidence is placed on the other side of the scale from defendant's evidence, the scale hardly moves. In opposition to the expert evidence from employees of the State, the prosecution offered only the lay opinion testimony of three law enforcement officers that Fisher appeared depressed, but coherent; that he was able to carry on logical conversations; and that he appeared rational. During the conversation with Agent East, however, Fisher was in paper clothing because of a suicide attempt.

State v. Ross, 297 N.C. 137, 254 S.E.2d 10 (1979), discussed by the majority, demonstrates that the evidence before the trial court was sufficient to lead to the conclusion that the State failed to meet its burden of proof.[1] In *Ross*, the defendant had a history of mental illness with several prior hospitalizations; he had not worked for five years; a week before his confession, he was involved in an incident that led to involuntary commitment; three days before the confession there was a very high likelihood that he was suffering from psychotic conditions; he engaged in bizarre behavior before the confession; he was placed on medication; while in jail, he did not have access to his medication; and three days after the confession, he was diagnosed as suffering from schizophrenia, including delusions and a misinterpretation of reality. *Id.* at 141-42, 254 S.E.2d at 12-13. The State relied only upon the testimony of a deputy sheriff, present during defendant's statement, that the defendant was logical and made sense. The *Ross* Court found the totality of evidence to be "compelling facts" justifying a conclusion of incompetency. *Id.* at 144, 254 S.E.2d at 14.

The evidence before this Court substantially parallels that of *Ross*. It suggests that Fisher had a history of mental illness and hospitalizations; that shortly before his confession he engaged in bizarre behavior causing him to be fired, arrested, hospitalized twice, deemed psychotic, and placed on the anti-psychotic medication Haldol; that he confessed while no longer taking his anti-psychotic

1. *Ross* can even be read as requiring a conclusion of incompetency on appeal, but I believe that the trial court should be given an opportunity to address the question in the first instance employing the proper burden of proof.

medication;[2] that he was psychotic and mentally unstable when making his confessions; and that, immediately following his confession, he again engaged in bizarre behavior and was deemed psychotic to the point of being out of touch with reality. Also, just as in *Ross*, the only evidence from the State was lay opinion testimony from law enforcement officers regarding Fisher's behavior during their meetings with him. If such evidence was sufficient in *Ross* to establish incompetency as a matter of law, it certainly defeats any argument that the trial court's improper burden shifting was harmless beyond a reasonable doubt.

I agree with the majority that the trial court erred in failing to make factual findings regarding defendant's competency during his statements to Glover and Wilkins. The majority, however, also holds that the error is harmless because of the admissibility of the 16 July 1999 confession to Agent East. Because I would hold that the trial court erred with respect to the East confession, I would further find that the trial court's error as to the statements to Glover and Wilkins was not harmless. I would, therefore, remand for a hearing on defendant's competency to make all three confessions.

II

In addition, I do not believe that the trial court's findings of fact are adequate under *Ross* and *Blackburn v. Alabama*, 361 U.S. 199, 4 L. Ed. 2d 242 (1960) to support its conclusion of law that defendant was competent when he confessed. For this alternative reason, I would also vacate the trial court's ruling on the motion to suppress and remand for a new hearing.

The only finding of fact purporting to support the conclusion that defendant's confession to Agent East was made voluntarily and that he properly waived his *Miranda* rights is finding of fact number fourteen: "He was rational and coherent throughout his conversation with the officers."[3] In *Ross*, the only evidence was likewise the testimony

2. Although the majority opinion suggests that a psychiatrist stated that defendant had been stable on Depakote even without Haldol, Dr. Wolfe's testimony indicates that it was only defendant—hardly a reliable witness as to his own stability—who claimed he had been stable on Depakote. The record contains no expert evidence that he was in fact stable when receiving only Depakote.

3. While the trial court's finding of fact number sixteen recites some of Dr. Wolfe's testimony, it excludes her opinion that Fisher was psychotic and mentally unstable at and around the time of his confession. Her conclusion that defendant was competent to stand trial, rendered in February 2001 (and included in the finding of fact), is irrelevant to whether he was competent when he confessed in July 1999. *State v. Reid*, 38

of a deputy sheriff that the defendant appeared logical and made sense. This evidence was deemed insufficient to establish competency because our Supreme Court was unwilling to "uphold the admission of defendant's confession on the mere chance that it was made during a lucid interval of the defendant." *Ross*, 297 N.C. at 143, 254 S.E.2d at 14. In reaching this conclusion, the Court relied on *Blackburn*, in which the United States Supreme Court likewise found that testimony of a deputy that defendant talked sensibly, was clear-eyed, and did not appear nervous was insufficient to establish competency. The Court held: "But without any evidence in the record indicating that these observed facts bore any relation to Blackburn's disease or were symptoms of a remission of his illness, we are quite unable to conclude that such an inference can be drawn." *Blackburn*, 361 U.S. at 209, 4 L. Ed. 2d at 249-50.

I cannot agree to affirm the trial court's ruling when its findings do no more than parrot the same evidence found inadequate in *Ross* and *Blackburn*. The majority opinion does not address this issue, which was properly presented by defendant.

For all the foregoing reasons, I would reverse the trial court and remand for a new hearing on the motion to suppress at which the State would bear the burden of proving the admissibility of defendant's statements.

N.C. App. 547, 248 S.E.2d 390 (1978) (expert testimony that a defendant was mentally capable to proceed to trial did not establish competency two to three months later), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 31 (1979).

THE RIGHT REVEREND, BISHOP CLIFTON W. DANIEL, 3RD, ROBERT J. POWELL, III, ALICE DILL LYNCH, TRUSTEES OF AND FOR THE DIOCESE OF EAST CAROLINA OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA; CLIFTON W. DANIEL, 3RD, BISHOP OF THE DIOCESE OF EAST CAROLINA; AND NICHOLAS F. THEUNER, HARRIET GRUBER, AND DOROTHY RANEY, AS VESTRYMEN OF ST. ANDREW'S EPISCOPAL CHURCH OF MOREHEAD CITY, PLAINTIFFS V. RICHARD H. WRAY; MARK J. SUBER; JOSEPH A. LAWRENCE; JOSEPH M. MCCLURE; HENRY LEN GIBBS; LORETTA GUTHRIE; PATRICIA M. DAVIS; ELOISE BLAIR; CHRIS WADE; VICKIE R. BISHOP; GEORGE D. PHILLIPS; JOHN H. KNELSON; C. KING COLE; JOHN GLADSTONE; JOHN GRAYSON; AND THAT ORGANIZATION CALLED BY ABOVE DEFENDANTS, INTERIM ANGLICAN EXPRESSION CHURCH IN MOREHEAD CITY, ALSO CALLED ST. ANDREW'S ANGLICAN CHURCH, ALSO CALLED ST. ANDREW'S EPISCOPAL CHURCH OF MOREHEAD CITY, EPISCOPAL PROVIDENCE (SIC) OF RWANDA, DEFENDANTS

No. COA02-768

(Filed 3 June 2003)

1. Pleadings— amendment—trustees substituted for organization

The trial court did not err by allowing the plaintiffs in a church dispute to amend their complaint to substitute the names of diocesan trustees for that of the diocese where defendant had not filed a responsive pleading prior to the amendment and the action was well within the statute of limitations period.

2. Parties— real party in interest not named—no prejudice

The trial court did not err by denying defendants' motion to dismiss an action over disputed church property because the national Episcopal organization (PECUSA) was not named as a party. Although PECUSA was a real party in interest because it could enforce the claim under its canons, defendants did not show prejudice from PECUSA's absence.

3. Churches and Religion— dissolving parish—property—connectional church—vesting in diocese

The trial court did not err by granting summary judgment for plaintiffs in a church property dispute because the church, St. Andrew's Episcopal Church of Morehead City, is a connectional church in property matters rather than an independent congregational church. The parent body of a connectional church has the right to control the property of local affiliated churches; in this case, the withdrawal of defendants from St. Andrew's essentially resulted in the dissolution of the parish, whereby the parish property vested in the Diocesan trustees until the Diocese recognized

the remaining members of the original congregation as the new St. Andrew's.

4. Deeds— church canon creating deed of trust—unrecorded—enforceable between parties

A canon of the Episcopal Church which essentially established a deed of trust but which was not recorded with the register of deeds was enforceable against defendants. The registration of deeds is primarily for the protection of purchasers for value and creditors; an unregistered deed is good between the parties.

5. Adverse Possession— church property—hostile possession—evidence insufficient

The trial court did not err by allowing summary judgment for plaintiffs in a dispute over church property where defendant contended that there was a material issue of fact as to adverse possession, but the record did not indicate that defendants' possession of any of the property was hostile prior to their decision to withdraw from the church organization on 28 February 2000.

6. Statute of Frauds— church property—trust created by Canon—not signed

The delivery and acceptance of a deed takes the covenants therein out of the statute of frauds, and a trust in church property was created by a Canon of the national Episcopal church even though it was not signed by defendants, who were attempting to withdraw St. Andrew's Episcopal Church from the national church.

7. Churches and Religion— seceding church members—use of church name

Defendants were properly enjoined from using the name "St. Andrew's Episcopal Church" or any confusingly similar name after they withdrew from the church. Seceding members should not be allowed to confuse the public or appropriate the name and good will of an existing parish by establishing another church in the same county with the same name.

8. Churches and Religion— individual liability—withdrawal from church—church property

The trial court erred by assessing liability against defendants individually in an action over disputed church property. Whether defendants were acting as trustees or directors of the original St.

Andrew's or of the church they formed after their withdrawal, defendants were nonetheless acting on behalf of a religious society and were immune under N.C.G.S. § 61-1(b).

Appeal by defendants from orders entered 6 July 2001 and 23 January 2002 by Judge John B. Lewis, Jr. and Judge John R. Jolly, Jr., respectively, in Carteret County Superior Court. Heard in the Court of Appeals 18 February 2003.

Wheatly, Wheatly, Nobles, Weeks & Valentine, P.A., by C. R. Wheatly, Jr. and C. R. Wheatly, III; Charles B. Park, III; Miller, Hamilton, Snider & Odom, L.L.C., by Palmer C. Hamilton, for plaintiff-appellees.

Taylor & Taylor, by Nelson W. Taylor, III; Beswick, Marquardt and Goines, P.A., by M. Douglas Goines; Susan H. McIntyre, for defendant-appellants.

HUNTER, Judge.

Defendants appeal an order denying their motion to dismiss plaintiffs' complaint for failure to allege registration of an assumed name certificate in their original complaint, as well as failure to join a real party in interest in this action. Further, defendants appeal an order granting plaintiffs' motion for summary judgment, which resulted in plaintiffs being declared the true "St. Andrew's Episcopal Church of Morehead City" and the rightful owners of all the parish's real and personal property. We affirm the trial court's decision with respect to both motions; however, we reverse the trial court's decision to assess liability against defendants in their individual capacities.

The Protestant Episcopal Church in the United States of America ("PECUSA") is a hierarchical or connectional church composed of 109 geographical dioceses. One such diocese, The Diocese of East Carolina ("Diocese"), admitted a missionary congregation called St. Andrew's Episcopal Church of Morehead City ("St. Andrew's") as a parish in 1952. As a parish within the Diocese's boundaries, St. Andrew's was bound by the Constitutions and Canons of that diocese, as well as the Constitutions and Canons of PECUSA.

Upon admission into the Diocese, St. Andrew's was deeded a parcel of land (containing three lots) in Morehead City by the Diocesan Trustees. The deed, which conveyed the land to the

"Vestrymen and Trustees for St. Andrew[']s Episcopal Church of Morehead City, . . . and their successors in office," contained the following language pursuant to PECUSA Canon II.6.1:

> The purpose of this conveyance is to transfer the above described property to the Vestrymen[] or Trustees of [] St. Andrew[']s . . . for the construction of a church or place of worship, and for the purpose of church use, and consent and approval for such construction by the Bishop of the Diocese and the Trustees is hereby freely given.

Over the next several years, St. Andrew's purchased and had conveyed to it by name, or to its then current vestry persons as vestry persons, nine other lots and parts of two others.

Following its establishment as a parish in the Diocese, St. Andrew's acted with full parish status and complied with the Canons of PECUSA and the Diocese. However, on 28 February 2000, the vestry of St. Andrew's unanimously resolved to withdraw from PECUSA and the Diocese. Its decision was announced at a subsequent parish meeting, and a majority of the parishioners supported the withdrawal.

Thereafter, the vestry sent a letter to the Right Reverend Bishop Clifton W. Daniel, 3rd ("Bishop Daniel"), Bishop of the Diocese, stating St. Andrew's was withdrawing from PECUSA and the Diocese to join the Interim Anglican Expression in the United States. The letter further stated that the name of the new parish would be "St. Andrew's Anglican Church of Morehead City"[1] and enclosed documents establishing parochial ownership of the St. Andrew's property and goods as deeded to the vestry. Bishop Daniel answered the letter, acknowledging the vestry members' resignations and withdrawal from the Episcopal Church, but advised them that "no vestry has the authority to withdraw a parish from membership . . . ." Bishop Daniel also laid claim to all property belonging to St. Andrew's because, pursuant to PECUSA Canon I.7.4, that property was to be held in trust for the parent body upon resignation and withdrawal of the vestry and other members.

On 11 May 2000, the Executive Council of the Diocese passed a resolution finding that twenty-five members of the St. Andrew's con-

1. At some point during the pendency of the subsequent action between the parties, defendants changed the name of their new church from St. Andrew's *Anglican* Church to St. Andrew's *Episcopal* Church.

gregation remained loyal to PECUSA and the Diocese. Those members had elected a new vestry and sought assistance in recovering the St. Andrew's property and goods from the departing vestry and members. The resolution further indicated that PECUSA Canon I.7.4 governed the property issues, and Bishop Daniel was to take such action as he deemed appropriate in returning the church property and goods to the newly organized vestry and congregation of St. Andrew's.

On 12 May 2000, Bishop Daniel, the newly elected vestry, and the Diocese (collectively "plaintiffs") filed suit against the former vestry of St. Andrew's and three other former clergymen of the parish (collectively "defendants"). Before an answer was filed, plaintiffs filed an amended complaint that substituted the names of the Diocesan Trustees for that of the Diocese. On 15 September 2000, defendants filed an answer which set forth motions that plaintiffs' action be dismissed pursuant to Section 1-69.1 of the North Carolina General Statutes ("Section 1-69.1") because the action was originally commenced naming the Diocese, an unincorporated association, as a plaintiff without alleging the registration of an assumed name certificate. Plaintiffs subsequently motioned to amend their amended complaint and, on 27 February 2001, plaintiffs were allowed to do so by adding allegations that stated an assumed name certificate had been filed for the Diocese with the Carteret County Register of Deeds. Defendants' motion to dismiss was denied in an order entered 6 July 2001.

The case was heard in July of 2001, but resulted in the trial court declaring a mistrial on 14 July 2001 when the jury failed to reach a verdict. The court further denied both parties' motions for judgment notwithstanding the verdict, as well as plaintiffs' motion for an injunction against defendants from using the name "St. Andrew's Episcopal Church."

As further proceedings on the action began, plaintiffs filed a motion for summary judgment on 17 December 2001.[2] The trial court granted the motion. Thus, plaintiffs were entitled to judgment in their favor as follows: (1) Plaintiffs were deemed to be the beneficial owners of all property formerly held by St. Andrew's; (2) defendants were permanently enjoined from using the name "St. Andrew's Episcopal Church" or any name confusingly similar; (3) defendants were required to make a written accounting for any funds received or

2. Plaintiffs had previously filed a motion for summary judgment on 2 October 2000 that was denied on 7 December 2000.

appropriated from the date of defendants' withdrawal from the Diocese; and (4) deeds recorded by defendants purporting to convey the church building to another parish were declared null and void. The cost of the action was taxed to defendants jointly and severally. Defendants appeal.

I.

At the onset, we address defendants' two assigned errors arguing that plaintiffs' non-compliance with procedural requirements should have resulted in the dismissal of their action.

A. Assumed Name Certificate

[1] First, defendants argue the trial court committed reversible error in denying their motion to dismiss because plaintiffs had failed to allege registration of the Diocese in an assumed name certificate. Section 1-69.1 requires an unincorporated association "bringing a suit in the name by which it is commonly known and called [to] allege the specific location of the recordation . . . ." N.C. Gen. Stat. § 1-69.1 (2001). Failure to do so is fatal to a complaint. *Cherokee Home Demonstration Club v. Oxendine*, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Here, plaintiffs' initial complaint violated Section 1-69.1 because it lacked the proper allegation when it named the Diocese as a party. Nevertheless, Rule 15(a) of the North Carolina Rules of Civil Procedure allows "[a] party [to] amend his pleading once as a matter of course at any time before a responsive pleading is served . . . ." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2001). Defendants had filed no responsive pleading prior to plaintiffs filing their amended complaint that substituted the names of the Diocesan Trustees for that of the Diocese. Such an amendment is appropriate and does not bar a party's action unless there is a statute of limitations issue. *See Bob Killian Tire, Inc. v. Day Enters., Inc.*, 131 N.C. App. 330, 333, 506 S.E.2d 752, 754 (1998). Since plaintiffs' action was filed well within the limitations period, the trial court did not err in allowing the Diocese's name to be substituted so that it could act through its trustees. *See* N.C. Gen. Stat. § 61.1 (2001).

B. Real Party in Interest

[2] Further, defendants argue the court erred in denying their motion to dismiss plaintiffs' action because PECUSA was not named as a party. Rule 17 of the North Carolina Rules of Civil Procedure pro-

vides, in part, that "[e]very claim shall be prosecuted in the name of the real party in interest[.]" N.C. Gen. Stat. § 1A-1, Rule 17(a) (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.' " *Parnell v. Insurance Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965) (citation omitted).

In the case *sub judice*, plaintiffs seek to enforce PECUSA Canon I.7.4, which essentially states that all real and personal property held by or for the benefit of St. Andrew's is held in trust for PECUSA and the Diocese. Defendants contend plaintiffs' action should have been dismissed because the canon specifically provides that the trust is for the benefit of the Diocese *and* PECUSA. We conclude that based upon the language of PECUSA Canon I.7.4, PECUSA was a real party in interest because it had a legal right to enforce the claim in question. Yet, Rule 17 provides that "[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[.]" N.C. Gen. Stat. § 1A-1, Rule 17(a). Thus, the trial court did not err in denying defendants' motion to dismiss; but, before ruling on plaintiffs' summary judgment motion, the court should have either granted a continuance to permit PECUSA's joinder or corrected the defect *ex mero motu*. *See Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 251, 314 S.E.2d 801, 804 (1984).

Nevertheless, this Court has also held that "the absence of the real party in interest . . . does not constitute a 'fatal defect,' [if the defendants] failed to 'show real prejudice in not having had the real party joined at the original trial.' " *Id.* Defendants have not argued, nor have we found, any way in which they were prejudiced by not having PECUSA made a party to this action. Moreover, although defendants did raise this issue in their answer as an affirmative defense, they never pursued the defense in the trial court or raised it in opposition to plaintiffs' motion for summary judgment. Therefore, the denial of the motion was not prejudicial to defendants.

II.

[3] Defendants also argue the trial court erred in granting summary judgment in favor of plaintiffs because there were genuine issues of material fact regarding the ownership of the St. Andrew's property.

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 nonmovant, 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).

Moreover, "[w]hile the civil courts have no jurisdiction over and no concern with purely ecclesiastical questions and controversies due to constitutional guarantees of freedom of religious profession and worship, the courts do have jurisdiction to determine property rights which are involved in, or arise from, a church controversy." *Looney v. Community Bible Holiness Church*, 103 N.C. App. 469, 473, 405 S.E.2d 811, 813 (1991). In determining these rights, "a central question is whether the church is connectional or congregational." *Fire Baptized Holiness Church v. McSwain*, 134 N.C. App. 676, 680, 518 S.E.2d 558, 560 (1999). "Connectional churches are governed by large bodies and individual congregations bear the same relation to the governing body as counties bear to the State. Congregational churches are independent republics, governed by the majority of its members and subject to control or supervision by no higher authority." *Looney*, 103 N.C. App. at 473, 405 S.E.2d at 813 (citations omitted).

In the instant case, it is undisputed that St. Andrew's is a connectional church. "As a general rule the parent body of a connectional church has the right to control the property of local affiliated churches, and, as a corollary, this right will be enforced in civil courts." *Id.* Plaintiffs contend the trial court properly granted summary judgment in their favor because, as a connectional church, the ownership of the St. Andrew's property is governed by the Constitutions and Canons of both PECUSA and the Diocese. Specifically, plaintiffs cite the following two canons to establish their rights to all the property:

> [PECUSA Canon I.7.4]. All real or personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the

> Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.
>
> . . . .
>
> [Diocese Canon II.6.2]. In the event of the dissolution of any Parish or Mission by the Convention, the real and personal property of the Parish or Mission shall immediately vest in the Trustees of the Diocese, in trust for the dissolved Parish or Mission.

Defendants, however, contend that these canons do not apply because this Court clearly recognized in *Looney* and *Fire Baptized Holiness Church* that a church could be congregational as to property matters even though connectional in other ways.

In *Looney*, a local church joined with a denomination for purposes of fellowship. Following its joinder, the local church changed its name and wrote deeds to itself in that new name. Years later, the local church disassociated itself from the denomination, which subsequently appointed new trustees for the local church. The new trustees deeded the local church property to themselves, but members of the local church continued to occupy the property. The denomination, through the new trustees, brought suit against the local church seeking possession of the property. The trial court overruled the denomination's motions for directed verdict and for judgment notwithstanding the verdict and, following a jury verdict, declared the local church the sole owner of the property.

On appeal, the *Looney* Court considered, *inter alia*, whether the local church had manifested an implied assent to be governed by the denomination's General Assembly minutes which provided that the denomination controlled the local church property. The *Looney* Court concluded that, when viewed in the light most favorable to the local church, the evidence created "a jury question as to whether *as to church property* the local church intended to establish a connectional relationship with the denominational church." *Looney*, 103 N.C. App. at 474, 405 S.E.2d at 813-14. The trial court's judgment was upheld.

The *Looney* holding was heavily relied upon by this Court in the decision rendered in *Fire Baptized Holiness Church*. In that case, a local church also voted to withdraw from a denomination. The

denomination's trustees conveyed the local church property to themselves as trustees of a newly formed church. In an action brought by the denomination to determine ownership of the local church property, a jury found the denomination did not have rights to the property because the local church was not connectional.

On appeal, this Court determined there was evidence that signified the local church (1) had not recorded deeds as set out by the denomination's rules, and (2) had acquired additional property despite the denomination's clear disapproval. Evidence further indicated that the denomination had made no effort to enforce its rules at the time of those violations. Thus, as in *Looney*, this Court determined there was contradictory evidence regarding whether the local church manifested an implied assent to the denomination's rules governing ownership of the church property and whether the local church's failure to adhere to those rules signified its "desire for independence prior to its ultimate secession from the denomination[.]" *Fire Baptized Holiness Church*, 134 N.C. App. at 682, 518 S.E.2d at 561. The judgment in favor of the local church was affirmed.

Defendants argue that similar to *Looney* and *Fire Baptized Holiness Church*, this case should have been presented to a jury because a genuine issue of material fact exists as to whether defendants acted in a congregational manner with respect to property matters. Particularly, defendants contend that the evidence indicates they are the owners of the St. Andrew's real property because (1) as the former Vestry of St. Andrew's, they are the successors of the original parcel of land deeded to the parish by the Diocese, and (2) the additional real property owned by the parish was purchased without the assistance of PECUSA or the Diocese and prior to the adoption of PECUSA Canon I.7.4. Yet, despite the similarities between these three cases, there are also significant distinctions which require this Court to reach a different result.

In *Looney* and *Fire Baptized Holiness Church*, we held that there was a genuine issue of material fact as to whether the local church that withdrew from the denomination had impliedly assented to the rules of that denomination with respect to property matters. Conversely, the present case involves a controversy between competing factions of the St. Andrew's congregation, each faction claiming ownership of the same property. The evidence in the record establishes that prior to defendants' withdrawal, the entire St. Andrew's congregation had adhered to the Constitutions and Canons of PECUSA and the Diocese for nearly fifty years. During that time, St.

Andrew's elected delegates to participate in various conventions at which new and revised canons were adopted, and defendants did not contest the adoption of those canons thereafter. Under the language of these canons, it is clear that the St. Andrew's property was to be held in trust for the Diocese. Defendants' withdrawal from St. Andrew's essentially resulted in a dissolution of the parish whereby the property immediately vested in the Diocesan Trustees until the Executive Council of the Diocese passed a resolution recognizing those members of the original St. Andrew's congregation that remained loyal to PECUSA and the Diocese as the new St. Andrew's. Thus, the canons clearly established a form of governance impliedly assented to by defendants that precluded the seceding vestry from taking control of the St. Andrew's property.

III.

Despite our conclusion that St. Andrew's is a connectional church as to property matters, defendants argue that material questions of fact still exist as to whether they have a defense that prevents the canons from encumbering the property. Specifically, defendants contend (A) PECUSA Canon I.7.4 does not create an interest in the property for plaintiffs because it was never recorded; (B) defendants were the owners of the St. Andrew's property by adverse possession; (C) PECUSA Canon I.7.4. violated the Statute of Frauds because it was not signed; and (D) the doctrine of estoppel or laches bars plaintiffs' action because neither PECUSA nor the Diocese attempted to enforce PECUSA Canon II.6.2[3] when St. Andrew's conveyed away and encumbered its property without obtaining the prior consent of the Bishop.

A. Recordation

[4] With respect to the St. Andrew's real property, PECUSA Canon I.7.4 essentially established a deed of trust. Defendants contend that since this canon was never recorded with the Register of Deeds, it cannot effectively create an interest for plaintiffs in the property. However, North Carolina recognizes that "[t]he registration of deeds

3. PECUSA Canon II.6.2 states:

> It shall not be lawful for any Vestry, Trustees, or other body authorized by laws of any State or Territory to hold property for any Diocese, Parish or Congregation, to encumber or alienate any dedicated and consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish or Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.

is primarily for the protection of purchasers for value and creditors; an unregistered deed is good as between the parties and the fact that it is not registered does not affect the equities between the parties." *Bowden v. Bowden*, 264 N.C. 296, 302, 141 S.E.2d 621, 627 (1965). *See also Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939). Defendants, in their positions as former vestry and clergy of St. Andrew's, had knowledge of PECUSA Canon I.7.4. Thus, while it is likely this unrecorded canon would have been unenforceable against innocent purchasers for value or creditors, it is enforceable against defendants.

B. Adverse Possession

[5] Defendants argue the trial court committed reversible error by allowing plaintiffs' motion for summary judgment when there were material questions of fact as to whether defendants had adversely possessed the St. Andrew's real property. Defendants, however, did not forecast evidence that their possession of that property was hostile, an essential element of adverse possession. "A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). The record does not indicate that defendants' possession of any of the property was hostile prior to their decision to withdraw from PECUSA and the Diocese on 28 February 2000. Plaintiffs filed this action on 12 May 2000. Therefore, absent such hostility for the required period of time, we cannot conclude that the trial court erred in granting summary judgment in favor of plaintiffs on this issue.

C. Statute of Frauds

[6] Defendants further argue PECUSA Canon I.7.4 violated the Statute of Frauds and thus, does not govern the ownership of the St. Andrew's property because they never signed it. This Court recognizes that "[a] grantee, by acceptance of a deed, becomes bound by conditions, etc., contained therein, even though he has not signed the deed. The delivery and acceptance of a deed takes covenants contained therein out of the operation of the statute of frauds." *Harris & Gurganus v. Williams*, 37 N.C. App. 585, 587, 246 S.E.2d 791, 794 (1978) (citations omitted). As previously stated, St. Andrew's is a connectional church that agreed to be bound by the Constitutions and Canons of PECUSA and the Diocese. In doing so, defendants, as the former vestry and clergy of St. Andrew's, "accepted" PECUSA Canon

I.7.4 as establishing a deed of trust in which the St. Andrew's property would be held upon their resignation and withdrawal. Therefore, this canon did create a valid trust even though it was not signed by defendants.

D. Estoppel and Laches

Additionally, defendants argue plaintiffs' action is barred by either the doctrine of estoppel or laches. However, after considering our analysis of the previous arguments raised by defendants in this case, we conclude this argument to be without merit and warrants no further decision.

IV.

[7] Next, defendants argue there was a genuine issue of material fact as to whether the name, "St. Andrew's Episcopal Church," had acquired a secondary meaning exclusive to plaintiffs thereby resulting in the trial court enjoining defendants from further use of that name. Defendants contend the words "St. Andrew's" and "Episcopal" are so common and generic that their use of these words as the name of their new church will not result in confusion of the public. We disagree.

In addressing plaintiffs' argument, we are persuaded by *Purcell v. Summers*, 145 F.2d 979 (4th Cir. 1944). In *Purcell*, three branches of the Methodist Church joined to become "The Methodist Church for the United Church." However, an opposing group seceded and began using the name of one of the former branches, "The Methodist Episcopal Church, South." The Methodist Church brought litigation to enjoin the use of the former branch name, which the trial court denied. On appeal, the United States Court of Appeals for the Fourth Circuit concluded:

> The right to use the name inheres in the institution, not in its members; and, when they cease to be members of the institution, use by them of the name is misleading and, if injurious to the institution, should be enjoined. No question of religious liberty is involved. Men have the right to worship God according to the dictates of conscience; but they have no right in doing so to make use of a name which will enable them to appropriate the good will which has been built up by an organization with which they are no longer connected. . . .
>
> . . . .

> It is said that the words "Methodist" and "Episcopal" are generic terms and that defendants have the right to use them for that reason, but defendants are not proposing to use either of these words in a new name so different from the old that no confusion could result. . . . [T]he question is, not whether they have the right to use "Methodist" or "Episcopal" in a new name so constructed as to avoid confusion, but whether they have the right to use the old name in a way that amounts, as we think it does, to implied misrepresentation to the damage of plaintiffs.

Id. at 987-88. *See also Christian Science Bd. of Directors v. Robinson*, 115 F. Supp. 2d 607 (W.D.N.C. 2000).

The issue addressed by the Fourth Circuit appellate court in *Purcell* is virtually identical to the issue currently before us. Here, plaintiffs sought to enjoin defendants from using the same name that was adopted by PECUSA and the Diocese for a parish that has been located in Carteret County for approximately fifty years. Defendants, as the seceding members of St. Andrew's, should not be allowed to confuse the public or appropriate the standing and good will of this still existing parish by establishing another church in Carteret County with the same name. Therefore, based on the rationale applied in *Purcell*, we conclude summary judgment was properly granted in favor of plaintiffs enjoining defendants from using the name "St. Andrew's Episcopal Church" or any name confusingly similar.

V.

[8] Finally, defendants argue the trial court erred in placing liability on them individually because they were acting as directors and officers of a religious society. We agree.

Section 61-1(b) of our statutes states that "[a] person serving as a trustee . . . or a director or officer of a religious society shall be immune individually from civil liability for monetary damages, except to the extent covered by insurance, for any act or failure to act arising out of this service[.]" N.C. Gen. Stat. § 61-1(b). *See also Pressly v. Walker*, 238 N.C. 732, 78 S.E.2d 920 (1953). Plaintiffs contend defendants are not immune from individual liability because they were not acting within their official duties as vestry members or clergymen of St. Andrew's when they appropriated the church's real and personal property after seceding from the Diocese and PECUSA. Whether defendants were acting as trustees or directors of the original St. Andrew's or of the church they formed after withdrawal from the Diocese and PECUSA, defendants were nonetheless still acting on

behalf of a religious society. Thus, the trial court erred in finding defendants individually liable.

In conclusion, the trial court did not err in denying defendants' motion to dismiss plaintiffs' action for failure to allege the Diocese in an assumed name certificate. Nor did the court commit prejudicial error by not joining PECUSA as a real party in interest. Moreover, the court did not err in granting plaintiffs' summary judgment motion with respect to ownership of the St. Andrew's property and enjoining defendants from using the name "St. Andrew's Episcopal Church" or any name confusingly similar. However, the trial court did err in assessing liability against defendants in their individual capacities.

Affirmed in part, reversed in part.

Judges BRYANT and ELMORE concur.

RONALD M. HUGHES, JEFFREY LANE CLEMMONS, CLARENCE Y. SYKES, OLIVER J. & SHIRLEY W. FOWLER, BARRY STEELE, DONNA K. ATKINS, SOUTHPORT ELECTRICAL SERVICE, INC., KEITH R. & HOLLEY G. ROGERS, DONALD B. & ANN T. STEPHENSON, JULIUS & MARTHA G. CARTERET, CARMICHAEL CONSTRUCTION CO., INC., GREGORY A. & VICKIE M. POTTER, MARVIN CARROLL & JULIE J. MARTIN, PETITIONERS v. TOWN OF OAK ISLAND, RESPONDENT

No. COA02-416

(Filed 3 June 2003)

1. **Cities and Towns— annexation—classification of property—use intended but not realized**

The Town of Oak Island misclassified a property as commercial under the subdivision test for annexation where the owners intended to construct a storage facility on the site but had not made the required progress by the time the Town approved the annexation plan.

2. **Cities and Towns— shoestring annexation—intent to annex commercial property—contiguity requirement**

The trial court did not err by finding and concluding that the Town of Oak Island had engaged in an impermissible shoestring annexation where there was sufficient evidence that the Town

acted primarily to annex valuable commercial property and that the ordinance's boundaries were inconsistent with the contiguity requirement of N.C.G.S. § 160A-36(b).

3. Cities and Towns— defective ordinance—declared void rather than remanded

The trial court acted within its discretion by declaring an annexation ordinance null and void rather than remanding it where petitioners did not offer evidence that the annexation area could meet contiguous boundary requirements on remand without property which petitioners had established should be excluded.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by respondent from judgment entered 29 May 2001 by Judge James F. Ammons, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 22 January 2003.

Shipman & Hodges, L.L.P., by C. Wes Hodges, II, for petitioner-appellees.

Roger Lee Edwards, P.A., by Roger Lee Edwards, for respondent-appellant.

HUDSON, Judge.

Respondent, the Town of Oak Island, North Carolina, adopted an ordinance to annex approximately 207 acres of land. Petitioners, who own real and personal property in the proposed annexation area, filed a petition for judicial review of the ordinance. After a hearing, the superior court declared the ordinance null and void, concluding that it failed to comply with North Carolina's annexation statutes. Respondent appeals and, for the reasons set forth below, we affirm the decision of the trial court.

BACKGROUND

On 29 November 1999, respondent adopted a resolution declaring its intent to annex an area approximately 207 acres in size on the northern side of the Atlantic Intercoastal Waterway. The area runs to the intersection of Long Beach Road and N.C. Highway 211 and includes property located on both sides of Long Beach Road. Respondent approved the annexation plan on 14 December 1999 and made the plan available to the public. On 14 March 2000, after a pub-

lic informational meeting and two public hearings, respondent adopted an ordinance entitled "An Ordinance to Extend the Corporate Limits of the Town of Oak Island, Under the Authority Granted by Chapter 160A, Article 4A, Part 2 of the North Carolina General Statutes—Long Beach Road Corridor Annexation" (hereafter "ordinance"), with an effective date of 31 March 2001. The ordinance purported to involuntarily annex real and personal property belonging to the petitioners.

On 12 May 2000, petitioners filed a petition for review of the ordinance by the superior court, pursuant to G.S. § 160A-38. Petitioners contended that the ordinance was invalid because it did not meet the statutory requirements imposed by G.S. §§ 160A-35, 160A-36, and 160A-37. After a hearing, the superior court declared the ordinance null and void, concluding (1) that a tract of land known as the "Big Toy Storage" tract was misclassified as commercial use at the time of annexation and, therefore, that the ordinance did not meet the subdivision test set forth in G.S. § 160A-36(c)(1); (2) that without the Big Toy Storage tract, the ordinance did not meet the contiguous boundary requirements set forth in G.S. § 160A-36(b)(2); and (3) that the ordinance violated the spirit and purpose of the contiguity requirement of G.S. § 160A-36 and constituted an impermissible "shoestring" annexation. Respondent filed post-trial motions pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure, which the superior court denied. Respondent now appeals.

ANALYSIS

A.

The superior court's review of an annexation ordinance is limited to deciding (1) whether the annexing municipality complied with the statutory procedures; (2) if not, whether the petitioners will suffer material injury as a result of any alleged procedural irregularities; and (3) whether the area to be annexed meets the applicable statutory requirements. *In re Annexation Ordinance*, 278 N.C. 641, 647, 180 S.E.2d 851, 855 (1971); *Trask v. City of Wilmington*, 64 N.C. App. 17, 28, 306 S.E.2d 832, 838 (1983), *disc. review denied*, 310 N.C. 630, 315 S.E.2d 697 (1984). Where the annexation proceedings show prima facie that the municipality has substantially complied with the requirements and provisions of the annexation statutes, the burden shifts to the petitioners to show by competent evidence a failure on the part of the municipality to comply with the statutory requirements or an irregularity in the proceedings that materially prejudices

the substantive rights of the petitioners. *In re Annexation Ordinance*, 278 N.C. at 647, 180 S.E.2d at 855-56.

On appeal, we are bound by the trial court's findings of fact if they are supported by competent evidence, even though there is evidence to the contrary. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980). The trial court's conclusions of law are reviewable de novo. *Id.*

B.

[1] Respondent argues, first, that the evidence did not support the trial court's finding and conclusion that Tax Parcel 237-25, known as the "Big Toy Storage" tract and located within the Long Beach Corridor, was not in commercial use at the time of annexation. Although assignment of error number 1 refers to page 29 of the record (the superior court's order), which contains several findings of fact, the only finding that respondent argued specifically in its brief is number 28. That finding and the relevant conclusion are as follows:

Finding of Fact

> 28. As of December 14, 1999, the time of annexation, the Big Toy Storage Property was vacant and undeveloped, and the Town improperly classified the Big Toy Storage Property as being used for commercial purposes at the time of annexation.

. . .

Conclusion of Law

> 5. The Town misclassified the Big Toy Storage Property acreage as being in use for commercial purposes at the time of annexation.

We disagree and conclude that the trial court's finding is supported by the evidence.

Pursuant to the "subdivision" test set forth in G.S. § 160A-36(c)(1), at least 60% of the total acreage of a proposed annexation site, not counting the acreage used at the time of annexation for commercial, industrial, governmental, or industrial purposes, must consist of lots and tracts three acres or less in size. "At the time of annexation" is statutorily defined as the date on which the municipality approved its annexation report. N.C. Gen. Stat. § 160A-36(c). G.S. § 160A-36(c) defines acreage in use for commercial purposes as "acreage actually occupied by buildings or other man-made struc-

tures together with all areas that are reasonably necessary and appurtenant to such facilities for purposes of parking, storage, ingress and egress, utilities, buffering, and other ancillary services and facilities." Accordingly, we must decide whether the superior court properly found and concluded that the Big Toy Storage tract was not being used for commercial purposes on 14 December 1999, the date respondent approved its annexation plan.

The Big Toy Storage tract, which is approximately 10.74 acres in size, was classified by respondent as being used for commercial purposes at the time of annexation. The trial court found and concluded, however, that the Big Toy Storage property "was vacant and undeveloped, and the Town improperly classified [it] as being used for commercial purposes" as of 14 December 1999.

After a careful review, we conclude that the trial court's findings and conclusions were supported by competent evidence. We see ample evidence that, even though the tract's owners intended to construct a storage facility on the property, they had not made enough progress to qualify as "in use" for commercial purposes as of 14 December 1999. Clayton Gsell, an owner of the Big Toy Storage facility, testified in his deposition that, as of December 1999, the tract was still a vacant piece of property and that no acres were occupied by buildings or other man-made structure except for one four-foot by eight-foot sign advertising the future storage facility.

Moreover, according to an affidavit from Terry Quinn, a director and officer of Big Toy Storage, Inc., the property consisted of vacant land and was not being used, either directly or indirectly, for any purpose in December 1999. He also indicated that the property was not used for commercial purposes at any time between 14 July 1999, when Big Toy Storage first acquired the property, through February 2000. Martin Long, the re-evaluation supervisor for Brunswick County who appraises tax parcels in the county, testified that he never saw any buildings or any commercial activity on the property during his numerous trips by the property in 1999 and 2000. This evidence amply supports finding of fact number 28.

The court also found that the Brunswick County tax card for the property expressly stated that the property consisted of 10.74 acres of "vacant land" and that respondent's own, informal surveys confirmed that there were no structures or ancillary services and facilities on the property as of December 1999. At the time of the approval of the annexation report, the court found, the property was zoned commer-

cial low density, and the owners intended to develop the property as a storage facility where the individual units would be sold to the public for recreational vehicles and boats. The court also found, however, that as of 14 December 1999, (1) the property had not been graded; (2) no foundation had been laid; (3) no storage facilities of any kind had been constructed; (4) no parking facilities of any kind had been built; (5) no storage slips had been sold or offered for sale; and (6) the owners were deriving no commercial revenue from the property. The court also found that all the owners had done was to enter into a listing agreement with a commercial real estate company, apply for and receive a driveway permit from the state, apply for storm water run-off and erosion control permits from the state, contract with an engineering firm to assist in the design and layout of the groundwater draining and water and sewer systems for the property, and submit a site plan for the development of the property to the sanitary district that was the zoning authority in the area at the time. Facilities on the site plan, however, could not be constructed until the property owners had obtained all the applicable permits, the court found, and the owners here did not even apply for building, mechanical, electrical, and plumbing permits until 2000. These findings, about which respondent has made no argument in its brief, in addition to finding number 28, are certainly sufficient to support conclusion of law number 5.

Respondent argues that the property was properly classified as being used for commercial purposes at the time of annexation because it was owned by a corporation that intended to construct a commercial facility on the premises sometime in the future. This contention has been expressly rejected by both our Supreme Court and this Court. In *Southern Railway Co. v. Hook*, 261 N.C. 517, 135 S.E.2d 562 (1964), the Supreme Court held that neither ownership nor future plans are relevant in determining whether property may be annexed. Specifically, Bessemer City, North Carolina, had classified an entire 13.75 acre tract owned by Ideal Industries ("Ideal") as being in use for industrial purposes at the time of annexation. *Id.* at 520, 135 S.E.2d at 565. The property was located across the street from Ideal's plant. About 1.4 acres of the lot were used for parking, and the remaining 12.35 acres were vacant and unused. *Id.* at 518-19, 135 S.E.2d at 564. An Ideal officer testified that Ideal had purchased the property for the purpose of eventually expanding its operation to the tract. Ideal had graded the lot but it was otherwise vacant and unused except for the parking area. *Id.* at 519-20, 135 S.E.2d at 564-65.

The trial court upheld the city's classification of the entire tract as being in use for industrial purposes, and the petitioners appealed. In reversing the trial court, the Supreme Court noted that the tract was "being held for possible industrial use at some indefinite future time. It is industrially owned but not industrially used." *Id.* at 520, 135 S.E.2d at 565. Because the property could not be classified as industrial, the city failed the subdivision test, and the ordinance was struck down. *Id.*, see also *Arquilla v. City of Salisbury*, 136 N.C. App. 24, 31-32, 523 S.E.2d 155, 161 (1999) (holding that the city improperly classified the tract at issue as governmental and reiterating that future plans for use are not relevant in determining whether property is subject to annexation), *disc. review denied*, 351 N.C. 350, 543 S.E.2d 122 (2000).

The superior court here found and concluded that, even though the owners of the Big Toy Storage property intended to construct a storage facility on the site, they had not made the required progress as of 14 December 1999. All that the owners had done prior to December 1999 was to record a site plan for future development and obtain a driveway permit. The facility could not be constructed because the required permits were not even applied for until 2000. None of the findings or conclusions to this effect have been specifically challenged on appeal. In sum, we conclude that the evidence was abundant to support the trial court's findings and conclusions that respondent misclassified the Big Toy Storage property as being in use for commercial purposes at the time of annexation.

C.

[2] Respondent also argues that the trial court erred in finding and concluding that the ordinance was an impermissible "shoestring" annexation because there was no evidence to support the court's finding that the respondent's main purpose in enacting the ordinance was to annex valuable commercial property. Again, we disagree.

Here, the trial court found and concluded that respondent intentionally manipulated the configuration of the annexation area for the purpose of annexing valuable commercial property at the intersection of Long Beach Road and N.C. Highway 211. The court also concluded that respondent violated the spirit and purpose of the contiguity requirement of G.S. § 160A-36(b) and that the ordinance constituted an impermissible shoestring annexation.

Specifically, the court found that four properties are located in the annexation area with a property tax value of at least one million

dollars and that each property is located at the far end of the annexation area at the intersection of Long Beach Road and N.C. Highway 211. The court also found that the "annexation of the valuable commercial property . . . was a main purpose of the Town's Ordinance." To reach those properties, the court found, respondent was required to include in the annexation area property fronting on Villanova Loop Road and Fish Factory Road to provide additional contiguity to the existing town limits. Without annexing these properties, respondent would not have been able to annex the valuable commercial property and still comply with the one-eighth contiguous boundary requirement set forth in G.S. § 160A-36(b)(2). The court also found that respondent intentionally excluded several other lots and tracts from the annexation area because of the negative effect that their inclusion would have had on respondent's compliance with the annexation statutes' requirements. And, in doing so, respondent has "created the potential for confusion in the provision of emergency and other such services to the annexation area and the excluded properties surrounded on both sides by area included within the annexation area." The court also found that the lots and tracts in the annexation area are, for the most part, already receiving from other entities the full range of municipal services that respondent proposed to provide in its annexation plan.

Again we conclude that the trial court's findings and conclusions were supported by competent evidence. At the hearing before the trial court, counsel for respondent admitted that one of the purposes of the annexation was to take in the income-producing, high-value properties at the end of the annexation area. Although respondent argues that reaching these properties was just one purpose of the annexation, and not the main purpose, the court found and concluded otherwise, and the evidence supports these findings.

The only other purpose for the annexation advanced by respondent was to enhance the provision of municipal services for the properties to be annexed. However, the evidence and the findings did not bear this out. As the court found, the annexation area excluded lots that are surrounded by included areas. For example, the Long Beach Road right of way is included in the annexation area, even though properties on both sides of that road were not. Further, many of the included properties are for the most part already receiving the full range of services from other entities. The court found that by excluding certain lots and tracts from the annexation area, respondent created the potential for confusion in the provision of emergency and

other services, since the properties in the annexation are surrounded on both sides by properties excluded from the annexation.

In its assignment of error, respondent refers the Court only to conclusions of law in the record at pages 34 and 35 but does not specify by number which conclusions it challenges. Therefore, we review the following conclusions to determine if the findings of fact support them and if they are consistent with applicable law:

> Conclusions of law
>
> 9. Literal compliance with the contiguity requirements of the annexation statutes is insufficient where it would result in the subversion of the purposes underlying this requirement, which is to ensure that essential government services are provided to residents within compact borders.
>
> 10. By intentionally manipulating the configuration of the annexation area, for the purpose of annexing the valuable commercial property at the intersection of Long Beach Road and N.C. Highway 211, the Town violated the spirit and purpose of the contiguity requirements of N.C.G.S. § 160A-36(b).
>
> 11. The Town's Ordinance constitutes an impermissible "shoestring" annexation.

Findings of fact numbers 34-48, none of which are challenged on appeal, support each of these conclusions. For example, the findings that "the annexation of the valuable commercial property at the intersection" was a main purpose of respondent's ordinance and "that the Town included these narrow strips of property . . . in order to reach the valuable commercial property" support conclusion number 10. Findings 42, 45, and 46, to the effect that inclusion of some parcels and exclusion of other adjacent parcels "created the potential for confusion in the provision of emergency and other such services," support conclusions numbers 9, 10, and 11 in that these boundaries contravene the spirit and purpose of the contiguity requirements—to provide essential services within compact borders.

In addition, the few cases on the subject of shoestring annexation also support our holding. Pursuant to G.S. § 160A-36(b), the area proposed for annexation must be contiguous to the existing boundaries of the municipality. Literal compliance with this provision is not sufficient, however, where it would result in the subversion of the purpose underlying the contiguity requirement—to ensure that the

essential governmental services are provided to "residents within compact borders." *Hawks v. Town of Valdese*, 299 N.C. 1, 12, 261 S.E.2d 90, 97 (1980). A shoestring annexation exists where a municipality uses a narrow corridor to connect the municipality to an outlying, noncontiguous area that the municipality desires to annex. *Amick v. Town of Stallings*, 95 N.C. App. 64, 71, 382 S.E.2d 221, 225-26 (1989), *disc. review denied*, 326 N.C. 587, 391 S.E.2d 40 (1990). Shoestring annexations contravene the contiguous boundary requirements set forth in the annexation statutes. *Id.*

In *Amick*, the main purpose of the town's ordinance was to annex three subdivisions that were not contiguous to the existing municipal limits. *Id.* at 66-67, 382 S.E.2d at 223-24. To achieve that purpose, the town annexed a lengthy, narrow strip of land adjacent to the town and used the strip to reach the desired subdivisions. *Id.* Doing so permitted the town to satisfy G.S. § 160A-36(b)(2), which requires that at least one-eighth of the aggregate external boundary of the annexation area coincide with the existing municipal limits. "[S]uch a crazy quilt boundary is not consistent with sound urban development of a municipality capable of providing essential governmental services to residents within compact borders." *Id.* at 71, 382 S.E.2d at 226 (citations and quotation marks omitted). Holding that such shoestring annexations contravene the clear purpose of the annexation statutes, this Court rejected the town's proposed ordinance. *Id.* at 71-72, 382 S.E.2d at 226.

In sum, we conclude that sufficient evidence supports the trial court's findings and conclusions that respondent enacted the ordinance primarily to annex valuable commercial property at the intersection of Long Beach Road and N.C. Highway 211 and that the ordinance's boundaries were inconsistent with the purposes of the contiguity requirement of G.S. § 160A-36(b). Further, the findings support the conclusion that respondent's ordinance constituted an impermissible shoestring annexation.

D.

[3] Respondent also contends that the trial court erred when it failed to remand the ordinance so that respondent could amend it. We do not agree.

G.S. § 160A-38(g) sets forth the remedies available to petitioners upon a finding that a municipality has not complied with the material provisions of the annexation statutes. A court may:

(2) Remand the ordinance to the municipal governing board for amendment of the boundaries to conform to the provisions of G.S. 160A-36 if it finds that the provisions of G.S. 160A-36 have not been met; provided, that the court cannot remand the ordinance to the municipal governing board with directions to add area to the municipality which was not included in the notice of public hearing and not provided for in plans for service.

. . .

(4) Declare the ordinance null and void, if the court finds that the ordinance cannot be corrected by remand as provided in subdivisions (1), (2), or (3) of this subsection.

N.C. Gen. Stat. § 160A-38(g)(2) & (4). Because respondent did not comply with G.S. § 160A-36, see *supra*, the only available options were to remand the ordinance back to respondent for amendment of the boundaries or to declare the ordinance null and void. Here, petitioners established at the hearing before the trial court that the Big Toy Storage property would have to be removed from the annexation area in order for the area to comply with the subdivision test set forth in G.S. § 160A-36(c)(1). However, once the Big Toy Storage property is excluded from the annexation area, the revised annexation boundary would have to run along the western property line of Tax Parcel 221-50. According to an affidavit from Sherwin D. Cribb, a registered land surveyor, only 7.76% of the boundary of the annexation area would then be contiguous to the existing municipal limits. Such a configuration runs afoul of G.S. § 160A-36(b)(2), which requires that at least one-eighth of the aggregate external boundaries of the annexation area coincide with the municipal boundary.

Respondent agreed at the hearing that the area would violate the contiguous boundary requirements but did not offer any other evidence that the annexation area could be corrected on remand. In light of respondent's failure to provide such evidence, we conclude that the trial court acted within its discretion in declaring the ordinance null and void rather than remanding it for further proceedings.

CONCLUSION

For the reasons set forth above, we affirm the decision of the trial court.

Affirmed.

Judge MARTIN concurs.

Judge STEELMAN concurs in part and dissents in part.

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

I concur in parts A and B of the majority's opinion, but I respectfully dissent from parts C and D.

Part C of the majority opinion affirmed the ruling of the trial court which held that respondent's annexation was an impermissible "shoestring" annexation. Only one reported appellate case has found an annexation to be invalid on this basis. In *Amick v. Town of Stallings*, 95 N.C. App. 64, 382 S.E.2d 221 (1989), the Town used a strip of land 7,411 feet long and varying in width from 50 to 200 feet to meet the one-eighth contiguous boundary requirement under N.C. Gen. Stat. § 160A-36(b)(2) (2001). The trial court concluded that this portion of the proposed annexation had " 'no relationship to any urban or municipal purpose' " and remanded the ordinance for amendment. *Id.* at 68, 382 S.E.2d at 224. This Court affirmed the trial court's order remanding for amendment and held that even though the Town literally complied with the statutory requirements, the annexation subverted the underlying purpose of the statute to ensure sound urban development. *Id.* at 71, 382 S.E.2d at 225-26.

In this case, the configuration of the annexation area does not rise to the level of flouting the intent of the statute as was found in *Amick*. Unlike the narrow "shoestring" corridor in *Amick* which had no relation to commercial activity, the proposed annexation here followed a commercial corridor along a major roadway. Such annexation does not contravene the statute's policy of ensuring sound urban development. The configuration of the annexation area should not have been a basis for invalidating the annexation in the instant case. It is only in such unusual cases as *Amick* that the court should invalidate an annexation ordinance which complies with the requirements of the statute.

As to part D of the majority opinion, upon a finding that an annexation ordinance is invalid, the trial court may either remand the ordinance to the municipality for amendment or declare the ordinance null and void, if it cannot be corrected by amendment. N.C. Gen. Stat. § 160A-38(g) (2001). In this case, defendant presented a revised plan

for annexation drawn by a registered land surveyor which clearly showed that even with the exclusion of the Big Toy Storage tract, the annexation area could be amended to comply with all provisions of N.C. Gen. Stat. Chapter 160A. I would remand the ordinance to defendant for amendment rather than declaring it null and void.

STATE OF NORTH CAROLINA v. ANTHONY MATHEW MANGUM

No. COA02-988

(Filed 3 June 2003)

1. **Burglary and Unlawful Breaking or Entering— indictment—allegation of non-existent felony—surplusage**

A burglary indictment alleging that defendant broke and entered with intent to commit the felonies of sexual assault and kidnapping was sufficient even though the crime of sexual assault does not exist in North Carolina. The indictment properly alleged intent to commit a felony; the specific language alleging intent to commit a sexual assault was unnecessary and does not create a fatal variance. Moreover, the indictment also alleged an intent to kidnap the victim, a crime for which defendant was convicted.

2. **Burglary and Unlawful Breaking or Entering— first-degree burglary—sufficiency of evidence—intent to commit felony—existence at time of entry**

There was sufficient evidence of first-degree burglary where defendant contended that there was insufficient evidence that he intended to rape the victim at the time he entered the residence. Defendant committed overt acts manifesting an intent of forcible sexual gratification, and none of the acts committed within the residence furthered defendant's asserted goals of using the telephone or the restroom.

3. **Kidnapping— second-degree—restraint—sufficiency of evidence**

The trial court correctly refused to dismiss a charge of second-degree kidnapping where defendant contended that there was insufficient evidence that he restrained the victim to commit a felony, but the evidence tended to show that he took the victim to a more secluded area to prevent others from witnessing

or hindering the rape. Asportation of a rape victim is sufficient to support a charge of kidnapping if defendant could have perpetrated the offense when he first threatened the victim.

4. **Burglary and Unlawful Breaking or Entering— lesser offense of non-felonious breaking or entering—no instructions**

There was no plain error in refusing to instruct on non-felonious breaking or entering in a first-degree burglary prosecution where there was substantial evidence that defendant entered the residence in order to rape the victim and none of the acts committed by defendant in the residence were in furtherance of his stated intent to use the telephone or the restroom.

5. **Kidnapping— second-degree—no instruction on false imprisonment**

There was no plain error in the court's refusal to instruct the jury on false imprisonment in a second-degree kidnapping prosecution where there was substantial evidence from which a jury could find that defendant restrained the victim for the purpose of raping her. Defendant's overtly sexual actions belie his assertions that he restrained the victim to use the telephone, to use the bathroom, or as horseplay.

Appeal by defendant from judgment entered 28 November 2001 by Judge James E. Ragan, III, in Wayne County Superior Court. Heard in the Court of Appeals 14 May 2003.

Attorney General Roy Cooper, by Assistant Attorney General Frank G. Swindell, Jr., for the State.

William D. Spence for defendant appellant.

TIMMONS-GOODSON, Judge.

Anthony Mathew Mangum ("defendant") appeals from the judgment of the trial court entered upon a jury verdict finding him guilty of first-degree burglary, attempted second-degree rape, and second-degree kidnapping. Defendant also pled guilty to habitual felon status. For the reasons stated herein, we find no error in the judgment of the trial court.

The evidence for the State tended to show the following: On 13 February 2001, at approximately 2:30 a.m., defendant knocked on the door of the residence of the victim, C.H. C.H. lived at the residence

with her mother, sister, and her sister's two young daughters. Defendant was the victim's cousin and a friend of her brother. When C.H. answered the door, she informed defendant that he could not come into the residence. She returned to bed and fell asleep.

C.H. woke at 4:00 a.m. because her niece was standing beside her bed. When C.H. left her bedroom to return the child to her own room, C.H. observed defendant standing in the living room of the residence. C.H. then picked up a telephone and asked defendant how he had entered the residence. Defendant informed C.H. that her mother had let him in, but C.H. knew that her mother was out of town at that time. C.H. then woke her sister, Karena, and asked her whether she had allowed defendant to enter the residence. When Karena responded negatively, C.H. telephoned 911 emergency assistance. Defendant then asked to use the telephone and the restroom, both of which requests C.H. denied. Defendant then pushed C.H. down the hall, into her bedroom and onto her bed. C.H. and defendant began struggling, and defendant attempted to "pin [C.H.] down" on the bed. Defendant then "pulled out some duct tape," and C.H. called to Karena for assistance. According to defendant, "when [he] was holding [the victim] down on the bed[,] she was yelling out, 'he is trying to rape me' to her sister Karena." When Karena entered the bedroom, defendant was lying on top of C.H. and holding her arms "behind her back real tightly." C.H. told Karena to "get the wood stick" that she kept beside her bed for protection, but Karena's children were crying and she left the room to attend to them. Defendant then began "grabbing [C.H.] on [her] vagina" and "grabbed her whole breast." C.H. managed to reach the piece of wood she kept beside her bed and struck defendant with it. Defendant ended his assault when law enforcement arrived shortly thereafter. Defendant fled the residence, escaping through the rear door.

In his later statement to law enforcement officers, defendant admitted that he "broke in the trailer without permission." Defendant further stated that C.H.

> picked up a stick and started hitting me with it. I knocked the stick out of her hand and grabbed her and pushed her up onto the bed. I got on top of her and was holding her down on the bed. I was telling—I was talking to her telling her why is she treating me like this. [C.H.] was not fighting me then because I had her arms held down. I then touched her right breast one time. I grabbed her whole breast in my hand. [C.H.] was yelling at me to get off of her. I then grabbed her between her legs. . . . I got a piece of duct tape

> out of my left pocket and told her I was going to put this tape on her mouth if she didn't stop fussing at me. . . . When I was holding [C.H.] down on the bed she was yelling out he is trying to rape me to her sister Karena. I know what I did was wrong and if I just could do it all over again I would not have went [sic] into the trailer without permission. . . . I did not know [C.H.] was going to tell the police that I was trying to rape her. I was just horseplaying when I grabbed her breast and her vagina.

Defendant offered no evidence at trial.

Upon the close of the evidence, the jury found defendant guilty of first-degree burglary, attempted second-degree rape, and second-degree kidnapping. Defendant also pled guilty to habitual felon status. The trial court consolidated the charges and sentenced defendant to a minimum term of 100 months' imprisonment, with a maximum term of 129 months' imprisonment. From the judgment entered against him, defendant appeals.

Defendant contends that the trial court erred in (1) denying defendant's motion to dismiss the charges against him; (2) failing to instruct the jury on the lesser-included offense of non-felonious breaking and entering in the first-degree burglary charge; and (3) failing to instruct the jury on the lesser-included offense of false imprisonment in the second-degree kidnapping charge. For the reasons stated herein, we find no error in the judgment of the trial court with respect to defendant's arguments.

By his first assignment of error, defendant contends that there was insufficient evidence that he intended to rape the victim or otherwise commit any felony within the residence at the time he forced his way into the home. Defendant therefore argues that the trial court erred in denying his motion to dismiss the charge of first-degree burglary and of attempted second-degree rape. Defendant asserts that there was a similar lack of evidence to support the charge of second-degree kidnapping.

Upon a defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *See State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). A motion to dismiss is proper when the State fails to present substantial evidence of each element of the crime charged. *See State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 214 (1991). Substantial evidence is evidence

that is "existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). We therefore examine the relevant law regarding the crimes of which defendant was convicted and the evidence presented by the State supporting such convictions.

[1] To support a first-degree burglary conviction, there must be evidence from which a jury could find that the defendant broke and entered an occupied dwelling of another at nighttime with the intent to commit a felony therein. *See State v. Wells*, 290 N.C. 485, 494, 226 S.E.2d 325, 331 (1976). The intent to commit a felony must exist at the time of entry, and it is no defense that the defendant abandoned the intent after entering. *See State v. Wilson*, 293 N.C. 47, 54, 235 S.E.2d 219, 223 (1977); *Wells*, 290 N.C. at 494, 226 S.E.2d at 331. The indictment of defendant in the present case alleged that defendant "broke and entered with the intent to commit felonies therein, to wit: sexual assault and kidnapping." Although defendant correctly notes that the crime of sexual assault does not exist in North Carolina, our Supreme Court has expressly held that an indictment for burglary does not require identification of the specific felony that the defendant intended to commit when he broke into a dwelling. *See State v. Worsley*, 336 N.C. 268, 280-81, 443 S.E.2d 68, 74 (1994); *see also State v. Roten*, 115 N.C. App. 118, 121-22, 443 S.E.2d 794, 797 (1994) (concluding that there was no fatal variance between an indictment alleging that the defendant forcibly entered a residence "with the intent to commit a felony therein: first degree sexual offense" and the defendant's conviction of first-degree burglary and attempted second-degree sexual offense because "the State is only required in the indictment to allege that the defendant intended to commit *a* felony" and therefore "any language in the indictment which states with specificity the felony defendant intended to commit is surplusage which may properly be disregarded"). Because the indictment properly alleged that defendant broke and entered the victim's residence with the intent to commit a felony, the specific language charging defendant with the intent to commit a sexual assault was unnecessary and does not create a fatal variance between the indictment and the evidence offered at trial. We further note that the indictment charged defendant with the intent to kidnap the victim, a crime for which he was convicted.

[2] Defendant argues that the State failed to present sufficient evidence that, at the time he forcibly entered the victim's residence, he intended to either rape or kidnap her. Because defendant's argument is dependent in large part on the substantive law of this State con-

cerning the crimes of attempted rape and kidnapping, resolution of this issue first requires an examination of these crimes. If there is sufficient evidence from which a jury could find that defendant either kidnapped or attempted to rape the victim, we will then consider whether or not the State presented sufficient evidence that defendant possessed the requisite intent to commit either of these crimes at the time he broke into the victim's residence. We now consider the crime of attempted rape.

In order to convict a defendant of attempted rape, the State must show that (1) the defendant had the specific intent to rape the victim; and (2) that the defendant committed overt acts showing intent to rape, going beyond mere preparation but falling short of the completed offense of second-degree rape. *See State v. Boone*, 307 N.C. 198, 210, 297 S.E.2d 585, 592 (1982); *State v. Canup*, 117 N.C. App. 424, 427, 451 S.E.2d 9, 11 (1994). The defendant need not retain the specific intent to rape throughout the commission of the overt acts forming the basis of the charge, as long as he at any time during the attempt has an intent to gratify his passion upon the woman, notwithstanding any resistance on her part. *See State v. Banks*, 295 N.C. 399, 412, 245 S.E.2d 743, 752 (1978). " 'Intent is an attitude or emotion of the mind and is seldom, if ever, susceptible of proof by direct evidence[;] it must ordinarily be proven by circumstantial evidence, i.e., by facts and circumstances from which it may be inferred.' " *Id.* (quoting *State v. Gammons*, 260 N.C. 753, 755-56, 133 S.E.2d 649, 651 (1963)).

The question of sufficiency of evidence to justify an inference of intent to rape has been addressed by our appellate courts in a number of cases. In *State v. Gay*, 224 N.C. 141, 29 S.E.2d 458 (1944), the Court held that where the defendant indecently exposed himself to the victim on a city street, posed an indecent question, and chased her briefly when she screamed and ran, but did not touch the victim, there was insufficient evidence of assault with intent to commit rape because there was no showing that the defendant intended to gratify his passions notwithstanding the resistance of the victim. *Id.* at 143, 29 S.E.2d at 459.

In contrast to *Gay*, the Supreme Court concluded in *State v. Bell*, 285 N.C. 746, 208 S.E.2d 506 (1974), that there was sufficient evidence of the defendant's intent to commit rape to support the defendant's conviction of first-degree burglary where the evidence tended to show that the defendant climbed into the victim's window, got into bed with her with his outside pants down and put his hand over her

mouth, threatened to cut her throat if she screamed, and ran away only when a third individual turned on the light in the room. *Id.* at 750, 208 S.E.2d at 508.

Defendant argues that the facts of the instant case are most analogous to the facts presented in *State v. Rushing*, 61 N.C. App. 62, 300 S.E.2d 445, *affirmed per curiam*, 308 N.C. 804, 303 S.E.2d 822 (1983), and *State v. Nicholson*, 99 N.C. App. 143, 392 S.E.2d 748 (1990). In *Rushing*, this Court vacated the defendant's conviction of attempted rape, concluding that there was insufficient evidence of the defendant's intent to rape the victim. The defendant in *Rushing* entered the victim's bedroom through a window, threatened to kill her if she screamed, and grabbed her arm. The defendant was wearing pants and gloves but no shirt at the time. When the victim's small child woke up and began screaming, the defendant abandoned his assault and jumped out of the window. The Court concluded that "a shirtless male's nocturnal entry into the bedroom of a sleeping woman" was insufficient to support an inference that the defendant intended to commit rape at the time he entered her room. *Rushing*, 61 N.C. App. at 66, 300 S.E.2d at 449.

The evidence in *State v. Nicholson* tended to show that, upon entering the residence of the victim, the defendant held a pistol to the victim's head and told her he was going to kill her. *See Nicholson*, 99 N.C. App. at 144, 392 S.E.2d at 750. He then forced the victim to walk to the living room of the residence, where she either fell or slid down onto the floor. The defendant picked the victim up and began carrying her towards the rear of the residence where the bedrooms and bathrooms were located. The victim screamed, fell or was dropped to the floor, and the defendant "slammed himself down on top of her." *Id.* at 145, 392 S.E.2d at 750. The defendant then began crying and allowed the victim to leave. He later apologized to her and gave her the pistol. The Court vacated the defendant's conviction of attempted rape, as there was no "evidence that would give rise to a reasonable inference that the attack on the victim was sexually motivated or that the defendant at any time had the intent to gratify his passion on the victim." *Id.* at 146, 392 S.E.2d at 750.

In the instant case, the evidence showed that defendant forced entry into the victim's residence at 4:00 a.m., pushed the resisting victim into her bedroom and "pinned her" onto the bed with his body, removed duct tape from his pocket and threatened to tape her mouth if she didn't "stop fussing" at him. The victim called to her sister, stating that defendant "was trying to rape her." During the struggle,

defendant "grabbed [the victim's] whole breast in [his] hand" and "grabbed her between her legs." Defendant did not end his assault on the victim until law enforcement arrived.

We conclude that there is sufficient evidence in the instant case, taken in the light most favorable to the State, from which a reasonable jury could find that defendant intended to gratify his passion on the victim, her resistance notwithstanding. Unlike the defendants in *Rushing* and *Nicholson*, defendant here committed overt acts manifesting an intent of forcible sexual gratification. Because there was sufficient evidence of defendant's intent to rape the victim, the trial court did not err in denying defendant's motion to dismiss the charge of attempted second-degree rape.

We moreover conclude that there was sufficient evidence from which a jury could find that defendant intended to rape the victim at the time he forced his way into the residence. The intent with which the accused broke and entered may be found by the jury from evidence as to what he did within the house. *See State v. Freeman*, 307 N.C. 445, 449, 298 S.E.2d 376, 379 (1983); *Bell*, 285 N.C. at 750, 208 S.E.2d at 508. Here, the evidence tended to show that defendant forced his way into the residence at four o'clock in the morning, when all of the residents of the home were asleep. When questioned, defendant lied to the victim, telling her that her mother had opened the door. Defendant then asked to use a telephone and the restroom. When the victim refused his request, defendant forced the victim into her bedroom, pushed her onto the bed, threw his body on top of hers and "pinned her down." Defendant then removed duct tape from his pocket, whereupon the victim renewed her efforts to escape and called for help. Defendant repeatedly touched the victim's breast and vagina and, despite her resistance, did not end the assault until law enforcement arrived. Although defendant asserts that he merely wished to use the telephone or the restroom when he entered the home, none of the acts he committed within the residence furthered these asserted goals. From the evidence presented, a reasonable jury could conclude that defendant broke into the residence with the specific intent to rape the victim. The trial court therefore did not err in denying defendant's motion to dismiss the charge of first-degree burglary.

[3] Defendant further argues that the trial court erred in denying his motion to dismiss the charge of second-degree kidnapping. Defendant contends that there was insufficient evidence that he restrained the victim for the purpose of facilitating a felony. Given

our conclusion that there was sufficient evidence from which the jury could find that defendant intended to rape the victim when he held her down on the bed, this argument is without merit.

Defendant further contends that the evidence of restraint forming the basis of the kidnapping charge was not independent of the restraint inherent in the attempted rape charge. Kidnapping, whether in the first or second degree, requires the unlawful restraint or confinement of a person for one of the purposes enumerated in the statute, which includes commission of a felony. *See* N.C. Gen. Stat. § 14-39(a) (2001). The unlawful restraint must be an act independent of the intended felony. *See State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992). Thus, the defendant's restraint of the victim must be independent of the alleged rape or attempted rape. The test of the independence of the act is "whether there was substantial evidence that the defendant[] restrained or confined the victim separate and apart from any restraint necessary to accomplish the act[] of [attempted] rape." *Id.* "Asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987). Where the asportation is separate and independent of the rape, it constitutes removal for the purpose of facilitating the felony of rape, and is therefore kidnapping under the statute. *See id.*

In the instant case, the evidence tended to show that defendant pushed the victim down the hallway of her residence, away from her sister's bedroom, into her bedroom and "pinned her" on her bed. We conclude that defendant's actions constitute evidence that he "took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *Id.* The trial court therefore did not err in denying defendant's motion to dismiss the charge of second-degree kidnapping, and we overrule defendant's first assignment of error.

[4] By his second assignment of error, defendant contends that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of non-felonious breaking and entering. "In order to prevail under a plain error analysis, 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. Sierra, 335 N.C. 753, 761, 440 S.E.2d 791, 796 (1994) (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)).

Misdemeanor breaking or entering is a lesser-included offense of first-degree burglary. *State v. Jones*, 264 N.C. 134, 136, 141 S.E.2d 27, 29 (1965); *State v. Patton*, 80 N.C. App. 302, 305, 341 S.E.2d 744, 746 (1986). "The distinction between the two offenses rests on whether the unlawful breaking or entering was done with the intent to commit the felony named in the indictment." *Patton*, 80 N.C. App. at 305, 341 S.E.2d at 746.

> "Where the only evidence of the defendant's intent to commit a felony in the building or dwelling was the fact that the defendant broke and entered a building or dwelling containing personal property, the appellate courts of this State have consistently and correctly held that the trial judge must submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict. . . . However, where there is some additional evidence of the defendant's intent to commit the felony named in the indictment in the building or dwelling, such as evidence that the felony was committed . . . or evidence that the felony was attempted, or . . . evidence that the felony was planned, and there is no evidence that the defendant broke and entered for some other reason, then the trial court does not err by failing to submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict."

Id. at 305-06, 341 S.E.2d at 746-47 (quoting *State v. Thomas and State v. Christmas and State v. King*, 52 N.C. App. 186, 196-97, 278 S.E.2d 535, 542-43 (1981)).

In the instant case, there was substantial evidence that defendant entered the residence in order to rape the victim. Once inside, defendant pushed the victim into her room and onto her bed, held her arms tightly behind her back, removed duct tape from his pocket, and repeatedly touched the victim's breast and vagina. Although defendant argues that there was evidence that he merely wanted to use the telephone and the restroom, none of the above-stated acts committed by defendant were in furtherance of defendant's stated intent to use the telephone or restroom. We conclude that the trial court committed no plain error in failing to instruct the jury on non-felonious breaking and entering, and we overrule this assignment of error.

[5] By his final assignment of error, defendant argues that the trial court plainly erred by failing to instruct the jury on the lesser-

included offense of false imprisonment in the second-degree kidnapping charge. The difference between kidnapping and the lesser-included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person. The offense is kidnapping if the reason for the restraint was to accomplish one of the purposes enumerated in the kidnapping statute. *See State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986). "The crux of [the] question [is] whether 'there was evidence from which the jury could have concluded that the defendant, although restraining, confining and removing the victim, did so for some purpose other than . . . to commit attempted second-degree rape.' " *Id.* at 520-21, 342 S.E.2d at 518 (quoting *State v. Lang*, 58 N.C. App. 117, 119, 293 S.E.2d 255, 257, *disc. reviews denied*, 306 N.C. 747, 295 S.E.2d 761 (1982)). Where the State presents evidence of every element of the offense, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, then no lesser-included offense need be submitted. *See State v. Williams*, 314 N.C. 337, 352-53, 333 S.E.2d 708, 719 (1985).

Defendant asserts that there was evidence from which the jury could find that defendant restrained the victim for purposes of using the telephone or restroom, or for purposes of "horseplay." We are unpersuaded. We fail to see how defendant's restraint of the victim and the repeated touching of the breast and vagina furthered his stated intent of using the telephone or restroom. Defendant's overtly sexual actions also belie his assertion that he was merely engaging in "horseplay" with the victim. We conclude that there was substantial evidence from which a jury could find that defendant restrained the victim for the purpose of raping her. We therefore find no plain error by the trial court in failing to instruct on the lesser-included offense of false imprisonment.

We hold that the trial court did not err in denying defendant's motion to dismiss the charges against him. We further hold that the trial court committed no plain error in failing to instruct the jury on the lesser-included offenses of misdemeanor breaking and entering and false imprisonment. In the judgment of the trial court, we therefore find

No error.

Judges HUDSON and STEELMAN concur.

IN THE MATTER OF: NICOLE HOPE YOCUM, A JUVENILE

No. COA02-582

(Filed 3 June 2003)

1. **Termination of Parental Rights— neglect—clear, cogent, and convincing evidence**

The trial court did not err in a termination of parental rights case by concluding that clear, cogent, and convincing evidence existed to show that respondent father neglected his minor child as set forth under N.C.G.S. § 7B-1111(a)(1), because: (1) respondent never paid any child support for the minor child and did not send the minor child any gift or other type of acknowledgment on her birthday; (2) although respondent contends he could not afford to care for the minor child while incarcerated, the evidence showed that he has only been incarcerated for a portion of the minor child's life, has maintained employment, and has never given any monetary support to the minor child; (3) respondent had limited contact with the minor child since her birth; and (4) respondent had the opportunity to provide gifts to the minor child through a charitable program for inmates at no personal expense, but failed to participate in the program.

2. **Termination of Parental Rights— abandonment—clear, cogent, and convincing evidence**

Although respondent father contends the trial court erred in a termination of parental rights case by concluding that clear, cogent, and convincing evidence existed to show that respondent father abandoned his child, this assignment of error need not be addressed because: (1) the trial court's findings and conclusions regarding neglect were upheld; and (2) a finding of any one of the enumerated termination grounds is sufficient to support the order of the trial court.

3. **Termination of Parental Rights— findings of fact—prevented from exercising parental responsibilities**

The trial court did not err in a termination of parental rights case by omitting findings of fact that petitioner mother prevented respondent father from exercising his parental responsibilities with the minor child, because: (1) respondent's testimony revealed that petitioner allowed him to schedule visits which he failed to keep; and (2) while evidence may have been presented

to support a finding that petitioner prevented respondent from visiting the minor child, the trial court was not required to specifically so find.

4. Termination of Parental Rights— best interests of child— abuse of discretion standard

The trial court did not abuse its discretion by concluding that it was in the best interests of the minor child to terminate respondent father's parental rights, because: (1) the evidence reflected that respondent demonstrated a pattern of neglect toward the minor child and petitioner maintained that she could not care for the minor child; and (2) it was within the trial court's discretion to conclude that the child's best interests would be served by terminating respondent's parental rights so that adoption could take place.

Judge TYSON dissenting.

Appeal by respondent from order entered 17 October 2001 by Judge Charles Brown in Rowan County District Court. Heard in the Court of Appeals 29 January 2003.

Sofie W. Hosford for respondent appellant.

Charles W. Porter for petitioner appellee.

TIMMONS-GOODSON, Judge.

Adam Jermaine Austin ("respondent") appeals the order terminating his parental rights as to his daughter, Nicole Hope Yocum ("the minor child"). For the reasons stated herein, we affirm the order of termination by the trial court.

The facts pertinent to the instant appeal are as follows: Respondent and Brenda Lee Yocum ("petitioner") are the natural parents of the minor child. Respondent and petitioner have never married. Prior to the birth of the minor child, respondent and petitioner sought pre-adoption counseling; however, respondent rejected the idea of adoption. On 13 February 1999, the minor child was born in Rowan County.

On 5 June 2001, petitioner filed a petition to terminate the parental rights of respondent. The petition alleged that respondent failed to establish paternity, failed to support the minor child, abandoned the minor child and failed to communicate with the minor

child. The matter came before the trial court on 24 September 2001. Respondent appeared and was represented by counsel at the termination hearing. Based on the evidence presented at the hearing, the trial court made the following pertinent findings of fact:

> 7. Respondent Father, Adam Austin, is 28 years old, incarcerated in North Carolina Department of Corrections for multiple consecutive sentences of Felony Breaking and Entering and has a projected release date of December 25, 2006. He has previously been incarcerated in North Carolina Department of Corrections in 1995 and released in January, 1997 without benefit of early release after having served a full term for Felony Indecent Liberties with a child and multiple probation violations.
>
> . . . .
>
> 9. The father has been employed:
>
> a. while incarcerated, from May, 2001 to present on a road crew and earned 70 cents per day, 5 days per week; all moneys were used for his personal expenses. None of these moneys were applied in direct cash toward support of the child nor was any of it used as a resource to make any telephone, US Mail or any other contact with the child.
>
> b. while incarcerated, February, 2001 to May, 2001 in the prison kitchen and earned 40 cents per day, 5 days per week; all moneys were used for his personal expenses. None of these moneys were applied in direct cash toward support of the child nor was any of it used as a resource to make any telephone, US Mail or any other contact with the child.
>
> c. for two months duration prior to incarceration on February 1, 2000 at Draftex Corporation. Prior to Draftex, he was employed at Superior Lawn Service. Prior to Superior Lawn Service, he was employed at Applebee's restaurant for approximately one year. At all three of the above jobs, he earned a paycheck every two weeks. The exact amount is unknown but he was able to meet his ongoing expenses of rent, food and clothing. None of these moneys were applied in direct cash toward support of the child nor was any of it used as a resource to make any telephone, US Mail or any other contact with the child.
>
> 10. He was consistently employed from 02-13-99 to his incarceration on 02-01-00. While incarcerated he was employed in the

kitchen from February, 2001 to May, 2001 and a road crew from May, 2001 to the present. All income received was used for his personal expenses. From birth, 02-13-99 to the time of trial, Respondent Father never paid any cash monetary support to the child or to the mother for the child's benefit.

11. A Voluntary Support Agreement for $189 per month was entered into by the Respondent Father on January 13, 2000 and no money has ever been paid pursuant to that Agreement.

12. The Respondent Father, accompanied by the paternal grandmother, visited the child and mother on at least 4 occasions but no more than 5 occasions at the Rockwell residence with maternal grandmother present. Each visit lasted no longer than 30 minutes. On the first two visits during the 1st month of the child's life, the Respondent Father brought clothing and blankets for the child. Respondent Father never brought any goods in kind after that.

13. The Respondent Father telephoned the mother and maternal grandmother to make arrangements for additional visits. The father acknowledged that after setting up the additional visits, he did not show up for them because of transportation conflicts.

14. The paternal grandmother telephoned the mother and maternal grandmother prior to the respondent's incarceration to set up her own visits with the child and suggested Walmart or K-Mart as a potential location. No agreement was reached for those visits.

15. Respondent Father acknowledged that he failed to communicate with the child by acknowledging that he never mailed any cards, letters nor gifts to the child on her birthday, Christmas, other special occasion or at any time since birth to the time of trial, a period of 2 years and 7 months, nor did he communicate in any other way with the child since birth.

16. Respondent Father never gave any presents for the child through the Angel Program, a charitable program that provides inmates the opportunity to send Christmas Presents to their children, nor any other Charitable program even though the Angel Program was available to him.

17. The mother has signed a consent for adoption, and has consistently desired to place the child for adoption because she feels

the child needs both a mother and father. The mother acknowledges she cannot raise the child by herself.

18. Alternatives to adoption have been explored by the mother by placing the child with her brother in Texas for several months.

19. The mother has received Government Aid in the form of Food Stamps and Medicaid to assist her financially with the child from birth to the present.

20. In the last 2 months before trial, the Paternal Grandmother has left notes at the mother's Salisbury address for the purpose of establishing visitation for herself. Respondent father has placed 2 collect phone calls to the mother.

Based on the above-stated findings, the trial court entered the following conclusions of law:

4. Respondent Father has willfully and intentionally evinced a settled purpose to forego all parental duties and has relinquished all parental claims to his child.

5. Respondent father has willfully neglected and refused to perform the natural and legal obligations of parental care and support. He has withheld his presence, his love, his care, the opportunity to display filial affection and has willfully neglected to lend any support or maintenance for the child.

6. Grounds exist to terminate the parental rights of the respondent father in that he has abandoned this child pursuant to NCGS 7B-1111(a)7.

7. The child does not receive the proper care, supervision nor discipline from the Respondent father.

8. The Respondent Father has not provided necessary medical care or remedial care.

9. Grounds exist to terminate the parental rights of the respondent father in that he has neglected the child pursuant to NCGS 7B-1111(a)1.

10. It is in the best interests of the child for the Respondent Father's parental rights to be terminated as the mother has consistently felt that this child needed both a mother and father to raise the child, has acknowledged that she cannot raise the child herself and has consented to adoption.

The trial court therefore terminated respondent's parental rights to the minor child. Respondent appeals.

Respondent presents four assignments of error on appeal, arguing that (1) there was not clear, cogent and convincing evidence that respondent neglected the minor child; (2) there was not clear, cogent and convincing evidence that respondent abandoned the minor child; (3) the trial court omitted a finding of fact that petitioner prevented respondent from having contact with the minor child; and (4) the trial court abused its discretion by concluding that it was in the best interest of the minor child to terminate respondent's parental rights.

[1] In his first assignment of error, respondent contends that there was not clear, cogent and convincing evidence that he neglected the minor child, and that the trial court therefore erred in otherwise finding. We disagree.

A proceeding for termination of parental rights involves two stages: (1) the adjudicatory stage, governed by section 7B-1109, and (2) the dispositional stage, governed by section 7B-1110. *See* N.C. Gen. Stat. §§ 7B-1109, 7B-1110 (2001); *In re Huff*, 140 N.C. App. 288, 290, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). At the adjudication stage, the petitioner must show by "clear, cogent and convincing evidence" the existence of one or more of the statutory grounds for termination of parental rights set fourth in section 7B-1111. N.C. Gen. Stat. § 7B-1109(e) and (f) (2001); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). The clear, cogent and convincing evidentiary standard is a greater standard than the preponderance of the evidence standard, but not as rigorous as the proof beyond a reasonable doubt requirement. *See In re Montgomery* at 109-10, 316 S.E.2d at 252. The trial court may terminate the parental rights on the basis of several grounds, and "[a] finding of any one of the . . . separately enumerated grounds is sufficient to support a termination." *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984). In a termination proceeding, this Court "should affirm the trial court where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996).

In the case at bar, the trial court found and concluded that respondent neglected the minor child as set forth in section 7B-1111(a)(1) of the North Carolina General Statutes. Under this section a "neglected" juvenile is defined as follows:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2001). In determining whether neglect has occurred, "the trial judge may consider . . . a parent's complete failure to provide the personal contact, love, and affection that [exists] in the parental relationship." *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982).

Here, the evidence showed, and the trial court found, that respondent neglected the minor child's welfare, in that he never paid any child support for the minor child and did not send the minor child any gift or other type of acknowledgment on her birthday. Respondent maintains that he could not afford to care for the minor child while incarcerated; however, the evidence shows that he has only been incarcerated for a portion of the minor child's life, has maintained employment, and has never given any monetary support to the minor child. Moreover, respondent had limited contact with the minor child since her birth, which consisted of no more than five visits. We further note that respondent had an opportunity to provide gifts to the minor child through a charitable program for inmates at no personal expense, but failed to participate in the program. We hold that grounds for termination of respondent's parental rights under section 7B-1111(a)(1) were established by clear, cogent, and convincing evidence. Respondent's first assignment of error is overruled.

[2] By his second assignment of error, respondent argues that the trial court committed error in finding that he abandoned the minor child. Respondent contends that there was not clear, cogent, and convincing evidence that he abandoned the minor child, because petitioner prevented him from maintaining a parental relationship with the minor child.

Because we have upheld the trial court's findings and conclusion regarding neglect, we need not address respondent's assignment of error contesting termination based on abandonment. A finding of any one of the enumerated termination grounds is sufficient to support the order of the trial court. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990).

[3] In his third assignment of error, respondent argues that the trial court omitted findings of fact that petitioner prevented him from exercising his parental responsibilities with the minor child. Specifically, respondent contends that petitioner's behavior prevented he and his family from visiting the minor child.

Findings of fact are conclusive on appeal if supported by competent evidence, even when there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). In the case *sub judice*, respondent gave the following testimony on cross-examination:

> Q: Did you ever make arrangements to visit and then not show up?
>
> A: Yes, because of transportation.
>
> . . . .
>
> Q: . . . And when you called to set up those visits, did you ever actually set the visits up?
>
> A: Yes, most of the time.
>
> Q: And did you show up for all of them?
>
> A: No, I didn't.
>
> Q: And are you saying now that it's transportation again?
>
> A: Yes
>
> Q: Okay. How many times did you not show up?
>
> A: I don't recall.

Respondent's testimony reveals that petitioner allowed him to schedule visits which he failed to keep. While evidence may have been presented to support a finding that petitioner prevented respondent from visiting the minor child, the trial court was not required to specifically so find. There was sufficient evidence as set forth above to support the finding by the trial court that respondent failed to appear after scheduling visits with the minor child. Thus, the trial court did not err.

[4] In his final assignment of error, respondent argues that the trial court abused its discretion in concluding that it was in the best interests of the minor child to terminate respondent's parental rights. We disagree.

"Once the court has determined that grounds for terminating parental rights are present, the court then 'moves to the disposition stage to determine whether it is in the best interests of the child to terminate the parental rights.' " *In re Leftwich*, 135 N.C. App. 67, 71, 518 S.E.2d 799, 802 (1999) (quoting *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997)). The trial court's decision to terminate parental rights is reviewed on an abuse of discretion standard. *See In re Brim*, 139 N.C. App. 733, 745, 535 S.E.2d 367, 374 (2000); *see also In re Allred*, 122 N.C. App. at 569, 471 S.E.2d at 88.

The evidence reflects that respondent demonstrated a pattern of neglect toward the minor child and petitioner maintained that she could not care for the minor child. It was well within the trial court's discretion to conclude that the child's best interests would be served by terminating respondent's parental rights so that adoption could take place. We therefore hold that the trial court did not abuse its discretion in terminating respondent's parental rights.

In conclusion, we hold that the trial court did not err in terminating respondent's parental rights to the minor child. The order of the trial court is therefore

Affirmed.

Judges LEVINSON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

I respectfully dissent from the majority's opinion affirming the trial court's termination of respondent's parental rights. The trial court concluded that respondent had abandoned and neglected the child, and grounded its decision to terminate pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) and N.C. Gen. Stat. § 7B-1111(a)(1). I do not find clear, cogent, and convincing evidence in the record to support the trial court's findings of fact and its conclusions of law. I would remand to the trial court for further findings of fact.

The "parental liberty interest 'is perhaps the oldest of the fundamental liberty interests' the United States Supreme Court has recognized." *Owenby v. Young*, 357 N.C. 142, 144, 264 S.E.2d 264, 266 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 65, 147 L. Ed. 2d 49, 56 (2000)). The clear, cogent, and convincing evidence standard is

"greater than the preponderance of the evidence standard required in most civil cases" and safeguards this liberty interest. *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). This standard has been defined as evidence "which should fully convince." *Williams v. Building & Loan Asso.*, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934).

I find substantial evidence supports respondent's contention that petitioner, who waived her parental visits with respect to the minor child before the hearing, interfered in the respondent's relationship with his daughter. Petitioner kept written records of the times respondent called and visited his daughter. These records show respondent communicated with petitioner at least twenty times during a period of nine months prior to his incarceration. Respondent also visited with his daughter four or five times during the year between her birth and his incarceration. Respondent and his mother called petitioner at her mother's home to schedule times to visit his daughter. They were informed on numerous occasions by petitioner or her mother not to visit or were discouraged from visiting. Petitioner secreted the child by sending her to live with her brother in Texas for six months during respondent's incarceration. After petitioner moved out of her mother's home and during respondent's incarceration, respondent's mother traveled to petitioner's home to visit her granddaughter several times, visiting once and leaving notes for petitioner the other times.

There is no dispute that respondent and his mother brought clothes and blankets for his daughter. Record evidence shows respondent and his mother offered petitioner money and other items to support the daughter that were refused by petitioner. Petitioner's behavior evidences an intent to shut respondent out of his daughter's life. Neither the trial court's order nor the majority's opinion accounts for either this interference or its effect on respondent's ability for parental involvement. The trial court's order makes no findings of fact in this regard.

The statute requires a finding of existing neglect at the time of the hearing to terminate parental rights on that ground. *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). The trial court failed to make a finding of existing neglect at the time of its order. The trial court relied upon its findings that while incarcerated respondent had not written his daughter, arranged for her to receive Christmas gifts through the prison's Angel Program, or paid any child support to petitioner. Incarceration, standing alone, is neither a sword nor a shield

in a termination of parental rights decision. *See In re Maynor*, 38 N.C. App. 724, 248 S.E.2d 875 (1978). Respondent's severely limited income prevented him from providing support to his daughter. After reviewing all competent evidence in the record, I fail to find clear, cogent, and convincing evidence to support the finding of neglect existing as of the date of the hearing.

Respondent's mother has been certified as a foster parent with the Department of Social Services for five years and is willing to provide a home for the child. The trial court failed to consider any placement possibility with the child's natural family. I would vacate the trial court's termination of respondent's parental rights and remand this case for further findings of fact based upon the clear, cogent, and convincing evidence in the record. I respectfully dissent.

LYNETTA DRAUGHON, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAX DRAUGHON, DECEASED, PLAINTIFF v. HARNETT COUNTY BOARD OF EDUCATION AND BARRY HONEYCUTT, JACKIE SAMUELS, STEPHEN AUSLEY, JASON SPELL, ANTHONY BARBOUR, PERRY SAENZ, DON WILSON, JR., RAYMOND MCCALL, AND BRIAN STRICKLAND, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA02-646

(Filed 3 June 2003)

1. **Appeal and Error— appealability—summary judgment for some defendants**

A summary judgment dismissing 4 of 10 defendants was interlocutory but affected a substantial right because plaintiff was asserting liability against a board as well as several of its employees. The liability of the board depends upon the joint and several liabilities of the individual defendants, the same factual issues would be present at two trials, and there is the possibility of inconsistent verdicts.

2. **Civil Procedure— summary judgment—unverified complaint—deposition exhibit—not trustworthy**

Summary judgment was properly granted for some of the defendants in a negligence action where the sworn evidence of record shows no genuine issue of material fact regarding defend-

ants' breach of duty. The complaint was not verified, an earlier verified complaint voluntarily dismissed was not treated as an affidavit because its allegations were not based upon plaintiff's actual knowledge, and a deposition with which plaintiff attempted to rebut the motion was not included in the record on appeal.

3. Civil Procedure— summary judgment—request for more time—made at hearing

The trial court did not abuse its discretion by denying plaintiff's request for more time at a summary judgment hearing where plaintiff did not move to continue the hearing pursuant to N.C.G.S. § 1A-1, Rule 56(f).

4. Civil Procedure— summary judgment—consideration of evidence

The trial court did not err when granting a summary judgment in its consideration of the record where the judgment stated that the court reviewed the admissible facts from the pleadings, depositions, other documents of record and considered the arguments of counsel.

Judge WYNN dissenting.

Appeal by plaintiff from judgment entered 17 December 2001 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 15 April 2003.

Keith A. Bishop, PLLC, by Keith A. Bishop, for plaintiff.

Tharrington Smith, LLP, by Jonathan A. Blumberg and Lisa Lukasik, for all defendants; Cranfill, Sumner & Hartzog, LLP, by Patricia L. Holland, for defendants Honeycutt, Ausley & McCall; and Bailey & Dixon, LLP, by Gary Parsons and Warren Savage, for defendants Honeycutt, Ausley, McCall, Spell & Wilson.

TYSON, Judge.

Lynetta Draughon ("plaintiff"), personal representative of the Estate of Max Draughon, appeals from summary judgment entered in favor of Stephen Ausley ("Ausley"), Raymond McCall ("McCall"), Jason Spell ("Spell"), and Don Wilson, Jr. ("Wilson"), (collectively "defendants"). We affirm.

I. Background

On 8 August 1998, Max Draughon ("decedent") participated in a morning football practice at Triton High School. The practice was the first "contact" practice of the football season. Practices held during the week prior to the practice at issue involved "conditioning" and not "contact." Outdoor temperatures exceeded 78 degrees Farenheit and the humidity exceeded 70% on the morning of 8 August 1998.

Decedent and the other players ran wind sprints at the practice. Water breaks were scheduled and taken, but allegedly, some were not given to decedent when he requested them during the wind sprints. Decedent continued to run until he collapsed onto the field. Decedent's coaches rendered first aid until an ambulance arrived. Decedent arrived unconscious at Good Hope Hospital in Erwin and was diagnosed as suffering from heat stroke. Decedent was airlifted to University of North Carolina Memorial Hospital where he died the next day from complications of heat stroke.

Plaintiff filed a wrongful death action on 3 August 2000, and voluntarily dismissed the complaint without prejudice on 6 July 2001. Plaintiff refiled her claim the same day against Harnett County Board of Education, Barry Honeycutt, Jackie Samuels, Stephen Ausley, Jason Spell, Anthony Barbour, Perry Saenz, Don Wilson, Jr., Raymond McCall, and Brian Strickland in their individual and official capacities. All defendants filed a collective answer, asserting affirmative defenses on 10 September 2001. Plaintiff filed responses to defendants' affirmative defenses on 20 September 2001. The parties stipulated on 2 October 2001, to incorporate by reference all depositions conducted during the initial dismissed action. On 9 November 2001, defense counsel moved for summary judgment on behalf of Defendants Ausley, McCall, Wilson, and Spell, (collectively "defendants") and noticed that motion for hearing on 26 November 2001. Defendants included the affidavit of Marshall Hinson, a parent who observed the football practice, in support of their motion for summary judgment and supported their motion with the stipulated depositions. Plaintiff allegedly filed a motion to continue, although no written motion is found in the record. Plaintiff filed no affidavits to oppose defendants' summary judgment motion. The trial court heard arguments on defendants' motion on 26 November 2001, and indicated orally that it would rule in favor of defendants Ausley, Spell, and Wilson. On 17 December 2001, the trial court entered summary judgment in favor of Ausley, McCall, Spell, and Wilson. Plaintiff appeals.

II. Issues

The issues are (1) whether this interlocutory appeal affects a substantial right and (2) whether a question of fact exists precluding summary judgment in favor of each of the defendants.

III. Interlocutory Issue and Substantial Right

[1] The four defendants at bar are among ten defendants in plaintiff's suit. The judgment appealed from is not a final judgment on this case, but it is a final judgment with respect to four of the defendants.

When summary judgment is allowed for less than all defendants and the judgment contains no certification for immediate appeal by the trial court pursuant to North Carolina Rules of Civil Procedure, Rule 54(b), the plaintiff's appeal is premature and interlocutory unless the order affects a substantial right. *See N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). "A substantial right . . . is considered affected if there are overlapping factual issues between the claim determined and any claims which have not yet been determined because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (quotations omitted).

Plaintiff asserted claims against the Board and its several individual employee defendants. Because the liability of the Board depends upon the joint and several liabilities of the individual defendants and contains the same nucleus of operative facts, the dismissal of the defendants could prejudice plaintiff's entire case. The same factual issues would be present if there were two trials and the possibility exists of inconsistent verdicts on those issues. We find that the order appealed from affects a substantial right.

IV. Summary Judgment Standard of Review

[2] Summary judgment "is 'a somewhat drastic remedy, [that] 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, 682, 565 S.E.2d 140, 146 (2002) (quoting *Marcus Bros. Textiles v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999)). " 'The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and

allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed.' " *Talbert v. Choplin*, 40 N.C. App. 360, 363, 253 S.E.2d 37, 40 (1979) (quoting *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979)).

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). " 'The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.' " *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. App. 445, 447, 579 S.E.2d 505, 507 (2003) (quoting *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985)).

A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. rev. denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

" 'Once 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.' " *Pacheco*, 157 N.C. App. at 448, 579 S.E.2d at 507 (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000)). " 'To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.' " *Id.* (quoting *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992)).

There is no evidence in the record of any response by plaintiff to defendants' motion for summary judgment. A partial transcript of the hearing shows that plaintiff attempted to rebut defendants' motion with a physician's affidavit. Defendants argued at hearing that the affidavit was (1) not timely served and (2) not properly

notarized. The affidavit is not included in the record before us on appeal, and we are unable to find any response to defendants' summary judgment motion. *See* N.C.R. App. P. 9 (2002) "[R]eview is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule." N.C.R. App. P. 9. (2002).

Plaintiff challenges the trial court's decision, resting on the pleadings and depositions. A trial judge in ruling on a summary judgment motion is confined to the sworn or verified testimony in the record as may be evidenced through pleadings, affidavits, or depositions. Rule 56 (e) of the North Carolina Rules of Civil Procedure provides "[w]hen a motion for summary judgment is made and supported [with 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." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2001).

Plaintiff cites statements from her complaint that present factual issues. Plaintiff's complaint is not verified and cannot be relied upon as sworn testimony. Plaintiff's dismissed complaint is part of the record as a deposition exhibit per the stipulation, and it was verified. Its truthfulness is questionable because the sworn testimony involves many issues of which plaintiff has no "actual knowledge."

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 *Talbert v. Choplin*, this Court affirmed summary judgment for a defendant where the plaintiff rested upon a verified complaint in rebuttal. 40 N.C. App. at 366, 253 S.E.2d at 41.

> Although the complaint was verified by [plaintiff] and in this respect might be considered as an affidavit, it failed to show affirmatively that the affiant was competent to testify concerning the identity of the driver. Unless she was present when the accident occurred, which is not alleged in the complaint, it is manifest that she was not competent to testify as to who was driving.

Id. at 365, 253 S.E.2d at 41.

The verified dismissed complaint upon which plaintiff rests was not treated as an affidavit. Its allegations (1) are based upon

the personal knowledge of someone other than the affiant, (2) are not within the purview of plaintiff's personal knowledge, and (3) are based upon the opinions and knowledge allegedly articulated to her by others.

Plaintiff also relies upon sworn deposition testimony in the record. The sworn evidence of record shows no genuine issue of material fact exists regarding defendants' breach of duty. Plaintiff failed to rebut defendants' affidavit supporting no breach of duty by the defendants. This assignment of error is overruled.

V. Plaintiff's Other Assignments of Error

Plaintiff assigns error to (1) the trial court's denial of her motion to continue and (2) the trial court's refusal to consider the entire evidence of record in ruling on the summary judgment motion.

A. Motion to Continue

[3] Plaintiff did not move to continue the hearing pursuant to Rule 56(f) of the North Carolina Rules of Civil Procedure. Plaintiff's counsel appeared and argued for more time at the summary judgment hearing. Our standard to review the trial court's decision is abuse of discretion.

A trial court does not abuse its discretion when it denies motions to continue a hearing on a motion for summary judgment if a party fails to file and give notice of a motion to continue and submit an affidavit pursuant to Rule 56(f). *Berkeley Federal Savings and Loan Assn. v. Terra Del Sol*, 111 N.C. App. 692, 710-711, 433 S.E.2d 449, 459 (1993), *appeal dismissed, disc. rev. denied*, 335 N.C. 552, 441 S.E.2d 110 (1994). This assignment of error is overruled.

B. Consideration of All Evidence

[4] Plaintiff argues that the trial court erred by not considering the entire record when it ruled on defendants' summary judgment motion. The trial court announced its intended ruling in favor of three of the defendants at the conclusion of the hearing. Plaintiff contends that the entire record was not fully considered before the judgment was entered.

"[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 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).

The judgment entered stated "[a]fter reviewing the facts that are admissible in evidence that appear from the pleadings, depositions, and other documents of record, and after hearing the arguments of counsel, the Court is of the opinion that there is no genuine issue as to any material fact, and that these Defendants are entitled to judgment as a matter of law." Plaintiff has failed to show otherwise. This assignment of error is overruled.

VI. Conclusion

Summary judgment in favor of the Defendants Ausley, McCall, Wilson, and Spell is affirmed. No genuine issue of material fact exists regarding their liability to plaintiff.

Affirmed.

Judge STEELMAN concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

The record in this case shows convincingly that defendants failed to sustain their initial burden of proving that an essential element of plaintiff's negligence claim was either non-existent or unsupported. Accordingly, plaintiff was not required to forecast any additional evidence to support her claim. As this appears to be the only basis for the trial court's grant of summary judgment, and the majority's affirmation of this judgment, I must dissent.

Fundamentally, the majority affirms the trial court's grant of summary judgment because Ms. Draughon failed to carry her "burden . . . to produce a forecast of evidence demonstrating specific facts . . . showing that [she] can . . . establish a prima facie case at trial." However, this burden only arises after defendants sustain their burden of proving, through discovery or affidavits, that an essential element of plaintiff's case was either non-existent or unsupported. "If the defendant fails to meet this initial burden of proof, the motion must fail even though the plaintiff does not submit any affidavits or other supporting materials in opposition to the motion." *Watts v.*

Cumberland Co. Hosp. Sys., 75 N.C. App. 1, 6, 330 S.E.2d 242, 247 (1985), *rev'd in part on other grounds*, 317 N.C. 321, 345 S.E.2d 201 (1986). *See also Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E.2d 281, 284 (1979); *Edwards v. Bank*, 39 N.C. App. 261, 269, 250 S.E.2d 651, 657 (1979). Consequently, "[t]he plaintiff is not required to present evidence to support his or her claim unless the defendant meets the initial burden of proof." *Watts*, 75 N.C. App. at 6, 330 S.E.2d at 247.

The majority opinion fails to address what evidence, if any, the defendants produced to prove that an essential element of plaintiff's claim was either non-existent or unsupported. Notwithstanding this lack of analysis, it is apparent from the record that defendants substantially relied upon the affidavit of Marshall Hinson, a parent who attended the football practice in which Max Draughon collapsed from heat stroke. According to Mr. Hinson's affidavit, "when [he] found out that Max [Draughon] died, [he] simply could not believe that anything that [he] saw at practice . . . caused [him] to die. From what [Mr. Hinson] could tell, the coaches did not do anything wrong." Furthermore, "it never occurred to [Mr. Hinson] that it was too hot or humid for football practice or running at the end of practice." Most assuredly, this evidence was insufficient, particularly in a negligence case, to meet defendants' initial burden of "proving" that an essential element of plaintiff's claim was either non-existent or unsupported.

Under well-settled principles, summary adjudications are disfavored in negligence cases "because application of the prudent [person] test, or any other applicable standard of care, is generally for the jury." *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350 (1990). *See e.g., Camalier v. Jeffries*, 340 N.C. 699, 710, 460 S.E.2d 133, 138 (1995); *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972). "Hence it is only in exceptional negligence cases that summary judgment is appropriate because the . . . applicable standard of care must be applied, and ordinarily the jury should apply it under appropriate instructions from the court." *Easter v. Lexington Memorial Hospital, Inc.*, 303 N.C. 303, 305, 278 S.E.2d 253, 255 (1981) (citations omitted). Nevertheless, the majority affirms the trial court's summary judgment on one fundamental basis: "Plaintiff failed to rebut defendants' affidavit supporting no breach of fiduciary duty by defendants."

The majority will not allow a jury to consider undisputed facts—and disputed facts that should be resolved in favor of the non-

movant—sufficient to establish a prima facie case of negligence ostensibly because the affidavit of one parent suggested that defendants did not breach the duty of reasonable care and supervision. I note, the verified complaint of Ms. Draughon, the mother of Max Draughon and the personal representative of his estate, shows (1) she entrusted her son to the coaches of the high school football team, (2) her son complained to the coaches that he was "burning up" and asked for water before and between "wind-sprints," (3) the coaches refused his request and required him to continue running "wind sprints", and (4) as a result of this intense exercise in the heat and humidity of early August, her son collapsed on the field and later died from heat exhaustion.

The ultimate issue of negligence is a matter for a jury to decide; it should not be decided based upon the opinion of a lay witness. In my view, notwithstanding the affidavit, questions of fact remain for a properly instructed jury to decide. Therefore, I respectfully dissent.

CHERYL S. BASS, PLAINTIFF v. DURHAM COUNTY HOSPITAL CORPORATION AND REBECCA S. RICH, M.D., DEFENDANTS

No. COA02-841

(Filed 3 June 2003)

1. Medical Malpractice— Rule 9(j) certification—voluntary dismissal without prejudice

The trial court erred in a medical negligence case by granting defendants' motions for judgment on the pleadings under N.C.G.S. § 1A-1, Rule 12(c) in an action where an N.C.G.S. § 1A-1, Rule 41(a) voluntary dismissal was taken and the second complaint contained the necessary N.C.G.S. § 1A-1, Rule 9(j) certification, because: (1) the fact that plaintiff obtained a 120-day extension under Rule 9(j) prior to filing the first complaint does not deprive her of the right to take a Rule 41(a) dismissal without prejudice; and (2) plaintiff's original complaint was timely filed, and the action was properly dismissed without prejudice and refiled within one year of the dismissal.

2. Civil Procedure— Rule 60(b) motion—mootness

Plaintiff's appeal in a medical negligence case of an order denying her Rule 60(b) motion to set aside a prior order of dis-

missal is moot, because the Court of Appeals reversed the prior order dismissing the case.

3. Appeal and Error— appealability—cross-assignment regarding original action voluntarily dismissed

Defendant doctor's attempt in a medical negligence case to cross-assign as error the trial court's denial of her motions to dismiss and for summary judgment in the original action is without merit because the original action was voluntarily dismissed and is not before the Court of Appeals.

Judge TYSON dissenting.

Appeal by plaintiff from an order entered 26 October 2001 by Judge Narley L. Cashwell and from an order entered 10 May 2002 by Judge Henry P. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 25 March 2003.

Hollowell, Mitchell, Peacock & Von Hagen, PA, by Joseph T. Copeland and Donald R. Von Hagen, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Timothy P. Lehan and Deanna Davis Anderson, for defendant-appellee Durham County Hospital Corporation.

Patterson, Dilthey, Clay & Bryson, LLP, by E.C. Bryson, Jr., Christopher J. Derrenbacher and Heather R. Waddell, for defendant-appellee Rebecca S. Rich, M.D.

STEELMAN, Judge.

Plaintiff, Cheryl S. Bass, appeals an order of the trial court dismissing her negligence claims with prejudice and an order denying her motion to set aside the dismissal under Rule 60(b). For the reasons discussed herein, we reverse and remand.

On 2 December 1999, plaintiff filed a complaint alleging that she was injured as a result of medical negligence on the part of defendants Dr. Rebecca S. Rich and Durham County Hospital Corporation. The alleged injury occurred on 3 August 1996. Plaintiff further alleged that she suffers from reflex sympathetic dystrophy in her right arm resulting from the improper insertion of an intravenous line during her treatment.

Plaintiff's original complaint was filed on the last day of a 120-day extension granted pursuant to Rule 9(j) of the North Carolina Rules

of Civil Procedure. The complaint did not contain a certification that plaintiff had a medical expert who: (a) was reasonably expected to qualify as an expert; (b) had reviewed plaintiff's medical care; and (c) was willing to testify that the medical care plaintiff received did not comply with the applicable standard of care, as required by Rule 9(j). On 13 December 1999, plaintiff filed an amended complaint under Rule 15(a) prior to the service of a responsive pleading. The amended complaint contained the certification required by Rule 9(j).

On 3 January 2000, Rich filed an answer, a motion for judgment on the pleadings, and a motion for summary judgment. These motions contended that plaintiff's claims were barred by the statute of limitations. The hospital answered on 20 January 2000 and filed a Rule 12(b)(6) motion to dismiss. On 24 May 2000, Judge Donald W. Stephens denied each of Rich's motions and held that plaintiff's amended complaint containing the Rule 9(j) certification related back to the 2 December 1999 filing of the original complaint. On 29 May 2001, plaintiff voluntarily dismissed her claims without prejudice pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure.

Plaintiff re-filed her complaint, which included a Rule 9(j) certification, on 12 June 2001. On 20 July 2001, Rich filed an answer and moved for judgment on the pleadings asserting that: (1) the original complaint was filed more than three years after the alleged events that gave rise to the suit; (2) the complaint failed to state a claim upon which relief could be granted; and (3) plaintiff did not comply with Rule 9(j). The hospital filed a similar motion for judgment on the pleadings on 10 August 2001.

Defendants' motions were heard and granted by Judge Narley L. Cashwell. An order was entered dismissing plaintiff's complaint with prejudice. Plaintiff filed a notice of appeal on 28 November 2001. On 20 February 2002, plaintiff filed a Rule 60(b) motion to set aside the prior order of dismissal. On 10 May 2002, plaintiff's motion was denied by Judge Henry P. Hight, Jr. On 23 May 2002, plaintiff filed a notice of appeal from the denial of the motion to set aside.

[1] In her first assignment of error, plaintiff argues the trial court erred in granting defendants' motions for judgment on the pleadings. We agree.

A motion for judgment on the pleadings pursuant to Rule 12(c) should be granted when all material questions of fact are resolved in the pleadings, and only issues of law remain. *Mabrey v. Smith*, 144

N.C. App. 119, 548 S.E.2d 183, *rev. denied*, 354 N.C. 219, 554 S.E.2d 340 (2001) (citing *Cash v. State Farm Mut. Auto Ins. Co.*, 137 N.C. App. 192, 528 S.E.2d 372, *aff'd*, 353 N.C. 257, 538 S.E.2d 569 (2000)). This motion, disfavored by the courts, liberally construe the pleadings in the light most favorable to the nonmovant. *Id.* (Citing *Pipkin v. Lassiter*, 37 N.C. App. 36, 245 S.E.2d 105 (1978)). Therefore, when all factual issues are not resolved by the pleadings, judgment on the pleadings is inappropriate. *Id.*

The fundamental question in this case is whether the instant action is controlled by *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000) or *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002).

In *Brisson*, the plaintiff timely filed a medical negligence complaint which lacked a Rule 9(j) certification. Subsequently, the plaintiff took a voluntary dismissal without prejudice pursuant to Rule 41(a). Upon the re-filing of the complaint, the trial court dismissed the second action because the original complaint did not contain the Rule 9(j) certification and the second complaint was thus filed outside the statute of limitations. The Supreme Court reversed, holding that the lack of the Rule 9(j) certification in the first action was not fatal to the second action.

In *Thigpen*, the plaintiff obtained a 120-day extension under Rule 9(j) in order to comply with the certification requirements. The plaintiff subsequently filed a complaint that did not contain the Rule 9(j) certification and later filed an amended complaint containing the certification. The trial court granted the defendants' motion to dismiss. Our Supreme Court affirmed, holding that once a plaintiff obtains a 120-day extension under Rule 9(j), the plaintiff cannot thereafter amend the complaint to add a Rule 9(j) certification. The dismissal of the plaintiff's complaint was mandated by Rule 9(j).

In the instant case, defendants argue that since plaintiff obtained a 120-day extension under Rule 9(j) in the original action and then filed a complaint without the Rule 9(j) certification, the subsequent action is barred by the statute of limitations. Defendants' argument requires this Court to look back at the original lawsuit and base its ruling on errors contained in the original complaint, which is contrary to the Supreme Court's holding in *Brisson*.

In that case, the Supreme Court, in broad and clear terms, affirmed the right of a plaintiff to take a voluntary dismissal under

Rule 41(a) and held that the taking of a dismissal would serve to correct defects in the first action.

> The Rule 41(a) voluntary dismissal "has salvaged more lawsuits than any other procedural device, giving the plaintiff a second chance to present a viable case at trial." 2 G. Gray Wilson, North Carolina Civil Procedure § 41-1, at 32 (2d ed. 1995) . . . The purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal and refile the claim within one year even though the statute of limitations has run subsequent to a plaintiff's filing of the original complaint is to provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit. The range of reasons clearly includes those circumstances in which the plaintiff fears dismissal of the case for rule violations, shortcomings in the pleadings, evidentiary failures, or any other of the myriad reasons for which the cause of action might fail. The only limitations are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.

Brisson, 351 N.C. at 597, 528 S.E.2d at 572-73.

The *Brisson* court further stated that "the plain language of Rule 9(j) does not give rise to an interpretation depriving plaintiffs of the one-year extension pursuant to their Rule 41(a) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint." *Id.* at 595, 528 S.E.2d at 571. Thus, the subsequent action was not subject to dismissal where a Rule 41(a) voluntary dismissal was taken, and the second complaint contained the Rule 9(j) certification.

In the instant case, as in *Brisson*, plaintiff filed a complaint in the first action which did not contain the mandatory Rule 9(j) certification. The fact that plaintiff obtained a 120-day extension under Rule 9(j) prior to filing the first complaint does not deprive her of the right to take a Rule 41(a) dismissal without prejudice.

Defendants contend that under *Thigpen*, plaintiff could not amend her complaint to add a Rule 9(j) certification where a 120-day extension had been obtained. However, defendants' reliance upon *Thigpen* is misplaced. *Thigpen* is not a Rule 41(a) case. The Supreme Court in *Brisson* made it clear that, in the context of a Rule 41(a) voluntary dismissal, motions to amend are irrelevant. It held that "[w]e

find that plaintiffs' motion to amend, which was denied, is neither dispositive nor relevant to the outcome of this case. Whether the proposed amended complaint related back to and superceded the original complaint has no bearing on this case once plaintiffs took their voluntary dismissal[.]" *Id.* at 593, 528 S.E.2d at 570.

The effect of a Rule 41(a) dismissal is to leave the plaintiff exactly as she was *before the action was commenced.* Defendant is thus "free from the taint of wrongful accusation or legal detriment," *Augur v. Augur*, 356 N.C. 582, 590, 573 S.E.2d 125, 131 (2002), which might have arisen as a result of failing to attach the Rule 9(j) certification to the original complaint.

The instant case is a Rule 41(a) case and is thus controlled by *Brisson* and not by *Thigpen.* Plaintiff's original complaint was timely filed. That action was properly dismissed without prejudice and properly re-filed within one year of the dismissal. Plaintiff's complaint, therefore, is not barred by the statute of limitations.

[2] Because we reverse Judge Cashwell's order dismissing this case, plaintiff's appeal of Judge Hight's order is moot.

At the time Judge Cashwell granted defendants' motion for judgment on the pleadings and dismissed plaintiff's suit, Rule 9(j) had been declared unconstitutional in *Anderson v. Assimos*, 146 N.C. App. 339, 553 S.E.2d 63 (2001). This holding was expressly vacated by our Supreme Court. *Anderson v. Assimos*, 356 N.C. 415, 572 S.E.2d 101 (2002).

Defendant Rich asserts that this Court's decision in *Anderson* retroactively extinguished plaintiff's right to seek a 120-day extension to file her original complaint. However, in *Best v. Wayne Mem. Hosp., Inc.*, 147 N.C. App. 628, 556 S.E.2d 629 (2001), *appeal dismissed and disc. rev. denied*, 356 N.C. 433, 572 S.E.2d 426 (2002), this Court held that *Anderson* did not invalidate a 120-day extension granted under Rule 9(j). This assignment of error is without merit.

[3] Rich attempts to cross-assign as error Judge Stephens's denial of her motions to dismiss and for summary judgment in the original action, which was voluntarily dismissed and which is not before us on appeal. *Brisson* held that after a plaintiff takes a Rule 41(a) voluntary dismissal, " 'there is nothing the defendant can do to fan the ashes of that action into life[,] and the court has no role to play.' " *Id.* at 593, 528 S.E.2d 570 (citing *Universidad Central Del Caribe, Inc. v.*

Liaison Comm. on Med. Educ., 760 F.2d 14, 18 n.4 (1st Cir. 1985)). Defendant Rich's cross-assignment of error as to Judge Stephens's order in the first lawsuit is thus without merit.

REVERSED AND REMANDED.

Judge WYNN concurs.

Judge Tyson dissents.

TYSON, Judge, dissenting.

I respectfully dissent from the majority's opinion reversing Judge Cashwell's order. The majority's opinion relies heavily upon *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000) to support its result. The Rule 9(j) 120-day extension that plaintiff at bar obtained and her failure to file a conforming complaint within that time factually and legally distinguishes this case from *Brisson*. The more recent Supreme Court opinion in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002), controls the outcome at bar. Judge Cashwell's dismissal with prejudice of plaintiff's complaint should be affirmed.

I. Rule 41(a)

The reliance of the majority's opinion upon and its application of the interpretation of Rule 41(a) in *Brisson* to the facts at bar is misplaced. *Brisson* holds that "[t]he effect of a judgment of voluntary dismissal is to leave the plaintiff exactly where he or she was before the action was commenced." *Brisson*, 351 N.C. at 593, 528 S.E.2d at 570.

The plain language of Rule 41(a) states that "*[i]f an action commenced within the time prescribed therefor*, or any claim therein, is dismissed without prejudice," the claimant has one year from the time of the dismissal to bring a new action on that same claim. N.C. Gen. Stat. § 1A-1, Rule 41(a) (2001) (emphasis supplied). Plaintiff's original complaint was not "commenced within the time prescribed therefor" because plaintiff failed to comply with Rule 9(j) until after the original statute of limitations and the 120-day extension had expired. *See Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002).

II. Effect of *Thigpen v. Ngo*

Our Supreme Court in *Thigpen v. Ngo* reviewed the applicability of Rule 9(j) to amendment of complaints. "[W]e hold that once a

party *receives and exhausts* the 120-day extension of time in order to comply with Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification." *Id.* at 205, 558 S.E.2d at 167 (emphasis supplied). The majority's opinion would allow plaintiff's amended complaint with the 9(j) certification, filed after the original statute of limitations period and the 120-day extension expired, to relate back and cure the defect. This result is precisely what our Supreme Court held plaintiff could not do. *Id.*

Relation back is unavailable where a plaintiff obtained an extension under Rule 9(j) to file the original complaint and failed to comply. *Id.* Under this rule, plaintiff's complaint was not "commenced within the time prescribed therefor." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2001). Plaintiff waited nearly the entire original limitations period and until the last day of the Rule 9(j) 120-day extension before filing a complaint that: (1) was facially defective, (2) did not contain the mandatory certification, and (3) could not be properly amended under Rule 15. *Thigpen*, 355 N.C. at 205, 558 S.E.2d at 167.

III. Reconciling *Brisson* and *Thigpen*

The majority's opinion reads *Brisson* to allow plaintiff to voluntarily dismiss without prejudice and refile. *See Brisson*, 351 N.C. at 600, 528 S.E.2d at 574 (Wainwright J., dissenting) (stating "[t]he majority's analysis would effectively extend the medical malpractice statute of limitations from three years . . . to four years and 120 days."); *See also*, John Huske Anderson, Jr., *Brisson v. Santoriello and Rule 9(j): A Step Backward in the Pursuit to Prevent Frivolous Medical Malpractice Actions in North Carolina*, 79 N.C. L. Rev. 855, 867-70 (2001) (discussing the practical effects of *Brisson* including (1) curtailment of Rule 9(j) as a prerequisite to filing a medical malpractice action, (2) extension of the statute of limitations, and (3) reduction of the judicial control of trial judges).

The facts of *Brisson* are distinguishable when compared to the case at bar. Unlike plaintiff here, "the plaintiffs in *Brisson* did not request the 120-day extension provided by Rule 9(j)." *Thigpen*, 355 N.C. at 201, 558 S.E.2d at 164 (citing *Brisson*, 351 N.C. 589, 528 S.E.2d 568). The proposed amended complaint with 9(j) certification in *Brisson* was filed within 120 days after the statute of limitations expired, and would have been timely filed if plaintiffs had requested and received the 120-day extension. *Brisson*, 351 N.C. at 591-92, 528 S.E.2d at 569-70.

The 120-day extension of the statute of limitations available to medical malpractice plaintiffs by Rule 9(j) is for the purpose of complying with Rule 9(j). N.C. Gen. Stat. § 1A-1, Rule 9(j) (2001). "The title of Rule 9, 'Pleading special matters,' plainly signals the statute's tailoring to address distinct situations set out in the statute." *Thigpen*, 355 N.C. at 203, 558 S.E.2d at 165. Since relation back is not available through Rule 15(c) of the North Carolina Rules of Civil Procedure to comply with Rule 9(j), plaintiff's amended complaint did not toll the statute of limitations. *Id.* at 205, 558 S.E.2d at 167. Plaintiff was not entitled to the one-year extension under Rule 41(a) because her original action was not timely filed.

Rule 9(j) mandates that any complaint which fails to comply with the certification requirement, " '*shall be dismissed.*' " *Id.* at 201, 558 S.E.2d at 164-65 (quoting N.C. Gen. Stat. § 1A-1, Rule 9(j)). *Thigpen* reasons that although the plaintiffs in *Brisson* voluntarily dismissed their case without prejudice, a trial judge can dismiss with prejudice where a complaint does not contain the certification required by Rule 9(j) and the statute of limitations has expired. *Id.* "In *Brisson*, we stated 'Had the trial court involuntarily dismissed plaintiffs' motion *before* plaintiffs had taken the voluntary dismissal, the plaintiffs' claims set forth in the second complaint would be barred by the statute of limitations.' " *Id.* (quoting *Brisson*, 351 N.C. at 595, 528 S.E.2d at 572) (emphasis in original).

I would hold that, although plaintiff voluntarily dismissed her initial complaint without prejudice, Judge Cashwell correctly dismissed plaintiff's second complaint. A Rule 41(a) voluntary dismissal would salvage the action and provide another year for re-filing had plaintiff filed a complaint complying with Rule 9(j) before the limitations period expired. Plaintiff's complaint was untimely filed beyond the expiration of the applicable statute of limitations and the Rule 9(j) extension. I would affirm Judge Cashwell's order dismissing plaintiff's action. I respectfully dissent.

STATE OF NORTH CAROLINA v. RANDY ADAM HOWARD

No. COA02-703

(Filed 3 June 2003)

1. Constitutional Law— effective assistance of counsel— opportunity to prepare—defendant fleeing prosecution

The denial of a continuance did not deny defendant the effective assistance of counsel where his attorney claimed inadequate opportunity to prepare, but defense counsel was appointed about one and a half years before trial and there was no evidence that defendant was unavailable until he fled the country. Defendant showed no evidence of attempting to contact counsel until a few days before trial and did not show that his incarceration rendered him inaccessible to counsel.

2. Rape— statutory—evidence of sex

There was sufficient evidence of sex in a statutory rape prosecution, and the court correctly denied defendant's motion to dismiss, where the witnesses consistently referred to the activity between the victim and defendant as sex, intercourse, or sexual intercourse. Plus, the victim got pregnant.

3. Rape— statutory—age difference between victim and defendant

There was sufficient evidence of the age difference between the victim and defendant in a statutory rape prosecution for the court to deny defendant's motion to dismiss.

4. Rape— statutory—constitutional

The statutory rape statute, N.C.G.S. § 14-27.7A, does not violate equal protection because the State has a reasonable basis for punishing more severely individuals who prey sexually on children aged 13, 14, or 15 as the age differential increases. The decision to distinguish sexual acts between married individuals from acts between unmarried individuals is rational and not arbitrary because marriage closes the bedroom door to governmental intrusion and because it would be incongruous to allow individuals 14-16 to marry but not consummate the marriage. The terms of the offense are clearly set out, and the argument that due process is violated by lack of notice is more correctly the invalid defense of ignorance of the law.

5. Evidence— statutory rape—nurse's testimony about time of conception

There was no plain error in a statutory rape prosecution in a nurse's testimony about when the victim conceived a child. The testimony of the nurse favored defendant in that it indicated that the date of conception was closer to when defendant and the victim were married than the birth date would have indicated.

6. Constitutional Law— right to remain silent—not invoked—contacts with detective

Defendant did not invoke his right to remain silent in a statutory rape prosecution where a detective testified that defendant did not attend an in-person interview but initiated telephone calls to the detective. There was no error, plain or otherwise, in allowing the detective's testimony.

Appeal by defendant from judgment entered 16 January 2002 by Judge Jerry Cash Martin in Davie County Superior Court. Heard in the Court of Appeals 12 March 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen E. Long, for the State.

Osborn & Tyndall, P.L.L.C., by Amos Granger Tyndall, for defendant-appellant.

CALABRIA, Judge.

Randy Adam Howard ("defendant") appeals from judgment entered in Davie County Superior Court upon a jury verdict finding him guilty of statutory rape.

According to the State's evidence, Connie Collet ("Ms. Collet") invited defendant, aged twenty-eight, to stay at her home since she was friends with his mother. During his visit, he helped Ms. Collet with her handicapped daughters. Ms. Collet's younger daughter, Naomi Collet ("the victim"), who was fifteen years of age and had been diagnosed with mild mental retardation, engaged in sexual intercourse with defendant in late November and December 1998.

In January of 1999, Detective John Stephens ("Detective Stephens") of the Davie County Sheriff's Department investigated a report from Social Services concerning sexual activity between defendant and the victim. As a result of that investigation and fears

concerning the loss of her children stemming from her knowledge of their sexual relationship, Ms. Collet agreed to allow defendant to marry the victim. On 13 January 1999, defendant and the victim were married in South Carolina. When the married couple returned later that same day, Ms. Collet went to defendant's residence, picked up the victim, and returned the victim to her residence. The victim subsequently returned to defendant's residence for one week before she expressed her desire to return to Ms. Collet's home.

On 1 February 1999, after an appointment with a nurse at the health department, the victim was found to be five weeks pregnant. After defendant and the victim proceeded with a divorce, Detective Stephens reinstated his investigation of defendant for statutory rape. On 13 March 2000, defendant was indicted for statutory rape in violation of N.C. Gen. Stat. § 14-27.7A.

This matter came to trial in Davie County Superior Court on 14 January 2002, the Honorable Jerry Cash Martin, presiding. Defendant moved to continue the case, asserting that, without additional time to prepare for trial, he would be denied effective assistance of counsel. The trial court denied defendant's motion. The trial court further denied defendant's motions to dismiss the charge at the close of the State's evidence and at the close of trial. After defendant's mother testified on his behalf concerning the nature of the relationship between defendant and the victim, the case went to the jury, which returned a verdict of guilty of statutory rape. The court entered judgment on the conviction, sentencing defendant to 202 to 252 months. Defendant appeals.

Defendant asserts the trial court erred in (I) denying defendant's motion to continue the trial and (II) failing to dismiss the charge. Defendant also asserts (III) N.C. Gen. Stat. § 14-27.7A is unconstitutional. Finally, defendant asserts the trial court committed plain error by (IV) allowing testimony by a nurse not qualified as an expert and (V) allowing testimony concerning interactions between Detective Stephens and defendant.

I. Motion to Continue

[1] Defendant asserts he was denied effective assistance of counsel when the trial court denied his motion to continue because preparation time for trial was inadequate.

> A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and the ruling will not be disturbed

> absent a showing of abuse of discretion. When a motion to continue raises a constitutional issue, however, the trial court's ruling thereon involves a question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record. Even when the motion raises a constitutional issue, denial of the motion is grounds for a new trial only upon a showing that "the denial was erroneous and also that [the defendant] was prejudiced as a result of the error." *[State v.] Branch*, 306 N.C. [101,] 104, 291 S.E.2d [653,] 656 [(1982)].

State v. Blakeney, 352 N.C. 287, 301-02, 531 S.E.2d 799, 811 (2000) (citations omitted). Where the constitutional issue asserted concerns effective assistance of counsel, we review the question of law fully to determine whether defendant has shown "he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Harris*, 290 N.C. 681, 687, 228 S.E.2d 437, 440 (1976).

In the present case, defendant's counsel requested a continuance based on a lack of communication and the unavailability of the defendant until "a few days" before trial. The facts of the present case, however, do not establish any constitutional violation. Defendant's trial counsel was appointed on 17 July 2000, approximately one and a half years prior to the date of trial. Defendant was available to communicate with counsel during the process of discovery and waiver of arraignment between July and November of 2000. There is no evidence defendant was unavailable until he fled the country in or around January 2001. Defendant was taken into custody in Australia and returned to the United States. Though defendant asserts his whereabouts were unknown to his counsel until October 2001, defendant has shown no evidence of attempting to contact his counsel, either personally or through his family, at any time until "a few days" before trial, when counsel for defendant was apprised of the possibility of a witness in Oklahoma. Additionally, defendant failed to show his incarceration rendered him inaccessible to counsel or incapable of establishing communication with him. Accordingly, defendant failed to establish he was deprived of any constitutional right by a lack of a reasonable opportunity to consult with his attorney in preparation for trial.

II. Motion to Dismiss

[2] Defendant asserts the trial court erred in denying his motion to dismiss because the evidence was insufficient to support the convic-

tion of statutory rape. Defendant contends the State failed to establish that he engaged in the prohibited sexual activity and that he was at least six years older than the victim at the time of the alleged acts. "A motion to dismiss on the ground of sufficiency of the evidence raises . . . the issue 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). "The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence." *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). Evidence may be direct, circumstantial, or both. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Absent marriage, guilt under N.C. Gen. Stat. § 14-27.7A is established where the State proves a defendant "engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person." N.C. Gen. Stat. § 14-27.7A (2001). Defendant contends the State failed to prove vaginal intercourse between defendant and the victim and failed to prove defendant was more than six years older than the victim. We disagree.

The evidence produced at trial was sufficient to establish the statutory elements. The victim testified as follows:

> Q. Tell the ladies and gentlemen of the jury what type of sexual act occurred.
>
> A. Just sex.
>
> Q. Just sex. Sexual intercourse?
>
> A. Yes.

Throughout the trial, each of the State's witnesses referred to the sexual activity between the victim and defendant as sex, intercourse, or sexual intercourse. Moreover, the victim became pregnant late in December, according to two sonograms performed by the health department. Considering the evidence in the light most favorable to

the State and giving it the benefit of all inferences drawn therefrom, there was relevant evidence that a reasonable mind might accept as adequate to support the conclusion that defendant and the victim engaged in vaginal intercourse.

[3] Regarding proof of the age difference between defendant and the victim, the victim testified correctly that defendant's birth date was 10 July 1970 and her own birth date was 2 May 1983. Moreover, the State introduced the marriage certificate into evidence, which set forth the ages of defendant and the victim at twenty-eight years old and fifteen years old, respectively. We hold the State presented substantial evidence of the age difference between the victim and defendant. Accordingly, the statutory elements of N.C. Gen. Stat. § 14-27.7A were met, and this assignment of error is overruled.

III. Constitutionality of N.C. Gen. Stat. § 14-27.7A

[4] Defendant next asserts N.C. Gen. Stat. § 14-27.7A violates the guarantees against cruel and unusual punishment, equal protection under the law, and due process of law. Defendant first argues that the criminal sentence imposed is unconstitutionally disproportionate to the crime for which defendant was convicted. We note the sentence imposed is within the limits fixed by the structured sentencing laws found in N.C. Gen. Stat. § 15A-1340.17 (2001). Moreover, this Court has already considered the issue of disproportionate punishment under N.C. Gen. Stat. § 14-27.7A and found no constitutional infirmity. *State v. Anthony*, 133 N.C. App. 573, 516 S.E.2d 195 (1999).

> The General Assembly established a statutory scheme to protect young females from older males. Section 14-27.7A defines two offenses in subsections (a) and (b), with a greater penalty corresponding to a greater age differential between the parties. Where the female is even younger, section 14-27.2 provides a penalty yet more severe than that found in section 14-27.7A. This statutory scheme, calibrating sentence severity to the gravity of the offense, reflects a rational legislative policy and is not disproportionate to the crime.

Id., 133 N.C. App. at 578, 516 S.E.2d at 198 (citation omitted).

Defendant argues N.C. Gen. Stat. § 14-27.7A violates his equal protection rights by discriminating on the grounds of age and marital status. "Where a statute is challenged on the basis that it denies a person equal protection under the law, the level of judicial scrutiny depends on whether the alleged denial involves a fundamental right

or a suspect class." *State v. McCleary*, 65 N.C. App. 174, 185, 308 S.E.2d 883, 891 (1983). With respect to defendant's argument that the statute impermissibly delineates between classes of individuals based on their age, age is not a suspect class; therefore,

> the test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. A statute is only void as denying equal protection when similarly situated persons are subject to different restrictions or are given different privileges under the same conditions.

Id., 65 N.C. App. at 186, 308 S.E.2d at 891-92.

The question is whether the State has a reasonable basis to punish more severely individuals who prey sexually on children aged 13, 14, or 15 as the age differential between the accused and the victim increases. Our Supreme Court, in considering N.C. Gen. Stat. § 14-27.7A, stated that its structure reflects "a legitimate legislative decision that sexual intercourse or sexual acts with children deserve more severe punishment if the victim is younger or based on a greater difference in age between the victim and the older defendant." *State v. Anthony*, 351 N.C. 611, 617, 528 S.E.2d 321, 324 (2000). Accordingly, defendant's argument is without merit.

With regards to marital status, defendant argues N.C. Gen. Stat. § 14-27.7A creates an arbitrary distinction between married and unmarried persons. We disagree. The United States Supreme Court has indicated that sexual relations between married individuals is entitled, through the right of privacy, to heightened protection from governmental intrusion. *Griswold v. Connecticut*, 381 U.S. 479, 485-86, 14 L. Ed. 2d 510, 516 (1965) (noting the idea of allowing the "police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives [to be] repulsive to the notions of privacy surrounding the marriage relationship"). In excepting married individuals from criminal liability under N.C. Gen. Stat. § 14-27.7A, our Legislature chose to respect this right of privacy by acknowledging that marriage closes the bedroom door. Moreover, it would be incongruous for our statutory scheme to allow an individual 14-16 years of age to marry another under certain circumstances without reference to the age difference between them,[1] yet criminalize the consummation of that marriage under N.C. Gen. Stat. § 14-27.7A. Because the decision to distinguish sexual acts between

1. *See* N.C. Gen. Stat. § 51-2.1 (2001).

married individuals from sexual acts between unmarried individuals is rational and not arbitrary, defendant's argument must fail.

Defendant argues N.C. Gen. Stat. § 14-27.7A violates his due process rights because potential or actual offenders have insufficient notice of the severity of the sanctions incurred for the offense. In actuality, the terms of N.C. Gen. Stat. § 14-27.7A clearly set out that the offense is classified as a class B1 felony as well as the elements which constitute the offense. Accordingly, defendant's argument is more correctly one of ignorance of the law. This Court has previously considered this defense: "it is axiomatic that 'ignorance or mistake of law will not excuse an act in violation of the criminal laws.' Therefore, defendant's claim is legally without basis (as well as being utterly preposterous) because ignorance of the law is not a valid defense." *State v. Rogers*, 68 N.C. App. 358, 385, 315 S.E.2d 492, 510-11 (quoting 21 Am. Jur. 2d, Criminal Law § 142, p. 278 (1981)). Accordingly, this assignment of error is overruled.

IV. Testimony of LuAnn Angell

[5] During the presentation of the State's evidence, the trial court allowed LuAnn Angell ("Nurse Angell"), a registered nurse, to testify concerning when the victim conceived the child. Because defendant failed to object to this testimony at trial, defendant asserts the trial court committed plain error because Nurse Angell was unqualified to give such testimony because she lacked the requisite expertise and because she was never qualified as an expert.

Plain error is " '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . grave error which amounts to [or results in] a denial of a fundamental right . . . a miscarriage of justice or . . . the denial to appellant of a fair trial[.]' " *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)) (emphasis in original). "The plain error rule applies only in truly exceptional cases. Before 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. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). Defendant asserts a different result would have been reached absent Nurse Angell's testimony.

The record reveals Nurse Angell testified that (1) a pregnancy test was administered and came out positive, (2) the date of conception,

using information obtained from the victim and two sonograms, was in late December, and (3) the date of birth was 1 September 1999. That the victim became pregnant is undisputed and clear from the record. The testimony concerning the date of conception, if anything, favored defendant. A birth date of 1 September would, ordinarily, indicate a conception date of early December; the testimony of Nurse Angell indicated the date of conception to be in late December, closer to when defendant and the victim were married and, therefore, beyond the criminal consequences of N.C. Gen. Stat. § 14-27.7A. Regardless, it is well-known that a typical pregnancy has a duration of nine months. Finally, the date of birth is uncontroverted. Accordingly, even absent Nurse Angell's testimony, nothing in the record supports the contention that a different result would have been reached. This assignment of error is overruled.

V. Testimony of Detective Stephens

[6] Finally, defendant asserts the trial court committed plain error by allowing Detective Stephens to testify regarding defendant's refusal to cooperate with interviews and appointments with officers. Defendant argues this testimony allowed the State to elicit harmful implications from defendant's refusal of opportunities for consensual interviews in violation of his right to remain silent. U.S. Const. amend. V; N.C. Const. art. I, § 23. In fact, while Detective Stephens did indicate defendant did not attend an appointed in-person interview, his testimony made clear defendant initiated phone calls to Detective Stephens on two separate occasions. The remainder of Detective Stephens' testimony merely explained the method of communication between defendant and himself as well as the information conveyed by defendant to Detective Stephens in the conversations initiated by defendant before he was taken into custody.

Assuming *arguendo* the right to remain silent is applicable in this context, it is clear from the record that defendant, by initiating the phone calls to Detective Stephens about which he testified, never invoked this right. Moreover, under plain error review, "the appellate court must be convinced that absent the error the jury probably would have reached a different verdict[]" in order for defendant to prevail. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. We find no error, much less plain error, in the trial court allowing the testimony of Detective Stephens.

The trial of defendant was free of reversible error.

No error.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. FRANK WILSON

No. COA02-739

(Filed 3 June 2003)

1. Indictment and Information— common law robbery—failure to indicate witnesses appeared before grand jury and gave testimony

Although defendant contends the trial court erred by failing to conclude that the indictment used to charge defendant with common law robbery was fatally defective based on its failure to indicate that the witnesses identified on the face of the indictment appeared before the grand jury and gave testimony as required by N.C.G.S. § 15A-623(c), failure to comply with this provision does not vitiate a bill of indictment or presentment.

2. Robbery— common law—motion to dismiss—sufficiency of evidence—perpetrator—taking by violence or fear

The trial court did not err by denying defendant's motion to dismiss the charge of common law robbery under N.C.G.S. § 14-87.1 even though defendant contends the State failed to establish that he was the perpetrator or that the taking of the property from the victim was accomplished by violence or fear, because: (1) the victim reiterated her certainty that defendant was her assailant no less than three times, and the victim testified her assailant asked for the same amount of money for the same reasons and gave the same story on both 4 June and 17 May; and (2) the victim's repeated direct testimony of her own state of mind and a doctor's testimony provided sufficient evidence of the victim's fear, common law robbery requires taking the property by either fear or violence, and it is undisputed that the victim was knocked down as her purse was taken.

3. Sentencing— restitution—pain and suffering

The appellate court exercised its discretionary power under N.C. R. App. P. 2 and determined that the trial court erred in a

common law robbery case by ordering defendant to make restitution under N.C.G.S. § 15A-1340.34(b) in the amount of $500.00 when the property loss incurred by the victim was limited to $20.00, because: (1) the trial court's basis for awarding restitution is limited to quantifiable costs, income, and values of the kind set out in N.C.G.S. § 15A-1340.35; and (2) pain and suffering is an impermissible basis for restitution.

4. **Evidence— prior crimes or bad acts—impeachment—truthfulness**

The trial court did not err in a common law robbery case by instructing the jury as to impeachment of a defendant as a witness by proof of an unrelated crime even though defendant contends his prior convictions do not bear on his truthfulness, because: (1) the trial court did not instruct the jury to consider the prior convictions as bearing on defendant's truthfulness, but instead explicitly left to the jury the determination of whether the prior convictions bore on defendant's truthfulness; and (2) the instruction given by the trial court correctly set forth the law in North Carolina. N.C.G.S. § 8C-1, Rule 609(a).

Appeal by defendant from judgment entered 23 January 2002 by Judge James M. Webb in Forsyth County Superior Court. Heard in the Court of Appeals 24 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Kevin L. Anderson, for the State.

Hall & Hall, P.C., by Douglas L. Hall, for defendant-appellant.

CALABRIA, Judge.

Frank Wilson ("defendant") appeals from a conviction and judgment entered upon a jury's verdict of guilty of common law robbery. At trial, the State's evidence tended to show that midday on 17 May 2001, Melissa Jane Bridges ("the victim") was leaving work, and as she was walking to her car, a man whom the victim later identified as defendant approached and stopped her. Defendant explained to the victim that he had been dropped off in Winston-Salem on his way home to Raleigh by two of his friends. Defendant, who claimed he was not familiar with Winston-Salem, asked the victim for ten dollars to purchase a bus ticket to Raleigh. The victim testified that after she declined to give money to defendant, he grabbed her purse with his right hand, pushed her to the ground with his left, and ran away.

Although the victim was frightened and had sustained abrasions and bruises to her ankle, she was anxious to retrieve her property, so the victim got up and chased defendant. The victim recovered her purse and wallet, which had been dropped by defendant after he removed the currency in it, consisting of a single twenty-dollar bill. The victim then flagged down a police officer to explain what had occurred and to give him a description of her attacker. Afterwards, Dr. William Dunn ("Dr. Dunn"), a podiatrist and the victim's employer, provided medical treatment for the cuts and bruises to her ankle. The victim noted the incident in her appointment book.

The victim further testified that, approximately two weeks later, on 4 June 2001 around 8:30 in the morning, she was on her way to work when defendant again approached her and asked for ten dollars so that he might get back to Raleigh after two of his friends had dropped him off in Winston-Salem. The victim asked defendant to wait there, and she went inside to summon the police. Defendant was subsequently taken into custody by Officer S. P. Dickerson ("Officer Dickerson") and charged with larceny from the person.

Defendant was indicted by the Forsyth County Grand Jury on 30 July 2001 for common law robbery in violation of N.C. Gen. Stat. § 14-87.1. Defendant pled not guilty, and the case came to trial on 22 January 2002 in the Superior Court of Forsyth County, the Honorable James M. Webb, presiding. After the close of the State's case, defendant testified on his own behalf and denied that he knew or robbed the victim. On cross-examination, the State inquired as to defendant's previous convictions. Both at the close of the State's case and at the close of defendant's evidence, defendant moved to dismiss the charges based upon insufficiency of the evidence. The trial court denied defendant's motions and sent the case to the jury, instructing, in part, that the jury could use the evidence of prior convictions for credibility purposes only and not as evidence of guilt of the crime charged. The jury found defendant guilty of the crime charged, and defendant was sentenced to fourteen to seventeen months in jail and ordered to pay restitution in the amount of $500.00 to the victim. Defendant appeals.

Defendant asserts that (I) the indictment was fatally defective and that the trial court erred by (II) denying defendant's motion to dismiss; (III) ordering defendant to pay $500.00 in restitution; and (IV) instructing the jury to consider defendant's prior criminal convictions for credibility purposes.

I. Indictment

[1] Defendant asserts the indictment for common law robbery in the instant case was fatally defective because the foreman of the grand jury failed to indicate that the witnesses identified on the face of the indictment appeared before the grand jury and gave testimony. North Carolina General Statute § 15A-623(c) (2001) states "[t]he foreman must indicate on each bill of indictment or presentment the witness or witnesses sworn and examined before the grand jury. Failure to comply with this provision does not vitiate a bill of indictment or presentment." *See also State v. Mitchell*, 260 N.C. 235, 237-38, 132 S.E.2d 481, 482 (1963) (holding an indictment is not fatally defective where the names of the witnesses to the grand jury are not marked). Accordingly, this assignment of error is overruled.

II. Motion to Dismiss

[2] Defendant asserts the trial court erred in denying his motion to dismiss because the evidence was insufficient to support the conviction of common law robbery. "A motion to dismiss on the ground of sufficiency of the evidence raises . . . the issue 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002), *cert. denied*, — U.S. —, — L. Ed. 2d — (May 19th 2003) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). "The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence." *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). Evidence may be direct, circumstantial, or both. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Common law robbery under N.C. Gen. Stat. § 14-87.1 (2001) is established where the State shows a "felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Parker*, 322 N.C. 559, 566, 369 S.E.2d 596, 600 (1988) (citing *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270 (1982)). Defendant contends the State failed to establish that he was the perpetrator or that the taking of the property from the victim was accomplished by violence or fear.

Defendant first argues there was not sufficient evidence the defendant was the perpetrator of the act because the victim gave an approximate date of the first offense and because she gave a vague description of the assailant to the officer who responded on 17 May. However, the victim testified as follows at trial:

> A. I knew it was [defendant].
>
> Q. And how did you know that?
>
> A. Because May the 17th he was eyeball to eyeball with me when he was talking. And he was no more than that far away [indicating a distance of about one to two feet with her hand from her face] from me when we were talking, and had been at least talking five minutes trying to explain hisself (sic) to me when he robbed me.

Throughout her testimony, the victim reiterated her certainty that defendant was her assailant no less than three times. Moreover, the victim testified her assailant asked for the same amount of money for the same reasons and giving the same story on both 4 June and 17 May. In the light most favorable to the State, this constituted relevant evidence from which a reasonable mind might conclude defendant was the perpetrator of the crime.

Defendant also argues the State failed to present evidence that the taking was accomplished by fear. Defendant argues the victim could not have been intimidated because (1) she ran after her assailant after he robbed her and (2) she did not appear intimidated after Officer Dickerson apprehended defendant on 4 June and was asking the victim questions. The victim gave testimony during direct examination and cross-examination that she was "absolutely scared," in fear, frantic, and "scared to death" of defendant while defendant robbed her. Dr. Dunn, the victim's employer, stated the victim was "in a terrible state," was "scared to death," and was acting unusual after the attack on 17 May. Not only is the victim's repeated direct testimony of her own state of mind and Dr. Dunn's testimony sufficient evidence, common law robbery requires the taking of property to be accompanied by either fear or violence, and it is undisputed that the victim was knocked down as her purse was taken. *Parker*, 322 N.C. at 566, 369 S.E.2d at 600. There is substantial evidence of each element of the crime, and this assignment of error is overruled.

III. Restitution

[3] Defendant asserts the trial court committed plain error in ordering defendant to make restitution in the amount of $500.00 when the property loss incurred by the victim was limited to $20.00. The State correctly asserts defendant is not entitled to plain error review because defendant did not object to the restitution ordered and did not assert plain error in his assignment of error in violation of N.C.R. App. P. 10(c)(4) (2003). Nevertheless, because this issue raises important questions concerning the trial court's authority to order restitution in a criminal case, we will address defendant's contentions in our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure. N.C.R. App. P. 2 (2003).

North Carolina General Statute § 15A-1340.34(b) (2001) directs a trial court to award restitution for "any injuries or damages arising directly and proximately out of the offense committed by the defendant." However, this provision (entitled "Restitution generally") must be read in conjunction with the following provisions contained in N.C. Gen. Stat. § 15A-1340.35 (2001) (entitled "Basis for restitution"). A trial court is entitled to award restitution for "an offense resulting in bodily injury to a victim" based on the following:

> a. The cost of necessary medical and related professional services and devices or equipment relating to physical, psychiatric, and psychological care required by the victim;
>
> b. The cost of necessary physical and occupational therapy and rehabilitation required by the victim; and
>
> c. Income lost by the victim as a result of the offense.

N.C. Gen. Stat. § 15A-1340.35(a)(1) (2001). The State argues that awarding $20.00 to replace the $20.00 stolen from the victim and adding $480.00 for pain and suffering is appropriate. We disagree.

Reading the statutory provisions together, the more specific statute explains and provides context for the broad language employed in the section concerning restitution generally. The trial court's basis for awarding restitution is limited to quantifiable costs, income, and values of the kind set out in N.C. Gen. Stat. § 15A-1340.35. This conclusion is reinforced by how the term "costs" (found in two of the three factors in N.C. Gen. Stat. § 15A-1340.35(a)(1)) is carried over into subsection (b). *Id.* Under

subsection (b), a court may require the victim to provide "admissible evidence that documents the costs claimed" under these statutory provisions. Pain and suffering, unlike medical and physical or occupational therapy costs, is neither tangible nor easily quantifiable, and the determination of the appropriate valuation of an individual's pain and suffering is traditionally left to the jury. *Weeks v. Holsclaw*, 306 N.C. 655, 661, 295 S.E.2d 596, 600 (1982) (observing "[t]he jury's ultimate task in answering the damages issue in a personal injury action . . . is somehow to assign a monetary value to the injured party's intangible losses attributable to pain [and] suffering"). Unlike lost income, medical costs, and physical or occupational therapy costs, no document can support the mathematical calculation of the value attributable to pain and suffering.

The conclusion that pain and suffering is an impermissible basis for restitution is supported by recent changes to statutory provisions concerning restitution as a condition of probation. Prior to 1998, N.C. Gen. Stat. § 1340.35 (2001) had no statutory predecessor; however, the predecessor to the current N.C. Gen. Stat. § 15A-1343(d) defined restitution as a condition of probation in part as follows: "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action[.]" N.C. Gen. Stat. § 15A-1343(d) (1997). This broad definition, which would permit a trial court to predicate restitution on the basis of pain and suffering, was deleted in 1998 when the provision dealing with restitution as a condition of probation was substantially changed. These changes also included using portions of N.C. Gen. Stat. § 15A-1343(d) (1997) as the basis for the newly enacted provisions concerning the determination of restitution and the effect of a restitution order found in N.C. Gen. Stat. §§ 15A-1340.36(a) and -1340.37(a). Significantly, the current framework provides no definition of restitution as a condition of probation; rather, the trial court is directed to consider the factors set forth in N.C. Gen. Stat. §§ 15A-1340.35 and -1340.36. N.C. Gen. Stat. § 15A-1343(d) (2001). These changes are consistent with a legislative intent to narrow the scope of permissible bases upon which a trial court may award restitution and accord with our interpretation of the factors found in N.C. Gen. Stat. § 15A-1340.35(a)(1).

We hold that where a trial court grants an award of restitution based on a victim's pain and suffering, the trial court has exceeded the intended bases upon which such an award may be premised. We note restitution was not sought for treatment administered by Dr. Dunn since Dr. Dunn treated his employee without charging her; oth-

erwise, any costs associated with such treatment would clearly be appropriate as a basis for restitution. In the instant case, the trial court erred in awarding restitution beyond the statutory authority granted, and we remand with instructions to reduce the restitution awarded to $20.00.

IV. Jury instructions

[4] Finally, defendant asserts the trial court erred by instructing the jury as to impeachment of a defendant as a witness by proof of an unrelated crime. Defendant, after testifying on his own behalf, was cross-examined by the State regarding past convictions of disorderly conduct, indecent exposure, communicating threats, resisting an officer, possession of drug paraphernalia, public disturbance, attempt to assault a government official, and misdemeanor larceny. In its charge to the jury, the trial court instructed the jury as follows:

> When evidence has been received that at an earlier time the defendant was convicted of criminal charges, you may consider this evidence for one purpose only. If considering the nature of the crimes you believe that this bears on truthfulness, then you may consider it together with all other facts and circumstances bearing upon the defendant's truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. It is not evidence of the defendant's guilt in this case. You may not convict him on the present charge because of something he may have done in the past.

While defendant recognizes that the crimes inquired into were admissible under Rule 609 of the North Carolina Rules of Evidence, defendant contends these prior convictions do not bear on defendant's truthfulness, and the trial court erred in instructing the jury to consider such. Defendant's argument is flawed for two reasons.

First, the trial court did not instruct the jury to consider the prior convictions as bearing on defendant's truthfulness. The trial court's instruction explicitly left to the jury the determination of whether the prior convictions bore on defendant's truthfulness. Moreover, the instruction made clear that if the jury determined the prior convictions bore on defendant's truthfulness, the jury could consider the prior convictions solely for the purpose of impeaching the credibility of defendant's testimony. Finally, the trial court instructed that, even if the prior convictions by defendant bore on his credibility, the jury

was instructed to consider the other "facts and circumstances" in deciding whether defendant's testimony was credible. Past crimes were not evidence of guilt on the present charge and, more importantly, the jury could not convict defendant on that basis.

Second, the instruction given by the trial court correctly sets forth the law in North Carolina. "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C. Gen. Stat. § 8C-1, Rule 609(a) (2001). As the commentary indicates, the practice in North Carolina, which permits inquiry into any sort of criminal offense for "the purpose of attacking credibility[,]" stands in contradistinction to its federal counterpart, which only allows evidence of convictions of a crime involving dishonesty or a false statement to be used to attack a witness' credibility. Commentary, N.C. Gen. Stat. § 8C-1, Rule 609 (2001). *See also State v. Ross*, 329 N.C. 108, 119, 405 S.E.2d 158, 164 (1991) (recognizing North Carolina's version of Rule 609 to be more permissive than its federal counterpart). This assignment of error is overruled.

Defendant's remaining assignment of error has been abandoned. N.C.R. App. P. 28(b)(6) (2003).

In sum, as to the common law robbery conviction and sentence of fourteen to seventeen months, we find no error; however, we vacate the portion of the judgment awarding $500.00 in restitution and remand for proceedings not inconsistent with this opinion.

No error in part, vacated and remanded in part.

Chief Judge EAGLES and Judge HUNTER concur.

HAROLD E. SMITH, EMPLOYEE, PLAINTIFF-APPELLEE v. FIRST CHOICE SERVICES, EMPLOYER, AND STATE FARM INSURANCE COMPANY, CARRIER, DEFENDANTS-APPELLANTS

No. COA02-814

(Filed 3 June 2003)

1. **Workers' Compensation— jurisdiction—insurance coverage—officer exclusion—mutual mistake**

The Industrial Commission did not lack jurisdiction to apply the Workers' Compensation Act to plaintiff's claim even though defendant insurance carrier contends plaintiff was not considered an employee under the pertinent insurance contract based on an alleged officer exclusion, and no reformation of the pertinent contract is required because: (1) plaintiff worked for defendant employer as an officer until his accident, the accident arose out of and occurred during the course of his employment with his employer, and thus plaintiff is considered an employee for the purpose of the Workers' Compensation Act even if his employer opted to exclude workers' compensation coverage for officers in its contract with defendant insurance carrier; and (2) defendant did not meet its burden of showing mutual mistake.

2. **Workers' Compensation— detailed findings of fact—mutual mistake**

The Industrial Commission did not err in a workers' compensation case by failing to make more detailed findings concerning the insurance application, the renewal audit reports, and the witnesses' differing testimony before reaching a conclusion regarding mutual mistake and draftsman's mistake, because: (1) the Court of Appeals already concluded that competent evidence existed to support the Industrial Commission's finding of fact that there was no mutual mistake between defendant insurance carrier and defendant employer; and (2) the Industrial Commission made findings on all ultimate facts in this case and no additional findings of fact were required.

3. **Workers' Compensation— credit for salary—available to employer and not to insurance carrier**

The Industrial Commission did not err in a workers' compensation case by denying defendant insurance carrier a credit for salary paid to plaintiff by defendant employer after plaintiff's injury, because: (1) the payments were considered due and

payable under N.C.G.S. § 97-42 since defendants accepted plaintiff's claim as compensable and defendant employer initiated payment of partial benefits, and the employer is not entitled to receive a credit for payments that are due and payable; and (2) there is no evidence that defendant insurance carrier made any payment of benefits to plaintiff following his injury, and N.C.G.S. § 97-42 does not provide for the insurance carrier to receive a credit for payments made by the employer.

Appeal by defendants from opinion and award entered 6 March 2002 by the North Carolina Industrial Commission. Heard in the North Carolina Court of Appeals 20 February 2003.

John J. Korzen and Ling & Farran, by Jeffrey P. Farran, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Matthew P. Blake, for defendants-appellants.

McGEE, Judge.

State Farm Insurance Company (State Farm) appeals from the opinion and award of the Industrial Commission awarding disability compensation to Harold E. Smith (plaintiff).

State Farm filed a Form 61 dated 30 July 1997 denying plaintiff's workers' compensation claim, stating that plaintiff was "not a covered employee under the Workers' Compensation Act." Plaintiff filed a Form 33 request for hearing dated 27 October 1997. State Farm filed a Form 33R response to request for hearing dated 15 December 1997 stating that defendants were not liable for benefits claimed by plaintiff.

The evidence before the Industrial Commission tended to show that First Choice Services (First Choice) was a small family-owned company in the business of insurance restoration work. Plaintiff was vice-president and secretary of First Choice and was responsible for sales, marketing and estimations. While trying to reach some cartons on 17 April 1997, plaintiff fell off a ladder onto a concrete warehouse floor and fractured both his femur and his left wrist. Plaintiff's average weekly wage was $581.40 at that time.

State Farm began providing First Choice with workers' compensation insurance coverage in 1991. Initially, First Choice elected to exclude its officers from coverage under the policy. Peggy Smith

(Mrs. Smith), plaintiff's wife and an employee of First Choice, testified that officers were excluded from coverage to save money because the officers' job requirements made it less likely they would be injured.

Mrs. Smith later revisited the issue of officer coverage with Richard Kepler (Kepler), an independent agent of State Farm. Mrs. Smith testified that when she asked Kepler if adding the officers would "shoot [her] premiums sky high," he responded "not really" because there had been no previous workers' compensation claims against First Choice. Mrs. Smith claimed that Kepler explained that workers' compensation would pay two-thirds of an officer's salary if an officer was injured and unable to work. She also testified that when the policy was renewed, she asked Kepler to "go ahead and add the officers on."

Mrs. Smith testified that after plaintiff was injured, she called Kepler and asked if First Choice should submit a workers' compensation claim. Mrs. Smith said Kepler asked whether there was an officer's exclusion on First Choice's policy, and Mrs. Smith responded that there was not. Mrs. Smith also stated that Kepler then checked his computer to confirm whether there was an exclusion. Upon finding no officer exclusion, Kepler told Mrs. Smith to file a claim for workers' compensation.

Plaintiff was disabled due to the accident and was unable to return to work. Mrs. Smith stated that First Choice voluntarily paid plaintiff one-third of plaintiff's salary. Mrs. Smith testified that First Choice made the payments because she was under the impression that workers' compensation would pay the other two-thirds of plaintiff's salary. Four months after plaintiff's accident, First Choice stopped paying any salary to plaintiff because business had declined in plaintiff's absence and money had become very tight.

Mrs. Smith testified that in July 1997 she received a letter from State Farm denying coverage to plaintiff. Upon receipt of the letter, she went to Kepler's office to inquire about why plaintiff was denied coverage. Kepler said he did not remember a prior conversation between Kepler and Mrs. Smith about adding the officers to the policy because "he talked to so many people he couldn't remember . . . individual conversations."

Although Kepler testified that First Choice's policy did not include officer coverage, he also testified that it was possible that the

conversation in which Mrs. Smith requested officer inclusion had occurred. Kepler admitted that his hard copy of the policy contained no exclusions. He later testified that an oral request was sufficient to change policy coverage. Kepler also testified that the premium statements did not indicate who was covered and that he was not accusing plaintiff or Mrs. Smith of fraud or misrepresentation. Furthermore, when Kepler was asked, "as far as you know, [there] was a unilateral mistake by State Farm," he responded, "I can't dispute that."

State Farm employee Elise Cobb (Cobb) testified that all First Choice's premiums were current and that the workers' compensation policy in effect did not contain an officer exclusion as of 17 April 1997.

State Farm audit supervisor Michael Chesnet (Chesnet) testified that during a 1995-1996 audit meeting, Mrs. Smith indicated that First Choice's officers were excluded from coverage. However, he admitted that he was not aware of what coverage Mrs. Smith requested from Kepler. Chesnet admitted that First Choice's annual premium had increased between 1996 and 1997, from $3,800 to $6,100 per year. Chesnet stated he was not the auditor in 1997 and did not speak with Mrs. Smith at that time. Chesnet testified that a computer system error during automatic renewal time accounted for the officer inclusion on First Choice's policy.

A deputy commissioner, in a bifurcated hearing, filed an opinion and award on 15 December 1998, finding that Mrs. Smith's testimony was "very credible" and that evidence indicated that a unilateral mistake was made by State Farm. The deputy commissioner concluded that plaintiff proved that "plaintiff was an 'employee' of the corporate employer for purposes of the Worker's Compensation Act." A deputy commissioner filed another opinion and award on 15 June 2000 and awarded compensation to plaintiff in the amount of $387.60 per week.

State Farm appealed to the Full Commission arguing that the findings of fact were not supported by the evidence. Plaintiff also requested attorney's fees, reimbursement to plaintiff for medical bills, and retroactive interest on the compensation award.

The Full Commission filed an opinion and award on 6 March 2002 which modified in part and affirmed in part the deputy commissioner's decisions. The opinion awarded plaintiff $387.60 per

week for temporary total disability compensation, all medical expenses incurred as a result of the injury, and attorney's fees. State Farm appeals.

When reviewing an Industrial Commission decision, our Court is "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). The Industrial Commission is the finder of fact and this Court may not reweigh the evidence presented but must restrict its review to determining whether there is " 'any evidence tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272 (1965)). Therefore, the findings of the Industrial Commission are conclusive on appeal when supported by competent evidence " 'even though there be evidence that would support findings to the contrary.' " *Id.* (quoting *Jones v. Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)).

I.

[1] State Farm first argues that the Industrial Commission lacked jurisdiction to apply the Workers' Compensation Act to plaintiff's claim as plaintiff was not considered an employee under the insurance contract in question and was therefore not subject to the Act's provisions. State Farm claims there was no enforceable contract for insurance coverage of First Choice's officers because the policy inclusion was due to draftsman's error and mutual mistake on the part of defendants. State Farm seeks reformation of the insurance policy under which plaintiff claims coverage.

The North Carolina Supreme Court has determined that the Industrial Commission has jurisdiction "to hear 'all questions arising under' the [Workers'] Compensation Act. . . . This jurisdiction under the statute ordinarily includes the right and duty to hear and determine questions of fact and law respecting the existence of insurance coverage and liability of the insurance carrier." *Greene v. Spivey*, 236 N.C. 435, 445, 73 S.E.2d 488, 495-96 (1952).

The record shows that plaintiff worked for First Choice as an officer until his accident. The accident arose out of and occurred during the course of his employment with First Choice. Plaintiff is therefore considered an employee for the purpose of the Workers'

Compensation Act, even if First Choice opted to exclude workers' compensation coverage for officers in its contract with State Farm. Since the Industrial Commission has "exclusive original jurisdiction to hear . . . matters of compensation for personal injury," subject to review by our appellate Courts on matters of law, the Industrial Commission had jurisdiction to determine whether plaintiff was entitled to insurance coverage at the time of the accident. *Cooke v. Gillis*, 218 N.C. 726, 728, 12 S.E.2d 250, 251-52 (1940). The Industrial Commission did not exceed its jurisdiction in hearing plaintiff's claim.

State Farm further argues that the policy's officer inclusion was a result of mutual mistake, and that State Farm is therefore entitled to reformation of the policy. A mutual mistake exists when both parties to a contract proceed " 'under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement.' " *Sudds v. Gillian*, 152 N.C. App. 659, 662, 568 S.E.2d 214, 217 (2002) (quoting *Metropolitan Property and Cas. Ins. Co. v. Dillard*, 126 N.C. App. 795, 798, 487 S.E.2d 157, 159 (1997)). A party seeking reformation must prove the existence of mutual mistake. *Id.* However, "[a] unilateral mistake by a party to a contract, unaccompanied by fraud, imposition, undue influence, or like circumstances of oppression is insufficient to avoid a contract." *Lowry v. Lowry*, 99 N.C. App. 246, 252, 393 S.E.2d 141, 144 (1990).

Mrs. Smith testified that she requested officer inclusion upon renewal of First Choice's policy. Kepler stated that he did not recall talking with Mrs. Smith about including officer coverage, although he also admitted that the request may have been made. When asked if there "was a unilateral mistake by State Farm," Kepler admitted that he could not dispute that. Mrs. Smith, Cobb and Kepler all testified that at the time of plaintiff's accident, the policy included coverage for plaintiff as an officer of First Choice. Chesnet testified that officers were included due to a computer error during automatic renewal. State Farm argues that the computer error should be regarded as draftsman's error and should be considered as evidence that the parties were mutually mistaken in their beliefs about the change in the officers' inclusion within the insurance policy.

Our case law supports the argument that "reformation on grounds of mutual mistake is available only where the evidence is clear, cogent and convincing." *Light v. Equitable Life Assurance Society*, 56 N.C. App. 26, 32-33, 286 S.E.2d 868, 872 (1982) (quoting *Durham v.*

Creech, 32 N.C. App. 55, 59, 231 S.E.2d 163, 166 (1977)). Findings of fact by the Industrial Commission are binding on appeal if they are supported by competent evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Upon weighing all the facts presented, the Industrial Commission found that "[d]efendants [did not meet] their burden in showing . . . mutual mistake." Since the Industrial Commission found that defendants did not show mutual mistake, and competent evidence exists to uphold such a finding, State Farm's claim for reformation of the contract fails. This argument is therefore overruled.

II.

[2] State Farm also argues that this case should be remanded to the Industrial Commission due to insufficient findings of fact. State Farm argues that the Industrial Commission was required to make more detailed findings in consideration of State Farm's claim that the officer inclusion was a result of mutual mistake by both State Farm and First Choice. We disagree.

When a party seeks to reform a contract due to an affirmative defense such as mutual mistake, misrepresentation or fraud, the burden of proof lies with the moving party. *See Metropolitan Property & Cas. Ins. Co.*, 126 N.C. App. at 799, 487 S.E.2d at 160 (holding that the insurance company had the burden of proving misrepresentation in the enforcement of an insurance contract). The evidence presented to prove mutual mistake must be "clear, cogent and convincing," and the question of reformation on that basis is a matter to be determined by the fact finder. *Durham*, 32 N.C. App. at 59, 231 S.E.2d at 166. The Industrial Commission is the ultimate fact finder. *Fennell v. N.C. Dep't of Crime Control and Pub. Safety*, 145 N.C. App. 584, 590, 551 S.E.2d 486, 490-91 (2001), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002).

State Farm argues that the Industrial Commission was required to make specific findings concerning the insurance application, the renewal audit reports and the witnesses' differing testimony before reaching a conclusion regarding mutual mistake and draftsman's mistake. The Industrial Commission found that State Farm failed to satisfy its burden of proof of mutual mistake. The Commission was not required to make further detailed findings of fact regarding every disputed issue. *See Hansel v. Sherman Textiles*, 304 N.C. 44, 54, 283 S.E.2d 101, 107 (1981) (denying compensation due to the failure of the claimant, who had the burden of proof, to prove any one of the elements of compensation). Our Court need only determine if competent

evidence exists to support the Industrial Commission's findings, as remand is only necessary if "the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy." *Id.* at 59, 283 S.E.2d at 109. This Court is not permitted to reevaluate evidence that may support a contrary conclusion and make a decision based on the weight of the evidence. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. We have already held that competent evidence existed to support the Industrial Commission's finding of fact that there was no mutual mistake between State Farm and First Choice. We hold that the Industrial Commission made findings on all ultimate facts in this case and that no additional findings of fact were required. This assignment of error is overruled.

III.

[3] State Farm argues that the Industrial Commission erred by denying State Farm a credit for salary paid to plaintiff by First Choice after plaintiff's injury. State Farm contends that it should be credited for payments made to plaintiff by First Choice after plaintiff's injury.

N.C. Gen Stat. § 97-42 (2001) states:

> 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.

"Payments are due and payable under section 97-42 when the employer has accepted the plaintiff's injury as compensable and initiated payment of benefits." *Thomas v. B.F. Goodrich*, 144 N.C. App. 312, 318, 550 S.E.2d 193, 197, *disc. review denied*, 354 N.C. 228, 555 S.E.2d 276 (2001). When payments made by an employer are due and payable, the employer is not entitled to receive a credit for payments under the statute. *Id.* at 318-19, 550 S.E.2d at 197; *see also Moretz v. Richards & Associates*, 316 N.C. 539, 542, 342 S.E.2d 844, 846 (1986).

The evidence in the record shows that First Choice considered plaintiff's claim to be compensable and paid plaintiff one-third of his salary, the portion of salary that was not covered under the insurance policy, for four months following plaintiff's injury. First Choice stopped paying plaintiff because business declined in plaintiff's absence and First Choice could not afford to continue the payments.

There is also evidence in the record that State Farm indicated to First Choice that State Farm considered plaintiff's claim to be compensable and instructed First Choice to file a workers' compensation claim. Since defendants accepted plaintiff's claim as compensable and First Choice initiated payment of partial benefits, the payments were considered due and payable under the statute. *See Moretz*, 316 N.C. at 541-42, 342 S.E.2d at 846. Accordingly, State Farm is not entitled to a credit under the statute.

Additionally, there is no evidence in the record that State Farm made any payment of benefits to plaintiff following his injury. N.C.G.S. § 97-42 allows the employer to receive credit when the employer makes payment of benefits, the purpose of which is "to encourage voluntary payments by the employer during the time of the worker's disability." *Effingham v. Kroger Co.*, 149 N.C. App. 105, 119, 561 S.E.2d 287, 296-97 (2002). However, the statute does not provide for the insurance carrier to receive a credit for payments made by the employer. State Farm has failed to point us to any authority that would support such an interpretation of the statute. This assignment of error is without merit.

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

Affirmed.

Judges HUDSON and STEELMAN concur.

MARK JAMES BRACKETT, PLAINTIFF v. SGL CARBON CORPORATION, DEFENDANT

No. COA02-965

(Filed 3 June 2003)

1. Pleadings— 12(b)(6) motion to dismiss—consideration of documents not attached to complaint—motion not converted to summary judgment

A motion to dismiss for failure to state a claim was not converted into a motion for summary judgment where the court considered documents not attached to the complaint. Those documents were referred to in the complaint and formed the procedural basis for the complaint.

2. Employer and Employee— retaliatory discharge—time limit for claim

The 180-day time limit for filing a Retaliatory Employment Discrimination Act claim with the North Carolina Department of Labor is mandatory even though there is no express statutory consequence for failing to file within the time limit.

3. Statutes of Limitations and Repose— retaliatory discharge—time limits for filing

There is no merit in the argument that the 3-year limitations period of N.C.G.S. § 1-52 should control the 180-day filing limit of the Retaliatory Employment Discrimination Act.

4. Employer and Employee— retaliatory discharge—motion to amend—additional claim—responsive pleading not filed—futile motion

The trial court properly denied plaintiff's motion to amend his complaint to assert an additional claim under the Retaliatory Employment Discrimination Act based on an alleged post-complaint incident of discrimination where the original claim was time-barred and plaintiff failed to file his additional claim with the N.C. Department of Labor before seeking to add it to his complaint so that allowance of the amendment would have been futile.

5. Employer and Employee; Workers' Compensation— wrongful discharge—assertion of workers' compensation rights—amendment of complaint—responsive pleading not filed—motion not futile

A plaintiff may state a claim for wrongful discharge in violation of public policy based upon an allegation that the dismissal resulted from an assertion of rights under the Workers' Compensation Act, and plaintiff was entitled to amend his complaint to add such a claim as a matter of right before defendants had filed a responsive pleading. The trial court could not properly deny as futile the motion to amend on the ground that plaintiff was a union employee who could only be dismissed for just cause rather than an at-will employee and thus could not sue in tort for wrongful discharge under *Trexler v. Norfolk S. Ry. Co.*, 145 N.C. App. 466, where the terms of the purported collective bargaining agreement were not before the court.

Appeal by plaintiff from orders entered 25 February 2002 and 8 March 2002 by Judge Kimberly S. Taylor in Burke County Superior Court. Heard in the Court of Appeals 16 April 2003.

Mark James Brackett, pro se, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Jonathan M. Crotty and John B. Anderson, for defendant-appellee.

MARTIN, Judge.

Plaintiff filed this action alleging defendant's violation of the North Carolina Retaliatory Employment Discrimination Act ("REDA"). Plaintiff sought compensatory and punitive damages and injunctive relief. According to the allegations of the complaint, plaintiff alleges he developed skin lesions on his arm due to burns sustained at work during 1998. He reported these injuries to defendant in the fall of 1999, took medical leave, and requested that defendant pay for surgical removal of the lesions. He was released to return to work by the company doctor on 1 December 1999. Plaintiff alleged that on 2 December 1999 he was falsely accused by defendant of working for another employer during his leave. Defendant terminated plaintiff's employment, denied liability for his alleged injuries, and refused to pay for his medical expenses.

On 2 June 2000, plaintiff filed a REDA claim against defendant with the North Carolina Department of Labor ("NCDOL"), alleging he was fired because he reported an on-the-job injury. Plaintiff received a "right-to-sue" letter from the NCDOL on 22 June stating that it was dismissing plaintiff's complaint due to his failure to file the REDA claim within 180 days of the alleged discriminatory discharge as required by statute. Plaintiff was subsequently reinstated by defendant on 28 August 2000 and returned to work.

Based on the right-to-sue letter, plaintiff filed the instant civil action in Burke County Superior Court on 20 September 2000. On 22 November 2000, defendant filed a "Motion for Judgment as a Matter of Law," citing G.S. § 1A-1, Rules 12(b)(6) and 56(b), asserting plaintiff's claim is time-barred. Eleven months thereafter, plaintiff filed a Motion to Amend seeking to allege that defendant had, since plaintiff's return to work, committed an additional discriminatory act under REDA. Before the motions were heard, plaintiff filed a Supplemental Motion For Leave to Amend on 21 February 2002, in which he also sought to allege a common law claim for wrongful discharge. Plaintiff appeals from the trial court's orders dismissing his

complaint with prejudice and denying his Motion to Amend and Supplemental Motion for Leave to Amend.

By his assignments of error, plaintiff asserts the trial court erred in (1) granting defendant's motion and dismissing plaintiff's complaint and (2) denying plaintiff's motions to amend his complaint.

[1] Plaintiff first asserts that although he filed his REDA claim with the NCDOL over 180 days after the alleged discriminatory discharge, his claim should not have been dismissed. We note at the outset that the trial court appears to have proceeded under Rule 12(b)(6) in dismissing plaintiff's complaint. Although the trial court must have necessarily considered plaintiff's administrative complaint and/or right-to-sue letter, documents not attached to the complaint, in ruling on the motion, because plaintiff referred to these documents in the complaint and they form the procedural basis for the complaint, the trial court did not convert the motion into one for summary judgment by doing so. *See Scott v. United Carolina Bank*, 130 N.C. App. 426, 428, 503 S.E.2d 149, 151 (1998) (consideration of trust indenture referred to in complaint did not convert 12(b)(6) motion to one for summary judgment), *disc. review denied*, 350 N.C. 99, 528 S.E.2d 584 (1999); *Brooks Distributing Co. v. Pugh*, 91 N.C. App. 715, 717-18, 373 S.E.2d 300, 302 (1988) (consideration of contracts presented by defendants at pre-trial conference which were subject of action did not convert motion to one for summary judgment), *reversed on other grounds*, 324 N.C. 326, 378 S.E.2d 31 (1989).

> To determine whether a complaint is sufficient to survive a Rule 12(b)(6) motion to dismiss, the court must ascertain " 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " Pursuant to Rule 12(b)(6), a complaint should be dismissed " 'if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.' "

Plummer v. Community General Hosp., 155 N.C. App. 574, 576, 573 S.E.2d 596, 598 (2002) (citations omitted).

[2] G.S. § 95-242, a provision of REDA, states in pertinent part:

> (a) An employee allegedly aggrieved by a violation of G.S. 95-241 may file a written complaint with the Commissioner of Labor

> alleging the violation. *The complaint shall be filed within 180 days of the alleged violation* . . . .

N.C. Gen. Stat. § 95-242(a) (2002) (emphasis added). Citing *Commissioner of Labor v. House of Raeford Farms*, 124 N.C. App. 349, 477 S.E.2d 230 (1996), *disc. review improv. allowed*, 347 N.C. 347, 492 S.E.2d 354 (1997), plaintiff contends the 180-day statutory time limit should not be strictly construed. Plaintiff relies, in particular, on the Court's statement that:

> Generally, "statutory time periods are . . . considered to be directory rather than mandatory unless the legislature expresses a consequence for failure to comply within the time period." Mandatory provisions are jurisdictional, while directory provisions are not.

Id. at 353-54, 477 S.E.2d at 233 (citations omitted). Because G.S. § 95-242(a) provides no express consequence for failure to file a REDA claim with the NCDOL within 180 days, plaintiff asserts the time limit is merely "directory, not mandatory."

Plaintiff's reliance on *House of Raeford Farms* is misplaced. *House of Raeford Farms* dealt with a claims processing time limit imposed on the NCDOL, the agency responsible for reviewing REDA claims under the statute. In declaring the time limit was not mandatory, the Court specifically expressed concern about interpreting the statute to allow agency delay to prejudice the claims of private citizens, *id.* at 356, 477 S.E.2d at 234, and cited similar decisions regarding statutory time limits on the actions of governmental authorities processing private claims. *See, e.g., Brock v. Pierce County*, 476 U.S. 253, 90 L. Ed. 2d 248 (1986); *State ex rel. Utilities Comm. v. Empire Power Co.*, 112 N.C. App. 265, 435 S.E.2d 553 (1993), *disc. review denied*, 335 N.C. 564, 441 S.E.2d 125 (1994). Thus, we decline to extend the rationale of *House of Raeford Farms* to the filing time limit at issue in the present case.

Although there is no express statutory consequence for failing to meet the 180-day time limit set forth in G.S. § 95-242(a), case law precedent indicates the limit is a mandatory one. For example, G.S. § 95-243 contains a time limit provision similar to the one at issue:

> (a) An employee who has been issued a right-to-sue letter . . . may commence a civil action in the superior court . . . .

> (b) A civil action under this section *shall be commenced by an employee within 90 days* of the date upon which the right-to-sue letter was issued . . . .

N.C. Gen. Stat. § 95-243 (2002) (emphasis added). In *Telesca v. SAS Inst., Inc.*, 133 N.C. App. 653, 516 S.E.2d 397, *disc. review denied*, 351 N.C. 120, 540 S.E.2d 749 (1999), this 90-day limit was interpreted as mandatory, though the statute contains no express consequence for failure to meet the deadline. In addition, 42 U.S.C. § 2000e-5(e) uses similar language to describe the time for filing charges of employment discrimination under Title VII of the Civil Rights Act of 1964:

> (1) A charge under this section *shall be filed within one hundred and eighty days* after the alleged unlawful employment practice occurred . . . .

42 U.S.C. § 2000e-5(e)(1) (2003) (emphasis added). In *Amtrak v. Morgan*, the United States Supreme Court declared this 180-day limitation to be mandatory, holding that "a claim is time barred if it is not filed within [this] time limit[]." 536 U.S. 101, 108-09, 153 L. Ed. 2d 106, 119 (2002) (" 'strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law' " (citations omitted)). We believe the 180-day time limit for filing a REDA claim with the NCDOL should be similarly construed. Thus, we hold the 180-day time limit for filing a REDA claim with the NCDOL is mandatory.

[3] Plaintiff's remaining argument that where the time limits of REDA conflict with G.S. § 1-52, § 1-52 should control, is clearly without merit. *See* N.C. Gen. Stat. § 1-52(2) (2003) (civil action must be commenced within three years "[u]pon a liability created by statute, . . . unless some other time is mentioned in the statute creating it"). Because plaintiff's administrative REDA complaint and right-to-sue letter show clearly that plaintiff filed his REDA claim with the NCDOL over 180 days after the alleged discriminatory discharge, the trial court did not err in concluding that plaintiff's complaint failed to state a claim under REDA and the dismissal of that claim with prejudice is affirmed.

[4] Plaintiff next argues the trial court erred in denying his motions for leave to amend the complaint by adding (1) a REDA claim based on alleged retaliatory conduct by defendant after the original complaint was filed and (2) a claim for wrongful discharge in violation of

public policy based on the original alleged discriminatory discharge. "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court . . . ; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2003). In contrast, "[u]pon motion of a party the court may, . . . upon such terms as are just, permit him to serve a supplemental pleading setting forth . . . occurrences or events which may have happened since the date of the pleading sought to be supplemented . . . ." N.C. Gen. Stat. § 1A-1, Rule 15(d) (2003).

Plaintiff's motion to amend to assert an additional REDA claim based on an alleged post-complaint incident of discrimination falls under Rule 15(d). A trial court's decision to grant or deny a motion to serve supplemental pleadings is reviewable only for abuse of discretion. *Miller v. Ruth's of North Carolina, Inc.*, 69 N.C. App. 153, 316 S.E.2d 622 (1984). Aside from failing to meet any of the time limitations discussed above, without a right-to-sue letter issued by the Commissioner of Labor, a plaintiff may not file a civil action for an alleged violation of REDA. N.C. Gen. Stat. § 95-243(e) (2003). Because plaintiff failed to file his additional REDA claim with the NCDOL before seeking to add it to the instant complaint, the trial court properly determined that granting plaintiff leave to add it to the complaint would be futile and denied the motion. *See North Carolina Council of Churches v. State*, 120 N.C. App. 84, 461 S.E.2d 354 (1995) (noting that motion under either Rule 15(a) or (d) may be denied if proposed amendment futile).

[5] Plaintiff's motion seeking to add to his complaint a claim for wrongful discharge in violation of public policy based on the original discriminatory discharge is properly considered under Rule 15(a). *See Williams v. Rutherford Freight Lines, Inc.*, 10 N.C. App. 384, 391-92, 179 S.E.2d 319, 325 (1971) ("amendments [under Rule 15(a)] relate to occurrences, transactions and events that could have been, but for some reason were not, alleged in the pleadings sought to be amended"). As such, because defendants had yet to file a responsive pleading and the trial court had yet to rule on defendant's Rule 12 motion when plaintiff made the motion to amend, it would appear that plaintiff was entitled to amend the complaint as a matter of right. *See Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987) (motion to dismiss is not responsive pleading, though trial court's dismissal of complaint terminates right to amend). Nonetheless, the trial court denied the motion to amend as futile.

North Carolina follows the at-will employment doctrine, which dictates that "in the absence of a contractual agreement . . . establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997), *reh'g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). One of the few exceptions to this doctrine is the public policy exception.

> There is no specific list of what actions constitute a violation of public policy. However, wrongful discharge claims have been recognized in North Carolina where the employee was discharged (1) for refusing to violate the law at the employers request, (2) for engaging in a legally protected activity, or (3) based on some activity by the employer contrary to law or public policy.

Ridenhour v. IBM, 132 N.C. App. 563, 568-69, 512 S.E.2d 774, 778, *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999). Wrongful discharge in violation of public policy is a tort claim, *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 718 (2002), *disc. review denied*, 357 N.C. 165, — S.E.2d — (1 May 2003), and to prevail on this claim, an employee must "plead[] and prov[e] that the employee's dismissal occurred for a reason that violates public policy." *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 693, 575 S.E.2d 46, 51 (2003).

Recently, in *Salter*, this Court analyzed whether "a claim of wrongful discharge based upon North Carolina public policy of not punishing employees for exercising their statutory rights under the Workers' Compensation Act was tenable . . . ." 155 N.C. App. at 697, 575 S.E.2d at 54. Although the Court concluded that it arguably was, it did not decide the issue definitively because the evidence proffered by the plaintiff in that case would not have sustained the claim. *Id.* Now that the issue is squarely before us, we agree with the reasoning of *Salter* on this issue.

Pursuing one's rights under the Workers' Compensation Act, G.S. §§ 97-1 *et seq.* (2003), is a legally protected activity. *See* N.C. Gen. Stat. § 95-241(a)(1)a. (2003); (former) § 97-6.1 (repealed 1991). "[P]ublic policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416

S.E.2d 166, 169 (1992) (plaintiffs stated claim for wrongful discharge in violation of public policy where allegedly forced to work for less than minimum wage in violation of state Wage and Hour Act). Moreover, the statutory remedy available for violation of this public policy does not "diminish the rights or remedies of any employee . . . at common law." N.C. Gen. Stat. § 95-244 (2002). Therefore, a plaintiff may state a claim for wrongful discharge in violation of public policy where he or she alleges the dismissal resulted from an assertion of rights under the Workers' Compensation Act. The statute of limitations for such a claim is three years. N.C. Gen. Stat. § 1-52(5) (2003).

The transcript of the hearing indicates the trial court decided plaintiff's amendment would be futile in light of this Court's decision in *Trexler v. Norfolk S. Ry. Co.*, 145 N.C. App. 466, 550 S.E.2d 540 (2001). Defendant asserts that *Trexler* stands for the principle that employees who are employed pursuant to union agreements are not at-will employees and therefore cannot sue in tort for wrongful discharge. However, in *Trexler*, the exact terms of the plaintiff's union agreement were cited as evidence that he could only be fired for just cause and was thus not an at-will employee. *Id.* at 471-72, 550 S.E.2d at 543. In the present case, although defendant asserted in its legal memorandum to the trial court and argued at the hearing that plaintiff was a union employee subject to discharge only for just cause under a collective bargaining agreement, plaintiff did not stipulate to this statement and neither party offered the collective bargaining agreement into evidence. Since the terms of the purported union agreement were not before the trial court, they could not have provided a proper basis for denying the motion to amend and dismissing the complaint. *See Hankins v. Somers*, 39 N.C. App. 617, 620, 251 S.E.2d 640, 642 (trial court "should rely only on material that would be admissible at trial in ruling on" motion to dismiss or for judgment), *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979). The trial court could only have made its ruling on the basis of defendant's characterization of an agreement not in evidence or a misunderstanding of the scope of *Trexler*. In either event, plaintiff's motion to amend the complaint by adding a claim for wrongful discharge in violation of public policy may not have been futile and the denial of the motion could not have been the result of a reasoned decision. Therefore, we reverse the trial court's denial of plaintiff's motion to amend by adding a claim for wrongful discharge and remand this matter for further proceedings consistent with this opinion.

Affirmed in part; reversed in part and remanded.

Judges HUDSON and ELMORE concur.

GARY HENSLEY, PLAINTIFF v. RAY'S MOTOR COMPANY OF FOREST CITY, INC., D/B/A APPLEGATE MOBILE HOMES, DEFENDANT

No. COA02-712

(Filed 3 June 2003)

Statutes of Limitation and Repose— breach of contract— mobile home—predominant factor test

The trial court did not err in a breach of contract action arising out of the purchase of a mobile home by granting defendant's motion to dismiss plaintiff's action based on the expiration of the pertinent statute of limitations where the contract of sale limited the time to bring an action for breach of contract to one year and plaintiff failed to file suit until over three years after tendered delivery, because: (1) plaintiff's mobile home does not constitute an improvement to land requiring a six-year statute of limitations under N.C.G.S. § 1-50(a)(5) in light of the court's traditional treatment of mobile homes as a good and absent allegations justifying the characterization of the mobile home as realty; (2) although the contract involved both the sale of goods and the provision of services, North Carolina now adopts the predominant factor test in its determination that the contract is predominantly a contract for the sale of goods, and the parties by the original agreement may reduce the period of limitation to not less than one year under N.C.G.S. § 25-2-725; and (3) defendant is not estopped from asserting the statute of limitations when plaintiff's unwillingness to accept repairs to the mobile home caused the statute of limitations to run.

Appeal by plaintiff from order entered 15 September 2000 by Judge Anna F. Foster in Cleveland County District Court. Heard in the Court of Appeals 12 March 2003.

Deaton & Biggers, P.L.L.C., by Brian D. Gulden, for plaintiff-appellant.

Hamrick, Bowen, Mebane, Greenway & Lloyd, L.L.P., by Bradley K. Greenway, for defendant-appellee.

CALABRIA, Judge.

On 8 January 1994, Gary Hensley ("plaintiff") entered into a contract to purchase a mobile home from Ray's Motor Company of Forest City, Inc., d/b/a Applegate Mobile Homes ("Applegate"), a North Carolina corporation engaged in the sale and distribution of mobile homes. The mobile home was manufactured by Southern Energy Homes of North Carolina, Inc., d/b/a Imperial Homes ("Imperial"). On the back of the contract, under "Additional Terms and Conditions," a one-year period of limitation clause provided the following: "I [the purchaser] understand and agree that if either of us [the purchaser and seller] should breach this contract—the other of us shall have only one year after the occurrence of that breach in which to commence an action for a breach of this contract."

The mobile home was delivered and set up in April 1994. Plaintiff immediately noticed problems and notified the Department of Insurance. Throughout the 1994 calendar year, plaintiff continued to observe and report defects in the mobile home to Imperial, and Imperial made certain repairs. On 2 December 1994, Imperial and Applegate were notified by the Department of Insurance to investigate and correct problems reported by plaintiff. Thereafter, the Department of Insurance notified plaintiff they had received further information, and it was their belief the problems had been resolved. More importantly, the Department of Insurance provided plaintiff a final opportunity to respond if the information was unsatisfactory. When plaintiff failed to respond, the Department of Insurance closed plaintiff's file.

On 23 and 27 March 1995, Imperial wrote to plaintiff in order to set up a time when representatives from Imperial and Applegate could inspect plaintiff's home to address his remaining items of concern. Imperial attempted to contact plaintiff on at least five occasions in order to either view the home and have a contractor make the necessary repairs or settle the continuing problems with a cash settlement. Correspondence with plaintiff's attorney indicated plaintiff wanted a new mobile home or a full refund, both of which Imperial was unwilling to provide.

On 27 October 1997, over three years after delivery of the home and discovery of the defects, plaintiff filed suit in Cleveland County District Court against Imperial and Applegate. Imperial and Applegate answered the complaint and moved to dismiss plaintiff's claims,

asserting as an affirmative defense that the claim was barred by the statute of limitations. On 15 September 2000, the trial court granted Applegate's motion to dismiss but denied Imperial's motion to dismiss. Plaintiff filed a notice of voluntary dismissal against Imperial, then appealed the trial court's granting of Applegate's motion.

In light of evident confusion in the record as to the procedural context of the trial court's action, we note that since the trial court was presented with affidavits and exhibits and did not exclude matters outside the pleadings, we treat the motion as one for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. *Baugh v. Woodard*, 56 N.C. App. 180, 287 S.E.2d 412 (1982).

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). "The rule is designed to permit penetration of an unfounded claim or defense in advance of trial and to allow summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). The party moving for summary judgment has the burden of showing that there is no genuine issue as to any material fact. *Dixie Chemical Corp. v. Edwards*, 68 N.C. App. 714, 715, 315 S.E.2d 747, 749 (1984).

"Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action." *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957). "The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Id.*, 246 N.C. at 371, 98 S.E.2d at 514. In the instant case, the trial court concluded plaintiff had filed his cause of action outside of the applicable statute of limitations.

On appeal, plaintiff asserts three arguments: (I) the mobile home was an improvement to property; therefore, the applicable standard of limitations is six years; (II) the contract for the mobile home was primarily a contract for services; and (III) even if the contract is governed by North Carolina's Uniform Commercial Code ("UCC") as a transaction in goods, Applegate is estopped from pleading the statute of limitations.

I. Nature of the Mobile Home

Plaintiff contends the purchase and setup of a mobile home is an improvement to real property, requiring a six-year statute of limitations as an action to "recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property . . . ." N.C. Gen. Stat. § 1-50(a)(5) (2001). Traditionally, the law treats a mobile home not as an improvement to real property but as a good, defined and controlled by the UCC as something "movable at the time of identification to the contract for sale . . . ." N.C. Gen. Stat. § 25-2-105(1) (2001). For example, this Court determined a mobile home was a good, the sale of which was controlled as a transaction under the UCC. *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). Moreover, we have "note[d] that prior decisions of this Court and our Supreme Court have classified a mobile home as a 'motor vehicle' for purposes of interpreting the application of our motor vehicle laws to mobile homes." *Hughes v. Young*, 115 N.C. App. 325, 328, 444 S.E.2d 248, 250 (1994) (citing *Peoples Sav. & Loan Ass'n v. Citicorp Acceptance Co.*, 103 N.C. App. 762, 407 S.E.2d 251 (1991); *King Homes, Inc. v. Bryson*, 273 N.C. 84, 159 S.E.2d 329 (1968)).

We have stated that under some circumstances, mobile homes can be considered realty and thereby could constitute an improvement to real property. *Hughes*, 115 N.C. App. at 328, 444 S.E.2d at 250. These circumstances include where a plaintiff shows either (1) annexation of the mobile home to land with the intent that it be permanent or (2) circumstances surrounding the association between the land and the mobile home or the relationship between the parties otherwise justifies treating the mobile home as realty which is to become or is part of the land. *Id.* In the instant case, plaintiff has made no allegations that the mobile home was permanently affixed to the property.[1] Additionally, plaintiff failed to show any relationship between the parties or between the land and the mobile home which would otherwise justify treating the mobile home as an improvement to the land on which it has been placed. In light of our traditional treatment of mobile homes and absent allegations justifying the characterization of the mobile home as realty, we hold the plaintiff's mobile home does not constitute an improvement to land.

1. The only allegation plaintiff has made concerning how the mobile home is affixed to the land is to state that water and electricity has been provided. That, standing alone, is insufficient.

II. Mixed Contract

Alternatively, plaintiff argues the sales contract for the mobile home was primarily a contract for services because Applegate delivered and set up the mobile home. The contract in the instant case is a mixed contract in that it encompassed both the sale of a good (i.e. the mobile home) and the provision of services (i.e. the delivery and setup). Accordingly, this Court must determine whether the contract is controlled by the UCC as a sale of goods or is governed by the common law of contracts as a service contract.

The scope of the UCC is limited to "transactions in goods" and does not apply to contracts for the provision of services. N.C. Gen. Stat. § 25-2-102 (2001). The leading case on the UCC's applicability to contracts which involve both goods and services is *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974). In *Bonebrake*, the Court determined a contract for both goods and services should be considered a "sale of goods" under the UCC because

> [the] test for inclusion or exclusion is not whether [the sale of goods and the provision of services] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved . . . .

Bonebrake, 499 F.2d at 960. While North Carolina has yet to expressly adopt the so-called "predominant factor" test set out in *Bonebrake*, previous decisions by North Carolina courts accord with the test. *See, e.g., Batiste v. Home Products Corp.*, 32 N.C. App. 1, 6, 231 S.E.2d 269, 272 (1977) (examining the "essence of the relationship" between a physician and a patient to determine whether the prescription of medication by the physician was the sale of goods or the provision of services); *HPS, Inc. v. All Wood Turning Corp.*, 21 N.C. App. 321, 324, 204 S.E.2d 188, 189 (1974) (treating a contract to furnish and install a boiler conversion system as a sale of goods). Surveying the jurisdictions which have addressed mixed contracts reveals the *Bonebrake* test has been overwhelmingly adopted. David J. Marchitelli, Annotation, *Causes of Action Governed by Limitations Period in UCC § 2-725*, 49 A.L.R.5th 1, 102-06 (1997). We expressly adopt the test enunciated in *Bonebrake* as the appropriate test to determine whether the UCC controls the rights of the parties to a contract involving both the sale of goods and the provision of services.

Accordingly, where the predominant factor of a contract is the rendition of services with the sale of goods incidentally involved, the UCC is not applicable. However, where the predominant factor of the contract is the sale of goods with the provision of services incidentally involved, the UCC controls.

Factors which have been used in determining whether a mixed contract should be governed by the UCC include the following: "(1) the language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials." *See, e.g., Princess Cruises, Inc. v. General Elec. Co.*, 143 F.3d 828, 833 (4th Cir. 1998); *Parks v. Alteon, Inc.*, 161 F. Supp. 2d 645, 649 (M.D.N.C. 2001). Applying these factors here, we note the language of the contract deals primarily with the terms of sale, including the price, warranties, description and model of the mobile home, and options and accessories. The nature of Applegate's business is the sale and distribution of mobile homes. Finally, the intrinsic worth of the mobile home is approximately its fair market value or the purchase price. Accordingly, we hold the contract is predominantly a contract for the sale of goods, and the provisions of the UCC control the rights of the parties.

Under the UCC, "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it." N.C. Gen. Stat. § 25-2-725(1) (2001). In the instant case, the contract of sale limited the time to bring an action for breach of contract to one year. Applegate delivered the mobile home in April 1994. Plaintiff became aware of the breach no later than his notification to the Department of Insurance in November 1994. Plaintiff failed to file suit for breach of contract until 27 October 1997, over three years after Applegate tendered delivery. Accordingly, we conclude plaintiff's action is barred by the applicable statute of limitations.

III. Estoppel

Plaintiff asserts Applegate should be estopped from pleading the statute of limitations as a defense pursuant to *Nowell v. Tea Co.*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959) because the delay in plaintiff bringing suit was induced by acts and representations by Applegate, and the repudiation of such acts and representations amounts to a breach of good faith. In *Nowell*, the defendant assured the plaintiff he would perform any necessary corrections to the building in the future

due to re-occurring problems in his construction work by stating he would "be entirely responsible and . . . [would] remedy the situation," if a previous complaint re-occurred. *Id.*, 250 N.C. at 578, 108 S.E.2d 891. In reliance on such promises, the plaintiff in *Nowell* entered into possession of the building, and after the statute of limitations had run, the defendant refused to assume responsibility or correct the re-occurring problem. *Id.* By contrast, in the case *sub judice* plaintiff was contacted on numerous occasions in order to commence repairs. Plaintiff repeatedly failed to respond or responded by demanding a new mobile home or a refund. After numerous letters, the one-year contractual limitation on plaintiff's claims was specifically raised, and plaintiff was urged to make contact in order to resolve the matter without further delay. The cause of the delay was not representations made by Applegate, but rather, it was plaintiff's unwillingness to accept repairs to the mobile home which caused the statute of limitations to run, and the theory of estoppel, as espoused in *Nowell*, is inapposite.

We have carefully considered plaintiff's remaining claims and found them to be without merit.

Affirmed.

Judges McCULLOUGH and TYSON concur.

ROBERT J. HOLCOMB, EMPLOYEE, PLAINTIFF v. BUTLER MANUFACTURING COMPANY, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA02-491

(Filed 3 June 2003)

Workers' Compensation— injury at work—Commission's finding—evidence supports

There was competent evidence to support the Industrial Commission's findings in a workers' compensation action that plaintiff did not injure his back at work. Plaintiff initially and repeatedly said that his back popped while rising from a chair while on vacation, he explained these statements by saying that he was afraid to jeopardize a corporate safety award, a co-worker

and supervisor did not recall plaintiff indicating that he had injured his back at work, and plaintiff's doctors testified that plaintiff likely suffered from degenerative disc disease and that trauma would not have been necessary for his injury.

Appeal by plaintiff from opinion and award filed 18 January 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 March 2003.

Jones Marcari Russotto Walker & Spencer, P.C., by David W. Spencer, for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan and Dan H. Hartzog, for defendant appellees.

ELMORE, Judge.

From an opinion and award of the North Carolina Industrial Commission denying his workers' compensation claim, plaintiff, Robert J. Holcomb, appeals. After a careful review of the record, we hold that the Commission's findings of fact are conclusive on appeal because competent evidence in the record supports those findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). We also find that the Commission's findings of fact support its conclusion of law. Accordingly, we affirm the full Commission's opinion and award denying plaintiff's claim.

Plaintiff began working for defendant Butler Manufacturing Company (Butler) as a temporary employee in May 1994 and became a permanent employee in June 1994. Plaintiff worked as a press operator; his duties included setting up the press, changing the die in the press, loading machinery, and operating the press.

Plaintiff contends that on 29 June 1995 he was assisting a coworker, Ralph Graham (Graham), in lifting and stacking several 100-pound "top cords" when he felt a "pop" in his back and "fell to one knee." Plaintiff testified that he told Graham "something popped in my back" and "I can't help you no more[,]" whereupon plaintiff went back to his press and continued working for the rest of his shift. Graham, however, testified at the Industrial Commission hearing that he did not recall plaintiff saying he had hurt his back. Plaintiff did not tell any other Butler employee about his back injury the rest of that day or the next, when he worked a full shift. Plaintiff thereafter did

not work from 1 July 1995 through 9 July 1995 because he was on vacation with his family at the beach.

Plaintiff returned to work from vacation on 10 July 1995 but left early because of back pain. Plaintiff testified he saw his supervisor, Duncan Stewart (Stewart), that day and "told him I had hurt my back. I didn't tell him how or why." Stewart testified that Butler required its employees to immediately report any work-related injury to their supervisor and to record the injury in a logbook, and that Plaintiff failed to follow these directives. Plaintiff also testified that he saw Butler's plant manager, Dana Wilson (Wilson), as he was leaving work on 10 July 1995, and that he told Wilson "I had hurt my back . . . I was cooking out and got up out of the chair, and something happened. . . . I don't know what happened to my back." At his deposition Wilson testified that he "specifically asked" plaintiff if his back injury occurred at work, and plaintiff responded "No, it did not. It occurred while [plaintiff] was on vacation. . . . He indicated his back popped. . . . When he was getting up from a chair." Plaintiff acknowledged giving Wilson this explanation for his injury, and plaintiff testified he did so because he was concerned that classifying the injury as work-related would jeopardize Butler's eligibility for a corporate safety award and could result in plaintiff losing his job. Wilson testified that he next spoke with plaintiff in April 1996, at which time plaintiff told Wilson he had actually injured his back at work but had not reported it for fear of losing his job.

On 11 July 1995, plaintiff went to his family physician, Dr. Bradford K. Faulkenberry, complaining of severe lower back pain radiating into his legs. At his deposition Dr. Faulkenberry testified that plaintiff presented with "a three-day [] history of low back pain[]" which plaintiff said began when he "was . . . cooking out, bent over, and felt a severe pain in his low back." Plaintiff, however, testified that he told Dr. Faulkenberry he hurt his back at work on 29 June 1995 while lifting the top cords. Dr. Faulkenberry examined plaintiff, initially diagnosed a lumbar spasm, and prescribed medication and physical therapy. Plaintiff's pain did not improve and he was seen at Scotland Memorial Hospital on 14 July 1995, where he again indicated that he injured his back getting out of a chair. Plaintiff subsequently underwent an MRI, which revealed multiple lumbar disc herniation and nerve impingement. When asked at his deposition whether it was atypical for a person to suffer herniated discs from getting out of a chair, Dr. Faulkenberry replied, "No. . . . I don't think he just got those that day. I think he'd had them for many years before that."

Plaintiff saw Dr. Malcolm Shupeck, a neurosurgeon, for a surgical consultation on 7 August 1995. Dr. Shupeck's notes indicate plaintiff was injured on 8 July 1995 when he "got out of [a] chair and felt a snap." Plaintiff, however, testified that he told Dr. Shupeck he hurt his back at work when he "was picking up something, and . . . felt something pop in my back." Plaintiff subsequently underwent a disk removal on 6 September 1995. When his pain did not resolve, plaintiff underwent additional surgery on 8 May 1996. At his deposition, Dr. Shupeck testified that he did not have a medical opinion as to the cause of plaintiff's injury, but that "most disc herniations are felt to be related to degenerative disease" and that it was not probable that lifting the top cords could have caused plaintiff's injury "unless there's already some disc abnormality."

After the second surgery failed to provide relief, plaintiff was seen at the University of North Carolina Pain Clinic by Dr. Michael Lee on 24 October 1996. Dr. Lee's notes indicate plaintiff reported suffering "a back injury in 6/95, after lifting more than 100 lbs. over his head at work." Plaintiff has not worked since 10 July 1995 due to his back pain.

On 30 April 1997, plaintiff filed a Form 18 notice of accident to employer, asserting that he suffered a work-related injury to his lower back on 29 June 1995 "caused by stacking beams and helping material handler pick up steel[.]" Defendants subsequently denied plaintiff's claim. On 3 April 1998, and again on 16 March 1999, plaintiff filed a Form 33 request that claim be assigned for hearing. On 24 June 1999, a hearing was held before Deputy Commissioner Theresa B. Stephenson, and the record was closed on 13 December 2000 after Dr. Faulkenberry, Dr. Shupeck, and Wilson were deposed. In her opinion and award filed 26 January 2001, Deputy Commissioner Stephenson concluded that plaintiff had sustained a work-related compensable injury and awarded temporary total disability benefits, medical expenses, and costs. The full Commission reviewed the case without receiving additional evidence on 27 September 2001. By its opinion and award filed 18 January 2002, the Commission made the following pertinent findings of fact:

> 2. On June 29, 1995, plaintiff was performing his duties on second shift and helped Ralph Graham, a materials handler, pick up a top cord. . . . Plaintiff and Mr. Graham were stacking these cords so another co-worker could lift them with a crane. . . . Plaintiff testified that, when he lifted the top cord overhead, he felt a pop

and sharp pain in his back and fell down to one knee. Plaintiff also testified . . . that he informed Mr. Graham he could not help him anymore. In contrast to this testimony, Mr. Graham testified that he did not believe that plaintiff went down on a knee, told him that he was injured, or failed to complete the job, but that, if plaintiff's testimony were true, then Mr. Graham simply did not remember such an incident. Mr. Graham did not recall any incident or injury to plaintiff. . . .

3. Plaintiff did not report his alleged work-related injury on June 29, 1995. Plaintiff returned to work the next day. Plaintiff testified that, after working four hours, he informed Mr. Duncan Stewart, a supervisor, he had hurt his back and had to go home. Mr. Stewart does not recall this conversation. . . .

. . .

5. When plaintiff returned to work on July 10, 1995, . . . [he] informed Mr. [Dana] Wilson that he hurt his back when he got up from a chair. Plaintiff testified that he did not inform Mr. Wilson that the injury occurred at work because the company was eligible for a corporate safety flag for "no time loss" injuries and plaintiff did not want to be the one who prevented the company from receiving this honor.

6. On July 11, 1995, plaintiff sought treatment from . . . Dr. Bradford Faulkenberry. Plaintiff reported a three-day history of severe low back pain with some radiation into his posterior thighs. Plaintiff did not indicate he injured his back at work but instead told Dr. Faulkenberry he felt a severe pain in his lower back when he bent over while cooking out. The three-day history of pain would be consistent with an injury on July 8, 1995, while plaintiff was on vacation.

. . .

8. On July 14, 1995, plaintiff received physical therapy at Scotland Memorial Hospital and indicated he had low back pain for five days. Plaintiff told them he had pain when he got out of a chair on July 8, 1995, which is, again, consistent with an injury occurring while plaintiff was on vacation.

. . .

10. Plaintiff saw Dr. Shupeck for the first time on August 7, 1995. Plaintiff reported low back pain, hip pain and right leg numbness,

and that the pain began when plaintiff got out of a chair. Dr. Shupeck excused plaintiff from working.

. . .

15. When plaintiff's pain did not improve [after two surgeries], Dr. Shupeck referred him to Dr. Lee at the Physical Medicine and Rehabilitation Clinic at UNC Hospital. The plaintiff saw Dr. Lee on October 24, 1996. Plaintiff reported to Dr. Lee that he had been injured on the job. This appears to be the first medical report to give a history relating the injury to work or indicating that the date of injury was when plaintiff was working.

. . .

18. Dana Wilson, the plant manager, testified that he saw plaintiff in July 1995, on plaintiff's first day back at work following his vacation, and noticed that he was walking "poorly" and asked plaintiff whether he was injured at work. Plaintiff reported that something in his back popped while he was on vacation while getting out of a chair. In April 1996, plaintiff called Mr. Wilson and informed him that he was injured at work while lifting some material. When asked by Mr. Wilson why he had not reported the injury before, plaintiff told Mr. Wilson that he was afraid to indicate that he was injured at work.

. . .

18. [sic] The greater weight of the evidence is that plaintiff did not injure his back at work on June 29, 1995. Plaintiff was on vacation on July 8, 1995, and the medical records and deposition testimony of Dr. Faulkenberry and Dr. Shupeck indicate that this was the date of plaintiff's symptoms. Plaintiff did not provide a history of injury at work to either Dr. Faulkenberry or Dr. Shupeck[.] . . . Mr. Graham was not able to confirm plaintiff's alleged injury. Plaintiff did not report to his employer that his injury was related to work until April 1996. Plaintiff did not indicate to a health care provider that his injury was caused at work until 15 months after the injury. Neither Dr. Faulkenberry nor Dr. Shupeck were able to relate plaintiff's back injury and complaints to the alleged work injury. For these reasons, the greater weight of the evidence is contrary to plaintiff's current assertion that he was injured at work.

Based on these findings of fact, the full Commission, with Commissioner Thomas J. Bolch dissenting, concluded that plaintiff

"has failed to establish that he suffered a compensable injury arising out of and in the course of his employment with [Butler] on 29 June 1995." From this determination, plaintiff appeals.

Plaintiff argues that the Commission erred "in finding that the greater weight of the evidence was that the plaintiff did not injure his back at work on June 29, 1995" and "in concluding that the plaintiff failed to establish that he suffered a compensable injury arising out of and in the course of his employment with the defendant on June 29, 1995[.]" We disagree.

It is well-settled that this Court, when reviewing an opinion and award of the Commission, is "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). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. Avx Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (quoting *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence in the record, even though there is evidence that would support contrary findings. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. "The 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." *Id.*

After reviewing the arguments set forth in plaintiff's brief in light of these principles, it is apparent plaintiff's arguments are without merit. The evidence before the Commission regarding when and how plaintiff injured his back was conflicting. Plaintiff essentially argues that because the Commission resolved this conflicting evidence in defendants' favor, the Commission did not properly consider the evidence in the light most favorable to plaintiff. In considering plaintiff's argument, we stress that "where the evidence before the Commission is such as to permit either one of two contrary findings, the determination of the Commission is conclusive on appeal and the mere fact that an appellate court disagrees with the findings of the Commission is not grounds for reversal." *Morrison v. Burlington Industries*, 301 N.C. 226, 232, 271 S.E.2d 364, 367 (1980).

The record in the case *sub judice* is replete with competent evidence tending to support the Commission's findings of fact, specifi-

cally that plaintiff did not injure his back at work on 29 June 1995. There is plenary evidence from the testimony and medical records of plaintiff's treating physicians that plaintiff consistently indicated he injured his back while on vacation around 8 July 1995 when he was getting up out of a chair. Both Dr. Faulkenberry and Dr. Shupeck testified that plaintiff likely suffered from degenerative disc disease, and that consequently trauma would not have been necessary to cause plaintiff's lumbar disc herniation. Graham and Stewart, plaintiff's coworker and supervisor, each testified they could not recall plaintiff indicating he had injured his back at work on 29 June 1995. Wilson, Butler's plant manager, testified that plaintiff initially indicated he had not injured his back at work, but rather when he got up out of a chair while on vacation, and that plaintiff did not tell him otherwise until almost a year later. Plaintiff did not file a claim for worker's compensation benefits until April 1997, almost two years after the allegedly work-related injury. While plaintiff's testimony conflicts with much of this evidence or purports to explain it in a manner favorable to his claim, we again stress that our Supreme Court has limited this Court's review of the Commission's findings of fact to whether there was any competent evidence of record tending to support them. *Adams*, 349 N.C. at 681, 509 S.E.2d at 413 ("It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony.")

Because the Commission's findings of fact are supported by competent evidence of record, and those findings in turn support the Commission's conclusions of law, we affirm the decision of the full Commission.

Affirmed.

Judges HUNTER and BRYANT concur.

BEULAH MONROE, PLAINTIFF v. CITY OF NEW BERN, NORTH CAROLINA, DEFENDANT

No. COA02-498

(Filed 3 June 2003)

Cities and Towns— demolition of house—no notice—sufficiency of threat to public

The City of New Bern's demolition of a house owned by plaintiff without the required notice should have resulted in summary judgment for plaintiff. Pursuant to N.C.G.S. § 160A-193, a city may demolish a building without providing notice or a hearing to the owner only if the building constitutes an imminent danger to the public health or safety. The record in this case does not establish that the condition of the house posed such a threat.

Appeal by plaintiff from an order and judgment entered 15 November 2001 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 11 February 2003.

Ralph T. Bryant, Jr., P.A., by Ralph T. Bryant, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Gregory Wenzl Brown and Katherine Hilkey-Boyatt, for defendant-appellee.

HUNTER, Judge.

Beulah Monroe ("plaintiff") appeals from the trial court's entry of summary judgment in favor of defendant, City of New Bern, North Carolina ("the City"), and denial of plaintiff's motion for summary judgment. For the reasons stated herein, we reverse the trial court's summary judgment entered in favor of the City and remand for entry of summary judgment in favor of plaintiff. We additionally remand this case for a trial to be held on the issue of damages.

This action arises from the City's demolition of plaintiff's house located on 212 Bryan Street, next to a daycare, in New Bern, North Carolina. According to plaintiff and John Clark ("Clark"), Chief Building Inspector for the City, plaintiff was given no notice nor an opportunity to be heard prior to demolition, which occurred on 6 and 7 April 2000. A lien for the cost of demolition in the amount of $6,033.75 was placed on plaintiff's property. The tax value on this

house was $43,850.00. At the time of demolition, plaintiff's house was boarded up and had been since March of 1997.

The condition of plaintiff's house was described in deposition testimony submitted to the court. The roof of the house had severely deteriorated to the point of partially caving in and there was heavy water infiltration throughout the structure. The plaster or the sheet rock had come off the ceiling of the second floor, and the floors were completely littered. In addition, the brick veneer on the exterior of the house had severe cracks in several locations. The windows were broken out and some of the ceiling joists had rotted from water infiltration over the years. Dead rats were observed in the bathtub. The paint on the walls was cracked. The inspectors were unable to go upstairs due to caved in portions of the house. Christopher Holmes ("Holmes"), a civil engineer acting as an expert for plaintiff, had reviewed pictures and a video of plaintiff's house and opined in a deposition that for the house to have been saved, it would have had to have been gutted down to the frame and the roof and flooring would have had to have been completely replaced. David Lavigne, a real estate appraiser, testified in a deposition that plaintiff's house was worthless and that the "highest and best use" demanded demolition.

Holmes testified that the house was not structurally sound and that it presented a danger to anyone who wandered into the house. When asked whether he thought the house was a danger to the public in its boarded up state, Holmes responded that it could be since vagrants might still find a way into the house. When asked whether he thought the house was a danger to the public if it was boarded up and no one was inside, he stated that besides the possibility that animals could get into the house and breed, the house did not present a threat to the safety of the public. Holmes further stated that he did not think there was a danger of the house collapsing onto a passerby.

Plaintiff filed a complaint on 21 July 2000, alleging that the demolition of her house constituted an unconstitutional taking of her property without just compensation under the North Carolina Constitution, the destruction violated her due process rights under the North Carolina Constitution, the application of the City's ordinance violated her equal protection rights under the North Carolina Constitution, and the City's actions constituted an unfair and deceptive trade practice. The City filed an answer to this complaint on 25 September 2000, denying liability for the demolition of plaintiff's house and later filed an amended answer on 3 April 2001, includ-

ing a counterclaim seeking recovery for the costs and expenses associated with the demolition of plaintiff's property. Both the City and plaintiff filed motions for summary judgment. Subsequently, plaintiff filed an amended complaint which included a trespass claim. At the summary judgment hearing, plaintiff stipulated that she was voluntarily dismissing all claims except her due process claim under the North Carolina Constitution and her common law trespass claim under North Carolina law. After hearing oral arguments from both sides and considering the evidence submitted, the trial court granted the City's motion for summary judgment, denied plaintiff's motion for summary judgment, and dismissed plaintiff's claims with prejudice. Plaintiff appeals.

Plaintiff contends the trial court erred in granting the City's motion for summary judgment and denying her motion for summary judgment. Plaintiff asserts that defendant is liable as a matter of law for the demolition of her house since the City failed to give her any of the notices or procedures required by the New Bern City Ordinance, the North Carolina General Statutes, and the North Carolina Constitution prior to demolition. On the contrary, the City argues the trial court properly granted its motion for summary judgment and properly denied plaintiff's motion for summary judgment because it had the authority to summarily demolish plaintiff's house pursuant to N.C. Gen. Stat. § 160A-193 (2001), entitled "[a]batement of public health nuisances."

At the outset, 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). In ruling on a summary judgment motion, the court "must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, and drawing all reasonable inferences in her favor." *Glenn-Robinson v. Acker*, 140 N.C. App. 606, 611, 538 S.E.2d 601, 607 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001).

N.C. Gen. Stat. § 160A-193, the statute the City asserts afforded it the authority to summarily demolish plaintiff's house, provides: "A city shall have authority to summarily remove, abate, or remedy everything in the city limits, or within one mile thereof, that is dangerous or prejudicial to the public health or public safety." N.C. Gen. Stat. § 160A-193(a). Neither party has provided us with, nor have we

found, any North Carolina cases in which a city has summarily demolished a building without providing notice or a hearing to the owner. Therefore, we have no precedent establishing circumstances when a building may summarily be destroyed. "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). To reach that end, we must consider "the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). Moreover, "where a statute is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978).

Applying these canons of statutory construction, we interpret Section 160A-193 as providing a city with the authority to summarily demolish a building only if the building constitutes an imminent danger to the public health or safety, creating an emergency necessitating the building's immediate demolition. We construe Section 160A-193 narrowly in accordance with legislative intent. Our General Assembly has provided notice and hearing requirements in N.C. Gen. Stat. §§ 160A-441 through 160A-450 (2001) that a city must follow in demolishing a person's dwelling in a non-emergency. Section 160A-193 only applies to a situation where a structurally unsafe building poses an imminent danger to the safety of the public such that the owner could not be provided notice and a hearing without endangering the public. Cities may not summarily demolish dwellings pursuant to Section 160A-193 merely because it is quicker and easier than providing the owners notice and an opportunity to be heard. Our interpretation of Section 160A-193 is in accordance with the general rule that "a municipality must, before destroying a building, give an owner sufficient notice, a hearing and ample opportunity to demolish the building or to do what suffices to make it safe or healthy for use and occupancy," as required by due process of law. 7A Eugene McQuillin, *The Law of Municipal Corporations*, § 24.561, at 183 (3d ed. 1998) (footnotes omitted). "[V]ested rights in a building cannot be destroyed summarily as a nuisance unless in a great emergency." *Id.* at 185. *See also Leppo v. City of Petaluma*, 97 Cal. Rptr. 840, 843 (Cal. Ct. App. 1971) (citation omitted) (stating that "[i]n an emergency situation involving the physical safety of the populace, the city could dispense with a due process hearing and demolish a building summarily"); *Rowland v. State*, 176 So. 545, 546-47 (Fla. 1937)

(noting that "[b]efore private property may be condemned and destroyed in the exercise of police power, except in cases of emergency, there must be an opportunity for the owner or occupant to be heard"). Accordingly, we hold that pursuant to Section 160A-193, a city may only demolish a building without providing notice or a hearing to the owner if the building constitutes an imminent danger to the public health or safety necessitating its immediate demolition. For instance, a city would have the authority to summarily demolish a building pursuant to Section 160A-193 if the building were in such a ruinous state that it was on the verge of falling onto a sidewalk frequented by pedestrians or in a situation where the destruction of the building is necessary to stop or control a large destructive fire.

If a city wishes to destroy a dwelling that does not pose an imminent threat to the public, then the city must follow the procedures required by N.C. Gen. Stat. §§ 160A-441 through 160A-450.

> N.C. Gen. Stat. § 160A-441 confers upon cities and counties the power to exercise their police powers by adopting and enforcing ordinances ordering a property owner to repair, close, or demolish dwellings that are determined to be unfit for human habitation and therefore dangerous and injurious to the health and safety of the public.

Newton v. City of Winston-Salem, 92 N.C. App. 446, 449, 374 S.E.2d 488, 490 (1988). The enabling legislation provides that an ordinance adopted by a city to regulate buildings unfit for human habitation must contain certain procedures that the city must follow prior to demolition of a dwelling including providing the owner with notice, a hearing, and a reasonable opportunity to bring his or her dwelling into conformity with the housing code. N.C. Gen. Stat. § 160A-443. In the case *sub judice*, the City had adopted an ordinance pursuant to Sections 160A-441 through 160A-150, setting out the necessary procedures for the City to follow in its demolition of a dwelling.

It is undisputed in this case that the City did not follow the procedural requirements under Sections 160A-441 through 160A-450, but instead, demolished plaintiff's house pursuant to Section 160A-193, without providing plaintiff notice or a hearing. Therefore, the dispositive issue in this case is whether plaintiff's house posed an imminent danger to the health or safety of the public requiring its immediate demolition under Section 160A-193, or whether the house was not an imminent threat to the public thus, entitling the owner to the notice and hearing requirements mandated under Sections 160A-441 through

160A-450. We conclude the record does not establish that the condition of plaintiff's house posed an imminent danger to the health or safety of the public and therefore, the City did not have authority under Section 160A-193 to summarily demolish the house. There is no evidence that an emergency existed to warrant immediate destruction. Plaintiff's house was boarded up in March of 1997 after the City sent plaintiff a notice that it wished to board up the house so that people could not get inside. Therefore, the City was well aware of the decaying state of plaintiff's house and the danger it posed to anyone occupying the home several years prior to demolition. The building inspectors who went to investigate the condition of the house prior to demolition had to remove a panel off the front door in order to enter the house. Further, according to Holmes, a civil engineer, the house would be dangerous to anyone who occupied it but that it was unlikely the house was going to fall onto a passerby. Holmes indicated that the house was not a threat to the public while boarded up with no one inside. Moreover, there was no evidence that anyone, including vagrants, were living in the dwelling. While there was evidence that plaintiff's house was in severe disrepair, we do not conclude that its condition posed an imminent threat to the public, warranting its immediate demolition. We acknowledge that there was testimony that members of the public could have possibly found a way into the home by either taking some boards down or climbing into a window that was not completely boarded up. However, we conclude this danger is not the kind of imminent danger to the public contemplated by Section 160A-193.

Since it is undisputed that the City did not comply with the procedural requirements of N.C. Gen. Stat. §§ 160A-441 through 160A-450, the City is liable in damages to plaintiff, as a matter of law, for demolishing plaintiff's house. *See Newton*, 92 N.C. App. 446, 374 S.E.2d 488. Accordingly, we reverse the trial court's summary judgment entered in favor of the City and remand for entry of summary judgment in favor of plaintiff. We further remand this case for a trial on the issue of damages.

Reversed and remanded.

Judges BRYANT and ELMORE concur.

IN RE LEDBETTER

[158 N.C. App. 281 (2003)]

IN THE MATTER OF: PATRICK LEDBETTER, DOB: 8-22-1992, MINOR CHILD

THE BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER V. PAMELA LEDBETTER, RICHARD HOLLOWAY, RESPONDENTS

No. COA02-650

(Filed 3 June 2003)

Child Abuse and Neglect— reunification efforts—findings of fact

The trial court erred in a permanency planning hearing regarding child neglect by ordering the cessation of reunification efforts between respondent mother and her child based on insufficient findings of fact, because: (1) none of the trial court's findings address the requirement in N.C.G.S. § 7B-907(b)(1) that the court make findings regarding whether it is possible for the juvenile to be returned home within the next six months; (2) findings that respondent was held in contempt of court for violating visitation restrictions and that she refused to pay child support do not alone explain why it is not in the juvenile's best interests to return home; and (3) the trial court did not address the requirement of N.C.G.S. § 7B-907(b)(4) that the court explain why the child was being transferred from his foster parents to his father.

Appeal by respondent Pamela Ledbetter from an order entered 11 December 2001 by Judge Marvin Pope in Buncombe County District Court. Heard in the Court of Appeals 24 March 2003.

John C. Adams, for petitioner-appellee.

Judy N. Rudolph, for Guardian ad Litem-appellee Kim Teich.
Lynne Rupp, for respondent-appellant.

CALABRIA, Judge.

Pamela Ledbetter ("respondent") appeals the 11 December 2001 order placing her child, Patrick ("the child"), in the custody of his father, Richard Holloway ("the father") with the Buncombe County Department of Social Services ("DSS" or "petitioner") providing protective supervision, and respondent being entitled to supervised visitation.

On 27 July 2000, DSS filed a petition alleging the child was a neglected juvenile. The petition explained: in February 2000, DSS substantiated that respondent used inappropriate discipline on the

child's sibling; respondent refused to cooperate with petitioner, and although she received some services, she "still has difficulty in parenting her children[;]" on 17 July 2000, respondent was arrested for assaulting and threatening to kill the child's sibling; on 18 July 2000, respondent agreed to have the child placed with her friend Melanie Johnson ("Johnson") pending the outcome of psychological evaluations. A hearing on the petition was held 23 October 2000. On 3 January 2001, the order was filed which adjudicated the child neglected and found it was in his best interests to remain in the custody of Johnson with DSS providing protective supervision, unsupervised visitation with his father, and supervised visitation with respondent. The court ordered respondent to transfer all child support and social security payments to Johnson.

Thereafter, the court conducted review hearings and entered orders approximately every two months. Five psychological evaluations revealed respondent suffers no serious psychopathy. In a letter to the trial court in June 2001, a psychologist for the area mental health agency advised "that Ms. Ledbetter's issues with the Department of Social Services be addressed through some other avenue than having her seek mental health treatment. Providing treatment to a patient without psychopathology would not be ethical and would not be fruitful." However, the child remained with Johnson and continued to have supervised visitation with his mother and unsupervised visitation with his father.

Two issues were repeatedly addressed in the court's review orders: (1) the child's encopresis, a disorder which causes him to soil himself; and (2) the mother's difficulty abiding by court orders.

The child has suffered the effects of encopresis since 1997. A medical examination, in the Fall of 2000, revealed no medical basis for the child's encopresis, but rather the doctor "believe[d] it is a result of fear and an emotional problem." The incidences of encopresis were documented to increase surrounding visitation between the child and his mother and "with any sort of stress or change in routine." A DSS report from July 2001, noted: "[the child's] doctor has reported [the child] is experiencing moderately severe anxiety reactions to his visits with his mother."

Respondent did not comply with court orders. First, although, in the 3 January 2001 order and each order thereafter, respondent was ordered to transfer all child support and social security payments to

Johnson, respondent never transferred the payments. The court found as fact that despite the court orders to the contrary, "[respondent] believes she does not owe said money to [the Johnsons]." Second, from a hearing held 3 and 7 August 2001, and the subsequent order filed 10 September 2001, the court, due to reoccurring problems with the respondent's visitation, ordered supervised visitation occur only on the following conditions: "[respondent] will not bring anyone with her to the visits, [respondent] will arrive for the visits fifteen minutes after the Johnson[]s have delivered the child for the visits, and [respondent] will stay a minimum of 1,000 feet away from [the Johnsons]." Despite these clear directives, respondent was found in contempt of court for arriving early to visitation, and violating a court order by parking two spaces away from Johnson. Although respondent apparently did not request their attendance, two of respondent's former witnesses were present at DSS on the day she violated the court order. For these actions, the court found respondent in contempt at a hearing on 16 November 2001, in an order filed 11 December 2001. Sentencing was suspended pending compliance with the court's directives with respect to visitation.

Following the contempt hearing, the court held the permanency planning and review hearing from which respondent appeals. The court found respondent had repeatedly violated court orders, while the father was "in full compliance with prior Court Orders." DSS recommended the child be placed with his father and the case be closed. The court ordered the child be placed with his father, finding as fact that despite DSS making "reasonable efforts to return the minor child to the home, . . . returning to the home is no longer the best plan for the minor child." The court, however, did not order the case closed. The court ordered DSS to continue "providing protective supervision" and that supervised visitation between the child and respondent continue, including specific provisions for visitation during the upcoming Christmas holiday. Respondent appeals.

Respondent asserts the trial court erred ordering the cessation of reunification efforts because there was not sufficient evidence to support this finding thereby violating N.C. Gen. Stat. § 7B-907(b).

I. Sufficiency of the Findings

Respondent asserts the trial court erred by entering the 11 December 2001 order without making the requisite findings of fact as required by N.C. Gen. Stat. § 7B-907.

First, the *Guardian ad Litem* argues the order was not a permanency planning order pursuant to N.C. Gen. Stat. § 7B-907, but rather was a standard review hearing pursuant to N.C. Gen. Stat. § 7B-906 and, therefore, this Court should look to § 7B-906 in considering the sufficiency of the findings of fact. While the order is not designated a permanency planning order, Judge Pope repeatedly referred to the hearing as a permanency planning hearing. Moreover, both DSS and respondent agree with Judge Pope that the hearing was a permanency planning hearing, and the order must comply with N.C. Gen. Stat. § 7B-907. Accordingly, we address respondent's argument.

At a permanency planning hearing, the court shall consider information from any "person or agency which will aid" its review, and:

> At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:
>
> (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
>
> (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
>
> (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
>
> (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
>
> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
>
> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2001). Moreover, "the judge shall make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(c) (2001).

In the case at bar, the trial court made the following findings:

4. That immediately prior to this Review Hearing . . . [the court] found as fact, and adjudicated as such, that [respondent] was in willful and intentional contempt of this Court . . . .

5. That, pursuant to prior Court Orders, [respondent] was to pay [child support to the Johnsons] . . . [t]o date, no money has been paid . . . .

8. . . . Mr. Holloway is in full compliance with prior Court Orders . . . and the Buncombe County Department of Social Services is in receipt of a positive homestudy . . . .

9. That the Buncombe County Department of Social Services recommended that it would be in the best interest of the minor child that his custody by [(sic)] placed with his father, Richard Holloway, and that the DSS case be closed. DSS did not recommend placement, or custody, with Pamela Ledbetter, due to her behaviors and the negative effect those behaviors have had on the minor child.

10. That it would be in the best interest of the minor child that his custody be placed with his father, Richard Holloway.

11. That the Buncombe County Department of Social Services made reasonable efforts to prevent removal of the child from the home, but removal was necessary to protect the safety and health of the minor child; and that the Buncombe County Department of Social Services has made reasonable efforts to return the minor child to the home, but returning to the home is no longer the best plan for the minor child.

None of these findings address the requirement in N.C. Gen. Stat. § 7B-907(b)(1) requiring the court make findings regarding "[w]hether it is possible for the juvenile to be returned home . . . within the next six months. . . ." N.C. Gen. Stat. § 7B-907(b)(1). Moreover, findings that respondent was held in contempt of court for violating visitation restrictions, and that she has refused to pay child support, do not alone explain "why it is not in the juvenile's best interests to return home[.]" Despite evidence of the child's encopresis, and that contact with respondent may be a significant trigger for his condition, the order contains no findings of fact relating to this issue. In fact, the trial court deleted the relevant findings.

The court also did not address the requirement of N.C. Gen. Stat. § 7B-907(b)(4) requiring the court to explain why the child was being transferred from the Johnsons' to his father. A DSS report explains the Johnsons "are no longer willing to continue having [the child] live with then[(sic)], unless they are granted guardianship." This context suggests that given the choice between the mother, the father, and foster care, the court chose to place the child with the father. However, this does not demonstrate a permanent plan or why that plan is in the best interests of the child. The court found as fact and concluded as a matter of law that it was in the child's best interests to be placed in the custody of his father, but there are no supporting findings of fact except that respondent was in noncompliance with court orders while the father was in compliance with the prior orders.

Finally, the meaning of the court's finding that "returning home is no longer the best plan for the minor child" has been debated on appeal. Respondent asserts this was an order for DSS to cease reunification efforts, while DSS asserts the court meant to add to the finding the words: "at this time." Neither interpretation resolves the underlying problem that these findings of fact do not comport with the requirements of N.C. Gen. Stat. § 7B-907(b).

We note the evidence and reports in this case might have supported the determination of the trial court. However, our statute requires the court to consider the § 7B-907(b) factors and make relevant findings. In this case, respondent correctly asserts the findings of fact do not comport with the requirements of the statute. Recent decisions of this Court support reversing the order of the trial court and remanding the case where the findings of fact do not comport with N.C. Gen. Stat. § 7B-907. *In the Matter of Eckard*, 148 N.C. App. 541, 559 S.E.2d 233 (2002) (reversing the order of the trial court and remanding the case in part due to failure to comply with N.C. Gen. Stat. § 7B-907(b)(2)); *In re Dula*, 143 N.C. App. 16, 544 S.E.2d 591, *aff'd*, 354 N.C. 356, 554 S.E.2d 336 (2001) (reversing the order of the trial court and remanding the case for failure to comply with N.C. Gen. Stat. § 7B-907(d)).

Accordingly, we reverse the order and remand this case to the trial court. We do not reach respondent's remaining assignments of error.

Reversed and remanded.

Chief Judge EAGLES and Judge HUNTER concur.

IN THE MATTER OF JESSICA RENEA HARTSOCK

No. COA02-912

(Filed 3 June 2003)

1. Trials— nonjury—presumption irrelevant evidence disregarded

The trial court did not err in a juvenile delinquency proceeding arising out of the unlawful possession of marijuana by allegedly considering irrelevant evidence that the juvenile attempted to assault an officer and consistently failed drug screenings, because: (1) the trial court is presumed to disregard any incompetent evidence in a nonjury trial when there is no evidence that the judge acted on it; and (2) the juvenile failed to meet her burden of showing that the incompetent evidence was not disregarded and was prejudicial.

2. Appeal and Error— preservation of issues—failure to make motion to dismiss at close of evidence

Although a juvenile contends the trial court erred by finding that the juvenile knowingly possessed marijuana, this assignment of error is overruled because the juvenile never moved to dismiss the action at the close of all the evidence based on insufficiency of the evidence.

3. Juveniles— delinquency—placement in a residential treatment facility

The trial court erred in a juvenile delinquency hearing arising out of the unlawful possession of marijuana by improperly delegating its authority under N.C.G.S. § 7B-2506(14) to order a juvenile to cooperate with placement in a residential treatment facility where it ordered the juvenile to cooperate with placement in a residential treatment facility "if deemed necessary" by a MAJORS counselor or a juvenile court counselor.

4. Juveniles— delinquency—confinement on an intermittent basis in approved detention facility

The portion of the trial court's order in a juvenile delinquency hearing arising out of the unlawful possession of marijuana that ordered the juvenile be confined on an intermittent basis in an approved detention facility is incomplete and has no effect because the court neither delineated the timing nor delegated its authority, and the space for instructions is blank.

5. Trials— recordation—four-tract audio equipment—meaningful review

Although a juvenile contends the trial court erred in a juvenile delinquency proceeding arising out of the unlawful possession of marijuana by recording the juvenile proceedings on four-tract audio equipment, the assertion that the recordation was inadequate to protect the juvenile's rights is overruled because the transcript was sufficient to provide for meaningful appellate review. N.C.G.S. § 7B-2410.

Appeal by juvenile from orders entered 26 October 2001 by Judge Otis M. Oliver in Stokes County District Court. Heard in the Court of Appeals 14 April 2003.

Attorney General Roy Cooper, by Assistant Attorney General Mary Penny Thompson, for the State.

Richard E. Jester, for juvenile-appellant.

CALABRIA, Judge.

On 29 December 2000, Jessica Renea Hartsock ("Jessica" or "juvenile") was adjudicated a delinquent juvenile. Jessica was placed on probation, with conditions including cooperating with the Step-One program and not violating any laws. In August 2001, a petition was filed asserting that on 23 May 2001 she violated N.C. Gen. Stat. § 90-95(a)(3) by possessing marijuana. In September 2001, a petition was filed asserting Jessica violated the terms of her probation by not participating in the Step-One program and violating N.C. Gen. Stat. § 90-95(a)(3).

On 26 October 2001, a hearing was held on the petitions. Regarding the possession of marijuana, Judge Otis M. Oliver ("Judge Oliver") found as fact:

> On May 23, 2001, the juvenile did have in her possession and control one pocketbook which she said was hers.
>
> The court further finds that the pocketbook did contain a controlled substance, to wit: marijuana, as tested by SBI lab.
>
> The juvenile did testify that she did not know that the pocketbook contained marijuana, and that the pocketbook belonged to her sister.

Based on these findings, the court adjudicated Jessica delinquent. Regarding the failure to comply with Step One, the court, in a separate adjudication, found the following facts:

> The court finds that the juvenile is presently under an order of Probation requiring her to cooperate with recommendations of treatment or counseling.
>
> The juvenile has not complied with recommendations of counselor, to wit: Step One.
>
> The juvenile has failed to attend requested meetings/therapy sessions; she has tested positive on drug screenings. The failure to comply with terms and conditions are willful and without lawful excuse. The juvenile is under no disability at this time.

Based on these findings, the court adjudicated Jessica delinquent. The court, in proceeding to the dispositional phase, entered an order noting Jessica was adjudicated delinquent for the offense of simple possession, but did not reference her failure to comply with Step One. The court ordered Jessica to: (1) "cooperate with placement in a residential treatment facility [i]f deemed necessary by MAJORS counselor or Juvenile Court Counselor[;]" (2) cooperate with placement in "an intensive substance abuse program MAJORS program[;] (3) "be placed on intensive probation[;]" (4) "be placed on Electronic House Arrest[;]" (5) "be confined on an intermittent basis in an approved detention facility as follows: . . .[;] (6) "be placed on probation, under the supervision of a court counselor, for 12 months[;]" and (7) "pay restitution in the amount of $100. . . ." From the adjudication and disposition orders, juvenile appeals.

Juvenile asserts the court erred by: (I) considering irrelevant evidence; (II) adjudicating her a delinquent juvenile for possession of marijuana where all the evidence demonstrated her possession was not knowingly; and (III) delegating the court's authority to place her in a residential treatment facility to the MAJORS or juvenile court

counselor. Juvenile also asserts: (IV) the recordation requirements are insufficient to protect her rights.

I. Consideration of Inadmissible Evidence

[1] A juvenile is " 'entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults.' " *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *In re Dulaney*, 74 N.C. App. 587, 588, 328 S.E.2d 904, 906 (1985).

Here, juvenile asserts the trial court erred by considering irrelevant evidence that she attempted to assault an officer and consistently failed drug screenings. Since we find juvenile has failed to demonstrate prejudicial error, we do not address whether the evidence was properly admitted.

"In a nonjury trial, if incompetent evidence is admitted and there is no showing that the judge acted on it, the trial court is presumed to have disregarded it." *In re Oghenekevebe*, 123 N.C. App. 434, 438, 473 S.E.2d 393, 397 (1996). Juvenile argues that when an objection to the evidence is made and overruled, the judge has thereby determined the evidence competent and may be presumed to have considered it. Juvenile cites no authority, and we find none.

Generally, the effect of the presumption articulated in *Oghenekevebe* is that the burden rests on the juvenile to rebut the presumption that any incompetent evidence was disregarded and demonstrate prejudice. *See State v. Moore*, 132 N.C. App. 197, 203, 511 S.E.2d 22, 26 (1999) (applying the presumption to an adult defendant). This burden applies even where the evidence was admitted over objection. *Broughton v. Broughton*, 58 N.C. App. 778, 785, 294 S.E.2d 772, 778 (1982) (noting the trial court's findings of fact are presumed to be based only upon competent evidence " 'unless the record affirmatively discloses that the finding was based, in part at least, on incompetent evidence heard over objection.' " (quoting 1 Strong's N.C. Index 3d, *Appeal and Error* § 57.2 (1976)); *Styron v. Supply Co.*, 6 N.C. App. 675, 171 S.E.2d 41 (1969) (applying the presumption despite the admission of the evidence over objections by defendant).

In the case at bar, the burden was upon juvenile to demonstrate the incompetent evidence was not disregarded and was prejudicial. Neither the trial court's findings of fact, nor the transcript reveal any indication the contested evidence was considered. Moreover, juvenile has failed to demonstrate prejudice. Accordingly, this assignment of error is overruled.

II. Sufficiency of the Evidence

[2] Juvenile asserts the trial court erred in finding she *knowingly* possessed the marijuana because "[i]n this case there is no evidence that Jessica knew that any marijuana was in her borrowed purse." In essence, the juvenile argues there is insufficient evidence regarding the element of knowledge. *See State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (to prove possession of a controlled substance, the State must show defendant (1) possessed a controlled substance and (2) possessed the substance knowingly).

"[J]uveniles 'may challenge the sufficiency of the evidence by moving to dismiss the juvenile petition.' " *Heil*, 145 N.C. App. at 28, 550 S.E.2d at 819 (quoting *In re Davis*, 126 N.C. App. 64, 65-66, 483 S.E.2d 440, 441 (1997)). "However, if a defendant [or juvenile] fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C. R. App. 10(b)(3) (2003). Since juvenile never moved to dismiss, this assignment of error is overruled.

III. Delegation of Authority

[3] The court ordered juvenile to "cooperate with placement in a residential treatment facility *[i]f deemed necessary by MAJORS counselor or Juvenile Court Counselor.*" (Emphasis added). Juvenile asserts the court improperly delegated its authority to place her in a residential treatment facility to the MAJORS counselor or juvenile court counselor. The State asserts the court complied with the purpose of the Juvenile Code by only ordering placement in a residential treatment facility when necessary, and the court specifically tailored this treatment to the juvenile as demonstrated by the predisposition report incorporated into the order by the trial court. However, the predisposition report was not incorporated into the record on appeal. The State cites the purpose of the Juvenile Code, N.C. Gen. Stat. § 7B-100(4) as support for their argument that the court utilized its discretion properly. We disagree.

The Juvenile Code provides: "[t]he court exercising jurisdiction over a juvenile who has been adjudicated delinquent may use the following alternatives . . . (14) [o]rder the juvenile to cooperate with placement in a residential treatment facility. . . ." N.C. Gen. Stat. § 7B-2506(14) (2001). The statute specifically provides *the court* with the power and discretion to order appropriate dispositional alternatives. Unlike in *In re Bullabough*, 89 N.C. App. 171, 181, 365 S.E.2d

642, 647 (1988), wherein the Court considered former N.C. Gen. Stat. § 7A-573, which explicitly permitted delegation of the court's power by administrative order, N.C. Gen. Stat. § 7B-2506 does not state, or even indicate, that the court may delegate its discretion. The statute does not contemplate the court vesting its discretion in another person or entity, therefore, the court, and the court alone, must determine which dispositional alternatives to utilize with each delinquent juvenile. Accordingly, we hold the trial court improperly delegated its authority to "[o]rder the juvenile to cooperate with placement in a residential treatment facility." Since we find the statute controlling, we do not reach constitutional arguments raised by juvenile.

We note, however, pursuant to N.C. Gen. Stat. § 7B-2506, a judge could order certain dispositional alternatives apply upon the happening of a condition, since *the court*, and not another person or entity, would be exercising its discretion. The State asserts the court placed such limitations on its order in the case at bar, however, no such limitations appear in the order nor in any attachments, and accordingly, the State's assertion is without support.

[4] Juvenile also asserted the court improperly delegated its authority to place her in intermittent confinement, as provided by N.C. Gen. Stat. § 7B-2506 (20). The court ordered juvenile "be confined on an intermittent basis in an approved detention facility. . . ." The statute expressly requires "[t]he timing of this confinement shall be determined by the court in its discretion[,]" and the form leaves space for instruction. N.C. Gen. Stat. § 7B-2506 (20) (2001). The court neither delineated the timing nor delegated its authority, rather the space for instructions is blank. Accordingly, this portion of the order is incomplete and has no effect. We note any delegation of authority would have been contrary to the express language of our statute.

IV. Recordation of Juvenile Actions

[5] Juvenile asserts the recordation of juvenile proceedings on four-track audio equipment is inadequate to protect juvenile rights. We disagree.

Regarding recordation, our law provides:

> [a]ll adjudicatory and dispositional hearings and hearings on probable cause and transfer to superior court shall be recorded by stenographic notes or by electronic or mechanical means. Records shall be reduced to a written transcript only when timely

notice of appeal has been given. The court may order that other hearings be recorded.

N.C. Gen. Stat. § 7B-2410 (2001). However, only "[w]here a trial transcript is 'entirely inaccurate and inadequate,' precluding formulation of an adequate record and thus preventing appropriate appellate review" would a new trial be required. *In re Lineberry*, 154 N.C. App. 246, 257, 572 S.E.2d 229, 237 (12-3-2002), *cert. denied*, 356 N.C. 672, —— S.E.2d —— (2003) (quoting *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984)). Where " 'the transcript, despite its imperfections, is not so inaccurate as to prevent meaningful review by this Court[,]' " the assertion that the recordation of juvenile court proceedings are inadequate to protect juvenile's rights is properly overruled. *Id.*, (quoting *State v. Hammonds*, 141 N.C. App. 152, 168, 541 S.E.2d 166, 178 (2000), *aff'd*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S.907, 153 L. Ed. 2d 184 (2002)). We hold the transcript was sufficient to provide for meaningful appellate review.

Affirmed in part, reversed in part.

Chief Judge EAGLES and Judge HUNTER concur.

CHRISTINA LYNN RUTH, PLAINTIFF v. VAUGHN ALAN RUTH, DEFENDANT

No. COA02-781

(Filed 3 June 2003)

1. Constitutional Law— due process—failure to continue—review

The failure to continue a child custody and visitation trial raised a constitutional issue in that due process involves the fundamental element of reasonable time for preparation. The failure to formally request a continuance does not preclude review, and the constitutional issue involves a question of law which may be reviewed by examination of the circumstances.

2. Trials— continuance denied—withdrawal of attorney 30 minutes before trial—new issues raised

An order denying a new trial in a child custody and visitation action was reversed where plaintiff's attorney withdrew 30 min-

utes before trial; plaintiff appeared without counsel and met with defendant and his attorney at the request of the court; they were unable to agree on visitation and proceeded to trial at the suggestion of defendant's attorney; and plaintiff asked for a delay when she realized that issues were being raised which were not related to visitation. Plaintiff likely was unaware or misled about the true nature of the trial, and nothing indicates that she sought to delay or evade trial.

Appeal by plaintiff from orders entered 13 July 2001 and 4 December 2001 by Judge Charlie Brown in Rowan County Superior Court. Heard in the Court of Appeals 19 February 2003.

Kary C. Watson for plaintiff appellant.

Robert L. Inge for defendant appellee.

TIMMONS-GOODSON, Judge.

Cristina Lynn Ruth ("plaintiff") appeals from orders of the trial court granting Vaughn Alan Ruth ("defendant") custody of Heather Dawn Ruth and Danatha Marie Ruth ("the minor children") and denying plaintiff's motion for a new trial. For the reasons stated herein, we reverse the order of the trial court.

Plaintiff and defendant are the natural parents of the minor children. Plaintiff and defendant were married on 26 June 1992 and subsequently divorced. On 21 January 1997 and 2 June 1998, plaintiff was awarded custody of the minor children and defendant was granted visitation.

On 29 March 2001, defendant filed a motion to modify the custody order, alleging that (1) since the entry of the prior order, plaintiff moved to West Virginia, which interfered with his visitation rights; (2) plaintiff moved several times and with numerous people, which continuously disrupted the minor children (3) the defendant was ordered to pay for day care and the minor children no longer attended day care; and (4) that defendant's income had been reduced since the entry of the prior order. Defendant's motion to modify sought a "workable" visitation schedule, custody of the minor children and a modification in defendant's child support obligations. A hearing on defendant's motion was initially set for 24 April 2001.

On 24 April 2001, plaintiff made arrangements with Milton Bays Shoaf ("Shoaf") to represent her in court. On 26 April 2001, Shoaf's

secretary telephoned plaintiff to inform her that Shoaf appeared in court and was granted a continuance on the matter. The hearing was calendered for 27 June 2001 and plaintiff met with Shoaf on 26 June 2001 to prepare for the trial. At the meeting, plaintiff paid Shoaf $400.00 as an initial deposit for his services and they discussed the case. On 27 June 2001, thirty minutes prior to trial, plaintiff was informed by Shoaf's secretary that Shoaf would not appear in court. According to testimony from Shoaf, he did not "feel that [plaintiff] had faith in [him] as an attorney." Because of comments she made, and because plaintiff did not pay him his full retainer, Shoaf informed the court on the morning before trial that he did not represent plaintiff. Shoaf then returned to plaintiff a portion of the money given to him and charged her for the conference they had on 26 June 2001.

As a result of Shoaf's withdrawal from the case, plaintiff appeared in court, answered at calendar call and informed the court that she was not represented by counsel. The court then requested that plaintiff meet with Robert Inge ("Inge"), defendant's counsel, in an effort to resolve defendant's motion by agreement.

According to plaintiff, during the meeting with Inge and defendant, they discussed defendant's visitation rights. However, the parties were unable to agree on a schedule and Inge suggested that the court should decide the matter. Plaintiff testified that Inge spoke with Judge Brown in his chambers and that she also asked to speak with Judge Brown. According to plaintiff, Judge Brown informed her that if she was going to ask for a continuance it would be denied.

Following the trial, defendant was granted custody of the minor children and plaintiff was granted visitation. On 31 July 2001, plaintiff filed a motion pursuant to Rule 59 of the North Carolina Rules of Civil Procedure requesting that the 13 July 2001 order be set aside and that she be granted a new trial. Plaintiff's motion was denied on 4 December 2001. Plaintiff appeals the order denying her motion for a new trial and the order granting custody of the minor children to defendant.

---

[1] The dispositive issue in the case is whether the trial judge abused his discretion in denying plaintiff's motion for a new trial under Rule 59 of the North Carolina Rules of Civil Procedure when her due process rights were violated. For the reasons stated herein, we reverse the order of the trial court.

"Orders under Rule 59 are within the trial court's sound discretion and should not be disturbed on appeal, unless it appears from the record that 'the trial judge's ruling probably amounted to a substantial miscarriage of justice.' " *Allen v. Beddingfield*, 118 N.C. App. 100, 101-02, 454 S.E.2d 287, 289 (1995) (quoting *Burgess v. Vestal*, 99 N.C. App. 545, 550, 393 S.E.2d 324, 327, *disc. rev. denied*, 327 N.C. 632, 399 S.E.2d 324-25 (1990)). "[W]here a motion for a continuance raises a constitutional issue, the trial court's decision . . . involves a question of law, not fact, which may be reviewed by an examination of the circumstances of each case." *State v. Williams*, 51 N.C. App. 613, 616, 277 S.E.2d 546, 548 (1981). Due process involves the fundamental element of a reasonable time for preparation for a trial. *Benton v. Mintz*, 97 N.C. App. 583, 589, 389 S.E.2d 410, 414 (1990); *see also McMillan v. Robeson County*, 262 N.C. 413, 137 S.E.2d 105 (1964). "An unrepresented party's failure to formally request a continuance does not preclude review of this issue." *Id.* at 588, 389 S.E.2d at 413; *see also Underwood v. Williams*, 69 N.C. App. 171, 174, 316 S.E.2d 342, 344 (1984).

[2] Here, plaintiff's request to continue the case at the time of trial raises a constitutional issue. Therefore, we must examine the circumstances of this case to determine whether the ruling from the trial court amounted to a miscarriage of justice. An examination of the record reveals that plaintiff was unrepresented by counsel, did not make a formal request for a continuance until she was on the witness stand, and believed that the issue before the court was visitation and not a change of custody. A close review of the record further indicates that plaintiff was likely misled as to the nature of the proceedings during her pretrial discussions with Shoaf and Inge. At the motion for a new trial, Shoaf gave the following testimony:

> Q: Did you have any conversations with Inge about what was at issue in this case?
>
> A: . . . I think he and I had a couple of brief telephone conversations and, yes, I do recall a few things that we talked about. . . . I think since she had the children . . . that he had not had any visitation in the past or . . . and that he was wanting just some standard . . . visitation could be worked out rather than full custody. I think it was sort of understood that she would retain custody and he would get some sort of visitation.

On cross-examination plaintiff gave the following testimony:

> Q: At the calendar call you never asked for a continuance, correct?
>
> A: I don't know the process if I could ask for a continuance at that time.
>
> Q: I'm just asking you did you or didn't you?
>
> A: I just did what they told me to do. They called roll, I answered, and I told him about Attorney Shoaf withdrawing.
>
> Q: And, in fact, later on that morning or right before lunch you asked the judge if you could go ahead and have your hearing, correct?
>
> A: Because I still assumed it was under scheduling visitation.
>
> Q: And at that point even then after you had spoken with me [Inge] you didn't ask for a continuance, did you?
>
> A: All we spoke about was visitation.
>
> Q: Didn't I tell you—and I realize I'm walking a fine line here—but didn't I tell you that [defendant] would like to have custody but we might be able to work out something if we could come up with an agreeable schedule?
>
> A: No.
>
> Q: Do you recall something like that being said?
>
> A: No, you didn't. You came back after you told me what [defendant] wanted for . . . visitation and he wanted all summer. Then when you left and came back, you said that was not agreed upon, we would let the judge decide.
>
> Q: Okay. And when we came back in you again still did not ask for a continuance; . . .
>
> A: When I realized that this hearing was going on and I was put up here on the stand and I did not have an attorney and I realized what was—or had a fathom of what was happening then I asked for a continuance till I could have an attorney.

We find the case of *Benton* instructive. In *Benton*, the defendant's attorney entered a court appearance on the defendant's behalf and

three months later filed a motion to withdraw. *Id.* at 584, 389 S.E.2d at 411. The trial court conducted a special proceeding on the motion to withdraw and the defendant was present in court. *Id.* at 585-86, 389 S.E.2d at 411-12. The defendant believed that the purpose of the hearing was to address the motion to withdraw; however, after the motion to withdraw was granted, the trial court proceeded with the hearing on the merits of the case. *See id.* at 586, 389 S.E.2d at 412. Because the defendant was confused, he asked for additional time to prepare his case, but the request was denied. *See id.* The trial court refused to continue the case even though the defendant's former attorney confirmed that he had probably put his ex-client under the impression that only the motion to withdraw would be heard that day. *Id.* The trial commenced with the defendant representing himself. *Id.* When defendant expressed that he could not secure his witnesses and when complicated legal issues arose during the trial, the defendant asked for a delay in the proceeding. *Id.* at 588, 389 S.E.2d at 413. The defendant was denied a delay in the trial and the trial court entered judgment against the defendant. *Id.* at 586, 389 S.E.2d at 412.

Likewise, in the case at bar, Shoaf entered an appearance for plaintiff in April 2000 and was successful in obtaining a continuance. After a new trial date was scheduled, plaintiff met with Shoaf to discuss the merits of the case. The record reveals that during the meeting with Shoaf, plaintiff paid him money to represent her in the matter; however, Shoaf withdrew from the case thirty minutes before trial. Plaintiff then appeared in court without the benefit of counsel, answered calendar call, and informed the court that her attorney had withdrawn from the case. At the request of the court, plaintiff then met with defendant and his attorney, was unable to agree on visitation, and proceeded to trial at the suggestion of Inge. When plaintiff realized that issues which did not pertain to visitation were being raised, she asked for a delay in the trial. Here, we note that defendant is a layman and while she may have failed to request a continuance at the appropriate time, she made a notable layman's attempt to stop the proceeding once she realized that the trial had moved in a direction she was unprepared to defend. "A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." N.C. Gen. Stat. § 1A-1, Rule 40(b) (2001).

Furthermore, Shoaf, a licensed attorney with approximately twenty years of legal experience in family law, testified that he talked with Inge and believed that the "primary issue" before the court was visitation. Therefore, it is likely that plaintiff in consulting with Shoaf

on the eve of trial, and in discussing the case with Inge before proceeding to trial, was prepared to proceed on the issue of visitation and not a change of custody. Moreover, nothing in the record here indicates that plaintiff sought to delay or evade the trial, and plaintiff was likely unaware or misled about the true nature of the trial. Accordingly, we grant a new trial. *See Benton*, 97 N.C. App. at 589, 389 S.E.2d at 414 (holding that a reversal of the trial court's refusal to grant a continuance is especially warranted when nothing in the case indicates that the movant's purpose for the motion was to delay or evade trial).

Because we reverse the trial court's order denying plaintiff's motion for a new trial, it is unnecessary for us to address the other assignments of error raised by plaintiff.

New trial.

Judges WYNN and LEVINSON concur.

JAMES ROBINSON, PLAINTIFF v. WAL-MART STORES, INC., DEFENDANT/THIRD-PARTY PLAINTIFF v. DENZIL WADE WRIGHT, INDIVIDUALLY, DENZIL WADE WRIGHT D/B/A UNIQUE SYSTEMS, INC. AND UNIQUE SYSTEMS, INC., A NORTH CAROLINA CORPORATION, THIRD-PARTY DEFENDANTS

No. COA02-930

(Filed 3 June 2003)

Premises Liability— slip and fall—summary judgment

The trial court erred by granting summary judgment in a slip and fall case in favor of third-party plaintiff store, because there was conflicting evidence as to whether the store's floor maintenance subcontractor created the dangerous situation and as to whether cones were placed in wet areas to provide adequate warnings to alert customers.

Appeal by plaintiff from judgment entered 26 February 2002 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 14 April 2003.

Doran, Shelby, Pethel and Hudson, P.A., by Michael Doran, for plaintiff-appellant.

Guthrie, Davis, Henderson & Staton, P.L.L.C., by K. Neal Davis and Kimberly R. Matthews, for defendant-appellee/third-party plaintiff.

CALABRIA, Judge.

On 1 February 1997 around 10:00 p.m., James Tyrone Robinson ("plaintiff") and his friend, Joseph Downs ("Downs"), went to a twenty-four-hour Wal-Mart store in Kannapolis to purchase a pair of shoes. The Kannapolis Wal-Mart store contracted floor maintenance services from Denzil Wade Wright d/b/a Unique Systems, Inc. ("Unique Systems"). Unique Systems subcontracted to two other companies: Priority One, owned by Caroline C. Grottalio ("Grottalio") and his most recently hired subcontractor, J.E.S. Company, owned by Jesse Smith ("Smith"). On 1 February 1997, employees from both Priority One and J.E.S. Company cleaned the tiled floors in Wal-Mart. Priority One, operating under Grottalio, cleaned, stripped, and waxed the tiled floors on the main aisle located at the entrance and towards the back of the store while J.E.S. Company, operating under Smith, spent most of the night mopping and spot-mopping the floors throughout the entire store.

Smith and his staff were unfamiliar with the layout of Wal-Mart and their specific duties because this was their first assignment as a floor maintenance company. After Smith shifted from mopping to buffing the floor, Smith testified he frequently got lost and, ultimately, was unable to differentiate between buffed and unbuffed areas of the store.

As plaintiff and Downs proceeded to the shoe department located in the back of the store, they encountered a roped-off area in front and to the right of the shoe department. The individual who was cleaning the tile floor with a high-speed buffer told plaintiff he was finished and took the rope down. This allowed plaintiff and Downs access to the shoe area.

After looking at shoes, plaintiff left the carpeted shoe area by way of the tiled floor to the left of the shoe department, thus avoiding the area in which the cleaner had recently finished buffing. As he stepped onto the tiled floor, his feet slipped out from under him, and he fell on his back and side, hitting his head and pinning his right arm beneath him. While on the floor, plaintiff observed the floor was slippery and

wet. He also could smell wax on his hand and his jacket. After lying on the floor for a short time, plaintiff got up to find a manager and report the event. The manager took plaintiff's information and explained the procedure to follow if he was injured. The manager accompanied plaintiff to and inspected the area where he fell.

Plaintiff initially thought he had not been injured by the fall, but the next morning, when he felt pain in his back and legs, plaintiff sought medical treatment at Rowan Regional Hospital, where a CT scan was performed. As a result of plaintiff's "excruciating" pain in his back and leg and the numbness in his lower extremities, plaintiff required hospitalization and surgery.

On 31 January 2000, plaintiff filed a complaint against Wal-Mart asserting negligence based on premises liability, creation of a hazardous condition, failure to warn, and failure to implement and enforce policies and procedures relating to safe floor maintenance. On 21 March 2000, Wal-Mart answered the allegations in the complaint and also asserted plaintiff was contributorily negligent. Thereafter, Wal-Mart filed a third party complaint against Unique Systems and Denzil Wright, individually. On 30 November 2001, after Unique Systems answered the third party complaint, Wal-Mart moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Arguments on Wal-Mart's motion for summary judgment were heard before the Honorable Larry G. Ford in the Rowan County Superior Court on 28 January 2002, and on 26 February 2002, the trial court granted Wal-Mart's motion finding there was "no genuine issue as to any material fact and that the Defendant/Third Party Plaintiff is entitled to Judgment as a matter of law[.]" Plaintiff appeals.

Summary judgment is appropriate when the moving party meets its burden of "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." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). "By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Id.* "Negligence is not presumed from the mere fact of injury. [A plaintiff must] offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, non-

suit is proper. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 68, 414 S.E.2d 339, 345 (1992). Nonetheless, "[s]ummary judgment generally is disfavored in cases of negligence or contributory negligence." *Thompson v. Bradley*, 142 N.C. App. 636, 544 S.E.2d 258, *disc. rev. denied*, 353 N.C. 532, 550 S.E.2d 506 (2001). "[I]t is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980).

In the instant case, Wal-Mart alleges plaintiff has failed, beyond mere speculation or conjecture, to produce a "forecast of evidence" necessary to establish the essential elements of negligence; therefore, summary judgment was properly granted by the trial court. To establish the essential elements of negligence, a plaintiff must prove the following: " '(1) the standard of care [duty owed]; (2) breach of the standard of care; (3) proximate causation; and (4) damages.' " *Clark v. Perry*, 114 N.C. App. 297, 304-05, 442 S.E.2d 57, 61 (1994) (quoting *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 (1981).

Wal-Mart contends plaintiff has failed to produce sufficient evidence to raise a genuine issue of material fact as to whether Wal-Mart breached any duty owed to plaintiff. To show Wal-Mart breached the duty owed, "plaintiff must show . . . defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence." *Roumillat*, 331 N.C. at 64, 414 S.E.2d at 342-43.

In his deposition testimony, plaintiff testified as follows:

> Q: And to your knowledge, you never saw any floor cleaning person in the area where you fell and never saw that area roped off, correct?
>
> A: No; That's correct.
>
> Q: So are you assuming because the floor was wet and there was a waxy smell that earlier there must have been somebody in the cleaning process in that part of the aisle too?
>
> A: Yes, I would say that.
>
> Q: But other than that assumption and because you saw the person earlier in a different place, you don't have any evidence that that's what caused the wetness or wax to be on the floor where you fell, do you?

A: No, I don't have any—no evidence over that, no. I just know I stepped on a wax floor and fell.

Based on this deposition testimony, Wal-Mart argues plaintiff's evidence is limited to pure speculation or conjecture.

Plaintiff's deposition testimony, however, was not the only evidence presented to the trial court. As to the creation of the wetness on the floor, Smith had just begun working as a floor maintenance subcontractor at Wal-Mart. In his deposition testimony, he stated that he swept and mopped the "whole place[.]" When asked if he had spot-mopped in the area of the shoe department, he answered, "I don't remember, but I probably did." When asked whether he knew if an area he had mopped was dry before he went on to the next section, Smith testified, "Well, you know, I didn't—I guess I didn't know they was [(sic)] dry, you know, honest about it [(sic)]." While Smith claimed he had used cones spaced approximately fifteen feet apart, plaintiff testified in his deposition he did not remember observing cleaning people marking the aisle in which he fell designating that it was wet.

Moreover, Grottalio testified as follows concerning water left on a waxed floor:

Q: You also talked about wax being water-soluble.

A: Uh-huh (yes).

Q: And if you allow water to be on wax—

A: Too long.

Q: —for too long, the wax comes up and—

A: Softens.

Q: —softens and basically is coming up off the surface?

A: It will go right up in your pad, yeah, clog it up.

Q: And also sit there wet with the water?

A: Uh-huh (yes).

This testimony and Smith's admission that it was likely he mopped in the area in question and may have left it wet corroborates plaintiff's contentions that the floor was wet and that his jacket smelled of wax.

Because there is conflicting evidence as to whether Smith created the dangerous condition and as to whether cones were placed in wet areas to provide adequate warning to alert customers, plaintiff has produced sufficient evidence to raise genuine issues of material fact. Accordingly, the granting of summary judgment was premature.

Reversed.

Chief Judge EAGLES and Judge HUNTER concur.

CITY OF CHARLOTTE, NORTH CAROLINA, PLAINTIFF v. PATRICIA E. KING, DEFENDANT

No. COA02-1218

(Filed 3 June 2003)

Cities and Towns— substandard dwelling—imposition of civil penalties for noncompliance

The trial court erred by concluding that the City of Charlotte improperly imposed a fine under Section 11-35(b) of the Charlotte Housing Code on a non-occupant owner of a substandard dwelling for her failure to comply with an order under the code to either repair or demolish the dwelling that she owned on or before 22 December 1996, and the case is remanded for a hearing to determine whether the penalty was properly imposed because: (1) the pertinent code allows the city to impose civil penalties for noncompliance of its orders without regard to whether the dwelling is occupied; and (2) the trial court focused upon whether the substandard dwelling was occupied in rendering its judgment and did not make any findings or conclusions regarding the penalty.

Appeal by plaintiff from judgment entered 7 May 2002 by Judge Nancy Black Norelli, District Court, Mecklenburg County. Heard in the Court of Appeals 13 May 2003.

Helms, Henderson & Associates, P.A., by Christian R. Troy, for plaintiff-appellant.

William D. McNaull, Jr. for defendant-appellee.

WYNN, Judge.

Under Section 11-35(b) of the Charlotte Housing Code, the City of Charlotte may fine an owner of a substandard dwelling who fails to comply with an order of the code enforcement official to repair or demolish the dwelling. In this case, the trial court concluded that the City of Charlotte improperly imposed a fine on Patricia E. King (a non-occupant owner of a substandard dwelling) because "the penalty imposed by Section 11-35(b) of the Code applies only to dwellings which are occupied by a non-owner." Because Section 11-35(b) allows the city to impose civil penalties for noncompliance of its orders without regard to whether the dwelling is occupied, we reverse the trial court's order and remand for further proceedings.

Briefly stated, Ms. King failed to comply with an order under Section 11-35(b) to either repair or demolish a dwelling that she owned on or before 22 December 1996. Ms. King did not use this unoccupied house as her principal residence. Apparently, the City of Charlotte granted Ms. King several extensions leading to a completion of the repairs on 17 June 1998. Nonetheless, the City of Charlotte imposed a civil penalty of $5500 which represented a fine for each day of delay from the date of the initial order until the repairs were completed. Thereafter, the City of Charlotte brought an action to recover the penalty. After the trial court found in Ms. King's favor, the City of Charlotte appealed contending that the trial court erroneously concluded "the penalty imposed by Section 11-35(b) of the Code [of the City of Charlotte] applies only to dwellings which are occupied by a non-owner." Upon our *de novo* review of this matter, we agree with the City of Charlotte. *Overton v. Camden County*, 155 N.C. App. 391, 574 S.E.2d 157, 160 (2002) (stating the proper interpretation of an ordinance is a question of law requiring de novo review).

Under Section 11-35(b) of the Charlotte Housing Code:

> Any owner of a dwelling, except an owner who occupies the dwelling as his principal place of residence, who fails to comply with an order of the code enforcement official to repair, alter or improve the dwelling or to vacate and close and remove or demolish the dwelling, within the time specified in the order, shall be subject to a civil penalty in the amount of one hundred dollars ($100.00) for the first day of noncompliance and ten dollars ($10.00) for each day thereafter until the dwelling is brought into compliance with the order. The civil penalty may be recovered by the city in a civil action in the nature of debt if the owner does not

> pay the same within thirty (30) days after the initial day of noncompliance.

As Ms. King concedes, the only reference to occupancy in Section 11-35(b) is the civil penalty exemption for an owner who occupies the substandard dwelling as his principal residence. Nonetheless, Ms. King argues that Section 11-35(b) must be read in conjunction with Section 11-35(a) which provides,

> it shall be unlawful for the owner of any dwelling or dwelling unit, with respect to which an order has been issued pursuant to section 11-28(b) of this chapter to occupy or permit the occupancy of the same.

She contends that Sections 11-35(a) which prohibits the occupancy of a substandard dwelling conflicts with Section 11-35(b) which exempts the owner of a substandard dwelling who occupies the same as a principal residence from civil penalties. Thus, she argues that since the "no occupancy" provision of Section 11-35(a) is the more stringent requirement, the trial court properly resolved this conflict under Section 11-34 which states:

> In the event any provision, standard or requirement of this chapter is found to be in conflict with any provision of any other ordinance or code of the city, the provision which establishes the higher standard or more stringent requirement for the promotion and protection of the health and safety of the residents of the city shall prevail.

We find Ms. King's argument to be without merit. Section 11-35(b) allows the city to impose civil penalties for noncompliance with it orders. It does not establish a standard related to the promotion and protection of the health and safety of the residents of the city.

"The rules applicable to statutes apply equally to the construction and interpretation of municipal ordinances." *Woodhouse v. Board of Comm'rs*, 299 N.C. 211, 225, 261 S.E.2d 882, 891 (1980). "The principal goal of statutory construction is to accomplish the legislative intent. The intent . . . may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish. If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001).

In this case, the clear and unambiguous language of Section 11-35(b) states that only the "owner who occupies the dwelling as his principal place of residence" is exempt from the civil penalty. Accordingly, we hold that the trial court erroneously interpreted the ordinance.

We note that Ms. King contends that the City of Charlotte tacitly and expressly waived the imposition of civil penalties. Moreover, she argues that there was sufficient evidence for the trial court to conclude that she did not "fail, neglect, or refuse to repair" the premises. However, because the record indicates the trial court focused upon whether the substandard dwelling was occupied in rendering its judgment and did not make any findings or conclusions regarding the penalty, we remand this matter to the trial court for a hearing to determine whether the penalty was properly imposed against Ms. King.

Reversed and remanded.

Judges McCULLOUGH and ELMORE concur.

BARRY HULON HYDE, PLAINTIFF v. ROBERT E. ANDERSON, INDIVIDUALLY; LANCASTER AVIATION, INC., A NORTH CAROLINA CORPORATION; GREEN VALLEY AVIATION GROUP, INC., A NORTH CAROLINA CORPORATION; LEONARD LANCASTER, INDIVIDUALLY; THE CITY OF CONCORD, AND THE CONCORD REGIONAL AIRPORT, DEFENDANTS

No. COA02-1039

(Filed 3 June 2003)

1. Appeal and Error— appealability—denial of venue change—substantial right

The denial of a motion to transfer venue was interlocutory but was immediately appealable because it affected a substantial right.

2. Venue— municipal entity—county where action arose

The denial of a motion to change venue from Mecklenburg County to Cabarrus County in an action against the City of Concord and the Concord Regional Airport was error because defendants were municipal entities. Under N.C.G.S. § 1-77(2),

venue existed as a matter of right in the county where any part of the cause of action arose and it was unnecessary to inquire into whether the defendants were engaged in a proprietary or a governmental function. However, plaintiffs are not precluded from later filing a motion to return venue to Mecklenburg County for the convenience of witnesses and to promote the ends of justice.

Appeal by defendants City of Concord and Concord Regional Airport from orders filed 8 January 2002 and 15 February 2002 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 April 2003.

Mineo & Crouse, by Robert A. Mineo, for plaintiff appellee.

Robert D. Potter, Jr. for defendant-appellants City of Concord and Concord Regional Airport.

Cozen O'Connor, by Michael L. Minsker, for defendant-appellee Robert E. Anderson.

BRYANT, Judge.

The City of Concord and the Concord Regional Airport (collectively defendants) appeal from orders filed (1) 8 January 2002 denying a motion to transfer this action from Mecklenburg County to Cabarrus County and (2) 15 February 2002 denying a motion to reconsider the motion to transfer.[1]

On 10 May 2001, Barry Hulon Hyde (plaintiff) filed a complaint against defendants in Mecklenburg County Superior Court, which was later amended on 6 June 2001. Plaintiff alleged he had suffered damages from injuries sustained in a plane crash caused by defendants' negligence. The aircraft in which plaintiff was flying crashed due to a lack of fuel. Plaintiff alleged defendants had a duty to refuel the aircraft daily but had failed to do so on the day of the crash.

Defendants filed their answer on 6 August 2001 and included a motion to transfer the case to Cabarrus County, the county in which defendants are located. Defendants argued Cabarrus County was the proper venue for this action either as a matter of right or, in the alternative, as a matter of convenience to the witnesses and the

1. On 1 March 2002, Robert E. Anderson, Lancaster Aviation, Inc., Green Valley Aviation Group, Inc., and Leonard Lancaster were voluntarily dismissed with prejudice from this action.

parties. Following a hearing, the trial court denied this motion and subsequently denied reconsideration of the motion.

---

[1],[2] The dispositive issue is whether defendants, as municipal entities, are entitled to have this case transferred to Cabarrus County as a matter of right.[2]

Defendants contend that the trial court erred in denying their motion to transfer venue. As an initial matter, we note that although this appeal is interlocutory, it is properly before this Court as a denial of a motion to transfer venue affects a substantial right. *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121-22, 535 S.E.2d 397, 401 (2000). Actions against public officers for acts done by virtue of their office "must be tried in the county where the cause, or some part thereof, arose." N.C.G.S. § 1-77 (2001); *see Thompson*, 140 N.C. App. at 122, 535 S.E.2d at 401. An action against a municipality is an action against a public officer under N.C. Gen. Stat. § 1-77(2) for purposes of venue. *Thompson*, 140 N.C. App. at 122, 535 S.E.2d at 401; *see* N.C.G.S. § 1-77(2) (2001). Proper venue for actions against municipalities is, therefore, usually the county in which the cause of action arose. *See Jarrell v. Town of Topsail Beach*, 105 N.C. App. 331, 332, 412 S.E.2d 680, 680 (1992). Under N.C. Gen. Stat. § 1-83(1), the trial court has the power to transfer a trial to another venue "[w]hen the county designated for that purpose is not the proper one." N.C.G.S. § 1-83(1) (2001). "[O]nce [a] defendant has made a timely motion requesting a change of venue, upon making the appropriate findings, the [trial] court lacks discretion to resolve the issue and must transfer the case to the place of proper venue." *Thompson*, 140 N.C. App. at 122, 535 S.E.2d at 401-02 (citing *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985)).

In this case, plaintiff does not argue either that defendants are not municipal entities, and thus, section 1-77 does not apply, *see Lee v. Poston*, 233 N.C. 546, 547, 64 S.E.2d 835, 836 (1951), or that venue is controlled by other statutory authority even though the suit is against a municipality, *see Jarrell*, 105 N.C. App. at 333, 412 S.E.2d at 681. Instead, plaintiff contends that refueling aircraft is a proprietary function and not a governmental function. As such, plaintiff maintains, defendants were not executing the duties of "a public officer done by him by virtue of his office." Plaintiff's position is that the correct test

---

2. Defendants do not appeal the denial of the motion to change venue on grounds of convenience to the witnesses or parties.

for determining if section 1-77(2) applies should be whether a municipality is engaged in a proprietary function or a governmental function. Although we acknowledge this is the proper test for determining whether a governmental actor is entitled to sovereign immunity, *see Pierson v. Cumberland County Civic Ctr. Comm'n.*, 141 N.C. App. 628, 631, 540 S.E.2d 810, 813 (2000), we discern no basis for applying it to determinations of venue in suits against a municipality.

North Carolina courts have, in fact, long recognized that by definition:

> since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of the provisions of [N.C. Gen. Stat. §] 1-77 (2), . . . and that a proper venue against a municipality is the county where the cause of action, or some part thereof, arose, and that if an action against a municipality be instituted in any other county the municipality has the right, upon motion aptly made, to have the action removed to the proper county.

Godfrey v. Power Co., 224 N.C. 657, 659, 32 S.E.2d 27, 29 (1944); *see Thompson*, 140 N.C. App. at 122, 535 S.E.2d at 401-02; *Pitts Fire Safety Serv., Inc. v. City of Greensboro*, 42 N.C. App. 79, 80, 255 S.E.2d 615, 616 (1979); *see also Light Co. v. Commissioners*, 151 N.C. 558, 560, 66 S.E. 569, 569-70 (1909) (in reviewing a denial of a removal motion, it is unnecessary to determine whether a defendant's actions are administrative or technically governmental in nature). Because North Carolina case law defines any action against a municipality as an action against a public officer falling under section 1-77, it is unnecessary to inquire into whether the municipality was engaged in a proprietary or governmental function. This reaffirms the general rule that in actions against municipal defendants, venue exists, as a matter of right, in the county where the cause of action, or any part thereof, arose. In the case *sub judice*, the cause of action arose in Cabarrus County, and thus, defendants have a right to have this action transferred to that venue. Accordingly, the trial court erred in denying defendants' motion to transfer, and we must reverse the orders of the trial court and remand this case to be transferred from Mecklenburg County Superior Court to Cabarrus County Superior Court.[3]

---

3. Defendants' right to remove venue to Cabarrus County does not, however, "preclude plaintiff from later filing a motion to return venue to Mecklenburg County for the convenience of witnesses and to promote the ends of justice." *Thompson*, 140 N.C. App. at 122, 535 S.E.2d at 402.

Reversed and remanded.

Judges TIMMONS-GOODSON and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

BASS v. NEW HANOVER CTY. BD. OF EDUC. No. 02-978	New Hanover (01CVS751)	Affirmed
BAUMGARNER v. LOWE'S COS., INC. No. 02-908	Wilkes (01CVS953)	Affirmed
C&M INVS. OF HIGH POINT v. U.S. FURNITURE INDUS., INC. No. 02-690	Guilford (01CVS413)	Dismissed
COMMISSIONER OF LABOR OF N.C. v. WARD No. 02-838	Wake (99CVS5553)	Affirmed
GREAT AM. INS. CO. v. MESH CAFE, INC. No. 02-840	Pitt (01CVS3130)	Affirmed
IN RE NORTHINGTON No. 02-1318	Burke (99J195) (99J196) (00J140)	Affirmed
IN RE STONE No. 02-522	Orange (99J74)	Affirmed
NORTHWESTERN NAT'L BANK v. WESTERN AND S. LIFE INS. CO. No. 02-760	Wilkes (01CVS2472)	Dismissed
O'BRIEN v. WINN-DIXIE CHARLOTTE, INC. No. 02-1177	Rutherford (01CVS1224)	Affirmed
RHODES v. HERSEK EXPRESS, INC. No. 02-816	Ind. Comm. (I.C. 274996)	Affirmed
STATE v. AUTRY No. 02-1355	Mecklenburg (00CRS51717)	No error
STATE v. BAXTER No. 02-790	Forsyth (01CRS15469) (01CRS54114) (01CRS55981)	Affirmed; remanded for correction of clerical error in judgment
STATE v. BOYD No. 02-1423	Guilford (01CRS23782) (01CRS90739)	No error

STATE v. BREWER No. 02-994	Union (01CRS7745) (01CRS50668) (01CRS50669)	No error in trial, vacated in part, remanded for resentencing
STATE v. BRIGGS No. 02-462	Alamance (00CRS57308) (00CRS57309) (00CRS57399) (00CRS57400)	No error
STATE v. BRINCEFIELD No. 02-1414	Alamance (01CRS58681)	No error
STATE v. COLE No. 02-1144	Duplin (01CRS2175)	No error
STATE v. DAVIS No. 02-693	Buncombe (01CRS3022) (01CRS51922)	New trial
STATE v. DAWKINS No. 02-1270	Pitt (99CRS68077) (99CRS68078) (99CRS68079)	No error
STATE v. FOSTER No. 02-787	New Hanover (00CRS20914) (00CRS20915)	No error
STATE v. FREDRICK No. 02-237	Rutherford (99CRS7354) (99CRS7405)	No error
STATE v. GENTRY No. 02-1249	Person (01CRS4513)	No error
STATE v. GILLESPIE No. 02-1213	Forsyth (98CRS4425) (98CRS4426)	No error
STATE v. HALL No. 02-802	New Hanover (00CRS60576)	Affirmed
STATE v. HARRIS No. 02-639	Catawba (01CRS10064)	No error
STATE v. HAYES No. 02-1058	Forsyth (01CRS9963)	No error
STATE v. HINTON No. 02-1347	Martin (01CRS13) (01CRS14)	No error
STATE v. HOUSE No. 02-1425	Forsyth (97CRS32039) (97CRS39666)	No error

STATE v. MACK No. 02-591	Cumberland (00CRS55178)	No error
STATE v. McLEAN No. 02-1013	Mecklenburg (01CRS4944)	No error
STATE v. MEDLIN No. 02-1522	Wake (01CRS99220) (01CRS111426)	No error
STATE v. NORIEGA No. 02-159	Buncombe (01CRS6) (01CRS7) (01CRS8)	No error
STATE v. ODOM No. 02-364	Mecklenburg (00CRS53047)	No error
STATE v. OLIVER No. 02-1259	Durham (01CRS13260)	No error
STATE v. PARTRIDGE No. 02-1292	Wake (01CRS97483) (01CRS97484) (01CRS105605) (01CRS105606)	Affirmed
STATE v. PRATT No. 02-1394	Guilford (01CRS23145) (01CRS91580)	No error
STATE v. RICE No. 02-1349	Buncombe (01CRS69) (01CRS51986)	No error
STATE v. SINGLETARY No. 02-1420	Cumberland (00CRS23478) (00CRS23479) (00CRS53461) (00CRS58146)	Affirmed
STATE v. STILLWELL No. 02-847	Brunswick (01CRS1347) (01CRS1348) (01CRS2802)	No error
STATE v. SULUKI No. 02-524	Cumberland (01CRS50696)	No error
STATE v. TATE No. 02-1534	Alamance (01CRS56575)	No error
STATE v. VEGA No. 02-637	Lincoln (00CRS50204) (01CRS45)	No error

STATE v. VELAZQUEZ No. 02-1480	Alamance (01CRS57509)	Appeal dismissed
STATE v. WESTMORELAND No. 02-884	Stokes (99CRS4651) (00CRS274)	No error
STATE v. WILLIAMS No. 02-641	Guilford (01CRS23286) (01CRS23287) (01CRS23305)	No error in part; vacated in part; and remanded for resentencing in part
STATE v. WILSON No. 02-1106	Lee (00CRS52268) (01CRS3866) (01CRS3867) (01CRS3869) (01CRS3870) (01CRS3871) (01CRS3872)	No error

BRUCE HOWERTON, JR., DDS, PLAINTIFF v. ARAI HELMET, LTD., A JAPANESE CORPORATION; ARAI HELMET, LTD., A NEW JERSEY CORPORATION; AND TOM BRISSEY, DEFENDANTS

No. COA02-612

(Filed 17 June 2003)

1. Evidence; Witnesses— expert opinion—Daubert analysis—scientific reliability—causation

The trial court did not abuse its discretion in a negligence and products liability case concerning the alleged defective design of a motorcycle helmet by excluding the causation testimony of four of plaintiff's experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because: (1) North Carolina has adopted the Daubert analysis concerning scientific reliability; (2) where the methodology and techniques of the proffered experts are either challenged or novel, the case law does not support the proposition that trial courts are prohibited from testing reliability; and (3) the record is replete with competent evidence supporting the challenged findings of the trial court.

2. Unfair Trade Practices— misrepresentation of motorcycle helmet—proximate cause—reliance

The trial court did not err by granting summary judgment in favor of defendant with respect to the unfair and deceptive trade practices claim under N.C.G.S. § 75-1.1 arising out of the alleged erroneous representations concerning the design of a motorcycle helmet, because: (1) plaintiff failed to forecast evidence creating a genuine issue of material fact as to whether defendant's alleged representations, that its helmet was designed to reduce the possibility of cervical injuries and that it was Snell certified, were a proximate cause of his injuries; and (2) even assuming that defendant engaged in an unfair and deceptive trade practice in or affecting commerce, plaintiff's deposition testimony demonstrated that he did not detrimentally rely on the assumed misrepresentation.

Appeal by plaintiff from judgment entered 27 February 2002 by Judge Wade Barber in Superior Court, Orange County. Heard in the Court of Appeals 12 March 2003.

Womble, Carlyle, Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Richard T. Rice and Christopher W. Jones, for plaintiff-appellant.

Ellis & Winters, L.L.P., by Richard W. Ellis, Matthew W. Sawchak and Andrew S. Chamberlin, for defendants-appellees.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Howard F. Twiggs, Donald H. Beskind, and Jerome P. Trehy, Jr., on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

Smith, Moore, L.L.P., by James G. Exum, Jr., Jon A. Berkelhammer, and Allison O. Van Laningham, on behalf of the North Carolina Association of Defense Attorneys and the North Carolina Citizens for Business and Industry, amicus curiae.

WYNN, Judge.

Summary

This appeal arises from an action instituted by Dr. Bruce Howerton, D.D.S., alleging that his quadriplegic condition, resulting from a motorcycle accident, was caused by a negligently designed helmet. He contends that Arai Helmet, Ltd. ("Arai") negligently designed his helmet without an integrated chin bar which would have distributed the compressive force of his motorcycle collision throughout his chest, thereby preventing the hyperflexion of his neck and resulting quadriplegia. At trial, upon considering evidence proffered by Dr. Howerton's four expert witnesses, the trial court, applying the reliability standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), concluded that the experts did not offer reliable opinions on causation. Consequently, the trial court granted Arai's summary judgment motion because Dr. Howerton "failed to offer evidence sufficient to raise a material issue of disputed fact as to the element of causation."

On appeal, Dr. Howerton contends the trial court erred by (1) relying upon *Daubert* in determining the admissibility of expert testimony, (2) applying the *Daubert* framework, assuming that it was properly used, and (3) concluding that his unfair and deceptive trade practices' claim failed as a matter of law. After carefully reviewing the record, relevant case law, and arguments of counsel, we hold that (1) North Carolina has recognized and endorsed the use of the *Daubert* framework to the admission of expert testimony, (2) in

applying the *Daubert* framework the trial court did not abuse its discretion by excluding the proffered testimony of plaintiff's expert witnesses, and (3) that trial court properly granted Arai's summary judgment motion with respect to plaintiff's unfair and deceptive trade practices' claim, as plaintiff failed to forecast any evidence of proximate cause. Accordingly, we affirm the determination of the Superior Court, Orange County.

I. Facts and Proceedings in Trial Court

On 7 January 2002, Arai filed an omnibus summary judgment motion on all claims and a motion to exclude the testimony of plaintiff's experts on the issue of causation. In a 29 January 2002 hearing, the trial court reviewed memorandum of law, depositions, and various other discovery responses relating to the reliability of the proffered experts. After making extensive findings of fact, the trial court granted Arai's motion because the expert testimony was not reliable. The pertinent explanatory information, deposition testimony of these experts, as well as the trial court's findings of fact and conclusions of law are set forth below.

In the trial court, the fundamental issue was whether Dr. Howerton could produce reliable expert testimony that Arai's helmet design was the proximate cause of his quadriplegia. The record indicates that motorcycle helmets are either full-face or open-face designs. Whereas full-face designs have an integrated chin bar built into the helmet's molded shell, open-face designs do not have an integrated chin bar. According to the Snell Memorial Foundation, a nonprofit organization specializing in safety certification for helmets, "full-face helmets provide a measure of facial protection in addition to the impact protection generally sought."

During his collision, Dr. Howerton wore an Arai open-face helmet. Like a full-face helmet, the Arai helmet had a chin guard.[1] However, unlike full-face helmets, the chin guard was not integral. Instead, the chin guard was attached to the body of the helmet with nylon screws. According to Arai, the nylon screws permitted the chin guard to breakaway during accidents and thereby prevented the chin

1. The parties dispute the terminology which should be applied to the "guard" on Arai's open-face helmet design. Arai insists that the guard is not a chin guard, but rather a "mouth guard" or "rock guard [designed] to protect the lower part of a rider's face from rocks and other debris kicked up by other riders." Dr. Howerton claims, on the other hand, that the "guard" is simply a defectively designed chin guard. The terminology, however, is irrelevant, and, for purposes of clarity, we have chosen to refer to the guard as a "chin guard."

guard from turning into a lever on the neck. According to Dr. Howerton, this "flexible design," and the corresponding advertising campaign promoting its benefits, was negligent and deceptive. Dr. Howerton claims that if the Arai helmet had been a full-face helmet, the helmet would have prevented his quadriplegia. To support this claim, Dr. Howerton produced, and subjected to deposition, four expert witnesses: Professor Hugh Hurt, Dr. William Hutton, Dr. Charles Rawlings, and James Randolph Hooper.

First, Dr. Howerton offered the expert testimony of Professor Hugh Hurt, President of the Head Protection Research Laboratory of Southern California and Professor Emeritus of Safety Science at the University of Southern California. Arai stipulated to Professor Hurt's expertise in the following subjects: (1) Motorcycle accident investigation and reconstruction, (2) Motorcycle helmet design and construction and related industry standards, and (3) Motorcycle helmet testing and motorcycle helmet performance in accidents and related government industry standards.

In his deposition, Professor Hurt testified that his review and reconstruction of the accident showed that:

> [As] a result of the collision, [Dr. Howerton] was thrown over the handlebars, to land on the back of his helmeted head. . . . And in that process, the failure of the flexible chin bar on the Arai helmet allowed a degree of hypermotion of the neck, which produced the injury that he suffered. . . . I think, essentially any other dirt bike helmet with a chin bar, with an integral chin bar, with a rigid chin bar, that Dr. Howerton would not have suffered that critical neck injury due to the unlimited hyperflexion.

Professor Hurt based his causation opinion—that an integrated chin bar would have prevented Dr. Howerton's quadriplegia—on his investigation and reconstruction of three motorcycle accidents. In these three accidents, motorcycle riders wearing full-face helmets did not suffer neck or cervical injuries despite a head landing. In investigating the respective accidents, Professor Hurt noticed a red "u" or "v" shaped mark on the chest of each motorcycle rider. Professor Hurt deduced that these marks were caused when the rigid integrated chin bar on the full-face helmet struck the chest of the rider during the accident. Essentially, when the integrated chin bar struck the chest, the rotation of the rider's neck was limited. According to Professor Hurt, the Arai helmet's breakaway, or flexible, design was defective because it permitted unlimited

hyperflexion in the neck and, thereby, created an increased risk of neck injury.

Furthermore, Professor Hurt testified that, without any scientific or engineering evidence, Arai marketed its "flexible helmet design" as a safer alternative to the conventional and rigid designs.[2] According to Professor Hurt, the Arai helmet design created the illusion of being a full-face helmet. Moreover, the consumer was unable to discern the difference, because the only warning regarding the potential hazards of the "flexible chin guard" were visible only to a rider who disassembled the helmet.

After reviewing Professor Hurt's deposition testimony, arguments from counsel, case law, and memorandums of law, the trial court made the following pertinent findings of fact:

19. Professor Hurt could not quantify the extent to which a full-face helmet would prevent forward flexion of the head and neck.

20. Professor Hurt did not test or perform independent research on his hypothesis that full-face helmets equipped with rigid chin bars prevent neck injuries. He did not subject his hypothesis to peer review by publishing it to his peers.

21. Professor Hurt did not report his hypothesis to the United States government, for whom he conducted extensive studies that included work on motorcycle helmet safety.

22. Professor Hurt was not able to identify any published work by any author that expressly supported his hypothesis and, thus, did not present any evidence other than his unsupported assertions that his hypothesis is generally accepted in the field.

23. Indeed, Professor Hurt's published work did not support—and in fact tends to contradict—his hypothesis that full-face helmets prevent neck injuries. In a University of Southern California report published in 1981, Professor Hurt published data indicating that serious neck injuries occurred

2. Aria, however, notes that its "design concerns were consistent with the developing literature on motorcycle helmets." To support this proposition, Arai relies on a 1981 study conducted by Professor Hurt which showed that riders with open-face helmets suffered serious cervical injuries less often than riders with full-face helmets. Professor Hurt's report noted: "It is clear from these data that the [open-face] helmets have a significant beneficial effect reducing neck injury."

> more frequently in riders wearing full-face helmets than in riders wearing . . . open-face helmets that were not equipped with chin bars.
>
> . . . .
>
> 25. Professor Hurt's opinion that a full-face helmet would have prevented plaintiffs' injury is speculative and based on inadequate data.
>
> 26. Professor Hurt's opinion that a full-face helmet would have prevented plaintiff's injury in not reliable. . . . [To] the extent that his methods represent a technique, it is clear that this technique is subject to an unacceptable high risk of error.

Accordingly, the trial court granted Arai's motion to exclude Professor Hurt's causation testimony on the basis of unreliability.

Next, Dr. Howerton offered as an expert in biomechanics Dr. William Hutton, Professor and Director of Orthopedic Research at Emory University School of Medicine. Dr. Hutton inspected plaintiff's helmet and opined that:

> When Arai's removable, flexible chin guard touched Dr. Howerton's chest, it should have prevented further flexion and should have transferred a significant portion of the applied force through his chin guard and into his chest. Instead, the bottom screws of the chin guard broke allowing over forty degrees of additional rotation of Dr. Howerton's head and neck. This additional rotation and lack of support from the broken chin guard, permitted additional flexion and compression forces to be exerted on Dr. Howerton's neck. These additional forces resulted in the flexion-compression fractures and movement of the C5 and C6 vertebrae that caused the compromise of Dr. Howerton's spinal cord and the resulting quadriplegia.

Dr. Hutton opined on the issue of causation that the Arai helmet's breakaway feature caused plaintiff's neck to enter into a flexion beyond the physiological limit—"hyperflexion." The hyperflexion magnified the compressive force of the impact, and, in the case of Dr. Howerton, this caused a retropulsion of bone into the spinal canal. Essentially, like Professor Hurt, Dr. Hutton testified that an integrated chin bar would have prevented Dr. Howerton's quadriplegia.

After reviewing Professor Hurt's deposition testimony, arguments from counsel, case law, and memorandums of law, the trial court made the following pertinent findings of fact:

> 48. Dr. Hutton conceded . . . that he has never researched, tested or published his hypothesis that the degree of retropulsion of bone fragments is a function of the degree of flexion or hyperflexion involved. He could not cite [] medical or scientific literature in support of this position. Dr. Hutton also conceded that retropulsion of bone fragments can occur in the absence of hyperflexion. Further, he acknowledged that plaintiff could have sustained some degree of retropulsion even if he had been wearing a full-face helmet. Finally, he conceded that he does not know how much retropulsion the spinal cord can withstand before paralysis occurs.
>
> 49. Dr. Hutton admitted that he had never dealt with a cervical injury similar to that experienced by plaintiff.
>
> 50. Dr. Hutton admitted that he could not identify any literature that supported the conclusion that plaintiff would not have been paralyzed but for the hyperflexion.
>
> 51. Dr. Hutton's opinion that plaintiff's injuries were caused by hyperflexion is speculative and based on inadequate data.
>
> 52. Dr. Hutton's opinion that plaintiff's injuries were caused by hyperflexion is not reliable. . . . To the extent that his methods represent a technique, it is clear that they incorporate an unacceptably high rate of error.

Accordingly, the trial court granted Arai's motion to exclude Dr. Hutton's causation testimony on the basis of unreliability.

Next, Dr. Howerton offered Dr. Charles Rawlings as an expert in neurosurgery. Dr. Rawlings conducted his residency and received a Doctorate in Medicine from the Duke University Medical Center. Between 1989 and 1999, Dr. Rawlings performed two to three surgeries per month for cervical fractures. At the time of his deposition, Dr. Rawlings was enrolled in Wake University School of Law.

In his deposition, Dr. Rawlings opined that Dr. Howerton did not suffer any cervical injuries until his head rotated forward beyond the normal range of motion. Essentially, like Professor Hurt and Dr. Hutton, Dr. Rawlings' testimony supported the theory that the Arai helmet's flexible design permitted plaintiff's head and neck to rotate

beyond physiological limits. With respect to Dr. Rawlings' testimony, the trial court made the following pertinent findings of fact:

> 41. . . . . [Dr. Rawlings] conceded that unless the amount of force is known, it is impossible to distinguish one degree and forty-five degrees of flexion based on radiology films. Dr. Rawlings conceded that he did not know the amount of force involved in the accident. Dr. Rawlings acknowledged that he had no medical basis to opine about whether plaintiff's head was rotated forward in flexion five degrees or forty-five degrees at impact.
>
> 42. Even though he did not know the force involved in the accident and could not accurately identify the position of plaintiff's head at impact, Dr. Rawlings opined that plaintiff would not have been paralyzed but for his head rotating beyond that normal anatomical range of motion. He admitted, however, that there are no objective criteria that can be used to confirm his hypothesis. . . .

Based on these findings, the trial court found that "Dr. Rawlings' opinion that plaintiff injury was caused by hyperflexion is not reliable."

Finally, Dr. Howerton offered James Randolph Hooper as an expert in helmet design. Mr. Hooper was the chief design engineer for a full-face motorcycle helmet developed at the same time Arai was developing its "flexible design"—1978-1982. Mr. Hooper testified that in 1978 it was well known in the helmet industry that rigid chin bars significantly increased the overall stiffness of the helmet and increased protection from impacts in all axises. Mr. Hooper opined that the Arai's flexible chin guard offered no protection during impact. Furthermore, Mr. Hooper related the details of many accidents in which the rider was (1) wearing a full-face helmet, (2) flipped over the handlebars landing on top of the head, and (3) did not suffer severe neck injury.

During Aria's cross-examination of Mr. Hooper the following colloquy occurred:

> Q: Do you contend that you have any sort of expertise so that you can offer an opinion with respect to whether a helmet will prevent a particular type of neck injury?
>
> A: No.

Q: Is that something you have expertise in?

A: No.

After reviewing Mr. Hooper's deposition testimony, arguments from counsel, case law, and memorandums of law, the trial court made the following pertinent findings of fact:

28. Mr. Hooper is not a medical doctor, an accident reconstructionist, an expert in biomechanics, or an engineer. He does not have a college degree.

29. When deposed, Mr. Hooper expressly conceded that he did not have the expertise to opine that a full-face helmet equipped [with] an integrated chin bar would have prevented plaintiff's injury.

. . . .

32. Mr. Hooper is not qualified to offer the opinion that a full-face helmet would have prevented plaintiff's injury in this case. His opinion that a full-face helmet would have prevented plaintiff's injury was speculative and based on inadequate data. Further, Mr. Hooper did not have a reliable basis to offer any meaningful comparison between his own history of accidents and plaintiff's accident.

After making the appropriate findings of fact, the trial court articulated the law on the admissibility of expert testimony and, thereafter, applied the law to the facts. In pertinent part, the trial court concluded:

1. North Carolina has adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993). *See State v. Goode*, 341 N.C. 513, 461 S.E.2d 631, 639 (1995); *see also State v. Bates*, 140 N.C. App. 743, 748, 538 S.E.2d 597, 600 (2000).

2. Even before the issuance of the *Daubert* decision, North Carolina courts adopted "reliability" as the touchstone of admissibility for expert opinion testimony as demonstrated in *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990). The indicia of reliability identified by the North Carolina Supreme Court in *Pennington* are consistent with the indicia of reliability found in *Daubert*. The opinions expressed by plaintiff's experts fail under either analysis.

3. The inquiry of the Court is not limited to the qualifications of the experts. Implicit in Rule 702 of the North Carolina Rules of Evidence is the precondition that the matters or data upon which an expert bases his opinion be recognized in the scientific community as sufficiently reliable and relevant. *Davis v. City of Mebane*, 132 N.C. App. 500, 503, 512 S.E.2d 450, 452 (1999), *rev. dismissed as improvidently granted*, 351 N.C. 329, 524 S.E.2d 569 (2000). The test of reliability involves a preliminary assessment of whether the reasoning or methods at issue are sufficiently valid. *Goode*, 341 N.C. at 527, 461 S.E.2d at 639 (citing *Daubert*).

Based on these principles of law, the trial court, in its discretion, concluded that the opinion testimony of Professor Hurt, Dr. Hutton, and Dr. Rawlings, on the issue of causation, was unreliable and, therefore, inadmissible. Moreover, the trial court concluded, in its discretion, that Mr. Hooper was not qualified to offer his expert testimony on the issue of causation. Accordingly, the trial court granted Arai's 7 January 2002 motion for summary judgment because "[in] the absence of reliable expert opinion testimony on the issue of causation . . . [the] plaintiff [] failed to offer evidence sufficient to raise a material issue of disputed fact as to the element of causation." Furthermore, the trial court granted Arai's partial summary judgment motion regarding plaintiff's claim for unfair and deceptive trade practices. The trial court concluded that this claim failed as a matter of law. From this summary judgment order, plaintiff appeals.

II. Has North Carolina Adopted *Daubert*?

[1] By his first argument, Dr. Howerton contends the trial court erred by excluding the causation testimony of his four expert witnesses under *Daubert*. Dr. Howerton asserts North Carolina has not adopted *Daubert*, and, consequently, the trial court committed reversible error by applying the wrong legal standard in determining the admissibility of his causation experts. After thoroughly reviewing the relevant case law, we disagree.

North Carolina courts, as well as courts of the United States, have long struggled with the admissibility, and evidentiary power, of "expert" testimony. This struggle has been particularly fierce in litigation advancing a "novel" theory of causation and/or liability. In *Frye v. United States*, decided in 1923, the Court of Appeals for the District of Columbia created a test for trial courts to apply when judging the admissibility of novel scientific principles, methods, and tech-

niques. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In *Frye*, the court held that:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs.

Under the *Frye* test, as this standard became known, the proponent of scientific evidence is required to establish the general acceptance, within the relevant scientific community, of the proposed expert's scientific principles, methods, and techniques. "In the 70 years [after] its formulation . . . , the 'general acceptance' test [became] the dominant standard for determining the admissibility of novel scientific evidence at trial." *Daubert*, 509 U.S. at 585. However, over time, legal scholars came to criticize the *Frye* test as unduly restrictive. Specifically, the *Frye* test inappropriately restricted parties from using novel, yet reliable, scientific evidence.

In the midst of this debate, the United States Congress enacted the Federal Rules of Evidence in 1975. Rule 702 provided that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702 (1975) (repealed 1996). After the promulgation of these rules, legal scholars debated whether or not the enactment of Rule 702 supplanted *the Frye* test, particularly in light of the "liberal thrust" of the Federal Rules of Evidence.

In *Daubert*, the United States Supreme Court resolved this question and held that the *Frye* Test did not survive the enactment of the Federal Rules of Evidence. *Daubert*, 509 U.S. at 589. Although *Frye* no longer applied, the Court noted that the new rules did not relieve trial courts from screening expert testimony.[3] "To the contrary, under

3. The *Daubert* Court noted that screening of expert testimony by the trial court is permitted because, unlike lay witnesses, expert witnesses are permitted wide latitude to offer opinion testimony that is not based on first hand knowledge or observa-

the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* The Court arrived at this holding through a standard statutory interpretation of Rule 702. Specifically, the Court concluded that: (1) "the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability," and (2) the requirement that "the evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue' " establishes (a) a standard of relevance and (b) a requirement that the testimony is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* at 591 (citations omitted). As to this latter requirement, commonly referred to as the "fit requirement," the Court explained:

> The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Id.

Accordingly, after *Daubert*, trial courts were required to make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. In making this preliminary assessment, the *Daubert* Court announced, in dicta,[4] four principles that trial courts should ordinarily consider in determining whether expert testimony is admissible pursuant to Rule 702: (1) whether the theory or technique can be (or has been) tested, (2) whether the theory or

---

tion. "Presumably, this relaxation of the usual requirement of firsthand knowledge—a rule which represents 'a most pervasive manifestation' of the common law insistence upon the most reliable sources of information,'—is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert*, 509 U.S. at 592. Accordingly, for the *Daubert* Court, it should not be "surprising" that the trial court should function as a gatekeeper with respect to ensuring the scientific validity—i.e., reliability—of the opinion testimony offered.

4. *See e.g.*, GE v. Joiner, 522 U.S. 136, 151 Fn. 2 (1997) (noting "the Daubert test was announced in dicta").

technique has been subjected to peer review by publication, (3) whether the theory or technique has a known rate of error, and (4) whether the technique has achieved a general acceptance in the scientific community. *Daubert*, 509 U.S. at 593-95. Importantly, the *Daubert* court noted that "[t]he inquiry envisioned by Rule 702 is . . . a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." *Id.* at 594-95. Consequently, the *Daubert* Court expressly equated scientific validity with reliability, i.e., the competence of the witness.

In the years following *Daubert*, the United States Supreme Court has refined and explicated the *Daubert* standard on two occasions. In *General Electric v. Joiner*, 522 U.S. 136 (1997), the Supreme Court held that "abuse of discretion is the proper standard by which to review a [trial] court's decision to admit or exclude scientific evidence." *Id.* at 146. Two years later, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that expert testimony based on technical or specialized knowledge is subject to the same gatekeeping function applicable to scientific knowledge. *Id.* at 152-58.

Despite the fact that *Daubert* is a decision of the United States Supreme Court, neither *Daubert*, nor its progeny, are binding upon the states. *See, e.g., State v. Bogle*, 324 N.C. 190, 202, 376 S.E.2d 745, 752 (1989). However, our Supreme Court and General Assembly have expressed the opinion that "uniformity of evidence rulings in the courts of this State and federal courts [was] one motivating factor [for North Carolina] in adopting [our evidence] rules and [it] should be a goal of our courts in construing those rules that are identical." *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 102 commentary (2002)). At the time of *Daubert*, the North Carolina rule regarding the admissibility of expert testimony was identical to the federal rule interpreted by the *Daubert* Court.[5] *See* N.C. Gen. Stat. § 8C-1, Rule 702 commentary (2002).

---

5. In North Carolina, the admissibility of expert testimony is governed by Rule 702 of the North Carolina Rules of Evidence which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702 (2002). In 2000, however, the federal rule was amended to codify *Daubert* and its progeny.

Despite the mandate of our General Assembly and State Supreme Court to construe identical state and federal rules of evidence in a manner that encourages uniformity, Dr. Howerton argues Rule 702 of the North Carolina Rules of Evidence, contrary to the United States Supreme Court's interpretation of the identical federal rule in *Daubert*, does not permit a trial court to test the reliability of expert testimony before allowing the case to proceed to the jury on the merits. For Dr. Howerton, a trial court's reliability inquiry smacks of a determination of witness credibility and evidentiary weight that should be resolved by the jury, rather than upon summary judgment. *See Federal Paperboard v. Kamyr, Inc.*, 101 N.C. App. 329, 399 S.E.2d 411 (1991).

The reliability determination provided in *Daubert*, however, is generally a judgment focused on the principles and methodology of the proposed testimony, rather than the substance or conclusions of the testimony.[6] Nevertheless, Dr. Howerton relies on *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), for the proposition that trial courts should not render reliability determinations and, the corresponding assertion, that trial courts are simply required to (1) identify whether the technique or subject matter is an appropriate area for expert testimony, (2) decide whether the witness is qualified as an expert, and (3) determine whether the proposed testimony is relevant.

Dr. Howerton's reliance on *Goode* is misplaced. In *Goode*, our Supreme Court, relying on *Daubert*, expressly held that the first inquiry a trial court must make in determining the admissibility of expert testimony is whether "the method of proof is sufficiently reliable." *Goode*, 341 N.C. at 513, 461 S.E.2d at 631. This makes sense, because "unless an expert's testimony . . . is sufficiently reliable, it is not considered competent evidence and therefore should not be presented to the jury." *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 23, 564 S.E.2d 883, 889 (2002). To arrive at this conclusion, the *Goode* Court analyzed precedent created over the last half century by the appellate courts of this State. *See, e.g., State v. Pennington*, 327 N.C.

6. Admittedly, as the United States Supreme Court held in *Joiner*:

> conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

GE v. Joinder, 522 U.S. at 146.

89, 98, 393 S.E.2d 847, 852 (1990) (holding that "[a] new scientific method of proof is admissible at trial if the method is sufficiently reliable"); *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984) (noting that under North Carolina law "scientifically accepted reliability justifies admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two); *State v. Peoples*, 311 N.C. 515, 526, 319 S.E.2d 177, 184 (1984) (holding that hypnosis is inadmissible because "overwhelming scientific evidence suggests that hypnotically refreshed testimony is not inherently reliable and that cross-examination is not an adequate safeguard against the dangers inherent in hypnosis"); *State v. Foye*, 254 N.C. 704, 708, 120 S.E.2d 169, 171 (1961) (holding that polygraph evidence is inadmissible and noting "that the lie detector has not yet attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception.").

Accordingly, long before the United States Supreme Court announced its holding in *Daubert*, North Carolina courts embraced the principle that, in determining the admissibility of expert testimony, the "emphasis [is] on the reliability of the scientific method." *Bullard*, 312 N.C. at 149, 322 S.E.2d at 381-82; *see also* Kenneth S. Broun, *Daubert is Alive and Well in North Carolina—In Fact, We Beat the Feds to the Punch*, N.C. St. B.J. (Fall 2002), at 10. Whereas prior to *Daubert* most jurisdictions applied the *Frye* test to novel scientific techniques and methods, North Carolina courts readily disavowed *Frye*'s mechanistic and conservative approach. *See, e.g.*, *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852 (noting that North Carolina courts "do not adhere exclusively to the [*Frye*] formula . . . that the method of proof 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' " Rather, the *Pennington* Court, in analyzing North Carolina precedent, believed that "the inquiry underlying the *Frye* formula is one of the reliability of the scientific method rather than its popularity within a scientific community.").

Because North Carolina arrived at the "reliability" principle prior to *Daubert*, the Supreme Court of North Carolina, as well as this Court, struggled to articulate a flexible set of inquires to guide trial courts in their gatekeeping function. For instance, in *Bullard*, Justice Frye explained that expert foot print testimony was admissible because (1) the expert used established techniques, (2) the expert had a strong professional background and qualifications, (3) the

expert used visual aids so that the jury was not required to accept the scientific hypotheses on faith, and (4) because of independent research conducted by the expert. *Bullard*, 312 N.C. at 150-51, 322 S.E.2d at 382. In *Pennington*, which was also decided before *Daubert*, our Supreme Court followed the *Bullard* precedent, and inquiries, in holding that the "reliability of the DNA profiling process" was sufficient to merit admissibility. *Pennington*, 327 N.C. at 100, 393 S.E.2d at 854.

After the United States Supreme Court announced *Daubert*, however, our appellate courts essentially stopped developing and refining the *Bullard* inquiries. Instead, North Carolina courts simply began to cite *Daubert* as precedent. *See, e.g., Goode*, 341 N.C. at 527, 461 S.E.2d at 639. From the time Justice Orr relied on *Daubert* in *Goode*, this Court has relied upon *Daubert* on fourteen occasions. *See, e.g., Leatherwood v. Ehlinger*, 151 N.C. App. 15, 23-24, 564 S.E.2d 883, 889 (2002) ("Implicit in the rules governing the admissibility of an expert's opinion is a precondition that the matters or data upon which the expert bases his opinion be recognized as sufficiently reliable and relevant by the scientific community."); *State v. Holland*, 150 N.C. App. 457, 463, 566 S.E.2d 90, 93 (2002) ("[W]here the principles underlying expert testimony on handwriting analysis had been repeatedly recognized as reliable and admissible, the trial court was not required to launch into a full analysis of the reliability of its underlying principles."); *State v. Stokes*, 150 N.C. App. 211, 225, 565 S.E.2d 196, 206 (2002) ("The trial court has the duty to act as gatekeeper and to insure that expert opinion is properly founded on scientifically reliable methodology."); *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 578 (2002) (quoting language in *Goode, supra*); *Taylor v. Abernethy*, 149 N.C. App. 263, 272-73, 560 S.E.2d 233, 239 (2002) ("In its role as gatekeeper, the pertinent question for the trial court is not whether the matters to which the expert will testify are scientifically proven, but simply whether the testimony is sufficiently reliable."); *State v. Berry*, 143 N.C. App. 187, 203, 546 S.E.2d 145, 156 (2001) (quoting language in *Goode, supra*); *State v. Davis*, 142 N.C. App. 81, 90, 542 S.E.2d 236, 241 (2001) (noting "*Daubert* . . . discuss[es] the need for the 'reliability' factors to be flexible"); *State v. Bates*, 140 N.C. App. 743, 748, 538 S.E.2d 597, 600 (2000) (noting that *Daubert* was adopted by *Goode*); *State v. Underwood*, 134 N.C. App. 533, 542, 518 S.E.2d 231, 239 (1999) (noting that North Carlina has "adopted factors similar to those of *Daubert*"); *State v. Cardwell*, 133 N.C. App. 496, 505, 516 S.E.2d 388, 395 (1999) (relying on *Daubert* and its progeny); *State v. Dennis*, 129 N.C. App. 686, 693, 500 S.E.2d

765, 769 (1998) (quoting language in *Goode*, *supra*); *State v. Helms*, 127 N.C. App. 375, 380, 490 S.E.2d 565, 568 (1997), *rev'd on other grounds by State v. Helms*, 348 N.C. 578, 504 S.E.2d 293 (1998) ("The court's 'gatekeeping' function [to ensure reliability] is made necessary by the heightened credence juries tend to give evidence perceived as scientific."); *Setzer v. Boise Cascade Corp.*, 123 N.C. App. 441, 447, 473 S.E.2d 431, 435 (1996) (Walker, J., dissenting in part and concurring in part) (in dissent, applying the publication and peer review inquiries in *Daubert*); *State v. Spencer*, 119 N.C. App. 662, 664, 459 S.E.2d 812, 814 (1995) ("Implicit in these rules is the precondition that the matters or data upon which the expert bases his opinion be recognized in the scientific community as sufficiently reliable and relevant.").

From a thorough review of our case law, it is eminently clear that North Carolina has adopted the *Daubert* analysis. This is not novel. *Daubert* has been the prevailing law in this state since *Goode*. Three years ago, in *Bates*, this Court expressly held that our Supreme Court in *Goode* adopted *Daubert*. *Bates*, 140 N.C. App. at 748, 538 S.E.2d at 600. Accordingly, plaintiff's first argument, insofar as it relies on the trial court's erroneous use of *Daubert*, is without merit.[7]

III. The Trial Court's Application of *Daubert*

Dr. Howerton claims, even if *Daubert* is the law in this State, the methodology, techniques, and validity[8] of his experts' testimony exceeds even the most stringent *Daubert* scrutiny.

---

7. Dr. Howerton, as well as *amicus curiae*, the North Carolina Academy of Trial Lawyers, contend that North Carolina trial court judges should not be required to perform the *Daubert* gatekeeping function. Specifically, Dr. Howerton contends that:

> Judges are not scientists, bio-mechanical engineers, or doctors. . . . "judges do not have the expertise required to decide whether a challenged scientific theory is correct, and therefore courts [should] defer this judgment to scientists." *State v. Copeland*, 922 P.2d 1304, 1312 (Wash. 1996). This task is particularly daunting in North Carolina where judges still "ride the circuit," have no law clerk, and could be faced with an infinite number of *Daubert* motions each Monday morning.

Although we understand some of the concerns expressed by Dr. Howerton, we, nevertheless, believe that our case law has wisely chosen to place the burden with a lay judge, rather than a lay jury, of initially determining the reliability of expert testimony.

8. We note, that in *State v. Helms*, this court stated that *Daubert* defined " 'reliability' in a legal context [as] 'evidentiary reliability' [which] is 'based upon scientific validity.' " *State v. Helms*, 127 N.C. App. at 380, 490 S.E.2d at 568, *rev'd on other grounds by State v. Helms*, 348 N.C. 578, 504 S.E.2d 293 (1998). Accordingly, scientific validity and evidentiary reliability are equivalent in the context of Rule 702.

"[T]he decision on what expert testimony to admit is within the wide discretion of the trial court." *Holland*, 150 N.C. App. at 462, 566 S.E.2d at 93. *See also Bullard*, 312 N.C. at 140, 322 S.E.2d at 376. Under this standard, "[a] trial court may be reversed . . . only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Ward*, 354 N.C. 231, 264, 555 S.E.2d 251, 272 (2001) (citations omitted). Accordingly, having decided that North Carolina has adopted *Daubert*, our review of a trial court's application of *Daubert* is limited to determining whether the trial court abused its discretion. *See Holland*, 150 N.C. App. at 462, 566 S.E.2d at 93; *Cardwell*, 133 N.C. App. at 505, 516 S.E.2d at 395; *see also Joiner*, 522 U.S. at 147.

Dr. Howerton proffered four experts to establish a chain of causation between the alleged defective design of the Arai helmet and his quadriplegia. Professor Hurt's and Mr. Hooper's testimonies were offered to establish that an integrated chin bar would have prevented hyperflexion. Dr. Hutton's testimony was offered to establish that the resulting hyperflexion had a magnifying effect on the compressive force of the injury which retropulsed bone into Dr. Howerton's spinal canal and resulted in quadriplegia. Dr. Rawlings' testimony was offered to establish that Dr. Howerton did not suffer any cervical injuries until his head and neck entered a state of hyperflexion. After making detailed findings of fact, the trial court excluded plaintiff's expert testimony. Dr. Howerton contends the trial court abused its discretion in so finding. We disagree.

First, Professor Hurt testified that Dr. Howerton would not have suffered cervical injuries if his Arai helmet had an integrated chin bar. Professor Hurt testified that he based his opinion on 30 years of experience and, specifically, three motorcycle accidents in which he noticed a "u" or "v" shaped mark on the chests of the respective riders.[9] Professor Hurt deduced from these marks, and the absence of cervical injuries in these riders, that the integrated chin bar prevented hyperflexion of the neck by contacting with the chest.

The trial court, however, found that this testimony was unreliable because Professor Hurt (1) did not test his hypothesis, (2) did not

9. The trial court, Arai, and Dr. Howerton, note that when asked about the basis of his opinion Professor Hurt replied: "Like Bo knows baseball, Hurt knows motorcycle accidents." The parties debate the significance of this statement, and, whereas Dr. Howerton claims that it was joke, Arai asserts that it demonstrates Professor Hurt's unreliability. In deciding this matter, we have placed little significance on this statement.

subject his hypothesis to peer review, (3) could not quantify the extent, if any, to which a full-face helmet would prevent forward flexion of the neck, (4) could not identify any literature supporting his hypothesis or demonstrating general acceptance of his hypothesis, and (5) published work that actually contradicted his hypothesis. Based on these detailed findings of fact, which are substantially unchallenged by Dr. Howerton, the trial court excluded Professor Hurt's testimony.

Dr. Howerton argues the trial court abused its discretion (that is, excluded the expert without reason) because Professor Hurt's field of expertise, accident reconstruction analysis, is an accepted area of expert testimony in North Carolina. Dr. Howerton contends that "when experts are testifying within their respective, well recognized disciplines, North Carolina law does not require [trial courts] to determine, over and over again, whether the method is reliable."

Indeed, a review of the relevant case law supports the proposition that trial courts are not *required* to test the reliability of expert testimony, where the methodology and techniques of the proffered experts are neither challenged nor novel. However, where the methodology and techniques of the proffered experts are either challenged or novel, the case law does not, in any respect, support the proposition that trial courts are *prohibited* from testing reliability. Any holding to the contrary would require trial courts to admit baseless and unsound opinion testimony simply because a qualified expert, with a degree in a recognized field, offers the opinion. Instead, in North Carolina a trial court's decision to test, or not to test, the reliability of expert testimony proffered by a qualified expert in a recognized area of expertise is reviewed for an abuse of discretion.

In *Davis v. City of Mebane*, 132 N.C. App. 500, 512 S.E.2d 450 (1999), for instance, this Court affirmed a trial court's decision to exclude expert testimony despite the fact that the proffered experts were qualified and testified within a recognized area of expertise. *Id.* at 503, 512 S.E.2d at 453. In *City of Mebane*, plaintiffs alleged that a dam project proximately resulted in recurring flooding and damage. To prove causation, plaintiffs proffered two experts, Dr. Barrett Kays, who held a Ph.D. in soil science and had vast experience and training in ground absorption systems and hydrology, and John Harris, a licensed professional engineer who specialized in hydraulics and had experience designing dams and conducting flood studies.

Despite the undisputed qualifications of these experts and the appropriateness and necessity of expert testimony in the relevant field, the trial court excluded the proffered expert testimony because of an absence of reliability. On appeal, plaintiffs argued that: (1) "the methodology underlying the experts' opinion was sufficiently reliable;" (2) "the experts used 'established techniques' and 'conducted significant independent research into the cause of the flooding;' " and (3) "the studies relied upon by plaintiffs' experts were subjected to substantial peer review." Finally, like plaintiff in the case *sub judice*, in *City of Mebane* plaintiffs argued that "the [experts' studies had] sufficient indicia of reliability and any 'perceived flaws in the testimony . . . [were] matters properly to be tested in the crucible of adversarial proceeding; they [were] not the basis for truncating that process." *Id.* at 502, 512 S.E.2d at 452.

It upholding the decision of the trial court to exclude the expert testimony, we noted that an abuse of discretion standard applied and, furthermore, that:

> There [was] evidence in the record to support the trial court's finding. First, defendants' experts . . . testified that Harris' study utilized water flow rates which were based on dramatically different methodology, and that 'it should have been immediately and readily apparent to any competent engineer that any comparison of the water flow rates . . . is invalid and fundamentally flawed, and thus, that any conclusions drawn from such a comparison would be erroneous, misleading and unreliable.' Second, the trial court determined that plaintiffs' experts' opinion that the dam project proximately caused the flooding because the reservoir flood storage capacity was not normal was conclusory because plaintiffs' experts provided no explanation or support for their opinion. . . . Accordingly, we [found] no abuse of discretion.

Id. at 503, 512 S.E.2d at 452-53. Thus, in *City of Mebane*, despite the appropriate qualifications and area of expertise, this Court reiterated and affirmed the gatekeeping function of the trial court to exclude unreliable evidence.[10]

10. We note, that neither *City of Mebane*, nor the present case, stand for the proposition that trial courts are always required to enter into a protracted analysis of the reliability of conclusions offered by a qualified expert in a recognized field of expertise. Instead, as the United States Supreme Court held in *Joinder*, a trial court is not precluded from undertaking such an analysis because the "court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *GE v. Joinder*, 522 U.S. at 146.

In the case *sub judice*, it is eminently clear that the trial court's decision to exclude Professor Hurt's testimony was neither arbitrary nor an abuse of discretion. The trial court's findings of fact are reasoned, detailed, and address the relevant inquiries required by *Daubert* and its progeny. Although evidence supporting a contrary conclusion does exist in the record, the record is replete with competent evidence supporting the challenged findings of the trial court. Accordingly, plaintiff's assignments of error are overruled insofar as they challenge the trial court's decision to exclude the causation testimony of Professor Hurt.

Second, Mr. Hooper, a proffered expert in helmet design, testified that a full-face helmet with an integrated chin bar would have prevented plaintiff's quadriplegia. However, the trial court found that Mr. Hooper was not qualified to offer an expert opinion on causation because Mr. Hooper expressly conceded that he did not have the expertise to opine that a full-face helmet with an integrated chin bar would have prevented plaintiff's injury.[11] Based on this finding, standing alone, it is eminently clear that the trial court's decision was neither arbitrary nor an abuse of discretion. Accordingly, this assignment of error is overruled.[12]

Third, Dr. Hutton, an expert in the field of biomechanics, testified that when the Arai helmet's chin guard broke during plaintiff's collision, the lack of support from the broken chin guard allowed plaintiff's head to rotate an extra forty-degrees. According to Dr. Hutton, this additional flexion had a magnifying effect on the compressive force of the injury which retropulsed bone into the spinal canal and resulted in quadriplegia. However, the trial court found that this testimony was unreliable because Dr. Hutton (1) never tested, published, nor researched his hypothesis, (2) conceded that retropulsion of bone fragments can occur in the absence of hyperflexion, (3) conceded that plaintiff could have sustained some degree of retropulsion even if he had been wearing a full-face helmet, and (4) could not

11. Like the decision to admit expert testimony, "the decision on who qualifies as an expert . . . is within the wide discretion of the trial court." *Holland*, 150 N.C. App. at 462, 566 S.E.2d at 93.

12. At this point, our analysis could end. Without the testimony of Professor Hurt or Mr. Hooper, Dr. Howerton did not forecast any evidence suggesting that the Arai helmet design was related to hyperflexion. Although the proffered testimony of Drs. Hutton and Rawlings does potentially describe an injury caused by hyperflexion, neither Dr. Hutton nor Dr. Rawlings is qualified to offer an expert opinion pertaining to helmet design. Notwithstanding, we address the trial court's decision to exclude the expert testimony of Drs. Hutton and Rawlings.

identify any literature that supported his hypothesis that plaintiff would not have been paralyzed but for hyperflexion. Furthermore, the trial court noted that Dr. Hutton had not subjected his hypothesis to peer review, and that Dr. Hutton's hypothesis incorporated an unacceptable high rate of error. Based on these detailed findings of fact, which are substantially unchallenged by Dr. Howerton, the trial court excluded Dr. Hutton's testimony. Although evidence in the record does support a contrary finding, it is eminently clear that the trial court's decision was neither arbitrary nor an abuse of discretion. Indeed, the record is replete with competent evidence supporting the challenged findings. Accordingly, this assignment of error is overruled.

Finally, Dr. Rawlings, an expert in neurosurgery, testified that Dr. Howerton did not suffer any cervical injuries, including his paralysis, until his head rotated forward beyond the normal range of motion. However, the trial court found that this testimony was unreliable because Dr. Rawlings (1) did not test his hypothesis, (2) did not subject his hypothesis to peer review, (3) conceded that there are no objective criteria that could be used to confirm his hypothesis, and (4) proffered an hypothesis that was not generally accepted. Furthermore, the trial court noted that Dr. Rawlings conceded that: (1) unless the amount of force in the accident is known, it is impossible to distinguish degrees of flexion, and (2) he did not know the amount of force involved in the accident. Based on these detailed findings of fact, which are substantially unchallenged by Dr. Howerton, the trial court excluded Dr. Rawlings' testimony. Although evidence in the record does support a contrary finding, it is eminently clear that the trial court's decision was neither arbitrary nor an abuse of discretion. Indeed, the record is replete with competent evidence supporting the challenged findings. Accordingly, this assignment of error is overruled.

As Dr. Howerton failed to forecast any admissible evidence on the issue of causation, the trial court properly granted Arai's summary judgment motion with respect to plaintiff's negligence and product liability claims.[13] *See, e.g., Porter v. Fieldcrest Cannon,*

13. As an additional ground for granting Arai's summary judgment motion with respect to plaintiff's product liability claims, the trial court held that Dr. Howerton failed to present sufficient evidence to state a *prima facie* claim that Arai unreasonably failed to adopt a safer, feasible design alternative as required under N.C. Gen. Stat. § 99B-6. Dr. Howerton asserts this ruling has no rational basis, because his "entire case is premised upon the failure of Arai to adopt a safer and reasonable design alternative—i.e., a full-face helmet." Dr. Howerton finds support for this proposition in

Inc., 133 N.C. App. 23, 29, 514 S.E.2d 517, 522 (1999) (holding that "where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury") (citations omitted).

IV. Unfair and Deceptive Trade

[2] By his final argument, Dr. Howerton claims the trial court erred by granting Arai's summary judgment motion with respect to his claim for unfair and deceptive trade practices. Dr. Howerton asserts that Arai made two claims regarding their helmets which constitute unfair and deceptive trade practices: (1) The Arai helmet was designed to "reduce the possibility of cervical injuries," and (2) The entire Arai helmet was Snell Certified. After carefully reviewing the record, it is clear that Dr. Howerton failed to forecast evidence creating a genuine issue of material fact as to whether these representations were a proximate cause of his injuries. Accordingly, we find no error.

N.C. Gen. Stat. § 75-1.1(a) provides that: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." "To prevail on a claim for unfair and deceptive trade practices, a claimant must demonstrate the existence of three factors: '(1) an unfair or deceptive act or practice . . . (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff . . . .' " *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 9, 472 S.E.2d 358, 363 (1996) (citations omitted). As to the element of proximate cause, this court has consistently held that liability under "Chapter 75 is limited to those situations when a plaintiff can show that plaintiff detrimentally relied upon a statement or misrepresentation and he or she 'suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation.' " *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 601, 394 S.E.2d 643, 651 (1990) (citation omitted).

Professor Hurt's 1981 report which found that: "The increased coverage of the full facial coverage helmet increases protection, and significantly reduces face injuries." The case *sub judice*, however, does not involve facial injuries. Furthermore, on the issue of cervical and neck injuries, Professor Hurt's 1981 report actually concluded that full-face helmet designs were actually associated with neck injuries more often than open-face helmet designs. Accordingly, because Dr. Howerton failed to forecast any evidence of an alterative reasonable design, the trial court had an additional ground for granting summary judgment.

In the case *sub judice*, even assuming that Arai engaged in an unfair and deceptive trade practice in or affecting commerce, the deposition testimony of Dr. Howerton clearly demonstrates that he did not, in fact, detrimentally rely on the assumed misrepresentation.

Q: You had testified the other day that you, based on the ads you had seen, had formed the impression that the Arai helmet was a great helmet . . . . And my question to you is superior in what way?

A. I think my choice was based on aesthetics, [and] who wore the helmet. Those two things.

Q. Did you form any impressions about the mouth or rock guard . . . based on the advertisements that you had viewed?

A. No, sir.

Q. Or judgments about it?

A. No judgments.

Q. When did you first realize that [the rock guard] was an adjustable or removable piece?

A. I knew it was adjustable from the pictures that I had seen of the helmet.

Q. These are before you ever bought it?

A. That's correct.

. . . .

Q. What function did you expect the mouth guard to perform?

A. Protection from falling, protection from debris.

Q. Debris?

A. From the back wheel of other vehicles—other off-road vehicles.

Q. . . . . Protection from falling in what sense? Face plant?

A. It could be a face plant. This is what I thought at the time. Side protection. If I fell from the side, I would expect it . . . the chin or jaw, the mandible.

. . . .

Q. Do you remember seeing ever anything in the [Arai helmet] ads that had to do with the neck?

A. No sir.

. . . .

Q. Did neck protection have anything to do with your purchase of the Arai helmet?

A. I wasn't thinking of neck protection *per se* in purchasing. . . .

Q. And what do you understand the purpose of a helmet to be?

A. Protection of the head area.

. . . .

Q. Before your accident, had you read anything or heard anything from any source concerning whether the Arai . . . helmet might have anything to do with neck injuries, either causing them or preventing them?

A. No, I hadn't read anything.

Despite this testimony, Dr. Howerton argues (1) that he had a pattern and practice of reading all of the ads in "Dirt Rider" magazine, which contained the offending ads, and that he simply did not remember his reliance upon these ads, and, in the alternative, (2) proof of "specific reliance" is not required under Chapter 75, but, instead, "as long as Arai's marketing campaign, taken as a whole, convinced plaintiff that the [Arai] helmet was the functional equivalent of a full-face helmet, then Arai's unfair and deceptive conduct was at least one of the proximate causes of plaintiff's injury." These arguments are without merit. Because plaintiff failed to forecast evidence creating a genuine issue of material fact with respect to proximate causation, the trial court properly granted Arai's summary judgment motion.

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

ANGELA WHITFIELD, EMPLOYEE, PLAINTIFF-APPELLEE AND CROSS-APPELLANT v. LABORATORY CORPORATION OF AMERICA, EMPLOYER, AND HARTFORD-ITT SPECIALTY RISK SERVICES, CARRIER, DEFENDANTS-APPELLANTS AND CROSS-APPELLEES

No. COA02-722

(Filed 17 June 2003)

1. Workers' Compensation— consideration of all evidence— determination of weight

The Industrial Commission did not disregard medical records in a workers' compensation case, as defends contended, where there were numerous findings regarding plaintiff's visits to care providers who produced the records. The Commission, as it was entitled to do, gave greater weight to the opinion of an anesthesiologist who was a pain management specialist and who had treated plaintiff longer than the other doctors.

2. Workers' Compensation— rules—contradicted by Commission—no prejudice

If the Industrial Commission makes rules, it should consider those rules in making its decisions. The Commission noted in this case that certain doctors were not deposed and that only their treatment records were in evidence, which contradicts Workers' Compensation Rule 12. However, the commission used other, appropriate bases for giving weight to the deposition of another doctor.

3. Workers' Compensation— back pain—causation—conclusion supported by findings and evidence

The Industrial Commission's conclusion that plaintiff had shown a causal relationship between her fall and her symptoms in a workers' compensation case was supported by the findings and the evidence. Although there was evidence to the contrary, an anesthesiologist who examined plaintiff several times over a year and a half testified that it was "likely" that plaintiff's fall caused her pain. His testimony, and the Commission's finding, focused on the probability rather than the possibility of causation.

4. Workers' Compensation— compensable injury—sufficiency of evidence

The Industrial Commission's finding in a workers' compensation case that plaintiff's injury was compensable was sup-

ported by sufficient competent evidence. Defendant's argument that plaintiff's evidence about her back was not credible was in essence an argument that the Commission should be reversed based on disputed testimony. This the Court of Appeals cannot do.

5. Workers' Compensation— return to work—not refused—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation case in its determination that plaintiff did not refuse to return to work where competent evidence supports findings that plaintiff was told by her employer that calling in every day until she was able to return to work was suitable, and that she did not learn that she was to be fired for staying home until her second day back after her recovery.

6. Workers' Compensation— diminished earning capacity—sufficiency of evidence

The evidence supported an Industrial Commission finding of diminished earning capacity where plaintiff presented check stubs from her new job and a summary of earnings in relation to the stipulated amount from her job with defendant.

7. Workers' Compensation— refusal of suitable employment—sufficiency of evidence

The Industrial Commission's refusal to find that a workers' compensation plaintiff refused suitable employment was supported by competent evidence. After a back injury, ongoing treatment, and attempts to return to work, plaintiff called in daily and was told that there would be no problem as long as she reported her status each day, plaintiff attempted to return to work once more and suffered pain, and the next day she was told that she was being discharged for missing work the previous week.

8. Workers' Compensation— medical expenses—past and future

The Industrial Commission correctly ruled that a workers' compensation plaintiff should receive future medical expenses from defendants, but incorrectly approved past expenses. There were findings supported by competent evidence that the recommended future treatment was reasonably necessary to provide relief, and that the doctor approved by the commission as the primary treating physician was qualified to provide that treatment.

However, there was no evidence in the record that plaintiff sought approval for treatment by that doctor (before or after treatment) prior to the Commission's order and award. The case was remanded for findings as to whether plaintiff made that request.

9. Workers' Compensation— attorney fees—failure to address request

The failure of the Industrial Commission to address a request for attorney fees from a workers' compensation plaintiff was error.

10. Workers' Compensation— attorney fees—appeal

A request for attorney fees for an appeal by a workers' compensation plaintiff met the requirements of N.C.G.S. § 97-88 and was an appropriate case for the exercise of the court's discretion. The insurer had been ordered to pay benefits to the employee and brought the appeal. A request for attorney fees under this statute does not require a lack of reasonable grounds.

Appeal by defendants and cross-appeal by plaintiff from an opinion and award entered 18 January 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 January 2003.

Edelstein & Payne, by M. Travis Payne, for plaintiff.

Smith Moore LLP, by Jeri L. Whitfield and Shannon J. Adcock, for defendants.

McGEE, Judge.

Laboratory Corporation of America (employer) and Hartford-ITT Specialty Risk Services (collectively defendants) appeal from an opinion and award of the North Carolina Industrial Commission (the Commission) entered 18 January 2002 granting Angela Whitfield (plaintiff) additional disability benefits, along with past and future medical expenses for injuries plaintiff sustained in a slip and fall accident in her employment with Laboratory Corporation of America. Plaintiff filed a cross-appeal dated 20 February 2002 as to the Commission's denial of her request for attorney's fees for defendants' failure to provide plaintiff reasonable and necessary medical treatment.

A deputy commissioner entered an opinion and award on 31 July 2000 concluding that plaintiff was (1) not entitled to any further tem-

porary total disability compensation beyond what she had received because plaintiff had failed to show she had sustained a compensable injury; (2) that plaintiff was able to return to work; and (3) that plaintiff's evidence concerning her back injury was not credible. Plaintiff appealed to the Full Commission. The Commission reversed the deputy commissioner's award on 18 January 2002, finding plaintiff was entitled to additional disability benefits, as well as past and future medical expenses. The Commission's opinion and award did not address plaintiff's request for attorney's fees under N.C. Gen. Stat. § 97-88.1.

Plaintiff worked for employer as a service representative, traveling to medical offices in Raleigh to pick up patient specimens for analysis. The specimens were placed in a cooler in the trunk of a car provided by employer. When plaintiff completed her route, she carried the cooler from the car into the offices of employer and labeled and packaged the specimens to be sent to a laboratory. Plaintiff had to stand for about two hours during the labeling and packaging at the end of the shift.

On 5 June 1998, plaintiff entered a building to make a pickup. As she entered the front door of the building, there was rainwater on the floor and plaintiff's legs slipped out from under her. She began to fall and twisted around abruptly to maintain her balance. She was able to grab onto the door with her left hand as she was falling backwards. She did not quite fall to the floor, as she was able to hold onto the door, but she ended up supporting most of her body weight with her left hand and arm.

Plaintiff almost immediately began experiencing a tingling sensation and pain in her back. As this pickup was near the end of her route, she was able to complete the route that day. Plaintiff rested over the weekend and returned to work on Monday. She reported her injuries to her supervisor and said she was in considerable pain and needed to see a doctor. Plaintiff's supervisor told her to call for an appointment and plaintiff saw Dr. Nichols the following day.

Dr. Nichols took plaintiff out of work until 17 June 1998 and gave her limitations of no lifting and minimal bending. Plaintiff attempted to work on June 17 and 18 but was experiencing so much pain in her back and neck that she returned to Dr. Nichols on June 19, and he again took her out of work.

Dr. Nichols sent plaintiff to Oren LeBlang for physical therapy, but plaintiff was in so much pain that the therapy did not

prove beneficial and it was terminated after about three visits. LeBlang wrote a letter stating that plaintiff complained of pain with "feather like stroking." Plaintiff testified that she clearly remembered the incident and that LeBlang "was mashing very hard on my back."

On 15 July 1998, Dr. Nichols released plaintiff to return to work in a sedentary position, lifting no more than ten pounds. When employer was provided with Dr. Nichols' restrictions, plaintiff was assigned to driving a full route, which aggravated her condition. On July 16 and 17, plaintiff's job was changed and she was allowed to remain in the office doing data entry for three hours. Plaintiff's supervisor testified that even when plaintiff was performing the data entry tasks, she appeared to be in significant pain. She was later assigned to a route with another employee. The route she was assigned was more hectic than the one she had previously done. The new route required plaintiff to move more quickly and also required going up and down more stairs. At the end of the day, plaintiff experienced significantly increased levels of pain.

Plaintiff drove from her home in Goldsboro to work in Raleigh on 20 July 1998. When she arrived at work, she told her supervisor that she was experiencing significant pain and spasms in her back, and requested to again see Dr. Nichols. When she could not get an appointment with Dr. Nichols, plaintiff requested to be allowed to go to a hospital emergency room to get some medication for her pain. She was refused permission to go to the emergency room, but employer located a doctor in Durham, Dr. Christian J. Lambertsen, that plaintiff could see that day. Plaintiff traveled to Durham and first saw Dr. Henry Adomonis, who conduced almost a full examination. Dr. Lambertsen came into the room and repeated the examination. Plaintiff's pain limited her ability to comply with all of the examination requests of the doctor. Dr. Lambertsen placed plaintiff on limited duty with no driving for three weeks. Plaintiff was in so much pain that she was barely able to walk and was unable to drive herself home to Goldsboro. She called and arranged to have a friend pick her up.

Over the next several days plaintiff, or someone on her behalf, called employer early each morning, informing them that plaintiff continued to be in a great deal of pain and could not work. Plaintiff was informed by her supervisor that as long as she called in and reported her status each day there would be no problem.

Plaintiff was informed on 21 July 1998 by a nurse working for employer that she would no longer be able to see Dr. Nichols. Two days later, plaintiff continued to experience severe pain and went on her own to a hospital emergency room in Greenville for treatment. Plaintiff drove to Raleigh and reported for work at her normal time on Friday, 24 July 1998. She was informed that she should return home and come back on Monday, 27 July 1998 to talk to with her supervisor, who was not at work that day. Plaintiff reported to work on July 27 and was informed by her supervisor that she had been discharged for not coming to work during the previous week.

On the afternoon of July 27, plaintiff kept an appointment with Dr. Scott Sanitate that had been arranged by defendants. Plaintiff's friend accompanied her to the appointment and went into the examination room with her. Plaintiff was still in significant pain and was dragging her right leg to a significant extent. Dr. Sanitate did a minimal evaluation and indicated to plaintiff that he thought all of her problems would resolve with no surgical intervention and with minimal treatment. He recommended a steroidal injection, which was scheduled for 4 August 1998.

Plaintiff was unable to attend the scheduled appointment for the injection because she had started other employment. She asked that the appointment be rescheduled, but defendants did not reschedule it. After 27 July 1998, defendants never provided plaintiff any type of medical treatment.

Plaintiff continued to experience severe levels of pain in her neck, back, shoulder and leg. She was unable to sit for long periods, unable to stand for significant periods, and unable to walk any significant distances. These were activities that she did regularly before her injury. Plaintiff also experienced difficulty in doing routine chores such as cleaning her house.

Plaintiff began to see Dr. Huh, at the Duke Hospital Pain Clinic in October 1998. Because of her limited financial resources and lack of health insurance, plaintiff was unable to see Dr. Huh as frequently as recommended. She was also financially unable to purchase all of the medications he prescribed or obtain the diagnostic tests he prescribed, such as cervical and lumbar MRI's.

Dr. Huh, a board certified anesthesiologist and board eligible pain management specialist, stated that plaintiff was experiencing real and significant levels of pain in her neck, back, and leg and that she

was not exaggerating her level of pain during the period he treated plaintiff. Based on a description of the slip and fall that plaintiff experienced on 5 June 1998, it was Dr. Huh's opinion that the types of problems he diagnosed for plaintiff were likely to have arisen from such a twisting fall.

Dr. Huh testified that plaintiff developed significant depression secondary to her chronic pain. He further opined that this was not unusual and that a doctor needed to treat the depression as well as the pain in order for a patient to obtain significant pain relief.

Dr. Huh also stated that plaintiff's inability to attend regular and scheduled appointments, due to her financial situation, negatively affected her treatment and possibilities for recovery; but her prognosis for a significant recovery was fair provided she was able to attend regularly scheduled medical visits at the pain clinic, receive all of the medication prescribed, attend regular psychotherapy sessions, and attend a regular, long-term physical therapy program. Dr. Huh testified that plaintiff was not capable and had not been capable of performing a job that required her to sit in a car and drive the vehicle for approximately four hours out of an eight hour shift due to the pain and difficulties that she experienced.

Following her discharge by employer, plaintiff was able to obtain employment driving a bus on a part-time basis. Driving the bus caused plaintiff considerable pain.

Defendants paid plaintiff temporary disability benefits during the periods she was unable to work from 9 June 1998 to 16 June 1998, and from 19 June 1998 to 15 July 1998. They have paid plaintiff no benefits since 20 July 1998. Defendants have provided plaintiff with no medical treatment since her appointment with Dr. Sanitate on 27 July 1998.

Defendants have failed to present an argument in support of assignments of error 10, 11, 15, and 18 and those assignments are deemed abandoned. N.C.R. App. P. 28(b)(6).

"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).

Johnson v. Herbie's Place, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113 (2003).

I.

[1] Defendants first argue that the Commission erred by wholly disregarding the stipulated medical records of Doctors Nichols, Lambertsen, Sanitate, and Adomonis, as well as the records of plaintiff's physical therapist, Oren LeBlang, which defendants argue show that plaintiff was not disabled and was able to return to work without restrictions. Defendants argue that the Commission based its decision solely on the deposition testimony of Dr. Huh.

It is reversible error for the Commission to fail to consider the testimony or records of a treating physician. *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 78, 541 S.E.2d 510, 515 (2001)

(the Commission "may not wholly disregard competent evidence"); *Lineback*, 126 N.C. App. at 680, 486 S.E.2d at 254. However, the record reveals that the Commission did not wholly disregard the medical notes of Doctors Nichols, Lambertsen, Sanitate, and Adomonis and the records of Oren LeBlang. The Commission made numerous findings concerning plaintiff's visits to these doctors and to the physical therapist. The Commission simply accorded greater weight to the opinion of Dr. Huh, as it is entitled to do. *See Rackley*, 153 N.C. App. at 472, 570 S.E.2d at 124 (citation omitted).

One reason stated by the Commission for giving greater weight to the opinion of Dr. Huh was that Dr. Huh was "more qualified by training to assess chronic pain." Another reason stated by the Commission was that Dr. Huh treated plaintiff for a longer period of time than the other doctors. Both of these reasons are supported by the evidence. The evidence showed that Dr. Huh is a board certified anesthesiologist and board eligible pain management specialist. He is an Associate in Anesthesiology at the Duke Hospital Pain Clinic, he graduated from medical school, and he served four years of residency and a fellowship in pain management at the University of North Carolina at Chapel Hill. In addition, there is competent evidence that Dr. Huh treated plaintiff during a period of more than a year and a half, as opposed to the minimal appointments plaintiff had with the other doctors and the physical therapist. The evidence in the record supports the Commission's findings.

[2] We note that the statement by the Commission that Doctors Nichols, Lambertsen, Sanitate, and Adomonis were "not deposed; [and that] only their treatment records [were] in evidence" is somewhat contradictory to North Carolina Workers' Compensation Rule 612. This rule encourages parties to stipulate medical records into evidence, as opposed to taking multiple depositions, by allowing assessment of the costs of a deposition of a medical witness, including attorney's fees, against the party who refuses to stipulate to medical records. *Hawley v. Wayne Dale Constr.*, 146 N.C. App. 423, 428-29, 552 S.E.2d 269, 273, *disc. review denied*, 355 N.C. 211, 558 S.E.2d 868 (2001). However, this rule does not prohibit a party from taking depositions if the party believes a deposition will be more useful than stipulated medical records of a medical witness. "The Commission may make rules, not inconsistent with this Article [the North Carolina Workers' Compensation Act], for carrying out the provisions of this Article." N.C. Gen. Stat. § 97-80(a) (2001). If the Commission makes rules, it should consider those rules in making its

decisions. In the present case, the Commission's findings show that it considered the medical records of Doctors Nichols, Lambertsen, Sanitate, and Adomonis and the reports of Oren LeBlang, along with the deposition of Dr. Huh. The Commission then gave more weight to the deposition of Dr. Huh because of Dr. Huh's training and experience and the fact that Dr. Huh treated plaintiff for an extended period of time, both appropriate bases to accord greater weight to Dr. Huh's deposition. This argument is overruled.

II.

[3] Defendants also argue that the Commission erred in its conclusion that plaintiff had proven a causal relationship between plaintiff's alleged symptoms and any compensable incident at work. As stated above, when reviewing the Commission's conclusions of law we must determine whether the findings of fact support the conclusions of law. However we review conclusions of law by the Commission *de novo*. *Hawley*, 146 N.C. App. at 427, 272 S.E.2d at 272.

The plaintiff in a workers' compensation case bears the burden of initially proving each and every element of compensability, including causation. *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 28, 514 S.E.2d 517, 521 (1999). " '[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury.' " *Demery v. Converse, Inc.*, 138 N.C. App. 243, 248, 530 S.E.2d 871, 875 (2000) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980)). "To establish the necessary causal relationship for the injury to be compensable under the Act, 'the evidence must be such as to take the case out of the realm of conjecture and remote possibility.' " *Id.* (quoting *Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)).

The Commission found that:

> 27. Based on a description of the slip and fall that plaintiff experienced on June 5, 1998, Dr. Huh was of the opinion and the Full Commission finds that the types of problems he diagnosed for plaintiff were likely to have arisen from such a twisting fall.

This finding, if supported by the evidence, is sufficient to support the Commission's conclusion that plaintiff had shown a causal relationship between plaintiff's symptoms and the compensable accident that

occurred on 5 June 1998. Such a finding takes the causal relationship out of the "realm of conjecture and remote possibility" as required. *Id.* We acknowledge that the "mere possibility of causation," as opposed to the "probability" of causation, is insufficient to support a finding of compensability. *Swink v. Cone Mills, Inc.*, 65 N.C. App. 397, 398, 309 S.E.2d 272, 271 (1983). However, this finding of fact speaks to the "probability," not the "possibility," of causation, and thus will support the conclusion of compensability if the finding of fact is supported by the evidence in the record. *See id.*

Dr. Huh testified in his deposition that, not only is it "possible," but that it is "likely" that plaintiff's near fall is the cause of her current pain. Dr. Huh also testified that he could say with a degree of "substantial certainty" that the fall on 5 June 1998 was the cause of plaintiff's back pain. Defendants argue that Dr. Huh had no basis for his opinion and his testimony was therefore inadmissible under (1) *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 125 L. Ed. 2d 469, 481 (1993), because it was not "ground[ed] in the methods and procedures of science," and (2) under *Young*, 353 N.C. at 230, 538 S.E.2d at 915, because his testimony was entirely based on "mere speculation or possibility." Dr. Huh examined plaintiff several times over the period of more than a year and a half, he knew about the fall that occurred on 5 June 1998, and he diagnosed the injuries of which plaintiff complains. As we have already stated, Dr. Huh's deposition testimony is not speculative and it focuses on the probability, not simply the possibility, that the fall on 5 June 1998 caused plaintiff's injuries. Dr. Huh's testimony as to causation was competent and could be considered by the Commission.

"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." *Hawley*, 146 N.C. App. at 427, 552 S.E.2d at 272 (citing *Deese*, 352 N.C. 109, 530 S.E.2d 549 (2000) and *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986)). Although there is contrary evidence in the record, we find that Dr. Huh's testimony was competent evidence to support the Commission's findings and its conclusion that plaintiff had shown a causal relationship between the fall on 5 June 1998 and the symptoms for which plaintiff seeks recovery. This argument is overruled.

III.

[4] Defendants next argue that the Commission erred in finding that plaintiff was entitled to temporary total disability benefits. A plaintiff

in a workers' compensation case has the burden of showing the injury complained of resulted from an accident arising out of and in the course and scope of her employment. *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950); *Smith v. Cotton Mills, Inc.*, 31 N.C. App. 687, 690, 230 S.E.2d 772, 774 (1976). With respect to a back injury, a plaintiff may show that the injury is the result of an accident, or that the alleged injury is the direct result of a specific traumatic incident of the work assigned. *Richards v. Town of Valdese*, 92 N.C. App. 222, 224, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). Defendants argue that plaintiff failed to carry her burden of proof.

Defendants basically contend that the deputy commissioner correctly determined that plaintiff's evidence concerning her back injury was not credible. Defendants argue that testimony by the four authorized physicians and a physical therapist, all opining that plaintiff was malingering, was the only credible evidence as to plaintiff's injuries, and the Commission erred in reversing the deputy commissioner.

Plaintiff presented medical evidence in the form of deposition testimony by Dr. Huh. Plaintiff also testified as to the injury to her lower back. Defendants argue that this evidence was entitled to no weight. As stated above,

> [w]here "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."

Johnson, 157 N.C. App. at 171, 579 S.E.2d at 113 (quoting *Rackley*, 153 N.C. App. at 472, 570 S.E.2d at 124 (citation omitted)). There is conflicting evidence as to whether the injuries plaintiff complains of resulted from the fall on 5 June 1998. "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." *Hawley*, 146 N.C. App. at 427, 552 S.E.2d at 272 (citations omitted). We find that there is sufficient evidence, in the form of deposition testimony of Dr. Huh, whose competence to testify we discussed above, and testimony by plaintiff to support the Commission's finding that plaintiff's injury was compensable. Defendants are essentially asking us to reverse the decision of the Commission on the basis of disputed testimony, which we cannot do. This argument is overruled.

IV.

[5] Defendants next argue that even if plaintiff can show that she sustained a compensable injury on 5 June 1998, there is no evidence on which to base a finding and conclusion that her injury resulted in any compensable disability. Defendants argue that findings of fact 33 and 34 are not supported by competent evidence in the record, and thus conclusion of law number 2 and paragraph 1 of the award by the Commission are without support.

The challenged findings state as follows:

> 33. While defendants paid plaintiff some temporary disability benefits during the periods she was unable to work from June 9-June 16, and June 19-July 15, 1998, they have paid her no benefits from the period since July 20, 1998. As a result of her injury, plaintiff was unable to earn wages in any employment from July 20, 1998 through July 31, 1998.
>
> 34. As a result of her injury, plaintiff has sustained diminished wage earning capacity. Plaintiff's earning as a part-time bus driver are indicative of her wage earning capacity. Plaintiff has been partially disabled since August 1, 1998.

Defendants argue that no medical evidence indicated that plaintiff was unable to work during the period from 20 July 1998 to 31 July 1998. In fact, defendants argue that plaintiff's treating physician authorized plaintiff to return to work and that plaintiff's "wage loss" was due to her failure to return to work. However, the Commission found that plaintiff, after talking to her supervisor, remained home and either called in or had someone call on her behalf everyday until she was able to return to work with employer. The Commission found that plaintiff was informed by employer that this was a suitable course of action under the circumstances, and that it was not until 27 July 1998, the second day she came to work after this recovery period, that plaintiff learned she was being fired for staying home to recover. These findings were supported by competent evidence in the record, including testimony of employer's branch manager, plaintiff, plaintiff's mother, and plaintiff's friend. The Commission did not err in its determination that plaintiff did not refuse to return to work.

[6] Defendants also argue that plaintiff has not shown any diminished earning capacity since the evidence shows plaintiff earned $5,516.00 in 1997, $9,253.00 in 1998, and $11,790.42 in 1999. However, in paragraph 5 of the pre-trial agreement entered into by the parties,

the parties stipulated that plaintiff's average weekly wage was "at least $280.00." An employee can establish that she is unable to earn the wages she earned at the time of her injury four different ways:

> (1) the production of medical evidence that [she] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that [she] is capable of some work, but that [she] has, after reasonable effort on [her] part been unsuccessful in her effort to obtain employment; (3) the production of evidence that [she] is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that [she] has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted).

In the present case, plaintiff presented evidence under the fourth option, in the form of check stubs showing her earnings from the job she began on 1 August 1998, as well as a summary of those earnings in relation to the stipulated amount of earnings from plaintiff's job with employer. Thus, there is competent evidence in the record to support the Commission's finding that plaintiff had demonstrated a reduced wage earning capacity under the fourth option. This finding, based on the competent evidence in the record, was a proper basis for the Commission to award plaintiff partial disability benefits. *See Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 259-60, 540 S.E.2d 768, 773 (2000), *aff'd per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001) (holding that a former professional football player with an $86,000.00 contract who had shown that because of injury he could not play football and had to perform low-paying jobs had presented sufficient evidence of reduced wage earning capacity). The Commission did not err in awarding plaintiff additional temporary total disability benefits from 21 July 1998 through 31 July 1998 and temporary partial disability benefits based on plaintiff's wage differential from 1 August 1998. Defendants' argument is overruled.

V.

[7] Similar to the argument above, defendants contend that the Commission erred in finding that plaintiff was entitled to continuing benefits, because plaintiff unjustifiably refused suitable employment. If an employer meets its burden of showing that a plaintiff unjustifi-

ably refused suitable employment, then the employee is not entitled to any further benefits under N.C. Gen. Stat. §§ 97-29 or 97-30. *Gordon v. City of Durham*, 153 N.C. App. 782, 787, 571 S.E.2d 48, 51 (2002); *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). Defendants argue that plaintiff's failure to return to work from 21 July 1998 to 23 July 1998 constituted an unjustifiable refusal of suitable employment. As noted in the Commission's findings of fact:

> 12. Over the next several days plaintiff, or someone on her behalf, called defendant-employer early each morning, informing them that plaintiff continued to be in a great deal of pain and could not work. Plaintiff was informed by her supervisor Ms. Howard, that as long as she called in and reported her status each day there would be no problems.
>
> . . .
>
> 15. On Friday, July 24, 1998, plaintiff drove to Raleigh and reported for work at her normal time. She was informed that she should return home, and come back on Monday to talk with Ms. Howard who was not at work that day. Plaintiff provided defendant-employer with a copy of a statement she had received from the emergency room the previous day, establishing that she had been to see a doctor and she continued to have significant limitations.
>
> 16. On Monday, July 27, 1998, plaintiff reported to work and was informed by Ms. Howard that [plaintiff] had been discharged for not coming to work during the previous week. Ms. Howard testified that she did not recommend plaintiff's discharge and did not know who really made that decision. She further indicated that she did not know what the company's attendance policies were.

These findings of fact are supported by the competent evidence in the record: testimony of employer's branch manager, plaintiff, plaintiff's mother, and plaintiff's friend. Defendants' argument that the Commission erred in failing to determine that plaintiff unjustifiably refused suitable employment is without merit.

VI.

[8] Defendants' final argument is that the Commission erred in ruling that employer is responsible for payment of medical bills that

plaintiff incurred for treatment, where the treatment was not approved by employer.

Employers are required to provide medical compensation when the treatment in question is reasonably required to lessen the period of disability, effect a cure, or give relief. N.C. Gen. Stat. §§ 97-2(18) and 97-25 (2001); *Little v. Penn Ventilator Co.*, 317 N.C. 206, 210, 345 S.E.2d 204, 207 (1986). "[R]elief from pain is a legitimate aspect of the 'relief' anticipated by future medical treatment under N.C. Gen. Stat. § 97-25." *Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 44, 415 S.E.2d 105, 108, *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992).

There is competent evidence in the record that supports the Commission's finding that plaintiff required further medical treatment as a result of her fall on 5 June 1998. Dr. Huh testified that because of plaintiff's limited resources and lack of health insurance, plaintiff was unable (1) to see Dr. Huh as frequently as he recommended, (2) to purchase all of the medications he prescribed, and (3) to obtain diagnostic tests he prescribed, such as cervical and lumbar MRI's. Dr. Huh testified that plaintiff was experiencing real and significant levels of pain in her neck, back, and leg and that she was not exaggerating her level of pain during the period he treated her. Dr. Huh also testified that plaintiff had developed significant depression secondary to her chronic pain and that it was usually necessary to treat the depression as well as the pain in order for such a patient to obtain significant pain relief. He testified that due to plaintiff's financial inability to attend regularly scheduled appointments, plaintiff's possibility for recovery was negatively affected; however, provided plaintiff did everything Dr. Huh recommended, he believed plaintiff's prognosis for recovery was fair. This competent testimony is sufficient to support the Commission's findings that plaintiff required further medical treatment to provide relief. As stated above, employers are required to provide medical treatment when the treatment is reasonably required to lessen the period of disability, effect a cure, or give relief. *Little*, 317 N.C. at 210, 345 S.E.2d at 207.

Defendants argue that plaintiff is not entitled to simply shop around for a physician who will medicate subjective complaints of pain when four employer-chosen physicians were all in agreement that further treatment for plaintiff would be useless. However, this is a credibility issue for the Commission to resolve, and as discussed above, we do not disturb those findings since they are supported by

competent evidence. *See Hawley*, 146 N.C. App. at 427, 552 S.E.2d at 272. N.C.G.S. § 97-25 allows "an injured employee [to] select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission."

The Commission approved Dr. Huh as the primary treating physician for plaintiff for the problems arising from plaintiff's 5 June 1998 injury by accident. The findings of fact indicate that the treatment recommended by Dr. Huh is reasonably necessary to provide relief to plaintiff. Those findings are supported by competent evidence. There are also findings that Dr. Huh is qualified to provide ongoing treatment to plaintiff, which are supported by competent evidence in the record of Dr. Huh's training and experience. Therefore, as to future medical expenses, the Commission did not err in ruling that defendants are responsible for those expenses.

As to the past medical expenses, there is no finding by the Commission that the Commission approved the treatment by Dr. Huh prior to the issuance of the Commission's order and award, or that plaintiff sought such approval from the Commission. The record does not show that any such request was made as required by N.C.G.S. § 97-25. We recognize that such a request need not be made before treatment is received, only within a reasonable time thereafter, *Larramore*, 141 N.C. App. at 258, 540 S.E.2d at 772-73; however, without any evidence of a request in the record, the issue of the timeliness of the request is not before us. We therefore vacate the portion of conclusion number three of the Commission's opinion and award granting past medical benefits for treatment by Dr. Huh and remand this issue to the Commission to make proper findings as to whether plaintiff actually requested approval from the Commission for treatment by Dr. Huh.

VII.

[9] Plaintiff has made two cross-assignments of error. Plaintiff first argues that the Commission erred by failing to find and conclude that defendants were aware that plaintiff was in need of on-going medical treatment arising from her injury, yet failed and refused to provide such treatment. Plaintiff also argues that the Commission erred (1) in failing to conclude that defendants' denial of benefits, particularly needed medical treatment, was unreasonable, and (2) in failing to award plaintiff reasonable attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 (2001).

N.C.G.S. § 97-88.1 states that:

> If the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff's attorney upon the party who has . . . defended them.

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) (citation omitted). However, the decision of the Commission to award or deny attorney's fees is reversible only for an abuse of discretion. *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54-55, 464 S.E.2d 481, 486 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996).

Upon review of the record it is evident that the Commission failed to rule on plaintiff's request for attorney's fees pursuant to N.C.G.S. § 97-88.1. Our Court recently addressed this same issue and determined that the failure of the Commission to address plaintiff's attorney's fee request was in error. *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 474, 577 S.E.2d 345, 353 (2003). " 'This Court has held that when the matter is "appealed" to the full Commission . . ., it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties.' " *Id.* (quoting *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992)). We must therefore remand this issue to the Commission for determination.

VIII.

[10] Plaintiff also requests that defendants be ordered to pay plaintiff's attorney's fees incurred in connection with the present appeal, pursuant to N.C. Gen. Stat. § 97-88 (2001). Under N.C.G.S. § 97-88 a reviewing court may award costs of the appeal, including attorney's fees, to an injured employee "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." *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 459, 518 S.E.2d 200, 205 (1999) (citations omitted). The statutory requirements have been met in the present case. Unlike N.C.G.S. § 97-88.1, a request for attorney's

fees under N.C.G.S. § 97-88 does not require a determination that a hearing be "brought, prosecuted or defended without reasonable ground" in order to assess the cost of the proceedings upon the party who has defended the proceedings. *Brown v. Public Works Comm.*, 122 N.C. App. 473, 477, 470 S.E.2d 352, 354 (1996). Our determination of this issue is therefore not controlled by the Commission's decision whether to award attorney's fees on remand under N.C.G.S. § 97-88.1 as discussed above.

We note that in the present case, the Commission's award requires plaintiff to pay her attorney "one-fourth of the indemnity compensation awarded to plaintiff," but does not take into account or include expenses related to medical care and treatment in determining the amount plaintiff must pay to her attorney. *See Hyler v. GTE Prod. Co.*, 333 N.C. 258, 264-65, 425 S.E.2d 698, 702-03 (1993) (distinguishing between general "compensation" and "medical compensation" under the Workers' Compensation Act). Our decision does not affect the amount of total indemnity compensation plaintiff will receive under the Commission's award, of which plaintiff's attorney is entitled a one-fourth interest under the terms of the award. Further, many of the assignments of error asserted by defendants focus on the credibility determinations by the full Commission, an area in which, as thoroughly discussed above, this Court is bound by the findings of the Commission if supported by any competent evidence. We find this to be an appropriate case to exercise our discretion and grant plaintiff's request for attorney's fees for the cost of this appeal. *See Brown*, 122 N.C. App. at 477, 470 S.E.2d at 354. We remand this matter to the Commission for a determination of the amount of reasonable attorney's fees owed plaintiff as a result of this appeal.

Affirmed in part and remanded in part.

Judges HUNTER and CALABRIA concur.

THOMAS C. ODDO, PLAINTIFF v. JEFFREY L. PRESSER, DEFENDANT

No. COA02-560

(Filed 17 June 2003)

1. Appeal and Error— preservation of issues—jury instruction—failure to object on assigned grounds

Although defendant contends the trial court erred by its instruction to the jury regarding alienation of affections, this assignment of error was waived, because: (1) although defendant objected to the jury instructions regarding alienation of affections, the objection pertained solely to a limited instruction regarding evidence of a recorded telephone conversation; and (2) there is no indication in the transcript that defendant opposed the offered standard concerning alienation of affections to which he now assigns error.

2. Appeal and Error— preservation of issues—loss of income—failure to object on assigned grounds

Although defendant contends the trial court erred in an alienation of affections and criminal conversation case by admitting evidence of alleged damages to plaintiff concerning plaintiff's lost income from his termination from employment as an investment advisor and his loss of income from a part-time college coaching job, defendant failed to preserve these issues because: (1) although defendant objected at trial to plaintiff's presentation of evidence concerning lost income and benefits, defendant did not object on the ground that plaintiff's lost income and benefits were not to be considered in determining damages for alienation of affections and criminal conversation; and (2) although defendant objected to the introduction of evidence concerning defendant's lost income from the college only on the grounds of hearsay and the unavailability of summarized documents presented to the jury, defendant failed to object on the ground of uncertainty.

3. Damages and Remedies— loss of income—investment advisor

The trial court did not err in an alienation of affections and criminal conversation case by admitting evidence of alleged damages to plaintiff concerning loss of plaintiff's income as an investment advisor, because: (1) plaintiff's expert testimony evidence

of his loss of income as an investment advisor was not so speculative as to preclude an award of damages based thereon; and (2) the testimony of witnesses as to the nature and extent of a plaintiff's injuries is evidence to be considered by the jury.

4. Damages and Remedies— loss of tuition benefits—speculative damages

The trial court erred in an alienation of affections and criminal conversation case by admitting evidence of alleged damages to plaintiff concerning loss of tuition benefits from Davidson College after plaintiff's termination from employment, because the evidence was overly speculative when: (1) plaintiff's three children were ten, seven, and three years of age; and (2) plaintiff offered no evidence to indicate the college would continue to offer the same or any tuition benefits eight to fifteen years in the future.

5. Alienation of Affections— punitive damages—evidence of sexual relations

The trial court did not err by submitting the issue of punitive damages to the jury on plaintiff's claim of alienation of affections, because: (1) evidence of sexual relations will allow a plaintiff to get to the jury on the issue of punitive damages in a claim for alienation of affections; and (2) there was evidence from which the jury could find that defendant engaged in sexual intercourse with plaintiff's wife on two separate occasions prior to her legal separation from plaintiff.

6. Damages and Remedies— punitive damages—excessive

The trial court did not abuse its discretion in an alienation of affections and criminal conversation case by failing to grant defendant a new trial on the issue of punitive damages even though defendant contends the award of punitive damages was excessive as a matter of law, because: (1) the amount awarded for punitive damages was substantially lower than the compensatory damages award; and (2) plaintiff's establishment of his cause of action and his entitlement to at least nominal damages meant the award of punitive damages could stand alone and is unaffected by the Court of Appeals' decision to grant defendant a new trial on the issue of compensatory damages.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 4 May 2001 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 29 January 2003.

KMZ Rosenman, by L. Stanley Brown, and Michelle D. Reingold, for plaintiff appellee.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for defendant appellant.

TIMMONS-GOODSON, Judge.

Jeffrey L. Presser ("defendant") appeals from the judgment of the trial court entered upon a jury verdict finding him liable to Thomas C. Oddo ("plaintiff") for criminal conversation and alienation of affections. For the reasons stated herein, we find no error in part and reverse in part the judgment of the trial court.

The pertinent facts of the instant appeal are as follows: Plaintiff married Debra Tyson ("Debra") in 1988. During the marriage, plaintiff was primarily employed as an investment advisor earning approximately $32,000.00 annually. Plaintiff also coached wrestling at Davidson College ("Davidson"), where his salary was based on a sliding scale that started at $2,000.00 per year in 1985 and progressed to $24,000.00 per year in 1999. Debra worked as a vice-president at Bank of America in Charlotte. She was also the primary care-giver for the couple's three children.

By February of 1999, Debra had become unhappy with her marriage, and she contacted defendant, a former high school and college boyfriend. Following their initial telephone conversation, defendant mailed a letter to Debra at her workplace. Defendant also called Debra at her home. Debra telephoned defendant in March of 1999. As a result of that conversation, Debra and defendant met in Charlotte three times between the 18th and 20th of March 1999. While visiting, Debra and defendant engaged in sexual intercourse at a hotel. After their first meeting, Debra and defendant continued to communicate via electronic mail.

On 29 March 1999, Debra informed plaintiff that she was in love with someone else and wanted a separation. Debra and plaintiff physically separated in April of 1999. After the separation, plaintiff learned of Debra and defendant's communications and involvement during the marriage. Debra and plaintiff subsequently divorced.

Plaintiff filed an amended complaint against defendant on 19 January 2000 in Mecklenburg County Superior Court, seeking compensatory and punitive damages for his claims of alienation of affections and criminal conversation. The case came before the jury on 17 April 2001. After considering the evidence, the jury found defendant liable to plaintiff and awarded him $910,000.00 in compensatory damages and $500,000.00 in punitive damages. The trial court entered judgment accordingly. From the judgment entered against him, defendant appeals.

Defendant contends the trial court erred in (1) improperly instructing the jury; (2) allowing evidence regarding damages to plaintiff; and (3) submitting the issue of punitive damages to the jury. Defendant further argues that (4) the award of punitive damages was excessive as a matter of law. For the reasons that follow, we conclude that the trial court erred in allowing speculative evidence concerning damages to plaintiff. We otherwise discern no error by the trial court.

[1] Defendant first assigns error to the trial court's instruction to the jury regarding alienation of affections. Specifically, defendant argues that the instruction given by the trial court required a lower standard of proof for establishing a claim for alienation of affections than is allowed under North Carolina law. We conclude that defendant has waived this assignment of error.

The North Carolina Rules of Appellate Procedure preclude a party from "assign[ing] as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection[.]" N.C.R. App. P. 10(b)(2) (2002); *see Shaw v. Stringer*, 101 N.C. App. 513, 517, 400 S.E.2d 101, 103 (1991). Although defendant objected to the jury instructions regarding alienation of affections, the objection pertained solely to a limiting instruction regarding evidence of a recorded telephone conversation. There is no indication in the transcript that defendant opposed the offered standard concerning alienation of affections to which he now assigns error. Because defendant did not object on these grounds, he failed to preserve his argument for appeal. *See* N.C.R. App. P. 10(b)(1). We therefore overrule this assignment of error.

By his second assignment of error, defendant argues that the trial court erred in admitting evidence of alleged damages to plaintiff aris-

ing from defendant's actions. At trial, plaintiff asserted that defendant's actions caused him such mental anguish as to impair his ability to effectively function in the workplace, resulting in the termination of his employment both as an investment advisor and a wrestling coach. Plaintiff argued that his termination from these positions resulted in a loss of income and other benefits. Defendant now asserts that the jury improperly considered evidence concerning plaintiff's loss of (1) income from investment advisor clients; (2) income and retirement benefits from his position as a wrestling coach at Davidson; and (3) tuition benefits. We consider defendant's arguments supporting this assignment of error in turn.

[2] Defendant first argues that the trial court erred in allowing evidence of plaintiff's lost income and benefits arising from his termination of employment. Defendant correctly notes that damages for alienation of affections and criminal conversation are limited to " 'the present value in money of the support, consortium, and other legally protected marital interests lost . . . through the defendant's wrong' " and " 'wrong and injury done to . . . health, feelings, or reputation,' " including damages for mental distress. *Hutelmyer v. Cox*, 133 N.C. App. 364, 373, 514 S.E.2d 554, 561 (quoting *Sebastian v. Kluttz*, 6 N.C. App. 201, 219, 170 S.E.2d 104, 115 (1969)), *disc. review denied*, 351 N.C. 104, 541 S.E.2d 146 (1999) *and appeal dismissed*, 351 N.C. 356, 542 S.E.2d 211 (2000). Again, however, defendant has failed to preserve this argument for appellate review.

To "preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make." N.C.R. App. P. 10(b)(1). Where a defendant objects to evidence on only one ground, he fails to preserve for appeal any additional grounds. *See State v. Francis*, 341 N.C. 156, 160, 459 S.E.2d 269, 271 (1995).

Although defendant objected at trial to plaintiff's presentation of evidence concerning lost income and benefits, defendant failed to object on the grounds that plaintiff's lost income and benefits were not to be considered in determining damages for alienation of affections and criminal conversation. Rather, defendant's objections centered on his contention that the evidence was speculative, improperly documented, and constituted impermissible hearsay. As a result, defendant has failed to preserve for appeal his argument that plaintiff's lost income and benefits were improper measures of damages

allowed in alienation of affections and criminal conversation claims. *See Francis*, 341 N.C. at 160, 459 S.E.2d at 271.

Defendant further argues that the admission of plaintiff's evidence of damages was improper as too speculative and uncertain. We note that defendant objected to the introduction of evidence concerning plaintiff's lost income from Davidson only on the grounds of hearsay and the unavailability of summarized documents that were presented to the jury, and not on the grounds of uncertainty. Defendant has therefore failed to preserve his argument relating to plaintiff's loss of income from Davidson. *See* N.C.R. App. P. 10(b)(1).

[3] Defendant did, however, properly object to the introduction of evidence concerning loss of plaintiff's income as an investment advisor and tuition benefits from Davidson as overly speculative. Plaintiff argues that the economic losses he suffered as a result of his poor work performance were a natural and consequential injury stemming from defendant's conduct.

The general rule in North Carolina is that where a plaintiff is injured by the tortious conduct of a defendant, "the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from [the] defendant's tort." *King v. Britt*, 267 N.C. 594, 597, 148 S.E.2d 594, 597 (1966). A defendant's "liability extends not only to injuries which are directly and immediately caused by his act, but also to such consequential injuries, as according to the common experience of men, are likely to result from such act." *Lane v. R.R.*, 192 N.C. 287, 290, 134 S.E. 855, 857 (1926).

Although precise damages are often difficult to ascertain, a jury may award damages based upon evidence that is relatively speculative, *see DiDonato v. Wortman*, 320 N.C. 423, 431, 358 S.E.2d 489, 494 (1987), and it is well settled that some speculation is inherent in the projection of future earning capacity. *See Bahl v. Talford*, 138 N.C. App. 119, 126, 530 S.E.2d 347, 352, *disc. review denied*, 352 N.C. 587, 544 S.E.2d 776 (2000). Recovery is not permitted, however, where speculation becomes unreasonable. *See DiDonato*, 320 N.C. at 431, 358 S.E.2d at 494 (holding that, in an action for wrongful death of a stillborn child, losses related to income were too speculative); *compare Fox-Kirk v. Hannon*, 142 N.C. App. 267, 273, 542 S.E.2d 346, 351 (holding that, in an action for personal injuries to a minor child, evidence pertaining to the child's mental and physical condition at age two years and eleven months was sufficient to provide the jury with a reasonable basis upon which to estimate dam-

ages of the child's lost earnings), *disc. review denied*, 353 N.C. 725, 551 S.E.2d 437 (2001).

Concerning plaintiff's loss of income as an investment advisor, defendant points to the uncertainty of future commissions based on projected investments and the growth or decline of financial markets and plaintiff's investment portfolios. While these contentions may make plaintiff's forecast of damages less certain, we conclude that plaintiff's evidence of his loss of income as an investment advisor, presented in the form of expert testimony, was not so speculative as to preclude an award of damages based thereon. *See Fox-Kirk*, 142 N.C. App. at 273, 542 S.E.2d at 351.

In addition to challenging plaintiff's evidence as too speculative and uncertain, defendant argues he does "not believe it is in 'the common experiences of men' that plaintiff would have" been unable to remain employed due to his mental distress and depression. It is within the province of the jury to determine questions of fact, however, and the testimony of witnesses as to the nature and extent of a plaintiff's injuries is simply evidence to be considered by the jury. *See Albrecht v. Dorsett*, 131 N.C. App. 502, 505, 508 S.E.2d 319, 322 (1998). In the determination of facts, it is not for this Court to replace its judgment with that of the jury. *Id.*

[4] Defendant further contends that evidence pertaining to plaintiff's loss of tuition benefits was speculative and improperly admitted by the trial court. At trial, plaintiff submitted an exhibit detailing tuition benefits offered by Davidson to the children of employees. According to the exhibit, Davidson funds eighty percent of the tuition for an employee's child or the equivalent of seventy percent of Davidson's tuition, if the child elects to attend a different college. Plaintiff argued that the loss of these benefits constituted actual damages suffered by plaintiff as a result of defendant's actions. The exhibit submitted by plaintiff estimated the present value of plaintiff's loss of tuition benefits as $282,122.87. Defendant asserts that these damages were too speculative and should not have been admitted into evidence. On this point, we agree with defendant.

At the time of trial, plaintiff's three children were ten, seven, and three years of age. The oldest child was eight years and the youngest child was fifteen years away from deciding whether to attend or being admitted to any college. Further, plaintiff offered no evidence to indicate that Davidson would continue to offer the same or any tuition benefits eight to fifteen years in the future. "The law disfa-

vors—and in fact prohibits—recovery for damages based on sheer speculation. . . . Damages must be proved to a reasonable level of certainty, and may not be based on pure conjecture." *DiDonato*, 320 N.C. at 430-31, 358 S.E.2d at 493. We conclude that the exhibit detailing plaintiff's loss of tuition benefits was overly speculative, and that the trial court erred in submitting it to the jury. Because it is impossible to determine the amount awarded by the jury in compensation of plaintiff's loss of tuition benefits, if any, a new trial on the issue of compensatory damages must be granted. We therefore reverse the judgment in part and remand this case to the trial court for a new trial on the issue of compensatory damages. We otherwise overrule defendant's second assignment of error.

[5] By his third assignment of error, defendant contends there was insufficient evidence of aggravating factors to submit the issue of punitive damages to the jury on plaintiff's claim of alienation of affections. We do not agree.

In actions for alienation of affections, punitive damages are recoverable where the plaintiff alleges and presents evidence that the defendant's conduct is malicious, willful, or of wanton character. *See* N.C. Gen. Stat. § 1D-15 (2001); *Ward v. Beaton*, 141 N.C. App. 44, 49, 539 S.E.2d 30, 34 (2000), *cert. denied*, 353 N.C. 398, 547 S.E.2d 43 (2001). To that end, the plaintiff must present "evidence of circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in alienating the affections between the spouses which was necessary to sustain a recovery of compensatory damages." *Chappell v. Redding*, 67 N.C. App. 397, 403, 313 S.E.2d 239, 243, *disc. review denied*, 311 N.C. 399, 319 S.E.2d 268 (1984). "Evidence of 'sexual relations' will allow a plaintiff to get to the jury on the issue of punitive damages in a claim for alienation of affections." *Ward*, 141 N.C. App. at 50, 539 S.E.2d at 34; *see also* Suzanne Reynolds, *Lee's North Carolina Family Law*, § 5.48(c) (5th ed. 1993) (concluding that "[w]here there are sexual relations, the plaintiff will get to the jury on punitive damages whether the claim is for alienation of affections or for criminal conversation or, as is often the case, for both").

In the instant case, there was evidence from which the jury could find that defendant engaged in sexual intercourse with plaintiff's wife on two separate occasions prior to her legal separation from plaintiff. As such, the trial court did not err in submitting the issue of punitive damages to the jury. *See Ward*, 141 N.C. App. at 50, 539 S.E.2d at 34; *see also Scott v. Kiker*, 59 N.C. App. 458, 464, 297 S.E.2d 142, 147

(1982) (upholding punitive damages against the defendant in an action for alienation of affections and criminal conversation, where the only evidence of malice or other aggravating circumstances was evidence from which the jury could infer sexual relations between the defendant and the plaintiff's wife). We therefore overrule this assignment of error.

[6] By his final assignment of error, defendant argues that the punitive damages awarded in this case were excessive as a matter of law, and that the trial court therefore abused its discretion in failing to grant a new trial. We disagree. Section 1D-25 of the North Carolina General Statutes provides in pertinent part as follows:

> Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

N.C. Gen. Stat. § 1D-25(b) (2001). Within the statutory limits, the jury may award punitive damages in its sound discretion, and the trial court should not disturb such an award unless the amount assessed is " 'excessively disproportionate to the circumstances of contumely and indignity present in the case.' " *Hutelmyer*, 133 N.C. App. at 375, 514 S.E.2d at 562 (quoting *Carawan v. Tate*, 53 N.C. App. 161, 165, 280 S.E.2d 528, 531 (1981)). Even nominal damages may support a substantial award of punitive damages. *See Horner v. Byrnett*, 132 N.C. App. 323, 328, 511 S.E.2d 342, 346 (1999) (concluding that there was no abuse of discretion by the trial court in denying the defendant's motion for a new trial where the jury awarded the plaintiff $1.00 in compensatory damages and $85,000.00 in punitive damages for criminal conversation).

In *Hutelmyer*, the jury awarded the plaintiff $500,000.00 in compensatory damages and $500,000.00 in punitive damages in a claim for alienation of affections and criminal conversation. *See Hutelmyer*, 133 N.C. App. at 375, 514 S.E.2d at 562. The defendant argued on appeal that the award of punitive damages was excessive as a matter of law. Because the jury could have awarded 1.5 million dollars in punitive damages under section 1D-25(b), this Court concluded that the award of $500,000.00 was not excessive as a matter of law, and that no abuse of discretion had been shown. *See id.*

Defendant in the present case has likewise shown no abuse of discretion by the trial court. Even subtracting the total amount of $282,122.87, which plaintiff represented was the value of his lost tuition benefits, from the amount of compensatory damages awarded by the jury, the amount awarded for punitive damages remains substantially lower than the compensatory damages award. Further, because plaintiff has established his cause of action, and therefore his entitlement to at least nominal damages, the award of punitive damages may stand alone and is unaffected by our decision to grant defendant a new trial on the issue of compensatory damages. *See Jennings v. Jessen*, 103 N.C. App. 739, 744-45, 407 S.E.2d 264, 267 (1991) (affirming an award for punitive damages in the amount of $300,000.00 although vacating the award of $200,000.00 in compensatory damages). The trial court did not abuse its discretion in denying defendant's motion for a new trial, and we overrule this assignment of error.

In conclusion, we hold that the trial court erred in allowing evidence of speculative damages to plaintiff. We must therefore reverse in part the judgment of the trial court and remand this case for a new trial on the issue of compensatory damages. We otherwise find no error by the trial court.

Reversed in part, no error in part, and remanded for a new trial on the issue of compensatory damages.

Judge TYSON concurs.

Judge LEVINSON concurs in part and dissents in part.

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

I agree with the majority's analysis and conclusions, except for the specific portions holding (1) plaintiff's evidence of lost tuition benefits from Davidson College (Davidson) was "overly speculative," and (2) the trial court did not err in allowing the jury to consider punitive damages for alienation of affections. Further, because I would reverse the punitive damages award, I make no comment on defendant's contention it was excessive as a matter of law.

I. PLAINTIFF'S LOST TUITION BENEFITS

I would hold that there is no error in the judgment on compensatory damages. While I agree with the majority's presentation of the

relevant case law, I reach a different conclusion upon analysis of the same as applied to the facts of this case.

Plaintiff's testimony regarding his lost income, benefits, and services was supplemented by expert testimony from Dr. Albert Link, Professor of Economics at the University of North Carolina at Greensboro's Bryan School of Business, on "economic analysis." Using information specific to plaintiff and Debra, as well as relevant statistical averages, Dr. Link calculated and reduced to present value the cost of, *inter alia*, plaintiff's lost tuition benefits from Davidson. Plaintiff also admitted into evidence a summary of Dr. Link's calculations, which utilized a benchmark rate of inflation to calculate the probable cost of Davidson tuition through the period during which plaintiff's children would likely attend college. Using this table, Dr. Link calculated the total amount that Davidson would have paid for plaintiff's children's education. He then reduced that amount to present value, based upon a conservative rate of growth. A comparison of this evidence to that reviewed in our Courts' decisions regarding damages in wrongful death actions is instructive.

Our appellate Courts have often held that, in the context of wrongful death actions, losses related to a child's future income are overly speculative if that child was stillborn. *DiDonato v. Wortman*, 320 N.C. 423, 431, 358 S.E.2d 489, 494 (1987) (quoting *Graf v. Taggert*, 43 N.J. 303, 310, 204 A.2d 140, 144 (1964)); *Gay v. Thompson*, 266 N.C. 394, 400, 146 S.E.2d 425, 429 (1966); *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 272, 542 S.E.2d 346, 351, *disc. review denied*, 353 N.C. 725, 551 S.E.2d 437 (2001). However, this Court, while acknowledging that proof of future damages regarding children "involves a significant degree of speculation," has allowed young children to recover for loss of earning capacity provided the evidence is sufficient to show that such damages are not *unreasonably* speculative. *Fox-Kirk*, 142 N.C. App. at 272, 542 S.E.2d at 351. In particular, it is significant that in *Fox-Kirk* this Court upheld admission of expert testimony on the probability that a child who was less than three years old at the time of a scarring injury would later attend college, and affirmed recovery for the child's lost earning capacity. *Id.* at 273, 542 S.E.2d at 351.

The majority cites the children's ages and the length of time before they will determine whether to attend college as factors contributing to the speculative nature of plaintiff's claim. However, in light of precedent declining to hold damages unreasonably speculative where the evidence included the probability a child would have

attended college but for her injuries before attaining three years of age, *see Fox Kirk v. Hannon, id.*, I cannot agree that evidence of plaintiff's lost tuition benefits for his children, all of whom were at least three years of age at the time of trial, is overly speculative.[1]

The majority also concludes plaintiff's evidence of lost tuition benefits is too speculative because plaintiff did not offer evidence that Davidson's tuition program would continue to exist in the future. However, the uncontradicted evidence was that Davidson's tuition benefit program, rather than being a bonus, is *guaranteed* to all employees who have worked at Davidson for at least three years. The reasonable inference is that, in the absence of evidence to the contrary, Davidson's guaranteed tuition benefit program will exist when plaintiff's children are college age.

In view of case law and the facts in this case, plaintiff's evidence of lost tuition benefits was properly submitted to the jury. I would affirm the award of compensatory damages in all respects.

II. PUNITIVE DAMAGES FOR ALIENATION OF AFFECTIONS

Secondly, there is error in the judgment on punitive damages. I do not agree with the majority that the evidence of sexual intercourse, without other evidence of aggravating circumstances, is sufficient to allow the submission of punitive damages to the jury in this action for alienation of affections.

This Court recently examined an issue similar to that presented in this case, and stated that, "[e]vidence of 'sexual relations' *will allow* a plaintiff to get to the jury on the issue of punitive damages in a claim for alienation of affections." *Ward v. Beaton*, 141 N.C. App. 44, 50, 539 S.E.2d 30, 34 (2000) (emphasis added). However, *Ward* cited and summarized the following cases in support of this proposition:

> *Hutelmyer v. Cox*, 133 N.C. App. [364,] 371, 514 S.E.2d [554,] 560 [(1999)] (finding sufficient aggravating factors where defendant engaged in sexual relations with plaintiff's husband, publicly dis-

1. Moreover, defendant's argument on appeal that the tuition benefits are overly speculative is primarily grounded not on the question whether these children will attend college, but rather on evidence suggesting plaintiff might not continue working at Davidson for reasons unrelated to defendant's conduct: (1) plaintiff's DWI conviction; (2) the lack of success of Davidson's wrestling team while plaintiff was its coach; and (3) the impact of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (2001) (prohibiting gender discrimination in educational programs or activities receiving federal funding) on Davidson's decision to continue its wrestling program.

played the affair, welcomed him into her home numerous times, and called plaintiff's home to determine his whereabouts); *Jennings v. Jessen*, 103 N.C. App. 739, 744, 407 S.E.2d 264, 267 (1991) (finding sufficient aggravating factors where defendant engaged in sexual intercourse with plaintiff's husband, as well as "cohabited for several weeks with [him] and was audacious enough to call plaintiff's home in an attempt to discover [his] whereabouts"); *Shaw v. Stringer*, 101 N.C. App. 513, 517, 400 S.E.2d 101, 103 (1991) (finding sufficient aggravating factors where defendant had sexual intercourse with plaintiff's wife, ignored plaintiff's request not to visit the marital home, and laughed when plaintiff's wife told him that plaintiff knew of the relationship).

Id. Ward also cited the following cases where the evidence was insufficient to submit the issue of punitive damages to the jury: *Cottle v. Johnson*, 179 N.C. 426, 431, 102 S.E. 769, 771 (1920) (ordering new trial where plaintiff received punitive damages for alienation of affections in case in which plaintiff did not make out criminal conversation and the court found no aggravating circumstances); *Chappell v. Redding*, 67 N.C. App. 397, 403, 313 S.E.2d 239, 243 (1984) (finding no evidence of criminal conversation, and reversing and remanding on the issue of punitive damages for alienation of affections because, although "the increasing amounts of time spent with plaintiff's wife was enough to permit the alienation of affections issue to go to the jury, plaintiff [failed to show] additional circumstances of aggravation to justify the submission of the punitive damages issue"); *Heist v. Heist*, 46 N.C. App. 521, 527, 265 S.E.2d 434, 438 (1980) (affirming trial court's refusal to enter judgment on the verdict for plaintiff on the issue of punitive damages where plaintiff's only evidence of aggravation tended to show that defendant allowed plaintiff's spouse to repeatedly visit her house even though defendant had knowledge that such visits caused marital discord).

The majority relies heavily on *Ward* in support of its conclusion that sexual intercourse, in and of itself, is sufficient to submit the issue of punitive damages to a jury.[2] However, this was not the essen-

2. The only other case authority the majority cites for its conclusion is *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982). Although *Scott* involves a claim for alienation of affections, it neither discusses nor holds anything relevant to the issue for which it is cited by the majority. Rather, the issue in *Scott* deals with spousal privilege and sheds no light on the evidence necessary to sustain an award of punitive damages for alienation of affections.

tial holding in *Ward*, and to the extent *Ward* can be interpreted to support that proposition it is *obiter dicta*. *See State v. Hickey*, 317 N.C. 457, 465, 346 S.E.2d 646, 652 (1986) (holding *obiter dicta* is not binding authority).

Although *Ward* includes the statement that evidence of sexual intercourse will allow submission of the issue of punitive damages, neither the cases upon which *Ward* relies nor the facts at issue in *Ward* support the majority's conclusion. In addition to evidence of sexual intercourse, *Ward* found:

> [T]here was evidence of other aggravating circumstances. Specifically, after forming a sexual relationship with plaintiff's husband, the defendant accompanied him when he returned his children to the custody of plaintiff. On a later date, the defendant appeared unannounced at the front door of the marital home, asking plaintiff if they could be friends. Again, about a week later, defendant arrived in the driveway of the marital home while plaintiff's husband was visiting his children, blowing the car horn for plaintiff's husband. The plaintiff walked outside and recognized the defendant, who subsequently drove away without Mr. Ward. *We find this evidence of additional circumstances of aggravation sufficient to warrant submission of the punitive damages issue to the jury on plaintiff's claim for alienation of affections.*

Ward, 141 N.C. App. at 51, 539 S.E.2d at 35 (emphasis added).

In *Ward*, as in all of the cases to which it cites in support of its proposition that sexual intercourse will allow submission of the issue of punitive damages to a jury, there was evidence of additional aggravating factors which supported submission of the issue to a jury. Moreover, none of the cases cited by *Ward* hold, as the majority does, that sexual intercourse, in and of itself, is sufficient to allow submission of punitive damages to a jury in an alienation of affections claim.

In *Ward*, defendant repeatedly harassed plaintiff at her home and flaunted her relationship with plaintiff's husband. *Id.* In *Hutelmyer*, defendant publicly displayed her affair with plaintiff's husband and called plaintiff's home to determine his whereabouts. *Hutelmyer*, 133 N.C. App. at 371, 514 S.E.2d at 560. In *Jennings*, defendant cohabited for several weeks with plaintiff's husband and called plaintiff's home in an attempt to discover her husband's whereabouts. *Jennings*, 103

N.C. App. at 744, 407 S.E.2d at 267. In *Shaw*, defendant ignored plaintiff's request not to visit the marital home and laughed when plaintiff's wife told him that plaintiff knew of the relationship. *Shaw*, 101 N.C. App. at 517, 400 S.E.2d at 103.

Contrary to both the plaintiff's contention and the majority holding, prior case law does not validate the conclusion that evidence of sexual intercourse, standing alone, is sufficient to submit the issue of punitive damages to a jury. Although there may be a correlation between cases involving sexual intercourse and those where the issue of punitive damages is submitted to the jury, relevant case law does not support the conclusion reached by the majority. Application of the majority's interpretation of *Ward* to the instant case would lead to overreaching results and a wholesale disfigurement of the foundation upon which damage awards in claims for alienation of affections are based.

In light of the criteria requiring "willful, wanton, aggravated or malicious conduct" beyond that necessary to satisfy the elements of the tort itself, *Ward*, 141 N.C. App. at 50, 539 S.E.2d at 35, the gravamen of the standard for an award of punitive damages in an alienation of affections claim is not the mere commission or omission of certain acts, such as sexual intercourse. Rather, it is the display and manifestation of defendant's actions to the plaintiff or others, in a way that tends to exacerbate plaintiff's loss. *See Chapell*, 67 N.C. App. at 403, 313 S.E.2d at 243 (holding "there must be some evidence of circumstances of aggravation in addition to the malice implied by law from the conduct of defendant in alienating the affections between the spouses which was necessary to sustain a recovery of compensatory damages").

Additionally, plaintiff argues there was evidence of other facts, apart from the evidence of sexual intercourse, that constitute malicious, willful, or wanton conduct sufficient to submit the issue of punitive damages to the jury. In his brief and at oral argument, plaintiff argues email communications, letters, and phone calls to Debra were sufficient evidence of aggravating circumstances. Plaintiff also points to the trial court's judicial review of the punitive damages award pursuant to N.C.G.S. § 1D-50 (2001):

(a) That the defendant knew the sexual affair between himself and Debbie Oddo Presser was wrong, and pursued said affair, and the sexual conduct involved, anyway;

(b) That the defendant intentionally pursued this sexual affair after Debbie Oddo Presser tried to terminate the relationship;

(c) That at the time of his conduct, the defendant knew that the plaintiff was married;

(d) That, at the time of the affair, the defendant pursued secret sexual meetings with Debbie Oddo Presser which he went to substantial measures to hide both from the plaintiff and from his wife;

(e) That the criminal conversations and alienation of affections committed by the defendant resulted in the absolute divorce of the plaintiff and Debbie Oddo Presser; and

(f) That at the time of his conduct, the defendant himself was married and he separated from his wife soon after his sexual affair with Debbie Oddo Presser began.

The trial court's review shows that defendant did not display or manifest to plaintiff or others his communication with Debra. Defendant's actions are merely dimensions of the malice ascribed to the underlying tort of alienation of affections and would be inherent in most claims of alienation of affections. Thus, defendant's actions are insufficient evidence of aggravating factors to allow the issue of punitive damages to be submitted to a jury.[3] To hold otherwise renders meaningless the long held standard allowing punitive damages only where defendant's actions evince circumstances of aggravation in addition to the malice implied by law from the tort itself. *See Chapell*, 67 N.C. App. at 403, 313 S.E.2d at 243.

In the case *sub judice*, unlike previous cases allowing punitive damages, there is no evidence of malicious, willful, or wanton conduct beyond that inherent in the underlying tort. Defendant did not flaunt or make known his contact with Debra. There is no record evidence that prior to separation defendant manifested his relationship

3. Although N.C.G.S. § 1D-35 (2001) sets forth the factors a jury may consider in determining *the amount* of punitive damages to be awarded, the first inquiry under G.S. § 1D-15 is whether, due to defendant's fraudulent, malicious, willful, or wanton conduct, sufficient evidence of aggravation exists to *entitle* plaintiff to punitive damages. Therefore, although G.S. § 1D-35 includes concealment as a factor in determining the amount of punitive damages, its inclusion is not determinative of whether there is aggravation pursuant to G.S. § 1D-15 (standards for recovery of punitive damages). Furthermore, I note that in many garden variety civil tort actions, the evidence may suggest feature(s) described in G.S. § 1D-35. This does not mean, of course, that every one of these tortfeasors is necessarily subject to punitive damages.

with Debra or made known his feelings to anyone other than Debra. In essence, plaintiff's claim rests on the evidence of sexual intercourse occurring on one or two occasions, approximately two weeks before the parties separated.[4]

I would hold the evidence of sexual intercourse, in and of itself, was insufficient to allow the submission of punitive damages to the jury in the claim for alienation of affections. Because the verdict sheet combined the issues of punitive damages for alienation of affections and criminal conversation, I would reverse and remand for a new trial on the issue of punitive damages for criminal conversation.

ADAMS, KLEEMEIER, HAGAN, HANNAH & FOUTS, PLLC, PLAINTIFF v. ROBERT JACOBS AND ELLIOT JACOBS AND DAVID QUELLER AND IRA BORN, DEFENDANTS

No. COA02-789

(Filed 17 June 2003)

Jurisdiction— personal—minimum contacts—legal representation

The trial court did not err by dismissing, based on lack of personal jurisdiction, plaintiff law firm's breach of contract and quantum meruit action arising out of nonresident defendants' alleged failure to pay plaintiff for legal services performed for defendants on appeal, because: (1) plaintiff's unsolicited letters to defendants that expressly conditioned representation upon defendant's agreement to plaintiff's financial terms do not establish the existence of an implied contract for legal representation when defendants neither responded to these letters nor sent plaintiff any money; (2) in the absence of any evidence of an express or implied contract between plaintiff and defendants, plaintiff has no right to recovery in quantum meruit; and (3) the bulk of plaintiff's allegations consist of a recitation of unilateral activity on its part which are insufficient to establish minimum contacts.

Judge WYNN dissenting.

---

4. There is some evidence that defendant and Debra engaged in sexual intercourse once after plaintiff and Debra separated, but before they divorced. However, plaintiff may not recover damages for post-separation conduct. *Pharr v. Beck*, 147 N.C. App. 268, 273, 554 S.E.2d 851, 855 (2001) (in an action for alienation of affections, spouse may not recover damages for post-separation conduct).

Appeal by plaintiff-appellant from order entered 20 March 2002 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 19 February 2003.

Adams, Kleemeier, Hagan, Hannah & Fouts, by J. Alexander S. Barrett, for plaintiff-appellant.

Davis & Harwell, P.A., by Fred R. Harwell, Jr., and Caleigh H. Evans, for defendants-appellees David Queller and Ira Born.

LEVINSON, Judge.

Plaintiff (law firm of Adams, Kleemeier, Hagan, Hannah & Fouts, hereafter 'Adams, Kleemeier') appeals from an order granting a motion by defendants (David Queller and Ira Born) to dismiss plaintiff's suit for lack of personal jurisdiction. We affirm.

The pertinent facts are summarized as follows: Born and Queller, both residents of Florida, are two of eleven defendants named in *New Horizon of NY, LLC v. Robert Jacobs, et al.*, 5:97-CV-126-BR(2) (EDNC). During the course of litigation, the *New Horizon* defendants hired the law firm of Patton Boggs, LLP, which at that time had offices in Washington, D.C.; Dallas, Texas; and Raleigh and Greensboro, North Carolina. Patton Boggs attorneys Read McCaffrey of the Washington office, and Steven Hedges of the Greensboro office, participated in the *New Horizon* trial, conducted in Raleigh, North Carolina. In mid July, 1999, judgment was returned against the *New Horizon* defendants in federal district court in the amount of $21,000,000.00. A week after the verdict, Patton Boggs closed its North Carolina offices. McCaffrey remained with the Patton Boggs office in Washington, D.C., while Hedges joined Greensboro law firm Adams, Kleemeier, plaintiff herein.

The contract between Patton Boggs and the *New Horizon* defendants did not include representation on appeal. Following the trial, Patton Boggs remained counsel of record for the *New Horizon* defendants until November, 1999. On 29 July 1999, McCaffrey wrote defendant Born and informed him that Hedges had left Patton Boggs and was working for a different law firm. Between July and October 1999, Hedges sent defendants Born and Queller several unanswered letters on behalf of Adams, Kleemeier, proposing that defendants hire plaintiff to provide appellate representation and suggesting various terms and payment arrangements. However, the record indicates that on appeal to the 4th Circuit Court of Appeals, defendants were represented by attorneys from three other law firms: Miller, Cassidy,

Larroca & Lewin, L.L.P., Washington, D.C. ('Miller, Cassidy'); Smith, Helms, Mullis & Moore, Raleigh, N.C. ('Smith, Helms'); and Blanchard, Jenkins & Miller, P.A., Raleigh, N.C. *See New Horizon of NY LLC v. Jacobs*, 231 F.3d 143 (4th Cir. 2000), *cert. denied*, 532 U.S. 1052, 149 L. Ed. 2d 1024 (2001).

On 25 September 2001, plaintiff filed suit against defendants and co-defendants Robert and Elliott Jacobs; the present appeal concerns only defendants Born and Queller. Plaintiff alleged that it had been hired to represent defendants on appeal and had performed legal services for defendants for which it had not been paid. Plaintiff asserted claims for breach of contract and damages in *quantum meruit*, and sought damages of $33,020.19 from Queller, and $18,527.75 from Born, as well as costs and attorney's fees. On 5 February 2002, defendants filed a motion to dismiss plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(2), for lack of personal jurisdiction. Defendants submitted accompanying affidavits and copies of the letters that plaintiff had sent them. On 5 March 2002, Hedges executed an affidavit in support of plaintiff's opposition to the dismissal motion, accompanied by copies of letters sent to defendants. On 20 March 2002, the trial court entered an order dismissing plaintiff's claim against defendants for lack of personal jurisdiction. From this order plaintiff appeals.

Plaintiff argues that by dismissing its complaint for lack of personal jurisdiction, the trial court committed reversible error. We disagree.

"Jurisdiction has been defined as 'the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment[.]' " *High v. Pearce*, 220 N.C. 266, 271, 17 S.E.2d 108, 112 (1941) (quoting McIntosh, Practice and Procedure, sec. 5) (citations omitted). "Personal jurisdiction refers to the Court's ability to assert judicial power over the parties and bind them by its adjudication." *Japan Gas Lighter Asso. v. Ronson Corp.*, 257 F. Supp. 219, 224 (D.N.J. 1966). A trial court ruling on the defendant's challenge to the exercise of personal jurisdiction may either (1) decide the matter based on affidavits, or (2) conduct an evidentiary hearing with witness testimony or depositions. N.C.G.S. § 1A-1, Rule 43(e) (2001). Either way, "[t]he burden is on the plaintiff to prove by a preponderance of the evidence that grounds exist for the exercise of personal jurisdiction over a defendant." *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 671, 541 S.E.2d 733, 736 (2001); *Murphy*

v. Glafenhein, 110 N.C. App. 830, 431 S.E.2d 241, *disc. review denied*, 335 N.C. 176, 436 S.E.2d 382 (1993). Moreover, "when the defendant supplements its motion [for dismissal] with affidavits or other supporting evidence, the allegations of the plaintiff's complaint 'can no longer be taken as true or controlling and plaintiff[] cannot rest on the allegations of the complaint,' but must respond 'by affidavit or otherwise . . . setting forth specific facts showing that the court has jurisdiction.' " *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 163, 565 S.E.2d 705, 708 (2002) (quoting *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615-16, 532 S.E.2d 215, 218, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000)) (citation omitted).

The trial court's determination regarding the existence of grounds for personal jurisdiction is a question of fact. *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 519 S.E.2d 317 (1999). " 'The standard of [appellate] review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.' " *Wyatt*, 151 N.C. App. at 163, 565 S.E.2d at 708 (quoting *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 217-18 (citing *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976)).

In its determination regarding the existence of personal jurisdiction, the trial court undertakes a two part analysis.

> First, the North Carolina long-arm statute must permit the exercise of personal jurisdiction. Second, the exercise of personal jurisdiction must comport with the due process clause of the Fourteenth Amendment of the United States Constitution. 'However, when personal jurisdiction is alleged to exist pursuant to the long-arm statute, the question of statutory authority collapses into one inquiry—whether defendant has the minimum contacts necessary to meet the requirements of due process.'

Filmar Racing, 141 N.C. App. at 671, 541 S.E.2d at 736 (quoting *Hiwassee Stables*, 135 N.C. App. at 27, 519 S.E.2d at 320) (citations omitted).

N.C.G.S. § 1-75.4 (2001), North Carolina's "long-arm statute," confers jurisdiction over non-residents. In the instant case, plaintiff did not reference G.S. § 1-75.4 in its complaint. However, "[t]he failure to plead the particulars of jurisdiction is not fatal to the claim so long as the facts alleged permit the inference of jurisdiction under the statute." *Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 428, 355 S.E.2d 177, 182 (1987). On appeal, plaintiff argues that statutory authority for the assertion of personal jurisdiction exists under N.C.G.S. § 1-75.4(5), which, in pertinent part, confers jurisdiction on actions:

> a. Aris[ing] out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
>
> b. Aris[ing] out of services . . . actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant[.] . . .

N.C.G.S. § 1-75.4(5)(a) and (b) (2001). Plaintiff alleges that it performed legal services for defendants, and that defendants either authorized or promised to pay for these services. We conclude plaintiff has asserted sufficient facts to support a statutory basis for the exercise of personal jurisdiction over defendants. We next consider whether minimum contacts consistent with constitutional principles exist.

"The Due Process Clause of the Fourteenth Amendment operates to limit the power of a state to assert *in personam* jurisdiction over a non-resident defendant." *Hiwassee Stables*, 135 N.C. App. at 28, 519 S.E.2d at 320 (citing *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 413, 80 L. Ed. 2d 404, 410 (1984)). The pivotal inquiry for a court's determination of whether the exercise of personal jurisdiction comports with due process is whether the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)) (citation omitted).

"In addition, '[t]he United States Supreme Court has noted two types of long-arm jurisdiction: 'specific jurisdiction,' where the controversy arises out of the defendant's contacts with the forum state, and 'general jurisdiction,' where the controversy is unrelated to the

defendant's activities within the forum, but there are 'sufficient contacts' between the forum and the defendant.' " *Wyatt*, 151 N.C. App. at 165, 565 S.E.2d at 709 (quoting *Helicopteros*, 466 U.S. at 414, 80 L. Ed. 2d at 411). "General jurisdiction exists where the defendant has continuous and systematic contacts with the forum state[.]" *Wyatt*, 151 N.C. App. at 165, 565 S.E.2d at 710 (citing *Frisella v. Transoceanic Cable Ship Co.*, 181 F. Supp. 2d 644, 647 (E.D. La. 2002)). In the instant case, plaintiff does not assert the presence of general jurisdiction, and we find no basis for its existence. We turn, therefore, to the question of whether grounds exist for the exercise of specific jurisdiction.

"North Carolina exercises specific jurisdiction over a party when it exercises personal jurisdiction in a suit arising out of that party's contacts within the state." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999). "To effectuate minimum contacts, a defendant must have acted to purposefully avail itself of the privileges of conducting activities within this State, thus invoking the benefits and protection of our laws." *Bates v. Jarrett*, 135 N.C. App. 594, 597, 521 S.E.2d 735, 736 (1999) (citing *International Shoe*, 326 U.S. at 319, 90 L. Ed. at 103).

> The 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or . . . 'unilateral activity of another party or a third person[.]' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State.

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 542 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 79 L. Ed. 2d 790, 797 (1984), and *Helicopteros*, 466 U.S. at 417, 80 L. Ed. 2d at 413). Therefore, "[t]he significant contacts considered are those actually generated by the defendant. It is firmly established that 'the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.' . . . Jurisdiction may not be manufactured by the conduct of others." *Chung v. NANA Development Corp.*, 783 F.2d 1124, 1127 (4th Cir.) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958)), *cert. denied*, 479 U.S. 948, 93 L. Ed. 2d 381 (1986).

Preliminarily, we note that plaintiff argues in its brief that personal jurisdiction is proper in part because "Queller made a partial

payment to [plaintiffs] in North Carolina." However, plaintiff has since submitted an exhibit to this Court, retracting this argument and stating this earlier allegation was "an inadvertent misstatement." Accordingly, we have disregarded plaintiff's earlier statements on this matter, and our holding in this case is not based in any respect on the assertion in plaintiff's brief that Queller had made a partial payment to plaintiff for appellate legal services.

Plaintiff argues on appeal that co-defendant Robert Jacobs "authorized and directed [plaintiff], on behalf of himself and [defendants], to perfect the appeal, preserve all appellate rights and handle a wide range of post-judgment motions and other matters." However, both defendants flatly contradicted this assertion in their affidavits, each of which stated that:

> Robert Jacobs is not now and never has been my agent for any purpose associated with the New Horizon case. Robert Jacobs is not now and never has been authorized to deal with Adams Kleemeier or Mr. Hedges as my agent or to retain Adams Kleemeier or Mr. Hedges to represent me.

Plaintiff offers no documentary or other evidentiary support of its claim that Robert Jacobs was authorized to contract on behalf of defendants. Nor does Hedges' affidavit include any reference to Robert Jacobs' acting on behalf of defendants. Instead, plaintiff relies solely upon assertions in its verified complaint, which plaintiff contends must be treated as an affidavit. On this basis, plaintiff argues that defendants' affidavits "do[] nothing more than create a factual dispute, which must be resolved in [plaintiff's] favor for purposes of [defendants'] [m]otion to [d]ismiss." Plaintiff misapprehends the law in this regard.

It is true that 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.' " *Spinks v. Taylor and Richardson v. Taylor Co.*, 303 N.C. 256, 264, 278 S.E.2d 501, 506 (1981) (quoting *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972)). However, the allegations in plaintiff's complaint regarding Robert Jacob's authority to act on behalf of defendants "meet[] neither the first nor the third requirements of the rule for affidavits and therefore may not be considered." *Page*, 281 N.C. at 705, 690 S.E.2d at 194; *see also Talbert v. Choplin*, 40 N.C. App. 360, 365, 253 S.E.2d 37, 41 (1979) (verified affidavit that failed to establish that

plaintiff was competent to testify to matter asserted had "failed to meet the requirements for an affidavit to be considered under Rule 56(e)" and thus could not be considered by the trial court). Because plaintiff failed to offer any evidence, by affidavit or otherwise, that Robert Jacobs entered into a contract on behalf of defendants, this allegation is disregarded in our determination of whether grounds exist for the exercise of personal jurisdiction over defendants.

Plaintiff bases its argument that defendants were subject to personal jurisdiction primarily upon evidence that Hedges "sent Defendants approximately 20 letters on Adams Kleemeier letterhead regarding their case." Plaintiff acknowledges that when the *New Horizon* trial ended, defendants "had not made or conveyed to trial counsel any decisions about appellate representation[,]" and also concedes that defendants "continually and entirely ignored" plaintiff's "repeated and frequent attempts to propose, negotiate and execute a formal written engagement with Defendants for post-trial and appellate services[.]" However, plaintiff argues on appeal that defendants' passive receipt of these letters constitutes the required "minimum contact" between defendants and North Carolina. We disagree.

It is settled law that personal jurisdiction is not created by the unilateral acts of plaintiff. " 'The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State[.]' " *Miller v. Kite*, 313 N.C. 474, 477, 329 S.E.2d 663, 665 (1985) (quoting *Hanson*, 357 U.S. at 253, 2 L. Ed. 2d at 1298); *see, e.g., Allegiant Physicians Services v. Sturdy Mem. Hosp.*, 926 F. Supp. 1106, 1115 (N.D. Ga. 1996) (personal jurisdiction not proper where defendant "received several unsolicited promotional brochures" from plaintiff before "finally respond[ing] to one of Plaintiff's inquiries"); *Covenant Bank for Sav. v. Cohen*, 806 F. Supp. 52, 55 (D.N.J. 1992) (where record contains "no allegation that defendants solicited or initiated the contact with [plaintiff]," Court finds exercise of personal jurisdiction improper, noting that "plaintiff's unilateral acts, directed to a nonresident defendant, do not create sufficient minimum contacts between the nonresident defendant and the forum"). In the present case, it is uncontroverted that plaintiff's letters to defendants were unsolicited. It is equally undisputed that defendants did not respond to plaintiff's solicitations to provide appellate legal services. We conclude that the mailing by plaintiff of letters to defendants in Florida was not an action *by defendants* directed towards North Carolina, and do not constitute a contact that defendants made with this State.

Plaintiff also asserts the existence of personal jurisdiction based on the contents of the letters it sent to defendants. Plaintiff contends that its letters either established an implied contract for appellate representation, or at least gave rise to an obligation on defendants' part to respond. Our examination of the letters reveals no basis for this assertion.

Plaintiff directs our attention to self-serving excerpts from these letters. For example, plaintiff's letter of 3 August 1999 to defendant Born states that "[y]ou have accepted that I, and [Adams, Kleemeier] will perform the bulk of the work on the New Horizon appeal[.]" There is no evidence in the record supporting this statement, or suggesting that defendant ever accepted plaintiff's proposed terms of engagement. Indeed, the letter also states the following:

> It is critically important that we have your financial commitment to this appeal. . . . *[M]y firm simply will not make an appearance in this appeal without a dependable commitment to the payment of the considerable fees* and expenses. . . . You must bring your account current with Patton Boggs as of July 31, 1999. *I will require a substantial retainer for Adams, Kleemeier. . . .*
>
> . . . .
>
> I understand that you experienced some sticker shock at the $900,000 figure demanded by Read. . . . The history of slow pay to prior lawyers has hurt you and will continue to hurt you. *Adams, Kleemeier will not make the considerable commitment* of resources to obtain a reversal on appeal if you will not give us the financial fuel to do our best on your behalf.

(emphasis added). Plaintiff's letter, which unequivocally warns that it "will not make an appearance in this appeal" absent payment of a "substantial retainer," is properly construed as an offer to provide appellate representation only upon receipt of "a dependable commitment to the payment of the considerable fees[.]" Similar language appears in the other letters included in the record. The 29 July 1999 letter from McCaffrey to defendant Born states, in relevant part, that:

> [Plaintiff] will not allow [this] matter to come in the door without a retainer. . . . [T]o keep [Hedges] involved . . . *we need $900,000.00. . . . This is as low as we can go and still receive permission from firm management to go forward.*

(emphasis added). This was followed by plaintiff's letter of 3 August 1999, discussed above. Plaintiff subsequently wrote to both defendants on 1 September 1999, that

> it is necessary that we establish an agreement to the terms of representation. . . . *The retainer I request to go forward with the appeal is $150,000.00.* . . . Other *terms of our engagement are set forth* on the enclosed term sheet. *We require that you acknowledge acceptance of and agreement to [these] terms* by signing the enclosed copy of this letter and returning same to me . . . along with your contribution [and] the *required retainer.*"

(emphasis added). This letter makes clear that as of 1 September 1999, no agreement had been reached regarding plaintiff's retention as appellate counsel. On 16 September 1999, plaintiff again wrote to defendants:

> [P]lease execute my engagement letter forwarded to you on September 1, 1999 and return it to me with the requested retainer. *We must establish an engagement with my new firm in order for me to continue to be involved in your representation.*

(emphasis added). This was followed on 4 October 1999 by letters from plaintiff to defendants stating in pertinent part "*I have not heard from you concerning my proposed terms of engagement for handling the appeal on your behalf.*" (emphasis added). These unsolicited letters to defendants expressly condition plaintiff's representation of defendants upon defendants' agreement to plaintiff's financial terms, and their payment of a "substantial retainer." Defendants were entitled to rely upon plaintiff's clear statements that it would not "receive permission from firm management to go forward" without payment of a retainer, and would "not make an appearance in this appeal without a dependable commitment" to payment of fees. *See Spartan Leasing v. Pollard*, 101 N.C. App. 450, 455, 400 S.E.2d 476, 479 (1991) ("One to whom a definite representation has been made is entitled to rely on that representation if the representation is of a character to induce action by a person of ordinary prudence and is reasonably relied upon.") (citing *Fox v. Southern Appliances*, 264 N.C. 267, 141 S.E.2d 522 (1965)). It is undisputed that defendants neither responded to these letters, nor sent plaintiff any money. We conclude that plaintiff's letters to defendants do not establish the existence of an implied contract for legal representation.

Plaintiff also argues that personal jurisdiction is properly exercised over defendants because they owe plaintiff in *quantum meruit* for legal services rendered on their behalf. Plaintiff contends that defendants' implied promise to pay for legal services provided by plaintiff is demonstrated by the fact that defendants "never told [plaintiff] to stop representing their interests[.]" However, the record is devoid of evidence that defendants had ever granted plaintiff permission to represent them in the first place. Plaintiff essentially argues that its unsolicited letters to defendants established a contractual arrangement, making it *defendants'* responsibility to amend or terminate their "representation." The letters provide no factual basis for this position. As discussed above, each of the letters makes clear that legal representation was contingent upon the parties reaching an agreement. We conclude that plaintiff's letters to defendants in no way justified plaintiff in *assuming* that defendants had chosen to hire the firm on appeal. We further conclude that in the absence of any evidence of an express or implied contract between plaintiff and defendants, plaintiff has no right to recovery in *quantum meruit*. *See Twiford v. Waterfield*, 240 N.C. 582, 585, 83 S.E.2d 548, 551 (1954) (to recover in *quantum meruit* "plaintiff must show by the greater weight of the evidence that both parties, at the time the labor was done or the services were rendered, contemplated and intended that pecuniary recompense should be made for the same"); *Thomas v. Thomas*, 102 N.C. App. 124, 125, 401 S.E.2d 396, 397 (1991) ("Recovery on *quantum meruit* must rest upon implied contract.").

Indeed, absent permission, plaintiff had no authority or right to represent defendants. *Dunkley v. Shoemate*, 350 N.C. 573, 577, 515 S.E.2d 442, 444 (1999) (" 'no person has the right to appear as another's attorney without the authority to do so, granted by the party for which he [or she] is appearing' ") (quoting *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 532, 463 S.E.2d 397, 400 (1995)); *Stamm v. Salomon*, 144 N.C. App. 672, 682, 551 S.E.2d 152, 159 (2001) (where "[n]othing in the record suggests that [defendant] gave his former attorneys permission to further represent him . . . his former counsel was without authority to make motions on his behalf"), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 139 (2002). We conclude that plaintiff's assertion of a right to recover in *quantum meruit* does not advance its contention that defendants were subject to personal jurisdiction in North Carolina.

Plaintiff further contends that defendants "authorized and ratified [plaintiff's] work[.]" To support this assertion, plaintiff points out

that defendants forwarded federal bankruptcy exemption forms to Hedges when requested to do so by Patton Boggs. The record shows that the bankruptcy forms were prepared by, and provided to, defendants by Patton Boggs attorneys. A Patton Boggs attorney mailed the forms to defendants, accompanied by a letter on Patton Boggs stationary, directing defendants to sign the forms and to forward them in the enclosed stamped and pre-addressed envelope. We conclude that the forwarding of these forms does not constitute "authorization" for plaintiff law firm to provide appellate representation, particularly as the bankruptcy exemption forms did not pertain to their appeal from the jury verdict.

We also reject plaintiff's argument that *Forman & Zuckerman v. Schupak*, 31 N.C. App. 62, 228 S.E.2d 503 (1976), "involv[es] almost identical facts" and thus "is controlling in this case." Although both cases address the issue of personal jurisdiction, the evidence in *Schupak* showed that "defendants sought out plaintiff to assist them in performance of professional services[;] . . . defendants supervised the work product of plaintiff; . . . [and] otherwise directly participated in the legal services being performed[.]" *Schupak*, 31 N.C. App. at 66, 228 S.E.2d at 506. Because pertinent facts in *Schupak* regarding the exercise of personal jurisdiction are entirely different from those presented on the record before us, the case has little or no bearing on the decision herein.

In sum, we conclude that "the bulk of [plaintiff's] allegations consist merely of a recitation of unilateral activity on its part, which is insufficient to establish minimum contacts." *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 65 (3d Cir. 1984). As expressed by the South Carolina Supreme Court:

> Every communication between the parties was initiated by [plaintiff.] . . . If the 'minimum contacts inquiry can be manipulated to create personal jurisdiction where an in-state resident manufactures contacts between its home forum and a nonresident entity by means of its own extraterritorial inducements, then very little legal predictability remains to enable potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will subject them to suit.'

Aviation Associates v. Jet Time, Inc., 303 S.C. 502, 508-09, 402 S.E.2d 177, 180 (1991) (quoting *Wells American Corp. v. Sunshine Electronics*, 717 F. Supp. 1121, 1125, n.3 (D.S.C. 1989)).

We conclude that the record supports the presumed finding of fact made by the trial court in its order dismissing this case for lack of personal jurisdiction over defendants. "Although we are cognizant of the liberal trend toward exercising personal jurisdiction over non-resident defendants, the minimum contacts which are 'absolutely necessary' between the defendant and our [S]tate for North Carolina to invoke jurisdiction are missing here." *Filmar Racing*, 141 N.C. App. at 673, 541 S.E.2d at 737-38 (quoting *Tutterrow v. Leach*, 107 N.C. App. 703, 708, 421 S.E.2d 816, 819 (1992)).

The trial court did not err by dismissing plaintiff's action for lack of personal jurisdiction. Accordingly, the trial court's order dismissing plaintiff's action is

Affirmed.

Judge WYNN dissents.

Judge TIMMONS-GOODSON concurs in result.

WYNN, Judge dissenting.

Because I disagree with the majority's holding that in this case, the "minimum contacts which are absolutely necessary between the defendant and our state for North Carolina to invoke jurisdiction are missing," I respectfully dissent.

The majority correctly states the two-part analysis required for determining the existence of personal jurisdiction:

> First, the North Carolina long-arm statute must permit the exercise of personal jurisdiction. Second, the exercise of personal jurisdiction must comport with the due process clause of the Fourteenth Amendment of the United States Constitution.

I agree with the majority's conclusion that the requirements of the North Carolina long-arm statute have been met. However, I disagree with the majority's resolution of the due process analysis.

In a lengthy analysis, the majority narrowly focuses its personal jurisdiction due process inquiry to the defendants' relationship with the plaintiff excluding all of defendants' other related contacts with our State. Indeed, "there is no requirement that the cause of action, pursuant to which the jurisdictional claim is raised, be related to the activities of the defendant which give rise to the in personam juris-

diction." *Hankins v. Somers*, 39 N.C. App. 617, 621, 251 S.E.2d 640, 643 (1979) (quoting *Munchak Corp. v. Riko Enterprises, Inc.*, 368 F. Supp. 1366, 1372 (M.D.N.C. 1973)); *see also, ETR Corporation v. Wilson Welding Service, Inc.*, 96 N.C. App. 666, 386 S.E.2d 766 (1990) (where this Court considered activities related and unrelated to the legal action in that case to determine whether a basis for in personam jurisdiction existed).

"In determining whether the exercise of personal jurisdiction comports with due process, the crucial inquiry is whether the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. To generate minimum contacts, the defendant must have acted in such a way so as to purposefully avail itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of the laws of North Carolina. Moreover, the relationship between the defendant and the state must be such that the defendant should reasonably anticipate being haled into a North Carolina court." *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 671-72, 541 S.E.2d 733, 736-37 (2001). "The existence of minimum contacts cannot be ascertained by mechanical rules, but rather by consideration of the facts of each case in light of traditional notions of fair play and justice. The factors to be considered are (1) quantity of contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties." *Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E.2d 300, 302 (1985).

In this case, the defendants had several contacts with North Carolina such that it would not be unreasonable for them to anticipate being haled into the courts of this State. Significantly, the defendants hired two other North Carolina law firms to represent them in North Carolina courts. The defendants hired Patton Boggs L.L.P., a law firm with offices in Greensboro and Raleigh, to represent them in the Eastern District of North Carolina. During this trial, the federal district court denied defendants' motion to dismiss for lack of personal jurisdiction and the trial resulted in a $21,000,000 verdict against defendants. Steven Hedges, one of the trial attorneys, joined the plaintiff law firm after the trial in the Eastern District of North Carolina and in his sworn statement, Mr. Hedges alleges he handled several matters in defendants' appeal. Defendants contend they did not hire Mr. Hedges or the plaintiff law firm to handle any appellate

matters. Rather, they hired another North Carolina law firm, the Raleigh office of Smith Helms Mulliss & Moore to prosecute their appeal. The plaintiff alleges it assisted in the prosecution of defendants' appeal by handling several matters including filing a motion and preparing and filing the docketing statement.

I would hold that the requirements of due process are satisfied in this case. By their business activities including retaining two law firms in this State to represent them on the underlying matters giving rise to this action, defendants have "purposefully [availed themselves] of the privilege of conducting activities within [North Carolina], thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), *see also*, *ETR Corporation v. Wilson Welding Service, Inc.*, 96 N.C. App. 666, 386 S.E.2d 766 (1990).

STATE OF NORTH CAROLINA v. GARY LOUIS MEADOWS

No. COA02-734

(Filed 17 June 2003)

1. Witnesses— five-year-old boy—competent

The trial court did not abuse its discretion by finding a five-year-old boy competent to testify about the shooting of his mother and her boyfriend when he was three years old. The sole test for competency is the requirement that the witness be capable of expressing himself and understanding his duty to testify truthfully. Despite defendant's assertions regarding particular statements made by the boy, it cannot be said that the court's determination could not have been the result of a reasoned decision.

2. Evidence— hearsay—present sense impression—emotional content necessary

A murder victim's statements regarding her relationship with a defendant are often admitted into evidence pursuant to N.C.G.S. § 8C-1, Rule 803(3) as a present sense impression. Statements which merely recite facts without revealing emotion are not admissible, but statements of fact providing a context for expressions of emotion are admissible.

3. Evidence— murder victim—statements about defendant—state of mind—factual context

A murder victim's statements to a witness about her ex-boyfriend were admissible under the state-of-mind exception to the hearsay rule where the victim showed the witness a picture of defendant and said she was afraid of him, that he was crazy and abusive and had burned her with an iron, and that she was sick and tired of the abuse and wanted to get away. The witness plainly linked the contextual facts to the victim's statements of her emotions and state of mind.

4. Evidence— murder victim—statements about defendant—state of mind—factual context

A murder victim's statements about defendant to a second witness were admissible under the state-of-mind exception to the hearsay rule even though the witness did not interject the victim's statements of emotion into every factual statement. The witness plainly testified to the victim's emotions and related those emotions to the precipitating actions.

5. Homicide— first-degree murder—instructions—manslaughter charge not given

Any error in not instructing a jury on voluntary and involuntary manslaughter in a first-degree murder trial was harmless where the court submitted first-degree murder based on premeditation and deliberation, felony murder, lying in wait, second-degree murder, and not guilty, and the jury found defendant guilty of first-degree murder based on premeditation and deliberation and felony murder.

6. Homicide— self-defense—claim of accident

Defendant was not entitled to a self-defense instruction for a shooting that he contended was accidental.

7. Homicide— self-defense—belief in necessity of shooting

The trial court did not err by not instructing on self-defense in an attempted murder trial where defendant's belief that the shooting was necessary to save himself was not objectively reasonable.

8. Homicide— first-degree murder—short-form—indictment

The short-form indictment for first-degree murder is constitutional.

Appeal by defendant from judgments entered 17 August 2001 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Buren R. Shields, III, for the State.

Everett & Hite, L.L.P., by Kimberly A. Swank, for defendant-appellant.

CALABRIA, Judge.

Gary Louis Meadows ("defendant") appeals convictions for the first-degree murder of his former girlfriend, Latonya Michelle Davis ("Davis"), and the attempted first-degree murder of William Todd Burgess ("Burgess"), Davis' neighbor and new boyfriend. The evidence tended to show Davis and defendant were involved in an intimate relationship between 1996 and 1999. Although Davis lived at home with her parents, defendant served as the father figure to Davis' son,[1] Daveon. There was evidence of domestic violence in Davis and defendant's relationship. It is undisputed that on 15 June 1999, Burgess took Davis out to dinner to celebrate her twenty-first birthday. When they arrived home, defendant was waiting for them.

Burgess testified to the events of 15 June 1999. According to Burgess, he and Davis dropped Daveon off at the home of Davis' brother and then stopped by Burgess' office to pick up some paperwork on their way to the restaurant. After the date, Davis and Burgess picked up Daveon. Davis then dropped Burgess off in the street in front of Burgess' house and continued into her driveway. Burgess returned to Davis' house because he had forgotten the paperwork in Davis' car. While Burgess was in Davis' yard, defendant approached him, from behind and to his right, mumbling "negative words." As Burgess turned towards defendant and realized he was within five feet of him, defendant shot him. Burgess then explained, "I seen [Davis] trying to get out of the way, and she was screaming. And when she was trying to get out of the way, the suspect went to her and shot her. And then I heard [Daveon] crying and telling his mother to try to wake up[.]" Burgess fled the scene.

1. Daveon was Davis' son from a previous relationship. Daveon was four months old when Davis and defendant began dating and was three years old when his mother was killed.

Defendant testified on his own behalf as to the events of 15 June 1999. According to defendant, at approximately 11 p.m., he went to Davis' home to give her a birthday present. When defendant arrived, since Davis was not home, he waited on the porch. After Davis pulled into the driveway, Daveon went up on the porch where he and defendant greeted one another. Burgess came across the yard and began kissing, hugging and grabbing Davis. Defendant testified he stepped off the porch and saw Burgess move as though he was pulling a gun or a knife from his crotch area. Defendant saw the item shine, and believed he needed to shoot Burgess to save himself. Defendant "fired one shot at Mr. Burgess, and then he fell back and I started to run. I stepped in the grass because it had been raining, and I still had my hand on the trigger, and I slipped in the grass and, I mean, I felt like my gun fired a second shot. I wasn't sure and I took off running." Although defendant knew he hit Burgess, he did not think Davis had been shot.

Defendant was subsequently arrested, indicted, tried by a jury, and convicted of the first-degree murder of Davis and the attempted first-degree murder of Burgess. Defendant was sentenced to consecutive terms of 180 months to 225 months for the first-degree attempted murder of Burgess and life imprisonment without the possibility of parole for the first-degree murder of Davis.

Defendant appeals asserting the trial court erred by: (I) permitting Daveon to testify; (II) admitting evidence of Davis' prior statements regarding her relationship with defendant; (III) refusing to instruct the jury on voluntary and involuntary manslaughter; (IV) refusing to instruct the jury on self-defense; and (V) allowing use of the short-form indictment.

I. Daveon Davis' Testimony

[1] Defendant appeals asserting the trial court abused its discretion by finding Daveon, who was three years old when he witnessed his mother and Burgess being shot and five years old at the time of trial, was competent to testify.[2]

North Carolina law provides: "[e]very person is competent to be a witness except . . . when the court determines that he is (1) incapable of expressing himself . . . or (2) incapable of understanding

2. We note, " '[t]here is no age below which one is incompetent, as a matter of law, to testify.' " *State v. Ward*, 118 N.C. App. 389, 394, 455 S.E.2d 666, 668 (1995) (quoting *State v. Jenkins*, 83 N.C. App. 616, 621, 351 S.E.2d 299, 302 (1986)).

the duty of a witness to tell the truth." N.C. Gen. Stat. § 8C-1, Rule 601 (2001). "The competency of a witness is a matter which rests in the sound discretion of the trial judge. 'Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal.' " *State v. Ford*, 136 N.C. App. 634, 639, 525 S.E.2d 218, 221-22 (2000) (quoting *State v. Hicks*, 319 N.C. 84, 89, 352 S.E.2d 424, 426 (1987)) (internal citation omitted). "When exercising its discretion, the trial court 'must rely on [its] personal observation of the child's demeanor and responses to inquiry on *voir dire* examination.' " *State v. Andrews*, 131 N.C. App. 370, 373-74, 507 S.E.2d 305, 308 (1998) (quoting *State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 555 (1985)).

Defendant asserts the trial court judge abused his discretion in determining Daveon understood his duty to tell the truth. We disagree. During *voir dire*, Daveon testified on direct examination:

Q: Can you tell us where you are?

A: Court.

Q: Okay. And do you know what you're here to talk about?

A: Telling the truth.

Q: Okay. Do you know about telling the truth and telling lies?

A: (Nodding head.)

Q: Can you tell us if telling the truth is good or bad?

A: Bad—good—I mean bad.

Q: Okay. How about telling a lie, is that good or bad?

A: Bad, not good.

Q: And what happens, Daveon, if you tell a lie?

A: You go get in trouble.

Q: Okay. And let me ask you, do you know what telling the truth and what telling a lie means?

A: (Nodding head.)

Q: You're nodding your head yes. Could you say 'yes' for us instead of nodding?

A: Yes, ma'am.

Q: Okay. Let me ask you a question. Could you look at your pants for me and tell me what color they are?

A: Black.

Q: Okay. And if you told me right now that your pants were white, would that be telling the truth or telling a lie?

A: Telling a lie.

Q: Okay. If you were going to testify in this case and testify in front of a jury, can you promise everyone in this courtroom that you're going to tell the truth?

A: (Nodding head.)

Daveon was later examined by the court, and the following exchange occurred:

Q: Now, you know the difference between telling a lie and telling the truth?

A: (Nodding head).

Q: You do?

A: (Nodding head). A lie is not what you have to do. Telling the truth is what you do.

. . .

Q: Let's make a deal. If somebody asks you a question and you don't know the answer to it, I want you to say, 'I don't know.' Can you do that?

A: (Nodding head).

Q: All right. So, if she [the prosecutor] asks you a question and she asks you—What's my name? You don't know my name, do you? Do you know my name?

A: No.

Q: So if she asks—

A: Never been seeing you.

Q: Yeah. You've never seen me before. You're not supposed to know my name, are you?

A: I never been seeing you.

Q: So if she [the prosecutor] asks you a question—if she asks you what my name is, what are you going to say to her?

A: That I don't know.

Q: That's right. I don't know. And that's telling the truth, because you don't know, isn't it?

A: Uh-huh (affirmative).

Q: Okay. You promise me that you'll do that?

A: (Nodding head).

These exchanges demonstrate Daveon was capable of expressing himself, understood the difference between the truth and a lie and knew to tell the truth, as required for competency by N.C. Gen. Stat. § 8C-1, Rule 601.

Defendant asserts Daveon was nevertheless an incompetent witness because he testified that telling the truth was "bad." We note, Daveon later demonstrated his understanding that "[t]elling the truth is what you do" and promised to only tell the truth. Considering the entire transcript, we cannot find the trial court abused its discretion by not finding Daveon incompetent based upon his singular statement that telling the truth was "bad." *See Andrews*, 131 N.C. App. at 374, 507 S.E.2d at 308 (holding a five year old competent to testify regarding her mother's murder despite having said it was not good to tell the truth since she later explained it was wrong to lie, she would get spanked for lying, it would be a lie to say her blue dress was red, and she wanted to tell the truth about her mother's killing.)

Defendant asserts a number of additional reasons why Daveon was not a competent witness. First, Daveon stated he lives with "[m]y grandaddy, my grannie and my mommy." However, Daveon explained he calls his grandmother both "grannie" and "mommy" because "my other mama [is] gone." Second, Daveon often nodded his head instead of responding audibly. Since a witness need only be capable of expressing himself, we cannot find Daveon's silent expression improper. Third, Daveon stated his mother died only one minute earlier. The transcript reveals Daveon's confusion, and it appears Daveon was attempting to testify the shooting took one minute.[3]

3. On cross examination, after asking Daveon to recite the alphabet, the following exchange occurred:

Q: Very good. Very good. Do you remember how long ago—

A: (Nodding head.)

Fourth, Daveon did not know Burgess' name. Considering Burgess has never been a part of Daveon's life, his inability to recall Burgess' name does not support the conclusion the trial court abused its discretion by permitting Daveon's testimony. Rather, this instance demonstrates that Daveon understood his role, as he responded precisely as he promised Judge Bridges and stated he did not know the other man's name. We do not find any of these assertions by defendant support the conclusion the trial court abused its discretion by finding Daveon competent to testify.

Finally, defendant asserts Daveon was incompetent to testify because he could not distinguish between what he saw and what he was told. On *voir dire* while conversing with the court, Daveon explained he was ready to tell the court what he saw, saying "I could tell it. I could tell all about it." He explained no one had told him about it but rather, "I just knew it. I just saw it." Daveon elaborated:

> A: I saw Gary shot my mommy. Shot the other guy and then—no. First thing when all—when we just came—when me and my mommy just came back from our house—from somewhere else, I think that Gary was sitting in there already, because I saw—because I knew Gary was in there. And I told myself, I know Gary not in that house. So I went in there and then when I was about to close the door, I saw Gary and he told me to be quiet or something.
>
> Q: But nobody has told you that?
>
> A: Huh-uh (negative).
>
> Q: You saw all that yourself?
>
> A: Uh-huh (affirmative).

Daveon then explained: "Gary went over by Oscar, yelling at the dog, and he climb up the fence and he ran over his car, trying

---

Q: —what happened to your mother happened?

A: (Nodding head.)

Q: How long ago was it?

A: Huh?

Q: How long ago was it that things happened to your mother?

A: Just one minute. Just—Gary just shot just two people and then that was when he just shot two people.

Q: And that was just one minute?

A: (Nodding head).

to wake—trying to—trying to go back home but the police found him . . . and put him in jail." While it is apparent Daveon did not see the police find the defendant and put him in jail, we do not agree that Daveon's testimony regarding this at *voir dire* necessitated the trial court finding him incompetent to testify. Although witnesses may not testify regarding information not within their personal knowledge, the proper recourse is objecting to this evidence at trial, striking that testimony, and not preventing the witness' testimony entirely as incompetent. The sole test for competency is set forth in N.C. Gen. Stat. § 8C-1, Rule 601, requiring the witness be capable of expressing himself and understand his duty is to testify truthfully. Applying this test and examining this record, we cannot conclude the trial court's determination that Daveon was competent to testify "could not have been the result of a reasoned decision." Accordingly, we affirm the trial court's determination that Daveon was competent to testify.

II. Victim's Prior Statements

[2] Defendant asserts the trial court erred by allowing Burgess and the victim's cousin Glenda Davis ("Glenda") to testify as to statements Davis made to each witness regarding her relationship with defendant. The trial court permitted the testimony as present sense impressions pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(3) (2001).

Generally, a statement made by a declarant other than the witness testifying is hearsay and is not admissible at trial to prove the truth of the matter asserted. N.C. Gen. Stat. §§ 801(c), 802 (2001). However, such testimony is admissible if it regards "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed . . . ." N.C. Gen. Stat. § 803(3) (2001). A murder victim's statements regarding her relationship with defendant are often admitted into evidence pursuant to Rule 803(3). *State v. Carroll*, 356 N.C. 526, 542, — S.E.2d. —, — (12-20-2002); *State v. McHone*, 334 N.C. 627, 637, 435 S.E.2d 296, 301-02 (1993).

In applying Rule 803(3), our Supreme Court has explained that statements which "are merely a recitation of facts which describe various events" and are totally without emotion are not admissible pursuant to this hearsay exception. *State v. Hardy*, 339 N.C. 207, 228, 451 S.E.2d 600, 612 (1994). However, "[t]he Court later clarified that statements of fact providing context for expressions of emotion are admissible under *Hardy*." *State v. Marecek*, 152 N.C. App. 479, 498, 568 S.E.2d 237, 250 (2002) (citing *State v. Gray*, 347 N.C. 143, 173, 491

S.E.2d 538, 550 (1997)). Where the statements reveal " 'the victim's state of mind or contain statements of the victim's fear of defendant' " the statements are distinguishable from those in *Hardy* because the *Hardy* statements only " 'contained descriptions of assaults and threats against the victim' " and revealed no emotion. *State v. Kimble*, 140 N.C. App. 153, 164, 535 S.E.2d 882, 890 (2000) (quoting *State v. Wilds*, 133 N.C. App. 195, 205, 515 S.E.2d 466, 475 (1999)).

[3] First, we address Burgess' testimony. Burgess testified that on the day of the shootings, Davis showed him a picture of defendant and told him defendant was "her ex-crazy boyfriend" who "burned her with an iron, [was] very abusive, physical[ly]" and she was "scared to death of him." Burgess elaborated Davis told him "she was sick and tired of the abuse" and "she want[ed] to get away. . . ." Burgess' testimony plainly linked the contextual facts to Davis' statements of her emotions and state of mind. We find the trial court did not err in permitting his testimony pursuant to Rule 803(3).

[4] Next, we address Glenda's testimony. Glenda stated she personally witnessed defendant stalk and abuse Davis. Glenda explained that Davis shared with Glenda her feelings and emotions regarding her relationship with defendant. Glenda testified Davis told her on numerous occasions that defendant beat her and "she was very scared, she was frightened, she was very upset" by defendant's actions towards her. Glenda testified Davis "said she had met someone new that she really liked a lot, and that she wanted to break if [(sic)] off with [defendant] . . . but she was scared." Glenda elaborated, "[s]he said she was scared [defendant] would kill her if he found out she was seeing someone else." Defendant asserts since Glenda testified without interjecting Davis' statements of emotions into every factual statement, the rule in *Hardy* requires that only those statements linked to emotion be admitted pursuant to Rule 803(3). We disagree. Glenda plainly testified as to Davis' emotions and related those emotions to the precipitating actions. We conclude this testimony sufficiently expressed Davis' emotional state and the appropriate statements of fact which supplied context to her emotions. The trial court properly admitted this evidence pursuant to Rule 803(3) and in accordance with North Carolina case law.

III. Jury Instructions on Manslaughter

[5] Defendant asserts the trial court erred by failing to instruct the jury on the lesser included offenses of voluntary and involuntary

manslaughter for the charge of first-degree murder. While "[a] defendant is entitled to have the jury consider all lesser included offenses supported by the indictment and raised by the evidence" we need not address whether the trial court erred in not submitting voluntary and involuntary manslaughter to the jury in the case at bar since any conceivable error was harmless. *State v. Price*, 344 N.C. 583, 589, 476 S.E.2d 317, 320 (1996). The North Carolina Supreme Court "has adopted the rule that when the trial court submits to the jury the possible verdicts of first-degree murder based on premeditation and deliberation, second-degree murder, and not guilty, a verdict of first-degree murder based on premeditation and deliberation renders harmless the trial court's improper failure to submit voluntary or involuntary manslaughter." *Id.*, 344 N.C. at 590, 476 S.E.2d at 321. Here, since the trial court submitted to the jury possible verdicts of first-degree murder based on premeditation and deliberation, felony murder, and lying in wait, second-degree murder, and not guilty, and the jury found defendant guilty of the first-degree murder of Davis based on both premeditation and deliberation and felony murder, any possible error would be harmless.

IV. Instruction on Self-Defense

Defendant asserts the trial court erred by not instructing the jury on self-defense.

[6] Defendant's claim of self-defense applies only to the charge of attempted murder of Burgess and not for the charge of murder of Davis. " '[D]efendant is not entitled to an instruction on self-defense while still insisting that he did not fire the pistol at [the victim], that he did not intend to shoot [the victim] and that he did not [know [the victim] had been shot].' " *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. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996)). Since here, defendant testified he did not fire the gun at Davis, did not intend to shoot Davis, and did not know she had been shot until later, defendant would not be entitled to an instruction on self-defense for the murder of Davis. Defendant claimed the shooting of Davis was accidental and occurred while he slipped in the wet grass as he ran away from her home. The trial court instructed the jury on accident. Accordingly, we address the claim of self-defense only in relation to the charge of attempted murder.

[7] "A defendant is entitled to a jury instruction on self-defense when there is evidence from which the jury could infer that he acted in self-

defense." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998). There are two types of self-defense, perfect self-defense, which consists of the following four elements, and imperfect self-defense, which consists of only the first two elements:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Lyons, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995) (quoting *State v. McAvoy*, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981))).

Therefore, for defendant to be entitled to an instruction on self-defense, the following questions must be answered affirmatively: " '(1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?' " *Lyons*, 340 N.C. at 662, 459 S.E.2d 778 (quoting *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982)). "In determining whether the self-defense instruction should have been given, 'the facts are to be interpreted in the light most favorable to [the] defendant.' " *State v. Moore*, 111 N.C. App. 649, 654, 432 S.E.2d 887, 889 (1993) (quoting *State v. Watkins*, 283 N.C. 504, 509, 196 S.E.2d 750, 754 (1973)).

Taking the evidence in the light most favorable to defendant, we hold the trial court properly declined to instruct the jury on self-defense because defendant's belief was not objectively reasonable. The uncontroverted evidence is that just prior to midnight on 15 June 1999, defendant was waiting on Davis' unlit porch. He had his gun out and a bullet was in the chamber. When Davis was greeted in the yard

by her date, defendant stepped past Daveon and off the porch. He held the gun in his hand. He approached the couple from behind Burgess mumbling "negative words." As he approached the couple, Burgess "pulling from his crotch area" and defendant "saw something shine." When defendant was close enough to Burgess that they could have touched each other without fully extending their arms, he shot Burgess in the face. Burgess fell immediately and both Burgess and defendant thought he was dead. Defendant testified he believed Burgess had a weapon and it was necessary for him to shoot Burgess to save himself. However, taking this evidence in the light most favorable to defendant, despite defendant's testimony, we find defendant's belief was not objectively reasonable.

Our Supreme Court held that where the record was "totally void of any evidence" supporting "defendant's self-serving claim" that he believed the other person was reaching for a weapon, the Court may hold defendant's belief was not objectively reasonable and that the trial court properly refused to instruct the jury on self-defense. *State v. Williams*, 342 N.C. 869, 873-74, 467 S.E.2d 392, 394 (1996). Accordingly, under the facts of this case, we hold the trial court did not err in failing to instruct the jury on self-defense.

V. Short Form Indictment

[8] Defendant asserts, for preservation of the issue, the short-form indictment utilized in the murder charge was fatally defective because "it failed to allege the essential elements of first-degree premeditated and deliberated murder or first-degree felony murder." However, defendant acknowledged the North Carolina Supreme Court has upheld the constitutionality of the short-form murder indictment. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001). Thus, we hold accordingly.

No error.

Judges McCULLOUGH and TYSON concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. ROYMAC PARTNERSHIP, A NORTH CAROLINA GENERAL PARTNERSHIP, AND COUNTY OF NEW HANOVER, DEFENDANTS

No. COA02-441

(Filed 17 June 2003)

1. Appeal and Error— appealability—interlocutory order—condemnation—substantial right

Orders from a condemnation hearing concerning title and the area taken affect a substantial right and may be appealed immediately even though they are interlocutory.

2. Eminent Domain— damages—industrial park—unity of use alone not sufficient

Unity of use alone was not determinative in deciding whether an industrial park was a unified parcel for calculating condemnation damages. Some portions of the park lacked unity of ownership or physical unity, and each parcel was analyzed separately.

3. Eminent Domain— damages—street within industrial park—continuity of parcel not broken

A parcel of land was properly considered a unified tract for assessing condemnation damages where there was unity of ownership and use, but physical unity was disputed because a road ran through the parcel. The mere existence of the road did not break the continuity of the parcel.

4. Eminent Domain— damages—unity of ownership—partnership and corporation

The trial court improperly concluded that there was unity of ownership between condemned lots where the two parcels were owned by a partnership and a corporation, and the principal shareholders of the corporation include the general partners of the partnership or entities owned by those partners. That argument has been rejected in prior opinions.

5. Eminent Domain— damages—physical unity—separated by other land

There was no physical unity between condemned parcels of land separated by other lots.

6. Highways and Streets— dedicated street—acceptance by DOT

DOT's acts were sufficient to constitute acceptance of the dedication of a street to the public, and the trial court erred by including the street as part of a unified tract for calculating damages from condemnation of the property.

7. Eminent Domain— damages—loss of highway access—part of unified tract

Some of the defendants in the condemnation of an industrial park were entitled to damages from a loss of direct access and some were not. Parcels which were not part of the unified tract and did not abut the highway were not entitled to damages, while parcels in unity with the condemned lots, one of which abuts the main highway, were entitled to damages.

8. Eminent Domain— damages—loss of access

Parcels which did not abut a street in an industrial park taken by eminent domain were not entitled to compensation under N.C.G.S. § 136-89.53 for loss of access. Moreover, the remaining lots abutting the road have not lost access to that road.

Appeal by plaintiff from order filed 21 November 2001 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court.[1] Heard in the Court of Appeals 11 March 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Richard Moore and Assistant Attorney General Elizabeth N. Strickland, for plaintiff appellant.

Murchison, Taylor & Gibson, PLLC, by Michael Murchison, for defendant appellees.

BRYANT, Judge.

The North Carolina Department of Transportation (DOT) appeals from an order dated 21 November 2001 concluding: (1) that Roymac Partnership (Roymac) should be allowed to amend the pleadings by adding Wilmington Materials, Inc. (Wilmat) and WMI Holdings, LLC as additional parties; and (2) that certain parcels of real estate owned by Roymac and Wilmat (collectively defendants) constitute a single

1. The 21 November 2001 order dismissed the County of New Hanover as a defendant in this case and it is not a party to this appeal.

unified tract for purposes of calculating damages in a condemnation action by DOT.[2]

On or about 6 March 2000, DOT filed this condemnation action to acquire three vacant lots in Roymac Industrial Park (the industrial park). After filing an answer and counterclaim, Roymac filed two motions dated 26 October 2001: (1) a "Motion to Determine Issues Other than Damages Pursuant to N.C.G.S. § 136-108"[3] and (2) a motion to amend its answer and counterclaim to add Wilmat and WMI Holdings, LLC.

The Properties[4]

The evidence presented at the 5 November 2001 hearing tends to show the industrial park is primarily situated around two roads: Roymac Drive and Frederickson Road. Roymac Drive runs in an east-west direction connecting U.S. Hwy. 421 in the east and Fredrickson Road in the west, both of which run in a north-south direction. The industrial park is made up of three separate parcels of land: (1) a number of lots owned by Roymac marked with an "R" on the attached illustrated map between U.S. Hwy. 421 and Fredrickson Road (the Roymac parcel) located on both the northern and southern sides of Roymac Drive (2) lots which were owned by Wilmat at the time of the filing of this action (the Wilmat parcel), which are marked with a "W" on the attached illustration, located to the north of the Roymac parcel and bordering the eastern side of Fredrickson Road, but do not abut U.S. Hwy. 421 or Roymac Drive and do not abut the property owned by Roymac, and (3) lots owned by Roymac marked with a Roman numeral "II" on the attached illustration in a parcel of land located on the western side of Fredrickson Road beginning across from the Wilmat parcel and continuing further north along Fredrickson Road, consisting of phase 2, lots 3-10 (the Phase Two parcel), which do not abut the Roymac parcel.[5]

---

2. The real estate owned by Wilmat was conveyed to WMI Holdings, LLC after the initiation of the condemnation action.

3. N.C. Gen. Stat. § 136-108 allows for a hearing upon a motion to determine issues other than damages raised by the pleadings in a condemnation action by DOT. *See* N.C.G.S. § 136-108 (2001).

4. Appended to this opinion is an illustration of the properties using defendants' "Exhibit B". The involved areas are identified by symbols that denote the parcels of land.

5. The trial court recognized that a number of the lots in the industrial park had been sold to other entities prior to the condemnation action. Those lots as depicted on the illustrated map were: Section 1; Section 2, Lots 13 and 14; Section 6, Lot 8; Section 7, Lot 7; Section 4, Lot 6; Section 3, Lot 5; Section 5, Lot 4; Section 3, Lot 3; Phase II, Lot 2; Phase II, Section 1, Lot 1.

DOT sought to condemn the three lots still owned by Roymac and located in the Roymac parcel as part of a plan to construct a U.S. Hwy. 17 bypass, which would intersect with U.S. Hwy. 421 at the industrial park. The three lots condemned by DOT include the lone remaining lot owned by Roymac, which abuts U.S. Hwy. 421, located on the southern side of Roymac Drive, and two lots on the northern side of Roymac Drive (collectively, the condemned lots) that are marked on the attached illustration with an asterisk. While construction of the bypass would cut off direct access to the industrial park from U.S. Hwy. 421 via Roymac Drive, access to U.S. Hwy. 421 would remain via other roads.

The Business Entities

Roymac comprises two general partners, Kyle McIntyre and David Royster. Roymac owns both the Roymac and Phase Two parcels. Wilmat is a North Carolina corporation with Kyle McIntyre and Capital Funds, Inc. as the principal shareholders. Wilmat owns the Wilmat parcel.

The Trial Court Order

The trial court found the portions of the industrial park still owned by defendants had: a unity of use as a commercial and industrial subdivision; physical unity; and a substantial unity of ownership. The trial court also found the construction of the bypass would eliminate the industrial park's direct access to U.S. Hwy. 421. Additionally, the trial court found that although Roymac Drive had been dedicated for public use, there had been no act of acceptance by any governmental body.

From these findings the trial court concluded (1) the portions of the industrial park owned by defendants had sufficient unity to qualify as a single tract for purposes of the condemnation action and (2) elimination of direct access to U.S. Hwy. 421 constituted a partial taking, entitling at least some of the defendants to damages, or alternatively, damages for loss or injury to their easements of access. Roymac was further allowed to amend its pleadings to add Wilmat and WMI Holdings, LLC as additional parties. The trial court then ordered a trial on the issue of damages resulting from the partial taking of the property owned by defendants, including Roymac Drive and any undedicated portion of Fredrickson Road.

The issues are whether: (I) the condemned lots are in unity with (A) the Roymac parcel, (B) the Wilmat parcel, and (C) the Phase Two

parcel; (II) DOT had accepted Roymac's dedication of Roymac Drive; and (III) defendants are entitled to damages for loss of access to U.S. Hwy. 421 and/or Roymac Drive.[6]

[1] As an initial matter, although this appeal is interlocutory, it affects a substantial right as "orders from a condemnation hearing concerning title and area taken are 'vital preliminary issues' that must be immediately appealed." *Dep't of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 65, 576 S.E.2d 341, 343 (2003); *see Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999). Accordingly, DOT's appeal is properly before this Court.

I

[2] DOT first contends the trial court erred in finding that all of the property owned by defendants in the industrial park was in unity with the condemned lots and thus erred in concluding defendants were entitled to damages based on a partial taking of the entire industrial park. DOT argues that the evidence instead shows the condemned lots are independent tracts of land as opposed to part of a unified tract and that defendants are only entitled to damages for the condemnation of those lots. The distinction between whether the condemned lots are part of a unified parcel of land or instead independent parcels is significant because, if treated as a unified parcel, the damages from the condemnation are calculated by the effect on the property as a whole and not based solely on the value of the condemned lots. *See Barnes v. Hwy. Comm'n*, 250 N.C. 378, 383-84, 109 S.E.2d 219, 224 (1959).

In determining whether condemned land is part of a unified tract, North Carolina courts consider three factors: (1) unity of ownership, (2) physical unity, and (3) unity of use. *See Barnes*, 250 N.C. at 384, 109 S.E.2d at 224-25. While not all three factors need be present and the greatest emphasis is generally given to unity of use, some unity of ownership must be established when separate parcels of land are involved. *See id.*; *Airlie Park*, 156 N.C. App. at 67, 576 S.E.2d at 344. Physical unity generally requires that "parcels of land must be contiguous to constitute a single tract of land." *Dep't of Transp. v. Rowe*, 138 N.C. App. 329, 333, 531 S.E.2d 836, 839 (2000), *rev'd on other grounds*, 353 N.C. 671, 549 S.E.2d 203 (2001); *see also Barnes*, 250 N.C. at 384, 109 S.E.2d at 225 (parcels claimed as single tract must be

6. As we conclude the owners of the Wilmat parcel are not entitled to compensation, it is unnecessary to address the assignment of error that the trial court improperly allowed the amendment of the pleadings to add Wilmat and WMI Holdings, LLC.

owned by the same party or parties). Unity of use is determined by whether the various tracts of land are being used as an integrated economic unit. *Dep't of Transp. v. Nelson Co.*, 127 N.C. App. 365, 368, 489 S.E.2d 449, 450 (1997) (unity of use existed where two separate parcels of land were part of a single development plan to construct an office park).

In its determination, the trial court considered all of the unsold portions of Roymac Industrial Park as a part of a unified tract finding there was sufficient unity of ownership, unity of use, and physical unity for purposes of condemnation. While we agree that the industrial park has unity of use as it was being developed as a single integrated economic unit similar to the office park in *Nelson Co.*, *see id.*, we also recognize that under our case law and under the facts and circumstances of this case, unity of use standing alone is not determinative. Unlike the trial court, we conclude that not all of the unsold portions of the industrial park have unity of ownership or physical unity. Therefore, we analyze each parcel with respect to the condemned lots.

A. Roymac Parcel

[3] It is undisputed that the remaining lots in the Roymac parcel are under the same ownership as the condemned lots. Furthermore, the entire industrial park has unity of use. DOT argues that the existence of Roymac Drive, nevertheless, breaks the physical continuity of the parcel by separating the Roymac parcel from the condemned lots, and thus there is no physical unity.

The general rule is that lands separated by an existing city street which is open to the public are independent parcels. *See Barnes*, 250 at 385, 109 S.E.2d at 225. The exception to this rule, however, is:

> [I]f a tract of land, no part of which is taken, is used in connection with the same farm, or the same manufacturing establishment, or the same enterprise of any other character as the tract, part of which was taken, it is not considered a separate and independent parcel merely because it was bought at a different time, and separated by an imaginary line, or *even if the two tracts are separated by a highway*, railroad, or canal.

at 386, 109 S.E.2d at 226 (citation omitted) (internal quotations omitted) (emphasis added); *City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 527, 281 S.E.2d 667, 673 (1981).

In this case, the exception applies because the Roymac parcel and the condemned lots enjoy a unity of use as an integrated economic unit and are owned by Roymac. The condemned lots are only separated from the remainder of the Roymac parcel by Roymac Drive, and the mere existence of this road does not break the continuity of the parcel. *See Barnes*, 250 N.C. at 386, 109 S.E.2d at 226. Thus, there is physical unity between the condemned lots and the remainder of the Roymac parcel. Accordingly, because there is unity of ownership, physical unity, and unity of use, the Roymac parcel and the condemned lots are to be properly considered as a unified tract for the purpose of assessing damages resulting from the condemnation.

B. Wilmat Parcel

[4] Defendants maintain, and the trial court found and concluded that, even though the unsold lots in the Wilmat parcel are owned by Wilmat, and not Roymac, substantial unity of ownership exists. This is so, defendants argue, because the principal shareholders of Wilmat include the general partners of Roymac, or entities owned by those partners. This Court, however, has previously rejected that argument, stating "a parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the sole or principal shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages." *Board of Transp. v. Martin*, 296 N.C. 20, 28, 249 S.E.2d 390, 396 (1978); *Airlie Park*, 156 N.C. App. at 67, 576 S.E.2d at 344-45 (corporation is treated as a separate entity from a stockholder; thus there can be no unity of ownership). Therefore, the trial court improperly concluded there was unity of ownership between the condemned lots owned by Roymac and the Wilmat parcel.

Where there is no unity of ownership it is unnecessary to address the other unities because there must be at least *some* unity of ownership between the separate parcels before they may be considered a unified tract. *See Airlie Park*, 156 N.C. App. at 67, 576 S.E.2d at 344; *see also Martin*, 296 N.C. at 26, 249 S.E.2d at 395 (absent unity of ownership, two parcels of land cannot be regarded as a single tract); *Barnes*, 250 N.C. at 384, 109 S.E.2d at 225 (parcels claimed as a single tract must be owned by the same party or parties). Nevertheless, we note that there also does not appear to be any physical unity between the Wilmat parcel and the Roymac parcel. Accordingly, the Wilmat parcel is not in unity with the condemned lots in the Roymac parcel.

C. Phase Two Parcel

[5] Although the Phase Two parcel, which is also owned by Roymac, does have unity of ownership with the Roymac Parcel, and thus the condemned lots, there is no physical unity. The Phase Two parcel is separated from the condemned lots and the Roymac parcel by the Wilmat parcel and other lots not owned by the defendants. As such, the Phase Two parcel is not part of a unified parcel of land. *See Airlie Park*, 156 N.C. App. at 69, 576 S.E.2d at 345 (no unity of lands where two parcels of land owned by one entity are separated by a parcel owned by a separate entity); *see also Barnes*, 250 N.C. at 384-85, 109 S.E.2d at 225 (general rule is that parcels of land must be contiguous in order to constitute a single tract, except in exceptional circumstances such as if a highway separates an otherwise unified tract); *cf.* N.C.G.S. § 40A-67 (2001) (contiguous tracts of land in the same ownership being used as an integrated economic unit treated as if a single tract).

II

[6] DOT further argues the trial court erred in concluding Roymac Drive should be included as part of the unified tract in calculating damages. DOT maintains Roymac Drive was dedicated to public use by Roymac and that the dedication was accepted when DOT authorized plans incorporating a portion of Roymac Drive into the U.S. Hwy. 17 bypass project.

In this case, there is no dispute that Roymac dedicated the land to public use. The only dispute is whether DOT's actions constituted acceptance of that dedication. Dedication of a road to the general public is a revocable offer until accepted by a proper public authority in a recognized legal manner. *Bumgarner v. Reneau*, 105 N.C. App. 362, 366, 413 S.E.2d 565, 568, *modified and aff'd*, 332 N.C. 624, 422 S.E.2d 686 (1992).

> Acceptance in "some recognized legal manner" includes both express and implied acceptance. Express acceptance may take the form of, *inter alia*, a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council's vote of approval, or the signing of a written instrument by proper authorities.

Id. at 366-67, 413 S.E.2d at 569 (citations omitted).

In this case, DOT introduced into evidence maps filed with the New Hanover County Register of Deeds showing Roymac Drive as a

public road. Moreover, DOT acted to exercise dominion over Roymac Drive by incorporating it into plans to construct the bypass. These acts are sufficient to constitute acceptance of the dedication of Roymac Drive to the public. *See Tower Dev. Partners v. Zell*, 120 N.C. App. 136, 141, 461 S.E.2d 17, 21 (1995) (acceptance manifested by official adoption of a map showing area dedicated as a public street followed by other acts). Accordingly, Roymac Drive was a public street at the time of these proceedings, and the trial court erred in including it as part of the property condemned in this action.

III

[7] DOT finally argues the trial court erred in finding that some of the defendants were entitled to damages resulting from a loss of direct access to U.S. Hwy. 421 from the industrial park.

A landowner is only entitled to damages for a deprivation of direct access to a highway where, before the condemnation occurred, his property abutted the highway to which he is denied direct access. *See Dep't of Transp. v. Harkey*, 308 N.C. 148, 151-52, 301 S.E.2d 64, 67 (1983). Because we have determined that the Roymac parcel is in unity with the condemned lots, one of which abuts U.S. Hwy. 421, we conclude that Roymac is entitled to damages resulting from a loss of direct access to U.S. Hwy. 421. As the Wilmat and Phase Two parcels, however, are not parts of the unified tract and do not abut U.S. Hwy. 421, they are not entitled to damages from a loss of direct access. Therefore, the trial court did not err in concluding that some of the defendants were entitled to damages as a result of a loss of direct access to U.S. Hwy. 421, insofar as Roymac is entitled to damages for loss of direct access based on its ownership of the Roymac parcel.

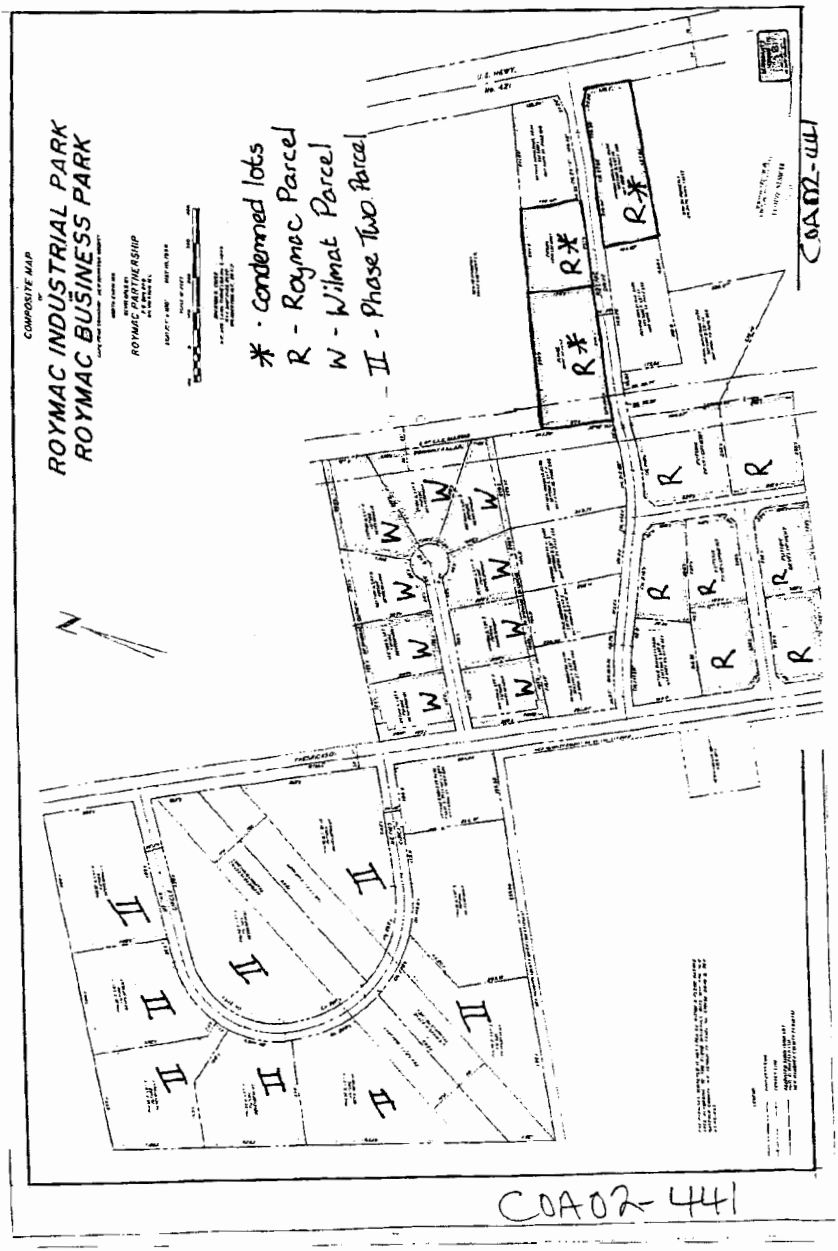
[8] Defendants alternatively claim they are entitled to compensation under section 136-89.53 of the North Carolina General Statutes for loss of access to Roymac Drive. As the Wilmat and Phase Two parcels do not abut Roymac Drive, defendants are not entitled to any compensation under N.C. Gen. Stat. § 136-89.53 for those parcels. *See* N.C.G.S. § 136-89.53 (2001) (owners of land abutting street included within a controlled access highway entitled to compensation). Moreover, the remaining lots in the Roymac parcel abutting Roymac Drive have not lost access to that road and thus Roymac is not separately entitled to compensation under section 136-89.53 for the Roymac parcel. *See Wofford v. Hwy. Comm'n*, 263 N.C. 677, 682, 140 S.E.2d 376, 380-81 (1965) (where street is made into a cul-de-sac,

abutting landowner is not entitled to compensation where the landowner still has reasonable access to the street).

Accordingly, we affirm the trial court's order with respect to the Roymac parcel being: (1) in unity with the condemned lots and (2) deprived of direct access to U.S. Hwy. 421. We, however, reverse the trial court's order with respect to: (1) the Wilmat parcel being in unity with the condemned lots; (2) the Phase Two parcel being in unity with the condemned lots; (3) the inclusion of Roymac Drive in the unified property for the purpose of determining damages resulting from the condemnation; (4) the deprivation of Wilmat and Phase Two parcels from direct access to U.S. Hwy. 421; and (5) defendants' alternative argument for compensation based on a deprivation of access to Roymac Drive.

Affirmed in part, reversed in part.

Judges WYNN and ELMORE concur.


COMPOSITE MAP
ROYMAC INDUSTRIAL PARK
ROYMAC BUSINESS PARK
* - Condemned lots
R - Roymac Parcel
W - Wilmat Parcel
II - Phase Two Parcel
U.S. HWY. No. 421
COA02-441

WAL-MART STORES, INC., PLAINTIFF v. INGLES MARKETS, INCORPORATED, E.H. PROPERTIES, L.P., AND HORNE PROPERTIES, INC., DEFENDANTS

No. COA02-896

(Filed 17 June 2003)

Deeds— restrictive covenant—lease agreement—radius restriction—use of land as grocery store

The trial court did not err by granting summary judgment in favor of plaintiff store based on its conclusion that although the restrictive covenant in a 1991 deed created a real covenant running with the parking lot tract of land transferred to plaintiff thus barring plaintiff's use of that tract for a grocery store, the restrictive covenant did not impose upon plaintiff the five-mile radius restriction to which defendant landlord agreed in its negotiated commercial lease with defendant company operating a grocery store, because: (1) Memorandum § 6 in the commercial lease contained personal covenants of the landlord, and the landlord honored its personal covenant by including in the 1991 deed a restrictive covenant stating that the parking lot tract sold to plaintiff was conveyed subject to a condition that plaintiff would comply with Memorandum § 6; (2) the restrictive covenant in the 1991 deed did not impose upon plaintiff the landlord's personal covenant not to operate a grocery store anywhere within five miles of the shopping center; and (3) the restrictive covenant did not impose an implied equitable servitude upon land subsequently purchased by plaintiff.

Appeal by defendants from judgment entered 19 March 2002 by Judge Sanford L. Steelman, Jr., in Stanly County Superior Court. Heard in the Court of Appeals 27 March 2003.

Smith, Debnam, Narron, Wyche, Story & Myers, L.L.P., by Bettie Kelley Sousa and Ashley H. Story, for plaintiff-appellee.

Hunton & Williams, by Matthew P. McGuire, and Hartman, Simons, Spielman & Wood, by David L. Pardue, for defendant-appellant Ingles Markets, Inc.

Robinson, Bradshaw & Hinson, P.A., by D. Blaine Sanders, for defendant-appellant E.H. Properties, L.P.

LEVINSON, Judge.

Defendants (Ingles Markets, Inc., and E.H. Properties, L.P.) appeal from an order granting summary judgment in favor of plaintiff (Wal-Mart Stores, Inc.). For the reasons discussed below, we affirm the trial court.

The factual and procedural background may be summarized as follows: In 1987, defendant Ingles leased space in the Stanly County Shopping Plaza (the shopping center), in Albemarle, for operation of a grocery store. Ingles and defendant Horne, then the owner of the shopping center, executed a lease setting out the terms of the rental. An abbreviated Memorandum of Lease (Memorandum) was subsequently recorded in Stanly County. Memorandum § 6 set out a radius restriction by which the landlord (then defendant Horne) generally promised not to occupy, rent, or sell property for use as a grocery store either in, or within five miles of, the shopping center. In 1991, plaintiff bought a small section of the shopping center parking lot (the parking lot tract) from defendant Horne. This tract did not include any of the property that Ingles rented for its grocery store, and plaintiff did not become Ingles' landlord. The deed for the parking lot tract included a restrictive covenant requiring plaintiff to "comply with the terms, covenants, and restrictions" of § 6 of the memorandum. Plaintiff did not sign the deed.

About ten years later, plaintiff began planning construction of a large Wal-Mart Supercenter, in which plaintiff planned to include a grocery department. The property plaintiff acquired for this project was not identified in the 1987 lease between Ingles and Horne, nor in the 1991 deed of the parking lot tract. Further, the proposed Supercenter property was not located in the shopping center, although it was within five miles of the shopping center. In June, 2001, plaintiff wrote defendants asking them to acknowledge that the provisions of the 1991 deed for the parking lot tract would not prohibit or restrict its planned Supercenter. Defendants would not agree to this, and on 4 September 2001, plaintiff filed a complaint seeking a declaratory judgment that its planned Supercenter would not violate the restrictive covenant in the 1991 Horne/Wal-Mart deed. Plaintiff's complaint named three defendants: Ingles, Horne, Inc., and E.H. Properties, L.P. (E.H.), Horne's successor in interest and Ingles' landlord.

On 15 November 2001, defendant Ingles filed a motion for summary judgment. E.H. joined Ingles' motion for summary judgment on

27 November 2001. Plaintiff filed its own motion for summary judgment on 19 November 2001. On 19 March 2002, the trial court entered summary judgment for plaintiff. The court's order stated in relevant part that:

> 3. The covenants contained in the deed from Horne Properties, Inc. to Wal-Mart Stores, Inc. dated October 4, 1991, . . . do create a valid, enforceable covenant, running with the land, which prohibits the plaintiff, Wal-Mart Stores, Inc. from using any portion of the lands conveyed in that deed for a term of twenty years commencing on April 21, 1987 for [the sale of groceries]. . . . This covenant is enforceable by the defendant, Ingles Markets, Incorporated. 4. The covenants in the deed from Horne Properties, Inc. to Wal-Mart Stores, Inc., dated October 4, 1991, . . . do not create a valid, enforceable covenant that would prohibit the plaintiff, Wal-Mart Stores, Inc., from operating a "Supercenter" containing a grocery store, on a tract of land (other than the property described in [the 1991 deed]) located within five miles of the Stanly County Plaza Shopping Center.

From this order, defendants E.H. and Ingles have appealed. Defendant Horne did not respond to the complaint, and has not appealed the trial court's summary judgment order.

Standard of Review

Defendants appeal from the entry of summary judgment. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2001). In the instant case, each party claims entitlement to summary judgment based on its proposed interpretation of the terms of the same documents: the 1987 Horne-Ingles lease, the 1987 Horne-Ingles Memorandum of Lease, and the 1991 Horne/Wal-Mart deed. Thus:

> [e]ach party based its claim upon the same sequence of events. . . . Neither party has challenged the accuracy or authenticity of the documents establishing the occurrence of these events. Although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute. Consequently, we conclude that 'there is no genuine issue as

to any material fact' surrounding the trial court's summary judgment order.

Adams v. Jefferson-Pilot Life Ins. Co., 148 N.C. App. 356, 359, 558 S.E.2d 504, 507, *disc. review denied*, 356 N.C. 159, 568 S.E.2d 186 (2002). " 'A deed is to be construed by the court, and the meaning of its terms is a question of law, not of fact.' " *Elliott v. Cox*, 100 N.C. App. 536, 538, 397 S.E.2d 319, 320 (1990) (quoting *Mason v. Andersen*, 33 N.C. App. 568, 571, 235 S.E.2d 880, 882 (1977)); *see also Alchemy Communications Corp. v. Preston Dev. Co.*, 148 N.C. App. 219, 222, 558 S.E.2d 231, 233, *disc. review denied*, 356 N.C. 432, 572 S.E.2d 421 (2002) (plaintiff's claim that defendant violated lease presented "a matter of contract interpretation and thus, a question of law") (citing *Harris v. Ray Johnson Constr. Co., Inc.*, 139 N.C. App. 827, 534 S.E.2d 653 (2000)).

We conclude that "there is no genuine issue as to any material fact" surrounding the trial court's summary judgment order. Rule 56(c). We next consider whether the trial court correctly determined that plaintiff is entitled to a judgment as a matter of law.

The central issue presented in this appeal is the proper construction of the restrictive covenant in the 1991 deed to the parking lot tract. Defendants contend that the restrictive covenant imposes upon plaintiff the radius restriction found in Memorandum § 6, thus prohibiting plaintiff from operating a grocery or food store within five miles of the shopping center. We disagree.

The restrictive covenant in the 1991 deed states in relevant part:

> The property conveyed hereby has been transferred *subject to* the following covenants running with the land: (i) The Grantee and any person(s) or entity hereinafter owning or leasing an interest in the Property *shall comply with the terms, covenants, and restrictions found in Section Six (6) of the Memorandum of Lease* . . . between Ingles Markets, Incorporated and the Grantor. . . .

(emphasis added). Thus, the question before us is the correct interpretation of plaintiff's agreement to "comply with the terms, covenants, and restrictions found in Section Six (6) of the Memorandum of Lease."

The memorandum was authorized by a provision in the lease allowing either party to prepare and record a "short form

or memorandum of this Lease in a form acceptable to Tenant[.]" Memorandum § 6, referenced in the restrictive covenant, states in pertinent part:

> 6. The lease provides that during its term, *Landlord covenants and agrees not to lease*, rent, *occupy, or suffer or permit to be occupied, any part of the Shopping Center or any other area* owned or controlled, . . . by Landlord, its successors, heirs or assigns, or Landlord's principal owners, stockholders, directors, or officers, or their assignees (hereinafter sometimes referred to as the "Owners"), which is *within five (5) miles* of the Shopping Center *for the purpose of* conducting therein or for use as, *[a] supermarket, [or] food store*, . . . and *further*, that *if Landlord* or Owners *own any land, or* hereinafter during the term of the Lease Landlord or Owners *acquire any land within such distance* of the Shopping Center, *neither will convey the same* (other than the Wal-Mart Premises as defined in the Lease) *without imposing thereon a restriction* for a period of twenty (20) years *which secures compliance with the terms of the Lease.* This Section 6 shall not be applicable to the portion of the Shopping Center to be purchased by Wal-Mart Properties, Inc.

(emphasis added).

Preliminarily, we observe that Memorandum § 6 states broadly that any property sold by the landlord within five miles of the shopping center will be conveyed subject to a restrictive covenant "which secures compliance with the terms of the Lease." Taken literally, the restrictive covenant in the 1991 deed stating that the property was conveyed "subject to" compliance with Memorandum § 6 would require plaintiff to, *e.g.*, maintain the shopping center's common areas, purchase fire insurance, or pay rent on the Ingles property, all of which are "terms of the lease." We conclude that § 6 is written so expansively that it cannot be read at face value. We are, therefore, required to determine the meaning of Memorandum § 6 by reference to established principles of contract interpretation.

"A lease is a contract which contains both property rights and contractual rights." *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 570, 500 S.E.2d 752, 756, *disc. review denied*, 349 N.C. 240, 514 S.E.2d 274 (1998). Thus, the provisions of a lease are interpreted according to general principles of contract law. *See Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990) ("the interpretation of an assignment [of a lease] is governed by rules ap-

plicable to the interpretation of a contract") (citing 3 Williston on Contracts § 431 (3d ed. 1960)). Further, "[t]he terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into." *Lexington Ins. Co. v. Tires Into Recycled Energy And Supplies, Inc.*, 136 N.C. App. 223, 225, 522 S.E.2d 798, 800 (1999), *disc. review denied*, 351 N.C. 642, 543 S.E.2d 872 (2000) (citation omitted). In so doing, the lease " 'should be interpreted as a whole and the meaning gathered from the entire contract, and not from particular words, phrases, or clauses.' " *Starling v. Still*, 126 N.C. App. 278, 281, 485 S.E.2d 74, 76 (1997) (quoting *Divine v. Watauga Hospital*, 137 F. Supp. 628, 631 (M.D.N.C. 1956)). Moreover,

> it is proper to seek for a rational purpose in the language and provisions of the [lease], and to construe it consistently with reason and common sense. . . . [W]e should reject that interpretation which plainly leads to injustice, and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results.

Meroney v. Cherokee Lodge, 182 N.C. 739, 746, 110 S.E.2d 89, 92 (1921). In addition, "[t]he heart of a contract is the intention of the parties as determined from its language, purposes, and subject matter and the situation of the parties at the time of execution." *McDonald v. Medford*, 111 N.C. App. 643, 647, 433 S.E.2d 231, 233 (1993) (citation omitted).

With these principles in mind and reading Memorandum § 6 as a whole, we conclude that § 6 states personal covenants of the landlord, whereby landlord promises that during the term of the lease it will (1) not *occupy* a competing grocery store in, or within five miles of, the shopping center; (2) not lease to, or permit occupancy by, any grocery store on land it owns or acquires in, or within five miles of, the shopping center; and (3) that any property conveyed by the landlord in, or within five miles of, the shopping center will be conveyed subject to a restrictive covenant barring its use as a grocery store.

These covenants are only one part of the mutual consideration between Ingles and the landlord, which includes "two useful devices of radius clauses and percentage rent. Percentage rent . . . was developed for the protection of both parties from losses incurred because of fluctuations in the economy over the term of the lease. As a necessary corollary, the [lessor may] rel[y] upon a radius clause so that the tenant is prevented from having a site too close to the shopping

center which would necessarily pull customers away from the shopping center site and reduce the percentage rent that would ordinarily be payable." *Winrock Enter. v. House of Fabrics of N.M.*, 91 N.M. 661, 663, 579 P.2d 787, 789 (1978). Radius restrictions also protect the lessee. *See Dan's Super Market, Inc. v. Wal-Mart Stores, Inc.*, 38 F.3d 1003, 1005 (8th Cir. 1994) ("the broad purpose of this covenant . . . was to permit the sale of the restricted lots to a discount store operator, while affording the store to be built by [Dan's] protection from a grocery sales competitor").

Thus, we agree with defendants' contention that the inclusion of radius restrictions is an accepted commercial practice in the negotiation of shopping center leases. "Radius restrictions serve a legitimate business purpose." *Winrock Enter.*, 91 N.M. at 663, 579 P.2d at 789. "The development of new shopping centers requires tremendous outlays of venture capital and risk by prospective tenants as well as by landlords; restrictive covenants against unwanted competition are consistent with the public interest in such development." *Valley Properties, Inc. v. King's Dept. Stores, Etc.*, 505 F. Supp. 92, 95 (D.C. Mass. 1981) (citing *Parker v. The Lewis Grocery Co.*, 246 Miss. 873, 153 So. 2d 261 (1963)). Moreover, to be meaningful, a radius restriction must effectively prevent a landlord from evading its terms by leasing or selling land to a lessee's competitor, while continuing to collect rent from the lessee. *See id.* ("landlord's promise binds him for the duration of the lease[;]" the Court holds that landlord "may not avoid that obligation by [purchasing] . . . land within the restricted area after the lease is signed"). However, our general acceptance of radius restrictions does not resolve the issue of whether the radius restriction in Memorandum § 6 applies to plaintiff by virtue of the restrictive covenant in the 1991 deed for the parking lot tract. To do so, we must examine the nature of the landlord's covenants in Memorandum § 6. A restrictive covenant is defined as a " 'private agreement, usually in a deed or lease, that restricts the use or occupancy of real property, especially by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put.' " *Hutchens v. Bella Vista Vill. Prop. Owners' Ass'n*, 82 Ark. App. 28, 35, 110 S.W.3d 325, 329 (2003) (quoting BLACKS LAW DICTIONARY 371 (7th ed. 1999)). Restrictive covenants may be either real or personal:

> Covenants that run with the land are real as distinguished from personal covenants that do not run with the land. . . . Three essential requirements must concur to create a real covenant: (1) the

intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant.

Raintree Corp. v. Rowe, 38 N.C. App. 664, 669, 248 S.E.2d 904, 907-08 (1978) (citing 20 Am. Jur. 2d Covenants, Conditions, Etc. § 30 (1965)). The distinction between real and personal covenants is that "a personal covenant creates a personal obligation or right enforceable at law only between the original covenanting parties, . . . whereas a real covenant creates a servitude upon the land subject to the covenant ('the servient estate') for the benefit of another parcel of land ('the dominant estate')[.]" *Runyon v. Paley*, 331 N.C. 293, 299, 416 S.E.2d 177, 182 (1992) (citing *Cummings v. Dosam, Inc.*, 273 N.C. 28, 32, 159 S.E.2d 513, 517 (1968)). Further, in analyzing whether a covenant is real or personal, "[t]he instrument must be construed most favorably to the grantee, and all doubts and ambiguities are resolved in favor of the unrestricted use of the property." *Stegall v. Housing Authority*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971).

We conclude that Memorandum § 6 contained personal covenants of the landlord. Plaintiff has never been Ingles' landlord, and is not subject to the personal covenants found in the lease. These personal covenants, standing alone, do not place restrictions on the use of any specific property; rather, the landlord personally promises to apply certain restrictions during the term of the lease to property it owns or acquires, as one part of the contract negotiated between Ingles and its landlord. The landlord honored its personal covenant by including in the 1991 deed a restrictive covenant stating that the parking lot tract was conveyed subject to a condition that plaintiff would "comply with" Memorandum § 6.

We further conclude that the restrictive covenant in the 1991 deed, construed with Memorandum § 6, creates a real covenant running with the property transferred in the deed to the parking lot tract, which bars its use as a grocery or food store. Thus, the trial court was correct when it interpreted the restrictive covenant in this manner.

We reject defendant's argument that the restrictive covenant in the 1991 deed also imposed upon plaintiff the landlord's personal covenant not to operate a grocery store anywhere within five miles of the shopping center. "[Defendant] seeks to construe the lease clause in isolation. It ignores the fact that the instrument containing the clause is itself a commercial lease agreement." *Reagan Nat.*

Advertising v. Capital Outdoors, 96 S.W.3d 490, 493 (Tex. App. 2002). The language of the restrictive covenant in the 1991 deed does not indicate that plaintiff agreed to a five mile radius restriction, any more than it agreed to keep the common area grass mowed, the property insurance current, or any of the landlord's other obligations under the lease. Nor would such a restriction fall within the original purpose of the radius restriction, which was to establish the *landlord's* obligation not to allow grocery store competition, *in exchange for* the income it would receive in the form of rental payments. Thus, " 'when the benefit and burden of a contract are inseparably connected, both must go together, and liability to the burden is a necessary incident to the right to the benefit.' " *Reed v. Elmore*, 246 N.C. 221, 227, 98 S.E.2d 360, 365 (1957) (quoting *Raby v. Reeves*, 112 N.C. 688, 16 S.E. 760 (1893)).

We also disagree with defendants that the restrictive covenant imposed an implied equitable servitude upon land subsequently purchased by plaintiff for use as a Supercenter. *See Harry v. Crescent Resources, Inc.*, 136 N.C. App. 71, 80, 523 S.E.2d 118, 124 (1999) ("We have not adopted the doctrine of implied equitable servitudes in North Carolina.").

We conclude that the trial court correctly determined that the restrictive covenant in the 1991 deed created a real covenant running with the land transferred in the deed, and barred plaintiff's use of that tract for a grocery store. We further conclude that the trial court correctly determined that the restrictive covenant did not impose upon plaintiff the five mile radius restriction to which landlord agreed in its negotiated commercial lease with Ingles. Accordingly, the trial court's order is

Affirmed.

Judges McGEE and McCULLOUGH concur.

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO AND NICOLE RIPELLINO, PLAINTIFFS v. THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED, AND THE JOHNSTON COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA02-1309

(Filed 17 June 2003)

1. Discovery— deposition of witness—motion for continuance

The trial court did not err in a personal injury case by denying plaintiffs' motion for a continuance to depose a witness, because plaintiffs failed to show that new information relevant to the limited issue presented in the summary judgment hearing regarding immunity and waiver of immunity would be discovered.

2. Immunity— sovereign—local school board—purchase of insurance—waiver

Although the trial court did not err in a personal injury case by granting summary judgment in favor of defendants on the ground of sovereign immunity for claims less than $100,000 and greater than $1,000,000 based on the fact that defendant local school board's participation in the North Carolina School Boards Trust (NCSBT) did not qualify as a purchase of insurance under N.C.G.S. § 115C-42 causing defendant to waive its immunity, the trial court erred by granting summary judgment for claims in excess of $100,000 and under $1,000,000 pursuant to excess insurance coverage purchased by defendant local board of education.

3. Immunity— sovereign—local school board—estoppel

Defendant local board of education is not estopped from claiming sovereign immunity in a personal injury case even

though defendant paid plaintiffs for property damage, because: (1) the General Assembly determines when and under what circumstances the State and its political subdivisions may be sued; and (2) the concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule.

4. Civil Rights— section 1983 claim—sovereign immunity defense inapplicable

The trial court erred in a personal injury case by granting summary judgment in favor of defendant local board of education on plaintiffs' § 1983 claim, because defendant may not assert a defense of sovereign immunity against plaintiffs' constitutional § 1983 claim even though plaintiffs may not be entitled to monetary relief under this section against defendant on grounds other than sovereign immunity.

5. Damages and Remedies— punitive damages—governmental entity immune

Defendant local board of education is immune from a claim for punitive damages because the board is a governmental entity.

6. Civil Procedure— summary judgment—contingent upon claims against other defendants

The trial court did not err in a personal injury case by granting summary judgment in favor of the trust defendants when those defendants did not move for summary judgment and did not participate in the summary judgment hearing because plaintiffs' claims against those defendants are related to and contingent upon the claims against defendant local board of education.

Appeal by plaintiffs from judgment entered 15 March 2002 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 15 May 2003.

Mast, Schulz, Mast, Mills, Stem & Johnson, P.A., by Bradley N. Schulz and Don R. Wells, for plaintiffs.

Yates, McLamb & Weyher, LLP, by Barbara B. Weyher, for the Trust defendants.

Cranfill, Sumner & Hartzog, LLP, by Stephanie Hutchins Autry, for Johnston County Board of Education.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jill R. Wilson, for North Carolina Council of School Attorneys, amicus curiae.

Ferguson Stein Chambers Wallas Adkins Gresham & Sumter, P.A., by S. Luke Largess, for North Carolina Academy of Trial Lawyers, amicus curiae.

TYSON, Judge.

Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino ("Nicole") (collectively "plaintiffs") appeal from an entry of summary judgment in favor of all defendants. We affirm in part, reverse in part, and remand.

I. Background

At the end of classes on 9 March 1998, Nicole was departing from Clayton High School in Johnston County in her parent's vehicle. A traffic control gate owned by the Johnston County Board of Education ("Board") swung closed, struck the vehicle, and injured Nicole. In October 1998, the Ripellinos were paid $2,153.18 for property damage. The Board refused to pay medical expenses or other compensation.

On 26 March 2001 and amended on 6 April 2001, plaintiffs filed suit against the Board, and The North Carolina School Boards Association, Inc., and The North Carolina School Board Trust and its self-funded trusts ("trust defendants"). Plaintiffs alleged (1) a negligent personal injury claim against the Board on the part of Nicole, (2) a medical expenses claim on the part of Nicole's parents against the Board, (3) declaratory judgment that immunity had been waived through (a) participation in the trust and (b) the payment of property damages, (4) unfair and deceptive trade practices against all defendants, (5) 42 U.S.C. § 1983 claim ("§ 1983 claim") and constitutional claims against all defendants, and (6) punitive damages.

Upon motion of the Board, the trial court bifurcated the trial allowing the issues of whether the Board was immune from suit and whether the Board had waived sovereign immunity to be resolved while the other claims were stayed. Based upon discovery affidavits, plaintiffs requested the deposition of Tom Davis.

On 19 February 2002, the trial court held a hearing regarding plaintiffs' request to depose Davis. At the end of the hearing, the trial

court orally ruled that because the trial was bifurcated and there was nothing new to which Davis would be able to testify regarding immunity, plaintiffs would not be permitted to depose Davis.

The hearing on the Board's motion for summary judgment was continued until 8 March 2002. After the hearing, the trial court granted summary judgment in favor of all defendants on all claims. Plaintiffs appeal from both the denial of the request for deposition of Davis and the grant of summary judgment to all defendants on all issues.

II. Issues

Plaintiffs contend the trial court erred in (1) preventing plaintiffs from deposing Davis, (2) granting summary judgment to the Board when the Board waived immunity by purchasing insurance, (3) granting summary judgment for the Board when the Board was estopped from denying payment of the claim, (4) granting summary judgment on the constitutional issues and the § 1983 claims, and (5) granting summary judgment to the Trust defendants.

III. Deposition of Davis

[1] Plaintiffs contend the trial court erred in denying their request to depose Davis. We disagree.

> Rule 56 of the Rules of Civil Procedure provides:
>
> (f) When affidavits are unavailable.—Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C. Gen. Stat. § 1A-1, Rule 56(f). To prevail on a Rule 56(f) motion, the moving party has the burden of showing why additional discovery is necessary and how that discovery will create a genuine issue of material fact. *See e.g.*, *Becerra v. Asher*, 105 F.3d 1042, 1048, *cert. denied*, 522 U.S. 824, 139 L. Ed. 2d 40 (1997).

Because of the previously bifurcated discovery and trial, the only issues open for discovery and the summary judgment hearing were immunity and waiver of immunity. On appeal, plaintiffs contend that "Davis' deposition is necessary to determine the nature of the Board's

interaction with Trust Defendants, as well as the arbitrary payment by the Board of claims." The Board had already provided through discovery a list of claims paid by the Board and that no claims had been paid by the Trust. The trial court did not err in denying plaintiffs' motion for a continuance to depose Davis when they failed to show that new information relevant to the limited issue presented in the summary judgment hearing would be discovered. This assignment of error is overruled.

IV. Sovereign Immunity

A. Non-Constitutional Claims

"As a general rule, the doctrine of governmental, or sovereign immunity bars action against, *inter alia*, the state, its counties, and its public officials sued in their official capacity." *Herring ex rel. Marshall v. Winston-Salem/Forsyth Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461, *disc. rev. denied*, 352 N.C. 673, 545 S.E.2d 423 (2000) (citations omitted). "A local board of education is immune from suit and may not be liable in a tort action unless the Board has duly waived its governmental immunity." *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996). The General Assembly has provided a means for a local board of education to waive immunity through N.C. Gen. Stat. § 115C-42 (2001), which provides in part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

The statute expressly defines how a local board may procure insurance and from whom it may be procured:

> Any contract of insurance purchased pursuant to this section shall be *issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of*

> *Insurance* and shall by its terms adequately insure the local board of education against liability for damages by reason of death or injury to person or property proximately caused by the negligent act or torts of the agents and employees of said board of education or the agents and employees of a particular school in a local administrative unit when acting within the scope of their authority.

(Emphasis supplied). N.C. Gen. Stat. § 115C-42.

N.C. Gen. Stat. § 115C-42 is the exclusive means of a local board of education to waive immunity. *Lucas v. Swain County Bd. of Educ.*, 154 N.C. App. 357, 361, 573 S.E.2d 538, 541 (2002). "The Courts of North Carolina have applied a rule of strict construction to statutes authorizing waiver of sovereign immunity." *Hallman*, 124 N.C. App. at 438, 477 S.E.2d at 181. As a local board of education, the Board is immune from suit in a tort action unless it waived immunity.

1. Participation in the Trust

[2] Plaintiffs argue the Board's participation in the North Carolina School Boards Trust ("NCSBT") qualified as a purchase of insurance under N.C. Gen. Stat. § 115C-42 and waived the Board's immunity. We disagree.

Our Court has recently determined that "the only way a plaintiff can establish that a board has waived its immunity is by showing the contract of insurance was issued by (1) an entity licensed and authorized to execute insurance contracts in this State; or (2) a qualified insurer as determined by the Department of Insurance." *Lucas*, 154 N.C. App. at 361, 573 S.E.2d at 541. Plaintiffs have failed to forecast evidence that NCSBT meets either of these requirements.

The NCSBT provides:

> local boards of education the opportunity to budget funds for the purpose of paying all or part of a Claim made or any civil judgment entered against any of its members or employees or former members or employees, when such a Claim is made or such judgment is rendered as Damages on account of any act done or omission made, or any act allegedly done or omission allegedly made, in the scope or their duties as members of the local board of education or as employees. NCSBT does not provide any coverage for any Claim which could not be paid by a local board of education pursuant to G.S.115C-43(b) or successor statute. The NCSBT Coverage Agreement is not a contract of insurance by a company

> or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance. Therefore, the NCSBT Coverage Agreement expressly is not considered a waiver of governmental immunity as provided in G.S.115C-42.

The policy states that the fund provides general liability coverage and errors and omissions coverage of $100,000 for each claim made and excess insurance limits of $900,000 for each claim made totaling $1,000,000 coverage. Excess insurance is defined as "insurance purchased by NCSBT that provides coverage over and above the Fund limits as shown in the Declarations." To the extent the excess insurance policy provides coverage, the Board waived immunity.

The trial court erred in granting summary judgment on the grounds of sovereign immunity for claims in excess of $100,000 and under $1,000,000 pursuant to the excess insurance coverage. The trial court did not err in granting summary judgment in favor of the Board for claims less than $100,000 and greater than $1,000,000.

2. Estoppel

[3] Plaintiffs contend the Board is estopped from claiming governmental immunity when the Board paid plaintiffs for property damage. We disagree.

A waiver of sovereign immunity must be established by the General Assembly. *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001). "Our Supreme Court has stated that 'it is for the General Assembly to determine when and under what circumstances the State [and its political subdivisions] may be sued." *Id.* (quoting *Guthrie*, 307 N.C. at 534, 299 S.E.2d at 625). "The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Any such change should be by plain, unmistakable mandate of the lawmaking body." *Id.*

If a court could estop the Board from asserting an otherwise valid defense of sovereign immunity, "then, effectively, that court, rather than the General Assembly, would be waiving [the Board's] sovereign immunity." *Id.* at 347, 556 S.E.2d at 45.

B. Constitutional Claims

[4] Plaintiffs contends the trial court erred in granting summary judgment in favor of the Board on the § 1983 claim. We agree.

Section 1983 provides "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding to redress." 42 U.S.C. § 1983 (2000). Our Supreme Court has held that the State of North Carolina and its agencies are not "persons" within the meaning of section 1983 and could not be sued for monetary damages under that statute. *Corum v. University of North Carolina*, 330 N.C. 761, 789, 413 S.E.2d 276, 293, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Municipalities are considered persons and subject to suit under § 1983 for monetary damages.

The United States Supreme Court has held that the legislature intended for "municipalities and other local government units to be included among those persons to whom § 1983 applies." *Monell v. Department of Social Servs.*, 436 U.S. 658, 690, 56 L. Ed. 2d 611, 635 (1978). "Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*

"A county may not claim sovereign immunity as a defense to a section 1983 claim if the violation of federal rights is caused by the county's official policy, such as the implementation of an ordinance or a decision officially adopted by the board of county commissioners." *Peverall v. County of Alamance*, 154 N.C. App. 426, 432, 573 S.E.2d 517, 521 (2002).

Plaintiffs alleged that the Board, the local governing body for the school system, has unconstitutionally paid some claims while asserting immunity on others in violation of plaintiffs' equal protection and due process rights. Plaintiffs showed through discovery that claims had been paid by the Board, including partial payment to plaintiffs.

The Board may not assert a defense of sovereign immunity against plaintiffs' constitutional § 1983 claims. We note that plaintiffs may not be entitled to monetary relief pursuant to section 1983 against defendant on grounds other than sovereign immunity. *Id.* (citing *Messick v. Catawba County*, 110 N.C. App. 707, 713-14, 431 S.E.2d

489, 493, *disc. rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993) (holding that, because a county is not a "person" for purposes of a section 1983 claim, it cannot be sued where the remedy sought is monetary damages)). As this appeal is limited to issues of sovereign immunity, we do not address the merits of such an argument. The trial court erred in granting summary judgment in favor of defendants on the § 1983 and constitutional claim.

C. Punitive Damages

[5] Plaintiffs asserted a claim of punitive damages against defendants. "Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Long v. City of Charlotte*, 306 N.C. 187, 207, 293 S.E.2d 101, 114 (1982). Usually, the individual wrongdoer himself is made to suffer for his conduct. Here, it is the governmental entity. *Id.*

In *Long*, our Supreme Court held that public policy, in the absence of statutory provisions to the contrary, provides that municipal corporations are immune from punitive damages. *Id.* We find the rational in *Long* persuasive, and hold that the Board, as a governmental entity, is immune from punitive damages.

V. Trust Defendants

[6] Plaintiffs contend the trial court erred in granting summary judgment to the trust defendants when the trust defendants did not move for summary judgment and did not participate in the summary judgment hearing.

Plaintiffs' claims against the trust defendants are related to and contingent upon the claims against the Board. To the extent the trial court properly granted summary judgment in favor of the Board, the claims against the trust defendants were also properly granted.

VII. Conclusion

The trial court erred in granting summary judgment on the grounds of immunity as to the constitutional claims against all defendants and as to the non-constitutional claims to the extent there was excess liability insurance for claims between $100,000 to $1,000,000 dollars. The trial court properly granted summary judgment to defendants on claims of less than $100,000 and for punitive damages.

Affirmed in part, reversed in part and remanded.

Judges McGEE and CALABRIA concur.

JOHNNIE DRAKEFORD, EMPLOYEE, PLAINTIFF v. CHARLOTTE EXPRESS, EMPLOYER, AND NATIONAL UNION FIRE, CARRIER, DEFENDANTS

No. COA02-510

(Filed 17 June 2003)

Workers' Compensation— continuing disability—underlying cause

The Court of Appeals affirmed an Industrial Commission decision terminating workers' compensation benefits based on a finding that plaintiff's back pain and disability were caused by a neurological disorder rather than a fall at work. Although plaintiff presented evidence to the contrary, the evidence in the record supports the Commission's findings, and the Commission is the sole judge of the weight and credibility of the evidence.

Appeal by plaintiff from opinion and award entered 9 October 2001 by the Industrial Commission. Heard in the Court of Appeals 29 January 2003.

Johnnie J. Drakeford, plaintiff-appellant, pro se.

Pinto, Coates, Kyre & Brown, P.L.L.C., by Martha P. Brown, for defendant-appellees.

HUDSON, Judge.

Plaintiff Johnnie Drakeford appeals an opinion and award entered 9 October 2001 by the North Carolina Industrial Commission that terminated his temporary total disability benefits. We affirm.

BACKGROUND

Plaintiff, who was employed as a driver/trainer for Charlotte Express, was in the course of driving a tractor-trailer when he stopped at a truck stop on 4 May 1995. On his way to the shower, he slipped on the wet floor and fell to the ground. He then felt pain in his neck and lower back. Charlotte Express and Charlotte Express's car-

rier, National Union Fire c/o Liberty Bell Agency ("defendants"), accepted compensability by paying benefits, without filing Form 21 or Form 60, and have paid plaintiff temporary total disability benefits since the date of the accident. Defendants filed a Form 24 on 6 August 1999, requesting that plaintiff's benefits be terminated on the grounds that plaintiff's current disability is the result of a non-work-related condition and is not caused or in any way related to his work-related injury sustained in May 1995. Special Deputy Commissioner Ronnie E. Rowell held an informal telephone hearing on 9 September 1999, after which he denied defendants' application for termination of benefits. Defendants then requested that the claim be assigned for hearing before the Industrial Commission.

The claim was heard 15 August 2000, and, in an opinion and award filed on 30 November 2000, Deputy Commissioner Pamela T. Young found that plaintiff's current condition was not caused by nor aggravated by the work-related injury of May 1995. The deputy commissioner also found that plaintiff's current medical condition and his disability were caused by a rare neurological disorder called Chronic Inflammatory Demyelinating Polyneuropathy ("CIDP"), which preexisted plaintiff's injuries that had resulted from the May 1995 fall. Accordingly, the deputy commissioner granted defendants' motion to terminate plaintiff's benefits.

In an opinion and award filed 9 October 2001, the Full Commission affirmed and adopted in whole the deputy commissioner's findings of fact, conclusions of law, and award. Plaintiff now appeals.

BACKGROUND

Below are some of the facts found by the Full Commission:

1. At the time of the hearing before the Deputy Commissioner, plaintiff was 47 years old and employed as a truck driver by defendant-employer. Plaintiff began working for defendant-employer in 1993.

2. Prior to 4 May 1995, plaintiff had suffered back problems. In 1981, plaintiff reported that he sought medical care for persistent back problems. Again, in 1987, plaintiff suffered a back injury while lifting materials at work. He was taken out of work for a period of nine months, but did not undergo any type of surgical intervention.

3. On 4 May 1995, plaintiff was in the course of driving a tractor-trailer for defendant-employer when he stopped at a truck stop. On his way to the shower, plaintiff slipped on the wet floor and fell to the ground. Thereafter, he felt pain in his neck and lower back.

. . .

5. Plaintiff complained of neck and back pain after his injury. After plaintiff completed his truck route and returned home, he went to the emergency room at Moore Regional Hospital.

6. On 8 May 1995, plaintiff presented to his local primary care facility complaining of back and neck pain. Dr. Ed Carey examined plaintiff. Dr. Carey diagnosed plaintiff with lumbosacral strain and prescribed anti-inflammatory medication. Initially, plaintiff's condition seemed to improve.

7. Plaintiff was evaluated by Dr. Shupeck on 26 June 1995. Dr. Shupeck diagnosed plaintiff with musculoskeletal pain with multiple diffuse symptoms. He recommended that plaintiff undergo physical therapy to alleviate his symptoms. After a regime of physical therapy, Dr. Shupeck found that plaintiff still had residual back pain and give-way weakness in his right leg; however, plaintiff's neurological examination was stable and his strength intact. A bone scan performed on 18 August 1995 was normal. By 23 October 1995, plaintiff was improving. He was able to perform yard work without complaints of pain, able to walk long distances without any giving way of his right leg and able to drive for at least 45 minutes.

8. Sometime thereafter, plaintiff's condition deteriorated with plaintiff complaining of increased weakness in his right leg. Dr. Shupeck ordered a myelogram and CT scans to rule out any disc problems. These tests were unremarkable, indicating some degenerative changes but no herniated discs.

9. Plaintiff was referred to a neurologist for another opinion as to his condition. Dr. Bruce Solomon examined plaintiff on 13 December 1995. Dr. Solomon's examination of plaintiff was normal and he diagnosed plaintiff with chronic low back pain due to plaintiff's subjective complaints of back pain. Dr. Solomon noted that many of plaintiff's symptoms were not physiologic and recommended a neuropsychological examination. In Dr. Solomon's opinion, plaintiff's sensory examination did not follow any pat-

tern and his gait problems were clearly not typical of any neurological disease. Dr. Solomon ordered additional MRI's of the lower thoracic spine and lumbar spine for completeness, both of which were generally normal with mild degenerative changes.

10. Dr. Solomon referred plaintiff to the Fayetteville Pain Clinic for management of plaintiff's continued symptoms. Plaintiff was initially evaluated at the Cape Fear Valley Pain Management Center on 21 February 1996. At that time, it was noted that plaintiff complained of stiffness in his neck, give-way weakness in his right leg and weakness in his left arm. A plan was established in which plaintiff was to receive nerve block injections, trigger point injections and physical therapy.

11. Plaintiff underwent one series of nerve block injections and trigger point injections and although the Pain Clinic doctors recommended additional injections, plaintiff refused this treatment. On 26 November 1996, Dr. Kenneth Oswalt discharged plaintiff from the Pain Clinic, finding that plaintiff was "very functional" in spite of the pain. He further found that plaintiff had maximized his rehabilitation and had reached maximum medical improvement. Dr. Oswalt found no evidence of any functional disability or any permanent impairment.

12. On 27 February 1997, plaintiff returned to his family physician, Dr. Lam, for follow-up treatment and medication management. Dr. Lam continued to monitor plaintiff's condition, noting that his condition was generally unchanged during this period of time.

13. On 2 June 1998, plaintiff received an evaluation from Dr. Mark E. Brenner at the Pinehurst Surgical Center. Dr. Brenner found that plaintiff was exhibiting symptoms consistent with a myofascial pain syndrome. However, plaintiff's objective findings did not correlate with his subjective complaints. Dr. Brenner found that plaintiff was able to return to full-time work with some restrictions, specifically no lifting greater than 50 pounds and no bending, stooping, crawling and long distance truck driving. Dr. Brenner found that plaintiff had reached maximum medical improvement and that the objective findings from the examination did not support any permanent disability rating.

14. Plaintiff was also seen for an independent medical evaluation by Dr. Robert Elkins, an orthopaedic specialist, on 24 June 1999.

Dr. Elkins performed a complete physical examination on plaintiff and noted many instances of symptom magnification and pain accentuation. Based on his examination of plaintiff and the medical records which he reviewed, Dr. Elkins diagnosed plaintiff with low back pain by history, moderate symptom magnification and pain accentuation, probable malingering and a conversion reaction and/or psychophysiologic disorder. Dr. Elkins did not recommend any further treatment and could not find an orthopaedic basis for restricting plaintiff from further employment. Dr. Elkins also found that plaintiff's condition did not warrant any permanent disability rating.

15. Plaintiff was ultimately referred to and examined by Dr. David P. Fedder, an orthopaedic specialist, on 22 September 1998. At the time of this examination, plaintiff complained of give-way weakness in his right leg. Dr. Fedder ordered nerve conduction studies, EMG/NCV, in order to determine the cause for plaintiff's problems. These studies, which were performed on 26 October 1998, indicated evidence of an acquired sensory motor neuropathy with axonal and demyelinating features. Based on the results of this study, Dr. Fedder referred plaintiff to Dr. Henry Tellez, a neurologist.

16. Dr. Tellez began treating plaintiff on 4 December 1998. By examination and the performance of a series of laboratory work, Dr. Tellez diagnosed plaintiff with Chronic Inflammatory Demyelinating Polyneuropathy, CIDP, a neurological disorder which affect the nerves and causes damage not only to the nerves but also to their covering.

17. Dr. Tellez opined that CIDP is not associated with nor caused by trauma and that plaintiff's CIDP was not caused by plaintiff's work-related injury of 4 May 1995. Dr. Tellez further stated that CIDP cannot be aggravated or exacerbated by trauma and that plaintiff's fall in May 1995 was not a significant contributing factor to his current neurological condition, CIDP.

18. Plaintiff suffered from problems with pain and weakness in his lower extremities prior to his work related injury on 4 May 1995. Nine months prior to plaintiff's fall at work, plaintiff sought treatment from Dr. Lam for a balance and gait problem. At that time, plaintiff noted that his balance and gait were a life-long problem which had worsened within the past few months.

19. Plaintiff's CIDP pre-existed plaintiff's injuries suffered as a result of his fall on 4 May 1995. Plaintiff's current disability is caused by his neurological condition, CIDP.

20. The competent evidence in the record establishes that plaintiff no longer suffers from any condition which may be related to his fall of 4 May 1995. Plaintiff's continued complaints are related to his neurological condition, CIDP, and are not associated with any type of injury that may be related to his fall in May 1995.

21. Due to plaintiff's CIDP, permanent restrictions have been placed on his ability to work. These restrictions include: no working at heights, avoiding extreme changes in temperature, no prolonged standing, no stooping, no bending, light lifting, no skillful manipulations with fingers and hands, no commercial driving and no driving over two hours per day. Notwithstanding these restrictions, plaintiff is able to return to gainful employment.

The Full Commission concluded that plaintiff was not entitled to benefits and that:

1. Plaintiff suffers from a rare neurological disorder which has been diagnosed as Chronic Inflammatory Demyelinating Polyneuropathy (CIDP), and which pre-existed plaintiff's injuries suffered as a result of his fall on 4 May 1995. In the instant case, the competent evidence is insufficient to establish that plaintiff's current condition is related to any type of injury that plaintiff may have sustained related to his fall in May 1995. Plaintiff's fall in May 1995 was not a significant contributing factor to his current condition, nor did the fall aggravate or exacerbate plaintiff's condition; therefore, plaintiff is not entitled to continuing compensation under the Act. N.C. Gen. Stat. § 97-2.

2. Since no Industrial Commission Form 21 Agreement was entered into by the parties, plaintiff retains the burden of proving the nature and extent of his disability and that this disability is causally related to his work-related injury on 4 May 1995. However, plaintiff failed to carry his burden of proof in this case and therefore, he is not entitled to continuing benefits under the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-2.

Plaintiff now appeals.

ANALYSIS

On appeal of a worker's compensation decision, we are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). An appellate court reviewing a worker's compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and quotation marks omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). In reviewing the evidence, we are required, in accordance with the Supreme Court's mandate of liberal construction in favor of awarding benefits, to take the evidence "in the light most favorable to plaintiff." *Id.*

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

> the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determination 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 or another or believes one piece of evidence is more credible than another.

Id. at 116-17, 530 S.E.2d at 553.

Plaintiff argues that the Commission erred when it concluded that his May 1995 injury was not a significant contributing factor to his current condition and that the fall did not aggravate or exacerbate his condition. We disagree.

Here, the parties stipulated that plaintiff's injury was work-related. The primary issue before the Commission was whether plaintiff's compensable injury resulted in his continuing inability to earn wages. Plaintiff argued that it did, and defendant argued that any disability suffered by plaintiff was unrelated to his injury. Our courts have held that when a pre-existing, non-job-related disease or infir-

mity eventually causes an incapacity to work without any aggravation or acceleration of it by a compensable accident or by an occupational disease, the resulting incapacity so caused is not compensable. *Morrison v. Burlington Indus.*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981). Here, the Commission found that plaintiff suffered from a neurological disease, CIDP, that pre-existed his May 1995 fall but that his condition was not aggravated or affected by his injury. The Commission also found that plaintiff no longer suffers any effects from his accident and that his continued complaints are related to the neurological condition.

Although plaintiff presented evidence to the contrary, we conclude, after careful review, that evidence in the record supports the Commission's findings. First, three doctors—doctors Tellez, Elkins, and Lam—all agreed that CIDP is not associated with nor caused by trauma. As Dr. Tellez testified:

> Q: Are you, Doctor, connecting his condition with the fall of 1995?
>
> A: No ma'am.
>
> Q: Okay. Okay. You are not—it is not your opinion that the fall caused Mr. Drakeford's condition, is it?
>
> A: You're right, uh-huh.

Moreover, there was evidence to support the finding that plaintiff suffered from CIDP prior to the date of the work-related injury. The stipulated medical records indicate that plaintiff sought treatment from his family doctor nine months prior to his fall in May 1995. On 22 August 1994, Dr. Lam evaluated plaintiff for his complaints of unsteady balance and ataxic gait, symptoms of CIDP. Plaintiff described the problem as a life-long one that had worsened within the past few months.

Plaintiff also saw a neurologist, Dr. Malcolm Shupeck, for his continued complaints of pain. Many of the symptoms of which he complained—pain in the right leg, numbness in the right leg to the ankle, and weakness in the right leg—were symptoms associated with the as-yet-undiagnosed CIDP. In addition, several diagnostic tests were performed on plaintiff, all with negative results. A bone scan was performed in August 1995, which was normal. A myelogram was performed in November 1995—again, the results were normal. A post-myelogram CT scan of the lumbar spine and a CT scan of the

cervical spine were performed in November 1995. These too were essentially normal. An MRI of plaintiff's lower thoracic spine and lumbar spine, in December 1995, was normal, with the exception of some mild degenerative changes. An MRI of plaintiff's neck, in July 1997, was also normal with some degenerative changes noted.

The doctors and specialists who examined and treated plaintiff after his injury all failed to find any objective basis for plaintiff's complaints of neck and back pain. Dr. Solomon, who treated plaintiff from December 1995 through January 1996, found that plaintiff's examination was normal and that many of his symptoms were not physiologic in nature. Dr. Oswalt, who treated plaintiff from February 1996 through November 1996, found that plaintiff was "very functional" and that he had maximized his rehabilitation and showed no evidence of any functional impairment. Plaintiff was also seen by two orthopaedic specialists, Dr. Brenner in June 1998 and Dr. Elkins in 1999. Neither found any objective findings to support plaintiff's subjective complaints, and both agreed that plaintiff needed no further treatment from an orthopaedic standpoint. Dr. Brenner also opined that plaintiff had reached his pre-accident status at the time he examined him, in June 1998.

We do note that Dr. Lam testified that he believed that plaintiff suffered from mild degenerative disc disease and myofascial pain syndrome and that these conditions were either caused by or materially aggravated by plaintiff's accident. Dr. Lam is a family practitioner, however, and is not an orthopaedic doctor. Moreover, Dr. Elkins, who is certified in orthopaedics, disagreed with Dr. Lam's assessment. He did not find any indication that plaintiff suffered from either degenerative disc disease or myofascial pain syndrome:

> Q: . . . Sir, we have taken the deposition of Dr. Lam in this matter, and Dr. Lam has diagnosed or has found that Mr. Drakeford had a degenerative disk disease. Did you find any indication that Mr. Drakeford had a degenerative disk disease?
>
> A: No, but—I didn't find any evidence of degenerative disk disease, but everybody who drives a truck at his age has degenerative disk disease, including me and probably half the people at this table. So degenerative disk disease means that your disks are getting old. It doesn't necessarily mean that they are responsible for a problem.
>
> . . .

Q: Did you find any—did you find that Mr. Drakeford had symptoms of degenerative disk disease?

A: No.

The Full Commission chose to credit Dr. Elkins' testimony as opposed to that given by Dr. Lam. As indicated earlier, the Full Commission is the "sole judge of the weight and credibility of the evidence" and does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. We conclude that ample evidence in the record supported the Commission's findings of fact.

Next, we examine whether the findings of fact support the Commission's conclusions of law. We believe that they do. Findings of fact numbers 2, 6, 7, 9, 13, 14, 16, 17, 18, 19, and 20, among others, specifically describe plaintiff's injury, his subsequent improvement, and his ongoing and pre-existing neurological condition. Thus, we reject plaintiff's argument.

CONCLUSION

For the reasons set forth above, we affirm the decision of the Industrial Commission.

Affirmed.

Judges MARTIN and STEELMAN concur.

IN THE MATTER OF: ZOE McKINNEY, DOB: 02/28/00

No. COA02-1307

(Filed 17 June 2003)

Termination of Parental Rights— *motion in the cause—subject matter jurisdiction*

The trial court erred by terminating respondent mother's parental rights based on petitioner Department of Social Services' motion in the cause, because: (1) petitioner's motion in the cause was insufficient when it nowhere asks for the termination of respondent's parental rights, and thus, it did not confer jurisdiction on the trial court; and (2) the Court of Appeals

may review the record to determine if subject matter jurisdiction exists in a case regardless of whether the issue is raised by the parties.

Appeal by respondent from order entered 26 April 2002 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 19 May 2003.

Northen Blue Law Firm, by Carol J. Holcomb and Samantha H. Cabe, for petitioner-appellee Orange County Dept. of Social Services.

Epting & Hackney, by Karen Davidson, for petitioner-appellee Guardian ad Litem.

Winifred H. Dillon, for respondent-appellant.

LEVINSON, Judge.

Respondent mother (Michelle McKinney) appeals from an order terminating her parental rights in her daughter, Zoe McKinney [hereinafter juvenile]. The factual and procedural history of this case is summarized as follows: The juvenile was born on 28 February 2000. When the juvenile was approximately seven months old, the Orange County Department of Social Services [hereinafter petitioner] filed a petition alleging neglect and dependency and naming both of the juvenile's parents as respondents. The juvenile initially was placed with her maternal grandparents, Thomas and Linda Elliott; however, on 13 November 2000, District Court Judge M. Patricia DeVine entered an order placing temporary custody of the juvenile with petitioner. The case was continued several times during the following six months, and the juvenile's custody remained with petitioner. On 6 March 2001, Judge DeVine entered an order concluding in relevant part that as to respondent, the juvenile was both "a dependent juvenile within the meaning . . . of N.C.G.S. [§] 7A-517(13)[,]" and a "neglected juvenile[] within the meaning and scope of N.C.G.S. [§] 7A-523(21)[.]" (We note that N.C.G.S. ch. 7A was repealed effective 1 July 1999 and recodified in N.C.G.S. ch. 7B, art. 11. Because all relevant proceedings in the instant case occurred after 1 July 1999, the corresponding provisions of N.C.G.S. ch. 7B are applicable, rather than N.C.G.S. ch. 7A.) The trial court also concluded that custody should remain with petitioner, and ordered that further efforts at reunification be ceased and that petitioner file a petition to terminate parental rights within the following sixty (60) days.

On 29 March 2001 petitioner filed a document captioned "Motion in the Cause." On 26 April 2001 respondent moved to dismiss petitioner's motion, in part on the basis that petitioner's motion failed to seek or request any relief. Respondent's motion was summarily denied on 18 September 2001. On 26 April 2002 Judge Joseph Moody Buckner entered an order terminating respondent's parental rights in the juvenile. From this order, respondent appeals and asserts errors not associated with subject matter jurisdiction. Because we determine that petitioner's "Motion in the Cause" was insufficient to constitute a petition for termination of parental rights, and thus did not confer jurisdiction on the trial court, the order terminating respondent's parental rights must be vacated.

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (citing 1 Restatement (Second) of Judgments § 11, at 108 (1982)), *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citing W. Shuford, *N.C. Civil Practice and Procedure* § 12-6 (1981)). Moreover, a court's inherent authority does not allow it to act where it would otherwise lack jurisdiction. "Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice *within the scope of their jurisdiction. In re Transportation of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citing 20 Am. Jur. 2d Courts § 78 (1965)). "[T]he inherent powers of a court do not increase its jurisdiction but are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Hopkins v. Barnhardt*, 223 N.C. 617, 619-20, 27 S.E.2d 644, 646 (1943).

N.C.G.S. § 1A-1, Rule 2 (2001), provides in relevant part that: "There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action." Under N.C.G.S. § 1A-1, Rule 3 (2001), "[a] civil action is commenced by filing a complaint with the court." Accordingly, jurisdiction is dependent upon the existence of a valid motion, complaint, petition, or other valid pleading:

> *A court* cannot undertake to adjudicate a controversy on its own motion; rather, it *can adjudicate a controversy* only when a party presents the controversy to it, and then, *only if it is presented in the form of a proper pleading.* Thus, before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.

In re Transportation of Juveniles, 102 N.C. App. at 808, 403 S.E.2d at 558-59 (emphasis added) (where "no action or proceeding had been commenced . . . the district court was without jurisdiction to enter an order") (citing 20 Am. Jur. 2d *Courts* § 94 (1965)). Similarly, in *Freight Carriers v. Teamsters Local*, 11 N.C. App. 159, 162, 180 S.E.2d 461, 463, *cert. denied*, 278 N.C. 701, 181 S.E.2d 601 (1971), the appellee filed a document that "did not purport to be a complaint and cannot be held to be one[,] . . . [and which] was not properly captioned as required by Rule 10(a)[, and in which] . . . there was no demand for relief made in the document as required by Rule 8(a)(2)[.]" This Court held that "no complaint had been filed by plaintiff" and thus "the [court] never acquired jurisdiction[.]" *Id.* at 160-61, 180 S.E.2d at 463.

To be valid, a pleading or motion must include a request or demand for the relief sought, or for the order the party desires the trial court to enter:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, *and shall set forth the relief or order sought.* The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

N.C.G.S. § 1A-1, Rule 7(b)(1) (2001) (emphasis added). *See Farm Lines, Inc. v. McBrayer*, 35 N.C. App. 34, 40, 241 S.E.2d 74, 78 (1978) (trial court erred by granting relief not sought in motion, because motion failed to comply with requirement of Rule 7(b)(1) that it "set forth the relief or order sought").

The Rules of Civil Procedure apply to proceedings for termination of parental rights:

> The conclusion that G.S. 1A-1, Rule 17(c)(2), Rules of Civil Procedure, applies [to termination of parental rights proceedings] is inescapable. All remedies in the courts of this State

> divide into (1) actions or (2) special proceedings. [N.C.]G.S. § 1-1. A proceeding to terminate parental rights is . . . either a civil action or a special proceeding, . . . [and thus] the Rules apply, G.S. 1-393, except where a different procedure may be prescribed by statute.

In re Clark, 303 N.C. 592, 598, n.3, 281 S.E.2d 47, 52 n. 3 (1981); *see also In re Hodge*, 153 N.C. App. 102, 105, 568 S.E.2d 878, 880 (2002) ("proceedings under the Juvenile Code are civil in nature, and accordingly, 'proceedings in juvenile matters are to be governed by the Rules of Civil Procedure.' ") (quoting *Matter of Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988)); *In re Brown*, 141 N.C. App. 550, 551, 539 S.E.2d 366, 368 (2000), *cert. denied*, 353 N.C. 374, 547 S.E.2d 809 (2001) ("because a termination of parental rights proceeding is civil in nature, it is governed by the Rules of Civil Procedure unless otherwise provided") (citing *In re Bullabough*, 89 N.C. App. at 179, 365 S.E.2d at 646).

Under N.C.G.S. § 7B-200(a)(4) (2001), the district court has "exclusive, original jurisdiction over . . . [p]roceedings to terminate parental rights." The district court has "exclusive original jurisdiction to hear and determine *any petition or motion* relating to termination of parental rights[.]" N.C.G.S. § 7B-1101 (2001) (emphasis added). However, in the absence of a proper petition, the trial court has no jurisdiction to enter an order for termination of parental rights. *See In re Ivey*, 156 N.C. App. 398, 401, 576 S.E.2d 386, 389 (2003) ("[T]he trial court erred in [entering order for non-secure custody] . . . where no petition had been filed and the trial court did not have jurisdiction over the child."); *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993) (termination of parental rights order vacated for lack of subject matter jurisdiction where petition not verified).

In the present case, an examination of petitioner's motion reveals that it nowhere asks for the termination of respondent's parental rights. The document is captioned generally as a "Motion in the Cause"; thus, its title does not state the relief desired. Below the caption is stated, "NOW COMES [PETITIONER] BY AND THROUGH THEIR UNDERSIGNED COUNSEL WHO RESPECTFULLY PRAYS THE COURT AS FOLLOWS[.]" Thereafter petitioner sets out seven paragraphs containing factual allegations as follows:

> 1. Zoe McKinney is a juvenile who is now in the custody of the Orange County Department of Social Services. . . .

2. The birth mother of Zoe McKinney is Michelle McKinney. . . . The birth father is John McKinney. . . .

3. A Permanency Planning hearing was held on February 1, 2001 and the recommendation of the [DSS] was that a Termination of Parental Rights action be initiated. The Court ordered that such an action should be filed.

4. As to Respondent Mother, she is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile with the meaning of NCGS 7B-101, and there is a reasonable probability that such incapability will continue for the foreseeable future. . . .

a. Respondent has a long-standing history of emotional and psychological instability. . . .

5. As to Respondent Father and Respondent Mother, the above named juvenile is a neglected juvenile within the meaning and scope of N.C.G.S. 7A-523(21) . . . [and did] not receive proper care, supervision, or discipline from her parents . . . .

6. No Guardian of the Person has been appointed and on information and belief, no other state or jurisdiction has considered the issue of the custody of [the juvenile]. . . .

7. It is in the best interest of [the juvenile] that the parental rights of her birth parents be terminated.

At the conclusion of petitioner's recitation of allegations, the motion states in all caps: "Now wherefore, the [petitioner] respectfully prays the court" followed by a blank area above the signature of counsel.

The title, or caption, of petitioner's motion does not state that it is a petition for termination of parental rights. Nor does the motion reference any of the statutory provisions governing termination of parental rights. Petitioner's motion does not seek a termination of parental rights hearing, or request that the court issue an order of termination of parental rights. Indeed, the motion fails to request *any* relief, judgment, or order from the trial court. Nor does the petitioner's use of the word "pray" establish what relief is sought, as petitioner does not "pray" *for* any desired relief. Moreover, shortly after petitioner filed its motion, respondent moved to dismiss petitioner's "motion in the cause" in part on the basis that the motion "failed to state, in its Motion in the Cause, any claim or demand for relief whatsoever and should therefore be dismissed."

The law is settled that jurisdiction cannot be created by the parties' stipulation, consent, or waiver:

> Respondent did not lose her right to challenge the custody jurisdiction of the Superior Court of Stanly County by failing to appeal from the order[.] . . . 'Jurisdiction over the subject matter cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to demur or object to the jurisdiction is immaterial.'

In re Custody of Sauls, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967) (quoting 1 Strong, N.C. Index, Courts § 2 (1957)); *see also Howard v. Coach Co.*, 211 N.C. 329, 331, 190 S.E. 478, 479 (1937) (a party "cannot by consent or by appearance confer jurisdiction when there is none in law"); *Lockamy v. Lockamy*, 111 N.C. App. 260, 262, 432 S.E.2d 176, 177 (1993) ("the fact that both parties participated in the equitable distribution hearing does not save plaintiff. Jurisdiction over the subject matter cannot be conferred upon a court by consent, waiver or estoppel."); *DeGree v. DeGree*, 72 N.C. App. 668, 670, 325 S.E.2d 36, 37 ("Although the parties stipulated in a pre-trial conference 'that the court has jurisdiction of the parties and of the subject matter,' we find such to be ineffective in conferring jurisdiction upon the court."), *disc. review denied*, 313 N.C. 598, 330 S.E.2d 607 (1985).

Nor is evidence that a party planned to file a motion, or announced an intention to file a complaint sufficient to confer jurisdiction. In *Lockamy*, 111 N.C. App. at 261-62, 432 S.E.2d at 177, the plaintiff alleged in her initial complaint that she "*anticipate[d]* that an action for . . . equitable distribution shall be filed when it is appropriate to do so." In a subsequent order granting absolute divorce, the trial court stated that "all matters of . . . Equitable Distribution . . . are reserved for future disposition in a separate pending action." *Id.* However, because "no such separate pending action existed at the time of the judgment of divorce" this Court held that the trial court lacked subject matter jurisdiction to enter an equitable distribution order. *Id.*

Furthermore, a trial court's general jurisdiction over the type of proceeding or over the parties does not confer jurisdiction over the specific action. *See Everette v. Taylor*, 77 N.C. App. 442, 444, 335 S.E.2d 212, 214 (1985) ("court erred in granting a permanent injunction when the only matter before the court was a hearing on whether to extend the temporary restraining order").

We recognize that a party's failure to brief a question on appeal ordinarily constitutes a waiver of the issue. *See In re Faircloth*, 153 N.C. App. 565, 581, 571 S.E.2d 65, 75 (2002) (where respondent-father failed to argue certain issues on appeal from order terminating his parental rights, "respondent ha[d] abandoned these issues on appeal" pursuant to N.C.R. App. P. 10(a) and 28(a)). However, regardless of whether subject matter jurisdiction is raised by the parties, this Court "may review the record to determine if subject matter jurisdiction exists in this case." *Foley v. Foley*, 156 N.C. App. 409, 412, 576 S.E.2d 383, 385 (2003). "[A] court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000).

Because we resolve this appeal on the basis of subject matter jurisdiction, it is unnecessary for us to consider the merits of respondent's motions for a writ of *certiorari*, and to amend the record, and these motions are therefore denied. We further conclude that petitioner's "Motion in the Cause" did not constitute a petition for termination of parental rights, and thus that the trial court lacked jurisdiction to enter an order for termination of parental rights. Accordingly, the order for termination of parental rights is vacated without prejudice to petitioner's right to bring a proper petition before the court.

Vacated.

Chief Judge EAGLES and Judge BRYANT concur.

MALCOLM L. BAILEY, INDIVIDUALLY AND MALCOLM L. BAILEY D/B/A VIRGINIA CAROLINA TOBACCO WAREHOUSE, INC.; BIG THREE WAREHOUSE, INC., A VIRGINIA CORPORATION; SOUTH GA. GOLDEN LEAF, INC., A GEORGIA CORPORATION; CAROLINA WAREHOUSE, INC., A SOUTH CAROLINA CORPORATION; CAROLINA TOBACCO WAREHOUSE, INC., A SOUTH CAROLINA CORPORATION; CENTER TOBACCO WAREHOUSE, INCORPORATED, A NORTH CAROLINA CORPORATION; DRAKE JOYCE; LYNCH'S TOBACCO WAREHOUSE, INC., A SOUTH CAROLINA CORPORATION; NEW DUPLIN TOBACCO WAREHOUSE, INC., A NORTH CAROLINA CORPORATION; NEW INDEPENDENT WAREHOUSES, LIMITED PARTNERSHIP, A NORTH CAROLINA LIMITED PARTNERSHIP; PEPPER'S WAREHOUSE, INC., A NORTH CAROLINA CORPORATION; PLANTERS WAREHOUSE, A VIRGINIA PARTNERSHIP; PLANTERS WAREHOUSE OF ROXBORO, INC., A NORTH CAROLINA CORPORATION; STAR-NEW HOME TOBACCO WAREHOUSE, INC., A SOUTH CAROLINA CORPORATION; AND W.W. (BILLY) YEARGIN, III, INDIVIDUALLY AND W.W. BILLY YEARGIN, III D/B/A YEARGIN TOBACCO WAREHOUSE, PLAINTIFFS V. FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION, A NORTH CAROLINA CORPORATION; BRUCE L. FLYE, PRESIDENT IN HIS OFFICIAL CAPACITY; LIONEL S. EDWARDS, GENERAL MANAGER AND SECRETARY IN HIS OFFICIAL CAPACITY; TRI-COUNTY TOBACCO WAREHOUSE, INC., A GEORGIA CORPORATION; JAMIE A. BRANNEN D/B/A BRANNEN'S TOBACCO; PLANTERS AND GROWERS GOLDEN LEAF WAREHOUSE, INC., A SOUTH CAROLINA CORPORATION; JOHNNY SHELLEY D/B/A BIG L WAREHOUSE; JOEY HARDIN D/B/A PEOPLES WAREHOUSE; SAMPSON TOBACCO WAREHOUSE, INC., A NORTH CAROLINA CORPORATION; JOE PARKER D/B/A KINSTON MARKETING CENTER; ROGER'S WAREHOUSE, INC., A NORTH CAROLINA CORPORATION; LIBERTY TOBACCO WAREHOUSE, INC., A NORTH CAROLINA CORPORATION; KENNETH KELLY D/B/A LIBERTY WAREHOUSE; ROBERT BROADWAY D/B/A LIBERTY WAREHOUSE; WILLIAM EDWARD STEPHENSON D/B/A BRIGHTLEAF-RIVERSIDE; GRANVILLE WAREHOUSE, INC., A NORTH CAROLINA CORPORATION; OLD BELT FARMERS COOPERATIVE, INC., A NORTH CAROLINA CORPORATION; MOTLEY'S TOBACCO WAREHOUSE, INC., A VIRGINIA CORPORATION; EXCHANGE WAREHOUSE, INC., A VIRGINIA CORPORATION, DEFENDANTS

No. COA02-1026

(Filed 17 June 2003)

1. Monopolies and Restraints of Trade— market centers subsidizing tobacco warehouses—anti-trust laws

The trial court did not err in an action for injunctive relief claiming defendant nonprofit marketing association was engaged in unlawful actions in restraint of trade by denying plaintiff tobacco warehouses' motion for summary judgment and by granting summary judgment in favor of defendant even though plaintiffs contend defendant's creation of market centers subsidizing tobacco warehouse operations is not exempt under North Carolina's anti-trust laws, because: (1) the agreement to waive fees and commissions normally associated with tobacco warehouses was solely between defendant and its members and fell

within the exemption under N.C.G.S. § 54-141 for agreements between the association and its members; (2) N.C.G.S. § 54-151(1) provides that defendant is authorized to engage in any activity, including financing, related to the marketing, selling, storing, and handling of any agricultural product produced or delivered to it by its members; (3) N.C.G.S. § 54-151(6) provides that defendant is empowered to hold such ownership rights in real property as may be necessary or convenient for the conducting and operation of any of the business of the association; and (4) N.C.G.S. § 54-152 grants defendant the power to require its members to sell their products exclusively at board-created warehouses, and therefore, defendant can create commission-free market centers at which its members have the option of selling their products.

2. Constitutional Law— North Carolina—law of the land clause—monopolies

The trial court did not err in an action for injunctive relief claiming defendant nonprofit marketing association was engaged in unlawful actions in restraint of trade by denying plaintiff tobacco warehouses' motion for summary judgment and by granting summary judgment in favor of defendant even though plaintiffs contend defendant's actions violate Article I, Sections 19 (law of the land clause), 32 (exclusive emoluments), and 34 (monopolies) of the North Carolina Constitution, because: (1) the trial court did not address Section 32 in its order and opinion, and there is nothing in the record indicating this particular constitutional issue was raised below; and (2) the claims under Sections 19 and 34 fail since the prohibition against deprivation of property does not extend to actions against private individuals but must instead concern state actors, and defendant is not a state actor.

Appeal by plaintiffs from order and opinion dated 10 April 2002 by Judge Ben F. Tennille in Wilson County Superior Court. Heard in the Court of Appeals 23 April 2003.

Allen and Pinnix, P.A., by Michael L. Weisel and M. Jackson Nichols; and Penry Riemann PLLC, by J. Anthony Penry, for plaintiff appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by C. Ernest Simons, Jr., Donald H. Tucker, Jr., and Jackson W. Moore, for defendant appellees.

BRYANT, Judge.

Malcolm L. Bailey, individually and doing business as Virginia Carolina Tobacco Warehouse, Inc., and several other tobacco warehouses (collectively plaintiffs) appeal an order and opinion dated 10 April 2002 denying their motion for summary judgment and request for a permanent injunction and granting summary judgment in favor of Flue-Cured Tobacco Cooperative Stabilization Corporation (Stabilization).[1]

Plaintiffs brought an action for injunctive relief claiming Stabilization was engaged in unlawful actions in restraint of trade. The facts as presented in the trial court's April 10 order are undisputed:

> {6} [Stabilization] is a not-for-profit organization that is owned by and serves the flue-cured tobacco farmers of Florida, Alabama, Georgia, South Carolina, North Carolina and Virginia. Stabilization is organized as a "marketing association" under North Carolina General Statutes, Chapter 54, Article 19. Its mandate under this enabling statute . . . is broad . . . .
>
> {7} Since its inception in 1946, Stabilization's primary function has been to administer the price component of the federal tobacco program under contractual agreement with the United States Department of Agriculture's (USDA) Commodity Credit Corporation (CCC). The program was established under the Agricultural Adjustment Act of 1938 as a means to raise and stabilize tobacco prices and income. . . .
>
> {8} Under the agreement with the CCC and auction warehouses, Stabilization makes loans to eligible flue-cured tobacco growers whose tobacco has been grown within the allotted quota and does not bring the minimum price established for that grade at the auction market. Funds to advance loans to farmers are borrowed from the CCC. The farmers' tobacco that is consigned to Stabilization is pledged as collateral to CCC for the money borrowed.
>
> {9} In order to administer the price support program, the USDA requires that all tobacco that Stabilization acquires through the program be graded at auction. . . . Without the grade, a price level

1. Following the trial court's April 10 order, plaintiffs filed a notice of voluntary dismissal without prejudice as to the warehouse defendants listed in the caption.

cannot be determined, and farmers therefore are not able to take advantage of the program.

{10} The price supports made possible by the federal tobacco program provide a "safety net" for growers . . . . By ensuring farmers a minimum price for their crop every year, farmers can plan, borrow and invest in their farms, thus permitting thousands of individual farmers to pursue their livelihoods with a degree of security that would otherwise not be available.

{11} For most of the past century, the primary method tobacco farmers used to sell their crops was through one of many auction warehouses located throughout the region. Recently, however, the auction warehouse system has been facing a severe challenge. Rather than designating their crop for sale at auction, many farmers are choosing to sell their crop under contract directly to buyers, such as large tobacco companies. The reason is straightforward: Over the past two years, the price that Stabilization's cooperative members have received for tobacco sold through the auction warehouse system is approximately nine to ten cents per pound less than they would have received if they sold the same tobacco under contract outside the auction system. This price differential subsumes two components: First, the average price per pound of tobacco is approximately five cents per pound higher than that received on the auction floor. Second, the farmers must pay the warehouse operators fees and commissions that reduce the net price the farmers receive at auction by approximately five cents per pound.

{12} These higher prices available to farmers who are willing to contract directly with the buyers has impacted the traditional auction system dramatically. From 2000 to 2001[,] the percentage of tobacco production sold under contract to the tobacco companies increased from 10 percent to over 80 percent. . . . Over the same period, the total number of independent warehouses in Stabilization's geographic area decreased from 147 to 67. . . .

{13} Overall, if these grower selling patterns continue to favor direct contract sales rather than auction sales, the existence of the auction system may be threatened, and, accordingly, the continuation of the federal tobacco program price supports would also be jeopardized.

{14} Throughout most of its existence, Stabilization has had little or no involvement with the operation of tobacco warehouses. In

2001, however, Stabilization established a pilot program involving two warehouses, located in Wilson, North Carolina, and Statesboro, Georgia, that it would operate. According to Stabilization, the purpose of this program was to see whether Stabilization could encourage a sufficient number of its members to stay with the auction system if Stabilization took the auction "in house" for the benefit of its members. For the 2002 season, Stabilization's board of directors considered and approved a program to open fourteen new "marketing centers" in Stabilization's territory. In an effort to make these centers an economically viable option for growers who felt financial pressure to sell their crop directly under contract, Stabilization's board agreed to waive the fees and commissions normally charged by warehouse operators. In effect[,] the Stabilization Board decided to use its cash reserve to subsidize the operation of the market centers. That subsidy directly benefit[t]ed its members, who did not have to pay fees and commissions if they used the market centers.

{15} Warehouses chosen as marketing centers would be leased for five months out of the year and would not be purchased by Stabilization. The lease agreements give the lessors no rights with respect to the operation of the marketing centers. Additionally, the lessors have no involvement in the decision to charge or waive fees, and they do not participate in the profits or losses of the marketing centers. Stabilization has no obligation to renew the lease beyond the current marketing season.

{16} In accordance with its agreement with the CCC, Stabilization submitted its plan for the marketing centers to the CCC. The USDA's Office of General Counsel reviewed and approved the plan.

In addressing the question whether Stabilization's activity violated North Carolina's antitrust laws, the trial court reviewed N.C. Gen. Stat. §§ 54-141, -151, and -152(a) and concluded that the creation of no-fee market centers for the benefit of Stabilization's members was exempt from the antitrust laws. The trial court further concluded that Stabilization's actions did not violate Article I, Sections 19 and 34 of the North Carolina Constitution. Finally, the trial court noted that:

[Plaintiffs] believe that the tobacco farmers have only two choices. They can sell on contract directly to the manufacturers or, if they wish to protect themselves from the tobacco manufac-

> turers, they can sell at auction in public warehouses where they must pay commissions and fees. The [trial] court believes that they have a third option of using their own funds to provide auction services to themselves for free. The goals of the market center program are to insure the survival of the auction market and the federal price support system upon which so many small farmers depend. The Stabilization Board may contract with third parties to accomplish those goals.

The issues are whether: (I) Stabilization's creation of market centers subsidizing warehouse operations falls within the exemption under N.C. Gen. Stat. § 54-141 to North Carolina's antitrust laws and (II) plaintiffs can challenge the constitutionality of Stabilization's actions under Article I, Sections 19 and 34 of the North Carolina Constitution.

I

[1] Plaintiffs contend that Stabilization's creation of market centers subsidizing warehouse operations is an action in restraint of trade that is not exempt under section 54-141. We disagree.

Section 54-141 provides:

> No association organized [under chapter 54, article 19 of the Cooperative Organizations Act] shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarily, nor shall the marketing contracts or agreements between the association and its members, or any agreements authorized in this Subchapter be considered illegal or in restraint of trade.

N.C.G.S. § 54-141 (2001). In this case, Stabilization leased warehouse space without assigning any operational rights to the lessors. The agreement to waive fees and commissions normally associated with tobacco warehouses is thus solely between Stabilization and its members and consequently falls within the exemption for "agreements between the association and its members." *Id.* Furthermore, pursuant to N.C. Gen. Stat. § 54-151:

> Each association incorporated under this Subchapter shall have the following powers:
>
> (1) *To engage in any activity in connection with the* producing, *marketing, selling,* . . . storing, handling, or utiliza-

> tion *of any agricultural products produced or delivered to it by its members* and other farmers; . . . ; or in the *financing* of any such activities; or in any one or more of the activities specified in this section. . . .
>
> . . . .
>
> (6) To buy, *hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conducting and operation of any of the business of the association,* or incidental thereto.
>
> (7) *To do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein enumerated*; or conducive to or expedient for the interest or benefit of the association; *and to contract accordingly* . . . .

N.C.G.S. § 54-151 (2001) (emphasis added). Therefore, Stabilization is authorized to engage in any activity, including financing, related to the marketing, selling, storing, and handling of any agricultural product "produced *or* delivered to it by its members." N.C.G.S. § 54-151(1) (2001) (emphasis added). In addition, Stabilization is empowered to hold such ownership rights in real property as "may be necessary or convenient for the conducting and operation of any of the business of the association." N.C.G.S. § 54-151(6) (2001). In light of these specific powers and the catch-all provision of subsection (7), we conclude that Stabilization's creation and operation of the market centers also falls within the exemption for "agreements authorized in this Subchapter." N.C.G.S. § 54-141.

We further note that the trial court found additional authority under N.C. Gen. Stat. § 54-152 for the provision of commission-free warehouses. This section authorizes "[t]he association and its members [to] make and execute marketing contracts, requiring the members to sell . . . all or any specified part of their agricultural products or specified commodities exclusively to or through the association or any facilities to be created by the association." N.C.G.S. § 54-152(a) (2001). Such marketing contracts were upheld as constitutional in *Cooperative Ass'n v. Jones*, 185 N.C. 266, 117 S.E. 174 (1923). The trial court reasoned, and we agree, that since the section grants Stabilization the power to require its members to sell their products exclusively at board-created warehouses, it can certainly create commission-free market centers at which its members have the option of

selling their products. As such, there was ample statutory authority supporting the trial court's conclusion that Stabilization's actions in this case are exempt from North Carolina's antitrust laws.

II

[2] In their brief to this Court, plaintiffs further argue that Stabilization's actions violate Article I, Sections 19 (law of the land clause), 32 (exclusive emoluments), and 34 (monopolies) of the North Carolina Constitution. We first note that the trial court did not address section 32 in its order and opinion, and there is nothing in the record indicating this particular constitutional issue was raised below. Consequently, we do not address the applicability of section 32 to this case. *See State v. Cooke*, 306 N.C. 132, 137, 291 S.E.2d 618, 621 (1982) (citation omitted) (" 'a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal' ").

The trial court did rule that plaintiffs were not deprived of any property rights in violation of section 19 and that Stabilization's actions did not violate the prohibition against monopolies in section 34. According to section 19, "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. It is clear from this language that the prohibition against deprivation of property does not extend to actions against private individuals but must instead concern State actors. As our Supreme Court has held, "[t]he civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action." *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). Conversely, "the Constitution itself does not recognize or create rights which may be asserted against individuals." *Id.* at 787, 413 S.E.2d at 292-93; *see also Johnson v. Mayo Yarns, Inc.*, 126 N.C. App. 292, 298, 484 S.E.2d 840, 844 (1997) (Greene, J., concurring) ("the United States Constitution . . . does not secure rights to individuals against other individuals"). Although, in their brief to this Court, plaintiffs point to case law to support their position that "[u]nlike most constitutional provisions, [section 34 prohibiting monopolies] applies to litigation even in the absence of a State actor," the cited authority does not stand for this proposition. *See In re Hospital*, 282 N.C. 542, 193 S.E.2d 729 (1973) (involving the actions of a State licensing commission); *Records v. Tape Corp.*, 19 N.C. App. 207, 212, 198 S.E.2d 452, 456 (1973) (where, in a suit between private parties, constitutional argument was raised as a defense, but this

Court did not engage in a constitutional analysis). As Stabilization is not a State actor, we conclude that both plaintiffs' section 19 and 34 claims fail. Accordingly, the trial court did not err in denying plaintiffs' motion for summary judgment and in granting summary judgment in favor of Stabilization.

Affirmed.

Judges TIMMONS-GOODSON and GEER concur.

IN RE THE ESTATE OF: VERA YARBOROUGH WASHBURN, DECEASED

No. COA02-1029

(Filed 17 June 2003)

1. Trusts— delivery of property—stock certificates

The trial court did not err by distributing one stock certificate to a trust and another to the estate, with the dividends divided accordingly. The certificate delivered to the trust was signed over to the trust and delivered to the trustees, even though the signature was not guaranteed as required to transfer the stock on the corporate books. The second certificate was not found until after the testator's death and was neither endorsed nor delivered to the trustees.

2. Trusts— transfer of property—furniture and appliances

The trial court did not err by assigning furniture and appliances to a trust where an "Assignment of Assets" was sufficient as a legal assignment of the property to the trustees. In the absence of statutory guidelines, the intent of the parties to pass legal title is the sole guide for personal property. Here, the retention of the property by the settlor during her life was consistent with an intent to pass title because the trust provided that the income and principal were to be used for her benefit during her life.

3. Powers of Attorney— scope—transfer of funds to trust

Deposits to a trust account of funds from closed bank accounts were within the scope of a power of attorney that specifically granted authority for banking transactions

and tax matters. These transfers clearly constituted banking transactions.

4. Wills— transfer of property—power of attorney—will not changed

A principal's assets were transferred to a trust under a power of attorney without altering or revoking the will.

Appeal by trustees Jerry Scruggs and John Cabiness and by co-executors Sylvia E. Hutchins and J.D. Champion from order and judgment filed 7 January 2002 by Judge W. Robert Bell in Cleveland County Superior Court. Heard in the Court of Appeals 19 May 2003.

Deaton & Biggers, by A. Susan Biggers, for trustee appellants.

Essex Richards, P.A., by G. Miller Jordan, Lisa T. Kelly, and James C. Fuller; and Leslie C. Rawls for co-executor appellants.

BRYANT, Judge.

Jerry Scruggs (Scruggs) and John Cabiness (collectively the trustees) appeal an order and judgment entered 7 January 2002 distributing the assets of Vera Yarborough Washburn (Washburn) between her estate and a trust established by her prior to her death. Sylvia E. Hutchins and J.D. Champion, the co-executors of Washburn's estate, also appeal from the January 7 order.

In this order, the trial court made the following undisputed findings:

1. [Washburn] . . . died on October 23, 2000.

2. On December 22, 2000, the Cleveland County Clerk of Superior Court probated [her] Last Will and Testament . . . .

3. On December 22, 2000, Sylvia Hutchins and J.D. Champion, niece and nephew, respectively, qualified as Co-Executors of the Estate of . . . Washburn.

4. On September 16, 1999, . . . Washburn executed an Irrevocable Trust Agreement (hereinafter "Trust") appointing [the trustees].

5. Accompanying the Trust agreement was an "Assignment of Assets to Trust" . . . , which provides in part that all common stock, household furnishings and appliances, $550,000.00 in cash and an Oldsmobile automobile go to the Trust.

6. During October and November 1999, over $590,000.00 in funds [were] transferred from . . . Washburn to bank accounts in the name of the Trust. At the time of . . . Washburn's death, a total of over $612,000.00 had been received in trust accounts at Centura Bank from deposits and earnings.

7. At the time of her death, . . . Washburn was the record owner of two Branch Banking and Trust [(BB&T)] stock certificates totaling 27,016 shares, to wit:

a. BB&T stock certificate No. BBT080224 . . . for 13,508 shares, and

b. BB&T stock certificate No. BBT093753 . . . for 13,508 shares.

8. On the reverse side of stock certificate No. BBT080224 . . . appears the signature of . . . Washburn indicating a transfer on October 3, 1999[] of the stock certificate to the [t]rustees.

9. The signature of . . . Washburn on stock certificate No. BBT080224 . . . did not contain a "signature guaranteed" certification.

10. The trustees took possession of stock certificate No. BBT080224 . . . .

11. At the time of her death, . . . Washburn was in possession of stock certificate No. BBT093753 . . . , which was never delivered to the trustees.

12. In February or March 2001, following the death of . . . Washburn, the trustees located BB&T stock certificate No. BBT093753 . . . in . . . Washburn's residence. The reverse side of the stock certificate was blank, was not completed for transfer, was not signed by . . . Washburn nor was a signature guaranteed.

13. [Prior to Washburn's death,] [t]he trustees in November 1999 requested [BB&T] transfer ownership of all BB&T stock in the name of . . . Washburn to the Trust based upon the terms of the Trust agreement and assignment.

14. [BB&T] refused to make the transfer on its books on that basis and notified the trustees and . . . Washburn that the proper procedure for the transfer of the certificates on the records of the corporation[] would be to deliver to BB&T the duly executed stock certificates transferring ownership to the Trust. In the

event of a lost certificate, . . . Washburn would have to make an application for a replacement certificate and post an indemnity bond before the stock could be transferred to the Trust.

15. . . . Washburn and the trustees made no further attempts with [BB&T] to transfer any of the stock in the name of . . . Washburn to the Trust, pending trying to locate the certificate.

16. . . . Washburn continued as BB&T's record owner of the two BB&T stock certificates . . . and received in her name dividends from her stock totaling some $17,020.08 from September 16, 1999[] to the date of her death on October 23, 2000, which were deposited in trust bank accounts.

17. At the time of her death, . . . Washburn was the record title owner of the two BB&T [stock] certificates . . . .

18. The household furnishings and appliances remained in the possession of . . . Washburn from the date of the Trust until her death.

19. The Oldsmobile automobile title was not changed to the Trust and the vehicle remained in the possession of . . . Washburn from the date of the Trust until her death.

20. On September 18, 2000, . . . Washburn executed a deed of her residence to the trustees, which was filed at the register of deeds.

Based on these findings, the trial court concluded:

1. The assignment attached to the Trust agreement is insufficient to transfer all assets listed to the Trust.

2. [Washburn], with the requisite intent and delivery, did place in the [T]rust the following property:

A. All funds on deposit in trust accounts at Centura Bank as of October 23, 2000, and $50.00 [from the sale of an appliance in Washburn's residence after her death] deposited February 14, 2001.

B. The BB&T stock certificate No. BBT080224 representing 13,508 shares of BB&T stock.

C. All her household furnishings and appliances located in her home . . . .

D. [Washburn's] residence . . . .

3. Funds transferred to the Washburn [T]rust, including the $1,270.00 cash found in the decedent's home, or funds received after October 23, 2000, [totaling $11,847.11] are assets of the decedent's estate, except that one-half of each BB&T stock dividend check will belong to the Washburn [T]rust and one-half of each BB&T stock dividend check will belong to the decedent's estate until the certificates are divided on the BB&T corporate records between the [T]rust and the decedent's estate and dividend checks are issued accordingly.

4. The assets of . . . Washburn not transferred to the Trust are assets of the decedent's estate.

The record also contains a power of attorney issued by Washburn to allow Scruggs to act, *inter alia*, as her agent with respect to her banking transactions, tax matters, personal affairs, estate transactions, and gifts to charities.

The issues are whether: (I) the stock certificates, household furnishings, and appliances were properly conveyed to the Trust and thus became trust assets and (II) the deposit of funds into the Trust account by Scruggs as Washburn's power of attorney was proper.

I

> By definition, the creation of a trust must involve a conveyance of property, and before property can be said to be held in trust by the trustee, the trustee must have legal title. . . . Aside from the situation in which a settlor of a trust declares himself or herself trustee, separation of the legal and equitable interests must come about through a transfer of the trust property to the trustee.

90 C.J.S *Trusts* § 68, at 193-94 (2002) (footnotes omitted). Accordingly, "the owner must surrender control of the property which he or she has subjected to the alleged trust." 90 C.J.S. *Trusts* § 70, at 196; *see also Wescott v. Bank*, 227 N.C. 39, 42, 40 S.E.2d 461, 463 (1946) ("there must be a transfer of the title by the donor or settl[o]r for the benefit of another"); *Baxter v. Jones*, 14 N.C. App. 296, 307, 188 S.E.2d 622, 628 (1972) (citation omitted) (" '[i]n order to create an enforceable trust it is necessary that the donor or creator should part with his interest in the property to the trustee by an actual conveyance or transfer, and, where the creator has legal title, that such title should pass to the trustee' "). "[I]f the owner of prop-

erty makes a conveyance inter vivos of the property to another person to be held by him in trust for a third person and the conveyance is not effective to transfer the property, *no trust of the property is created.*" Restatement (Second) of Trusts § 32 (1959) (emphasis added).

BB&T Stock

[1] The trustees and the estate claim the trial court erred by failing to assign both stock certificate No. BBT080224 (Certificate 1) *and* stock certificate No. BBT093753 (Certificate 2) to them. The trustees, in support of their position, contend that the "Assignment of Assets" executed contemporaneously with the Trust was sufficient to transfer both stock certificates to the Trust. We disagree.

In order to determine the proper transfer of legal title to a security, we must look to Article 8 of the Uniform Commercial Code governing investment securities. Under Article 8, "a valid transfer of a certificated security requires both the indorsement and delivery of the certificate by its holder to the transferee." *Tuckett v. Guerrier*, 149 N.C. App. 405, 410, 561 S.E.2d 310, 313 (2002) (citing N.C.G.S. §§ 25-8-301, -304 (1999)); *see* Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 10.10, at 10-26 (7th ed. 2002) [hereinafter *Robinson*] ("[t]he title to a share certificate, and to the shares represented thereby, is normally transferred by the delivery of the certificate to the transferee, either duly endorsed or with a separate document containing a written assignment or a power of attorney to transfer the shares"). An " '[i]ndorsement' means a signature that alone or accompanied by other words is made on a security certificate in registered form or on a separate document for the purpose of assigning, transferring, or redeeming the security." N.C.G.S. § 25-8-102(a)(11) (2001). Delivery, in turn, "occurs when: (1) [t]he [transferee] acquires possession of the security certificate; [or] (2) [a]nother person . . . acquires possession of the security certificate on behalf of the [transferee]." N.C.G.S. § 25-8-301(a)(1)-(2) (2001).

In this case, the parties do not contest that Washburn indorsed Certificate 1 by signing it and designating the "Vera Y. Washburn Trust Fund c/o Jerry R. Scruggs and John W. Cabiness, Trustees" as transferee in the allotted space on the certificate. The evidence is also clear that Certificate 1 was delivered to the trustees before Washburn's death. The estate nevertheless contends that because Washburn's signature was not guaranteed as required to transfer the

stock on the corporate books, the transfer was not complete and could therefore not serve to create a trust in that stock. This argument is of no avail.

"A registration of . . . a [stock] transfer on the stock transfer books of the corporation is not necessary to complete the transfer of title." *Robinson* § 10.10, at 10-26. It simply means that "until the transfer is recorded on the stock transfer books, the corporation can treat the record holder as the true owner of the shares." *Id.*; *see also* N.C.G.S. § 25-8-306 (2001) (a guarantee merely warrants that the signature is genuine and that the person signing is the appropriate person to indorse the certificate and has the legal capacity to sign). Thus, in accordance with the statutory requirements for a valid transfer, the trustees acquired legal title of Certificate 1 when Washburn signed it over to the Trust and delivered it to the trustees. *See Wescott*, 227 N.C. at 42, 40 S.E.2d at 463; *Tuckett*, 149 N.C. App. at 410, 561 S.E.2d at 313. Certificate 2, on the other hand, which was not found until after Washburn's death, was neither indorsed nor delivered to the trustees. Under these circumstances, there was no transfer of legal title to Certificate 2 by Washburn to the trustees and the asset belongs to the estate. Therefore, the trial court did not err in distributing Certificate 1 to the Trust and Certificate 2 to the estate and dividing the respective dividends accordingly.

Household Furniture and Appliances

[2] The estate next contends the trial court erred in assigning to the Trust Washburn's furniture and appliances, items that remained in her possession until her death.

As discussed above, in order to create a valid trust in certain property, there must be a transfer of legal title by the settlor to the trustee. *See Wescott*, 227 N.C. at 42, 40 S.E.2d at 463. Generally, this can be accomplished by either "actual delivery of the . . . property or of a legal assignment thereof to the trustee, with the intention of passing legal title to him or her as trustee." 90 C.J.S. *Trusts* § 70, at 197. In the case of securities, our statutes define the proper method of conveying legal title. With respect to personal property such as furniture and appliances, however, there are no statutory guidelines to follow. Thus, we are solely guided by the intent of the parties. *Callaham v. Newsom*, 251 N.C. 146, 149, 110 S.E.2d 802, 804 (1959) ("[w]hen called upon to interpret a trust agreement or other contract, courts seek to ascertain the intent of the parties and, when ascertained, give effect thereto, unless forbidden by law").

We hold that in this case the "Assignment of Assets" was sufficient as a legal assignment of Washburn's furniture and appliances to the trustees. *See* 90 C.J.S. *Trusts* § 70, at 197. Furthermore, Washburn's retention of possession of the items during her lifetime was not inconsistent with the intention to pass legal title as the Trust provided that the income and/or principal were to be used for Washburn's benefit during her lifetime. The trial court therefore did not err in assigning the furniture and appliances to the Trust.

II

[3] Finally, the estate argues the trial court erred in concluding that all funds deposited in the Trust account prior to Washburn's death belonged to the Trust because $10,507.32 of these funds were deposited in violation of the power of attorney granted by Washburn to Scruggs. The deposits at issue consist of $10,038.32 in funds from SouthTrust Bank accounts Scruggs closed for Washburn and a $469.00 tax refund. The estate contends that these deposits exceeded the scope of Scruggs' power of attorney because the document did not authorize transfers to the Trust. We disagree.

"A power of attorney is an instrument in writing granting power in an agent to transact business for his principal." *Cabarrus Bank & Trust Co. v. Chandler*, 63 N.C. App. 724, 726, 306 S.E.2d 184, 185 (1983). Thus, "an agent is a fiduciary only pertaining to matters within the scope of his agency." *In re Will of Sechrest*, 140 N.C. App. 464, 472, 537 S.E.2d 511, 517 (2000). The power of attorney executed by Washburn specifically grants Scruggs the authority to act on Washburn's behalf with respect to her banking transactions and tax matters, and the transfers and deposits clearly constituted banking transactions. In addition, the designation of the funds to the Trust involved gifts to charities as the beneficiaries of the Trust were churches. Consequently, the deposits fell within the scope of the power of attorney.

[4] The estate further contends that an agent cannot transfer the principal's assets to a trust under a power of attorney and thereby change the dispositive provisions of the principal's will. The estate bases its argument on a 1977 article that engaged in a hypothetical discussion of an agent's powers based on an agent's lack of authority to create, alter, or revoke a principal's will. *See* William S. Huff, *The Power of Attorney—Durable and Nondurable: Boon or Trap*, Eleventh Annual Institute on Estate Planning 3-1, 3-10 (1977). This article, however, bears no weight on our analysis in light of

the binding precedent established by this Court "permit[ting] the conveyance of property which would comprise the estate under a will without revoking or altering that will." *Duncan v. Duncan*, 147 N.C. App. 152, 156-57, 553 S.E.2d 925, 928 (2001) (where the testator had entered an enforceable agreement not to revoke or alter her will and subsequently deeded away the property to be disposed of under the will, there was no breach of the agreement not to revoke or alter the will), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 800 (2002); *see also* N.C.G.S. § 31-5.6 (2001) ("[n]o conveyance . . . made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, . . . shall prevent the operation of the will with respect to any estate or interest in such real or personal estate *as the testator shall have power to dispose of by will at the time of his death*") (emphasis added). Accordingly, Scruggs was permitted to transfer the assets to the Trust under the power of attorney and the trial court did not err in concluding that all funds deposited in the Trust account prior to Washburn's death belonged to the Trust.

Affirmed.

Chief Judge EAGLES and Judge LEVINSON concur.

STATE OF NORTH CAROLINA v. COREY DORAN JONES

No. COA02-909

(Filed 17 June 2003)

1. Jury; Witnesses— witness questioned directly by jurors— no prejudice

There was no prejudice in allowing jurors to ask a witness about images in crime scene photographs even though the court did not follow the better practice of receiving written questions from the jury, holding a bench conference for objections, and reading the questions to the witness. Defendant did not carry his burden of proving that the questions and responses were so prejudicial that they resulted in an adverse verdict, particularly in light of the other strong evidence of guilt.

2. Drugs— forfeiture of funds—no conviction of Controlled Substances Act offense

A forfeiture of illegal drug money was vacated where defendant was not convicted of any crime described in N.C.G.S. § 90-112(a)(2).

Appeal by defendant from judgments entered 1 February 2002 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 14 May 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General James M. Stanley, Jr., for the State.

Richard G. Roose for defendant-appellant.

MARTIN, Judge.

Defendant was charged with the first degree murder of Anthony Mahoney, conspiracy to commit robbery with a dangerous weapon, and first degree burglary. A jury convicted him of second degree murder, conspiracy to commit robbery with a dangerous weapon, and first degree burglary. He appeals from the judgments entered upon the verdicts.

The State's evidence at trial tended to show that Mahoney was shot to death at his home in Fayetteville sometime between 10:00 p.m. and midnight on the evening of 26 January 1998. Nyron Pitterson, a friend of Mahoney's who was staying with him at the time, testified that he was in the living room when he heard a loud knock on the front door. Pitterson looked through the peep hole and recognized defendant and his cousin, both of whom he had met previously. Pitterson informed Mahoney, who was in a bedroom, that defendant and his cousin were at the door. Mahoney went to the door and Pitterson went into the kitchen. Pitterson heard Mahoney ask who was at the door and defendant respond "Corey." Pitterson heard the door open and immediately heard gunshots. Upon hearing the gunfire, Pitterson ran through a glass door in the kitchen. Pitterson testified that someone was firing at him as he ran through the backyard, and that the shooter chased him through the backyard, through a swamp area, and into an adjoining cul-de-sac. Pitterson was screaming for help, and a neighbor opened a door, let him inside, and contacted police.

Corporal J.B. Thomas testified that he and other officers entered Mahoney's house, which had been ransacked, and discovered

Mahoney, who appeared to be deceased. A forensic pathologist testified that Mahoney had been shot three times and died as a result of two gun shot wounds, one to the abdomen and one to the chest. Pitterson told police that defendant and his cousin had entered Mahoney's house and killed him, and he identified the two assailants from a photographic line-up. Pitterson told police he knew defendant lived with his girlfriend, Tomekia Burgos. A police K-9 team was used to track the perpetrators' trail and led police to a nearby street where police observed a vehicle which had been left unattended. A registration check revealed the vehicle was registered to Burgos.

Burgos testified for the State that she and defendant lived together at the time of the shooting. On the night of the shooting, defendant was driving her black 1994 Acura. Defendant was supposed to pick Burgos up from work when her shift ended at 11:40 p.m., but he never came. Burgos got a ride home from work with her brother sometime after midnight. Upon arriving home, Burgos received a call from Carlos Palmer, Mahoney's brother. Palmer was upset, and told Burgos he believed defendant had killed Mahoney. After hanging up the telephone, Burgos discovered a note defendant had left for her on the dresser. In the note, defendant wrote that he and his cousin "got to get [sic] ready to hit these niggas. You know who. I gotta pay the [sic] bills, and deez niggas don't realize [sic] I ain't on my feet now so I got to get their cash." Burgos then checked to see if her gun was behind the door where she usually stored it; it was not. Burgos testified the gun was behind the door when she left for work earlier that day.

Burgos further testified that she discovered approximately $2,000 in cash on the dresser along with a note from defendant that it was to be used as bond money if something were to happen. Burgos testified that the money was defendant's, that he made money selling drugs, and that he bragged to her about how much money he made selling drugs. She stated that defendant had not been employed since May 1997 and would not have received that amount of money through any legitimate business. Burgos testified defendant had been involved in selling drugs since June of 1997, that he sold crack cocaine, and that she had observed the drugs in her home.

Defendant brings forward only two of his six assignments of error contained in the record on appeal. The four assignments of error not addressed in defendant's brief are deemed abandoned. *See* N.C. R. App. P. 28(a), 28(b)(6).

[1] In his first argument, defendant asserts he is entitled to a new trial because the trial court erroneously permitted jurors to ask questions of a witness for the State. During the testimony of Margaret Godwin, a member of the crime scene unit of the sheriff's department, the State introduced several photographs of the crime scene taken by Godwin for the purpose of illustrating her testimony. Godwin was in the process of describing a photograph of Mahoney's body when the following colloquy transpired with a juror:

THE WITNESS: This is the victim's chest.

JUROR #9: Okay. That's the way you had it turned?

THE WITNESS: Yes.

JUROR #9: So that's like turned upside down?

THE WITNESS: No, this is the floor right here.

JUROR #9: Right.

THE WITNESS: This is chest sideways.

JUROR #9: Where would the victim's head be?

THE WITNESS: Up here.

JUROR #9: Okay.

THE WITNESS: The shirt was pulled down.

JUROR #9: Okay.

Shortly thereafter, jurors questioned Godwin about a photograph of the outside of the sliding glass door:

JUROR #10: Is the part right here, this here, is this the part the glass came out of?

THE WITNESS: Yes, ma'am.

JUROR #9: Now, you told me that this is the entire frame which would have stood here, or is it from this—I mean—

THE WITNESS: This is the frame that was laying out. There's a screen frame and a glass frame from this side of the door.

JUROR #9: I'm trying to get some perspective. Is this one side of a sliding glass door?

THE WITNESS: Yes.

JUROR #9: Okay.

THE WITNESS: This is both sides of the door.

JUROR #9: Yes, but this—

THE WITNESS: This came from this side.

JUROR #9: Thank you.

The same jurors further questioned Godwin about a photograph of the front door:

JUROR #10: That's from the outside or the inside?

THE WITNESS: Outside. Around the wooden door frame area.

JUROR #9: So if I'm getting this right— so if this is a duplex, when you're facing that door, there's another door directly behind you?

THE WITNESS: Yes.

JUROR #9: Okay.

THE WITNESS: I'm not exactly sure if that door is directly opposite the other door or not. I do know that they had shared steps, and you had to go up on the deck and turn left to go into that apartment.

JUROR #9: Okay.

JUROR #11: Can I ask a question? Do these bullet holes appear to be from the outside going in or from the inside coming out?

. . .

THE WITNESS: In my opinion, they're from the outside going in.

Juror number 9 continued to question Godwin about a photograph of the bathroom depicting a bullet hole:

JUROR #9: This the continuation of the hole that was three foot, eight inches above in the hallway? Is this the same—is that where you say it came?

THE WITNESS: In my opinion, it possibly could, but I can't swear to it—

JUROR #9: All right.

THE WITNESS: —because that hole was so much further down.

JUROR #9: Right. So this is up higher?

THE WITNESS: It's at the top of the sink, right—this is the back side of the sink, is that portion going right across there, and the bullet hole is just above it at an angle going into the wall.

Finally, the following colloquy took place regarding a photograph of the front door:

JUROR #9: Sir, the previous photo with the blood on the back of the door, would that be in the back of that front door?

THE WITNESS: It would be the back of this front door right here.

JUROR #9: The door you go into?

THE WITNESS: Yeah. If the door was closed and you were standing outside, you'd see it this way. If the door was closed and you were standing inside, this is what you would see.

JUROR #9: It's on the inside of the front door?

THE WITNESS: It's on the inside.

JUROR #9: Thank you.

Defendant did not object to any of the jurors' questions.

In *State v. Howard*, 320 N.C. 718, 360 S.E.2d 790 (1987), the Supreme Court observed that the issue of jurors questioning a witness is rare. The Court noted that in its one prior case addressing this issue, it held such questioning did not constitute error:

> "There is no reason that occurs to us why this [juror questioning of a witness] should not be allowed in the sound discretion of the Court, and where the question asked is not in violation of the general rules established for eliciting testimony in such cases. This course has always been followed without objection, so far as the writer has observed, in the conduct of trials in our Superior Courts, and there is not only nothing improper in it when done in a seemly manner and with the evident purpose of discovering the truth, but a juror may, and often does, ask a very pertinent and helpful question in furtherance of the investigation."

Id. at 725, 360 S.E.2d at 794 (quoting *State v. Kendall*, 143 N.C. 659, 663, 57 S.E. 340, 341 (1907)). The Supreme Court further observed that many courts have agreed that such questioning is within the trial

court's sound discretion. However, the Court also considered concerns expressed by other courts, including that jurors' unfamiliarity with the rules of evidence could result in prejudicial questions, and that counsel "is placed in the untenable position of having to choose between not objecting and letting the possibly prejudicial testimony in or objecting to the question and risking offending the juror." *Id.* at 726, 360 S.E.2d 794. Our Supreme Court concluded that while *Kendall* remains good law, the better practice would be for jurors to submit written questions to the court, for the court to hold a bench conference to rule on any objections outside the presence of the jury, and for the court to read jurors' questions to the witness. The Court further held that counsel is not required to object at trial to jurors' questions in order to preserve the issue for appeal.

Nevertheless, the Court held in *Howard* that the defendant was not entitled to a new trial based on a juror posing several questions to a witness about the technique used in drawing blood for purposes of determining alcohol content. The Court rejected the defendant's claim that the trial court had erred in permitting the questioning, noting the questions were posed in the context of potentially confusing testimony about medical terminology, that "the questions by the juror were proper since the apparent purpose of the questioning was for clarification of the medical procedures used in this case," and that the trial court ensured that the juror's questions were limited to clarification of the witness' testimony. *Id.* at 728, 360 S.E.2d at 796.

Although the trial court in the present case did not follow the procedure of having jurors submit written questions, as described in *Howard*, we discern no abuse of discretion in allowing the questioning since the jurors' questions were posed solely to clarify the potentially confusing images depicted in the crime scene photographs. Even assuming, as defendant asserts, that Godwin's opinions that the bullet holes originated outside the residence and that a bullet hole in the bathroom was a continuation of a hole from the hallway were "potentially objectionable," defendant has failed to carry his burden of establishing that the jurors' questions and Godwin's responses were so prejudicial that they resulted in an adverse verdict, particularly in the light of the other strong evidence presented as to defendant's guilt. *See* N.C. Gen. Stat. § 15A-1443(a) (defendant must carry burden of proving outcome of trial would have been different but for alleged error). This assignment of error is overruled.

[2] In his final argument, defendant contends the trial court erred by ordering forfeiture of the money seized from Burgos' apartment as

illicit drug money pursuant to the provisions of G.S. § 90-112(a)(2). That statute subjects to forfeiture: "All money, raw material, products, and equipment of any kind which are acquired, used, or intended for use, in selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of this Article." N.C. Gen. Stat. § 90-112(a)(2) (2003). We are constrained to agree with defendant.

This Court has held, in several cases, that the mere possession of a sum of money along with, or in proximity to, the possession of a controlled substance does not subject the money to forfeiture absent evidence that the money was "acquired, used or intended for use" in violation of the Controlled Substances Act. *See State v. Fink*, 92 N.C. App. 523, 375 S.E.2d 303 (1989); *State v. Teasley*, 82 N.C. App. 150, 346 S.E.2d 227 (1986), *appeal dismissed and disc. review denied*, 318 N.C. 701, 351 S.E.2d 759 (1987); *State v. McKinney*, 36 N.C. App. 614, 244 S.E.2d 455 (1978). More recently, in *State v. Johnson*, 124 N.C. App. 462, 478 S.E.2d 16 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997), this Court noted that G.S. § 90-112(a)(2) is a criminal, or *in personam*, forfeiture statute which requires that the State prove the guilt of the property's owner beyond a reasonable doubt. In *Johnson*, the defendant, though found guilty of possession of cocaine, was acquitted of possession of cocaine with intent to sell or deliver. Declaring that "[c]riminal forfeiture, therefore, must follow criminal conviction," the *Johnson* court set aside the forfeiture of the money seized from the defendant's person because the forfeiture did not follow a conviction of any of the acts described in G.S. § 90-112(a)(2). *Id.* at 476, 478 S.E.2d at 25.

Following *Johnson*, we interpret the statute to require that the conviction of the property's owner be related to one of the acts described therein, i.e., "selling, purchasing, manufacturing, compounding, processing, delivering, importing, or exporting a controlled substance in violation of the provisions of [the Controlled Substances Act]." In the present case, defendant was not convicted of any crime related to the Controlled Substances Act, and specifically, none of the acts described in G.S. § 90-112(a)(2). Therefore the money found in Burgos' apartment was not subject to forfeiture under the provisions of that statute and the order of forfeiture must be vacated. Though the State suggests in its brief that the money should be subjected to other monetary assessments imposed upon defendant or to the possibility of seizure by federal authorities pursuant to 21 U.S.C. § 881, we, as did the *Johnson* court, decline to

address the trial court's authority to do so, as the question has not properly been put before us.

No error in the trial; order of forfeiture vacated.

Judges HUNTER and GEER concur.

IN THE MATTER OF: WEILER

No. COA02-295

(Filed 17 June 2003)

1. **Appeal and Error— appealability—change in planning order for abused children—dispositional**

The Court of Appeals denied a motion to dismiss the appeal of a permanency planning order for abused and neglected children where petitioner contended that the appeal was interlocutory because it merely continued custody in DSS rather than changing custody. An order that changes the permanency plan from reunification with the mother to termination of parental rights is a dispositional order that fits squarely within the statutory language of N.C.G.S. § 7B-1001.

2. **Termination of Parental Rights— permanency planning order—required findings—futility of reunification—health and safety of children**

A permanency planning order for abused and neglected children was reversed where the order changed the plan from reunification to termination of parental rights but did not include the findings required by N.C.G.S. § 7B-507(b). The trial court based its decision primarily on respondent's "continued obstructionist attitude and refusal to accept responsibility for her children's behaviors, coupled with her repetitive switching of jobs and residence." The court made no findings that reunification efforts would be futile or that the health and safety of the children were inconsistent with the efforts required by the statute.

Appeal by respondent from order entered 19 September 2001 by Judge Mitchell L. McLean in Wilkes County District Court. Heard in the Court of Appeals 22 January 2003.

James N. Freeman, Jr., for respondent-appellant.

No brief filed for petitioner-appellee.

HUDSON, Judge.

Tabitha Weiler ("respondent" or "mother") appeals from a permanency planning order ("order") ceasing efforts to reunify her with her two sons, Raymond Weiler ("Raymond") and Christopher Weiler ("Christopher"). For the reasons discussed herein, we reverse the order of the trial court.

Background

On 18 May 1998, petitioner Wilkes County Department of Social Services ("petitioner" or "DSS") filed a juvenile petition alleging that Raymond and Christopher were abused and neglected and obtained a non-secure custody order for the children. On 1 June 1998, the trial court ordered that legal custody of the children continue with petitioner and that physical custody of the children be with their maternal grandparents. However, on 17 July 1998, the trial court returned both legal and physical custody to petitioner due to the maternal grandmother's violation of certain conditions of the custody order. On 15 February 1999, the trial court ordered that legal and physical custody of the children continue with petitioner, but ordered that the children be placed in the home of their paternal grandparents. The children resided with their paternal grandparents for approximately one week, after which they were returned to the custody of DSS due to the grandparents' inability to care for them.

On 27 April 2000, the trial court entered a permanency planning order pursuant to G.S. § 7B-907. The order directed petitioner to institute proceedings to terminate respondent's parental rights. On 21 September 2000, at the suggestion of Stephanie Sparks, respondent's case worker at DSS, the court entered a consent order changing the permanency plan from termination of parental rights to reunification with the mother.

On 15 December 2000, the children were placed back in respondent's home on a trial basis. On 29 March 2001, a report of inappropriate discipline involving Raymond prompted DSS again to remove the children from respondent's home.

On 19 September 2001, the trial court ordered that legal and physical custody of the children remain with petitioner and that the per-

manency plan change from reunification with the mother to termination of parental rights. In this order the trial court made the following pertinent findings of fact:

> 10. No relatives are available who can provide a safe and suitable home for the children within a reasonable period of time, nor is there a relative available who could assume guardianship of the children.
>
> 11. The Wilkes County Department of Social Services has utilized reasonable efforts to eliminate the need for placement of the children outside of a parent's home. Indeed, the record reflects that the Department of Social Services has provided more care and services and has afforded the mother of the children more opportunities than in most cases. This is particularly true in light of the Department's having sought and obtained permission to pursue termination of parental rights, and then affording the mother another opportunity to keep her children.
>
> 12. It is apparent that the mother has a very antagonistic attitude toward service providers in this case, particularly the Department of Social Services.
>
> 13. Although the mother reports that she has not had much contact with the father of her children, the Court notes that the mother is once again living in Onslow County so that the children may be near their paternal grandparents. This is so despite the fact that almost all of the mother's family, including the children under consideration in these cases, reside in Wilkes County, North Carolina.
>
> 14. The mother has another child, Tiffany, who is not at issue in these cases. Apparently, David Weiler is also the father of that child; and that Mr. Weiler has periodic contact with the child, despite the mother's testimony that she does not know where the father is.
>
> 15. The Court notes that the mother has changed her residence to and from Onslow County on at least three (3) occasions since the children have been in foster care. The mother states that the most recent change in her residence was due to more jobs being available in Onslow County.
>
> 16. The children continue to have serious behavior problems and are continuing in counseling. Both of the children take medications for their Attention Deficit Hyperactivity Disorder.

17. In their current foster home placement, an additional staff member has been added to each shift so that there will be sufficient persons to monitor the behavior of Raymond and Christopher.

18. The mother continues to blame the Department of Social Services for any problems which she and her children are having; and that the mother continues to accept little, if any, responsibility for her children's behaviors or for those events which led to the removal of the children in 1998.

***

20. It is not in the juveniles best interests for them to be returned to the home of their mother. The mother's continued obstructionist attitude and refusal to accept responsibility for her children's behaviors, coupled with her repetitive switching of jobs and residence, leads the Court to conclude that the mother is still exhibiting inconsistent behaviors. The Court notes that since moving to Sneads Ferry, North Carolina, the mother has had at least three (3) jobs.

21. The court has been presented with no evidence which indicates that there are any barriers to adoption of the juveniles.

22. The best plan of care to achieve a safe, permanent home for the juveniles within a reasonable period of time is pursuit of termination of parental rights and adoption.

Based upon the aforementioned findings of fact, the trial court reached the following conclusions of law:

2. It is in the best interest and general welfare of the above-named children for their legal and physical custody to remain with the Wilkes County Department of Social Services.

3. The appropriate plan for the juveniles is pursuit of termination of parental rights and adoption.

Motion to Dismiss

[1] Before addressing respondent's arguments, we must first address petitioner's motion to dismiss this appeal. Petitioner asserts that this appeal is interlocutory and not properly before us, arguing that the 19 September 2001 order from which this appeal was taken is not a "final order" as defined in G.S. § 7B-1001. The thrust of petitioner's

argument is that because the order did not change custody, but merely continued custody in DSS, it was not an order of disposition after an adjudication of abuse, neglect or dependency. For the following reason, this motion is denied.

G.S. § 7B-1001 provides that review of any "final order of the court in a juvenile matter . . . shall be before the Court of Appeals." It further provides that a "final order shall include: (1) Any order finding absence of jurisdiction; (2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken; (3) *Any order of disposition after an adjudication that a juvenile is abused, neglected, or dependent*; or (4) Any order modifying custodial rights." G.S. § 7B-1001 (2001) (emphasis added).

Here, the juveniles were adjudicated neglected by order 1 June 1998. On 27 April 2000, the court ordered that the permanency plan for the juveniles be termination of parental rights. Subsequently, pursuant to DSS's request, the court changed the permanency plan from termination of parental rights to reunification with the mother. The present order again changed the disposition from reunification with the mother to termination of parental rights. An order that changes the permanency plan in this manner is a dispositional order that fits squarely within the statutory language of section 7B-1001. *See In re Eckard*, 144 N.C. App. 187, 547 S.E.2d 835 (2001), *appeal after remand*, 148 N.C. App. 541, 559 S.E.2d 233 (2002). Thus, the appeal is properly before us and petitioner's motion to dismiss is denied.

Respondent's arguments

[2] Respondent argues that the trial court's findings of fact are not supported by competent evidence and, in turn, that the findings of fact do not support the conclusions of law. All dispositional orders of the trial court after abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing. *In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 676 (1997). If the trial court's findings of fact are supported by competent evidence, they are conclusive on appeal. *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). In a permanency planning hearing held pursuant to Chapter 7B, the trial court can only order the cessation of reunification efforts when it finds facts based upon credible evidence presented at the hearing that support its conclusion of law to cease reunification efforts. *Eckard* at 199, 547 S.E.2d at 842. Although we believe there was competent evidence presented at the hearing to support the findings of fact contained in

the order, we do not believe the findings support the conclusions. Thus, for the reasons discussed below, we reverse the order of the trial court.

The purpose of a permanency planning hearing is "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." G.S. § 7B-907(a) (2001). The trial court has the authority to cease reunification efforts pursuant to section 7B-507(b):

> (b) In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.

G.S. § 7B-507(b) (2001). "When a trial court is required to make findings of fact, it must make the findings of fact specially." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). Additionally, "[t]he trial court may not simply 'recite allegations,' but must through 'processes of logical reasoning from the evidentiary facts' find the ultimate facts essential to support the conclusions of law." *Id.* (citations and quotation marks omitted).

Here, the trial court made no such findings. The court found as fact neither that efforts toward reunification with respondent would be futile nor that such efforts would be inconsistent with the juveniles' health, safety, and need for a permanent home. The trial court came closest to making these required findings in paragraphs 20 and 22. Number 22, designated as a finding of fact, provides that "The best plan of care to achieve a safe, permanent home for the juveniles within a reasonable period of time is pursuit of termination of parental rights and adoption." We believe, however, that despite its inclusion in the findings of fact, number 22 is actually a conclusion of law and, thus, does not satisfy the court's obligation under section 7B-507(b). *See Johnson v. Adolf*, 149 N.C. App. 876, 878 n.1, 561 S.E.2d 588, 589 n.1 (2002) ("Although this statement is included . . . as a finding of fact, and thus inappropriately labeled, this Court will

treat it as a conclusion of law"). Further, finding number 20 is a summing up of the types of problems the court identified in respondent's efforts, to wit: "obstructionist attitude," "refusal to accept responsibility," "repetitive switching of jobs and residence," and "inconsistent behaviors." None of these problems were found to be inconsistent with the juveniles health, safety and need for a permanent home. Thus, we conclude that the findings the court did make are insufficient to support the conclusions of law.

The order here is similar to that in *Eckard*, where this Court found that the findings of fact did not support the conclusions of law that ceased reunification efforts with the mother. There the court found as fact that:

> (1) Respondent has had relationships with five different men in the two years preceding the hearing, (2) respondent is "gullible and naive," (3) respondent would require "ongoing assistance from professionals for a number of reasons," with "no guarantees that she would [not] form questionable relationships, which could put her daughter at risk," (4) respondent has an I.Q. "which ranks in the extremely low range," (5) "[the juvenile] is too bonded to her current placement [with her foster parents] to risk her young and fragile well-being at this time" and (6) respondent did not do more to protect [the juvenile].

Id. at 198-99, 547 S.E.2d at 842. The Court went on to hold that "all of the above findings do not constitute sufficient evidence to support the conclusion that it is in [the juvenile's] best interest to cease reunification efforts with her natural mother." *Id.* at 199, 547 S.E.2d at 842. On reconsideration after remand, this Court again held that these findings were not sufficient to support the conclusion of law to change the permanency plan from reunification to termination of parental rights. *In re Eckard*, 148 N.C. App. 541, 559 S.E.2d 233 (2002), *disc. review denied*, 356 N.C. 163, 568 S.E.2d 192 (2002).

Likewise, in *In re Nesbitt*, 147 N.C. App. 349, 555 S.E.2d 659 (2001), this Court reviewed an order terminating the mother's parental rights. In *Nesbitt*, the trial court found as fact that the mother previously worked as an exotic dancer; was arrested for lewd and indecent conduct; worked approximately seven different jobs since the juvenile was removed from her home; and had been evicted from her apartment, lived in a motel part time, and lived in a shelter since her children had been removed from her home. *Id.*

This Court held that these facts did not provide an adequate basis for terminating the mother's parental rights, noting that "we are impressed with the mother's continued efforts to secure employment" and that "the record shows that in spite of her troubled work history, Ms. Nesbitt has maintained child support payments while [the juvenile] was in the custody of [social services] and has maintained a home for almost a year." *Id.* at 359-60, 555 S.E.2d at 666.

Here, the trial court ordered the cessation of reunification efforts based on findings less extensive than those made in *Eckard* and *Nesbitt.* The trial court based its decision primarily on respondent's "continued obstructionist attitude and refusal to accept responsibility for her children's behaviors, coupled with her repetitive switching of jobs and residence." The court, however, as mentioned above, made no statutory findings that reunification efforts would be futile or that the health and safety of the children were inconsistent with such efforts as required by section 7B-507(b).

Thus, we conclude that, in light of its failure to make the findings required by statute, the court's findings do not support its conclusions of law that efforts to reunify respondent with her children should cease and that the "appropriate permanent plan for the juveniles is pursuit of termination of parental rights and adoption."

Reversed.

Judges MARTIN and STEELMAN concur.

DAVID LEE GRIGGS, EMPLOYEE, PLAINTIFF v. EASTERN OMNI CONSTRUCTORS, EMPLOYER, AND LEGION INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA02-1093

(Filed 17 June 2003)

Workers' Compensation— injury by accident—findings

A workers' compensation case was remanded to the Industrial Commission for further findings as to whether plaintiff was injured while performing his usual tasks in the usual way under the totality of conditions. Plaintiff was an electrician assigned to pull wire from machinery without damaging it; the work was done while short-handed and under time constraints,

and involved passing the wire through a control panel more than twenty feet above the floor. The Commission found that pulling wire in awkward positions was a normal part of plaintiff's job routine, but this is not dispositive.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 18 March 2002. Heard in the Court of Appeals 15 May 2003.

Heidi G. Chapman for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Alison R. Bost, for defendants-appellees.

TYSON, Judge.

David Lee Griggs ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("Commission") which denied workers' compensation benefits. We remand to the Commission for further findings of fact and conclusions of law.

I. Background

On 6 April 1999, plaintiff, who had been an electrician for twenty-two years, was employed by Omni Constructors ("employer") as an electrician and was working at a job site in Brown Summit. Plaintiff and Richard Lambeth were assigned a "rush job" of pulling old wire leading from heavy machinery without damaging the wire in order that it could be reinstalled.

Plaintiff testified that he asked his supervisor for more help because he did not feel that he and Lambeth would be able to complete the assignment within the time frame required. His supervisor was unable to provide additional assistance because they were "very short on personnel."

In order to remove the wire without damage, plaintiff was required to disconnect the wire, pull it out of one set of conduit, lay it out on the floor to straighten it, and feed the wire through another conduit located above the ceiling which led to a control panel where Lambeth could roll the wires. Each bundle of wires weighed approximately 130 pounds.

Plaintiff was pulling the wire up and feeding it through the control panel, more than twenty feet above the floor. Plaintiff testified "I

was having to stand between the race way in my front, and the conduit running at my back, and I was having to reach across my left side down below my knees and [dead] lift this wire up and hold it over my head to guide it to go down to the conduit, to come out the other end to go back into the control panel to be rolled up." In response to the question "Have you ever done that procedure before?", plaintiff responded "It's an awkward position to pull wire in, and it was very hard, but I can't actually say I've actually been in a situation where I had to pull wire like that before, no."

On cross-examination, plaintiff admitted that pulling wire both in installation and in removal were normal parts of his employment. Plaintiff explained, "We were told that this wire was to be saved, that the company wanted to try to re-install a machine, which is very unusual, and this was the first time I'd ever even done this in 22 years." Pulling wire on removal is different because "where you're doing a demolition, generally the wire is just cut off, and it's cut off in a manner where you can just more or less just reach it with one hand and yank it out of the pipe."

While plaintiff was working in an "awkward position," he felt "something pop really hard in [his right] shoulder." Plaintiff waited a few minutes for the pain to subside and resumed work with his other hand to complete his tasks. Plaintiff informed his employer of the injury at his break.

After examining plaintiff, Dr. James Kendall placed plaintiff's arm in a sling, ordered light work for four to five days and prescribed prescription Ibuprofen. Despite plaintiff's complaint of continued pain, employer returned plaintiff to his previous job. When plaintiff informed employer that he was not able to continue working because of the pain, employer terminated plaintiff.

Plaintiff was examined by an orthopedic surgeon who diagnosed plaintiff with a rotator cuff strain/sprain with tendinitis/bursitis and "DJD AC joint." When conservative treatment failed, plaintiff underwent surgery to rebuild a collapsed rotator cuff, remove a bone chip, and repair damage to the shoulder ligaments.

Employer presented evidence that pulling wire was a part of the daily requirements for electricians working with employer. Fred Redman testified that there was nothing unusual in plaintiff's description of the manner in which he was pulling wire, but that he was not present that day and did not see the conditions under which plaintiff

worked. Redman further testified that running wires high up off the floor was common.

The Commission found that a normal part of an electrician's job was to "pull wire" through a conduit. Depending on the job, an electrician may be "in an awkward position from time to time." The Commission found:

> 5. The evidence fails to show that plaintiff's right shoulder injury was caused by an accident arising out of and in the course of his employment with defendant-employer. While plaintiff indicated that he was in an awkward position, his testimony is equivocal regarding the unusualness of the incident. The greater weight of the evidence including his testimony demonstrates that there was no interruption of his regular work routine, as pulling wire sometimes in awkward positions was a normal part of plaintiff's job routine. Significantly, plaintiff had been working as an electrician pulling wire for 22 years. Moreover, there was nothing unusual in what plaintiff was required to do in removing the wire on April 6, 1999.

The Commission concluded that plaintiff was not entitled to benefits because the injury did not occur by accident. Commissioner Laura Kranfield Mavretic dissented. Plaintiff appeals.

II. Issues

Plaintiff contends the Commission erred in (1) concluding plaintiff did not suffer an injury by accident and (2) failing to make sufficient findings of fact.

III. Standard of Review

In appeals from the Commission, our review is limited to whether there is any competent evidence in the record to support the Commission's findings of fact. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Even where there is competent evidence to the contrary, we must defer to the findings of the Commission where supported by any competent evidence. *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 259, 540 S.E.2d 768, 773 (2000), *aff'd*, 353 N.C. 520, 546 S.E.2d 87 (2001). The Commission's findings of fact may only be set aside when "there is a complete lack of competent evidence to support them." *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980). We review conclusions of law *de novo*.

IV. Injury by Accident

Plaintiff contends the Commission erred in concluding plaintiff did not suffer an injury by accident.

A compensable injury is an "injury by accident arising out of and in the course of employment." N.C. Gen. Stat. § 97-2(6). An accident has been defined as "an unlooked for and untoward event which is not expected or designed by the injured employee." *Norris v. Kivettco, Inc.*, 58 N.C. App. 376, 378, 293 S.E.2d 594, 595 (1982). "There must be some unforeseen or unusual event other than the bodily injury itself." *Rhinehart v. Roberts Super Market, Inc.*, 271 N.C. 586, 588, 157 S.E.2d 1, 3 (1967). "If an employee is injured while carrying on his usual tasks in the usual way the injury does not arise by accident." *Lineback v. Wake County Bd. of Comm'rs*, 126 N.C. App. 678, 681, 486 S.E.2d 252, 254-55 (1997). "An accident therefore involves 'the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999), *disc. rev. denied*, 351 N.C. 351, 543 S.E.2d 124 (2000).

In *Calderwood*, the plaintiff was a registered nurse assisting in the delivery room. 135 N.C. App. at 113, 519 S.E.2d at 62. The patient she was assisting was 5'3" tall and weighed 263 pounds. *Id.* The patient received an epidural which resulted in a "complete block" such that she was unable to assist in lifting her own leg. The plaintiff lifted the patient's leg without assistance from the patient and injured her shoulder. *Id.* The plaintiff testified that she was sometimes required to assist in lifting a patient's leg as part of her usual job, however, the size and complete lack of assistance from the patient was unusual. *Id.* The plaintiff's supervisor testified that lifting the leg of a patient during delivery was a "job expectation." *Id.* at 114, 519 S.E.2d at 62. The Commission found that the plaintiff was injured while performing her usual employment duties in the usual way. *Id.* at 114, 519 S.E.2d at 63. This Court reversed holding that there was no competent evidence to support the findings that the injury occurred while performing her usual employment and were not a result of unforeseen or unusual event. *Id.* at 116, 519 S.E.2d at 64. "The fact that her job responsibility did include assisting patients who received epidurals resulting in a total block is not dispositive. The question is whether her regular work routine required lifting the legs of women weighing 263 pounds who had received epidurals resulting in total

blocks, . . . and there is no evidence that it did." *Id.* at 116, 519 S.E.2d at 63-64.

Here, plaintiff testified that he was pulling old wire, under an accelerated time frame, without additional help, twenty-five feet above the ground, and attempting to salvage the wire to reuse. Plaintiff presented evidence to show that he needed and should have been given additional help in completing this job. Defendants did not present any evidence to dispute plaintiff's evidence regarding the usual number of employees required for the specific job, the usual time frame for such a job, or that the actions of plaintiff were usual. None of defendant's witnesses were present at the time of the injury.

The Commission found "pulling wire sometimes in awkward positions was a normal part of plaintiff's job routine." This is not dispositive. The question is whether the totality of the conditions under which plaintiff worked at the time of the injury were "usual tasks in the usual way" expected of an electrician working for the employer. *Lineback*, 126 N.C. App. at 681, 486 S.E.2d at 255.

V. Conclusion

We remand this case to the Commission for further findings, either with or without the taking of additional evidence, regarding whether, under the totality of the circumstances, plaintiff was performing "usual tasks in the usual way" expected of an electrician working for the employer.

Remanded.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. RUDOLPH CEPHUS ACOLATSE, DEFENDANT

No. COA02-824

(Filed 17 June 2003)

Drugs— constructive possession—sufficiency of evidence

The premises on which cocaine was found were not under defendant's control and the State failed to present incriminating circumstances from which constructive possession could be

inferred. Defendant was on or near the sidewalk in front of a house used for car detailing when officers approached; he fled and was chased from a sidewalk into bushes behind a detached garage; defendant did not own or live in the house; an officer saw defendant make a throwing motion toward the bushes but not the garage; and nothing was found in the bushes but five bags of cocaine were found on the roof of the garage.

Appeal by defendant from judgment entered 28 June 2001 by Judge Howard R. Greeson, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 13 May 2003.

Attorney General Roy Cooper, by Assistant Attorney General Edwin Lee Gavin, II, for the State.

Robert T. Newman, Sr. for the defendant-appellant.

WYNN, Judge.

Following his conviction on drug-related charges, defendant contends on appeal that the trial court erroneously failed to dismiss the charges against him. For the reasons given by our Supreme Court in *State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967), we are compelled to hold that the record in this case shows that the evidence raised only a suspicion of possession; accordingly, we reverse defendant's convictions.

The underlying facts of this case tend to show that while waiting on 29 August 2000 for a tax warrant to seize an unoccupied black Mercedes, Winston Salem Police Detectives K. L. Jones, Matt Morgan, Priscilla Thomas, Curtis Richardson, and Mike Cardwell saw defendant, Rudolph Cephus Acolatse, drive up and park his vehicle behind the Mercedes. Although defendant did not own the Mercedes under surveillance, the detectives determined that he was driving with a revoked license. However, when the detectives attempted to approach defendant who was now outside of his car talking on a cell phone, defendant ran along the left side of the house nearest to the parked Mercedes. Detective Richardson responded by pursuing him along the left side of the house; and, he could see the defendant at all times until the detective encountered a pit bull dog near a detached garage. He lost sight of defendant for approximately ten seconds.

In the meantime, Detective Thomas, upon seeing Detective Richardson run around the left side of the house, ran around the right

side of the house to trap defendant. Once Detective Thomas rounded the house, she did not see defendant. She went to the corner of a shed in the backyard and immediately saw defendant standing near a fence in some bushes.

Detective Cardwell also ran around the right side of the house. Upon rounding the house, the detective saw defendant approaching the rear of the storage building and was in between an old vehicle parked there and the wall of the storage building. Detective Cardwell went towards the fence because he felt defendant was going to jump over the fence. Detective Cardwell stated Detective Thomas was closer to the storage shed. Detective Cardwell did not see defendant make a throwing motion.

Detective Jones remained in front of the house near the vehicles during the chase and Detective Morgan ran to another street to intercept defendant if he ran out onto that street. After defendant ran around the corner of the house, neither Detective Jones nor Morgan saw defendant again until he was in custody.

After defendant's arrest, Detective Thomas told the other detectives she saw defendant make a throwing motion towards the bushes. Detective Jones, a K-9 officer, searched the area with her dog. Nothing was found in the bushes. However, the dog alerted to the odor of narcotics near a detached garage. The detectives then found five bags of cocaine, 39.6 grams, on the roof of the detached garage in an area that was not located near the bushes. There were no fingerprints on the bags. Defendant did not own or reside at the house next to the detached garage, and the detectives testified they did not know who owned the house. The detectives also searched defendant's car, but no drugs were found. The detectives found a cell phone in defendant's car and found the cell phone on which defendant had been talking in the front yard. A third phone was also recovered. Defendant had $830.00 in cash on his person.

After a trial, defendant was convicted of possession with intent to sell and deliver cocaine and trafficking in cocaine by possession, sentenced to a term of 35 months to 42 months and fined $50,000. He appealed.

On appeal, the defendant contends the trial court erroneously denied his motion to dismiss the charges based upon insufficient evidence. "The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the

offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. In determining the sufficiency of the evidence the trial court must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Harris*, 145 N.C. App. 570, 578, 551 S.E.2d 499, 504 (2001).

"Under the charge of possession with the intent to sell or deliver cocaine, the State has the burden of proving: (1) the defendant possessed the controlled substance; and (2) with the intent to sell or distribute it." *State v. Diaz*, 155 N.C. App. 307, 319, 575 S.E.2d 523, 531 (2002). "To prove the offense of trafficking in cocaine by possession, the State must show 1) knowing possession of cocaine and 2) that the amount possessed was 28 grams or more." *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873-74 (1991); *see also* N.C. Gen. Stat. § 90-95(h)(3)(a). Since the State had no evidence to show that defendant actually possessed the cocaine, the State sought to prove the possession element of trafficking in cocaine by possession or possession with the intent to sell and deliver cocaine by constructive possession. *See State v. Wilder*, 124 N.C. App. 136, 139-40, 476 S.E.2d 394, 397 (1996); *State v. Diaz*, 155 N.C. App. 307, 313-14, 575 S.E.2d 523, 528-29 (2002).

"Constructive possession occurs when a person lacks actual physical possession, but nonetheless has the intent and power to maintain control over the disposition and use of the substance." *State v. Wilder*, 124 N.C. App. 136, 139-40, 476 S.E.2d 394, 397 (1996). "Where a controlled substance is found on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury. If a defendant does not maintain control of the premises, however, other incriminating circumstances must be established for constructive possession to be inferred." *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993).

In this case, the cocaine evidence was found on the roof of a detached garage in the backyard of a residence. The defendant did not own the residence and the detectives testified they did not know who owned the premises. Prior to being chased by the detectives, the defendant was in the front area of the residence near the sidewalk at all times. Under these facts, the premises were not under the defendant's control. Accordingly, the State must demon-

strate other incriminating circumstances to raise an inference of constructive possession.

The State contends the evidence placing the defendant in close juxtaposition to the cocaine, the money ($830.00) found on defendant's person in denominations consistent with the sale of controlled substances and the defendant's throwing motion are sufficient incriminating circumstances from which one can infer constructive possession. We disagree.

In *State v. Chavis*, our Supreme Court reversed the defendant's conviction for felonious possession of marijuana even though the evidence invoked a strong suspicion that the defendant had constructive possession of the marijuana. In *Chavis*, the police had been following the defendant for several blocks and had been close enough to touch the defendant if they so desired. They observed the defendant wearing gray trousers, a three-quarter length coat and a gray felt hat. They watched the defendant as he and another man talked and walked across a vacant lot and down a street. The "defendant and his companion were observed by the officers continuously except for two or three seconds when the headlights of . . . a car . . . caused the officers to step back out of the glare of the headlights to avoid disclosure of their presence." The officers then crossed the street and continued to watch the men for approximately one minute until the defendant began walking back towards the officers. The officers stopped the defendant and searched him. At the time of the search, the defendant was bareheaded. The officers searched the area and thirty minutes later, they found a hat identical to the one the defendant had been wearing approximately four or five feet from where the police had observed the defendant and his companion talking. The police found marijuana in the crown of the hat. *Chavis*, 270 N.C. 306, 306-09, 154 S.E.2d 340, 341-43 (1967). In reversing the defendant's conviction in *Chavis*, our Supreme Court acknowledged the evidence against the defendant was strong enough to raise a suspicion that the defendant possessed the marijuana; however, the evidence was not substantial enough to present the case to the jury. *Chavis*, 270 N.C. at 311, 154 S.E.2d at 344. Following *Chavis*, we are compelled to hold that substantial evidence of possession was not presented in this case.

In this case, the evidence viewed in the light most favorable to the State shows the detectives were in front of a residence conducting surveillance upon a convicted drug dealer's automobile when defendant drove up and parked in front of the residence frequented by people for car detailing services. The automobile under surveil-

lance did not belong to defendant. Defendant was in the front area of another person's residence near the sidewalk talking on a cell phone and approaching his car when the detectives approached him to question him about driving with a revoked license. Defendant looked up, saw the officers and ran around the left side of the residence down the driveway. Four detectives pursued defendant. Defendant was apprehended in the bushes behind the detached garage near a fence after a police officer saw him make a straight throwing motion towards the bushes. Nothing was found in the bushes; however, drugs were found on the roof of the detached garage. One of the detectives testified the twenty-five foot roof line where the drugs were found was in a different direction from the bushes. The bushes were either directly across from the roof or off to a ninety degree angle. None of the detectives saw the defendant throw anything on the roof and no fingerprints were found on the bags of cocaine. Although the odor of cocaine was detected in the defendant's vehicle, no drugs were found in the vehicle.

At trial, the State contended the cocaine odor in the defendant's vehicle combined with the belief that during the few seconds the defendant was out of the detectives' view, the defendant had enough time to throw the drugs onto the roof was enough to establish possession. However, *Chavis* dictates that this evidence only raises a suspicion of possession. "If the evidence is sufficient merely to raise a suspicion or conjecture as to any element of the offense, even if the suspicion is strong, the motion to dismiss should be allowed." *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991). "This is true even though the suspicion aroused by the evidence is strong." *State v. Ledford*, 23 N.C. App. 314, 316, 208 S.E.2d 870 (1974) (where constructive possession of LSD was not established even though the police observed the defendant go near the location where the drugs were found several times); *see also State v. Chavis*, 270 N.C. 306, 154 S.E.2d 340 (1967).

In sum, we must hold under our Supreme Court's decision in *Chavis* that the State has failed to present any incriminating circumstances from which one can infer constructive possession. *See State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (stating there must be more than mere association or presence linking the person to the item in order to establish constructive possession); *State v. Neal*, 109 N.C. App. 684, 687-88, 428 S.E.2d 287, 289-90 (1993) (describing evidence of a defendant's presence in a closed room which contained the controlled substance coupled with the fact the

defendant had a large amount of cash on his person and another case in which there was evidence of the defendant fleeing from, not to, the area where illegal drugs were found as two cases in which there were sufficient incriminating circumstances); *State v. Wilder*, 124 N.C. App. 136, 476 S.E.2d 394 (1996) (constructive possession established where defendant threw a white substance into the bushes, cocaine was later found in the bushes into which the defendant had thrown, and after the police left, the defendant's friends searched the bushes for the cocaine); *State v. King*, 99 N.C. App. 283, 288, 393 S.E.2d 152, 155 (1990) (where this Court identified three typical situations [in which constructive possession has been established] regarding the premises where drugs were found: (1) some exclusive possessory interest in the defendant and evidence of defendant's presence there, (2) sole or joint physical custody of the premises of which defendant is not an owner; and (3) in an area frequented by defendant, usually near defendant's property.).

Reversed.

Judges McCULLOUGH and ELMORE concur.

IN THE MATTER OF: SHO'REICE DOMAINE BAKER, DOB: 10/29/89

No. COA02-729

(Filed 17 June 2003)

Termination of Parental Rights— willfully leaving child in foster care—failure to make reasonable progress to correct conditions

The trial court did not err by terminating the parental rights of respondent parents under N.C.G.S. § 7B-1111(a)(2) based on clear, cogent, and convincing evidence that respondents willfully left their child in foster care for more than twelve months and failed to make reasonable progress in correcting the conditions that led to the child's removal from the home, because: (1) although respondents agreed to attend parenting classes, they refused to find out about them and had not completed parenting classes at the time of the hearing on termination of parental rights; (2) respondents refused to sign a Department of Social Services family plan for reunification; (3) respondents refused to cooperate with individual therapy; (4) attendance at a one-day

workshop was not evidence of any real effort by respondent mother; and (5) respondent father did not show reasonable progress even though he completed an anger management class when the therapist who conducted the course observed that respondent had only a limited understanding of the concepts presented.

Appeal by respondents from order entered 19 November 2001 by Judge Jimmy L. Love, Jr. in Johnston County District Court. Heard in the Court of Appeals 12 March 2003.

Stephanie L. Mitchiner for respondent-appellant Antonio Baker.

Terry F. Rose for respondent-appellant Michelle Baker.

Jennifer S. O'Connor for petitioner-appellee Johnston County Department of Social Services.

Murphy & Johnson, P.A., by James D. Johnson, Jr., for Guardian ad Litem.

LEVINSON, Judge.

Petitioners (Johnston County Department of Social Services, hereafter DSS) initiated this action on 3 August 2001, by filing a petition to terminate the parental rights of respondents (Michelle Baker and Antonio Baker) in their son, Sho'Reice Baker (the juvenile). A hearing was conducted in October 2001, and on 20 November 2001, the trial court entered an order terminating the parental rights of both respondents. From this order respondents appeal. For the reasons discussed below, we affirm the trial court.

Preliminarily, we note that respondent father, Antonio Baker, failed to include his notice of appeal in the record. This Court does not acquire jurisdiction without proper notice of appeal. *Fenz v. Davis*, 128 N.C. App. 621, 623, 495 S.E.2d 748, 750 (1998). However, Mr. Baker filed a motion to amend the record to include written notice of appeal. We grant respondent's motion, and proceed to review the merits of respondents' appeal.

Standard of Review

At the hearing on a petitioner's motion for termination of parental rights, the burden of proof "shall be upon the petitioner or movant to

prove the facts justifying such termination by clear and convincing evidence." N.C.G.S. § 7B-1111(b) (2001).

> Thus, in order to prevail in a termination of parental rights proceeding . . . the petitioner must: (1) allege and prove all facts and circumstances supporting the termination of the parent's rights; and (2) demonstrate that all proven facts and circumstances amount to clear, cogent, and convincing evidence that the termination of such rights is warranted.

In re Pierce, 356 N.C. 68, 70, 565 S.E.2d 81, 83 (2002). "A clear, cogent and convincing evidentiary standard is a higher standard than preponderance of the evidence, but not as stringent as the requirement of proof beyond a reasonable doubt." *In re Hardesty*, 150 N.C. App. 380, 385, 563 S.E.2d 79, 83 (2002).

A proceeding for termination of parental rights requires the trial court to conduct a two part inquiry. N.C.G.S. § 7B-1109(e) (2001) directs that the court first "shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. [§] 7B-1111 which authorize the termination of parental rights of the respondent." Disposition is governed by N.C.G.S. § 7B-1110 (2001), which provides in relevant part that upon a finding "that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent . . . unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." N.C.G.S. § 7B-1111(a) (2001).

On appeal, "[o]ur standard of review for the termination of parental rights is whether the court's 'findings of fact are based upon clear, cogent and convincing evidence' and whether the 'findings support the conclusions of law.' " *In re Pope*, 144 N.C. App. 32, 40, 547 S.E.2d 153, 158 (quoting *In re Huff*, 140 N.C. App. 288, 292, 536 S.E.2d 838, 840 (2000), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001)), *aff'd*, 354 N.C. 359, 554 S.E.2d 644 (2001).

With regards to each respondent, the trial court found that the following ground for termination of parental rights existed:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the

> circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C.G.S. § 7B-1111(a)(2) (2001). Respondents have each argued on appeal that this finding was not supported by clear, cogent, and convincing evidence. However, respondents failed to assign this issue in their assignments of error, in violation of N.C.R. App. P. 10(a) ("scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10"). Nonetheless, in the interests of justice, and pursuant to our authority under N.C.R. App. P. 2, we elect to review the merits of respondents' argument.

In the case *sub judice*, it is undisputed that the juvenile was in foster care for more than twelve months prior to the filing of the petition. However, to sustain the trial court's finding that grounds existed for termination of parental rights under G.S. § 7B-1111(a)(2), we must also determine that there was clear, cogent, and convincing evidence that (1) respondents "willfully" left the juvenile in foster care for more than twelve months, and (2) that each respondent had failed to make "reasonable progress" in correcting the conditions that led to the juvenile's removal from the home. *In re Bishop*, 92 N.C. App. 662, 667, 375 S.E.2d 676, 680 (1989).

A parent's "willfulness" in leaving a child in foster care may be established by evidence that the parents possessed the *ability* to make reasonable progress, but were *unwilling* to make an effort. *See, e.g., In re McMillon*, 143 N.C. App. 402, 410, 546 S.E.2d 169, 175 (2001) (holding willful refusal to make progress demonstrated where "tasks assigned to [respondent] were within her ability to achieve, and did not require financial or social resources beyond her means"); *In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995) (holding respondent's refusal to seek treatment for alcoholism constituted willful failure to correct conditions that had led to removal of child from home).

Regarding the requirement that for *at least twelve months* the respondents failed to make reasonable progress in addressing the problems underlying their child's removal from the home, the North Carolina Supreme Court recently held:

> The legislature specifically delineated that the "reasonable progress" evidentiary standard be measured in a twelve-month increment, and in our view, the *twelve-month standard* envisioned by lawmakers *was "within 12 months" from the time*

> *the petition* for termination of parental rights *is filed* with the trial court.

In re Pierce, 356 N.C. at 75, 565 S.E.2d at 86 (emphasis added). In the instant case, the petition for termination of parental rights was filed 2 August 2001, so our focus is on respondents' progress during the year preceding that date.

The record indicates that petitioners had "an extensive history with [respondents,]" and that DSS had "investigated 16 reports on [respondents]" between 1990 and the date of the hearing. In 1992, two reports of improper discipline of the juvenile's sister were substantiated, and a petition was filed. Testimony from a DSS social worker indicated that both respondents were "perpetrators" of the improper discipline substantiated in 1992. After the petition was filed in 1992, Ms. Baker attended parenting classes. In 1996, two more reports of improper discipline of the juvenile's sister were substantiated, and another petition was filed against Ms. Baker. In 1997, DSS substantiated a report of sexual abuse of the juvenile's sister by Mr. Baker, and the girl was placed in DSS custody. The remaining investigations were unsubstantiated.

On 7 March 2000, DSS investigated a report that the juvenile, then ten years old, had "marks and bruises on his arms, back, and legs." Melissa Cloer, a DSS social worker, examined the juvenile at school and found "linear belt marks [on] the inside of his forearm[,] . . . linear marks on his back and on the front of his left thigh." Later that day, Cloer went to respondents' home to discuss the situation. When confronted about the marks on her son, Ms. Baker began yelling at the juvenile that it was "his fault" that DSS was at the house, because "he had gone to school and run his mouth." She stated that Mr. Baker had spanked the juvenile with a belt because he had lied to his parents "about tearing up his underwear." When Mr. Baker arrived home, he admitted to spanking the juvenile for "tearing up his underwear." Meanwhile, Ms. Baker continued to shout that she would not cooperate with DSS. That evening, Cloer removed the juvenile from his home "because he had marks and bruises on him, the family had a history of improper discipline, we'd offered services[, but] the mother stated that she was going to continue to spank him and was not going to comply with [DSS] and [at] that time we could not ensure his safety. . . ."

The following day, respondents met with Cloer, who discussed with them the steps they would have to take to regain custody of the

juvenile. Although respondents agreed to attend parenting classes, they refused to "call around and find out about them," and at the time of the hearing on termination of parental rights, respondents had not completed parenting classes. Respondents also refused to sign a DSS family plan for reunification. In April, 2000, respondents did attend a one-day workshop on child discipline. However, respondents "both refused to go to any type of services offered by Johnston County Mental Health," either to be evaluated, to obtain individual counseling, or to complete a Child Abuse Potential Inventory. Their refusal to cooperate with individual therapy is particularly significant given Cloer's testimony that, although respondents had previously attended group classes on parenting and discipline, "bruises are continuing to be left on the children. . . ."

Ms. Baker has argued that she demonstrated reasonable progress towards addressing the issues underlying the juvenile's placement in foster care. We disagree. Attendance at a one-day workshop was not evidence of any real effort on the respondent's part. Moreover, Ms. Baker invalidated the results of the only diagnostic test she completed by failing to give truthful answers; she steadfastly refused to participate in counseling; and she would not agree to change her methods of disciplining the juvenile. We also reject Ms. Baker's argument that her improper discipline of the juvenile is mitigated by the subsequent diagnosis that the juvenile may be suffering from obsessive compulsive disorder. Respondent's discipline was improper because it involved whipping the juvenile with a belt, to the extent that marks and bruises resulted, not because she lacked a complete understanding of his problems.

Mr. Baker also argues that he showed "reasonable progress" in his case because he completed an anger management class. However, the therapist who conducted the course observed that Mr. Baker had "only a limited understanding of the concepts presented." This is corroborated by the following testimony from Mr. Baker:

> Q. And what are those [documents]?
>
> A. Dealing with the anger management classes, *how you're supposed to whip your children* and how you're supposed to discipline them. How you're supposed to—when you're angry and *supposed to whip them when you're mad.* And I got some true and false questions up here.

(emphasis added).

"Extremely limited progress is not reasonable progress." *Nolen*, 117 N.C. App. at 700, 453 S.E.2d at 224-25; *see also In re Fletcher*, 148 N.C. App. 228, 235-36, 558 S.E.2d 498, 502 (2002) (upholding termination of parental rights order where "[al]though the respondent mother made some efforts, the evidence supports the trial court's determination that she did not make sufficient progress in correcting conditions that led to the child's removal"); *Bishop*, 92 N.C. App. at 670, 375 S.E.2d at 681 (holding trial court's finding was supported by clear, cogent, and convincing evidence where "although respondent has made some progress in the areas of job and parenting skills, such progress has been extremely limited").

The record evidence amply supports the trial court's finding that respondents "willfully left the juvenile in foster care . . . for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile[.]" Respondents have also challenged the trial court's finding that they neglected the juvenile. However, "[i]n light of our holding that the trial court did not err in finding that grounds exist to terminate respondent[s'] parental rights under [N.C.G.S. § 7B-1111(a)(2)], we need not discuss the remaining . . . grounds for termination asserted by petitioner." *In re Brim*, 139 N.C. App. 733, 743, 535 S.E.2d 367, 373 (2000). Moreover, respondents have not challenged the trial court's determination that it was in the child's best interests for their parental rights to be terminated. We conclude the trial court properly found the existence of a statutory ground for termination of parental rights.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. PERRY JAMEL ANTWAIN JONES

No. COA02-996

(Filed 17 June 2003)

1. **Firearms and Other Weapons— firearm enhancement statute—first-degree kidnapping**

The trial court did not err by sentencing defendant to an additional sixty months in prison for first-degree kidnapping pursuant to the firearm enhancement statute even though our Supreme Court held in *Lucas*, 353 N.C. 568 (2001), that the State must allege the statutory factors supporting the enhancement under N.C.G.S. § 15-1340.16A in an indictment, because: (1) the decision in *Lucas* was expressly limited to cases that were not yet final; and (2) the judgment in defendant's case was final at the time the decision in *Lucas* was filed.

2. **Sentencing— aggravating factor—serious, permanent, and debilitating injury**

The trial court did not abuse its discretion in a first-degree kidnapping case by finding the aggravating factor that the victim suffered serious, permanent, and debilitating injury, because: (1) the evidence that the victim had been shot was sufficient to prove the serious injury element of first-degree kidnapping, and the evidence that the victim was paralyzed as a result of the shooting was the additional evidence that supported the finding of the aggravating factor; and (2) the same item of evidence was not used to prove both an element of the offense and an aggravating factor in this case.

Appeal by defendant, by writ of certiorari granted by this Court on 11 March 2002, from judgments dated 6 September 1995 by Judge George L. Wainwright, Jr. in Superior Court, Lenoir County. Heard in the Court of Appeals 17 April 2003.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

Lynne Rupp for defendant-appellant.

McGEE, Judge.

Perry Jamel Antwain Jones (defendant) was indicted for armed robbery, attempted first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and first degree kidnapping on 1 May 1995. Defendant pled guilty to first degree kidnapping and assault with a deadly weapon inflicting serious injury and the State dismissed the remaining charges on 6 September 1995. The State presented a factual basis for defendant's plea in open court and Judge George L. Wainwright, Jr. accepted the plea.

The factual basis tended to show that defendant was playing cards with friends at the home of Robert Lang (Lang) on 2 February 1995. Defendant left Lang's house and returned after the card game. Defendant and Lang played a few more hands of cards and defendant went to the bathroom and returned with a gun. Defendant demanded his money back from Lang and Lang gave him about $200.00. Defendant ordered Lang to go with him into the backyard, forcing Lang at gunpoint to walk onto the porch. When Lang refused to go into the backyard, defendant pushed Lang off the porch and began shooting him. Lang fell to the ground but could not get up because he had been shot. Lang remains paralyzed as a result of the shooting.

Judge Wainwright made findings as to aggravating factors that included the finding that Lang suffered serious injury that was permanent and debilitating. Judge Wainwright also found as a mitigating factor that defendant suffered from a mental condition that reduced his culpability but that was insufficient to constitute a defense. The trial court sentenced defendant to a minimum of 108 months and a maximum of 139 months in prison for first degree kidnapping. The trial court also added an enhanced firearm penalty of 60 months in prison to the sentence, making the sentence a minimum of 168 months and a maximum of 199 months in prison. The trial court also sentenced defendant to a minimum of 36 months and a maximum of 53 months in prison for assault with a deadly weapon inflicting serious injury.

Judge Paul L. Jones amended defendant's judgment on 12 April 2001 to correct the sentence by making the maximum sentence correspond with the minimum sentence according to the sentencing grid. Defendant's corrected sentence was a minimum of 168 months and a maximum of 211 months in prison for first degree kidnapping.

Defendant filed a petition for writ of certiorari on 19 February 2002 with this Court. We granted defendant's petition on 11 March 2002 for the purpose of reviewing the judgments entered against defendant by Judge Wainwright on 6 September 1995.

[1] Defendant first argues the trial court erred in sentencing defendant to an additional 60 months in prison pursuant to North Carolina's firearm enhancement statute because the requisite facts were not alleged in the indictment to which defendant pled guilty. Defendant contends that imposition of the enhancement in this case is a violation of his rights under the United States and North Carolina constitutions.

Defendant bases his argument upon the rule established by our Supreme Court in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), which followed decisions by the United States Supreme Court in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999) (holding that any facts that increase the maximum penalty for a crime must be charged in an indictment), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000) (holding that the rule established in *Jones* was applicable to state statutes under the Fourteenth Amendment to the United States Constitution).

Our Supreme Court held in *Lucas* that "in every instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in an indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury." *Lucas*, 353 N.C. at 597-98, 548 S.E.2d at 731. In *Lucas*, the defendant's enhanced sentences for first degree kidnapping and second degree burglary were vacated and remanded because the defendant was not charged in an indictment with the statutory factors supporting an enhancement. However, this ruling was specifically limited to cases in which a defendant had not yet been indicted, cases that were pending on direct review, and cases that were not yet final as of the certification date of the opinion. *Id.* at 598, 548 S.E.2d at 732.

Our Supreme Court filed its opinion in *Lucas* on 20 July 2001. In the present case, the record indicates that defendant was sentenced pursuant to a plea agreement on 6 September 1995. Defendant was required at that time to give oral notice of appeal at trial or file a written notice of appeal within fourteen days after entry of the judgment in order to preserve his right of appeal. N.C.R. App. P. 4(a). Defendant failed to give notice of appeal during this time frame and his case was

not pending on appeal at the time of our Supreme Court's decision in *Lucas*. Accordingly, the judgment in defendant's case was final at the time the decision in *Lucas* was filed. While defendant's petition for a writ of certiorari was granted by this Court on 11 March 2002, this did not change the final judgment status of defendant's case for the purpose of *Lucas*. Since the decision in *Lucas* was expressly limited to cases that were not yet final, defendant's argument is without merit.

[2] Defendant also argues the trial court erred in finding the aggravating factor that Lang suffered serious, permanent, and debilitating injury. Defendant contends that the serious injury elevated the crime from second degree kidnapping to first degree kidnapping and is statutorily prohibited from being used as an aggravating factor.

Under the Structured Sentencing Act, the trial court must consider evidence of aggravating and mitigating factors and may impose a sentence in its discretion. N.C. Gen. Stat. § 15A-1340.16(a) (2001). "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." *State v. Wampler*, 145 N.C. App. 127, 133, 549 S.E.2d 563, 568 (2001). "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation." N.C. Gen. Stat. § 15A-1340.16(d); *see State v. Holt*, 144 N.C. App. 112, 547 S.E.2d 148 (2001), *disc. review improvidently allowed*, 355 N.C. 347, 560 S.E.2d 793 (2002).

Kidnapping is the unlawful, nonconsensual confinement, restraint or removal from one place to another of a person for the purpose of committing specified acts that are set forth in N.C. Gen. Stat. § 14-39 (2001). *See State v. Claypoole*, 118 N.C. App. 714, 717, 457 S.E.2d 322, 324 (1995). "If the person kidnapped . . . was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree." N.C.G.S. § 14-39(b). N.C. Gen. Stat. § 15A-1340.16(d)(19) (2001) lists "serious injury inflicted upon the victim [that is] permanent and debilitating" as an aggravating factor for consideration by the trial court.

In *State v. Crisp*, 126 N.C. App. 30, 483 S.E.2d 462, *disc. review denied*, 346 N.C. 284, 487 S.E.2d 559 (1997), the defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious

injury. At sentencing, the trial court found as an aggravating factor that the victims suffered serious injury that was permanent and debilitating. In upholding the sentence imposed by the trial court, our Court stated:

> [T]he language of the statute, that "the serious injury inflicted upon the victim is permanent and debilitating" creates a distinction between the suffering of the victim at the time the serious injury is inflicted and any long-term or extended effects that arise due to that serious injury. The gunshot wounds suffered by [the victims] resulted in serious injuries at the time they were inflicted, wholly apart from their consequences. Richardson's paralysis and Nordan's weakness and diminished ability to use his arm were the long-term effects of these injuries. Thus, the same evidence was not used to support an element of the offense and the aggravating factor.

Id. at 39, 483 S.E.2d at 468.

Our Supreme Court reached a similar result in *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994). In *Brinson*, the defendant attacked his cell mate, striking him in the jaw and slamming his head into the jail bars. After hearing the victim's neck pop, the defendant then slammed the victim's head onto the floor several times. The victim was paralyzed below the chest as a result of the attack. Our Supreme Court held that "[t]he evidence relating to the victim's broken neck, aside from evidence relating to the resulting paralysis, was sufficient to establish the element of the crime that the defendant inflicted a 'serious injury' upon the victim." *Id.* at 770, 448 S.E.2d at 826. The Court also stated that "[t]he evidence relating to the broken neck, however, was not used in making the finding that the 'injuries sustained by the victim were extremely severe and permanent'; instead, that finding rested solely on the victim's paralysis." *Id.*

In the case before us, the record shows that defendant forced Lang to walk out onto the porch at gunpoint, where defendant pushed Lang off of the porch and shot him. Lang fell to the ground but was unable to get up because he had been shot. He is paralyzed as a result of the shooting. The evidence supporting the finding of the aggravating factor that the injury was permanent and debilitating went beyond that necessary to prove the serious injury element of first degree kidnapping. The evidence that Lang had been shot was sufficient to prove the serious injury element of first degree kidnapping. The evidence that Lang was paralyzed as a result of the shooting was

the additional evidence that supported the finding of the aggravating factor. The same item of evidence was not used to prove both an element of the offense and an aggravating factor in this case. This assignment of error is without merit.

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

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

BOBBY MARTIN, EMPLOYEE, PLAINTIFF v. MARTIN BROTHERS GRADING, EMPLOYER, AND N.C. FARM BUREAU MUTUAL INSURANCE COMPANY, THIRD-PARTY ADMINISTRATOR, DEFENDANTS

No. COA02-381

(Filed 17 June 2003)

Workers' Compensation— weight of evidence—discretion of Industrial Commission

A workers' compensation finding that plaintiff's disability was proximately caused by head injuries suffered while he worked for his son's grading company was supported by the evidence. Although defendant pointed to plaintiff's pre-existing small vessel disease, the Industrial Commission was entitled to rely upon medical testimony that it was "possible," "probable," or "likely" that plaintiff's accidents caused his disability. The level of the witnesses' certainty went to the weight of their testimony and not its competence.

Appeal by defendants from the Opinion and Award filed 23 October 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2003.

Crumley & Associates, P.C., by Daniel L. Deuterman and Pamela W. Foster, for plaintiff-appellee.

Young Moore and Henderson, P.A., by J. D. Prather and Zachary C. Bolen, for defendants-appellants.

GEER, Judge.

It is undisputed on this appeal that plaintiff Bobby Martin suffered compensable work-related accidents on 29 November 1996 and 2 April 1997. The sole issue before this Court is whether the Industrial Commission's decision finding that plaintiff's disability was caused by those accidents is supported by competent evidence. We hold that it is and affirm.

Defendant Martin Brothers Grading is a grading company owned by plaintiff's son, Ricky Martin. Martin Brothers clears and grades land prior to new construction. In August 1996, after being laid off from his prior employment, plaintiff went to work full time for his son running a compactor.

On 29 November 1996, a falling tree limb struck plaintiff on the head while plaintiff was helping clear property for a softball field. The force of the blow knocked plaintiff unconscious. Because there were no witnesses, no one knows how long plaintiff lay unconscious. A coworker found plaintiff wandering in the woods and brought him to his son, who then took plaintiff to the hospital.

Plaintiff was hemorrhaging from a large laceration that exposed his skull. The hospital's triage staff was unable to control plaintiff's scalp hemorrhage and plaintiff underwent emergency surgery to close and repair the laceration. A CT scan revealed that plaintiff had also suffered a subdural hematoma to the right hemisphere of his brain.

After returning home from the hospital on 1 December 1996, both plaintiff and his wife noticed that plaintiff was having problems with his memory. He was also irritable, anxious, and had begun repeating himself. Dr. Kimberly Livingston, the neurosurgeon who had treated plaintiff in the hospital, reported to plaintiff's family physician that plaintiff's symptoms were consistent with a closed head injury. Plaintiff's medical records prior to 29 November 1996 showed no evidence that plaintiff had ever before experienced any neurological, cognitive, or memory problems.

Dr. Livingston released plaintiff to return to work on 3 March 1997. Because neither plaintiff nor defendant-employer felt that plaintiff was yet ready to return to work, he was assigned to the lightest duty work available: driving a small earth compactor. On 2 April 1997, plaintiff backed the compactor onto a mound of dirt, over-

turned the compactor, and sustained another head injury. Plaintiff has not worked since 2 April 1997.

Plaintiff has experienced continuing personality, memory, and cognitive problems. He was seen by his family physician who recommended that plaintiff undergo a neurological examination. Subsequently, he revisited Dr. Livingston who suggested that he see a neuropsychologist regarding the nature of his memory and cognitive problems.

On 25 March 1998, the defendant-carrier referred plaintiff to Dr. Thomas Gualtieri for a neuropsychiatric evaluation. After performing complete physical and neurological examinations, Dr. Gualtieri also recommended that plaintiff undergo a battery of neuropsychological tests.

On 8 June 1998, plaintiff was referred by his attorney to Dr. Stephen Kramer, an Associate Professor of Psychiatry at the Wake Forest University School of Medicine and the Director of the Wake Forest University Department of Neuropsychiatry. Dr. Kramer consulted with Dr. Jonathan Burdette, a neuroradiologist at Wake Forest, who reviewed plaintiff's 10 December 1996 CT scan and subsequent 9 November 1998 Gadolinium enhanced MRI scan.

On 15 December 1998, 18 January 1999, and 19 August 1999, plaintiff was examined, at the request of defendants, by Alexander A. Manning, Ph.D, an expert in neuropsychology, specializing in the study of how the brain functions and the relationship of brain functions to behavior. Dr. Manning performed a complete battery of neuropsychological tests on plaintiff.

Plaintiff filed separate workers' compensation claims for the November 1996 and April 1997 accidents. The two claims were consolidated and initially heard by Deputy Commissioner Chrystal Stanback who awarded plaintiff temporary total disability benefits. On defendants' appeal, the Full Commission affirmed the decision of the Deputy Commissioner, finding that "[t]he greater weight of the medical evidence establishes that plaintiff's disability after April 2, 1997 was the proximate result of either the injury by accident of November 29, 1996 or a combination of the compensable injuries plaintiff sustained on November 29, 1996 and April 2, 1997." Because the Commission further found that plaintiff was and remains incapable of earning the wages that he was receiving at the time of his injuries by accident at the same or other employment, the

Commission awarded plaintiff temporary total disability benefits from 2 April 1997 until further order of the Commission or until plaintiff returns to work.

Defendants argue that the Commission's finding that plaintiff's disability after 2 April 1997 was the proximate result of his work injuries is unsupported by competent evidence. In reviewing a decision by the Commission, this Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The Commission's findings of fact are conclusive upon appeal if 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). On appeal, this Court may not re-weigh the evidence or assess credibility. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). Findings of fact may be set aside on appeal only "when there is a complete lack of competent evidence to support them." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

The record contains ample evidence to support the Commission's finding that plaintiff's disability was proximately caused by either the November 1996 accident or by a combination of the November 1996 and April 1997 accidents. Although defendant points to plaintiff's pre-existing small-vessel disease as a cause for plaintiff's disability, the Commission was entitled to rely upon medical testimony otherwise.

Specifically, in Dr. Kramer's opinion, "the most likely diagnosis" for plaintiff was persistent post-concussive syndrome resulting from the November 1996 and April 1997 accidents with the November 1996 accident "an essential factor producing the syndrome." On cross-examination, Dr. Kramer rejected defendants' contention that plaintiff's disability arose from the small-vessel disease. According to Dr. Kramer, it was "not likely." Dr. Gualtieri similarly testified that the injury to the right hemisphere of plaintiff's brain—occurring in the November 1996 accident—is "more likely" the cause of plaintiff's problems than the small-vessel disease. He repeated that plaintiff's disability was "probably" related to the head injury in November 1996 and that the disability was "more probably a result of this injury."

Dr. Manning's testimony was more equivocal. Yet, even he testified:

> With Mr. Martin, I've got a number of signs that are fairly strong indications that the right hemisphere is being affected to a significant degree more than the left hemisphere. So because of that lateralized finding, I think I said in my report, that this may be an indication of the traumatic brain injury that he had. He had a subdural hematoma that affected the right side of the brain. These lingering findings here, this lateralized finding, may be some evidence that, indeed, there is still an [e]ffect of that traumatic brain injury present that is—that overlays the diffuse [small-vessel disease] process that was also there.

Dr. Manning further testified that "[i]t's clearly possible" that the accidents in November 1996 and April 1997 "could have accelerated [plaintiff's] deterioration" and that "it would seem more likely than not that it accelerated that." Later, he clarified that it was "likely" that the injury "aggravated" the progress of plaintiff's small-vessel disease. While he would not testify that the aggravation was more likely than not, he did confirm that "[t]here is a possibility that the traumatic brain injury did play a role in what I'm seeing."

Defendants point to the testimony of Dr. Livingston and Dr. Burdette to support their claim that plaintiff failed to prove that his accidents and not his small-vessel disease caused his disability. While Dr. Livingston does provide support for defendants' contention, Dr. Burdette, who reviewed plaintiff's MRI, does not. Dr. Burdette stressed that he is not an expert on post-concussive syndrome and that although his review of the MRI did not reveal a "gross abnormality," that fact "does not entirely exclude a traumatic postconcussive-type episode" because "postconcussive syndrome is . . . more on a cellular level in the brain, and these findings might not be seen, in fact, usually are not seen on a brain MRI."

It was the responsibility of the Commission to weigh all of this expert testimony and determine whose opinion was most persuasive. On appeal, defendants seek to undermine plaintiff's evidence by arguing that the doctors did not testify to a reasonable degree of medical certainty and by suggesting that the evidence merely establishes that plaintiff's condition is *possibly* related to his work injuries. Defendants' contentions have been rejected by this Court. As this Court most recently held in *Johnson v. Piggly Wiggly of Pinetops, Inc.*, 156 N.C. App. 42, 49, 575 S.E.2d 797, 802 (2003):

> No longer is testimony inadmissible for its failure to state it was based on "reasonable medical probability." The degree in which

> an expert testifies as to causation, be it "probable" or "most likely" or words of similar import, goes to the weight of the testimony rather than to its admissibility.

Applying this principle, this Court upheld reliance on expert testimony that it was "possible" that the incident at issue caused plaintiff's condition. *Id. See also Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 599, 532 S.E.2d 207, 211 (2000) (internal quotation marks omitted) ("[W]e note that the expert testimony need not show that the work incident caused the injury to a 'reasonable degree of medical certainty.' "); *Buck v. Procter & Gamble Mfg. Co.*, 52 N.C. App. 88, 94-95, 278 S.E.2d 268, 272-73 (1981) (expert's opinion that accident "could" have caused disc protrusion competent although also testified on cross-examination that it was "equally possible" that the defect was degenerative in nature).

As *Johnson* stresses, whether the doctors in this case testified that it was "possible," "probable," or "likely" that plaintiffs' accidents caused his disability, the level of their certainty went to the weight of the testimony and not its competence. The decision regarding what weight to give each piece of expert evidence is a task for the Commission and not this Court. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. Since there exists competent evidence that plaintiff's work injury or injuries proximately caused his disability, we affirm the Commission's Opinion and Award.

Affirmed.

Judges WYNN and BRYANT concur.

THE BOARD OF DRAINAGE COMMISSIONERS OF PITT COUNTY DRAINAGE DISTRICT NO. 3, ET AL., PLAINTIFFS v. TERRY RAY DIXON, CHARLES OLIVER DOVE, PAMELA S. DOVE, MARY D. DUNN, THE HOMESTEAD OF PITT INC. D/B/A HOMESTEAD MEMORIAL GARDENS, THE HOMESTEAD OF PITT, INC. D/B/A HOMESTEAD MEMORIAL GARDENS, AND DOVE'S MONUMENTS, INC., DEFENDANTS

No. COA02-834

(Filed 17 June 2003)

Constitutional Law; Discovery— sanctions—Fifth Amendment privilege—failure to appear

The trial court abused its discretion in an embezzlement case by imposing monetary sanctions of $2,800.00 against defendant and his attorney for violation of N.C.G.S. § 1A-1, Rule 37(d) arising out of defendant's appearance at a deposition and his refusal to answer questions based on his assertion of the Fifth Amendment privilege against self-incrimination, because: (1) where an individual party physically appears at a deposition, the imposition of Rule 37(d) sanctions for failure to appear is not appropriate; and (2) the better course of action would have been for defendant to apply for a protective order under Rule 26(c), and then the trial court could define the scope of the examination in light of defendant's assertion of his Fifth Amendment privilege.

Appeal by defendants from order entered 4 October 2001 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 25 March 2003.

Ward & Smith, PA, by Lance P. Martin and Michael P. Flanagan, for plaintiffs-appellees.

Mills & Economos, by Larry C. Economos, for defendants-appellants.

STEELMAN, Judge.

Defendants, Charles Oliver Dove (Dove) and his counsel, Larry C. Economos (Economos), appeal a trial court order imposing monetary sanctions. They argue only one assignment of error, that the trial court erred in ordering sanctions in the amount of $2,800.00 for violation of Rule 37(d) of the North Carolina Rules of Civil Procedure. We agree.

A complaint was filed alleging defendant Dove and other defendants had embezzled money from plaintiffs. During discovery, plaintiffs sought to depose Dove. At the deposition, which was scheduled for 16 August 2001 by the consent of the parties, Dove answered questions about his name and address. His attorney, Economos, then announced that Dove was invoking his right against self-incrimination under the Fifth Amendment. Dove refused to answer any further questions. Economos had a discussion with plaintiffs' attorney, who contended that he had a right to question Dove and that Dove could assert his privilege on a question by question basis. Economos stated that Dove could assert a blanket Fifth Amendment privilege and not answer any questions. Counsel further stated that he understood that "there was an indictment underway against [Dove]" and that this was the basis for his client invoking the privilege. Economos terminated the deposition and left with Dove.

Plaintiffs filed a motion for sanctions pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure against both Dove and Economos on 29 August 2001. Dove and Economos then filed a response and a motion for Rule 11 sanctions against plaintiffs' counsel. The trial court ruled in favor of plaintiffs and imposed sanctions against Dove and Economos, ordering them to pay plaintiffs $2,800.00. The trial court additionally ordered that Dove be deposed on 14 September 2001. Dove was directed to answer all questions put before him, and, if he chose, to assert his Fifth Amendment privilege question by question. Defendants Dove and Economos appeal the imposition of monetary sanctions. They did not appeal the trial court's ruling that Dove was to assert his Fifth Amendment privilege on a question by question basis during the deposition.

Rule 37 provides for sanctions for failure to make discovery. N.C. Gen. Stat. § 1A-1, Rule 37 (2001). The trial judge has broad discretion in imposing sanctions to compel discovery under Rule 37. *American Imports, Inc. v. G.E. Employees Western Region Federal Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978). The trial court's choice of sanctions under Rule 37 will not be overturned absent a showing of abuse of discretion. *Brooks v. Giesey*, 106 N.C. App. 586, 418 S.E.2d 236, (1992), *aff'd*, 334 N.C. 303, 432 S.E.2d 339 (1993).

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. "[T]he constitutional privilege against self-incrimination 'applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal

responsibility him who gives it.' " *Johnson County Nat'l Bank & Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 501, *cert. denied*, 298 N.C. 304, 259 S.E.2d 300 (1979) (quoting *McCarthy v. Arndstein*, 266 U.S. 34, 40, 69 L. Ed. 158, 161 (1924)).

In *Stone v. Martin*, 56 N.C. App. 473, 476, 289 S.E.2d 898, 901 (1982), *appeal dismissed and rev. denied*, 320 N.C. 638, 360 S.E.2d 105 (1987), this Court held that:

> Under North Carolina discovery rules, subject only to limitation by court order, any party to a civil action is entitled to all information relevant to the subject matter of that action *unless such information is privileged.* The right of discovery must yield, however, to the privilege against compulsory self-incrimination. Thus, courts cannot compel disclosure of information which would tend to incriminate the person from whom it is sought and cannot impose sanctions on one who refuses to disclose privileged information.

(Emphasis in original) (citations omitted). Our courts have thus given special deference to the privilege against self-incrimination. In *Golding v. Taylor*, 19 N.C. App. 245, 198 S.E.2d 478, *cert. denied*, 284 N.C. 121, 199 S.E.2d 659 (1973), this Court held that the failure to make a timely objection to interrogatories did not operate as a waiver of this privilege. "[While we agree that ordinarily, in the absence of an extension of time, failure to object to interrogatories within the time fixed by the rule is a waiver of any objection, we hold that this principle must yield to the privilege against self-incrimination guaranteed by the Fifth Amendment to the Federal Constitution." *Id.* at 248, 198 S.E.2d 480.

Rule 37(d) provides that the trial court may impose sanctions where a party "fails . . . to appear before the person who is to take his deposition, after being served with a proper notice[.]" N.C. Gen. Stat. § 1A-1, Rule 37(d) (2001). Dove contends that he did appear and then asserted his privilege against self-incrimination. Plaintiffs contend that merely appearing at a deposition and then refusing to answer questions is tantamount to failing to appear, regardless of the reason given for refusing to testify.

There is no North Carolina case which speaks directly to this question. It is thus appropriate to look at cases decided under Rule 37(d) of the Federal Rules of Civil Procedure for guidance. *See Goins v. Puleo*, 350 N.C. 277, 512 S.E.2d 748 (1999). In *SEC v. Research*

Automation Corp., 521 F.2d 585, 588-89 (2d Cir. 1975), the court stated:

> we believe that the term "appear" as used in Rule 37(d) must be strictly construed, limiting it to the case where a defendant literally fails to show up for a deposition session. Where a defendant does in fact appear physically for the taking of his deposition but refuses to cooperate by being sworn and by testifying, the proper procedure is first to obtain an order from the court, as authorized by Rule 37(a), directing him to be sworn and to testify.

Accord, Salahuddin v. Harris, 782 F.2d 1127 (2d Cir. 1986). Conversely, plaintiffs argue that this Court should follow the reasoning of *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275 (3d Cir. 2000) and *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196 (5th Cir. 1993), *reh'g denied*, 1993 U.S. App. LEXIS 8383. These cases concern witnesses designated to testify on behalf of a corporation pursuant to Rule 30(b)(6). In the cases, witnesses appeared, but lacked knowledge of the topics designated in the Rule 30(b)(6) deposition notice. *Black Horse* held that "when a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), 'producing an unprepared witness is tantamount to a failure to appear' [and] is sanctionable under Rule 37(d)." *Black Horse* at 304 (quoting *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996)).

Such is not the situation in the instant case. An individual was being deposed, not a corporation. *Black Horse* acknowledges that this is a different situation. "Were we here faced with a case involving the deposition of a natural person we might be inclined to agree with the reading of Rule 37(d) by our Second Circuit colleagues [in *Salahuddin v. Harris*, 782 F.2d 1127 (2d Cir. 1986)]. The deposition of a corporation, however, poses a different problem, as reflected by Rule 30(b)(6)." *Id.* at 303 (quoting *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197-98 (5th Cir. 1993)).

We find that *SEC v. Research Automation Corp.*, 521 F.2d 585, 588 (2d Cir. 1975), embodies the better reasoned approach. Where an individual party physically appears at a deposition, the imposition of Rule 37(d) sanctions for failure to appear is not appropriate. The better course of action would have been for Dove to apply for a protective order pursuant to Rule 26(c). Then the trial court could define the scope of the examination in light of defendant's assertion of his Fifth Amendment privilege.

We hold that the trial court abused its discretion in imposing sanctions under Rule 37(d).

REVERSED.

Judges WYNN and TYSON concur.

CHRYSLER FINANCIAL COMPANY, LLC, PLAINTIFF v. SOUTH CAROLINA INSURANCE COMPANY, JIMMY JOHNSON AND MARY JOHNSON, DEFENDANTS

No. COA02-1079

(Filed 17 June 2003)

1. **Insurance— automobile—finance company as loss payee—standard mortgage clause—misrepresentations by purchaser**

Alleged misrepresentations by the insured did not entitle defendant auto insurer to cancel the policy as to the loss payee, and summary judgment was incorrectly granted for defendant, where the loss payee (plaintiff) was the company which financed the purchase of an automobile that was declared a total loss after a collision; the loss payee clause provided that it would become invalid only for insured's conversion or secretion of the covered auto or damage to or destruction of the covered auto with intent to commit fraud; the loss payee clause was thus a standard mortgage clause which created a distinct and independent contract between the insurer and the loss payee and conferred greater coverage to the loss payee than to the insured; and no exceptions to the loss payee clause applied to the insured's alleged misrepresentations. Furthermore, even though defendant insurer notified the insured that it was declaring the policy void ab initio for misrepresentations, the record does not indicate that defendant gave notice to plaintiff loss payee as the policy required, and plaintiff was not a party to the agreement which contained the void ab initio language in the fine print.

2. **Appeal and Error— appealability—denial of summary judgment—interlocutory order**

The denial of summary judgment for plaintiff in an insurance dispute was an interlocutory order and not immediately appealable where there was neither a certification nor a

substantial right affected. That portion of the appeal was dismissed.

Appeal by plaintiff from orders entered 17 September 2001 by Judge Richard D. Boner in Mecklenburg County Superior Court and 14 June 2002 by Judge Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 May 2003.

Waggoner, Hamrick, Hasty, Monteith & Kratt, PLLC, by S. Dean Hamrick, for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III, for defendant.

TYSON, Judge.

Chrysler Financial Corporation ("plaintiff") appeals from an interlocutory order denying summary judgment against South Carolina Insurance Company ("defendant") and from order granting summary judgment for defendant. We reverse the order granting summary judgment against plaintiff and dismiss the appeal from the interlocutory order.

I. Background

On 30 March 1998, Jimmy and Mary Johnson executed a retail installment contract in favor of plaintiff secured by a 1998 Chrysler Sebring Coupe ("vehicle") as collateral. On 29 September 1999, defendant issued an automobile insurance policy ("policy") to Jimmy Johnson covering the vehicle. The policy named plaintiff as "loss payee."

The loss payee portion of the policy read as follows.

> Loss or damage under this policy shall be paid as interest may appear to you and the loss payee shown in the Declarations or in this endorsement. This insurance covering the interest of the loss payee shall become invalid only because of your:
>
> 1. conversion or secretion of "your covered auto", or
>
> 2. damage to or destruction of "your covered auto" with the intent to commit fraud.
>
> However, we reserve the right to cancel the policy as permitted by policy terms and the cancellation shall terminate this agree-

ment as to the loss payee's interest. We will give the loss payee 10 days notice of cancellation.

When we pay the loss payee we shall, to the extent of payment, be subrogated to the loss payee's rights of recovery.

On 24 October 1999, the vehicle suffered damage during a collision in Pennsylvania. Defendant received notice of the collision and investigated the accident. The fair market value of the car was estimated to be $18,225.00. It was declared a total loss. After the initial investigation, defendant determined that the Johnsons had made misrepresentations in their application for insurance. By letter dated 4 January 2000, defendant denied coverage for the loss of the vehicle.

Neither the Johnsons nor defendant advised plaintiff of the damage to the vehicle. After the collision, the Johnsons failed to make payments to plaintiff, and plaintiff learned of the damage to the vehicle. On 9 October 2000, plaintiff sent a demand letter to defendant for the payment due pursuant to the terms of the loss payable clause of the policy. On 16 October 2000, defendant replied to plaintiff's letter and contended that no coverage was available to plaintiff as loss payee, due to the misrepresentations made by the Johnsons in their application.

On 26 January 2001, plaintiff filed a complaint against defendant to recover for damages to the vehicle and against the Johnsons to recover the balance due on the retail installment contract. Defendant and the Johnsons filed answers and cross claims against each other. On 2 April 2001, plaintiff filed a motion for summary judgment against defendant and the Johnsons. On 12 September 2001, the trial court granted summary judgment against the Johnsons for $18,708.98 plus interest accrued from 11 December 2000. On 17 September 2001, the trial court denied plaintiff's motion for summary judgment against defendant. On 14 June 2002, the trial court granted defendant's motion for summary judgment dismissing the claims of the Johnsons and plaintiff. Plaintiff appeals.

II. Issues

The issues are (1) whether the Johnsons' misrepresentations to defendant in their insurance application voided the protection afforded plaintiff in the loss payee clause and (2) whether the trial court erred in denying summary judgment in favor of the plaintiff against defendant.

III. Effect of Johnsons' Misrepresentations

[1] The trial court granted defendant's motion for summary judgment on the grounds: (1) that the Johnsons' misrepresentations voided the policy *ab initio*, and (2) that plaintiff held no interest as loss payee in a voided policy. The trial court relied upon the case of *Odum v. Nationwide Mutual Ins. Co.*, 101 N.C. App. 627, 401 S.E.2d 87, *disc. review denied*, 329 N.C. 499, 407 S.E.2d 539 (1991). *Odum* held that fraud was a defense to any amount of coverage in excess of the statutory minimum required for motor vehicle liability coverage. *Id.* at 635-36, 401 S.E.2d at 92.

Odum involved a liability coverage dispute. Here, the interpretation of a loss payee clause and the impact of the insured's fraud on the rights of the loss payee are at issue.

We hold that the more recent and factually similar case of *Nationwide Mutual Ins. Co. v. Dempsey*, 128 N.C. App. 641, 495 S.E.2d 914, *disc. review denied*, 348 N.C. 283, 502 S.E.2d 847 (1998) controls. In *Dempsey*, Regional Acceptance Corporation held a perfected security interest in the insured's vehicle and was named as the "loss payee" in insured's insurance contract. *Dempsey*, 128 N.C. App. at 642, 495 S.E.2d at 915. The loss payee clause was virtually identical to that at bar. *Id.* This Court found that clause to be a "standard mortgage clause" rather than an "open or simple loss-payable clause." *Id.* at 644, 495 S.E.2d at 916.

> The clause stated that the "insurance covering the interest of the loss payee shall become invalid only because of your conversion or secretion of your covered auto." This language clearly extends to the loss payee greater coverage than that extended to Dempsey as it sets out only two instances when the loss payee's insurance coverage will become invalid. For this reason, we hold that the clause is a standard mortgage clause.

Id.

Although the loss payee clause at bar extends an exception to "damage to or destruction of 'your covered auto' with the intent to commit fraud," we find the rationale of *Dempsey* applicable. The clause is a standard mortgage clause which exists as a "distinct and independent contract between the insurance company and the mortgagee and 'confers greater coverage to the lienholder than the insured has in the underlying policy.' " *Id.* at 643, 495 S.E.2d at 915

(quoting *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 605 fn. 27 (Mich. 1992)). Plaintiff's rights are not derivative of the Johnsons' interest.

The trial court did not interpret whether the Johnsons' alleged misrepresentations constituted one of the exceptions outlined in the loss payee clause. We hold that the Johnsons' behavior does not constitute an exception to payment for the loss payee.

Aside from the exceptions, the loss payee clause sets forth a notice requirement for cancellation. Defendant was required to give the Johnsons and the loss payee ten days notice of the impending cancellation for the collision insurance at issue. The record does not indicate when or if defendant gave notice of its cancellation to plaintiff. Defendant notified the Johnsons of the cancellation by letter of 4 January 2000 in which it denied coverage and cancelled the policy. The letter declared the coverage "cancelled" from the inception date. To allow defendant to cancel the policy from the inception defeats the purpose of the notice provisions outlined in the policy.

Defendant relies upon fine print language in the application for insurance signed by Mr. Johnson which states defendant can declare the policy void *ab initio* if any of the answers on the application are false or misleading. Plaintiff was not a party to this agreement, and there is no indication, other than its financing of the vehicle, that it consented to it. "The well established and universal rule is that insurance contracts will be liberally construed in favor of the insured and strictly construed against the insurer, since the insurance company selected the language used in the policy." *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984). The insurance policy was issued after the application and set out certain conditions for cancellation that cannot be circumvented by the prior application with respect to the loss payee. The summary judgment award in favor of defendant is reversed.

IV. Plaintiff's Summary Judgment Motion

[2] Plaintiff attempts to appeal from the denial of its summary judgment motion. The denial of a summary judgment motion is an interlocutory order. *Pate v. State Farm Fire and Casualty Company*, 136 N.C. App. 836, 838, 526 S.E.2d 497, 498 (2000). Interlocutory orders are not appealable to this Court absent certification by the trial court or an issue affecting a substantial right. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 246, 507 S.E.2d 56, 60 (1998).

We find neither a substantial right affected nor a certification at bar. This portion of the appeal is dismissed as interlocutory.

Reversed and Remanded.

Judges McGEE and CALABRIA concur.

CUMBERLAND HOMES, INC., PLAINTIFF v. CAROLINA LAKES PROPERTY OWNERS' ASSOCIATION, INC., DEFENDANT

No. COA02-517

(Filed 17 June 2003)

Deeds— restrictive covenants—house plans

The trial court did not err in a declaratory judgment action by construing the "enclosed heated living area" in a restrictive covenant to include a bonus or computer room located on the second floor of the garage, because: (1) nothing in the restrictive covenant requires the enclosed heated living area to be on the ground level, but instead only mandates that the space cover a ground area of not less than 1,400 square feet; and (2) the minimum enclosed heated living space includes space on the second floor that creates its own footprint over ground area and is not above first floor enclosed heated living space.

Appeal by defendant from judgment dated 5 December 2001 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 12 May 2003.

The Yarborough Law Firm, by Garris Neil Yarborough and Barry K. Simmons, for plaintiff appellee.

Duncan B. McCormick, for defendant appellant.

BRYANT, Judge.

Carolina Lakes Property Owners' Association, Inc. (defendant) appeals from a declaratory judgment dated 5 December 2001 construing a restrictive covenant in favor of Cumberland Homes, Inc. (plaintiff).

On 6 September 2001, plaintiff filed this action seeking a declaration that two house plans submitted to defendant's architectural committee complied with a restrictive covenant governing section N of the Carolina Lakes residential subdivision. The undisputed evidence, presented at a 30 November 2001 hearing, shows that plaintiff, the owner of two lots in section N of the Carolina Lakes subdivision, submitted two separate plans for houses to be built on the lots. Defendant's architectural committee rejected the plans on the ground they did not comply with Paragraph 6 of the "Reservations and Restrictions" governing that section of the subdivision. Paragraph 6 states:

> 6. HOUSE SIZE REQUIREMENTS: The enclosed, heated, living area (exclusive of garages, carports, porches, terraces, private yards, bulk storage and basements of one-story, two-story and split level dwellings shall cover a ground area of not less than 1,400 square feet.
>
> The term "enclosed heated living area" as used in these minimum size requirements shall mean the total enclosed area within a dwelling provided, however, that such term does not include garages, terraces, decks, open porches, and like areas.

Neither of the house plans submitted by plaintiff contained 1,400 square feet of living area on the first floor. They did, however, both contain "bonus rooms" and/or a "computer room" located on the second floor above the respective garages. If the bonus rooms and computer room were included in the calculations, both plans exceeded the minimum "enclosed heated living area."

Defendant presented no evidence but argued at the hearing that the restrictive covenant should be interpreted to count only living space located on ground level. In support of this position, defendant asserted that second floor living space located above first floor living space was not included in the calculation of "enclosed heated living space" and, thus, space above a garage should not be counted at all, as a garage was expressly excluded from the calculation. Defendant explained the purpose of the covenant was to maintain similar exterior appearances of houses in that section of the subdivision by requiring a certain amount of living space on the ground level and to lead to the construction of "ranch-style" homes. Plaintiff, on the other hand, contended that second floor living area not located above the first floor living area should be counted toward the minimum as it created an additional "footprint" over the ground area. Plaintiff

argued that the purpose of the covenant was to maintain property values by requiring a certain total amount of livable space in houses in the same section.

The trial court, without making any separate findings of fact or conclusions of law, ordered that the restrictive covenant be construed consistently with the statement:

> For purposes of meeting the minimum 1,400 square feet ground area coverage . . . , the phrase "enclosed heated living area" shall include enclosed heated living space of both the first floor and second floor, and the floor in between in the case of a split level home, as long as such space is not directly above or below other living space that has already been counted and credited toward the minimum ground area coverage requirement.

The trial court further ordered that plaintiff's two house plans were in compliance with the restrictive covenant.

The dispositive issue is whether the undisputed facts of this case lead to the single inference that plaintiff's house plans complied with the restrictive covenant.

Defendant argues the trial court, without making findings of fact or conclusions of law, incorrectly interpreted the restrictive covenant. Declaratory judgments may be reviewed in the same manner as other judgments. *See Hobson Const. Co., Inc. v. Great American Ins. Co.*, 71 N.C. App. 586, 589, 322 S.E.2d 632, 634 (1984). "In all actions tried upon the facts without a jury . . . the [trial] court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2001); *see also Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985) (trial court, when sitting as finder of fact, is required to "(1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly"). Where a trial court fails to make the required findings or conclusions, "the appellate court may order a new trial or allow additional evidence to be heard by the trial court or leave it to the trial court to decide whether further findings should be on the basis of the existing record or on the record as supplemented." *Harris v. N.C. Farm Bureau Mut. Ins. Co.*, 91 N.C. App. 147, 150, 370 S.E.2d 700, 702 (1988) (citation omitted) (internal quotations omitted). Remand

is unnecessary, however, where the facts of the case are undisputed and those facts lead to only one inference. *Id.* According to the parties in the instant case, the evidentiary facts are not in dispute. Therefore, because additional findings of fact are not required and because the record provides a sufficient basis for our review on the merits, we can properly determine whether the trial court erred in construing the restrictive covenant.

" 'In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions.' " *Donaldson v. Shearin*, 142 N.C. App. 102, 106, 541 S.E.2d 777, 780 (2001) (quoting *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967)), *aff'd*, 354 N.C. 207, 552 S.E.2d 142 (2001) (per curiam). Moreover, restrictive covenants are "strictly construed in favor of the unrestricted use of property." *Rosi v. McCoy*, 319 N.C. 589, 592, 356 S.E.2d 568, 570 (1987). A trial court should not interpret a restrictive covenant in an unreasonable manner or a manner that defeats the plain and obvious purpose of the covenant. *See Long*, 271 N.C at 268, 156 S.E.2d at 239; *see also Donaldson*, 142 N.C. App. at 106, 541 S.E.2d at 780 (restrictive covenants should not be so strictly construed so as to defeat the purpose of the covenant).

In this case, review of all the restrictive covenants applicable to section N of the subdivision reveals that Paragraph 5 limits the use of property to the building of "one (1) detached single family dwelling not to exceed two (2) stories in height," and Paragraph 6 itself also refers to two-story dwellings. From this, it is clear that construction of two-story houses in section N was anticipated in the drafting of the restrictive covenants. Furthermore, nothing in the restrictive covenant requires the "enclosed heated living area" to actually be on the ground level. Instead, it only mandates that the space cover a "ground area of not less than 1,400 square feet."

Thus, construing the restrictive covenant to give effect to its plain meaning and against limitation of the free use of property, the only inference to be drawn is that the minimum "enclosed heated living space" includes space on the second floor that creates its own "footprint" over ground area and is not above first floor "enclosed heated living space." The trial court, therefore, did not err in its construction of the restrictive covenant. Accordingly, declaratory judgment for plaintiff was proper.

Affirmed.

Chief Judge EAGLES and Judge LEVINSON concur.

IN THE MATTER OF: LINDSAY ALEXANDER, DOB: 3/13/89 A MINOR CHILD

IN THE MATTER ROBYN ALEXANDER, DOB: 5/30/94 A MINOR CHILD

THE ORANGE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER V. DAVID ALEXANDER AND BRENDA ALEXANDER, RESPONDENTS

No. COA02-1073

(Filed 17 June 2003)

Termination of Parental Rights— statutory notice requirements—mandatory

An order terminating parental rights was reversed and remanded where DSS did not give adequate notice to respondents or their counsel. Although DSS argued that the notice provided through motions was sufficient and that there was no prejudice, this issue is governed by the mandatory requirements of N.C.G.S. § 7B-1106.1 rather than constitutional principles of due process. Failure to comply with the statutory mandate in the word "shall" is reversible error.

Appeal by respondents from orders entered 21 March 2002 by Judge M. Patricia DeVine in Orange County District Court. Heard in the Court of Appeals 14 April 2003.

Carol J. Holcomb and Samantha Hyatt Cabe, for petitioner-appellee.

Elizabeth A. Hansen and Janet K. Ledbetter, for respondents-appellants.

CALABRIA, Judge.

David and Brenda Alexander (collectively "respondents") appeal from orders terminating their parental rights to Lindsay Alexander and Robyn Alexander (collectively "the minor children"). We reverse.

The termination of parental rights issue in this case arises approximately two years after the Orange County Department of

Social Services ("DSS") substantiated a report of neglect. On 11 December 2000, DSS obtained a non-secure custody order to remove the minor children from the home of respondents. Thereafter, DSS attempted to eliminate the need for placement of the minor children outside the home by creating a case plan to assist respondents in providing the minor children with appropriate care and safe living conditions. In October of 2001, conflicting reports as to the progress made by respondents were submitted to the trial court. On 4 October 2001 at the permanency planning hearing, the district court found the appropriate permanent plan for the minor children was to pursue adoption, and ordered DSS to cease reunification efforts and to file a petition seeking termination of the parental rights of each parent within sixty days.

On 7 November 2001, DSS filed termination of parental rights motions for each of the minor children as against each respondent in Orange County District Court. While the motions and certificates of service were served on respondents and their counsel, notice complying with the provisions of N.C. Gen. Stat. § 7B-1106.1 was not received. The court continued the case until 31 January 2002. Respondents received timely service of the motion and order to continue. On 31 January 2002, the court held a hearing on DSS' motion to terminate respondents' parental rights. Respondents' attorneys were present at the hearing and had contacted respondents the week before the hearing; however, respondents failed to attend. In orders entered on 21 March 2002, respondents' parental rights to the minor children were terminated. Respondents appeal.

The dispositive question presented in this appeal is whether DSS satisfied its statutory duty to prepare notice to respondents comporting with N.C. Gen. Stat. § 7B-1106.1 (2001). Since the record indicates respondents did not receive the requisite notice and since the provisions of N.C. Gen. Stat. § 7B-1106.1 concerning notice are mandatory, we remand this case for a new hearing.

In 1999, the North Carolina General Assembly restructured the juvenile code and enacted Chapter 7B of the North Carolina General Statutes. In 2000, the General Assembly added N.C. Gen. Stat. § 7B-1106.1, which provides in part that "[u]pon the filing of a motion [for termination of parental rights,] the movant shall prepare a notice directed to . . . (1) The parents of the juvenile." N.C. Gen. Stat. § 7B-1106.1(a) (2001). Subsection (b) states the notice to the parents "shall" contain the following:

(1) The name of the minor juvenile.

(2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.

(3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.

(4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.

(5) Notice that the date, time, and place of hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.

(6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

The mandatory nature of the language employed in N.C. Gen. Stat. § 7B-1106.1 is underscored by N.C. Gen. Stat. § 7B-1102, which states, in relevant part, that the service of the motion for termination of parental rights "*and the notice required by G.S. 7B-1106.1 shall* be . . . in accordance with G.S. 1A-1, Rule 5(b) . . . ." N.C. Gen. Stat. § 7B-1102(b) (2001) (emphasis added).

The General Assembly, through the interlocking provisions of N.C. Gen. Stat. §§ 1A-1, Rule 5(b), 7B-1102, and 7B-1106.1, has enacted three mandates regarding the notice required to accompany a filing of a motion to terminate parental rights, including the provision that the notice "shall be served on the party against whom it is asserted or on the party's attorney of record." N.C. Gen. Stat. § 1A-1, Rule 5(b).

DSS concedes it failed to prepare notice to respondents or their counsel comporting with this statutory framework; however, DSS asserts (I) the notice provided in the motions and order continuing the review hearing and rescheduling the hearing for termination of parental rights was reasonably calculated to apprise respondents of the pending hearing and gave actual notice of the hearing and (II) the absence of the statutory requirements from the notice given resulted in no prejudice to respondents. We disagree.

First, DSS argues due process requires only that a governmental agency provide " 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795, 77 L. Ed. 2d 180, 185 (1983) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950)). However, the level of notice in the instant case is not governed by the constitutional principles of due process. It is mandated by the statutory requirements as set forth in N.C. Gen. Stat. § 7B-1106.1. Accordingly, this argument is without merit.

Second, DSS argues that, despite their failure to include the notice requirements of N.C. Gen. Stat. § 7B-1106.1(b), respondents were not prejudiced by the lack of those requirements. Specifically, DSS contends the information in the motion to terminate parental rights along with the added information in the motion to continue included the following statutory elements of N.C. Gen. Stat. § 7B-1106.1(b): (1) the names of the minor juveniles satisfying subsection (b)(1); (2) the date of the hearing satisfying subsection (b)(5) in part; and (3) the purpose of the hearing satisfying subsection (b)(6) in part. DSS further contends the remaining notice requirements were unnecessary under the facts of this case.

The law regarding notice accompanying a motion to terminate parental rights is clear: (1) the notice "shall" be directed to the necessary parties, including the parents of the juvenile, (2) the notice "shall" include the required elements, and (3) the notice "shall" be served in accordance with N.C. Gen. Stat. § 1A-1, Rule 5(b). This Court has held the General Assembly's use of the word "shall" establishes a mandate, and failure to comply with the statutory mandate is reversible error. *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001).

The notice requirements at issue are part of a statutory framework intended to safeguard a parent's fundamental rights "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000). "This parental liberty interest 'is perhaps the oldest of the fundamental liberty interests[.]' " *Owenby v. Young*, 357 N.C. 142, 144, — S.E.2d —, — (2003) (quoting *Troxel*, 530 U.S. at 65, 147 L. Ed. 2d at 56)). The notice requirements in the enacted framework are neither unnecessary nor overly burdensome. DSS may satisfy the notice requirements

of N.C. Gen. Stat. § 7B-1106.1 by preparing and giving appropriate notice to the parents of the juvenile and their attorneys at the permanency placement hearing when the date is determined after the trial court orders the filing of a petition for the termination of parental rights. However, where a movant fails to give the required notice, prejudicial error exists, and a new hearing is required.

Reversed and remanded for a new hearing.

Chief Judge EAGLES and Judge HUNTER concur.

MICHAEL KENNEDY AND WIFE, MICHELE KENNEDY, PLAINTIFFS v. HAYWOOD COUNTY, A BODY POLITIC AND CORPORATE WITHIN THE STATE OF NORTH CAROLINA PURSUANT TO N.C.G.S. § 153A-11, DEFENDANT

No. COA02-875

(Filed 17 June 2003)

Immunity— sovereign—negligent building inspection

Building inspectors are not law enforcement officers and defendant's purchase of liability insurance covering law enforcement officers did not serve to waive its sovereign immunity for claims of negligent building inspection. Moreover, exclusions for property damage claims have been held to include claims of damage from negligent inspection.

Appeal by plaintiffs from order entered 22 February 2002 by Judge Ronald K. Payne in Haywood County Superior Court. Heard in the Court of Appeals 27 March 2003.

Brown Queen Patten & Jenkins, PA, by Frank G. Queen, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr., for defendant-appellee.

LEVINSON, Judge.

Plaintiffs (Michael and Michele Kennedy) appeal from an order granting summary judgment in favor of defendant Haywood County. We affirm the trial court.

Plaintiffs filed an amended complaint against defendant on 17 March 2000, alleging that they had hired Hart Construction Company (Hart) to build a house on plaintiff's property, and that Hart failed "generally to complete and/or properly construct the dwelling and its load-bearing and structural elements." Plaintiffs alleged negligence on the part of defendant in issuing Hart a building permit; in its inspections of the construction; and in issuing a certificate of compliance. Plaintiffs alleged that defendant's negligence in failing to assure Hart's compliance with applicable building and construction codes had proximately caused damage to plaintiffs, in that their house was not structurally sound and had required substantial sums to "attempt to correct or at least ameliorate" the problems with the building.

On 12 June 2000, the case was transferred to superior court. Defendant moved for summary judgment on 5 January 2001, on the grounds that defendant was entitled to governmental immunity. On 22 February 2002 the trial court granted summary judgment for defendant on "each and every claim asserted by Plaintiff." From this order, plaintiffs appeal.

Plaintiffs appeal from an order granting summary judgment. Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2001); *Pacheco v. Rogers & Breece, Inc.*, — N.C. App. —, — S.E.2d — (2003). "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (citing *Nicholson v. American Safety Utility Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997)). The moving party can meet this burden "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." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). In the instant case, defendant raised the affirmative defense of sovereign immunity.

" 'As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity.' " *Herring v.*

Winston-Salem/Forsyth County Bd. of Educ., 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (quoting *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493 (1993)), *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000) (citation omitted). "The common law doctrine of sovereign immunity generally protects states and their political subdivisions, such as county governments, from suit for damages for tort liability based on performance of governmental functions." *Norton v. SMC Bldg.*, 156 N.C. App. 564, 566-67, 577 S.E.2d 310, 313 (2003).

Pursuant to N.C.G.S. § 153A-435 (2001), a county may waive its sovereign immunity by purchasing liability insurance:

> A county may contract to insure itself and any of its officers, agents, or employees against liability[.] . . . The board of commissioners shall determine what liabilities and what . . . employees shall be covered by any insurance purchased[.] . . . Purchase of insurance . . . waives the county's governmental immunity, *to the extent of insurance coverage*[.] . . . By entering into an insurance contract with the county, an insurer waives any defense based upon the governmental immunity of the county.

N.C.G.S. § 153A-435(a) (2001) (emphasis added). However, "[w]aiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983) (citation omitted).

In the case *sub judice* plaintiffs contend that defendant waived its sovereign immunity by purchasing liability insurance that covers their claims of negligent building inspection. Plaintiff argues that defendant's building inspectors are "law enforcement officers," and thus are covered by the Law Enforcement Coverage part of defendant's Professional Liability policy. We disagree.

Plaintiffs base their argument that building inspectors are law enforcement officers on the provisions of N.C.G.S. § 153A-352 (2001), directing local building inspectors "to enforce within the county's territorial jurisdiction State and local laws and local ordinances and regulations relating to . . . [t]he construction of buildings[,]" and stating that their duties include "bringing judicial actions against actual or threatened violations, . . . [of building construction] laws and ordinances and regulations." However, a building inspector's authority to,

e.g., issue an order to stop construction of a building, does not transform a county building inspector into a law enforcement *officer*. Building inspectors have no authority to issue arrest warrants or other criminal process; are not certified law enforcement officers as provided in N.C.G.S. § 17C; do not take the oath required of law enforcement officers under N.C.G.S. § 11-11; and are not charged with providing police protection or enforcing criminal laws. Moreover, the North Carolina Supreme Court has previously indicated that building inspectors are not law enforcement officers:

> This Court *has not heretofore applied the public duty doctrine to a claim* against a municipality or county in a situation *involving any group or individual other than law enforcement.* After careful review of appellate decisions on the public duty doctrine in this state and other jurisdictions, *we conclude that the public duty doctrine does not bar this claim* against Lee County *for negligent inspection* of plaintiffs' private residence.

Thompson v. Waters, 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000) (emphasis added). In *Thompson*, the Court held that (1) the public duty doctrine was applicable only to law enforcement officers, and (2) that it was *not* applicable to county building inspectors. We hold, therefore, that county building inspectors are not law enforcement officers. For this reason, defendant's purchase of liability insurance covering law enforcement officers did not serve to waive its sovereign immunity as regards claims of negligent building inspection.

Moreover, defendant's insurance policy specifically excludes claims "for loss, damage to or destruction of any tangible property, or the loss of use thereof[.]" In *Norton v. SMC Bldg.*, 156 N.C. App. 564, 577 S.E.2d 310 (2003), the plaintiff brought an action for damages based on defendant-county's negligent building inspection. This Court considered an identical provision in the county's liability insurance and held:

> The words used in the exclusionary provision at issue here are non-technical and there is no evidence or assertion that they were intended to have a special meaning. . . . [T]he American Heritage Dictionary defines 'damage' as 'harm or injury to property . . ., resulting in loss of value or the impairment of usefulness.' *American Heritage Dictionary of the English Language*, 4th Ed. (2000). The disputed exclusionary provision is not ambiguous and, when construed and enforced according to its

plain meaning, it *clearly encompasses the construction defects plaintiffs allege resulted from the County's negligent building inspection.*

Norton, 156 N.C. App. at 569-70, 577 S.E.2d at 314 (emphasis added). We conclude that the holding of *Norton*—that the insurance policy exclusion of claims for property damage applies to claims of damage resulting from negligent inspection by county building inspectors—controls the outcome of the present case. Accordingly, we hold that the trial court did not err by granting summary judgment for defendant, and that the trial court's order is

Affirmed.

Judges McGEE and McCULLOUGH concur.

ORANGE COUNTY EX REL. GENEVIEVE J. HARRIS, PLAINTIFF v. DAREN LYNN KEYES, DEFENDANT

No. COA02-1163

(Filed 17 June 2003)

Child Support, Custody, and Visitation— support—retroactive modification—adjustment of vested arrears

The trial court erred in a child support case by adjusting defendant father's vested child support arrears in violation of N.C.G.S. § 50-13.10, because: (1) child support payments may not be reduced retroactively so as to grant relief from arrears absent a compelling reason; and (2) the trial court's forgiving of $1,272.00 arrears based on the fact that the sum represented past paid public assistance which was paid before defendant knew of the existence of his child is not a reason that satisfies any of the situations described in N.C.G.S. § 50-13.10(a)(2).

Appeal by plaintiff from order entered 20 May 2002 by Judge Charles T.L. Anderson in Orange County District Court. Heard in the Court of Appeals 3 June 2003.

Coleman, Gledhill & Hargrave, P.C., by Leigh Peek, for plaintiff appellant.

No brief filed by defendant appellee.

McCULLOUGH, Judge.

Dominique Dejuante Wilson was born on 15 February 1991 to plaintiff Genevieve Harris and defendant Daren Keyes. On 4 August 1998, defendant entered into a voluntary support agreement pursuant to N.C. Gen. Stat. § 110-132, -133 and -136, which required him to: (1) pay current child support of $265.00 per month, effective 1 August 1998; (2) provide health insurance for the child within sixty days of the order; (3) pay $3,445.00 in prior maintenance; and (4) pay $1,272.00 to reimburse the State for past paid public assistance. The $1,272.00 arrears to the State was to be repaid at a rate of $20.00 per month.

In March 2002, plaintiff and defendant each filed a Motion and Notice of Hearing for Modification of Child Support Order. Plaintiff requested an increase in child support, while defendant requested a decrease in child support and termination of his arrears. By order dated 20 May 2002, the trial court applied the Child Support Guidelines to the case, increased defendant's child support obligation to $291.00 per month, and noted "that a substantial change underlies the modification of this order." The order also reduced defendant's arrears by $1,272.00, the amount due to the State for past paid public assistance. With regard to the arrears, the trial court made the following pertinent findings of fact:

8. This order was initiated in 1997, and Defendant has a vested total arrears of $4499.56, of which $1272.00 is past paid public assistance owed to the State of North Carolina.

9. The Court finds it appropriate to forgive the portion of the Defendant's vested arrears which represents past paid public assistance rendered for the minor child prior to the Defendant knowing of the minor child's existence, namely the $1272.00, as the minor child was born in 1991 and Defendant was not informed as to the birth of the child until 1997.

10. That the remainder of the arrears, namely $3,227.56, shall be repaid at the rate of $20.00 per month, such that effective May 1, 2002, the Defendant's child support obligation shall be $311.00, with $291.00 to current support and $20.00 to the arrears.

The trial court also concluded:

4. That it is appropriate to forgive that portion of the Defendant's arrears which represents past paid public assistance owed to

> the State of North Carolina prior to the Defendant knowing of the minor child's existence.

The trial court indicated that its order was effective 1 May 2002. Plaintiff appealed.

On appeal, plaintiff contends the trial court's adjustment of defendant's vested child support arrears violated N.C. Gen. Stat. § 50-13.10 (2001) and 42 U.S.C. § 666(a)(9) (2001). For the reasons stated herein, we agree and reverse the order of the trial court.

N.C. Gen. Stat. § 50-13.10 states:

> (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, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties either:
>
> (1) Before the payment is due or
>
> (2) If the moving party is precluded by physical disability, mental incapacity, indigency, misrepresentation of another party, or other compelling reason from filing a motion before the payment is due, then promptly after the moving party is no longer precluded.

Stated another way, child support payments may not be reduced retroactively so as to grant relief from arrears, absent a compelling reason. *Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 144, 438 S.E.2d 417, 418 (1993).

In the present case, defendant voluntarily agreed to repay $1,272.00 in past paid public assistance and $3,445.00 in prior maintenance costs in August 1998. Upon both plaintiff's and defendant's motions, the trial court conducted a hearing on 24 April 2002 and clearly articulated that it would forgive the $1,272.00 arrears because that sum represented past paid public assistance which was paid before defendant knew of the existence of his child. This reason does not satisfy any of the situations described in N.C. Gen. Stat. § 50-13.10(a)(2) and is therefore an insufficient basis upon which the reduction was predicated.

As the trial court did not point to "physical disability, mental incapacity, indigency, misrepresentation of another party, or other

compelling reason[,]" it had no legal basis to retroactively modify defendant's vested child support arrears. *See* N.C. Gen. Stat. § 50-13.10(a)(2). We are also mindful that

> [t]he purpose of a child support proceeding is to determine the nature and extent of the support required. The initial determination is subject to modification or vacation at any time upon motion and a showing of changed circumstances. The support issue thus may be before the court on numerous occasions during a child's minority.

Leach v. Alford, 63 N.C. App. 118, 123, 304 S.E.2d 265, 268 (1983) (citation omitted). While we must reverse the retroactive modification in this case, we note that both plaintiff and defendant are entitled to move for modification or vacation of child support in the future and may prevail upon a showing of changed circumstances.

The order of the trial court is hereby

Reversed.

Judges WYNN and ELMORE concur.

DAVID KEITH EVANS, PLAINTIFF v. ANGELA CARTER EVANS, DEFENDANT

No. COA02-933

(Filed 17 June 2003)

Appeal and Error— appealability—domestic order—change of custody—not the loss of a substantial right

The allegation that a custody order changed the children's lives immediately was not sufficient to establish the loss of a substantial right and avoid dismissal of an appeal as interlocutory. The record contains no intimation that the children's health or safety is in jeopardy or that irreparable harm would be caused by delaying the appeal until the final resolution of the case.

Appeal by defendant from judgment entered 18 December 2001 by Judge Charles W. Wilkinson in Granville County District Court. Heard in the Court of Appeals 24 April 2003.

Currin & Dutra, L.L.P., by Thomas L. Currin and Lori A. Dutra, for plaintiff-appellee.

The Sandlin Law Firm, by Deborah Sandlin and John Patrick McNeil, for defendant-appellant.

LEVINSON, Judge.

Defendant (Angela Evans) appeals from an order entered 18 December 2001. We conclude that defendant's appeal is premature and should be dismissed.

The parties were married 11 February 1989, and separated in February, 2001. Two children were born of the marriage. On 13 February 2001, plaintiff (David Evans) filed a complaint for divorce from bed and board, child custody, writ of possession of the marital home, equitable distribution, and attorney's fees. Defendant filed a counterclaim on 20 February 2001, seeking divorce from bed and board, child custody, child support, alimony and post separation support, equitable distribution, possession of the marital home, dismissal of plaintiff's complaint, and attorney's fees. On 18 December 2001 the trial court entered an order awarding plaintiff a divorce from bed and board; denying defendant's motion for post-separation support; granting the parties joint legal custody of their minor children, with the children's primary residence to be with plaintiff; and ordering that defendant pay $379.80 per month child support. From this order defendant appeals.

An order "is either interlocutory or the final determination of the rights of the parties." N.C.G.S. § 1A-1, Rule 54(a) (2001). A final judgment "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court[,]" while an interlocutory order "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 354, 361-62, 57 S.E.2d 375, 381 (1950). In the present case, the trial court's order did not resolve the parties' respective claims for equitable distribution and for attorney's fees, and did not rule on defendant's claim for alimony. We conclude that the order from which defendant appeals was interlocutory.

In general, "there is no right to immediate appeal from an interlocutory order." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002); N.C.G.S. § 1A-1, Rule 54(b) (2001). "This rule is grounded

in sound policy considerations. Its goal is to 'prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard.' " *Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 261-62 (2001) (quoting *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980)). However, there are two significant exceptions to this rule. First, an interlocutory order is immediately appealable "when the trial court enters 'a final judgment as to one or more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting Rule 54(b)). Secondly, an interlocutory order may be immediately appealed if "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Southern Uniform Rentals v. Iowa Nat'l Mutual Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988); N.C.G.S. § 1-277(a) (2001); N.C.G.S. § 7A-27(d) (2001).

In the instant case, the trial court did not certify its order for immediate review. *See* Rule 5A(b). Therefore, we next consider whether "the challenged order affects a substantial right that may be lost without immediate review." *McConnell v. McConnell*, 151 N.C. App. 622, 624, 566 S.E.2d 801, 803 (2002). "Whether an interlocutory appeal affects a substantial right is determined on a case by case basis." *Id.* at 625, 566 S.E.2d at 803 (citing *McCallum v. N.C. Coop. Extensive Serv.*, 142 N.C. App. 48, 542 S.E.2d 227, *disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001)). This Court has previously held that:

> A substantial right is 'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.' The right to immediate appeal is 'reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed.' Our courts have generally taken a restrictive view of the substantial right exception. The burden is on the appealing party to establish that a substantial right will be affected.

Turner v. Norfolk S. Corp., 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (quoting *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983), and *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). Defendant cites *McConnell v. McConnell*, 151 N.C. App. 622,

566 S.E.2d 801 (2002), in support of her contention that an immediate appeal is proper. However, in *McConnell* this Court specifically concluded that immediate review was warranted because "the physical well being of the child [was] at issue[.]" *Id.* at 625, 566 S.E.2d at 804. Thus, *McConnell* does not support the proposition that all orders for child custody are immediately appealable. In the case *sub judice*, defendant alleges only that as a result of the court's custody order "the children's lives changed immediately[,]" a truism which would apply to many custody orders. Defendant has not argued that any substantial right will be lost without immediate appeal, and we discern none. The record contains no intimation that the children's health or safety is in jeopardy, or that irreparable harm will be caused by delaying the appeal until final resolution of the case.

"Where an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *State v. School*, 299 N.C. 351, 360, 261 S.E.2d 908, 914 (1980) (citing *Waters v. Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978), *opinion certified on rehearing*, 299 N.C. 731, 265 S.E.2d 387 (1980)). We conclude that defendant has appealed from an interlocutory order, which does not affect a substantial right, and from which there is no right to immediate appeal. Accordingly, defendant's appeal is

Dismissed.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND OCEAN CLUB VENTURES, LLC, COMPLAINANT, APPELLEES v. BUCK ISLAND, INC., APPELLANT

No. COA02-1088

(Filed 17 June 2003)

Utilities— jurisdiction—interlocutory appeal—no final decision by Commission

An appeal from a Utilities Commission determination that Buck Island was a public utility and subject to the Commission's jurisdiction was dismissed as interlocutory. The Court of Appeals

has no jurisdiction to consider appeals of interlocutory orders of the Utilities Commission, even where an appellant challenges the Commission's exercise of jurisdiction. Moreover, the Court of Appeals has no authority to issue a writ of certiorari to review these issues where there is no final order or decision of the Commission. N.C.G.S. §§ 62-90, 7A-29.

Appeal by respondent from orders entered 20 March 2001 and 1 April 2002 by the North Carolina Utilities Commission. Heard in the Court of Appeals 21 May 2003.

North Carolina Utilities Commission—Public Staff, by Chief Counsel Antoinette R. Wike and Staff Attorney Elizabeth Szafran, for intervenor-appellees.

Nelson Mullins Riley & Scarborough, LLC, by James H. Jeffries, IV, for complainant-appellee Ocean Club Ventures, LLC.

Hunton & Williams, by Edward S. Finley, Jr., and Sabrina Presnell Rockoff, for appellee Carolina Water Service, Inc.

John S. O'Connor, for intervenor-appellees Monteray Shores, Inc., and Robert and Laurie DeGabrielle.

Trimpi, Nash & Harman, L.L.P., by Thomas P. Nash, IV, and John G. Trimpi, for respondent-appellant Buck Island, Inc.

MARTIN, Judge.

Complainant-appellee Ocean Club Ventures, L.L.C., ("O.C.V.") a developer, filed a complaint before the North Carolina Utilities Commission ("the Commission") against respondent-appellee Carolina Water Service, Inc., ("C.W.S.") after it had been unable to successfully negotiate with C.W.S. and intervenor-appellee Monteray Shores, Inc., another developer, for the provision of water and sewer service to O.C.V.'s future planned development known as Corolla Shores. The only water and sewer processing facilities convenient to Corolla Shores are owned jointly by Monteray Shores and appellant Buck Island, Inc., and leased and operated by C.W.S. The facilities are currently adequate to serve only Buck Island and Monteray Shores' respective developments, but would not be adequate to serve Corolla Shores without expansion. Monteray Shores moved to intervene in the proceeding; the motion was allowed by the Commission. By orders dated 20 March 2001 and 1 April 2002, the Commission, *inter alia*, declared that, as part owner of the water and sewer

processing facilities, Buck Island was a public utility as defined in G.S. § 62-3(23)a.2 and was thus subject to the Commission's jurisdiction. Buck Island gave notice of appeal.

Neither of the orders from which Buck Island appeals are final orders of the Commission. G.S. § 62-90 states in pertinent part:

> (a) Any party to a proceeding before the [Utilities] Commission may appeal from any *final order or decision* of the Commission . . . .
>
> (d) The appeal shall lie to the appellate division of the General Court of Justice as provided in G.S. 7A-29 . . . .

N.C. Gen. Stat. § 62-90 (2003) (emphasis added). G.S. § 7A-29 provides for appeals of right from certain administrative agencies as follows:

> (a) From any *final order or decision of the North Carolina Utilities Commission* not governed by subsection (b) of this section, the Department of Health and Human Services under G.S. 131E-188(b), the Commissioner of Banks under Articles 17, 18, 18A, and 21 of Chapter 53 of the General Statutes, the Administrator of Savings and Loans under Article 3A of Chapter 54B of the General Statutes, the North Carolina Industrial Commission, the North Carolina State Bar under G.S. 84-28, the Property Tax Commission under G.S. 105-290 and G.S. 105-342, the Commissioner of Insurance under G.S. 58-2-80, or the Secretary of Environment and Natural Resources under G.S. 104E-6.2 or G.S. 130A-293, appeal as of right lies directly to the Court of Appeals.
>
> (b) From any final order or decision of the Utilities Commission in a general rate case, appeal as of right lies directly to the Supreme Court.

N.C. Gen. Stat. § 7A-29 (2003) (emphasis added). In contrast, G.S. § 7A-27 provides for appeals of right from certain interlocutory orders of the superior or district courts. N.C. Gen. Stat. § 7A-27(d) (2003); *see also* N.C. Gen. Stat. § 1-277 (2003). We must conclude from the absence of any exceptions to § 62-90 or § 7A-29 allowing review of interlocutory orders of the Utilities Commission that the omission was intentional on the part of the General Assembly. Thus, this Court has no jurisdiction to consider appeals of interlocutory orders of the

Utilities Commission. *State, ex rel. Utilities Comm. v. Public Staff*, 111 N.C. App. 251, 431 S.E.2d 880 (1993). This is true even where an appellant challenges the Commission's exercise of jurisdiction over it. *See The North Carolina State Bar v. Du Mont*, 298 N.C. 564, 566, 259 S.E.2d 280, 281 (1979) (no appeal of right under G.S. § 7A-29 from interlocutory denial of motion to dismiss for lack of jurisdiction by disciplinary hearing commission of State Bar); *State ex rel. Utilities Comm. v. Southern Bell Tel. & Tel. Co.*, 93 N.C. App. 260, 268, 377 S.E.2d 772, 776 (1989) (noting in opinion addressing appeal of final order by Utilities Commission that two prior appeals in same action of orders asserting jurisdiction over appellant had been dismissed as interlocutory), *rev'd on other grounds*, 326 N.C. 522, 391 S.E.2d 487 (1990). Moreover, this Court has no authority to issue a writ of certiorari pursuant to G.S. § 7A-32(c) to review the issues raised by appellant where there is no final order or decision of the Commission. *See Martin v. Piedmont Asphalt & Paving*, 337 N.C. 785, 788, 448 S.E.2d 380, 381 (interpreting provisions of G.S. § 7A-29 and 7A-32 with regard to appeals from Industrial Commission), *writ of supersedeas dismissed*, 337 N.C. 801, 449 S.E.2d 473 (1994). Therefore, Buck Island's appeal is dismissed.

Dismissed.

Judges HUNTER and GEER concur.

STATE OF NORTH CAROLINA v. WILLIAM J. WOLFE, JR.

No. COA02-1011

(Filed 17 June 2003)

Indictment and Information— motion to suppress before indictment—no jurisdiction

The denial of a motion to suppress was void where the motion was filed and heard before defendant was indicted or waived indictment. Both the State Constitution and the Criminal Procedure Act require an indictment or waiver for a superior court to have jurisdiction in a criminal case. The fact that defendant filed the motion and participated in the suppression hearing did not give the court jurisdiction.

Appeal by defendant from judgments entered 22 March 2002 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 21 May 2003.

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

Morrow Alexander Tash Kurtz & Porter, by Benjamin D. Porter, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon his pleas of guilty to three counts of third degree sexual exploitation of a minor. As a condition of his plea, defendant reserved the right to appeal, pursuant to G.S. § 15A-979(b), the superior court's denial of his motion to suppress all evidence obtained during a search of his residence on 25 May 2001. The search was conducted pursuant to a search warrant and several items of child pornography were seized from defendant's home.

Defendant was charged in a warrant with three counts of third degree sexual exploitation of a minor on 17 June 2001. On 21 December 2001, defendant filed the motion to suppress the evidence seized during the search of his home. The motion was calendared by the State and was heard on 14 February 2002. At the time the motion to suppress was heard, there had not been any true bills of indictment returned by the grand jury charging defendant with any offense related to the evidence which defendant sought to suppress. At the conclusion of the hearing, the trial court denied the motion to suppress. On 22 March 2002, the prosecutor signed a bill of information alleging defendant had committed three counts of third degree sexual exploitation of a minor, and defendant and his attorney signed a waiver of indictment, allowing the case to proceed on the bill of information. On the same date, defendant entered pleas of guilty to the three offenses and was sentenced by the court.

Though defendant brings forward three of the four assignments of error contained in the record on appeal, we need only address his first assignment of error, by which he argues the order denying the motion to suppress should be vacated because the superior court lacked jurisdiction to hear the motion because defendant had not been indicted or waived indictment at the time of the hearing. Both our State Constitution and Criminal Procedure Act require

indictment or waiver thereof in order for a superior court to have jurisdiction in a criminal case. N.C. Const., Art. I, § 22; N.C. Gen. Stat. § 15A-642 (2003); *State v. Moses*, 154 N.C. App. 332, 334, 572 S.E.2d 223, 226 (2002) (citing *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968) and *State v. Midyette*, 45 N.C. App. 87, 262 S.E.2d 353 (1980)). Therefore, defendant is correct in asserting that the superior court was without jurisdiction to entertain and rule upon his motion to suppress and the order entered denying the motion must be vacated.

Citing G.S. § 15A-1443(c), the State argues that because defendant moved to suppress the evidence before he was indicted, participated in the suppression hearing without objection, and did not move a second time to suppress the evidence after he waived indictment and before entering his plea, any related error is a result of his own conduct and he cannot have been prejudiced by it. *See* N.C. Gen. Stat. § 15A-1443(c) (2003). However, the fact that defendant filed a motion to suppress before he was indicted did not give the superior court jurisdiction to entertain the motion or rule on it, thus, defendant's conduct does not validate the void order. *See McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966) (sentence imposed upon defendant's plea of guilty to offense for which he had not been indicted held null and void for lack of jurisdiction).

Defendant's pleas of guilty were conditioned on his right to appeal the order denying his motion to suppress. That order is void and the judgments entered upon defendant's pleas must therefore be vacated and the case remanded for further proceedings based on the bill of information.

Vacated and remanded.

Judges HUNTER and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

AAPCO, INC. v. SMALLEY No. 02-903	Watauga (01CVS208)	Affirmed
BIRCHFIELD v. LEDFORD No. 02-910	Buncombe (00CVD5402)	Dismissed
CLONTZ v. ST. MARK'S EVANGELICAL LUTHERAN CHURCH No. 02-1065	Iredell (01CVS2795)	Affirmed
CRAWFORD v. PAUL DAVIS RESTORATION-TRIAD, INC. No. 02-1040	Forsyth (00CVS8137)	Affirmed
ECHOLS v. GRANVILLE MED. MGMT., INC. No. 02-1085	Ind. Comm. (I.C.953018)	Affirmed
EL-AMOOR v. NEEDMORE STORE #2, INC. No. 02-976	Rutherford (01CVS113)	Affirmed
GALLENWATER v. N.C. DEP'T OF TRANSP. No. 02-351	Ind. Comm. (I.C. 844900)	Affirmed
GRADY v. DIXON No. 02-1075	Wayne (01CVD1933)	Remanded
IN RE BURKES No. 02-1210	Guilford (99J230) (99J231)	Affirmed in part, reversed and remanded with instructions in part
IN RE HOBSON No. 02-1117	New Hanover (00J297)	Affirmed
IN RE LINT No. 02-1109	Haywood (01J20) (01J21)	Affirmed
IN RE VALDEZ No. 02-1303	Randolph (00J178) (00J179) (00J180) (00J181) (00J182)	Affirmed
J.H. BATTEN, INC. v. JONESBORO UNITED METHODIST CHURCH No. 02-633	Forsyth (01CVS7334)	Affirmed

SMITH v. BOARD OF ADJUST. OF TOWN OF STALLINGS No. 02-1063	Union (01CVS522)	Affirmed
STATE v. AMERSON No. 02-375	Harnett (99CRS10795)	No prejudicial error
STATE v. JONES No. 02-596	Dare (99CRS2259) (99CRS2260) (99CRS2261) (99CRS2262) (99CRS2306)	No error
STATE v. LUTZ No. 02-648	Catawba (00CRS12602) (00CRS12603) (00CRS12604) (00CRS12605)	No error
STATE v. REID No. 02-349	Guilford (99CRS66747) (00CRS23707) (00CRS23708)	No error
STATE v. STANTON No. 02-708	Bladen (99CRS5218) (99CRS5219)	No error
STATE v. WHITEHURST No. 02-985	Pasquotank (00CRS50786) (00CRS50812) (00CRS50813) (00CRS50815) (00CRS50818)	No error
STATE v. WILSON No. 02-1097	Rowan (00CRS52411)	No error
TOWN OF WEAVERVILLE v. MORRIS No. 02-947	Buncombe (00CVS4200)	Affirmed

STATE OF NORTH CAROLINA v. PAUL RASMUSSEN

No. COA02-849

(Filed 1 July 2003)

1. Motor Vehicles— driving while impaired—right to communicate with counsel, family, and friends

A defendant charged with driving while impaired was not denied his statutory or constitutional rights to communicate with counsel, family, and friends, because: (1) defendant was advised at least three times of his right to an attorney but did not assert that right, and law enforcement officers were not required to assume that defendant wanted to speak to his friend as an attorney simply based on the fact that she was an attorney even though officers knew that fact; and (2) defendant's friend was provided with enough contact with defendant to allow her to form an opinion as to his impairment or lack thereof, and even if defendant's friend should have been allowed to witness the field sobriety tests, there was no prejudicial error since the trial court on its own motion suppressed the introduction of the test results at trial. N.C.G.S. §§ 15A-501, 20-16.2(a)(6); N.C. Const. art. I, § 23.

2. Criminal Law— driving while impaired—motion for mistrial—jury deliberations past 5:00 p.m.—verdict not coerced

The trial court did not abuse its discretion in a driving while impaired case by denying defendant's motion for a mistrial and did not commit plain error by failing to recess the trial proceedings until Monday morning, because: (1) defendant waived appellate review of the assignment of error that the jury deliberated past 5:00 p.m. when defendant failed to object; (2) the length of the deliberations did not have a coercive effect upon the jury when the trial court left the decision of whether to continue deliberations to the jury members; and (3) defendant's arguments concerning a particular juror's perceived distress that allegedly coerced her into finding defendant guilty to speed up the deliberations was merely speculation.

3. Jury— numerical division regarding verdict—*Allen* instruction

The trial court did not commit plain error in a driving while impaired case by inquiring into the numerical division of the jury

regarding its verdict and in its *Allen* instruction based on N.C.G.S. § 15A-1235, because: (1) the inquiry into the numerical division was not coercive and did not constitute an abuse of discretion by the trial court; and (2) the trial court did not deviate from the statutory language of N.C.G.S. § 15A-1235 in giving the *Allen* charge.

4. Motor Vehicles— driving while impaired—denial of motion to dismiss—written findings of fact and conclusions of law not required

The trial court did not commit reversible or plain error by allegedly failing to make adequate findings of fact and conclusions of law to support the order denying defendant's motion to dismiss the charge of driving while impaired, because: (1) there is no unresolved material conflict in the evidence, and there is no need to remand the case for written findings of fact and conclusions of law; and (2) defendant has waived any claim that the trial court was required to make written findings of fact and conclusions of law by not making a timely objection or requesting that the trial court reduce its findings and conclusions to writing.

Appeal by defendant from judgment entered 2 November 2001 by Judge Orlando Hudson in Wake County Superior Court. Heard in the Court of Appeals 27 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.

George B. Currin for defendant appellant.

McCULLOUGH, Judge.

Defendant Paul Rasmussen was tried before a jury at the 29 October 2001 Term of Wake County Superior Court after being charged with driving while impaired (DWI) and failing to drive at a speed that was reasonable and prudent under the circumstances (a moving violation infraction). The pertinent facts leading to this appeal are as follows: On 28 April 1999, defendant attended a business dinner in Chapel Hill, North Carolina. During the dinner, he consumed several glasses of wine. As he and his business companions left the restaurant, it was raining heavily. Defendant offered to follow Ms. Suzanne Markle (another attendee at the dinner) home to ensure she arrived safely. After leaving Ms. Markle's home in Cary, defendant

traveled on Harrison Avenue to the Interstate 40 ramp toward Raleigh. As he merged onto Interstate 40, defendant stated a large truck passed him and splashed his windshield with water. Defendant testified that he applied his brakes, but they locked up and the car spun to the left. The right rear end of defendant's car struck the back of another vehicle being driven by Mr. Sam Middleton. Defendant's car traveled across the road and went headfirst into the guardrail and ditch. Defendant called 911 to report the accident and told the dispatcher he smelled gasoline. Defendant also called Ms. Markle and asked her to come to the accident scene. Defendant then turned off the ignition, got out of the car and took an umbrella out of the trunk. He crossed Interstate 40 to check on Mr. Middleton and told him that the police and fire department had been called.

Trooper Thomas Garner of the North Carolina State Highway Patrol responded to the accident scene shortly after 11:00 p.m. and discovered a two-car collision. Trooper Garner talked to both drivers, determined they were uninjured, and asked them to sit in his patrol car so he could take their statements and obtain their insurance information. While the men were in the patrol car, Ms. Markle arrived and opened the vehicle's door to speak to defendant. She sat on the edge of the door and attempted to help defendant fill out his paperwork. Trooper Garner asked Ms. Markle if she was involved in or saw the accident; when she indicated she was not involved and did not witness the accident, he asked her to step away from the car. She complied.

Trooper Garner testified that, while he spoke to defendant, he noticed a strong odor of alcohol about him, saw that defendant's eyes were red and glassy, and noted that defendant's speech was slurred. Trooper Garner asked defendant if he had consumed any alcohol that evening, and defendant stated he had a couple of glasses of wine at dinner earlier that evening. Trooper Garner then administered an ALCO-SENSOR test to defendant. As a result of the test, Trooper Garner placed defendant under arrest for DWI and handcuffed him. Trooper Garner read defendant his *Miranda* rights, and defendant indicated he understood them. At trial, Trooper Garner testified he had formed the opinion that "the defendant did consume a sufficient amount of an impairing substance to cause an appreciable impairment of his mental and physical faculties."

Thereafter, Trooper Garner drove defendant to the City County Bureau of Investigation (CCBI) in Raleigh for processing. On the way, at defendant's request, Trooper Garner called Ms. Markle on defend-

ant's cell phone and gave her directions to the CCBI. Sometime during the drive, defendant told Trooper Garner that Ms. Markle was a corporate attorney. Upon arriving at the CCBI, defendant was taken before Ms. Holly Murphy, the chemical analyst. She read defendant his Intoxilyzer rights, then asked if he understood them, to which defendant replied yes. Ms. Murphy also asked defendant if he wanted to call a witness or attorney. Defendant stated he wanted to call Ms. Markle, who was a civil attorney. Ms. Murphy advised defendant that he could call anyone he wanted to witness the test and showed him where the telephone was located. After the observation period ended, Ms. Markle was brought into the room and witnessed Ms. Murphy administer the Intoxilyzer test to defendant. Defendant's alcohol concentration was 0.10 at 12:52 a.m.

While she waited to witness defendant's Intoxilyzer test, Ms. Markle had called an attorney who advised her to have defendant take an additional test. After defendant completed the first Intoxilyzer test (which consisted of two sequential readings), Ms. Markle told Ms. Murphy that defendant wanted to take another test. Ms. Murphy stated that she was not statutorily required to administer another test and refused to do so. She also explained that defendant had the right to take another test, but it would be on his own time and at his own expense. Ms. Markle was then escorted out of the Intoxilyzer room and waited for defendant to be released. Defendant was subsequently released by the magistrate at 1:30 a.m. and left the CCBI with Ms. Markle.

After a 3 March 2000 bench trial in district court, defendant was found guilty of both charges. Defendant appealed and was granted a jury trial *de novo* in superior court. On 12 March 2000, defendant filed a motion to dismiss the DWI charge on the ground that he was denied his right of access to friends and counsel under N.C. Gen. Stat. § 15A-501, U.S. Const. Amend. VI, and Article I, §§ 19 and 23 of the North Carolina Constitution. Defendant also filed a motion to suppress the results of the Intoxilyzer test administered the night of his arrest on the ground that the chemical analyst refused his request for a second test.

The trial court conducted a hearing at the 13 March 2001 Criminal Session of Wake County Superior Court and denied both of defendant's motions. However, on its own motion, the trial court did suppress the results of defendant's field sobriety tests because his attorney was not present during those tests. At the close of all the evidence, defendant moved to dismiss the charges for insufficiency of

the evidence. The trial court granted the motion to dismiss the DWI charge in part by ruling that the evidence was insufficient to submit the charge on the theory of appreciable impairment. The DWI charge was thereafter submitted to the jury solely on the theory that defendant had an alcohol concentration of 0.08 or higher. The jury determined defendant was not responsible for the moving violation infraction but was unable to reach a unanimous verdict on the DWI charge. The trial court declared a mistrial because the jury was hopelessly deadlocked.

Defendant's second trial took place during the 29 October 2001 Criminal Session of Wake County Superior Court. After deliberating, the jury found defendant guilty of the DWI charge and the trial court sentenced him to a suspended sentence of sixty days, unsupervised probation for twelve months, and required him to pay $292.00 in costs. Defendant appealed.

On appeal, defendant argues the trial court erred by (I) denying his motion to dismiss based on constitutional grounds; (II) denying his motion for a mistrial; (III) asking the jury about its numerical division on the verdict; and (IV) failing to make findings of fact and conclusions of law to support its order denying his motion to dismiss. For the reasons stated herein, we disagree with defendant's arguments and conclude he received a trial free from error.

Motion to Dismiss

[1] By his first assignment of error, defendant contends the trial court erred in denying his motion to dismiss because he was denied his constitutional right to obtain witnesses in his behalf and his statutory right to communicate with counsel, family and friends. Specifically, defendant argues he should have been permitted to confer with Ms. Markle prior to the administration of the Intoxilyzer test, and that Ms. Markle should have been allowed to be present when he performed the field sobriety tests for Trooper Garner, after the Intoxilyzer test had been administered. Upon review, we disagree.

(1) Right of Access to Counsel Before Intoxilyzer Test

Defendant readily concedes that criminal defendants have no *constitutional* right to confer with counsel before deciding to submit to a breathalyzer test. *Seders v. Powell, Comr. of Motor Vehicles*, 298 N.C. 453, 461-62, 259 S.E.2d 544, 550 (1979); *State v. Howren*, 312 N.C. 454, 455-56, 323 S.E.2d 335, 336-37 (1984) (explaining that administration of a breathalyzer test is not a critical stage of the prosecution

entitling a defendant to a constitutional right to an attorney). However, defendant contends that he maintained the *statutory* right to communicate with an attorney before submitting to a breathalyzer test pursuant to N.C. Gen. Stat. § 15A-501(5) (2001) and N.C. Gen. Stat. § 20-16.2 (2001). N.C. Gen. Stat. § 15A-501 states:

> Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:
>
> * * * *
>
> (5) Must without unnecessary delay advise the person arrested of his right to communicate with counsel and friends and must allow him reasonable time and reasonable opportunity to do so.

N.C. Gen. Stat. § 20-16.2(a)(6) provides:

> (6) The person has the right to call an attorney and select a witness to view for him or her the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time when the person is notified of his or her rights.

The only limitation on the statutory right to communicate with counsel, argues defendant, is that a criminal defendant may not delay the administration of the breathalyzer test for more than 30 minutes for the purpose of obtaining and communicating with an attorney. *Seders*, 298 N.C. at 460, 259 S.E.2d at 549. Defendant contends the evidence shows that he was denied his statutory right under N.C. Gen. Stat. § 15A-501(5) to communicate with Ms. Markle prior to deciding whether to submit to the Intoxilyzer test.

The burden of proving prejudice from a statutory violation is on defendant. N.C. Gen. Stat. § 15A-1443(a) (2001). "The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). Our standard of review is as follows:

> While charges pending against an accused may be dismissed for violations of his statutory rights, dismissal is a drastic remedy which should be granted sparingly. *See State v. Curmon*, 295 N.C. 453, 245 S.E.2d 503 (1978). Before a motion to dismiss should be granted, this court has held that it must appear that the statutory violation caused irreparable prejudice to the prepara-

> tion of defendant's case. *State v. Knoll*, 84 N.C. App. 228, 352 S.E.2d 463 (1987).

State v. Gilbert, 85 N.C. App. 594, 596, 355 S.E.2d 261, 263 (1987).

The State argues, and we agree, that N.C. Gen. Stat. § 20-16.2 controls over N.C. Gen. Stat. § 15A-501(5) in this context. This is so because

> anyone who accepts the privilege of driving upon our highways has already consented to the use of a breathalyzer test and has no constitutional right to consult a lawyer to void that consent. . . .
>
> * * * *
>
> In view of this prior consent, we see no reasons why [the defendant] has any claim to consult counsel other than that provided for in G.S. 20-16.2(a)[(6)].

Seders, 298 N.C. at 462-63, 259 S.E.2d at 550-51. The trial court found that there was no statutory violation in this case. Ms. Markle testified that she did not tell anyone that she was an attorney; she described herself as defendant's "witness." Ms. Markle did, in fact, witness the administration of the Intoxilyzer test and had an opportunity to consult with defendant before the test was administered, but defendant did not request to see her prior to the administration of the test. Defendant's only argument is that he was prevented from conferring with Ms. Markle prior to administration of the test. During the hearing on defendant's pretrial motions, the following inquiry took place:

> THE COURT: Just wait just one second. Let me make sure I have the information I need. I need a little more information about how you described Ms. Markle to trooper—first to trooper Garner. I mean, do you know when it was and by what words you used to let him know that this was an attorney here on your behalf?
>
> THE WITNESS: I don't recall if I said my friend or attorney, lawyer; whether she was there to be of support to me and to help me out. I don't recall if I distinctly said friend, lawyer, attorney. I just don't.
>
> THE COURT: All right. How about after you got to the Public Safety Center and you're in the breathalyzer room and breathalyzer operator's advising you of your rights. Do you know when

you made her aware that Ms. Markle, who was outside, not only was there as a friend, potential witness and support, but also she was there as an attorney?

THE WITNESS: I don't recall if that ever came up, that she was an attorney, I don't know if she declared that she was an attorney or that I said it, I really don't. If I may say, when you're in that breathalyzer processing area, you don't get to talk much, you're just standing there. It's, boom, they don't want to hear from anybody.

THE COURT: I understand. I understand that, they're going through protocol.

THE WITNESS: Yes, sir.

THE COURT: Okay. But you have stated you never said, hey, guys, you know this right down here about conferring with a lawyer, my lawyer's outside, her name is Ms. Markle. I would like to talk to her. Did you ever clearly say that to anybody in authority who would have then had to make a decision about whether or not they were going to let you confer with her?

THE WITNESS: I believe that Officer Garner was aware.

THE COURT: I'm not talking about what you believe Officer Garner was aware of, I'm asking you whether you, yourself, ever clearly said to either him or the breathalyzer operator, I want to confer with a lawyer, my lawyer is outside. I want to talk to her before I take the test. I want to talk to her before I answer any questions, anything like that. So that they were on notice that you were exercising your right to counsel, and that they had a legal obligation to make her available to you immediately. Any words that would suggest that to them?

THE WITNESS: Again, if I may say, Your Honor, you're not given any chance to talk about anything. They don't want to talk to you, they don't want to hear you, anything else.

THE COURT: Sir, no matter what they want, whether they advise you of your rights, if you exercise one of those rights in a clear unequivocal way, by law they must.

THE WITNESS: Well—

THE COURT: They must. They must comply.

THE WITNESS: I believe they knew she was my attorney. I wanted her there. They would not—did not have the opportunity to speak to her because she was ushered out immediately after the test.

THE COURT: I understand that. And I don't quarrel with the fact that you believe they knew that. I want to know how you communicated that to them so that they believed that.

THE WITNESS: Well, when I volunteered for the first tests, I said that I wanted Ms. Markle there, I was told that she was not going to be there, I said she's my attorney. Officer Garner knew that at that instant, I was not allowed to have her there.

THE COURT: That was after you [had] taken the breathalyzer test, after you had also requested another test that had been done.

THE WITNESS: Yes, and I don't recall if I—the answer to that question, just because of what goes on.

THE COURT: I mean, I understand this was a—this was a very unusual situation for you, and just some time later, I'm asking you a lot of specific questions, but that's what I need.

THE WITNESS: Yes, sir.

THE COURT: Just trying to get your best recall. All right. Any other questions based on that?

Shortly thereafter, the following exchange took place:

Q. [DEFENSE ATTORNEY MR. PETTY]: Do you specifically recall requesting your attorney, Mr. Rasmussen?

A. Yes.

MR. PETTY [DEFENSE ATTORNEY]: No further questions, Your Honor.

THE COURT: Okay. Any other questions?

MR. MANGUM [PROSECUTOR]: No, not at this point.

THE COURT: Okay. Well, I mean, you recall that a moment ago, do you now recall when it was that you requested to confer with Ms. Markle as your attorney?

THE WITNESS: In the presence of Ms. Murphy. She took the notes.

THE COURT: Do you know whether—do you know before—whether it was before the test, after the test when you requested the second test immediately before the physical test, or do you recall?

THE WITNESS: The exact instance?

THE COURT: Just trying to get some idea during this whole time frame when that happened.

THE WITNESS: Well, it was—

THE COURT: If you can remember. If you can't, obviously, you can't.

THE WITNESS: It was obviously before the request for second test was denied.

THE COURT: Okay.

THE WITNESS: That's obvious.

THE COURT: Okay. All right.

On cross-examination, Ms. Markle testified as follows:

Q. At any point did you—do you recall Mr. Rasmussen asking for the opportunity to speak with you before he took those tests?

A. I did not hear him ask that, no, I don't recall that.

Q. At any time did you have particular—a request to have a chance to talk with Mr. Rasmussen?

A. No.

Defendant did not identify Ms. Markle as his attorney and did not affirmatively ask to speak to her before the Intoxilyzer test was administered. To invoke the right to counsel, "the suspect must unambiguously request counsel. . . . Although a suspect need not 'speak with the discrimination of an Oxford don,' he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994) (citations omitted). As defendant did not make an unambiguous request to confer with Ms. Markle, the trial court correctly determined there was no violation of defendant's statutory right of access to counsel prior to administration of the Intoxilyzer test.

(2) Statutory Right to Communicate with Family and Friends and Constitutional Right to Obtain Witness Testimony

Defendant also argues he was prevented from communicating with family and friends and obtaining witnesses and exculpatory evidence after the Intoxilyzer test, in violation of both N.C. Gen. Stat. § 15A-501(5) and Article I, § 23 of the North Carolina Constitution. Defendant notes that, in the case of a DWI charge, "intoxication is an essential element" and time is of the essence in allowing him access to his friends and family, so that they can make observations about his condition and possibly provide him with exculpatory evidence for use in his defense. *See State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971); and *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). Defendant contends he asked for Ms. Markle to be present for the field sobriety tests and argues that, because he was arrested and charged with DWI at the accident scene, his statutory and constitutional right to communicate with family and friends attached at that time, such that Ms. Markle was fully entitled to observe the field sobriety tests. Again, we disagree.

Upon review, we note that defendant was not denied his right to communicate with family and friends because Ms. Markle was in contact with him from the time she arrived at the accident scene around 11:35 p.m. until he was released around 1:30 a.m. She saw defendant at the dinner before the accident, at the accident scene, in the Intoxilyzer room, and at the time of his release. These instances provided Ms. Markle with enough contact with defendant to allow her to form an opinion as to his impairment or lack thereof. She also testified as to her observations at his trial, and stated that he "looked fine," had no odor of alcohol about his person, and did not appear flushed, glassy-eyed, or light-headed.

We further note that, even if Ms. Markle should have been allowed to witness the field sobriety tests, there is no prejudicial error because the trial court, on its own motion, suppressed the introduction of the field sobriety test results at trial. The trial court also dismissed the appreciable impairment theory of DWI and submitted the issue to the jury solely on the theory that defendant had an alcohol concentration of 0.08 or higher. As defendant has demonstrated no prejudicial error, *see Gilbert*, 85 N.C. App. at 597, 355 S.E.2d at 263, he is not entitled to a new trial.

In sum, we believe the trial court properly determined that defendant was not entitled to have the charges against him dis-

missed. Defendant did not indicate that Ms. Markle was his attorney; instead, she was a witness. Ms. Markle was permitted to witness the Intoxilyzer test and could have spoken to defendant before the test was administered had defendant clearly made such a request. Defendant was advised at least three times of his right to an attorney, but did not assert that right. Furthermore, we do not believe that the law enforcement officers were supposed to assume that defendant wanted to speak to Ms. Markle as his attorney simply because she was an attorney and they knew that fact. In the absence of a clear request by defendant that he wished to speak to his attorney, we discern no error by the trial court. Accordingly, defendant's first assignment of error is overruled.

Motion for Mistrial

[2] Defendant next argues that the trial court abused its discretion by denying his motion for a mistrial and committed plain error by failing to recess the trial proceedings until Monday morning. According to defendant, the totality of the circumstances showed that the jury verdict was the result of coercion placed upon the jury by the trial court, which resulted in a denial of his constitutional rights to a fair trial and due process. Specifically, defendant points to (1) the length and lateness of the jury's deliberations, and (2) the situation involving Juror No. 9. Upon review of these arguments, we discern no errors by the trial court.

> It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citations omitted). "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). Here, defendant did not object to the jury deliberating past 5:00 p.m., and has therefore waived appellate review of this assignment of error.

Plain error review has only been applied to jury instructions and to evidentiary matters. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983); *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983). To show prejudicial error warranting a new trial, defendant must show that " 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . . The burden of showing such prejudice . . . is upon the defendant.' " *State v. Ratliff*, 341 N.C. 610, 617, 461 S.E.2d 325, 329 (1995) (quoting N.C. Gen. Stat. § 15A-1443(a) (1988)).

In the present case, defendant's motion for a mistrial was based on the fact that the jury was allowed to deliberate past 5:00 p.m. and the trial court did not recess the proceedings. N.C. Gen. Stat. § 15A-1235 (2001) states:

> (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

"[T]he action of the judge in declaring or failing to declare a mistrial [under N.C. Gen. Stat. § 15A-1235] is reviewable only in case of gross abuse of discretion." *State v. Darden*, 48 N.C. App. 128, 133, 268 S.E.2d 225, 228 (1980). Our review must take into account the totality of the circumstances. *State v. Patterson*, 103 N.C. App. 195, 201, 405 S.E.2d 200, 204, *aff'd*, 332 N.C. 409, 420 S.E.2d 98 (1992).

At 3:09 p.m. on a Friday afternoon, the jury began deliberating the single issue of whether defendant was guilty of DWI. Over the course of the afternoon, the jury sent questions to the trial court, which were duly answered. Around 5:00 p.m., after answering a question posed by the jury, the trial court asked if a preliminary vote had been taken, but did not ask how the votes were actually being cast. After the jury foreman indicated a vote had been taken, the trial court tried to determine whether the jurors wanted to leave or stay:

> THE COURT: We talked a little bit about this on yesterday. We just want to get a feel about what y'all thinking, Mr. Foreman.

Why don't we do it this way. Why don't you talk to the jurors and see what it is they want to do. Five o'clock is normally the time that we would close court, but you know, we want to get the case done if we can do it today. And I'm not asking you to do it today, but I am asking you how long you want to be here today. Kind of the same question.

A JUROR: What time does the parking lot close across the street?

THE COURT: I think the parking lot will be open, the parking lot will be open. I believe that they will just—

THE FOREPERSON: I think I saw a sign that the gate closed at six forty-five.

THE COURT: I think you can get out. I'm not aware that they won't let you out.

THE FOREPERSON: Well, I think we're kind of undecided on that. Also I think there's a couple of folks that are ready to go and a lot of folks that don't want to come back Monday. So is that a fair statement?

THE COURT: Well, y'all need to work it out. Y'all need to tell us what you want to do.

THE FOREPERSON: Why don't we try a few more minutes.

THE COURT: Why don't we do this, if that's what you want to do you want to try a few, just go back there for a couple minutes, tell us that you want to try for a few minutes okay.

In response to some inquiries, the trial court told the jurors that if they decided to continue deliberating, they would be given access to phones to notify their families that they were staying late. The jury resumed deliberations at 5:00 p.m. and returned to the courtroom at 5:05 p.m. At that time, the foreperson stated:

THE FOREPERSON: We have agreed that we all would like to finish this today if possible. We would like another half hour or two to discuss this to see if we could come to a conclusion.

The trial court called the jury back into the courtroom at 5:55 p.m. and stated:

THE COURT: All right. Mr. Foreman, has the jury reached a unanimous verdict on the issue?

THE FOREPERSON: No, we have not.

THE COURT: Mr. Foreman, do you recall your last vote?

THE FOREPERSON: Yes, I do.

THE COURT: I just want you to give me the numbers, not the way it's going for instance.

THE FOREPERSON: Ten two.

THE COURT: All right. Mr. Foreman, do you believe that with further deliberations the jury would reach a unanimous verdict?

THE FOREPERSON: I am not sure; is that fair? I'm not sure.

THE COURT: I'm going to read you some language and ask the jury to consider it and then we'll make a decision about what we're going to do.

The trial court then read the *Allen* charge contained in N.C. Gen. Stat. § 15A-1235 and the jury resumed deliberations at 5:57 p.m. Some time later, the trial court again brought the jury into the courtroom to gauge their progress, and the foreperson indicated they were "very close" to reaching a verdict and could reach a verdict with further deliberations. At 6:25 p.m., the jury returned a guilty verdict.

We note that the jury deliberated only one and one-half hours after 5:00 p.m. The aforementioned colloquies indicate that the trial court properly left the decision of whether or not to continue deliberations to the jury members. *See State v. Bussey*, 321 N.C. 92, 97, 361 S.E.2d 564, 567 (1987). We therefore conclude the length of the deliberations did not have a coercive effect upon the jury.

Defendant also argues that the trial court's failure to declare a mistrial was error because Juror No. 9 had "emotional and unresolved concern over the well-being of her daughter, who was waiting outside in the dark with no knowledge of the whereabouts of her mother." Again, we disagree.

After the jury foreman told the trial court the jury was "very close" to a verdict (shortly after 6:00 p.m.), and after the jury resumed deliberations, the trial court asked the deputy to relate what Juror No. 9 had said to him:

THE COURT: All right Mr. Deputy, what did juror number nine say?

* * * *

THE DEPUTY: Apparently her daughter is waiting outside. Wants her to be contacted to let her know she's still here in deliberation.

THE COURT: Did she tell you where she was?

THE DEPUTY: Yeah, in front of the sheriff's office.

THE COURT: Can you let somebody know that?

THE DEPUTY: I think I'm the only one here. I know I am. If I can go down there, I'm the only one left.

THE COURT: Right. She tell you what her name is?

THE DEPUTY: Yeah, she told me what she was driving.

THE COURT: Okay, why don't you go ahead.

Defendant moved for a mistrial due to Juror No. 9's perceived "distress," which he believed coerced her into finding him guilty to speed up the deliberations. The trial court considered defendant's argument and denied the motion. Upon review, we believe Juror No. 9 simply asked the deputy to relay a message to her daughter that she was still involved in deliberations with the jury. If she was concerned for her daughter's safety, the deputy was an armed officer who could help keep her daughter safe. Moreover, the record does not reveal which way Juror No. 9 voted, and defendant's arguments are therefore merely speculative. After carefully reviewing the transcript and considering the circumstances, we believe defendant's arguments are meritless, and this assignment of error is overruled.

Trial Court's Inquiry of Jury's Numerical Division

[3] In a related assignment of error, defendant contends the trial court committed plain error by inquiring into the numerical division of the jury regarding its verdict and in its subsequent *Allen* instruction based on N.C. Gen. Stat. § 15A-1235. Specifically, defendant contends these actions were coercive under the totality of the circumstances and violated his state and federal constitutional rights to a trial by jury and due process of law by causing the jury to enter a unanimous guilty verdict. Upon review, we disagree.

> [T]he defendant is entitled to a new trial if the circumstances surrounding jury deliberations
>
> > might reasonably be construed by [a] member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict.

State v. Dexter, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496, *aff'd*, 356 N.C. 604, 572 S.E.2d 782 (2002) (quoting *State v. Roberts*, 270 N.C. 449, 451, 154 S.E.2d 536, 538 (1967)).

> It is true that our constitution has been interpreted to require a jury of twelve and a unanimous verdict. This Court has also recognized the importance of protecting jury deliberations from influences which deprive jurors of their freedom of thought and action. We do not consider questions concerning the division of the jury to be a *per se* violation of Art. I, § 24 [of the North Carolina Constitution] when the trial court makes it clear that it does not desire to know whether the majority is for conviction or acquittal. Such inquiries are not inherently coercive, and without more do not violate the right to trial by jury guaranteed by the North Carolina Constitution. The appropriate standard is whether in the totality of the circumstances the inquiry is coercive.

State v. Fowler, 312 N.C. 304, 308-09, 322 S.E.2d 389, 392 (1984) (citations omitted). The making of such inquiry lies within the sound discretion of the trial judge. *State v. Mann*, 317 N.C. 164, 176, 345 S.E.2d 365, 372 (1986).

Defendant concedes that the trial court's instructions and inquiry into the numerical division of the jury may have been insufficient to coerce a unanimous verdict in this case. Defendant therefore seeks to bolster the perceived coerciveness by pointing to several "coercive circumstances" he believes existed at the time: (1) the trial court's statement to the jury that it wanted "to get the case done if we can do it today[]"; (2) the fact that the jury was asked to deliberate after normal hours on a Friday evening; (3) the fact that the trial court indicated its preference that the case be concluded on Friday when it gave the *Allen* charge; (4) the possible problems regarding closure of

the parking lot; and (5) the situation involving Juror No. 9. Defendant contends these circumstances pitted the jury "against the clock" and created a coercive environment which prejudiced him and entitled him to a new trial.

After consideration of the transcript, we believe the circumstances were not coercive. As previously noted, the inquiry into the jury's numerical division was not coercive and did not constitute an abuse of discretion by the trial court. Additionally, the trial court did not deviate from the statutory language of N.C. Gen. Stat. § 15A-1235 in giving the *Allen* charge. "The purpose behind the enactment of N.C.G.S. § 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision." *State v. Evans*, 346 N.C. 221, 227, 485 S.E.2d 271, 274 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998). The trial court accomplished that goal through its instruction. As we discern no error in the trial court's actions, this assignment of error is overruled.

Trial Court's Order

[4] In his final assignment of error, defendant contends the trial court committed reversible and plain error by failing to make adequate findings of fact and conclusions of law to support the order denying his motion to dismiss. We do not agree.

"When a defendant alleges he has been denied his right to communicate with counsel, family, and friends, the trial court must conduct a hearing on defendant's motion to dismiss and make findings and conclusions." *State v. Lewis*, 147 N.C. App. 274, 277, 555 S.E.2d 348, 351 (2001). "Generally, when a trial court fails to make required findings of fact, the case must be remanded to the trial court for entry of findings. However, when the evidence in the record as to a finding is not controverted, remand is not required." *Pitts v. American Sec. Ins. Co.*, 144 N.C. App. 1, 18, 550 S.E.2d 179, 192 (2001), *aff'd*, 356 N.C. 292, 569 S.E.2d 647 (2002) (citation omitted). Stated another way, "[i]f there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because [the appellate court] can determine the propriety of the ruling on the undisputed facts which the evidence shows." *State v. Lovin*, 339 N.C. 695, 706, 454 S.E.2d 229, 235 (1995). There is no statutory authority which requires the trial court to make written findings of fact and conclusions of law in this instance. The transcript reveals the following relevant statement by the trial court, after it heard the testimony on defendant's motion to dismiss:

> The standard the Court needs to find the facts in support of the ruling, the court finds the facts to be true as testified to by all witnesses who testified on behalf of the State, and also the testimony of Suzanne Markle, Court finds also to be true for purposes of making this decision. I do not find based on the Defendant's blood alcohol reading, on his recall, limited recall of the event, I do not find his testimony to be entirely credible to the extent that I can rely upon it in making this decision, to the extent there's some conflict with the testimony of the other witnesses, then I accept their testimony as more accurate and more truthful than his.

In short, the trial court stated it considered the evidence and found the testimony of other witnesses more credible than defendant's. After reviewing this case, we hold there is no unresolved material conflict in the evidence, and we see no need to remand the case for written findings of fact and conclusions of law. *See State v. Major*, 84 N.C. App. 421, 352 S.E.2d 862 (1987).

We also agree with the State that defendant has waived any claim that the trial court was required to make written findings of fact and conclusions of law by not making a timely objection or requesting that the trial court reduce its findings and conclusions to writing. *See* N.C.R. App. P. 10(b)(2) (2002). Accordingly, defendant's final assignment of error is overruled.

Upon careful review of the record, transcript, and the arguments presented by the parties, we conclude defendant received a fair trial, free from error.

No error.

Judges McGEE and LEVINSON concur.

STATE OF NORTH CAROLINA v. KAWAME LLOYD MAYS, DEFENDANT

No. COA01-1387

(Filed 1 July 2003)

1. Homicide— instructions—acquit first

An erroneous instruction that the jurors in a first-degree murder prosecution could consider second-degree murder only after they unanimously acquitted defendant of first-degree murder was harmless. The defendant in this case received the only relief to which he was entitled when the jury failed to convict and the court ordered a new trial. It is suggested that a jury expressing confusion be instructed to consider first the primary offense, then the lesser offense if reasonable efforts do not produce a verdict, and that a unanimous not guilty verdict for the primary offense is not required before consideration of the lesser offense.

2. Constitutional Law— double jeopardy—indictment after hung jury

A second indictment for murder did not violate double jeopardy where the first resulted in a hung jury. Although defendant argued that the first jury sent a note to the court that indicated unanimous agreement on second-degree murder, that note is open to interpretation and is not equivalent to a verdict.

3. Criminal Law— self-defense instruction—not given—harmless error

Any error in the court not giving an imperfect self-defense instruction was harmless where the court submitted first-degree murder based on both premeditation and deliberation and felony murder, second-degree murder, or not guilty, and the jury convicted defendant of first-degree murder based both on premeditation and deliberation and on felony murder.

4. Homicide— felony murder instruction—harmless error

Any error in submitting a felony murder instruction was harmless where defendant was found guilty of first-degree murder based upon both felony murder and premeditation and deliberation.

5. Evidence— motion in limine denied—no contemporaneous objection

The question of whether the State's cross-examination of a murder defendant was proper was considered by the Court of Appeals in its discretion, even though defendant did not lodge contemporaneous objections at trial after his motion in limine was denied.

6. Evidence— attack on correctional officers—admissible for willingness to attack officers

The admission of defendant's attack on correction officers was not improper in a prosecution for the first-degree murder of a police officer. The State was entitled to rebut defendant's assertions that he would not knowingly harm an officer and that he shot the police officer because he was mistaken about his identity.

7. Witnesses— defendant's witness called by State—not prejudicial

Any error in allowing the State to call an expert witness previously retained by defendant was harmless where the witness's testimony was tangential.

8. Homicide— first-degree murder—short-form indictment

A first-degree murder indictment was sufficient even though it did not set forth all elements of that crime.

Appeal by defendant from judgment entered 15 September 1998 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 7 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell and Assistant Attorney General Robert C. Montgomery, for the State.

Center for Death Penalty Litigation, by Robert Manner Hurley, for defendant-appellant.

GEER, Judge.

A jury found defendant Kawame Lloyd Mays guilty of first degree murder in a re-trial following the trial court's declaration of a mistrial. Defendant appeals, arguing that the trial court erred in various respects, including improperly instructing the jury in the first trial

that they could not consider the charge of second degree murder unless they had unanimously acquitted defendant of first degree murder, an instruction commonly called an "acquit first" instruction. We agree that the trial court erred in giving an "acquit first" instruction, but hold that defendant has already received the appropriate relief: a new trial with a properly instructed jury. As for defendant's other assignments of error, we find no prejudicial error.

On 4 August 1997, defendant was indicted for the murder of Raleigh Police Officer Paul Hale. On the same date, defendant was also separately indicted for the murder of Michael Walker. The two cases were joined and tried together at the 4 May 1998 criminal session of Wake County Superior Court with the Honorable Donald W. Stephens presiding. In the Walker case, the jury found defendant guilty of felony murder, but was unable to reach a unanimous decision as to sentence. The court therefore imposed a sentence of life without the possibility of parole. In the Hale case, Judge Stephens declared a mistrial based on the jury's inability to reach a unanimous verdict as to guilt or innocence.

The Hale case was re-tried at the 10 August 1998 criminal session of Wake County Superior Court with Judge Stephens again presiding. The jury found defendant guilty of first degree murder based on both premeditation and deliberation and felony murder. The jury was unable, however, to reach a unanimous verdict as to the sentence. On 15 September 1998, the trial court imposed a sentence of life without the possibility of parole.

From the judgment in the Hale case, defendant gave notice of appeal on 25 September 1998. The Walker case was the subject of a separate appeal in *State v. Mays*, 154 N.C. App. 572, 573 S.E.2d 202 (2002).

Facts

On 11 July 1997, defendant was sleeping at the apartment of an acquaintance, Linda Bass. Michael Walker first came by the apartment for a short time at 3:00 or 3:30 a.m. to smoke crack cocaine. He returned at 5:00 a.m., but Bass would not let him in because she was about to go to bed. Shortly afterwards, she heard a fight outside her apartment. Defendant was awakened by the noise and he and Bass went out onto her front porch.

Walker was being assaulted by a "couple of guys," but when Bass yelled, they stopped and ran down the street. Walker asked Bass to

walk him to his truck. Bass told him, "they're gone, you'll be all right." Walker stepped off Bass' porch and ran to his truck.

As Walker drove off in his truck, defendant started shooting at the back of the truck. Defendant testified that he did not have a reason to fire the gun and that he was not trying to shoot Walker. Bass testified that she asked defendant, "why did you do that, you don't know him. He didn't do anything to you." Defendant responded, "I'm sorry." Bass told defendant to go, but recommended that he leave by way of State Street.

At 8:30 or 9:00 a.m., defendant spoke to Chris Sanders on State Street. In response to defendant's question about the driver of the truck, Sanders told him that the driver had been killed. Defendant then got into a cab. Sanders walked to the crime scene, where officers were investigating Walker's death, and threw a piece of paper onto the ground in front of the officers. He had written on the paper that the person the police were looking for had just gotten into cab number 31.

When detectives interviewed the cab driver, he gave them a description of his passenger and said that he had dropped him off in the 700 block of East Lenoir Street. After learning that defendant's girlfriend lived at 727 East Lenoir Street, the police department set up surveillance around the apartments at that address in an attempt to apprehend defendant.

Raleigh Police Officers Paul Hale and Patrick Niemann, both drug and vice squad officers dressed in plain clothing, participated in the surveillance and were given a description of defendant. No arrest warrant had been issued; they were supposed to detain defendant in an investigative stop and call the officers of the major crimes unit to interview him. The officers drove to the surveillance area in an unmarked 1984 Subaru.

Defendant was in fact at his girlfriend's apartment. The stepmother of defendant's girlfriend, Rosie Williams, testified that at about 5:00 p.m., she was leaving the apartment and defendant asked her for a ride to the store. They walked to the parking lot with another daughter of Williams and got into a Suzuki owned by that daughter. Defendant climbed into the back seat while Williams sat in the driver's seat. The daughter went over to speak to a friend. While they waited for Williams's daughter, they saw another car drive into the parking lot and pull up behind them. Defendant testified that he

thought the men in the car were friends of Walker. Williams, however, testified that she heard defendant say, "[T]he police have just pulled up behind us."

The men in the car were Niemann and Hale. Niemann had spotted defendant and thought he might be their suspect. As the officers drove towards the parking lot, they saw defendant get into the backseat of the Suzuki. According to Niemann's testimony, the officers pulled into the parking lot behind the Suzuki, parked the car, put on their police ballcaps, and exited the car. Hale's cap had "police" written on it in big letters.

Niemann walked over to talk to two pedestrians (Williams' daughter and her friend). When Hale walked towards the Sukuzi, Niemann then moved to the rear of the car. Neither officer had drawn his gun. Niemann testified that he heard Hale tell defendant, "put your hands where I can see them." Both Williams and her daughter confirmed that they too heard Hale ask defendant to step out of the car and put his hands where Hale could see them.

As Williams attempted to look out of her rear window, she saw defendant pull a gun out from his pants. Then, as Hale approached the door on defendant's side of the Sukuzi, defendant leaned forward and shot him. The State's expert pathologist testified that defendant's gun was fired at a distance of three to six inches from Hale's face.

Defendant claimed that he shot Hale because he believed that Hale had a gun in his hand and was going to shoot him. Hale actually was holding a walkie-talkie. Defendant testified that he would never have shot Hale had he known he was a police officer.

Niemann heard the shot and saw Hale fall to the ground. He used the officers' Subaru for cover, fired several shots at defendant, and radioed for help. He saw a hand fling a black semiautomatic pistol, which had jammed, on the ground. Several officers, who were also participating in the surveillance, pulled defendant out of the Sukuzi. Various witnesses confirmed that defendant, who had also been shot, stated that he did not know Hale was a police officer. Both Hale and defendant were taken to Wake Medical Hospital, where Hale died several hours later.

I

[1] Defendant argues that the trial court erred in instructing the jurors that they could not consider whether defendant was guilty of

second degree murder unless they had first unanimously decided to acquit defendant of first degree murder. We agree with defendant, based on the plain language of N.C. Gen. Stat. § 15A-1237 (2001) and prior decisions of the North Carolina appellate courts. Nevertheless, defendant has already received the only relief to which he would be entitled: a new trial with a properly instructed jury.

During defendant's first trial, the jury foreman sent a note to the trial court that stated, "If we cannot unanimously agree on 1st degree murder under either legal theory, (for one of the cases) [a]nd we can unanimously agree that minimally the defendant is guilty of 2nd degree murder, must we conclude that he is guilty of 2nd degree murder." (Emphasis original) After the note was delivered to the trial court, but before the jury was brought back to the courtroom, the following discussion occurred:

> THE COURT: Of course as we all know and understand the law the jurors must unanimously agree on each potential verdict before they can make a decision about that verdict. That is to say, the jurors must unanimously agree that the defendant is guilty of murder in the first degree or they must unanimously agree that he is not. And until such time as they unanimously agree either way they do not address whether or not he's guilty of second degree murder.
>
> . . . .
>
> If my recollection of the legal principles involved are contrary to yours you need to tell me now. Mr. DA, is that your understanding?
>
> [PROSECUTOR]: That's my understanding of the law, your Honor. They must agree unanimously on the first charge before they can address other offenses and they would have to do it under both theories.
>
> . . . .
>
> [DEFENSE COUNSEL]: Your Honor, our position based on the note is that the Court should instruct them that they should return a verdict of second degree in the case, that they can unanimously agree that this is a second degree conviction and we request that the Court instruct the jurors as to that if they're unanimous on second degree.

The trial court denied defense counsel's request and instructed the jury: "You would not reach the question of whether or not the defendant is guilty of murder in the second degree until all twelve of you agree and are so satisfied that the answer[s] to the first two issues [whether defendant is guilty of premeditated murder or felony murder] are no and the State has failed to prove beyond a reasonable doubt the defendant is in fact guilty of murder in the first degree."

After receiving the supplemental instructions, the jury continued their deliberations, but subsequently sent a second note to the trial court, which read: "Upon careful discussion, we cannot unanimously agree yes to 1st degree murder in one case. We also cannot all 12 agree no to 1st degree murder in the same case. We do not believe that with any amount of further deliberation, this will change." The jury again asked: "Do we need 12 unanimous no votes to 1st degree murder before we consider 2nd degree murder?" Based on the jury's inability to reach a unanimous decision, the trial court declared a mistrial.

N.C. Gen. Stat. § 15A-1237 provides:

> (b) The verdict must be unanimous, and must be returned by the jury in open court.
>
> . . .
>
> (e) If there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees.

Since in this case, there were "two or more offenses"—premeditated murder, felony murder, and second degree murder—"for which the jury could return a verdict," § 15A-1237(e) controls. The trial court's instruction requiring that the jury first acquit defendant of first degree murder before considering whether defendant was guilty of second degree murder cannot be reconciled with the plain language of N.C. Gen. Stat. § 15A-1237(e).

Under § 15A-1237(e) (emphasis added), the jury was permitted to "return a verdict with respect to *any* offense, including a lesser included offense on which the judge charged, as to which it agree[d]." Necessarily, because of the statute's specific reference to "a lesser included offense," the jury in this case was entitled to return a verdict of second degree murder if they all agreed. Nothing in the statute sup-

ports the trial court's added limitation that the juror was first required to acquit defendant as to first degree murder. The mandatory nature of the instruction is inconsistent with the permissive language of the statute.

In addition, the trial court's instruction has already been rejected by this Court in *State v. Sanders*, 81 N.C. App. 438, 344 S.E.2d 592, *disc. review denied*, 318 N.C. 419, 349 S.E.2d 604 (1986). In *Sanders*, defendant argued that the trial court improperly coerced the jury's verdict, pointing to the following discussion between the trial court and the jury foreman:

> COURT: Okay. I assume you have not reached a verdict.
>
> FOREMAN: Your Honor, we have a difference of understanding on that matter. It is my interpretation that we have but questions were raised and I need a clarification from you at that point and I had hoped before we came back out.
>
> . . . .
>
> FOREMAN: Your Honor, I understood your instructions to indicate that it was our task to take these options and in the light of the evidence presented in this Court and our common sense understanding of that agree on one of these four verdicts. There are several specifications in there and we discussed this in what we all thought was orderly manner and we agree unanimously on one of these options.
>
> Then there was the interpretation advanced that we had to be unanimous in every detail. Obviously we were not unanimous in one of the details.
>
> And so then there was the notion that we were not unanimous in our agreement because we choose—we did not choose the first one, the unanimity was on another option.
>
> COURT: On the option that you ultimately select, any one of the four, you must be unanimous.
>
> FOREMAN: Yes, sir. That was my interpretation but I was not able to convince all members that that was the end of it, that any misgivings about any other point were automatically dropped once you have unanimity on that.
>
> COURT: That's correct.

Sanders, 81 N.C. App. at 440-41, 344 S.E.2d at 593. In addressing this colloquy, the *Sanders* Court stated:

> It is readily apparent from the colloquy between the court and the jury foreman in the jury's presence that the jury was not unanimous as to the "first option," the indicted offense, and that some members of the jury believed that to reject that "option" required a unanimous vote. The court correctly agreed with the foreman that this was not a proper interpretation, and correctly instructed the jury that its decision on any one of the four options (including not guilty) must be unanimous. . . . The jury had already agreed unanimously on a lesser offense, and simply was confused as to whether their rejection of the greater offense had to be unanimous. The court instructed them correctly as to their duty.

Sanders, 81 N.C. App. at 442, 344 S.E.2d at 594. The reasoning articulated in *Sanders* fits squarely within the language of N.C. Gen. Stat. § 15A-1237(e).

In arguing that this Court should not follow *Sanders*, the State relies on *State v. Wall*, 9 N.C. App. 22, 175 S.E.2d 310 (1970), *State v. Wilkins*, 34 N.C. App. 392, 238 S.E.2d 659, *disc. review denied*, 294 N.C. 187, 241 S.E.2d 516 (1977), *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982), and *State v. Felton*, 330 N.C. 619, 412 S.E.2d 344 (1992), *overruled on other grounds*, *State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998), for the proposition that North Carolina is an "acquittal first" state. We disagree.

State v. Wall was authored prior to the adoption of N.C. Gen. Stat. § 15A-1237(e) and, therefore, is not instructive on how this Court should interpret and apply that statute. In fact, the *Wall* decision was grounded on the lack of authority to support the jury's having "the unbridled right to consider each offense separately and in any order they see fit." *Id.* at 24, 175 S.E.2d at 311. N.C. Gen. Stat. § 15A-1237(e) supplies that authority. *State v. Wilkins*, while authored in the same year as the adoption of the statute, relied solely on *Wall* and did not address the language of the statute. Neither *State v. Booker* nor *State v. Felton* addressed § 15A-1237(e) or specifically considered whether a trial court is required to instruct the jury that it must acquit defendant of the indicted offense before considering the lesser included offenses. None of these decisions require this Court to disregard the plain language of N.C. Gen. Stat. § 15A-1237(e) or *Sanders*.

In addition, the approach adopted here is consistent with North Carolina Supreme Court decisions regarding instructions on lesser included offenses. In *State v. Thomas*, 325 N.C. 583, 599, 386 S.E.2d 555, 564 (1989), the Supreme Court discussed the importance "of permitting the jury to find a defendant guilty of a lesser included offense supported by the evidence . . . ." As the Court explained, "[i]t aids the prosecution when its proof may not be persuasive on some element of the greater offense, and it is beneficial to the defendant 'because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal.' " *Id.* (quoting *Beck v. Alabama*, 447 U.S. 625, 633, 65 L. Ed. 2d 392, 400 (1980)). The Court expressed its primary concern that

> in a case in which "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction" despite the existing doubt, because "the jury was presented with only two options: convicting the defendant . . . or acquitting him outright."

Id. (quoting *Keeble v. United States*, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 850 (1973)) (emphasis in *Keeble*).

In *Thomas*, the Court concluded that since the evidence all pointed to some criminal culpability on defendant's part, "[i]t was important, therefore, that the jury be permitted to consider whether defendant was guilty of the lesser included offense of involuntary manslaughter and not be forced to choose between guilty as charged or not guilty." *Id.* The error in failing to instruct on a lesser included offense is not cured by a unanimous verdict of guilty on the greater charge because "the jury might well have found the accused to be guilty of the lesser offense rather than the greater." *State v. Pearce*, 296 N.C. 281, 294, 250 S.E.2d 640, 649 (1979).

These principles still have force when a jury is instructed in how it should proceed in considering the offenses charged. While in this case, the jury was not forced to choose between guilty or not guilty, it was effectively restricted to a choice of guilty of first degree murder or a hung jury, an equally unpalatable choice for a jury convinced that the defendant is guilty of some criminal conduct. The trial court's instruction below required a juror not persuaded of first degree murder to choose between overriding his or her own true beliefs or leaving the case unresolved with no guarantee that the defendant will ultimately be punished. Precisely in order to avoid

such coercion, the Ohio Supreme Court has rejected an "acquittal first" instruction:

> Although the risk of coerced decisions may be present in any jury deliberation, we agree with the Oregon Supreme Court that the "acquittal first" instruction exacerbates such risk. "When the jury is instructed in accordance with the 'acquittal first' instruction, a juror voting in the minority probably is limited to three options upon deadlock: (1) try to persuade the majority to change its opinion; (2) change his or her vote; or (3) hold out and create a hung jury." . . . Because of its potential for a coerced verdict, the "acquittal first" instruction is improper and may not be charged to a jury in this state.

State v. Thomas, 40 Ohio St. 3d 213, 219-20, 533 N.E.2d 286, 292 (1988) (quoting *State v. Allen*, 301 Or. 35, 39, 717 P.2d 1178, 1180 (1986)), *cert. denied*, 493 U.S. 826, 107 L. Ed. 2d 54 (1989). *See also Allen*, 301 Or. at 40, 717 P.2d at 1181 (noting that jury studies "demonstrate that the 'acquittal first' instruction exacerbates the risk of coerced decisions . . .").

An "acquittal first" instruction, such as was used here, also dilutes the jury's freedom of decision that our State's lesser-included-offense jurisprudence has so carefully guarded. If, in the face of a unanimous guilty verdict on the indicted offense, our courts are still required to remand for a new trial simply so that a jury will be able to consider all lesser included offenses supported by the evidence, an instruction that then effectively bars the jury from considering the lesser included offenses cannot be permitted. *See State v. Sawyer*, 227 Conn. 566, 594, 630 A.2d 1064, 1078 (1993) (Katz, J., dissenting) ("Although juries are often instructed on lesser included offenses, the majority's imposition of the acquittal first rule effectively prohibits them from actually considering the lesser included offenses.").

The appropriateness of an "acquittal first" instruction has been debated across the country. Those states requiring such instructions do so either because it is mandated by statute or because of their fear that any other instruction could lead to compromise verdicts. *See, e.g., State v. Raudebaugh*, 124 Idaho 758, 761, 864 P.2d 596, 599 (1993) (Idaho Code § 19-2132(c) forbids a jury from considering lesser included offenses until after it has found the defendant not guilty of each greater offense); *People v. Boettcher*, 69 N.Y.2d 174, 183, 505 N.E.2d 594, 597 (1987) (expressing concern about compromise ver-

dicts). Other states, as a matter of policy, reject an "acquittal first" instruction because they are more concerned about the instruction's coercive effect and the possible increase in hung juries:

> We believe the "reasonable efforts" procedure is superior to the acquittal-first requirement for a number of reasons. First, it reduces the risks of false unanimity and coerced verdicts. When jurors harbor a doubt as to guilt on the greater offense but are convinced the defendant is culpable to a lesser degree, they may be more apt to vote for conviction on the principal charge out of fear that to do otherwise would permit a guilty person to go free. The "reasonable efforts" approach also diminishes the likelihood of a hung jury, and the significant costs of retrial, by providing options that enable the fact finder to better gauge the fit between the state's proof and the offenses being considered.

State v. LeBlanc, 186 Ariz. 437, 438-39, 924 P.2d 441, 442-43 (1996) (en banc) (citations omitted). *Accord State v. Labanowski*, 117 Wn. 2d 405, 420, 816 P.2d 26, 34 (1991) (en banc).

While the latter group of states' analysis fits more closely with the jurisprudence of this State,[1] we do not need to make that policy determination. That decision was already made by our General Assembly in adopting N.C. Gen. Stat. § 15A-1237(e) and we, as a court, are not free to revisit the question.

The approach that we believe § 15A-1237(e) mandates is consistent with the current pattern jury instructions. For example, in 1 N.C.P.I.—Crim. 206.11 (2002) (emphasis added), a jury is instructed:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally but not in self-defense, killed the victim thereby proximately causing the victim's death and that the defendant acted with malice, with premeditation, and with deliberation, it would be your duty to return a verdict of guilty of first degree murder. *If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder.*

---

1. *See State v. Alston*, 294 N.C. 577, 592-93, 243 S.E.2d 354, 364 (1978) ("[O]ur Court has solidly established certain rules for our guidance, *e.g.*, a trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous.").

If you do not find the defendant guilty of first degree murder, you must determine whether he is guilty of second degree murder.

This instruction simply directs a jury to consider the primary charge first before continuing onto the lesser included offense. It does not mandate that the jury unanimously find the defendant not guilty with respect to first degree murder before turning to second degree murder. *See State v. Gardner*, 789 P.2d 273, 284 (Utah 1989) (although rejecting an "acquittal first" instruction, approving an instruction that permitted the jury to consider the lesser included offenses "if they do not find the defendant guilty of the charged offense"), *cert. denied*, 494 U.S. 1090, 108 L. Ed. 2d 965 (1990).

If, however, as occurred below and in *Sanders*, a jury expresses confusion regarding its responsibilities, then we suggest that the trial court give a "reasonable efforts" instruction similar to the one that has been adopted in a number of other jurisdictions: (1) that the jury should first consider the primary offense, but it is not required to determine unanimously that the defendant is not guilty of that offense before it may consider a lesser included offense; and (2) that if the jury's verdict as to the primary offense is not guilty, or if, after all reasonable efforts, the jury is unable to reach a verdict as to that offense, then it may consider whether the defendant is guilty of the lesser included offense.

Although we agree with defendant that the trial court erred in giving an "acquit first" instruction, this error was harmless. When a trial court erroneously instructs a jury, the proper relief on appeal is the granting of a new trial. *State v. Millsaps*, 356 N.C. 556, 569, 572 S.E.2d 767, 776 (2002) ("Ordinarily a trial error committed in jury instructions would warrant a new trial on the issue affected by the instructions.") (quoting *State v. Blakenship*, 337 N.C. 543, 563, 447 S.E.2d 727, 739 (1994)). Here, after the erroneous instruction, the jury failed to convict defendant and the trial court ordered a new trial. Defendant has not contended that the jury was improperly instructed on this issue in the second trial. Defendant has thus already obtained the only relief to which he is entitled.

Although defendant argues that an appropriate remedy would be to mandate that the trial court accept the jury's verdict of second degree murder, the jury never rendered a verdict of second degree murder in the first trial. Defendant points to the jury's note stating "we can unanimously agree that minimally the defendant is guilty of

2nd degree murder . . . ." (Emphasis original) The Supreme Court has already held that such a note does not constitute a verdict. *Booker*, 306 N.C. at 304, 293 S.E.2d at 79. In addition, we stress that while the jury was *permitted*, under N.C. Gen. Stat. § 15A-1237(e), to render a verdict as to second degree murder, it was not *required* to do so. A properly instructed jury might still have been unable to agree on a second degree murder verdict.

We therefore hold that the trial court's erroneous instructions have not harmed defendant as he has already received relief in the form of a new trial with a properly instructed jury.

II

[2] Second, defendant argues that the trial court erred in denying his motion to dismiss the second indictment based on double jeopardy. Specifically, defendant argues that it was double jeopardy to again indict defendant for first degree murder, when, in light of the jury's note to the trial court, the jury in the first trial must have found defendant guilty of second degree murder for the same charge. We disagree.

As stated above, the jury in the first trial never rendered a verdict of second degree murder. Defendant argues that the jury's first note was indicative of their unanimous agreement on the verdict of second degree murder. This note, however, is open to various interpretations and is not equivalent to a verdict. Because there was no final verdict, there can be no double jeopardy. *Booker*, 306 N.C. at 307, 293 S.E.2d at 81 (because the jury only sent a note, the jury did not return a final verdict and there was no double jeopardy).

In addition, it is well-established that "[n]ormally, 'a retrial following a "hung jury" does not violate the Double Jeopardy Clause.' " *Sattazahn v. Pennsylvania*, 537 U.S. 101, 109, 154 L. Ed. 2d 588, 597 (2003) (quoting *Richardson v. United States*, 468 U.S. 317, 324, 82 L. Ed. 2d 242 (1984)). *See also Booker*, 306 N.C. at 304, 293 S.E.2d at 79 ("The general rule in North Carolina is that an order of mistrial will not support a plea of former jeopardy."). Since only an order of mistrial exists and there was no verdict, this assignment of error is overruled.

III

[3] Third, defendant argues that the trial court erred in denying his request for an imperfect self-defense jury instruction. As defendant

acknowledges, the purpose of an instruction on imperfect self-defense is to permit a jury to find the defendant guilty of voluntary manslaughter. *State v. Norris*, 303 N.C. 526, 532, 279 S.E.2d 570, 574 (1981). Even if the evidence supported the requested instruction, the failure of the trial court to give the instruction was harmless.

In this case, the trial court instructed the jury that it had three choices: first degree murder (including both felony murder and premeditation and deliberation), second degree murder, or not guilty. The jury found defendant guilty of first degree murder based on both premeditation and deliberation and felony murder. Our Supreme Court has held: "[W]hen the trial court submits to the jury the possible verdicts of first-degree murder based on premeditation and deliberation, second-degree murder, and not guilty, a verdict of first-degree murder based on premeditation and deliberation *renders harmless the trial court's improper failure to submit voluntary or involuntary manslaughter.*" *State v. Price*, 344 N.C. 583, 590, 476 S.E.2d 317, 321 (1996) (emphasis added). *See also State v. Reid*, 335 N.C. 647, 672-73, 440 S.E.2d 776, 790 (1994) (any error as to imperfect self-defense instruction was harmless because jury found defendant guilty of first degree murder based on premeditation and deliberation); *State v. Potter*, 295 N.C. 126, 145-46, 244 S.E.2d 397, 410 (1978) (same). This assignment of error is overruled.

IV

[4] Defendant next argues that the trial court erred in submitting a felony murder jury instruction when that instruction was not supported by the evidence produced at trial. Even assuming defendant is correct and felony murder should not have been submitted to the jury, defendant suffered no harm.

The Supreme Court has held that any error in allowing a jury to consider felony murder does not require a new trial if the jury also found the defendant guilty based on premeditation and deliberation. *State v. McLemore*, 343 N.C. 240, 249, 470 S.E.2d 2, 7 (1996) ("[Defendant] was found guilty based on the felony murder rule and on the theory of premeditation and deliberation. . . . Although the defendant should not have been convicted of felony murder, the verdict cannot be disturbed if the evidence supports a conviction based on premeditation and deliberation."). Since defendant was found guilty of first degree murder based on both the theories of premeditation and deliberation and felony murder, any error in submitting the felony murder instruction was harmless.

V

[5] Fifth, defendant argues that the trial court erred in denying his motion *in limine* to prohibit the State from cross-examining defendant regarding disciplinary infractions arising out of an alleged assault on correctional officers while he was incarcerated. The actual issue to be decided is not whether the motion *in limine* should have been granted, but rather whether the evidence was properly admitted at trial:

> "[W]hen a party purports to appeal the granting or denying of a motion *in limine* following the entry of a final judgment, the issue on appeal is not actually whether the granting or denying of the motion *in limine* was error, as that issue is not appealable, but instead 'whether the evidentiary rulings of the trial court, made during the trial, are error.' "

State v. Gaither, 148 N.C. App. 534, 539, 559 S.E.2d 212, 215-16 (2002) (quoting *State v. Locklear*, 145 N.C. App. 447, 452, 551 S.E.2d 196, 198-99 (2001)) (citations omitted). Defendant has not properly preserved this issue for appeal.

When a motion *in limine* has been denied and when the contested evidence is then offered at trial, the party opposing admission of the evidence must renew his objection at trial to preserve the issue for appellate review. Even if the trial court allows the party a standing objection, the party is not relieved of his obligation to make a contemporaneous objection. *State v. Gray*, 137 N.C. App. 345, 348, 528 S.E.2d 46, 48 (issue of admissibility of evidence not preserved for appeal even though trial court granted defendant's motion for a standing objection), *disc. review denied*, 352 N.C. 594, 544 S.E.2d 792 (2000). Because defendant did not lodge contemporaneous objections, but relied upon a standing objection, *Gray* requires us to conclude that this issue was not preserved for review. Additionally, defendant has not argued that the admission constitutes plain error. We elect, however, to exercise our discretionary powers under N.C.R. App. P. 2 and address this issue.

[6] During the cross-examination, the prosecutor asked defendant a series of questions regarding whether he had attempted to assault correctional officers with a lock. In denying any assault, defendant claimed that the correctional officers beat him up and then fabricated the story that he had attempted to assault them. Defendant argues that these questions were improper, relying solely on Rules 608 and

609 of the North Carolina Rules of Evidence. The State responds that the evidence was in any event admissible under Rule 404(b).

It is well-established that evidence inadmissible under Rules 608 and 609 may still be admissible under Rule 404(b). *See, e.g., State v. Wilkerson*, 148 N.C. App. 310, 323, 559 S.E.2d 5, 13 (Wynn, J., dissenting), *adopted per curiam*, 357 N.C. 418, 571 S.E.2d 583 (2002) ("Thus, evidence eliciting details of acts that formed the basis of prior convictions may be elicited under Rule 404(b) even though such evidence may be barred under Rule 609."); *State v. Barnett*, 141 N.C. App. 378, 389, 540 S.E.2d 423, 430 (2000) ("[T]hat the evidence could not be admitted pursuant to Rule 609(a) does not preclude its admission under [Rule 404(b)]."), *aff'd*, 354 N.C. 350, 554 S.E.2d 664 (2001); N.C. Gen. Stat. § 8C-1, Rule 608 Commentary (2001) ("Evidence of wrongful acts admissible under Rule 404(b) is not within this rule and is admissible by extrinsic evidence or by cross-examination of any witness."). We believe the State's questions were proper under N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001).

Under Rule 404(b) of the Rules of Evidence,

> 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.

As the Supreme Court has emphasized, Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis original).

In this case, defendant testified repeatedly that he would not have shot Hale if he had known that he was a police officer: "If I would have known he was a police officer I never would have shot the gun, sir." In other words, defendant contended he shot Hale because he was mistaken about Hale's identity and that he would not have knowingly harmed a law enforcement officer. The State was entitled to rebut this claim by suggesting that defendant had knowingly assaulted law enforcement officers on another occasion. *See*

Young v. Rabideau, 821 F.2d 373, 380 (7th Cir.) (evidence of inmate's assaults on correctional officers admissible under Rule 404(b) to negate inmate's claim that he had acted accidentally or in self-defense in confrontation with a correctional officer), *cert. denied*, 484 U.S. 915, 98 L. Ed. 2d 221 (1987). This assignment of error is overruled.

VI

[7] In his next assignment of error, defendant contends that the trial court erred in allowing the State to call as an expert witness the same expert witness previously retained by defendant, citing *State v. Dunn*, 154 N.C. App. 1, 571 S.E.2d 650 (2002), *disc. review denied*, 356 N.C. 685, 578 S.E.2d 314 (2003). The State argues that *Dunn* is distinguishable. We do not need to reach this issue since we find that any error was harmless beyond a reasonable doubt.

Prior to trial, defendant obtained an *ex parte* order from the trial judge authorizing defense counsel to retain the expert services of Anita Matthews, a serologist employed by Lab Corp, to test Hale's police ballcap for blood. The presence or absence of blood on the cap was relevant to the question whether Hale was wearing his cap when shot. After consulting with Matthews, defendant decided not to call her as a witness. Unbeknownst to defendant, however, the State had subsequently also employed Matthews to test the cap for blood.

The trial court allowed Matthews to testify over defendant's objection on the grounds that she conducted separate tests for defendant and the State and she had not disclosed the results of the defense tests to the district attorney. The trial court prohibited any testimony regarding Matthews' employment by defendant or the tests she had conducted for defendant.

Matthews' testimony addressed an issue that ultimately proved to be tangential. She testified only that she had found the presence of blood on Hale's police ballcap, thus suggesting that Hale was wearing his police ballcap at the time he was shot. This fact was relevant only to the question whether defendant knew that Hale was a police officer when he shot him. That question in turn relates only to the charge of felony murder. Since the jury also found defendant guilty of first degree murder based on premeditation and deliberation, and Hale's status as a police officer was irrelevant to that

charge, we believe the admission of Matthews' testimony was harmless beyond a reasonable doubt.[2]

VII

[8] Finally, defendant argues that the trial court erred in denying defendant's motion to dismiss the indictment on the grounds that it failed to set forth each element of first degree murder. Defendant's argument fails in light of our Supreme Court's ruling in *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797, (2001). *See also State v. Anderson*, 355 N.C. 136, 148-49, 558 S.E.2d 87, 96 (2002); *State v. Long*, 354 N.C. 534, 543, 557 S.E.2d 89, 95 (2001).

No Error.

Judges WYNN and BRYANT concur.

STATE OF NORTH CAROLINA v. CARLOS MAURICE FRINK

No. COA02-570

(Filed 1 July 2003)

1. Evidence— plea agreement of codefendant—no expression of opinion by trial court

The trial court did not commit structural or plain error in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by admitting evidence that the trial court had consolidated charges against a codefendant for sentencing on the condition that she give truthful testimony in proceedings related to the victim, because: (1) considering the totality of circumstances, there is no indication that the judge's sentencing of the codefendant prior to trial expressed an opinion to the jury; and (2) there is no evidence to support the proposition that the judge was impartial merely because he presided over both the codefendant's open plea and defendant's trial.

---

2. Additionally, the State presented testimony from a number of eye witnesses that Hale was wearing a ballcap and the ballcap was ultimately found next to Hale's head on the ground.

2. Criminal Law— sentencing condition—enforceability—not presentation of false evidence

The trial court did not commit structural or plain error in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by allegedly presenting false evidence based on defendant's contention that a codefendant's sentencing condition was unenforceable under N.C.G.S. § 15A-1021 which governs plea bargains, because: (1) the codefendant's guilty plea was an open plea of guilty and not a plea agreement with the State, and the trial court consolidated the codefendant's sentences to a single life sentence on the condition that she testify truthfully if called upon by the State; (2) there is no evidence that the enforceability of the condition was discussed at trial at all nor before the jury; and (3) even assuming the condition was unenforceable, it cannot be said that either the State or the trial court knew it was not and purposefully implied to the jury that it was.

3. Evidence— codefendant's credibility—sentencing condition

Although defendant contends the trial court committed plain error in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by instructing the jury to carefully consider a codefendant's credibility in light of her agreement with the trial court, defendant's assertion relied upon a finding that the trial court improperly admitted evidence of her sentencing condition which the Court of Appeals concluded was not error.

4. Criminal Law— prosecutor's argument—asking defendant rhetorical questions

The trial court did not err in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by failing to intervene ex mero motu when the State asked defendant rhetorical questions during closing arguments, because the questions did not stray far enough from the parameters of propriety that the trial court abused its discretion by not intervening on its own accord.

5. Criminal Law— prosecutor's argument—suffering and mental torture of victims

The trial court did not err in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by failing to intervene ex mero motu when the State

asked the jurors during closing argument to think about what happened to the three victims as they were in their car trunk not knowing what was going to happen to them, because the argument focused on the suffering and mental torture of the victims.

6. Criminal Law— prosecutor's argument—implication defendant not raised by his mother

The trial court did not abuse its discretion in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by allowing the prosecutor during closing argument to read album titles seized from the stolen vehicles to implicate that defendant was not raised by his mother, because: (1) the implication that defendant was raised by someone other than his mother is irrelevant and is not inherently degrading and disrespectful; and (2) considering the plethora of evidence against defendant, it cannot be concluded that the comment was prejudicial.

7. Criminal Law— prosecutor's argument—disparaging comments about defense counsel

Although defendant contends the trial court abused its discretion in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by allowing the prosecutor during closing argument to make comments allegedly disparaging defense counsel, there is no reasonable possibility that without these comments another result would have been reached.

8. Criminal Law— prosecutor's argument—comparison of Crips gang's writings to Nazi writings

Although the trial court abused its discretion in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by allowing the prosecutor during closing argument to compare the Crips gang's writings demonstrating their intent to the Nazi writings since they needlessly reference infamous acts that may improperly affect the jury, the requisite prejudice was not demonstrated to show that a reasonable possibility exists that a different result would have occurred.

Appeal by defendant from judgments entered 7 March 2001 by Judge William C. Gore, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 14 April 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.

Margaret Creasy Ciardella, for defendant-appellant.

CALABRIA, Judge.

Carlos Maurice Frink ("defendant") appeals judgments entered 7 March 2001 by Judge William C. Gore, Jr. ("Judge Gore") in Cumberland County Superior Court. Defendant asserts Judge Gore improperly admitted evidence of a codefendant's sentencing condition, and erred in permitting certain remarks by the prosecutor in closing argument. We find no prejudicial error.

The State's evidence tended to show the following facts. Defendant was a member of a gang known as the Crips. Tameika Douglas ("Douglas"), another gang member, testified for the State. On 17 August 1998, the gang decided to steal a car. Three newer members of the gang were sent out with instructions to return with a car and the owner in the trunk. They accosted Debra Alice Cheeseborough ("Cheeseborough"), took her money and jewelry, put her in the trunk of the car and returned to meet the remaining gang members. Defendant searched through belongings in Cheeseborough's car. Defendant and other older members of the gang met and decided to kill Cheeseborough. Defendant, Douglas, and other members of the gang drove, with Cheeseborough in the trunk, to a secluded area. The gang formed a semicircle around Cheeseborough and let her out of the trunk. Defendant instructed another member to shoot Cheeseborough in the head. The other member repeatedly shot Cheeseborough, and the gang left.

The gang met and agreed to steal another car. Douglas and other members got into Cheeseborough's car and drove around searching for the car. After following a number of cars, they finally followed and blocked a car occupied by Susan Raye Horne Moore ("Moore") and Tracy Rose Lambert ("Lambert"). They forced Moore and Lambert out of the car and into the trunk. Douglas took their money and jewelry. The group returned to the trailer, where defendant and other leaders were waiting. Defendant took the purses into the trailer and removed the money. The gang then drove in Moore's and Cheeseborough's cars into the country. They again circled the trunk of the car containing the victims. One member assisted Lambert out, and shut Moore in the trunk. Lambert was then taken by the arm, walked into the field, forced to her knees and shot in the head. A

different member then took the gun, and helped Moore out of the car. Moore began screaming when she saw Lambert dead. This member then walked Moore in a different direction, forced her to her knees and attempted to shoot her. After the gun jammed, he took out a knife to kill her. Moore plead "Please don't cut me. If you are going to kill me, then shoot me because I don't want to suffer." The man then repeatedly attempted to fire the gun, which continued to jam; on the fourth time, the gun fired and shot Moore in the head. The gang returned to the trailer and dispersed.

The next day, upon learning that Cheeseborough was alive, defendant, Douglas and other members of the gang took Cheeseborough's car and drove to Myrtle Beach. The police subsequently apprehended the group at a motel in Myrtle Beach.

Defendant was arrested, charged and convicted of numerous crimes including, *inter alia*, attempted first-degree murder, first-degree murder, first-degree kidnapping and conspiracy charges. Defendant was sentenced to a total of 1,570 months to 1,997 months and two terms of life imprisonment without parole. His sentences were imposed consecutively.

Defendant appeals asserting the trial court erred by: (I) admitting "evidence regarding the plea agreement codefendant Douglas had with the trial court[;]" and (II) permitting certain comments in the State's closing argument.

I. Douglas' Sentencing Condition

[1] State's Exhibit 171 is a transcript of Douglas' open plea with the court, wherein after Douglas pled guilty to all the charges, the court consolidated them "on condition that the defendant give truthful testimony in any proceedings if called upon to do so by the State of North Carolina." The court then sentenced Douglas to concurrent sentences for her crimes, including two terms of life imprisonment without parole. Regarding the condition, Douglas testified at defendant's trial:

> STATE: All right. Then over on the back, on the top of the back side of that page, would you tell us, please, ma'am, what question 14 reads?
>
> DOUGLAS: 'The prosecutor and your lawyer have informed the Court that these are all the terms and conditions of your plea.' Do you want me to read the answer?

STATE: Yes, ma'am.

DOUGLAS: The defendant agrees to plead guilty as charged to all counts in 99 CRS 1543 plus 99 CRS 2708 and has' now plea agreed—

STATE: And has what?

DOUGLAS: 'No plea agreement with the State of North Carolina.'

STATE: Okay. Go ahead.

DOUGLAS: 'The Court will consolidate all counts in 99 CRS 1543 plus 99 CRS 2708 plus sentencing on condition that the defendant give truthful testimony in any proceedings if called upon to do so by the State of North Carolina.'

. . .

STATE: Okay. And did you have a plea agreement with the state at all?

DOUGLAS: No, ma'am.

. . .

STATE: Okay. Now, Ms. Douglas, as you sit before this jury right now, do you now have or have you ever had any sort of plea agreement with Mr. Grannis, with Mr. Scott, with me, with anyone from the district attorney's office?

DOUGLAS: No, ma'am.

STATE: And so you're testifying why?

DOUGLAS: Testifying for the part of this transcript that the judge has signed that I testify truthfully if called upon by the state.

Defendant asserts the admission of the Exhibit 171 and Douglas' testimony that she was present pursuant to an agreement with the trial court, and not with the State, constitutes structural and plain error. Defendant further asserts the trial court committed plain error in its instruction to the jury regarding Douglas' sentencing condition.

" '[S]tructural error' is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 113 L. Ed. 2d 302, 331 (1991)). However, our Supreme Court has recog-

nized the rarity of structural error, and noted the United States Supreme Court has found it in only a limited number of cases wherein the essential structure of our justice system was implicated. *Id.* Structural error may arise by the absence of an impartial judge. *Id.*, (citing *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927)).

Alternatively, defendant asserts the trial court's admission of the exhibit and testimony constituted plain error. Since defendant failed to object to the admission of this evidence at trial, defendant correctly asserts appellate review is limited to plain error. N.C. R. App. 10(c)(4) (2003). "Plain error is error ' "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." ' " *State v. Parks*, 148 N.C. App. 600, 607, 560 S.E.2d 179, 184 (2002) (quoting *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987))).

A. Impartial Tribunal

Defendant asserts his right to be tried by an impartial tribunal was violated because Judge Gore expressed his opinion of Douglas' testimony. Defendant argues the court expressed to the jury that it trusted Douglas to comply with the sentencing condition. Defendant explains that by sentencing Douglas before she complied with the condition, the court would have had no recourse had Douglas failed to testify. Therefore, defendant asserts, Judge Gore's trust of Douglas was apparent and improperly conveyed to the jury.

It is well established that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2001). Our Court considers the totality of the circumstances to determine whether the judge has expressed an impermissible opinion. *State v. Wilkerson*, 148 N.C. App. 310, 317, 559 S.E.2d 5, 10, *rev'd on other grounds*, 356 N.C. 418, 571 S.E.2d 583 (2002).

Considering the totality of the circumstances, we find no indication that Judge Gore's sentencing of Douglas prior to trial expressed an opinion to the jury. Defendant's assertion that the jury could or would deduce an implied opinion is unconvincing. The enforceability of the condition was not discussed before the jury or raised before the trial court. Moreover, Judge Gore's only comment regarding Douglas' veracity was in the jury instruction. There, Judge Gore told

the jury to examine Douglas' testimony "with great care and caution in deciding whether or not to believe it" because she was testifying as a condition of her sentence. Accordingly, we find Judge Gore did not express an improper opinion and find neither structural nor plain error.

Defendant also asserts his right to be tried by an impartial tribunal was violated because "the trial court wanted the jury to validate his prior sentencing of Douglas." Defendant asserts the trial court's interest can be implied by the fact Judge Gore presided over both Douglas' open plea and defendant's trial. We find no support for this proposition, and accordingly hold there is no merit to defendant's argument that Judge Gore was not impartial, and overrule this assignment of error.

We note defendant correctly asserts that our system is structured such that the judge remains impartial. With regard to plea bargains, the judge's role is limited to acceptance or rejection of the bargain negotiated between defendant and the State. While our system permits the trial court judge to impose sentencing conditions, it does not permit this power to be utilized in substitution for the plea bargaining process. We expressly disapprove of such a practice. However, in the case at bar, we do not find the admission of evidence of Douglas' sentencing condition rises to the level of structural error.

B. False Evidence

[2] Defendant asserts, alternatively, the court committed structural and plain error because the evidence constituted false evidence. Defendant explains the evidence was false since the sentencing condition was unenforcable under N.C. Gen. Stat. § 15A-1021, which governs plea bargains. Defendant asserts Judge Gore participated in misleading the jury by characterizing the sentencing condition as an agreement in his jury instruction. We disagree.

" '[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.' " *State v. Williams*, 341 N.C. 1, 16, 459 S.E.2d 208, 217 (1995) (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 1221 (1959)). The evidence presented was entirely true. Douglas' guilty plea was an open plea of guilty, and not a plea agreement with the State. Douglas never had a plea agreement with the State. The court, in its discretion, consolidated her sentences to a single life sentence on the condition that she testify truthfully if called upon by the State. Defendant's argument

regarding the knowing use of false evidence is based solely upon the assertion that the State and Judge Gore presented to the jury that the sentencing condition was enforceable, while defendant asserts it was not. However, there is no evidence that the enforceability of the condition was discussed at trial at all, nor, more importantly, before the jury. Accordingly, even assuming *arguendo* the condition is not enforceable, we cannot find either the State or Judge Gore knew it was not and purposefully implied to the jury it was. Therefore, defendant's assertion is without merit, and we cannot find the actions of the Judge and the State constituted presentation of known false evidence in violation of defendant's due process rights. Accordingly, we find neither structural nor plain error, and overrule this assignment of error.

C. Jury Instructions

[3] Defendant asserts the court committed plain error by instructing the jury to carefully consider Douglas' credibility in light of her agreement with the court. Defendant's assertion relied upon finding the court improperly admitted evidence of her sentencing condition, and in accordance with our decision, this assignment of error is overruled.

II. State's Closing Argument

Defendant asserts the trial court erred by permitting the State to make improper statements during closing argument during the guilt-innocence phase of the trial.

Our standard of review of the prosecutor's statements depends on whether defendant objected at trial. If defendant objected, "this Court must determine whether 'the trial court abused its discretion by failing to sustain the objection.' " *State v. Walters*, 357 N.C. 68, 101, — S.E.2d —, — (2003) (quoting *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002)). "When defendant fails to object to an argument, this Court must determine if the argument was 'so grossly improper that the trial court erred in failing to intervene ex mero motu.' " *Id.*, (quoting *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002), *cert. denied*, — U.S. —, 155 L. Ed. 2d 1074 (2003)).

A. Failure to Intervene

[4] We first address those statements to which defendant did not object. Under these circumstances, " '[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. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001), *cert. denied*, 354 N.C. 575, 559 S.E.2d 184, *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996)). The test for our Court is " 'whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord. . . .' " *Walters*, 357 N.C. at 102, —— S.E.2d at —— (quoting *Jones*, 355 N.C. at 133, 558 S.E.2d at 107). Defendant assigns error to the following argument:

> There are some things I don't think you and I can explain. Why in the world—(walked over in front of defense table)—Mr. Frink, would a civilized man do this to a fellow human being? What joy and fun do civilized men find in doing these things, Mr. Frink? Why wouldn't one of these civilized human beings, Mr. Frink, have tried to protect Debra Cheeseborough and saved her from this barbaric attack? Why wouldn't one of them have gone back and offered her aid and help, Mr. Frink? You were there. (Walked back to podium.)

Defendant argues these rhetorical questions were posed "for the purpose of irritating or provoking the defendant" and accordingly the trial court should have intervened. We disagree, and do not find these rhetorical questions asked of defendant "strayed far enough from the parameters of propriety" that the trial court abused its discretion by not intervening of its own accord. *State v. Hill*, 139 N.C. App. 471, 485, 534 S.E.2d 606, 615 (2000) (where the trial court intervened *ex mero motu* when the prosecutor during closing argument was agitated, approached the defense table and shouted rhetorical questions at defense counsel while brandishing the pistol introduced into evidence).

[5] Defendant also asserts it was error for the trial court not to intervene *ex mero motu* into the following argument:

> But you need to think about what happened to these three ladies as they're in the trunk of the car. You need to think about what they went through as they ride around in the trunk of the car. Not knowing what's going to happen to them. And then, of course, the ultimate bad happening to them. Think about

> the suffering. Think about the torture. Think about the mental anguish. Think about it.

Generally, "[a]n argument 'asking the jurors to put themselves in place of the victims will not be condoned. . . .' " *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993) (quoting *United States v. Pichnarcik*, 427 F.2d 1290, 1292 (9th Cir. 1970)). However, " 'this Court has consistently allowed arguments where the prosecution has asked the jury to imagine the emotions and fear of a victim. . . .' " *Anthony*, 354 N.C. at 428, 555 S.E.2d at 592 (quoting *State v. Wallace*, 351 N.C. 481, 529, 528 S.E.2d 326, 356 (2000)). Since this argument focused on the suffering and mental torture of the victims, we hold the trial court did not err by failing to intervene *ex mero motu*.

B. Failure to Sustain the Objection

We next address those statements to which defendant objected at trial. Our standard of review is abuse of discretion. *Walters*, 357 N.C. at 102-03, — S.E.2d at —. "Application of the abuse of discretion standard to closing argument requires this Court to first determine if the remarks were improper." *Id.*, 357 N.C. 101, — S.E.2d at —. " '[I]mproper remarks include statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others.' " *Id.*, 357 N.C. 105, — S.E.2d at — (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106). Upon finding improper remarks were made, " 'we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court.' " *Id.*, 357 N.C. 101, — S.E.2d at — (quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106). "In order to demonstrate prejudicial error, a defendant must show that there is a reasonable possibility a different result would have been reached had the error not occurred." *State v. Allen*, 353 N.C. 504, 509, 546 S.E.2d 372, 375 (2001) (holding prejudicial error because prosecutor's argument); *State v. Little*, 126 N.C. App. 262, 268, 484 S.E.2d 835, 839 (1997) (holding no prejudicial error despite prosecutor's argument).

[6] Defendant assigns error to the prosecutor's reading of album titles seized from the stolen vehicles, wherein the prosecutor said: " 'Mama Raised Me.' You heard a shred of evidence about any mama—anybody's mama raising 'em, amongst this group of people right here, including that defendant (indicating)?" Defendant objected at trial, and asserts on appeal that the prosecutor implied

that defendant was not raised by his mother, and "[t]his comment is analogous to the State calling a defendant a 'mean S.O.B.' " and is reversible error under *State v. Davis*, 45 N.C. App. 113, 114-15, 262 S.E.2d 329, 329-30 (1980). We find this remark was an improper remark. However, we do not find this remark was prejudicial error. The implication that defendant was raised by someone other than his mother is irrelevant, and is not inherently "degrading and disrespectful. . . ." *Davis*, 45 N.C. App. at 115, 262 S.E.2d at 330. Considering the plethora of evidence against defendant, we cannot conclude this comment was prejudicial.

[7] Defendant assigns error to the following closing arguments:

> PROSECUTOR: Now, the state didn't just go out—walk out in the street—now, that's something defense counsel like to do. They like to come up and tell you all—
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> PROSECUTOR: —that the police botched it. Why don't we have the deaf guy? Where is Ione Black?
>
> . . .
>
> PROSECUTOR: I know this has been a long ordeal for y'all. And I don't want to just go on and on, (indicating) but when the defense counsel gets up here—
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled.
>
> PROSECUTOR: —and tries to tell—put a spin on what you saw with your own eyes, I ask you the question that Groucho Marx asked one time, 'You going to believe me or your lying eyes?' You see? So you believe your own eyes, ladies and gentlemen of the jury.

Defendant asserts these remarks were improper, and made with the intent to disparage defense counsel. The State asserts this argument was proper and merely countered defendant's contention that the State failed to meet its burden of proof. We need not determine the impropriety of these arguments since we cannot find a reasonable possibility exists that without these comments another result would have been reached. Accordingly, we find no prejudicial error.

[8] Defendant assigns error to improper comments by the prosecutor during closing argument referencing Hitler and the Nazis. The prosecutor made the following arguments:

> PROSECUTOR: And he wants you to think that he's sitting over there fresh out of college with a tie on, a haircut, cleaned up. He would deceive you, ladies and gentlemen of the jury. Evil doesn't necessarily have a bad or dirty or whatever kind of face you want to put on it. Ordinary people could be evil. Did you know a man named Heinrich Himmler that was responsible for the slaughter of—
>
> DEFENSE COUNSEL: #1: Objection.
>
> DEFENSE COUNSEL: #2: Objection.
>
> PROSECUTOR: —the Jews?
>
> THE COURT: Overruled.
>
> PROSECUTOR: Did you know he was a chicken farmer? The man raised chickens, but he went to a meeting called the Wannsee Conference, and he sat down with a bunch of other people and planned to slaughter six million people or more. This defendant (walked over to defense table, indicating) was sitting right at 1386 Davis Street with his friends (walked over in front of easel), planning to slaughter somebody. Didn't know who. Didn't know it was going to be Debra Cheeseborough. Didn't know it was going to be Susan Moore. (Moved over in front of DA's table.) Didn't know it was going to be Tracy Lambert. But they knew they were gonna slaughter somebody. Isn't that wicked? Isn't that vile?
>
> . . .
>
> PROSECUTOR: Now, let me—let me jump back to Nazi Germany right quick.
>
> DEFENSE COUNSEL: Objection, your Honor.
>
> THE COURT: Overruled.
>
> PROSECUTOR: The reason Telford Taylor and those men that tried the Nuremberg criminals at the Nuremberg trials were able to find out so much is because the Germans put it in writing, the Nazis put it in writing, (held up exhibit) just like them (indicating defense table), put it in writing.
>
> . . .

> PROSECUTOR: This was found in their gang headquarters. (Indicating easel.) End of the World War II, that's where those folks—that's where our soldiers got all that information from when they went in the bunker and went in Bertchesgaden, found all that stuff that belonged to Hitler and their gang. They put it in writing. Unbelievable, but they put it in writing. These people put their intent in writing. (Indicating, holding exhibit.)

We agree with defendant that these arguments were improper. Although our courts "do not completely restrict closing arguments to matters that are only within the province of the record, to the exclusion of *any* historical references. . . . [We] will not allow such arguments designed to inflame the jury, either directly or indirectly, by making inappropriate comparisons or analogies." *Walters*, 357 N.C. at 105, —— S.E.2d ——. Moreover, "using Hitler as the basis for the example has the inherent potential to inflame and to invoke passion in the jury, particularly when defendant is compared to Hitler in the context of being evil." *Walters*, 357 N.C. at 105, —— S.E.2d at ——. We find prosecutor's comments comparing defendant to Himmler also has the inherent potential to improperly impassion the jury and such statements are improper. We find prosecutor's comments comparing the Crips' writings demonstrating their intent to the Nazi writings are also improper as they needlessly reference infamous acts that may improperly affect the jury.

However, we find the requisite prejudice was not demonstrated. In the present case, we find no support for the assertion that without these comments by the prosecutor a reasonable possibility exists a different result would have occurred.

Defendant neither briefed nor argued his remaining assignments of error and accordingly they are deemed abandoned. N.C. R. App. 28(b)(6) (2003).

No error.

Chief Judge EAGLES and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. BRIAN JACKIE HARPER, DEFENDANT

No. COA02-764

(Filed 1 July 2003)

1. Search and Seizure— permission to enter hotel room—nonverbal conduct

A cocaine defendant's nonverbal conduct in a doorway (stepping back and opening the door) constituted a valid consent for officers to enter the hotel room. Defendant did not contend that he lacked authority to consent or that his consent was obtained through duress or coercion.

2. Search and Seizure— plain view doctrine—scales seen in hotel room

Scales were lawfully observed and seized from a cocaine defendant under the plain view doctrine in the totality of the circumstances. A detective had received information that the occupants of a hotel room possessed drugs, the behavior of the occupants of the room indicated drug activity, and the detective saw the scales in the room after he knocked on the door, talked with defendant, and gained entry through a voluntary consent.

3. Search and Seizure— warrantless—scene frozen awaiting warrant—exigent circumstances

Officers were justified in lifting a mattress and in opening a nightstand drawer in a hotel room prior to obtaining a search warrant. Under the totality of the circumstances, the officers had probable cause to believe that a drug crime was being committed and they were justified in freezing the scene pending issuance of a search warrant. Their warrantless search of the area toward which defendant repeatedly moved was justified under the exigent circumstances exception.

Appeal by defendant from judgment entered 6 December 2001 by Judge Jack W. Jenkins in New Hanover County Superior Court. Heard in the Court of Appeals 25 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

William D. Spence for defendant appellant.

ELMORE, Judge.

Defendant, Brian Jackie Harper, was indicted on 9 April 2001 for the following related offenses: trafficking in cocaine by possession (01 CRS 4678); possession with intent to sell and deliver cocaine (01 CRS 4679); conspiracy to traffic in cocaine (01 CRS 4680); possession with intent to sell and deliver heroin (01 CRS 4681); and maintaining a place for controlled substances and possession of drug paraphernalia (01 CRS 4682) (collectively, the "drug charges"). The drug charges arose out of events which occurred on 3 March 2001 at a Wilmington, North Carolina hotel while defendant was present and in control of a room therein. Prior to his indictments on the drug charges, defendant was indicted on 2 April 2001 for the unrelated offense of statutory rape (01 CRS 2530).

On 9 August 2001, defendant filed a motion to suppress certain evidence in his prosecution on the drug charges. This evidence consisted of (1) physical evidence seized, pursuant to a warrantless police search, on 3 March 2001 from a hotel room in which defendant was present, and (2) statements made by defendant during and after the search. On 6 December 2001, following a hearing and presentation of evidence by the State, the trial court denied defendant's motion to suppress. Immediately thereafter, pursuant to a plea arrangement made with the State in the event the motion to suppress was denied, defendant pled guilty to trafficking in cocaine by possession and assault on a female. Under the resulting plea agreement, the remaining drug charges and the statutory rape charge were dismissed, and defendant reserved the right to appeal the denial of his motion to suppress. The trial court sentenced defendant to a minimum of thirty-five months and a maximum of forty-two months imprisonment on the trafficking in cocaine by possession offense, and to 150 days, with full credit for time served, on the assault on a female offense.

On 10 December 2001, defendant gave notice of appeal to this Court from (1) the denial of his motion to suppress, and (2) the entry of final judgment after his guilty plea to the trafficking in cocaine by possession charge and the resulting prison sentence. For the reasons stated herein, we conclude that defendant's motion to suppress was properly denied, and we affirm the trial court's order and the final judgment entered pursuant to the plea agreement.

Evidence presented by the State at the suppression hearing tended to show that at approximately 11:00 a.m. on 3 March 2001,

Detective Charles Wilson (Detective Wilson) of the New Hanover County Sheriff's Department's Vice and Narcotics Unit was notified by a dispatcher of an anonymous call stating that "there was a large quantity of crack cocaine, heroin in Room 210 at the Homestay Inn at 245 Eastwood Road" in Wilmington. After unsuccessfully attempting to contact the tipster, Detective Wilson proceeded to the hotel, spoke with the desk clerk, and examined the log book, which contained an entry from the clerk who had been on duty the previous night stating "I think Room 210 is on drugs." Other entries indicated that the occupant of Room 210 paid cash for the room and "checked in as a single and then changed it to a double." According to the hotel registry, Room 210 was registered to "George Davis." Detective Wilson checked the vehicle registration information corresponding to Room 210 and determined that the license plate number matched a utility trailer registered to Nick Lionudakis of Escalon, California. Detective Wilson checked the parking lot and found no such trailer on the premises. Detective Wilson also learned from another hotel employee that within the past fifteen minutes, someone from Room 210 had "declined room service and requested that the maid come in . . . about an hour after they had left."

Detective Wilson, who was dressed in plain clothes and driving an unmarked car, called the Wilmington Police Department for backup and positioned his car in the parking lot where he could observe Room 210. He observed defendant, clad in a towel and brushing his teeth, step outside of Room 210 for a few seconds before reentering the room. Soon thereafter, a blue car entered the lot and parked near Room 210. Detective Wilson watched as a man, later identified as Bryan Maurice Brailford (Brailford), got out of the car, knocked on the door to Room 210, and entered. After "a short period of time . . . maybe thirty to forty-five seconds," Brailford returned to the blue car and "leaned down and talked to the driver and the occupants of the car from the passenger side." Detective Wilson testified that he observed "some hand motions back and forth that led me to believe there was some kind of a transaction" between Brailford and the blue car's occupants, and that, based on his experience and training, this activity was consistent with a possible drug sale. Brailford then re-entered Room 210 and shut the door.

Within five minutes, Officer Bryan Robinson (Officer Robinson) of the Wilmington Police Department arrived in uniform and approached Detective Wilson's car. At the same time, Brailford opened the door to Room 210 and looked around. Fearing that

Brailford had spotted the uniformed Officer Robinson and that "if there was evidence of a drug crime in the room, it may be disposed of" as a result, Detective Wilson and Officer Robinson hurried across the parking lot towards Room 210. The blue car, which had remained in the parking lot, sped away.

Detective Wilson knocked on the door to Room 210. Defendant, now dressed, "opened the door slightly, a crack." Detective Wilson identified himself and asked to speak to George Davis. Defendant initially replied "George Davis doesn't stay here," but when Detective Wilson stated that the room was registered to George Davis, defendant "started stuttering a little bit" and said Davis had stepped out and he didn't know when Davis would be back. During this conversation, defendant had opened the door "a little bit more, probably about halfway open just for his body" and Detective Wilson could see Brailford in the room. Detective Wilson testified that "[defendant] was . . . blocking my access to the room" and he "could tell that [defendant] didn't want me to come into the room at that point . . . [b]y his body language." Detective Wilson then testified as follows:

> A. I asked [defendant] if I could step inside the room—if I could step inside the room to see if George Davis was in, and at that moment, he stepped back from me, from the threshold of the door, opening up the door.
>
> Q. How wide did he open the door?
>
> A. He opened it almost to its full extension. It seemed plainly evident to me, in light of the question I just asked, "Can I step inside?" And immediately following, he stepped back from the threshold with his right hand, completely opens the door, virtually ushering myself and Officer Robinson inside the room, that he wanted us to come inside the room or he had given consent for us to come inside the room.
>
> Q. Did he say anything?
>
> A. No, sir. He just stepped back and kind of hung his head down.

Detective Wilson testified that as he was standing at the threshold he observed a set of electronic scales on the night stand between the room's two beds, and that he knew drug dealers often used such scales to measure quantities of illegal narcotics. Detective Wilson and Officer Robinson then entered the hotel room, where they observed

Brailford holding a cup and a lit cigarette. Defendant was initially cooperative, but Brailford became hostile when Detective Wilson asked him to put the cigarette and the cup down, so Detective Wilson took the items from him. Detective Wilson testified that he was concerned for his safety when Brailford "started moving about the room" and became increasingly "agitated," so he handcuffed Brailford and told him to sit on one of the beds. When Brailford refused to remain seated, Officer Robinson patted him down and was stuck in the hand by a hypodermic needle contained in Brailford's pocket.

Meanwhile, Detective Wilson continued to talk with defendant, who initially gave false information when asked for his name and date of birth. When asked by Detective Wilson, defendant refused to give his consent for the officers to search the hotel room. Detective Wilson then "froze" the room, meaning "nobody could leave or enter the room pending our application for a search warrant," and called for backup officers to initiate the search warrant application process. Because defendant defied the officers' order to remain seated on the other bed, he too was handcuffed.

When defendant and Brailford still refused to remain seated, Detective Wilson moved them into the kitchen and did a "quick frisk" of the "lunge area" near where defendant had been seated on the bed. This brief search consisted of lifting the mattresses of both beds, which were about two and one-half feet apart, opening a drawer in the night stand between the beds, and lifting the cushion of a chair next to one of the beds. Detective Wilson testified that he searched the "lunge area" near the beds and night stand because he was concerned "that [defendant] was trying to get to that area of the room to retrieve something . . . my feeling was he was going to get a weapon, maybe from under a mattress, maybe from inside the drawer." Detective Wilson discovered seven hundred dollars in cash under the mattress of the bed upon which Brailford had been seated, an additional quantity of cash under the chair cushion, and crack cocaine and an additional one hundred and fifty dollars in cash in the night stand drawer. The officers did not seize either the cash or drugs at that time, nor did they conduct any additional search of the hotel room until a search warrant had been issued. Shortly thereafter the officers received and executed the search warrant and discovered heroin behind the television and underneath a chest of drawers. At that point defendant and Brailford were placed under arrest.

Detective Wilson testified that he did not recall advising defendant of his *Miranda* rights and that he did not ask defendant anything

other than "general information" questions such as "name, date of birth, Social Security number, where he lives." The record does not indicate that defendant made any incriminating statements to Detective Wilson or Officer Robinson. Officer Robinson testified at the hearing and substantially corroborated Detective Wilson's testimony. Defendant offered no testimony on his behalf.

In denying defendant's motion to suppress, the trial court orally made findings of fact regarding the officers' entry into the hotel room as follows:

> Wilson knocked on the door. Robinson was . . . standing beside him. The Defendant opened the door slightly, a crack. Wilson identified himself as a detective, asked to speak with George Davis. The Defendant said there was no Davis there. Again, Wilson indicated that the room was registered in the room [sic] of George Davis. The Defendant said Davis had stepped out, didn't know if and when Davis was coming back. Wilson confronted the Defendant about this discrepancy. The door opened slightly more. Wilson could see in the room a little better. The Defendant blocked the door, still in a posture suggesting the Defendant did not want Wilson to enter the room. . . . Wilson asked if he could step into the room. It's unclear exactly what words were used at that time. The Defendant stepped back from the threshold of the door, the door opened to its full extension. The Defendant said nothing at this time. His hand was still on the doorknob, but his body had moved and the door had opened to the full extent.
>
> Wilson took this as a consent to enter and, at this time, Wilson saw scales in the room in plain view. Wilson stepped into the room. . . . The Defendant was cooperative and cordial.

Regarding the pre-warrant search of the hotel room, the trial court made the following findings of fact:

> At some point, the Defendant was handcuffed. Wilson asked the Defendant for consent to search the remainder of the premises. The Defendant said he could not give such consent because it was not his room.
>
> At this point, Wilson froze the room, contacted Detective Taft with [sic] a search warrant. The Defendant and the other male had appeared interested in a particular area of the room around the night stand between the beds. At some point, the Defendant

and the male were removed to the kitchen and away from that area. Wilson then checked or patted down, frisked the so-called lunge area. And in that area, also, the scales were seen in plain view, but also checked under the mattresses. Under one mattress, found money; under the other mattress, found nothing. In the drawer . . . between the two beds, found a Bible. Also found drugs and money.

At this point, the officers observed [sic] the status quo, did not move anything and were in wait of receipt of back-up help and also of a warrant. . . .

Finally, regarding the post-warrant search of the hotel room, the trial court found as follows:

A warrant was subsequently attained, search was made, heroin was found beside the TV in plain view, although it had not been seen previously by the officers while in the room. And heroin was also found under a chest of drawers.

The trial court then made conclusions of law, in pertinent part, as follows:

Law enforcement personnel gained consensual entry to the room through the actions and inactions of the Defendant.

While lawfully in the room, the officers observed sufficient evidence that, coupled with the conduct of the Defendant and [Brailford], and considering the two tips that had been received by the dispatcher and relayed to Wilson, [the] conduct of [Brailford] when he arrived in the [blue car] and made a trip to the room and back to the car and back up to the room, the three entries in the motel's night log, the conduct of [Brailford] when he observed the uniformed officer while looking out the motel window, the registration and the fictitious name, the reference in the registration to a 1981 California trailer, the evasive and erroneous responses of the Defendant when asked about his name, his age and the person to whom the room was registered, presence of scales in plain view in the room, and the totality of the circumstances surrounding this incident, the officers did have probable cause to believe that the commission of a crime was taking place. The Court further concludes that the officers lawfully froze the scene pending the issuance of a search warrant, that a search warrant was lawfully issued, the scene was lawfully searched and the evidence derived therefrom was lawfully

seized. Therefore, the Court holds that the Defendant's motion to suppress is denied.

On appeal, defendant brings forth five assignments of error, asserting that the trial court erred in concluding (1) the officers gained consensual entry to the hotel room; (2) the officers, while lawfully in the hotel room, made observations that, coupled with the totality of the circumstances, gave them probable cause to believe a crime was taking place; (3) the officers lawfully froze the room pending issuance of a search warrant; (4) the scene was lawfully searched, and evidence lawfully seized, pursuant to a valid search warrant; and (5) defendant's motion to suppress should be denied. After a thorough review of the record, we find each assignment of error to be without merit.

At the outset, we note that "[i]n reviewing the trial court's order following a motion to suppress, we are bound by the trial court's findings of fact if such findings are supported by competent evidence in the record; but the conclusions of law are fully reviewable on appeal." *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997); *see also State v. Mahatha*, 157 N.C. App. 183, 191, 578 S.E.2d 617, — (2003).

It is axiomatic that unreasonable searches and seizures are prohibited by both our federal and state constitutions. U.S. Const. amend. IV; N.C. Const. art. I, § 20. Generally, warrantless searches are not allowed absent probable cause and exigent circumstances, the existence of which are factual determinations that must be made on a case by case basis. *State v. Harris*, 145 N.C. App. 570, 580-81, 551 S.E.2d 499, 506 (2001), *disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002). "Consent, however, has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *Smith*, 346 N.C. at 798, 488 S.E.2d at 213 (1997) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973)). Further, N.C. Gen. Stat. § 15A-221(a) (2001) authorizes warrantless searches and seizures "if consent to the search is given." N.C. Gen. Stat. § 15A-221(b) (2001) defines "consent" as "a statement to the officer, made voluntarily . . ., giving the officer permission to make a search."

In considering whether a defendant's nonverbal conduct alone, absent any words evidencing consent, may constitute valid consent to a search, this Court has held as follows:

> In determining whether under the totality of the circumstances defendant's nonverbal response in this case constituted a statement within the meaning of consent under N.C. Gen. Stat. § 15A-221(b), we are guided by *Black's Law Dictionary* definition of the word "statement" as "a verbal assertion or nonverbal conduct intended as an assertion." *Black's Law Dictionary*, 1416 (7th ed. 1999). Thus, a statement need not be in writing *nor orally made. Rather, the use of nonverbal conduct intended to connote an assertion is sufficient to constitute a statement.*

State v. Graham, 149 N.C. App. 215, 219, 562 S.E.2d 286, 288 (2002), *disc. review denied*, 356 N.C. 685, — S.E.2d — (2003) (emphasis added). In *Graham*, this Court upheld the trial court's conclusion that the defendant voluntarily consented to a warrantless search of his person where the defendant, after being asked by a police officer if she could search his pants pocket, did not reply verbally but rather "stood up and raised his hands away from his body accompanied by a gesture which [the officer] took to mean consent." *Id.* This Court then affirmed the denial of Graham's motion to suppress the evidence seized as a result of the search.

[1] In the case *sub judice*, we conclude that, as in *Graham*, defendant's nonverbal response after Detective Wilson knocked on the hotel room door, identified himself as a police officer, engaged in conversation, and asked to come in constituted a valid consent for Detective Wilson and Officer Robinson to enter. The trial court found that defendant initially "opened the door slightly, a crack" when Detective Wilson knocked. As they talked, the door "opened slightly more," but defendant remained "in a posture suggesting [he] did not want Wilson to enter." However, after Detective Wilson "asked if he could step into the room," defendant "stepped back from the threshold . . . , the door opened to its full extension. The Defendant said nothing . . . [Defendant's] hand was still on the doorknob, but his body had moved and the door had opened to its full extent." After the officers entered "[t]he Defendant was cooperative and cordial." There is ample evidence of record supporting the trial court's findings of fact. Defendant does not now contend, nor does the record reflect, that he lacked authority to consent to the officers' entry or that his consent was obtained through duress or coercion. Viewing this evidence under the totality of the circumstances, we hold that the trial court properly determined that defendant voluntarily consented to the officers' entry into the hotel room.

[2] Defendant contends that the warrantless search conducted by the officers after they entered the room was illegal, and that the evidence resulting therefrom should be suppressed. We disagree. In North Carolina, the plain view doctrine authorizes the lawful seizure of evidence without a warrant "when the officer was in a place he or she had a right to be at the time the evidence was discovered, it is immediately obvious that the items observed are evidence of a crime, and the discovery is inadvertent." *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 487 (2001), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002).

In the instant case, the trial court found that "Wilson saw scales in the room in plain view." Detective Wilson testified that he "saw a set of scales sitting on the night stand . . . as I was standing at the threshold of the door." Whether he observed the scales while standing at the threshold or after crossing it is immaterial, given our holding that defendant consented to the officers' entry. Either way, Detective Wilson was in a place where he had a right to be when he observed the scales. Detective Wilson testified that he knew scales such as these were often used by dealers to measure quantities of illegal narcotics. While such scales are not *per se* illegal, "scales and balances" are included within the definition of "drug paraphernalia" found in the Controlled Substances Act. N.C. Gen. Stat. § 90-113.21(a)(5) (2001). Immediately prior to seeing the scales, Detective Wilson had received information that the occupants of Room 210 possessed drugs, and he had detected and observed behavior by the room's occupants indicative of drug-related criminal activity. Here, under the totality of the circumstances, we conclude that it was immediately obvious to Detective Wilson that the scales were evidence of a drug crime. Finally, since the officers had no reason to know that they would observe scales when they asked if they could enter the room, we conclude that their discovery was inadvertent. *Bone*, 354 N.C. at 9, 550 S.E.2d at 487. We hold that the scales were lawfully observed and subsequently seized under the plain view doctrine.

[3] Next, defendant contends that the officers engaged in a constitutionally impermissible search by lifting the mattresses and opening the night stand drawer prior to obtaining a search warrant. It is well settled that "just because officers can justifiably enter a dwelling, that does not give them free rein in their search of the dwelling. The question becomes whether the scope of the ensuing searches was permissible." *State v. Woods*, 136 N.C. App. 386, 392, 524 S.E.2d 363,

367, *disc. review denied*, 351 N.C. 370, 543 S.E.2d 147 (2000). However, a warrantless search is not unconstitutional when there is probable cause to search and circumstances render impracticable a delay to obtain a warrant. *State v. Nance*, 149 N.C. App. 734, 743, 562 S.E.2d 557, 564 (2002).

In the case *sub judice*, we agree with the trial court's conclusion that after entering the room, the officers, under the totality of the circumstances, did have probable cause to believe that a drug crime was being committed therein, and were justified in "freezing" the scene pending issuance of a search warrant. *State v. Sanchez*, 147 N.C. App. 619, 622, 556 S.E.2d 602, 606 (2001), *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002). The record is replete with evidence supporting the findings which in turn support this conclusion, as set forth in detail above.

The United States Supreme Court has cited immediate danger to the lives of law enforcement officers as an exigent circumstance justifying a warrantless search. *Warden v. Hayden*, 387 U.S. 294, 298-99, 18 L. Ed. 2d 782, 787 (1967). Here, the trial court's findings establish that defendant and Brailford "appeared interested in a particular area of the room around the night stand between the beds," and Detective Wilson testified they repeatedly moved towards this area. Both Detective Wilson and Officer Robinson testified that they were concerned that weapons might be hidden in this area of the room, and they consequently feared that waiting for a warrant before searching this area placed them in danger. The search was limited to places within this part of the room where the officers could have reasonably expected weapons to be concealed—under mattresses and seat cushions, and inside a drawer. The drugs and money found as a result of this search were left in place and not seized until a warrant was obtained. We conclude that Detective Wilson's warrantless search of the "lunge area" within the part of the room defendant and Brailford repeatedly moved toward was justified under the exigent circumstances exception to the warrant requirement, and that the scope of the search was permissible.

Having determined that both the officers' warrantless entry into the room and subsequent search of the "lunge area" were lawful, we find no merit in defendant's contention that the subsequently-issued search warrant was obtained using illegally obtained information.

Affirmed.

Judges MARTIN and HUDSON concur.

STATE OF NORTH CAROLINA v. SHONTEZ ANTERIO BARNES

No. COA02-1418

(Filed 1 July 2003)

1. **Search and Seizure— warrantless entry into house—no exigent circumstances**

The entry into a house by officers was a warrantless, nonconsensual search, presumptively in violation of the Fourth Amendment, where the officers suspected drug activity at the house, approached quietly at night, and followed when defendant ran from the porch into the house. The State does not argue that exigent circumstances were present.

2. **Search and Seizure— plain view—lawfulness of officer's presence—first determination**

The trial court erred by considering whether cocaine found within a house was in plain view without first determining whether officers had a right to be in the house.

3. **Constitutional Law— search of house—reasonable expectation of privacy—defendants' burden**

The trial court applied an erroneous standard to determining whether a cocaine defendant could raise a constitutional challenge to the search of a house rented by another person where the court ruled that defendant had standing or the right to raise the issue "nothing else appearing." Defendants are required to show an actual and reasonable expectation of privacy.

4. **Constitutional Law— search of house—expectation of privacy—insufficient evidence for determination**

The record contained insufficient evidence for an appellate review of the trial court's conclusion that defendant had standing for a constitutional challenge to a search of a house. The trial court may have inadvertently discouraged both attorneys from presenting all of their evidence.

5. Constitutional Law— search of house—standing—failure to determine—prejudicial

The failure to properly determine whether defendant had standing to constitutionally challenge a search was prejudicial because defendant was charged with possession of cocaine. There is a reasonable possibility of a different result if the cocaine had been suppressed.

Appeal by defendant from judgment entered 3 July 2002 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 11 June 2003.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.

Hosford & Hosford, P.L.L.C., by Sophie W. Hosford, for defendant-appellant.

LEVINSON, Judge.

Defendant (Shontez Barnes) appeals from convictions of possession of cocaine and possession with intent to sell and deliver cocaine. For the reasons that follow, we reverse and remand.

On 21 September 2000, law enforcement officers entered a residence located at 210 N. East Street, ("the house") in Wilson, North Carolina, where the defendant was present. Shortly after entering the house, the police saw what appeared to be cocaine either falling, or being dropped, from defendant's pocket. The law enforcement officer confiscated the cocaine, and searched the defendant, who was also in possession of approximately $390 in currency. Defendant was arrested and charged with possession of cocaine, and possession with intent to sell and deliver cocaine. The house was searched and other items were discovered, including currency, crack cocaine, marijuana, two sets of scales, a night vision monocle, and two walkie-talkies. Several other individuals were found within the house, and some were charged with various offenses. Prior to trial, defendant filed a motion to suppress the evidence seized from his person and from the house at the time of his arrest.

A *voir dire* was conducted during trial, at which time testimony was elicited from one witness, Officer Jeff Boykin of the Wilson Police Department, the officer who had searched and arrested defendant. Boykin testified that he had been observing the house for more than a month. During this time, Boykin often saw defendant sit-

ting or standing on the porch of the house, and noticed that defendant sometimes ran inside the house when the police approached it. Boykin also testified that he observed an unusually high number of visitors to the house, most of whom left after a brief visit. Additionally, two weeks before defendant's arrest, Boykin received a tip from a confidential informant that several people, including the defendant, were selling drugs at the house. Based on information from the informant and on his own observations, Boykin suspected that drugs were being sold in the house. Consequently, he went to the house about two weeks before defendant's arrest, knocked, and spoke with Ms. Carolyn Simms, the person in whose name the house was rented. Boykin warned Simms that she would face legal consequences if she could not "control" the activities within the house. Although Boykin knew defendant was present at the house, he did not speak with him at that time.

Shortly after midnight on 21 September 2000, Boykin and three other law enforcement officers approached the house on bicycles. Boykin testified that "[t]he way the residence is laid out . . . if there's anybody on the porch, they won't see you . . . until the last possible second when you're in front of them." Boykin stated that on the night in question "it was dark, we were quiet. [At the l]ast possible second, we got in front of that house[]" whereupon Boykin "shined [his] flashlight onto the porch[.]" At that point the defendant and another man "jumped out of their chair, acted like they were scared, and attempted to go in the front door." When Boykin saw defendant and the other man getting up from their chairs to go inside the house, he and the other officers set down their bicycles and went up the steps and into the house. When they got inside, Boykin saw defendant with his hand inside his pocket, then saw a bag of what appeared to be crack cocaine fall out onto a coffee table. Thereupon, Boykin searched and arrested defendant, while the other law enforcement officers searched the rest of the house.

At the close of the *voir dire*, the trial court ruled that the cocaine and money seized from defendant's person were admissible at trial, but that evidence of the other items found in the house should be suppressed. At trial, defendant was convicted of possession of cocaine and possession with intent to sell and deliver cocaine. He was sentenced for possession with intent to sell and deliver cocaine, and judgment was arrested on the charge of possession of cocaine. From this conviction and sentence, defendant appeals.

[1] Defendant argues on appeal that the trial court erred by denying his motion to suppress the cocaine and money seized from him when the law enforcement officers followed him inside the house. We conclude that the trial court's order was based upon errors of law, and must be reversed.

In its ruling on defendant's suppression motion, the trial court stated, in pertinent part, the following:

> *Unless search exists* from the *mere fact of the officers entering the home*, that *does not concern me*, and the *issue of search* as such in the home *is a matter that this defendant, nothing else appearing*, has the right or the *standing to raise.*
>
> I *do not think* that *there was a search* as of such *involving the defendant because*, . . . the *drugs appeared on the table* as having fallen from his pocket. I think it's a better practice to be used under the totality of the situation that these officers—better police practice would have been to—to obtain a warrant. The [confidential informant's] information per two weeks, nothing else appearing, would probably be stale.

(emphasis added). Thus, in its ruling on defendant's suppression motion, the trial court apparently (1) held that the "mere" entry into the house by law enforcement officers did not constitute a search; (2) assumed that, "nothing else appearing" the defendant had standing to contest the search of the house; and (3) concluded that the cocaine was not seized pursuant to a search of defendant, because it was in plain view of the officer. In these assumptions and conclusions, the trial court erred.

The Fourth Amendment to the U.S. Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

> The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Similarly, the Constitution of the State of North Carolina provides that 'general warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.'

State v. Grooms, 353 N.C. 50, 73, 540 S.E.2d 713, 728 (2000) (quoting N.C. Const. art. I, § 20) (citing *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 69 (1994)), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

In the instant case, the trial court held that the "mere" entry into the house by law enforcement officers was not a "search" within the meaning of the Fourth Amendment. However, generally speaking, an intrusion into a residence *is* a search within the meaning of the Fourth Amendment, for "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313, 32 L. Ed. 2d 752, 764 (1972). Indeed, exclusion of the government from one's dwelling lies at the heart of the Fourth Amendment:

> A man's home is his castle. The storm and wind may enter, but the King cannot enter, and all the forces of the Crown cannot cross the threshold of his ruined tenement. These words by Lord Eldon served as the basis for that portion of the Fourth Amendment in the Bill of Rights declaring that the people shall be secure in their houses against unreasonable searches and seizures.

Pledger v. State, 257 Ga. App. 794, 797, 572 S.E.2d 348, 351 (2002). The United States Supreme Court recently held:

> 'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' *With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no* . . . in the case of the search of a home's interior . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable.

Kyllo v. United States, 533 U.S. 27, 31, 34, 150 L. Ed. 2d 94, 100 (2001) (police use of thermal imager to obtain information about inside of house constituted a search for 4th Amendment purposes) (quoting *Silverman v. United States*, 365 U.S. 505, 511, 5 L. Ed. 2d 734, 739 (1961)); *see also State v. Tarantino*, 322 N.C. 386, 368 S.E.2d 588 (1988) (officer's use of flashlight to peer between cracks of boarded up outbuilding is a search within the meaning of the Fourth Amendment), *cert. denied*, 489 U.S. 1010, 103 L. Ed. 2d 180 (1989); *State v. Wooding*, 117 N.C. App. 109, 449 S.E.2d 760 (1994) (finding unlawful search of apartment where officer looked in through small

gap in curtains). We conclude that the law enforcement officers' entry into the house constituted a "search" for purposes of the Fourth Amendment. Moreover, " '[i]t is a basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.' " *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (quoting *Payton v. New York*, 445 U.S. 573, 586, 63 L. Ed. 2d 639, 651 (1980)). In *Payton*, the United States Supreme Court stated:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, 445 U.S. at 590, 63 L. Ed. 2d at 653. In the present appeal, the State does not argue that exigent circumstances were present. We conclude that the officers' entry into the house was a warrantless, nonconsensual search, and as such was presumptively in violation of the Fourth Amendment to the U.S. Constitution. Accordingly, the trial court erred by assuming otherwise.

[2] The trial court also concluded that there was no search of the defendant because "the defendant went into his pocket and the drugs appeared on the table as having fallen from his pocket." In essence, the trial court ruled that the cocaine was in "plain view" of Boykin after he entered the house. It is true that "under certain circumstances the police may seize evidence in plain view without a warrant." *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 29 L. Ed. 2d 564, 582 (1971). However, "the initial intrusion which brings the evidence into plain view must be lawful" for the "plain view" exception to apply. *State v. Williams*, 315 N.C. 310, 317, 338 S.E.2d 75, 80 (1986). "Whether or not the warrantless seizure of items in plain view is reasonable under the Fourth Amendment depends on several factors. First, officers must not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *State v. Nance*, 149 N.C. App. 734, 740, 562 S.E.2d 557, 561 (2002) (plain view exception to warrant requirement of Fourth Amendment not applicable where officers' entry onto property was unlawful and was not justified by exigent circumstances). Thus, the trial court erred by considering the fact that the cocaine was in plain view without *first* determining whether the officers had a lawful right to be present in the house. Similarly, the State argues on appeal that the defendant forfeited his privacy interest in the cocaine when he dropped it on the

table. Again, this begs the question of whether law enforcement officers were rightfully present in the home.

[3] We next consider the trial court's determination that this defendant was entitled to challenge the search of the house. A defendant's rights "against unreasonable searches and seizures under the Fourth Amendment are personal and, unlike some constitutional rights, may not be asserted by another." *State v. Monk*, 291 N.C. 37, 50, 229 S.E.2d 163, 172 (1976) (citing *Brown v. United States*, 411 U.S. 223, 36 L. Ed. 2d 208 (1973)). Thus:

> Before defendant can assert the protection afforded by the Fourth Amendment, however, he must demonstrate that any rights alleged to have been violated were his rights, not someone else's. A person's right to be free from unreasonable searches and seizures is a personal right, and only those persons whose rights have been infringed may assert the protection of the Fourth Amendment.

State v. Ysut Mlo, 335 N.C. 353, 377, 440 S.E.2d 98, 110, *cert. denied*, 512 U.S. 1224, 129 L. Ed. 2d 841 (1994). Additionally, under N.C.G.S. § 15A-972 (2001), only "a defendant who is aggrieved may move to suppress evidence[.]" The North Carolina Supreme Court interprets G.S. § 15A-972 as follows:

> [W]e hold that a defendant is aggrieved and may move to suppress evidence under G.S. 15A-972 only when it appears that his personal rights, not those of some third party, may have been violated, and such defendant has the burden of establishing that he is an aggrieved party before his motion to suppress will be considered.

State v. Taylor, 298 N.C. 405, 415-16, 259 S.E.2d 502, 508 (1979) (citations omitted).

As a general rule, "in 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)). However, the defendant has the burden to establish his right to contest a challenged search. *Ysut Mlo*, 335 N.C. at 378, 440 S.E.2d at 110-11; *State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) ("defendant [has] the burden of demonstrating an infringement of his personal rights by a search").

Although a defendant's entitlement to Fourth Amendment protections is frequently referred to as his "standing" to object to a search, the United States Supreme Court explained in *Minnesota v. Carter*, 525 U.S. 83, 84, 142 L. Ed. 2d 373, 376 (1998), that "the rubric of 'standing' doctrine [has been] expressly rejected. . . . [T]o claim Fourth Amendment protection, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." Under some circumstances a defendant who is not the legal owner or lessee of a house may nonetheless have a reasonable expectation of privacy while on the premises. For example, in *Minnesota v. Olson*, 495 U.S. 91, 96-97, 109 L. Ed. 2d 85, 93 (1990), the United States Supreme Court held "that [defendant's] status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." The Court explained that its holding "merely recognizes the everyday expectations of privacy that we all share." *Id.* at 98, 109 L. Ed. 2d at 94. The values underlying *Olson* have also been recognized in situations other than those involving overnight houseguests:

> [Plaintiff] was not an overnight guest. Nevertheless, the principles that guided *Olson* are applicable to her. [She] was a frequent visitor at the Mealey residence. . . . She often ran errands for Ms. Mealey, whom everyone called 'Grandma'. . . . We believe that [her] activities—visiting a neighbor and assisting the elderly—establish an expectation of privacy that is 'recognized and permitted by society.'

Bonner v. Anderson, 81 F.3d 472, 475 (4th Cir. 1996). In *Minnesota v. Carter*, 525 U.S. 83, 142 L. Ed. 2d 373, the Court refined its holding in *Olson*, drawing a distinction between social visitors and those present only for a business transaction:

> *Respondents* here were obviously not overnight guests, but *were essentially present for a business transaction* and were only in the home a matter of hours. There is *no suggestion that they had a previous relationship* with [tenant of apartment], *or that there was any other purpose to their visit. Nor was there* anything similar to the overnight guest relationship in *Olson* to suggest *a degree of acceptance into the household.*

Id. at 90, 142 L. Ed. 2d at 473 (emphasis added). In a Georgia case, the defendant, who was on the porch of his girlfriend's sister's apartment,

ran inside when the police approached the area. The Georgia Court of Appeals held:

> As no criminal activity was observed by police, the mere fact that . . . appellee 'ran' inside the apartment when the police drove up did not provide probable cause and/or exigent circumstances authorizing the police to enter Jennifer Tabb's home to arrest appellee without a warrant. . . .
>
> [A]ppellee had a legitimate expectation of privacy in the apartment of Jennifer Tabb. He was a frequent welcome social visitor, he left possessions there, and he had spent the night as a social guest. That he may not have been spending the night on this occasion does not alter his status as Tabb's social guest. He had been allowed previously to 'seek shelter' by entering her house on a recurring basis, and that is what he did on this occasion—he entered her house. As the evidence viewed to support the trial court's ruling shows, he was not a stranger standing on the street; he was not seen doing anything illegal.

State v. Brown, 212 Ga. App. 800, 801-03, 442 S.E.2d 818, 819-21 (1994).

In sum, a defendant challenging a Fourth Amendment violation occurring in the home of another must demonstrate a "legitimate expectation of privacy, which has two components: (1) the person must have an actual expectation of privacy, and (2) the person's subjective expectation must be one that society deems to be reasonable." *State v. Wiley*, 355 N.C. 592, 602, 565 S.E.2d 22, 32 (2002), *cert. denied*, 537 U.S. 117, 154 L. Ed. 2d 795 (2003).

In the instant case we conclude that the trial court may have applied an erroneous legal standard to the issue of whether defendant could properly challenge the search of the house. In its ruling, the court stated that "the issue of search as such in the home is a matter that this defendant, *nothing else appearing*, has the right or the standing to raise." We interpret the phrase "nothing else appearing" to be a shorthand expression for "nothing else appearing to the contrary." Thus, the trial court appears to assume that, in the absence of evidence requiring a contrary ruling, the default setting would be that the defendant had standing to contest the search. As discussed above, the law requires defendant to show that he had an actual and reasonable expectation of privacy in the house.

[4] Moreover, we conclude that we cannot determine from the evidence presented on *voir dire* whether the trial court correctly ruled that the defendant was entitled to challenge the search of the house. "The applicable standard in reviewing a trial court's determination 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. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 130 L. Ed. 2d 661 (1995)), *cert. denied*, —— U.S. ——, 155 L. Ed. 2d 1074 (2003). Therefore, we would ordinarily examine the record to determine whether the trial court's conclusion that the defendant had "standing" to challenge the search of the house was supported by competent evidence. However, our review of the transcript indicates that there was insufficient evidence presented on this issue to enable us to reach a determination, and suggests the trial court may have inadvertently discouraged counsel for the State and the defendant from presenting all their evidence relevant to this issue.

The trial court was an active participant in conducting the *voir dire*. Initially the prosecutor questioned Boykin about the sequence of events surrounding defendant's arrest, which occupies about five pages of transcript testimony. At the end of the *voir dire*, defendant cross-examined Boykin, which also occupies about five pages of transcript. But, sandwiched between the examinations conducted by the State and defendant are at least twelve pages of testimony and discussion directed or conducted by the trial court. The trial court focused primarily on the lack of a search warrant, and questioned Boykin extensively about his failure to obtain a search warrant prior to approaching the house. This was certainly a valid concern for the court to address. However, in the course of the *voir dire*, the trial court indicated several times that it was disinclined to hear evidence on the issue of standing. In the course of its soliloquy, the trial court stated, in pertinent part:

> THE COURT: I want to know—if I see an officer and I turn and go the other way, by what right does that officer come in hot pursuit of me? And certainly when I go into a residence—here's an officer who . . . has sent a confidential and reliable informant who brings him back information that confirms what he suspects.
>
> Now, our Constitution says that at that point in time you want to go in there, go get you a piece of paper. . . . Why these officers

> didn't go get a . . . search warrant, rather than . . . go[ing] into what is the most precious thing that we have in a free society, and that is our castle.
>
> Now, *whatever the relationship was between [defendant] and [Simms] I'm truly not concerned with.* But to go into someone's residence because they get up and leave at that time. . . .

(emphasis added). After some discussion regarding whether the law enforcement officers could justify their warrantless entry into the house on the basis of reasonable suspicion, the prosecutor shifted gears, and attempted to raise the question of defendant's entitlement to claim Fourth Amendment protection:

> PROSECUTOR: Okay. Well, that brings me to my next issue, which is it's not the defendant's house. . . .
>
> THE COURT: *Who says it's not the defendant's house?*

(emphasis added). After this remark by the trial court, no further evidence was adduced on defendant's standing to challenge the search, although the prosecutor and defense each presented brief arguments on the issue. The trial court then directed the voir dire back to the issue of the officer's conduct:

> THE COURT: I am aware of the standing issue. . . . The defendant has standing to move to suppress evidence only when it appears that the defendant's personal rights, not those of a third party, have been threatened. And at this point in time *I don't know what the defendant's rights were as it pertains to that residence.*
>
> *The thing that made my hair stand up is Officer Boykin's own words*, "If they ran, I was going to follow; if not, I was going to talk to them." *So there's a mind-set already made up that regardless of what occurred, I was going into that home.*

(emphasis added). Following the trial court's lead, the prosecutor engaged in a brief debate with the court regarding the officer's behavior. Then, although defense counsel had not yet had any opportunity to cross-examine the officer, the trial court asked:

> THE COURT: Are you through [defense counselor]?
>
> [DEFENSE COUNSEL]: Through with the argument on that point, Your Honor.
>
> THE COURT: Do you wish to [cross-examine] the officer?

> [DEFENSE COUNSEL]: Yes, Your Honor. Just a couple of questions, please. I think most of it has been covered.

We conclude that the trial court misapplied the law in regards to whether the law enforcement officers' entry into the house was a search, and on whether the concept of "plain view" was appropriately considered in this factual setting. We further conclude that the court may have been operating under a misapprehension about the defendant's standing to contest the officer's entry into the house. The trial court also may have prevented a full airing of all relevant evidence on the issue, thus preventing this Court from conducting our own review. We hold, therefore, that the trial court erred in its ruling on defendant's suppression motion.

[5] We also conclude that the trial court's error was not harmless in light of the facts of this case. N.C.G.S. § 15A-1443 (2001) 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.

In the present case, defendant was charged and convicted of possession of cocaine. Clearly, if the cocaine were suppressed, there is a reasonable possibility that a different result would have been reached. Therefore, we conclude the trial court's failure to properly determine whether defendant had standing to challenge on Fourth Amendment grounds the law enforcement officers' entry into the residence constituted "reversible error which denied the defendant a fair trial conducted in accordance with law." N.C.G.S. § 15A-1447(a) (2001). Accordingly, defendant is entitled to a new trial at which the admissibility of the evidence seized from defendant will be determined in accordance with the law as explained herein:

> [F]aced with the appraisal that the case had been tried in the main upon an unsound principle of law, we remanded it for another hearing or a new trial, as is the rule in this jurisdiction. Where a case is tried under a misapprehension of the law, the practice is to remand it for another hearing.

State v. Williams, 224 N.C. 183, 189, 29 S.E.2d 744, 748 (1944) (citations omitted).

For the reasons discussed above, the defendant's conviction is

Reversed and the case Remanded for a New Trial.

Judges MARTIN and TYSON concur.

THOMAS WILLIAM HILL, PLAINTIFF v. BOBBY MEDFORD, INDIVIDUALLY AND AS SHERIFF OF BUNCOMBE COUNTY; AND WESTERN SURETY COMPANY, DEFENDANTS

No. COA02-956

(Filed 1 July 2003)

1. **Appeal and Error— appealability—interlocutory order—governmental or sovereign immunity—substantial right**

Although defendant's appeal of the denial of his motion for summary judgment on plaintiff's breach of contract action is an appeal from an interlocutory order, appeals raising issues of governmental or sovereign immunity affect a substantial right and are immediately reviewable on appeal

2. **Public Officers and Employees— termination of deputy sheriff—breach of contract—at-will employee—public policy violation**

The trial court did not err by denying defendant sheriff's motion for summary judgment on plaintiff deputy sheriff's breach of contract action arising out of plaintiff's termination from employment after he began to investigate allegations that another deputy had committed perjury and made false reports in connection with a number of criminal prosecutions, because plaintiff is not precluded as a matter of law from maintaining his action for breach of contract where defendant terminated his employment for reasons that violate public policy even though plaintiff's employment was at will.

Judge MARTIN dissenting.

Appeal by defendants from order entered 8 May 2002 by Judge James Baker, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 16 April 2003.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for plaintiff-appellee.

Long, Parker, Warren & Jones, P.A., by Robert B. Long, Jr., and W. Scott Jones, for defendant-appellants.

HUDSON, Judge.

Plaintiff brought this action seeking compensatory and punitive damages from defendant Medford, individually and as Sheriff of Buncombe County, and damages against Western Surety Company in the amount of $20,000 as surety upon defendant Medford's official bond. In summary, Plaintiff alleged in his complaint that from December 1994 until 27 April 2000, he was employed by defendant Medford as a deputy sheriff and, at all times relevant to the complaint, was the lieutenant in charge of the Internal Affairs Division of the Buncombe County Sheriff's Department.

Plaintiff alleged that he was instructed by defendant Medford to investigate the conduct of another deputy in the department as a result of a February 1998 incident in which the deputy was involved. In the course of this investigation, Plaintiff determined that the deputy had committed serious acts of misconduct which included making false reports and committing perjury. Plaintiff reported his findings to Medford in writing. Notwithstanding Medford's receipt of Plaintiff's report, the deputy was not discharged. However, defendant Medford did advise the Buncombe County district attorney of the deputy's perjury, and, as a result, the district attorney was required to disclose such conduct to other persons facing criminal charges in the Buncombe County courts in which the deputy was a witness.

Plaintiff alleged that on 27 April 2000, Medford terminated Plaintiff's employment without any just cause and that such termination was motivated solely by Medford's malice toward him for reporting the deputy's misconduct. Plaintiff asserted claims for breach of contract and for "a tort of wrongful discharge."

Upon Medford's motion, Plaintiff's claims against him in his individual capacity were dismissed. Defendants filed an answer, denying the material allegations of the complaint and asserting sovereign immunity as a bar to Plaintiff's claims. Defendants subsequently moved for partial summary judgment asserting (1) that there was no evidence of the existence of an employment contract between Plaintiff and Medford and the employment relationship was at will; and (2) that sovereign immunity limited any tort claim against

Defendants to $20,000, the amount of the bond purchased by Medford. The trial court granted Defendants' motion with respect to the tort claim, thus limiting Plaintiff's potential recovery on that claim, but denied it with respect to the claim for breach of contract.

[1] Before addressing Medford's argument, we note that "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 337-38, 556 S.E.2d 38, 39 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002) (quoting *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999)). Thus, although this appeal is interlocutory, it is properly before us.

[2] Defendant has assigned error to the denial of his motion for summary judgment on Plaintiff's contract claim, arguing that there can be no claim for breach of contract since the plaintiff's employment was at will. Here, the deputy sheriff plaintiff was fired by the Sheriff after he began to investigate allegations that another deputy had committed perjury and made false reports in connection with a number of criminal prosecutions. In its order on Defendants' motion for summary judgment, the trial court reached the following pertinent conclusion:

> 1) There is no genuine issue of material fact that Plaintiff's contract with the Defendant Medford was an employment at will contract, which fact does not preclude Plaintiff from proceeding with his cause of action for breach of contract and Defendants' Motion for Partial Summary Judgment on Plaintiff's cause of action for breach of contract should therefore be denied.

We have carefully reviewed the arguments made and authorities relied upon by the parties, and agree that the plaintiff is not precluded, as a matter of law, from maintaining his action for breach of contract, where the defendant terminated his employment for reasons that violate public policy, even though his employment was at will. Thus, for the reasons explained below, we affirm the denial of summary judgment on this basis.

We read the cases, particularly *Sides v. Duke University*, 74 N.C. App. 331, 329 S.E.2d 819 (1985), *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985), and *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989), and subsequent Court of Appeals

cases, as recognizing that an employment relationship, even at will, is essentially contractual. In *Sides*, this Court held that an at will employee could proceed with both a claim in tort and a claim for breach of contract, where her employment was terminated due to her refusal to give false testimony, a reason that violated public policy. The plaintiff here relies on *Sides*, where this Court, in recognizing an action based on a contract theory, stated the following:

> Even if the employment contract was at will, for the same public policy reasons stated above, we hold that defendant Duke had no right to terminate it for the unlawful purposes alleged in the complaint, and that plaintiff's claim for breach of contract with resulting damages has been sufficiently alleged against the defendant Duke.

Sides, 74 N.C. App. at 344-45, 328 S.E.2d at 828. The defendant argues, despite this language, that *Coman* and several later cases from this Court permit only an action in tort for wrongful discharge in violation of public policy.

We disagree with this interpretation, since, rather than rejecting a breach of contract theory, the Supreme Court in *Coman* appears to have acknowledged the possibility of such a claim. In *Coman*, the employee was fired when he refused to falsify his trucking logs. In allowing the claim to proceed, the Supreme Court, relied upon *Sides* and stated the following:

> We *approve and adopt* the following language from *Sides:*
>
> [W]hile there may be a right to terminate a *contract at will* for no reason, or for an arbitrary or irrational reason, there can be no right to terminate *such a contract* for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Coman, 325 N.C. at 175, 381 S.E.2d at 447 (emphasis added). In light of this language, as well as the remainder of the discussion in *Coman*, we do not believe that the Supreme Court implicitly rejected any claim for breach of contract. While the Court in *Coman* did not label the plaintiff's claim as one for breach of contract, the word "tort" does not appear in the majority opinion. Even the dissent in *Coman* refers to the at-will doctrine as defining North Carolina law regarding "employment contracts of indefinite duration." *325 N.C.* 179, 381

S.E.2d at 449. More important, however, is that in the discussion, both by the majority and the dissent, the Court was addressing the circumstances under which it may not be permissible for an employer to terminate such an employment agreement.

The defendant also relies on *Houpe v. City of Statesville*, 128 N.C. App. 334, 497 S.E.2d 82 (1998), *disc. review denied*, 348 N.C. 72, 505 S.E.2d 871 (1998). We do not believe that *Houpe* applies here, because the plaintiff in *Houpe* alleged breach of an existing contract of employment. As the Supreme Court pointed out in *Coman*, the cause of action for wrongful termination in violation of public policy was created as an exception to the general rule that in North Carolina an employee may be terminated at will, unless there is a contract or other protection by law. When the employee alleges a more extensive contract, as the employee did in *Houpe*, he may have no need to turn for recourse to the *Coman* exception to the at will doctrine. The Court in *Houpe* upheld "the trial court's denial of defendants' [12(b)(6)] motion with respect to plaintiff's claims of wrongful termination [in tort], breach of contract, [and other claims]." *Id.* 128 N.C. App. at 352, 497 S.E. 2d 94. Although the Court allowed the plaintiff to proceed with both types of claims, the analysis based on the allegations of a contract with terms beyond the mere employment relationship is simply inapposite here. In more recent decisions, this Court has reached similar conclusions in cases involving allegations of written contracts. Thus, none are applicable here. *See, Trexler v. Norfolk S. Ry. Co.*, 145 N.C. App. 466, 550 S.E.2d 540 (2001); *Doyle v. Asheville Orthopaedic Assocs., P.A.*, 148 N.C. App. 173, 557 S.E.2d 577 (2001).

Even more recently, in *Paquette v. County of Durham*, 155 N.C. App. 415 , 573 S.E.2d 715 (2002), *disc. review denied*, No. 91P03, 2003 N.C. LEXIS 480 (N.C. May 1, 2003), the plaintiff alleged a claim in tort for wrongful discharge and a claim for breach of contract seeking unpaid wages, as well as claims alleging discrimination. The plaintiff was a probationary employee, who "did not have a contractual right to continued employment," even on an at will basis, and did not allege that she did. Her breach of contract claim was for unpaid wages alone. This Court reversed the dismissal of the contract claim and remanded that claim, noting that "[t]he relationship of employer and employee is essentially contractual in its nature," and held the claim was not barred by sovereign immunity. 155 N.C. App. at 420, 573 S.E.2d at 718. As for the tort claim for wrongful discharge, the Court affirmed the dismissal, but on the grounds that the plaintiff had not

alleged a waiver of immunity by the defendants. The claims in *Paquette* were so different from those raised by the plaintiff here, that we do not believe this case applies.

In sum, we interpret the cases since *Sides* and *Coman* as allowing a discharged, public at will employee, like the plaintiff here, to proceed with *either* a claim for breach of contract under the public policy exception to the at will doctrine *or* a claim in tort if the entity has waived immunity, or *both*. Here, the plaintiff alleged both. Regarding these claims, the superior court denied the defendants' motion for summary judgment on the first claim, and allowed it on the second, as to any amount exceeding the surety bond. Certainly Medford's conduct, if Plaintiff's allegations are true—terminating Plaintiff for reporting serious misconduct including perjury and falsification of evidence by another deputy—violated public policy. If the plaintiff has inadequate recourse, the result, in effect, penalizes him for honestly performing his duties, and rewards others whose actions, if proved, undermined the integrity of a number of investigations and prosecutions of crime in the county. As the Supreme Court noted in *Coman*, this "interpretation would encourage and sanction lawlessness," which we do not wish to do. Thus, we affirm the trial court in all respects, and remand for further proceedings.

AFFIRMED.

Judge ELMORE concurs.

Judge MARTIN dissents.

MARTIN, Judge, dissenting.

I respectfully dissent. As a public official, if sued in his or her official capacity, a sheriff is protected against tort actions by governmental immunity unless the sheriff purchases a bond pursuant to G.S. § 58-76-5, and then, can only be liable on tort claims to the extent of the amount of that bond. N.C. Gen. Stat. § 58-76-5 (2003); *Summey v. Barker*, 142 N.C. App. 688, 544 S.E.2d 262 (2001). No such immunity exists as to claims for breach of contract. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). Due to defendant Medford's purchase of a $20,000 bond, plaintiff may potentially recover up to that amount on his tort claim. Plaintiff may recover a greater amount only through his claim for breach of contract.

North Carolina is an employment at will state. *See Kurtzman v. Applied Analytical Indus.*, 347 N.C. 329, 493 S.E.2d 420 (1997), *reh'g denied*, 347 N.C. 586, 502 S.E.2d 594 (1998). Plaintiff admits that he had no contract with defendant Medford for employment for a definite term, rendering him an at-will employee, but contends that he has a viable claim for breach of contract under the "public policy exception."

As noted by the majority, the public policy exception to the at-will employment doctrine was originally articulated in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 335 S.E.2d 13 (1985), *overruled on other grounds by Kurtzman*, *supra*. In *Sides*, this Court reviewed the dismissal of plaintiff's claims for, *inter alia*, tort and breach of contract and held that under the facts alleged the plaintiff had stated a claim in tort for wrongful discharge. *Id.* at 343, 328 S.E.2d at 826-27. The Court then analyzed whether the plaintiff had stated a claim for breach of contract:

> Even if the employment contract was at will, for the same public policy reasons stated above, we hold that defendant Duke had no right to terminate it for the unlawful purposes alleged in the complaint, and that plaintiff's claim for breach of contract with resulting damages has been sufficiently alleged against the defendant Duke.

Id. at 344-45, 328 S.E.2d at 828. The majority relies on this language in *Sides* in holding plaintiff's breach of contract claim may stand despite his at-will status. The result is that plaintiff and other at-will employees who find themselves in similar situations hereafter may allege two separate and independent claims for relief, one in tort and one in contract. I cannot agree with this result for several reasons.

First of all, the Court's holding in *Sides* that the plaintiff had stated a claim for breach of contract despite her at-will status was unnecessary to its decision and was *dictum*. After making the statement, the Court went on to say:

> The additional consideration that the complaint alleges, [the plaintiff's] move from Michigan, was sufficient, we believe, to remove plaintiff's employment contract from the terminable-at-will rule and allow her to state a claim for breach of contract since it is also alleged that her discharge was for a reason other than the unsatisfactory performance of her duties.

Id. at 345, 328 S.E.2d at 828. The holding that relocation for employment provides "additional consideration" sufficient to establish employment contract was later overturned in *Kurtzman, supra.* Admittedly, the opinion in *Sides* is confusing in that it appears to hold that the plaintiff stated a claim for wrongful discharge in tort, a claim for breach of contract for at-will employment based on wrongful discharge, *and* a claim for breach of contract based on an alleged contract. *Sides*, however, should be interpreted in the light of guidance from later case law precedent.

The public policy exception to the at-will employment doctrine was not expressly approved by our Supreme Court until *Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989). Although the Supreme Court's opinion in *Coman* does not specify whether the plaintiff's claim sounded in tort or contract, the opinion of this Court, and the record, makes clear that the plaintiff had alleged a claim in tort. *See Coman v. Thomas Mfg. Co.*, 91 N.C. App. 327, 371 S.E.2d 731 (1988). Therefore, the Supreme Court's opinion in *Coman* recognized the tort of wrongful discharge, but did not "acknowledge[] the possibility" of a breach of contract claim for discharge in violation of public policy by an at-will employee. In addition, the language in *Coman* and *Sides* cited by the majority as emphasizing the contractual nature of at-will employment should not be amplified into a basis for a breach of contract claim. An at-will employment relationship may be referred to as a " 'contract at will,' " *Coman*, 325 N.C. at 175, 381 S.E.2d at 447, without converting it into something it is not.

Finally, although *Sides* seemingly held that claims for the tort of wrongful discharge and for breach of contract could stand on the same facts, several cases have since clarified this point. In *Houpe v. City of Statesville*, 128 N.C. App. 334, 497 S.E.2d 82, *disc. review denied*, 348 N.C. 72, 505 S.E.2d 871 (1998), the Court upheld the denial of the defendant's motion for judgment on the pleadings for, *inter alia*, the plaintiff's claims of wrongful discharge and breach of contract. However, the Court stated that:

> Preliminarily, we assume plaintiff's wrongful termination and breach of contract claims to have been advanced *in the alternative.* Wrongful termination may be asserted "only in the context of employees at will," and not by an employee "employed for a definite term or . . . subject to discharge only for 'just cause.' "

Id. at 343, 497 S.E.2d at 88-89 (citations omitted) (emphasis added). I note that the present plaintiff seems to acknowledge a mutual exclu-

sivity for the tort of wrongful discharge and breach of contract in his complaint, wherein he prays, *inter alia*, for the following:

> The damages of defendant, in his official capacity in an amount exceed [sic] $10,000 on his claim for breach of contract, or in the alternative, for damages in a like amount on his claim for wrongful discharge; . . . .

The *Houpe* Court then went on to declare that:

> A viable claim for breach of an employment contract must allege the existence of contractual terms regarding the duration or means of terminating employment. Plaintiff's complaint addressed this requirement by alleging that the City's charter, ordinances and written policies created an agreement whereby he would not be terminated except for "good cause" . . . .

Id. at 344, 497 S.E.2d at 89. The majority declares that *Houpe* does not apply to the present case because the plaintiff "alleged breach of an existing contract of employment." I believe *Houpe* is relevant because it states that the plaintiff only had an *alternative* claim for breach of contract *because* he had alleged an employment contract. To interpret *Houpe* otherwise, as the majority has apparently done, with respect to the instant case, would lead to the result that plaintiffs who allege wrongful termination of their at-will employment *and* breach of an employment contract would only be able to recover under one theory or the other, but plaintiffs who allege wrongful termination of their at-will employment and admit to the absence of any employment contract would be able to recover in both tort and contract. *See Doyle v. Asheville Orthopaedic Assocs., P.A.*, 148 N.C. App. 173, 174, 557 S.E.2d 577, 577 (2001) (noting in context of claim by contractual employee that contractual employee limited to breach of contract and tort of wrongful discharge available only to at-will employee), *disc. review denied*, 355 N.C. 348, 562 S.E.2d 278 (2002); *Trexler v. Norfolk S. Ry. Co.*, 145 N.C. App. 466, 471-72, 550 S.E.2d 540, 543 (2001) (holding union employee subject to discharge pursuant to terms of collective bargaining agreement had cause of action in contract, but not for tort of wrongful discharge).

Although the majority correctly points out that *Doyle* and *Trexler* involved allegations of written contracts, they did not involve alternative allegations of at-will employment as did *Houpe*. To the extent *Sides* may have appeared to allow a contractual employee to allege both breach of contract and the tort of wrongful discharge, *Houpe*,

Doyle, and *Trexler* have made clear that such was not the case. Following the logic of these cases, it is a stretch to conclude the reverse: that an at-will employee is entitled to two avenues of relief for wrongful discharge while an employee promised continued employment under contract is limited to only one.

The majority also glosses over *Paquette v. County of Durham*, 155 N.C. App. 415, 573 S.E.2d 715 (2002), *disc. review denied*, 357 N.C. 165, —— S.E.2d —— (1 May 2003), and does not confront *Vereen v. Holden*, 121 N.C. App. 779, 468 S.E.2d 471 (1996), *remanded for reh'g on other grounds*, 345 N.C. 646, 483 S.E.2d 719 (1997). In both of these cases, an at-will employee alleged claims for the tort of wrongful discharge and breach of contract. In *Paquette*, the plaintiff's claim for breach of contract was upheld because she alleged she had performed work for the defendants for which she had not been paid. In *Vereen*, the complaint was held to state a claim for the tort of wrongful discharge, but not breach of contract, where allegations in the complaint were insufficient to allege an employment contract. If a claim for breach of contract for termination of at-will employment in violation of public policy was viable, it stands to reason that the Courts in *Houpe*, *Paquette*, and *Vereen* would have held the complaints at issue in those cases did, in fact, state such claims. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), (c) (2003). At the very least, those cases, along with *Doyle* and *Trexler*, are difficult to reconcile with the majority's holding that the "public policy exception" to the at-will employment doctrine was intended to authorize causes of action in both tort and contract for at-will employees.

For all these reasons, I conclude that an employee terminable at will, who alleges wrongful discharge in violation of public policy, does not have a claim for breach of contract against his or her employer on that basis. The trial court's denial of defendants' motion for summary judgment on plaintiff's contract claim should be reversed. Contrary to the majority's final assertions, this conclusion would not leave plaintiff without remedy, much less "penalize" him, as his tort claim against defendant is still extant, though his potential recovery is limited by the doctrine of governmental immunity.

STATE OF NORTH CAROLINA v. JOSEPH DONNELL LITTLEJOHN

No. COA02-575

(Filed 1 July 2003)

1. Jury— selection—peremptory challenges—*Batson* hearing—nondiscriminatory reasons

Peremptory challenges were correctly allowed in an assault prosecution where the court permitted the prosecutor to explain the challenges without ruling on whether defendant had established a prima facie case; the prosecutor articulated credible, non-discriminatory reasons for the challenges which were both well-grounded in law and supported by fact; defendant did not offer any evidence of pretext other than the argument that the articulated reasons pertained equally well to other jurors who were not challenged; and the court considered this argument but concluded that none of the other jurors had the same combination of factors.

2. Constitutional Law— double jeopardy—not raised at trial

An assault defendant convicted of two assaults waived the question of whether double jeopardy was violated by not raising the issue at trial.

3. Assault— one sequence of events—two counts

The evidence was sufficient to establish two assaults, and the trial court properly denied defendant's motion to dismiss, where the assaults involved defendant and two different individuals, each with his own thought process and each using a different weapon, each assault was distinct in time and inflicted wounds in different locations, and the second assault occurred after the first had ceased and the victim had fallen to the floor.

Appeal by defendant from judgment entered 6 September 2001 by Judge Judson D. DeRamus, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 17 February 2003.

Attorney General Roy Cooper, by Assistant Attorney General Jane Ammons Gilchrist, for the State.

Glover & Peterson, P.A., by Ann B. Petersen, for defendant-appellant.

EAGLES, Chief Judge.

Joseph Donnell Littlejohn appeals from judgment entered in Forsyth County Superior Court upon a jury verdict convicting him of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury.

The State's evidence tends to establish the following: Defendant and the victim, Bobby Lumley ("Lumley"), were friends who often socialized together. At approximately 3:00 p.m. on 27 January 2001, defendant called Lumley on the phone to see whether Lumley had any marijuana and if he wanted to smoke it. Lumley responded by telling defendant that he did have some marijuana and that he had just received his income tax refund. Lumley invited defendant to come to his house later so the two of them could smoke marijuana and "go have a good time." Defendant agreed.

At approximately 5:30 p.m., defendant arrived at Lumley's house accompanied by two men who Lumley did not know. Lumley, suspicious of the two other men, asked defendant who they were. Defendant told Lumley the two men were friends of his and assured Lumley that they were "cool." However, defendant never told Lumley the names of the two men. After repeated assurances from defendant that the unknown men were "cool," Lumley retrieved a small amount of marijuana from his bedroom and took it into the kitchen. Defendant and the two unknown men followed Lumley into the kitchen. Lumley placed the marijuana on the table and went to the refrigerator to get himself a drink. When Lumley turned back toward the table, he was confronted by defendant and the two unknown men. One of the unknown men ("Assailant B") brandished a small caliber handgun, pointed it at Lumley's head and demanded Lumley's money and "weed." The other unknown individual ("Assailant A") brandished a knife and stood with defendant, who was unarmed, behind Assailant B. When Lumley asked defendant what was "going on," defendant replied "I don't know," and proceeded, along with Assailant A, to pat Lumley down.

At this point, Lumley lunged at Assailant B, grabbed the gun, and began pushing him backwards into the doorway between the kitchen and the living room. Lumley forced defendant and Assailants A and B backward until all four men were jammed in the doorway. Lumley then knocked the gun out of Assailant B's hands onto the living room floor. Assailant B called out that he "dropped the gun" and an altercation followed as both Lumley and Assailant B tried to reach and

gain control of the gun. Ultimately, all four men ended up in the living room of Lumley's house. While Lumley struggled with Assailant B, defendant and Assailant A came up behind Lumley and began trying to "grab" and "hold" Lumley. At some point during this altercation, either defendant or Assailant A stabbed Lumley seven times in the back, buttocks and leg. Lumley stopped struggling and fell to the ground. Once Lumley was on the ground, Assailant B "picked up the gun" and shot Lumley twice in the leg. Defendant yelled "lets bail" and fled out the front door with Assailant A and Assailant B.

Following his arrest, defendant told police that he and the other two men, Assailants A and B, had gone to Lumley's house for the purpose of robbing him. Defendant gave police two names that he said were the names of Assailant A and Assailant B. Defendant also looked through books of police photos. However, at the time of trial, neither Assailant A nor Assailant B had been identified or arrested. Defendant was indicted and tried on: (1) one count of robbery with a dangerous weapon, under the theory of aiding and abetting; (2) one count of assault with a deadly weapon (.25 caliber pistol) with intent to kill inflicting serious injury, under the theory of acting in concert; and (3) one count of assault with a deadly weapon (knife) with intent to kill inflicting serious injury, under the theory of acting in concert.

During jury selection, the prosecutor peremptorily excused jurors number one and eleven. Defense counsel moved for relief under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), on grounds that defendant and both jurors were African-American. Without first ruling on whether defendant had established a *prima facie* case of discrimination, the trial court gave the prosecutor an opportunity to respond to defense counsel's allegations. After hearing argument from both counsel the Court found that "[a]ssuming that a *prima facie* case has been shown . . . the [S]tate has offered sufficient race-neutral reasons for exercising . . . the two peremptory challenges . . . The defendant has shown insufficient grounds for relief under *Batson*." (Emphasis added.) When the prosecutor peremptorily excused an African-American alternate juror, defendant again moved for *Batson* relief and renewed his earlier *Batson* motion. Without ruling on whether defendant had established a *prima facie* case, the trial court asked the prosecutor to respond. Following the prosecutor's explanation of her reasons for the peremptory challenge and a brief response from defense counsel, the trial court said,

> again, assuming a *prima facie* case without finding a *prima facie* case, [the Court] finds the reasons given by the [S]tate for the

> excuse of [the alternate juror] and other peremptorily challenged jurors to be race-neutral, and not violative of *Batson* restrictions, and the motion for striking the jury panel, or other relief from this jury panel is denied.

(Emphasis added.)

At the close of the State's evidence, defendant moved without argument, to dismiss all charges. The trial court denied defendant's motion to dismiss but reduced the second count of the indictment, the assault with the .25 caliber pistol, to assault with a deadly weapon inflicting serious injury on grounds that the State's evidence failed to establish that Assailant B acted with specific intent to kill. Defendant presented no evidence. Defendant was convicted of both assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury, but was found not guilty as to the first count of the indictment, robbery with a dangerous weapon. Defendant was sentenced to imprisonment for a term of 151 to 191 months for assault with a deadly weapon with intent to kill inflicting serious injury and a consecutive term of 53 to 73 months for assault with a deadly weapon inflicting serious injury. Defendant appeals.

[1] Defendant first contends the trial court erred by permitting the prosecutor to exercise peremptory challenges to exclude potential jurors on the basis of race. Specifically, defendant argues that the prosecutor's justifications were not sufficiently race-neutral and the trial court's inquiry into the legitimacy of those justifications was deficient. We disagree.

In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), and *Powers v. Ohio*, 499 U.S. 400, 113 L. Ed. 2d 411 (1991), the United States Supreme Court developed a three-part inquiry to be employed when a defendant alleges that a prosecutor has impermissibly excluded prospective jurors on the basis of race. *State v. Caporasso*, 128 N.C. App. 236, 243, 495 S.E.2d 157, 162, *appeal dismissed*, 347 N.C. 674, 500 S.E.2d 91 (1998). First, the criminal defendant must establish a *prima facie* case of discrimination. *Id.* "[A] defendant makes out a *prima facie* case of purposeful discrimination . . . if he shows: (1) he is a member of a cognizable racial minority, (2) members of his racial group have been peremptorily excused, and (3) racial discrimination appears to have been the motivation for the challenges." *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990) (emphasis added). Next, "the burden of production 'shifts to

the State to come forward with a neutral explanation' for each peremptory strike[,]" to rebut defendant's *prima facie* showing. *Id.* (citation omitted). A prosecutor's explanations for exercising a peremptory challenge need not rise to the level of justifying a challenge for cause. *State v. White*, 349 N.C. 535, 551, 508 S.E.2d 253, 264 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). So long as the "motive is not racial discrimination, a prosecutor may exercise peremptory challenges based on 'legitimate hunches and past experience.' " *Id.* (citation and internal quotations omitted).

> [I]f the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether the stated reasons are a credible, nondiscriminatory basis for the challenges or simply pretext.

State v. Hoffman, 348 N.C. 548, 551-52, 500 S.E.2d 718, 721 (1998) (citation omitted), *aff'd after remand*, 349 N.C. 167, 505 S.E.2d 80 (1998), *cert. denied*, 526 U.S. 1053, 143 L. Ed. 2d 522 (1999). Finally, "the defendant has a right of surrebuttal to show that the prosecutor's explanations are a pretext." *Porter*, 326 N.C. at 497, 391 S.E.2d at 150. Ultimately, the "burden of persuading the court that intentional racial discrimination has guided the use of peremptory challenges rests on the defendant." *Id.* at 497-98, 391 S.E.2d at 150. Because this necessarily entails an " '[e]valuation of the prosecutor's state of mind based on demeanor and credibility,' " *Caporasso*, 128 N.C. App. at 243, 495 S.E.2d at 162 (citation omitted), an "appellate court should not overturn the trial court's findings unless [it] is 'convinced that [the trial court's] determination was clearly erroneous.' " *Id.* (citation omitted).

Our courts have consistently held that the State may permissibly "exercise[] its peremptory challenges in pursuit of a jury that is 'stable, conservative, mature, government oriented, sympathetic to the plight of the victim, and sympathetic to law enforcement crime solving problems and pressures.' " *Porter*, 326 N.C. at 498, 391 S.E.2d at 151 (citation omitted). A prosecutor may also peremptorily excuse jurors when they "display[] a lack of attention," *Caporasso*, 128 N.C. App. at 244, 495 S.E.2d at 162 (citations omitted), or when the prosecutor has legitimate "concerns about a prospective juror's knowing the defendant or witnesses . . . ." *White*, 349 N.C. at 551, 508 S.E.2d at 264.

Here, without ruling on whether defendant had established a *prima facie* case, the trial court permitted the prosecutor to respond to defendant's allegations. The prosecutor gave the following reasons for each peremptory challenge: "With regard to juror number one . . . the juror was extremely young, or appeared to be extremely young. She's not married, nor does she have children, nor does she have a stake in a home of her own, she's currently renting." Furthermore, "[w]ith regard to [juror number eleven], as she came into the box, and throughout the court's introductory remarks to her, I noted her nodding and smiling at least in the direction of the defendant, and because of that, I was somewhat uncomfortable with her service." The prosecutor added that these actions "were so noticeable . . . that, without hearing the first word out of her mouth, I placed an X on her number on my sheet . . . ." Finally, after noting that the excused alternate juror was pregnant, the prosecutor explained:

> I had a difficult time getting the impression that she was able to stay awake. She seemed sluggish to me. When I walked in the courtroom after lunch, I noticed her sitting in the back sleeping. And then when she took her place in the alternate seat, it took her what I perceived to be an abnormally long time just getting up here; and then when she sat down, her eyes would droop, her voice would be slow and somewhat sluggish.

Because the trial court permitted the prosecutor to explain the challenges without ruling on whether defendant had established a *prima facie* case, the only issue before the trial court was whether the prosecutor's stated reasons were credible and non-discriminatory or a pretext. After careful review of the trial transcript, we conclude that the prosecutor articulated credible, non-discriminatory reasons for the challenges which were both well grounded in law and supported by fact. In response, defendant did not offer any evidence of pretext other than the argument that the articulated reasons pertained equally well to white jurors who were not challenged. The transcript reveals that the trial court considered this argument, but concluded that none of the other jurors had the same combination of factors and rejected defendant's argument of pretext. We hold that the trial court's determination in permitting the peremptory challenges was not clearly erroneous. Accordingly, this assignment of error is rejected.

[2] Defendant next contends that because the shooting and stabbing constituted one continuous assault, the trial court erred by denying

his motion to dismiss one of the assault charges. Relying on *State v. Brooks*, 138 N.C. App. 185, 530 S.E.2d 849 (2000), defendant argues that the evidence was insufficient to support convictions of both offenses because the State failed to present evidence of a distinct interruption between the assault with the knife and the assault with the gun. Defendant further argues that his conviction and punishment for two separate assaults violates his constitutional right against double jeopardy. We disagree.

We begin by noting that the constitutional right against double jeopardy may, like other constitutional rights, be waived by defendant's " 'action or inaction' " at trial. *State v. Christian*, 150 N.C. App. 77, 81, 562 S.E.2d 568, 572 (citation omitted), *disc. review denied*, 356 N.C. 168, 568 S.E.2d 618 (2002). " 'To avoid waiving this right, a defendant must properly raise the issue of double jeopardy before the trial court. Failure to raise this issue at the trial court level precludes reliance on the defense on appeal.' " *Id.* (citation omitted).

Here, defendant moved to dismiss all charges against him at the close of the State's evidence and at the close of all the evidence. However, defendant did not raise the issue of double jeopardy as the basis for these motions. Moreover, there is no evidence in the record that the issue of double jeopardy was ever raised in the trial court. Accordingly, defendant has waived review of this issue.

[3] Defendant nevertheless argues that insofar as the evidence presented at trial was insufficient as a matter of law to support his conviction of two separate assaults, this issue was properly preserved by assigning error to the trial court's denial of his motion to dismiss. After careful review of the record and transcript, we hold that even if this issue was properly preserved, there was no error.

Upon reviewing a motion to dismiss in a criminal trial, " 'the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869. " 'In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and dis-

crepancies do not warrant dismissal of the case but are for the jury to resolve.' " *Id.* at 596, 573 S.E.2d at 869 (citation omitted). " 'When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.' " *Id.* at 596-97, 573 S.E.2d 869 (citation omitted).

Although the trial court reduced the second count of the indictment, it denied defendant's motion to dismiss and instructed the jury on assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury under the doctrine of acting in concert. The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are: "(1) an assault, (2) with a deadly weapon, (3) with the intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). The essential elements of assault with a deadly weapon inflicting serious injury are: " '(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death.' " *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997) (citation omitted). Under the doctrine of acting in concert, "[i]f 'two [or more] persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.' " *State v. Mann*, 355 N.C. 294, 306, 560 S.E.2d 776, 784 (citations omitted), *cert. denied*, — U.S. —, 154 L. Ed. 2d 403 (2002).

Defendant does not contend that the evidence was insufficient to support a conviction of either assault with a deadly weapon with intent to kill inflicting serious injury or assault with a deadly weapon inflicting serious injury; only that the evidence was insufficient to support convictions of both offenses.

In order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction, the evidence must establish "a distinct interruption in the original assault followed by a second assault[,]" so that the subsequent assault may be deemed separate and distinct from the first. *Brooks*, 138 N.C. App. at 189, 530 S.E.2d at 852. Therefore, the dispositive issue in this case is whether the State presented substantial evidence of an interruption between the assault with the knife by Assailant A and the assault with the gun by Assailant B, so that they may be deemed two separate

events. If so, defendant may be convicted of both offenses under the doctrine of acting in concert.

In *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995), defendant was riding in an automobile that pulled into a parking space next to the space where the victim was sitting in his automobile. Following a verbal altercation with the victim, defendant produced a gun. The victim ducked down in the seat as defendant fired once through the victim's windshield. When the victim pulled forward, defendant fired again, this time through the victim's passenger door. Defendant fired a third time into the rear bumper area of the victim's car as the victim continued pulling away from defendant. *Id.* at 176, 459 S.E.2d at 512. Defendant was convicted of three separate counts of discharging a firearm into occupied property. *Id.* at 175, 459 S.E.2d at 511. Defendant appealed on grounds that three separate convictions violated double jeopardy.

Our Supreme Court rejected defendant's claim, concluding that "defendant's actions were three distinct and, therefore, separate events." *Id.* at 176, 459 S.E.2d 513. The Court based this conclusion on the following factors: (1) "[e]ach shot . . . required that defendant employ his thought processes each time he fired the weapon"; (2) "[e]ach act was distinct in time"; and (3) "each bullet hit the vehicle in a different place." *Id.* at 176-77, 459 S.E.2d 513. *Accord State v. Nobles*, 350 N.C. 483, 515 S.E.2d 885 (1999).

Here, the assaults in which defendant was involved were carried out by two different individuals, each employing his own thought processes and each using a different weapon. The victim testified that he "knocked the gun out of [Assailant B's] hand" and began to struggle with Assailant B when the victim "went to pick the gun up . . . ." However, "[the victim] was stabbed first," at which time he "dropped" and "fell down." After the victim was on the floor, Assailant B "picked up the gun [and] shot [the victim] twice in the leg." Finally, while the victim was stabbed in the back, buttocks and leg, he was shot in the kneecap.

Viewed in the light most favorable to the State, this evidence tends to establish that each assault was distinct in time and inflicted wounds in different locations on the victim's body. Moreover, the assault by Assailant B occurred only after the original assault had ceased and the victim had fallen to the floor. It was at this point that Assailant B walked over to the gun, picked it up and began firing at the victim. Applying *Rambert*, we hold the State's evidence was suffi-

cient to show that there were indeed two separate assaults. Accordingly, the trial court properly denied defendant's motion to dismiss.

For all the foregoing reasons, we hold the defendant received a fair trial, free from prejudicial error.

No error.

Judges MARTIN and GEER concur.

TONY W. ALEXANDER AND WIFE SARAH M. ALEXANDER; ROGER L. MILLER AND WIFE PENNY W. MILLER; SHARON BELL RICH; DONNY L. WILLIAMS AND WIFE DEBRA C. WILLIAMS, ON BEHALF OF THEMSELVES, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. DAIMLERCHRYSLER CORPORATION, AND DAIMLERCHRYSLER MOTORS CORPORATION, AND HICKORY AUTOMALL CHRYSLER PLYMOUTH, INC.; AUTO USA, INC., D/B/A EMPIRE CHRYSLER DODGE JEEP EAGLE; AND YSU AUTOMOTIVE, INC., F/K/A SHELBY CHRYSLER PLYMOUTH JEEP EAGLE, INC., ON BEHALF OF THEMSELVES, AND OTHER CHRYSLER DEALERS SIMILARLY SITUATED, DEFENDANTS

No. COA02-767

(Filed 1 July 2003)

1. Appeal and Error— appealability—requested relief granted

Plaintiffs were not aggrieved parties who could appeal the trial court's requirement that they receive approval from the court before withdrawing their request for class certification. Plaintiffs argued that the court approval required by N.C.G.S. § 1A-1, Rule 23(c) applies only after a request for certification has been granted, the court ruled that approval of the withdrawal was required in this case, and the court then granted plaintiffs the relief they sought and allowed the withdrawal.

2. Appeal and Error— preservation of issues—notice of withdrawal of class notification request—no final decision—plaintiff's agreement

A purported error was not preserved for appellate review where the trial court required plaintiffs to notify potential members of a lawsuit class that the request for class certification had been withdrawn, a final decision was not made on the type of notice, and plaintiffs agreed that some type of notice was fair and necessary.

3. Appeal and Error— appealability—withdrawal of class certification request—court's authority during decision—no final decision

The question of the trial court's authority during the withdrawal of a request for class certification was not properly appealed where the court did not made a final decision.

4. Appeal and Error— appealability—order to attend show cause hearing—no final decision

An order that an attorney withdrawing a request for class certification attend a show cause hearing was not ripe for appeal because the court did not decide whether the attorney had violated a court order and should be held in contempt. There was no final decision.

5. Appeal and Error— appealability—review of voluntary dismissal—not a final decision

The issue of whether an order that a voluntary dismissal would require court approval was not ripe for review because no final decision was made. The court did not approve or disapprove the settlement or the voluntary dismissal; it merely held that a review of the dismissal was necessary.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by plaintiffs from orders entered 13 and 19 February 2002 by Judge Ben F. Tennille in Wake County Superior Court. Heard in the Court of Appeals 19 May 2003.

Abrams & Abrams, P.A., by Douglas B. Abrams, for plaintiff-appellants.

Womble, Carlyle, Sandridge and Rice, P.L.L.C., by Burley B. Mitchell, Jr. and Christopher T. Graebe, for defendant-appellees.

EAGLES, Chief Judge.

Tony and Sarah Alexander, Roger and Penny Miller, Sharon Bell Rich and Donny and Debra Williams ("plaintiffs") appeal from orders by the trial court entered on 13 and 19 February 2002. Plaintiffs argue that the orders were erroneous because: (1) plaintiffs did not need court approval before withdrawing their motion for class certification; (2) plaintiffs were not required to give notice of their intention to withdraw the motion for class certification; (3) the trial court did

not have the authority to force plaintiffs and their attorneys to submit information regarding their contact with the media; (4) the trial court did not have authority to force plaintiffs' attorney to appear before another court to show cause; and (5) plaintiffs' voluntary dismissal of their case against one defendant did not require the trial court's approval. After careful review of the record, briefs and arguments of counsel, we dismiss this appeal as interlocutory and not affecting a substantial right.

Plaintiffs here purchased automobiles from various dealerships in North Carolina. The Alexanders bought a 1995 Jeep sport utility vehicle from defendant Hickory Automall. The Millers bought a 1996 Dodge truck from defendant Empire Chrysler Dodge Jeep Eagle on 17 January 1998. Plaintiff Sharon Bell Rich bought a 1996 Dodge Grand Caravan from defendant YSU Automotive on 28 November 1997. Donny and Debra Williams purchased a 1996 Dodge Ram pickup truck from Benson Ford-Mercury, Inc. on 6 November 1996. All of these vehicles had been sold to an original owner and repurchased by defendant Chrysler because of defects in the vehicles. Plaintiffs contend that the vehicles were sold to them without disclosure about the vehicles' defects or notice that the vehicles had been repurchased by the dealers.

Plaintiffs filed suit against defendants claiming negligence by defendants, unfair and deceptive trade practices and requesting punitive damages. In the complaint, plaintiffs requested the trial court to certify a class of plaintiffs and a defendant class composed of dealerships.

Plaintiffs moved for certification of a plaintiff class and a defendant class by a separate motion on 22 March 2001. Defendants DaimlerChrysler Corporation and DaimlerChrysler Motors Corporation moved to dismiss all plaintiff's requests and allegations regarding a class action. On 12 June 2001, the case was transferred to the Special Superior Court for Complex Business Cases.

On 7 November 2001, plaintiffs notified defendants that plaintiffs were withdrawing their request and motion for certification as a class. Defendants objected to plaintiffs' withdrawal. Defendants argued that plaintiffs could not withdraw their request for class certification unless plaintiffs received the trial court's approval. Also, defendants stated that some type of notice to putative class members was required before the class certification motion could be withdrawn.

Plaintiffs filed a request to amend their complaint on 20 November 2001 so that the class action language could be removed. Defendants DaimlerChrysler Corporation and DaimlerChrysler Motors Corporation filed motions for summary judgment against all of the plaintiffs individually. A document entitled "Disclosure Notice" was attached to each motion filed against the individual plaintiffs. The Disclosure Notice listed the repairs performed on each plaintiff's vehicle and contained the purchasing plaintiff's signature.

On 8 September 2002, plaintiffs settled their claims against Defendant Auto, USA, which operates as Empire Chrysler Jeep Dodge Eagle. Plaintiffs gave notice of the settlement and also voluntarily dismissed their claims against Empire with prejudice.

The trial court ordered that plaintiffs could not withdraw their request for a class certification, amend their complaint to delete the request for class certification or voluntarily dismiss their claims against any defendant without express approval from the trial court. The trial court held that if the court did not have an opportunity to review class certification withdrawals, class plaintiffs could prejudice other members of the putative class by withdrawing without notifying the other class members. The trial court then allowed plaintiffs to withdraw the request for class certification. However, the trial court required both plaintiffs and defendants to submit affidavits detailing any contact with the media regarding this case. Also, all parties were ordered to submit a proposed plan of notification designed to notify all potential class members who believed that plaintiffs represented the other members' interests. Plaintiffs and defendants DaimlerChrysler Corporation and DaimlerChrysler Motors Corporation submitted a notification plan. The trial court has not decided what type of notification to potential class members is appropriate in its 19 February 2002 order or in any other order.

Defendants also requested immediate contempt sanctions against plaintiffs' counsel H.C. Kirkhart on 8 November 2001. Kirkhart had been enjoined from soliciting prospective clients from customer lists and other information he received as part of discovery against DaimlerChrysler. Defendants alleged that Kirkhart solicited clients in violation of that injunction. Kirkhart responded to defendants' allegations by stating that any solicitation that he participated in took place when the information was a matter of public record or otherwise when the injunction was not effective. The State Bar conducted an investigation of Kirkhart's activities and found no violation of the Rules of Professional Conduct. By an order on 13 February 2002, the

trial court instructed Kirkhart to appear before the trial judge that issued the injunction and show cause why he should not be held in contempt for violating the injunction. In its 13 February 2002 order, the trial court did not hold Kirkhart in contempt or force him to end his representation of plaintiffs. No hearing has yet been held by the trial court that originally issued the injunction against Kirkhart. Plaintiffs appeal from the trial court's orders entered on 13 and 19 February 2002.

We note that a party cannot appeal an interlocutory order by the trial court unless the order affects a substantial right. G.S. § 1-277 (2001). A judgment or order is considered interlocutory if it is not a "final determination of the rights of the parties." G.S. § 1A-1, Rule 54(a). An appeal may only arise from a final determination of all the parties' claims by the trial court. G.S. § 1A-1, Rule 54(b). Also, G.S. § 1-271 states that "[a]ny party aggrieved may appeal . . . ." However, a party is considered to be aggrieved only if the party's "rights have been directly and injuriously affected by the action of the court." *N.C. Trust Co. v. Taylor*, 131 N.C. App. 690, 693, 508 S.E.2d 809, 811 (1998) (quoting *Culton v. Culton*, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990)).

[1] Plaintiffs' first argument asserts that the trial court erred by holding that plaintiffs were required to receive the trial court's approval before plaintiffs could withdraw their request for class certification. Plaintiffs and defendants dispute the applicability of Rule 23 of the North Carolina Rules of Civil Procedure:

> A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

G.S. § 1A-1, Rule 23(c). Plaintiffs argue that the requirement of court approval outlined in Rule 23(c) only applies after a request for class certification has been granted and does not apply to the situation here where class certification has only been requested. Here, the trial court found that plaintiffs were required to have court approval before they could withdraw their request for class certification by amendment of their complaint or by a separate motion. After analyzing the possible negative effects on potential members of the class lawsuit, the trial court also stated in its order that withdrawal of the class claims was justified. The trial court granted plaintiffs the relief they sought by allowing the withdrawal of the class claims. As a

result, plaintiffs are not "parties aggrieved" who are allowed to appeal this issue. Accordingly, plaintiffs' first assignment of error is overruled.

[2] Plaintiffs contend that the trial court erred by requiring plaintiffs to notify potential members of the lawsuit class that plaintiffs had withdrawn their request for class certification. Plaintiffs argue that notification of putative members of the class is not necessary because Rule 23(c) does not apply in this instance. Plaintiffs contend that no prejudice could affect possible class members if the class certification request was voluntarily withdrawn. We decline to address plaintiffs' arguments on this issue for two reasons. First, no final decision has been made on what type of notice will be proper in this case. According to Rule 54, appellate review is not proper because the trial court has not issued a final decision on notice. Second, this purported error has not been preserved for appellate review according to N.C.R. App. P. 10(b). During the trial court hearing, plaintiffs agreed with defendants that some type of notice to the putative class was fair and necessary before the class certification was withdrawn in this case. Therefore, plaintiffs' second assignment of error has no merit and is overruled.

[3] Plaintiffs also dispute the trial court's authority to order both parties to submit affidavits about the parties' contacts with the media. Plaintiffs argue that this information was irrelevant to the trial court's decision. During the trial court hearing, defendants presented evidence of plaintiffs' extensive contacts with various members of the media. The trial court found that "[t]he existence of that publicity substantially increases the likelihood that there are absent class members who may be relying on the class representatives to pursue their claims." The issue of notification is tied to plaintiffs' contacts with members of the media. However, since the trial court has not made a final decision regarding what notification should be given to the putative plaintiff class, this issue may not be properly appealed. This assignment of error is dismissed.

[4] Plaintiffs' fourth argument refers to the trial court's holding in the 13 February order that plaintiffs' attorney Kirkhart was required to attend a show-cause hearing. The trial court did not decide whether or not Kirkhart had violated a court order and should be held in contempt of court. Instead, the court referred Kirkhart to the judge who signed the original order that he was accused of violating. Since the trial court made no final decision on this matter, it was not ripe for appeal. Plaintiffs' fourth assignment of error is overruled.

[5] Plaintiffs assign error to the trial court's holding that the voluntary dismissal of the Millers' claims against defendant Empire would require court approval. Again, no final decision has been made on this issue in the order. The trial court did not approve or disapprove the settlement agreement or voluntary dismissal; it held that a review of the dismissal was necessary. Accordingly, this issue was not properly appealed.

For the reasons stated, this appeal is dismissed. Defendants Hickory Automall and YSU Automotive's motion to dismiss this appeal based upon appellate rule violations is denied. Defendants DaimlerChrysler Corporation and DaimlerChrysler Motors Corporation's motion to dismiss this appeal as interlocutory is granted, but their request for payment of attorney fees is denied.

Dismissed.

Judge BRYANT concurs.

Judge LEVINSON concurs in part and dissents in part.

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

While I agree with the majority's dismissal of plaintiffs' appeal, I respectfully dissent from the denial of defendants' motion for attorney fees.

Under N.C.R. App. P. 34, "Frivolous appeals; Sanctions" this Court is authorized under certain circumstances to impose sanctions, including attorneys' fees, upon a party:

> (a) A court of the *appellate division may . . . impose a sanction* against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:
>
> (1) the appeal was *not well grounded in fact and warranted by existing law or a good faith argument for the extension*, modification, or reversal of existing law;
>
> . . . .
>
> (b) A court of the appellate division may impose one or more of the following sanctions:
>
> . . . .

> c. reasonable expenses, including reasonable attorney fees . . . .

N.C.R. App. P. 34(a)(1); (b)(2)c (emphasis added). I conclude that in the present case plaintiffs' interlocutory appeal was "not . . . warranted by existing law or a good faith argument for the extension, modification, or reversal" of existing law. Accordingly, I would grant defendants' Rule 34 motion for sanctions, and would require plaintiffs to pay defendants' reasonable attorney fees. *See Steadman v. Steadman*, 148 N.C. App. 713, 714, 559 S.E.2d 291, 292 (2002) (imposing Rule 34 sanctions, including attorney's fees, where "this Court is constrained to conclude that the appeal was taken for an improper purpose so as to cause unnecessary delay and needless increase in the cost of this litigation").

Regarding plaintiffs' appeal from a holding that they would be required to provide notice to potential class members of their intention to withdraw their motion for class certification, I note plaintiffs *conceded* during the motions hearing in the trial division it would need to provide some notice to putative class members. Further, the trial court's ruling is entirely interlocutory; at this juncture the trial court has merely memorialized its intention to require notification and has not even ruled on the type of notice it will require. Interestingly, plaintiffs rely on defendants' estimate of $100,000 to provide notice as a ground for appeal. Specifically, plaintiffs contend that the outlay of this amount of money affects a substantial right. Again, however, we have no idea of what type of notice the trial court will require—or the attendant cost—or upon which parties this burden might fall. Perhaps the cost will be $10,000. Maybe $1,000,000. We cannot know at this point. Plaintiffs also contend that the trial court's order requiring them to provide affidavits related to their contacts with the media, consumer groups, trade associations or attorneys affects a substantial right that would be lost without relief from this Court, namely their ability to "further investigate the long-standing pattern of corporate misconduct by Appellees DaimlerChrysler." The force of this argument is completely lost, however, when one considers the fact plaintiffs have previously *voluntarily complied* with this directive of the trial court. Further, in a related assignment of error, plaintiffs contend the trial court erred in holding that court approval of the Millers' voluntary dismissal of claims against Empire Dodge was required. As the majority opinion correctly points out, however, the trial court has not yet approved or disapproved the voluntary dismissal. The gravamen of plaintiffs' appeal—that the trial court lacks

the authority to require notification under the facts of this case, and that court approval of a voluntary dismissal is not required—will not be lost by a later, proper appeal.

Plaintiffs also purport to appeal from the trial court's order referring defendants' Show Cause motion to Judge Stafford G. Bullock, who was designated by Judge Donald W. Stephens, Senior Resident Superior Court Judge, to hear matters related to this issue. Plaintiffs' contention, that the order of the trial court referring the Show Cause to another judge affects a substantial right, is patently frivolous. The order was a routine administrative transfer which determined no substantive issue in the case, and affected no substantial right. *See Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 686, 513 S.E.2d 598, 600 (1999), *aff'd*, 351 N.C. 349, 524 S.E.2d 804 (2000) (Court dismisses as interlocutory defendant's appeal from discovery order that did "not impose sanctions or adjudge defendant to be in contempt[,]" and rejects argument that order "deprives defendant of the substantial right to a fair and impartial adjudication of the class certification issue"). The trial court's order itself states, "[w]hether the contempt, if any, is civil or criminal is a determination this Court will leave to the judge who hears the motion."

Plaintiffs' appeal has needlessly extended this litigation and prevented the trial court from conducting, *inter alia*, a hearing on defendants' Show Cause motion. It is self-evident this appeal does not affect any substantial rights. I would grant defendants' motion for attorney fees.

STATE OF NORTH CAROLINA v. WELDON EUGENE THORNTON, DEFENDANT

No. COA02-303

(Filed 1 July 2003)

1. Evidence— hearsay—medical diagnosis or treatment exception

The trial court did not commit plain error in a first-degree rape and taking indecent liberties with a minor case by failing to instruct the jury that statements made by the victim during interviews with a licensed clinical social worker were not substantive evidence, because the statements were admissible under N.C.G.S. § 8C-1, Rule 803(4) when the victim made the statements to the social worker with the understanding that they would lead

to medical diagnosis or treatment and that the statements were reasonably pertinent to diagnosis or treatment.

2. Evidence— sexual abuse—improper opinion testimony—motion for mistrial

The trial court did not abuse its discretion or commit plain error in a first-degree rape and taking indecent liberties with a minor case by failing to declare a mistrial sua sponte, or alternatively inquiring further of the jury whether it could disregard certain testimony given by a clinical social worker that was stricken by the court, because: (1) the trial court gave prompt and emphatic instructions to disregard the social worker's statement; and (2) there is a presumption that the jury has complied with the trial court's instructions.

3. Constitutional Law— effective assistance of counsel—motion for appropriate relief

Although defendant's motion for summary disposition of his motion for appropriate relief is denied, the motion for appropriate relief alleging ineffective assistance of counsel is remanded to the trial court for an evidentiary hearing and ruling by that court.

Appeal by defendant from judgment entered 14 September 2001 by Judge Evelyn W. Hill in Alamance County Superior Court. Heard in the Court of Appeals 8 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General Jill B. Hickey, for the State.

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

HUDSON, Judge.

Defendant appeals judgments entered upon jury verdicts convicting defendant of one count of first degree rape and one count of taking indecent liberties with a minor. For the reasons discussed below, we conclude there was no error. We remand defendant's Motion for Appropriate Relief to the superior court for the taking of evidence and such further proceedings as it deems necessary.

Factual Background

The child victim, BM, testified at trial. She was eight years old when she testified, and seven years old when the events at issue

occurred. BM testified that defendant worked across the street from her father's house, and that one day defendant came to the house and told her to go into a room. BM testified that she "walked in there" and defendant "told me to pull down my skirt and my underwear, and so I did. And, umm, he did, too. And he got right on top of me. And umm, he started going up and down, and he kissed me."

BM also testified that on another occasion, while she was at defendant's house, "he done the same thing." When asked exactly what defendant did, BM answered that defendant put his "private part" in her "private part," and her testimony further clarified her understanding of a "private part."

BM further testified that on another occasion, when defendant was taking BM home from church, defendant turned off onto a dirt road, stopped the truck they were traveling in, and told her they were looking for "deers" in the field. BM went on to testify that "He got out of the, out on his side. He went around. And, umm, and then when he got around to my side, he opened the door. And he pulled down my, my skirt and my underwear. And then he got on top of me and got up and down, then he kissed me again."

BM also testified that defendant, on yet another occasion, put his "private part" in her mouth, though BM could not remember when or where this happened.

Danny Walker, a juvenile investigator with the Alamance County Sheriff's Department, testified that he investigated these allegations upon referral of the case from Orange County Department of Social Services. He testified that, during an interview, BM told him about the incidents involving defendant. Upon defendant's motion, the trial court instructed the jury that Mr. Walker's testimony could only be used to corroborate BM's testimony.

On 27 October 2000, Dr. Adrea Theodore, a pediatrician at the University of North Carolina School of Medicine, conducted a physical examination of BM at the Center for Child and Family Health. Dr. Theodore was tendered and accepted at trial as an expert in "child medical examinations and pediatric medicine." She testified that she observed a "notch" on BM's hymen that she considered to be a "significant finding," which was "suspicious for penetrating trauma." When asked whether in her opinion BM exhibited signs consistent with being sexually abused, Dr. Theodore testified that "based on our physical exam which shows a finding that's suspicious for penetrating trauma, that is suggestive of sexual abuse."

On 27 October 2000 and 3 November 2000, Donna Potter, a licensed clinical social worker with the Duke University Department of Psychiatry and the Center for Child and Family Health, interviewed BM. Ms. Potter testified at trial. When the prosecution began to question her about her interviews with BM, defense counsel objected and asked for an instruction limiting Ms. Potter's testimony regarding BM's out-of-court statements to corroboration. The court overruled the objection on the grounds that an expert is allowed to testify to matters relied upon in forming an opinion, stating that:

> If she relied upon them in making, in forming her opinion, I assume she knew she was going to give and they're admissible. If we get to the point that she is not asked the appropriate opinion question and doesn't say she relied upon it, then we'll strike them all.

Later in her testimony, the prosecutor asked Ms. Potter whether BM exhibited any characteristics of a sexually abused child. At the point, the court interrupted the examination and stated:

> I want to be sure that we're very clear here, Counselor . . . . That this witness may testify about the characteristics in general of sexually abused children, which she has not done yet. Having done that, she may then testify about what symptoms, similar symptoms that she may have observed in this child. But she may not then take the next step. So if she's going to testify about symptoms in general, if she's going to testify about symptoms this child exhibited which are symptoms that are generally seen, let's get the generally seen symptoms testified about first.

After the prosecutor elicited testimony about symptoms of child sexual abuse in general, the witness testified that, "My opinion is that [BM] has absolutely been sexually abused." The court instructed the jury to disregard the statement, and reminded the witness that the question was whether the child showed symptoms that were consistent with abuse. The witness answered, "Yes, she did."

At the conclusion of the direct examination of Ms. Potter, the prosecution played a videotape of a portion of Ms. Potter's second interview with [BM]. Prior to playing the videotape, defense counsel stipulated to its authenticity and lodged no other objection to the tape. After the tape played, defense counsel stated that he did not object to its admission into evidence.

Argument

[1] Defendant first argues that the trial court committed plain error by not instructing the jury that statements made by the victim during interviews with Ms. Potter were not substantive evidence. We disagree.

"In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). Our Supreme Court has emphasized that:

> the plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, 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. Black, 328 N.C. 191, 200-01, 400 S.E.2d 398, 404 (1991) (internal citations and quotation marks omitted).

The medical diagnosis or treatment exception to the hearsay rule provides as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ***
>
> (4) Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4). "Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for pur-

poses of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000). In *Hinnant*, our Supreme Court reaffirmed the inherent reliability of evidence admitted under Rule 803(4), but required that "the proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287, 523 S.E.2d at 669. In ascertaining the intent of the declarant, "all objective circumstances of record surrounding declarant's statements" should be considered. *Id.* at 288, 523 S.E.2d at 670.

In *Hinnant*, a child sexual abuse case, the Court found that there was no evidence that the child victim had a treatment or diagnostic motive when speaking to a clinical psychologist specializing in child sexual abuse. The circumstances that led the Court to this conclusion were: the record did not disclose that anyone explained to the child the medical purpose of the interview or the importance of truthful answers; the interview was not conducted in a medical environment; the interview consisted of a series of leading questions by the psychologist who pointed to anatomically correct dolls and asked whether anyone had performed various acts with the child; and the child victim did not meet with the psychologist until two weeks after her initial medical examination. *Id.* at 290, 523 S.E.2d at 671. Based upon the foregoing, the Court reversed the decision of this Court and held that the child victim's interview statements were not admissible under Rule 803(4).

The present case is easily distinguishable from *Hinnant*. BM's medical and psychological evaluations took place at the Center for Child and Family Health in Durham. The Center utilizes a team approach to the diagnosis and treatment of sexually abused children. Dr. Theodore, who conducted the medical examination of BM, and Social Worker Potter, who conducted the interviews, work in the same building and their offices are just doors apart. Both the physical examination and the initial interview were conducted on 27 October 2000.

Potter testified that at the beginning of the interview she spent time making sure that BM understood that she was "actually in a doctor's office." Potter further testified that BM "was very aware of the fact that she was in a doctor's office," and that Potter "worked with a

doctor and that my job is to help her." Potter explained to BM the importance of being truthful during the interview and testified that BM was "very clear about that." In addition, Potter asked BM very general questions about her home life, and "very general and non-leading" questions about any touching that may have occurred.

Given these circumstances, we believe that the trial court properly concluded that the statements were admissible, since BM made her statements to Potter with the understanding that they would lead to medical diagnosis or treatment and that the statements were reasonably pertinent to diagnosis or treatment. Thus, Potter's testimony as to BM's interview statements were admissible under Rule 803(4), and this assignment of error is overruled.

[2] Defendant next argues that the trial court committed plain error in not declaring a mistrial *sua sponte*, or alternatively inquiring of the jury whether they could disregard certain testimony given by Potter that was stricken by the court. In the presence of the jury, the prosecutor asked Potter whether BM exhibited any characteristics of a sexually abused child. At that point, the court interrupted the examination to clarify that the witness could testify about abuse in general and about the child's symptoms. After the prosecutor elicited testimony about symptoms of child sexual abuse in general, the following exchange took place:

Q. Based on your formal training in this field and your practical experience, your opportunity to observed [sic] and to talk to [BM], your consultation with Dr. Theodore, other licensed clinical social workers and the team, did you form an opinion as to whether or not [BM] exhibited characteristics of a sexually abused child?

DEFENSE COUNSEL: Objection.

A: Yes, I did.

COURT: Over-ruled.

Q: What is that opinion?

A: My opinion is that [BM] has absolutely been sexually abused.

DEFENSE COUNSEL: Objection.

COURT: Motion to strike.

DEFENSE COUNSEL: Yes, ma'am.

COURT: Ladies and gentlemen, you are to disregard the statement made by the witness. It was not responsive to the question. The question was whether or not the child exhibited, whether or not [BM] exhibited characteristics consistent with known symptoms and characteristics of sexually abused children.

WITNESS: Yes, she did.

COURT: And for the reason that, ladies and gentlemen, because I know I sounded very sharp when I said that. The reason for that is there are only twelve people in this room that can answer that question. Remember I told you that. Only twelve people in the room can answer that question. And even an expert in North Carolina law cannot answer that question. That's the jury province. So you didn't do anything wrong. You know, you just, you did fine. It's just that in North Carolina, those twelve people decide that issue.

A motion for a mistrial is addressed to the sound discretion of the trial judge and is only appropriate when there are such serious improprieties as would make it impossible for the defendant to have a fair trial and impartial verdict under the law. *Black*, 328 N.C. at 200, 400 S.E.2d at 403. "[A]bsent a showing of gross abuse of that discretion, the trial court's ruling will not be disturbed on appeal." *State v. Roland*, 88 N.C. App. 19, 26, 362 S.E.2d 800, 805 (1987), *affirmed*, 322 N.C. 469, 368 S.E.2d 385 (1988). "It is well-settled that where the trial court withdraws incompetent evidence and instructs the jury not to consider that evidence, any prejudice is ordinarily cured." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). Additionally, "our legal system through trial by jury operates on the assumption that a jury is composed of men and women of sufficient intelligence to comply with the court's instructions and they are presumed to have done so." *State v. Glover*, 77 N.C. App. 418, 421, 335 S.E.2d 86, 88 (1985). On appeal, an appellate court presumes that juries follow the trial court's instructions. *State v. Richardson*, 346 N.C. 520, 534, 488 S.E.2d 148, 156 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 652 (1998).

Here, we see no abuse of the trial court's discretion. First, no motion for a mistrial was made for the court to rule on so defendant

has argued this assignment of error must be analyzed under the plain error rule. Second, immediately after Potter's testimony that in her opinion BM had "absolutely been sexually abused," the trial court instructed the jury that Potter's answer was nonresponsive to the question asked and instructed the jury to disregard that testimony. The trial court then apologized to the jury for sounding so "sharp" and explained to the jury that under North Carolina law, only the jury could make that determination. Given the trial court's prompt and emphatic instructions to disregard Potter's statement, as well as the presumption that the jury has complied with the court's instructions, we conclude that the trial court did not abuse its discretion or commit plain error by not *sua sponte* declaring a mistrial or inquiring further of the jury whether it could disregard the testimony.

Motion for Appropriate Relief

[3] On 6 March 2003, defendant filed a Motion for Appropriate Relief ("MAR") in this Court, and on 9 May 2003, defendant filed a Motion for Summary Disposition of his Motion for Appropriate Relief. In his MAR, defendant alleges that he was denied effective assistance of counsel in violation of his state and federal constitutional rights in that his trial counsel: was unprepared; failed to seek the assistance of a medical and psychological expert; refused to utilize the results of an extensive investigation of a related case conducted by Assistant Public Defender Susan Seahorn of Defender District 15B; and that had his trial counsel employed the trial strategy suggested by Ms. Seahorn, the jury would have acquitted defendant.

The State filed a response, indicating that, while the State does not concede that the factual allegations contained in defendant's MAR are true or that defendant was denied effective assistance of counsel, it appears that it is appropriate for this Court to remand to the superior court for an evidentiary hearing on defendant's MAR. For the reasons explained here, we deny the Motion for Summary Disposition and remand the MAR to the superior court for an evidentiary hearing and ruling by that court.

G.S § 15A-1418(a) provides that a motion for appropriate relief on grounds found in section 15A-1415 may be made in the appellate division when a case is in the appellate division for review. One ground found in section 15A-1415(b), "the conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina," includes defendant's claim of ineffective assistance of counsel. *State v. Watkins*, 89 N.C. App. 599, 608, 366 S.E.2d 876,

881, *disc. review denied*, 323 N.C. 179, 373 S.E.2d 123 (1988). G.S. § 15A-1418(b) provides:

> When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

G.S. § 15A-1418(b) (2001). Although the statute authorizes the appellate court to initially determine a motion for appropriate relief, *State v. Jolly*, 332 N.C. 351, 420 S.E.2d 661 (1992), where the materials before the appellate court, as in this case, are insufficient to justify a ruling, the motion must be remanded to the trial court for the taking of evidence and a determination of the motion, *State v. Wiggins*, 334 N.C. 18, 431 S.E.2d 755 (1993).

No error; Motion for Appropriate Relief remanded.

Judges MARTIN and STEELMAN concur.

STATE OF NORTH CAROLINA v. JOHN WESLEY HOOPER

No. COA02-869

(Filed 1 July 2003)

1. Appeal and Error— probation revocations—appeal to Court of Appeals rather than superior court

Defendant's appeal of his probation revocation judgments in district court was properly made to the Court of Appeals rather than to the superior court, because: (1) the legislative intent is to allow district courts to act as superior courts in disposing of guilty or no contest pleas in cases involving Class H or I felonies; and (2) appeals in these cases should be treated as though they were coming from the superior court even though they were actually taken in district court.

2. Probation and Parole— probation revocation—credit for time spent in confinement

The trial court erred in a probation revocation case by failing to give defendant credit for time spent in confinement, and this issue is remanded back to the trial court for a determination of any credits to which defendant may be entitled.

3. Sentencing— probation revocation—consecutive sentences

The trial court did not err by imposing consecutive sentences upon defendant's probation revocation when the original eight probation judgments did not indicate that the sentences were to run consecutively, because N.C.G.S. § 15A-1344 permits a judge to impose a consecutive sentence when a suspended sentence is activated without regard to whether the sentence previously imposed ran concurrently or consecutively.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 29 August 2000 by Judge Laura J. Bridges in Transylvania County District Court. Heard in the Court of Appeals 22 April 2003.

Roy Cooper, Attorney General, by P. Bly Hall, Assistant Attorney General, for the State.

Haley H. Montgomery for defendant-appellant.

STEELMAN, Judge.

Defendant, John Wesley Hooper, appeals eight judgments revoking his probation and activating six to eight months sentences in each case. For the reasons discussed herein, we affirm in part and remand in part.

On 28 August 2000, defendant pled guilty to eight counts of felony forgery and eight counts of felony uttering in the Transylvania County District Court upon eight informations. Eight separate judgments were entered, all placing defendant on probation. On 22 January 2002, defendant's probation officer filed violation reports in each case. Defendant admitted all violations on 19 March 2002 in the Transylvania County District Court. The judge revoked his probation in each case and defendant was ordered imprisoned for eight consecutive six to eight month sentences. Defendant appeals.

I.

[1] In his first assignment of error, defendant argues that the trial court erred in finding that defendant had given notice of appeal to this Court rather than to the Transylvania County Superior Court. We hold that the appeal to this Court is proper.

The North Carolina Constitution provides that this Court "shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. Art. IV, § 12. "The General Assembly shall by general law provide a proper system of appeals." *Id.*

The general rule governing appeals of probation revocations is found in section 15A-1347 of the North Carolina General Statutes, "[w]hen a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a *de novo* revocation hearing." N.C. Gen. Stat. § 15A-1347 (2001). This statute was enacted in 1977. At the time of its enactment, the district court did not have jurisdiction to make a final disposition of felony cases. In 1995, the General Assembly modified the jurisdiction of the district court to allow it to accept guilty and no contest pleas in Class H and I felonies.

Section 7A-272 provides, in pertinent part:

> (c) With the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or I felony if:
>
> (1) The defendant is charged with a felony in an information filed pursuant to G.S. 15A-644.1, the felony is pending in district court, and the defendant has not been indicted for the offense; or
>
> (2) The defendant has been indicted for a criminal offense but the defendant's case is transferred from superior court to district court pursuant to G.S. 15A-1029.1.
>
> (d) Provisions in Chapter 15A of the General Statutes apply to a plea authorized under subsection (c) of this section as if the plea had been entered in superior court, so that a district court judge is authorized to act in these matters in the same manner as a superior court judge would be authorized to act if the plea had been entered in superior court, and appeals that are authorized in these matters are to the appellate division.

N.C. Gen. Stat. § 7A-272 (2001). The provisions of section 15A-1347 appear to conflict with those of section 7A-272.

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993).

Here, the statute is not ambiguous. Section 7A-272(d) conflicts with section 15A-1347, which provides that a defendant appealing a probation revocation in the district court should address the appeal to the superior court. When conflicting statutes are construed, the specific controls over the general if the statutes cannot be reconciled. *See Krauss v. Wayne County Dept. of Social Services*, 347 N.C. 371, 493 S.E.2d 428 (1997). Section 7A-272(d) creates a specific exception to the general rule that all felony cases must be finally disposed of in the superior court. The purpose of the provisions is clear. It allows for Class H and I felonies to be disposed of at an earlier stage of the proceedings. The specific procedures allowing for the handling of certain felonies in the district court override the general rule of section 15A-1347, which requires that appeals of probation revocations from the district court are to the superior court.

Further, our Supreme Court has held that when there are conflicting provisions in statutes, the most recent provision "represents the latest expression of legislative will and intent." *Adair v. Orrell's Mut. Burial Assoc.*, 284 N.C. 534, 541, 201 S.E.2d 905, 910, *appeal dismissed*, 417 U.S. 927, 41 L. Ed. 2d 231 (1974) (citations omitted). Section 15A-1347 was passed in 1977. Section 7A-272 was passed in 1995.

In addition, by the same bill that amended section 7A-272, 1995 (Reg. Sess. 1996), c. 725, § 6, our General Assembly enacted section 15A-1029.1, which provides:

> (a) With the consent of both the prosecutor and the defendant, the presiding superior court judge may order a transfer of the defendant's case to the district court for the purpose of allowing the defendant to enter a plea of guilty or no contest to a Class H or I felony.

(b) The provisions of Article 58 of this Chapter apply to a case transferred under this section from superior court to district court in the same manner as if the plea were entered in superior court. Appeals that are authorized in these matters are to the appellate division.

N.C. Gen. Stat. § 15A-1029.1 (2001). It is clear that the legislative intent was to allow district courts to act as superior courts in disposing of guilty or no contest pleas in cases involving Class H or I felonies. If such cases remained in the superior court, there is no question that the proper appeal would be to this Court. Section 7A-272 and 15A-1029.1 indicate that these specific cases will be treated "in the same manner as if the plea were entered in superior court." Thus, appeals in these cases should be treated as though they were coming from the superior court even though they were actually taken in district court.

The dissent accuses the majority of legislating rather than engaging in judicial interpretation, relying upon bills which were introduced, but not enacted, during the 2001 session. Senate Bill 819 (2001 session) was titled "An Act to Clarify That a Person Who Pleads Guilty or No Contest to a Class H or I Felony in District Court and Receives a Probationary Sentence Will Have Any Resulting Probation Violation hearing Held in District Court, and That an Appeal From a Subsequent Probation Revocation Will Be Heard in the District Court." The fact that the General Assembly failed to enact this bill should not be used by this Court as a basis for construing legislative intent. In light of the General Assembly's inaction, this Court is compelled to render a decision in the case that has been brought before it, based upon the applicable principles of statutory construction.

The cases of *State v. Killian*, 25 N.C. App. 224, 212 S.E.2d 419 (1975), and *State v. Golden*, 40 N.C. App. 37, 251 S.E.2d 875 (1979), are inapplicable to this case, having been decided prior to the enactment of the amendments to sections 7A-272 and 15A-1029.1 in 1996.

Defendant's appeal of his probation revocation judgments was properly made to this Court and not the superior court. This assignment of error has no merit.

II.

[2] In his second assignment of error, defendant argues the trial court erred in failing to give him credit for time spent in confinement. We agree.

Section 15-196.4 provides, in pertinent part, that "[u]pon sentencing or activating a sentence, the judge presiding *shall* determine the credits to which the defendant is entitled[.]" (Emphasis added). The judge activating defendant's sentences was required to make this determination. None of the eight judgments that activated defendant's sentences provided for *any* credit. Yet the record shows that defendant had been in custody for "quite awhile" at the time of his revocation hearing.

This issue is remanded back to the trial court for a determination of any credits to which defendant may be entitled.

III.

[3] In his third assignment of error, defendant argues the trial court erred in imposing consecutive sentences upon his probation revocation when the original probation judgments did not indicate that the sentences were to run consecutively. We disagree.

Defendant's argument focuses upon section 15A-1354(a) which provides that if the trial court does not specify whether multiple sentences are to run consecutively, they shall run concurrently. N.C. Gen. Stat. § 15A-1354(a) (2001). The eight probation judgments originally entered in the instant case did not state whether the judgments were consecutive or concurrent. The State argues that: (1) the clerk's minutes show that the judge directed for each of the original probation judgments to be consecutive; (2) this was not properly reflected in the judgments; (3) defendant acknowledged this at the revocation hearing; and (4) the trial judge amended the original eight judgments to reflect that the eight probation sentences were to run consecutively.

We hold that whether there was an error in the original probation judgments is not determinative of this issue. Rather, it is controlled by the provisions of section 15A-1344(d):

> A sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period unless the revoking judge specifies that it is to run consecutively with the other period.

N.C. Gen. Stat. § 15A-1344(d) (2001). In *State v. Paige*, 90 N.C. App. 142, 369 S.E.2d 606 (1988), this Court held that this statute permits a judge to impose a consecutive sentence when a suspended sentence

is activated without regard to whether the sentence previously imposed ran concurrently or consecutively. *See also State v. Campbell*, 90 N.C. App. 761, 370 S.E.2d 79, *appeal dismissed, rev. denied*, 323 N.C. 367, 373 S.E.2d 550 (1988). This assignment of error is without merit.

AFFIRMED IN PART; REMANDED IN PART.

Judge TYSON concurs.

Judge Wynn dissents.

WYNN, Judge dissenting.

Notwithstanding what may be a laudable judicial desire to avoid direct appeals of felony probation violations to superior court as required by N.C. Gen. Stat. § 15A-1347 (2002), the change in that statute is a task for our General Assembly, not the judiciary. Indeed, in two separate bills aimed at changing the law to allow for direct appeal of felony violations to the Court of Appeals, the General Assembly failed to make the changes to Section 15A-1347 that the majority seeks to make today by judicial fiat. *See* H.B. 1085, 2001 Reg. Sess., N.C. Gen. Assem.; S.B. 819, 2001 Reg. Sess., N.C. Gen. Assem. Neither this Court nor our Supreme Court is empowered—particularly in light of express legislative inaction—to rewrite the laws of this State, including the law duly enacted by our legislature and codified at N.C. Gen. Stat. § 15A-1347.

With clear and unequivocal language, Section 15A-1347 is the sole statute authorizing an appeal of the revocation of a probationary judgment by the district court. In pertinent part, Section 15A-1347 provides:

> When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing.

Furthermore, N.C. Gen. Stat. § 7A-271(b) (2002) provides that: "Appeals by the State or the defendant from the district court [in criminal actions] are to the superior court."

The indisputable purport of the foregoing statutes is that appeal to this Court under the circumstances *sub judice* would be proper

only *after* activation of a suspended probationary sentence by the superior court upon *de novo* review following appeal of the revocation of said probationary sentence by the district court. *See* N.C. Gen. Stat. §§ 15A-1347, 7A-271(b); *see also* N.C. Gen. Stat. § 7A-26 (2002) (establishing appellate jurisdiction of Court of Appeals); N.C. Gen. Stat. § 7A-27 (2002) (delineating appeals of right from the trial court division.).

In short, as in *State v. Killian*, 25 N.C. App. 224, 225, 212 S.E.2d 419, 420 (1975)—dismissing a criminal appeal from a district court judgment because the "constitutional and statutory structure of our General Court of Justice" directs that "appeals in *criminal* causes [from the district court] must go first to the superior court"—defendant's "appeal, *ex mero motu*, [must be] dismissed." *Id.*; *see also State v. Golden*, 40 N.C. App. 37, 40, 251 S.E.2d 875, 877 (1979) ("No appeal lies to [The] Court [of Appeals] from an order or judgment entered in a criminal action in the District Court.").

While I join with my colleagues in recognizing the merits of rewriting N.C. Gen. Stat. § 15A-1347, we are but judges not legislators. I believe we must follow the statute. Therefore, I am compelled to respectfully dissent.

SANDRA B. WILKINS, PLAINTIFF v. GUILFORD COUNTY, GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES, AND JOHN W. SHORE, DIRECTOR OF THE GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA02-1042

(Filed 1 July 2003)

1. Disabilities— Americans with Disabilities Act—Rehabilitation Act—negative side effects from increased dosage of medication—employment termination

The trial court did not err in an alleged unlawful employment termination case by granting summary judgment in favor of defendants even though plaintiff social worker contends there was a genuine issue of material fact concerning whether she suffered from a disability under the Americans with Disabilities Act (ADA) and the Rehabilitation Act based on alleged negative side effects from her increased dosage of attention deficit disorder

(ADD) medication, because: (1) there was no evidence that defendant was unable due to side effects from Adderall to perform a major life activity, i.e. work, that an average person could perform; (2) plaintiff made no requests for ADA accommodations based on ADD until the date she was recommended for termination; and (3) plaintiff had been taking the increased dosage of medication per day for at least a month prior to her first performance evaluation at the Department of Social Services on which she received the second-highest rating, indicating the use of drugs had no impact on her job performance and that other nondrug-related factors contributed to the decline in her work performance.

2. Civil Rights— section 1983 claim—property interest in employment

The trial court did not err in an alleged unlawful employment termination case by granting summary judgment in favor of defendants on plaintiff's section 1983 claim based on the Department of Social Services' (DSS) alleged failure to comply with the warning requirements set forth in Regulation 28 of the Guilford County Personnel Regulations dealing with disciplinary action including the dismissal of personnel, because there was no evidence that Regulation 28 was adopted with the same formality and characteristics of an ordinance, and plaintiff thus did not acquire a property interest in her employment with DSS.

Appeal by plaintiff from judgment filed 27 December 2001 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 19 May 2003.

Jerry R. Everhardt for plaintiff appellant.

County Attorney Jonathan V. Maxwell and Assistant County Attorney Kevin W. Whiteheart, for defendant appellees.

BRYANT, Judge.

Sandra B. Wilkins (plaintiff) appeals a judgment filed 27 December 2001 granting summary judgment in favor of Guilford County, Guilford County Department of Social Services (DSS), and DSS director John W. Shore (Shore) (collectively defendants).

In her complaint filed 18 December 2000, plaintiff, a former DSS employee, alleged that the performance deficiencies cited by DSS as

grounds for her 14 January 2000 dismissal were caused by side effects from an increased dosage of the drug Adderall prescribed to her for attention deficit disorder (ADD). Consequently, plaintiff claimed DSS' actions were in violation of 42 U.S.C. § 12101, *et seq.* of the Americans with Disabilities Act (ADA), 29 U.S.C. § 794 of the Rehabilitation Act of 1973, N.C. Gen. Stat. § 168A-5 (North Carolina's Persons with Disabilities Protection Act), 42 U.S.C. § 1983 for due process violations under the United States and North Carolina constitutions, and the public policy of this State. Defendants filed an answer dated 16 February 2001 denying liability, accompanied by a motion to dismiss under, *inter alia*, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Following discovery, defendants again moved to dismiss the case and, in the alternative, moved the trial court for summary judgment in their favor.

Medical History

The pleadings, depositions, and affidavits filed in this action reveal that plaintiff consulted her physician, Dr. Mary John Baxley, in December 1997 claiming she was suffering from ADD. Dr. Baxley accepted plaintiff's "self-report [of ADD] as [her] diagnosis [of plaintiff]" because plaintiff "knew quite a bit about attention deficit disorder, and it seemed to be reasonable." Dr. Baxley initially prescribed plaintiff an anti-depressant but placed her on Ritalin in May 1998. In May 1999, Dr. Baxley referred plaintiff to psychiatrist Dr. Brian Andrew Farah with "an existing diagnosis" of ADD and a history of depression. At this time, plaintiff was not using Ritalin. Plaintiff told Dr. Farah "she had responded to Ritalin in the past and wanted to go back on stimulants." Dr. Farrah recommended that plaintiff start using Adderall instead of Ritalin because, in his opinion, "there[] [is] a rebound effect . . . often see[n] when Ritalin runs out" that is not as severe with Adderall. The initial dosage prescribed to plaintiff was for ten milligrams a day, but Dr. Farah instructed plaintiff to monitor the effect of the Adderall according to the ADD symptoms she was experiencing and allowed her to increase her dosage up to 40 milligrams a day if needed. During a follow-up visit on 14 June 1999, plaintiff told Dr. Farah she was using the maximum dosage prescribed by him. She reported that the "target symptoms" of "[c]oncentration, focus, ability to stay on task, inattentiveness, [and] distractibility [sic]" had improved and that she was not experiencing any negative side effects. Plaintiff also indicated she was experiencing fewer mood swings. Based on this information, Dr. Farah continued plaintiff's prescription for Adderall at 40 milligrams per day.

Plaintiff saw Dr. Farah again in October 1999, at which time plaintiff reported several stress factors affecting her such as a loan agreement entered into by her husband and her mother's suffering from Alzheimer's disease. Dr. Farah noted the increased stress level, but because the Adderall appeared to be effective and plaintiff neither indicated nor exhibited any side effects, Dr. Farah continued plaintiff on the same dosage. It was only after plaintiff's employment was terminated that she complained to Dr. Farah that the Adderall was affecting her mood and consequently must have impacted her work performance. Following the filing of plaintiff's complaint, plaintiff's expert, Dr. C. Keith Connors, evaluated plaintiff and concluded that she probably suffered from attention deficit hyperactivity disorder (ADHD).

Work History

Plaintiff had been employed by the County since 1983. On 1 May 1999, plaintiff transferred to and began working as a social worker in the DSS adult services unit. On 19 July 1999, plaintiff received an initial performance evaluation with a score of four out of five points, five being the highest rating. Five months later, however, plaintiff's performance score had slipped to a two, meaning her "work [was] below job expectations in several areas." Following this evaluation, plaintiff's supervisor, on 17 December 1999, recommended plaintiff's dismissal from DSS based on insubordinate behavior, unwillingness or inability to get along with people, and a lack of compassion and sensitivity toward clients. When plaintiff was notified of this recommendation, she, for the first time, "thought [that] maybe the medicine [(Adderall)] was[] [not] working like [it should]" and requested accommodations for her ADD. Plaintiff also requested and was granted a conference hearing with Shore to contest the recommendation. In a letter dated 3 January 2000, plaintiff informed Shore that her ADD medication could cause "loss of appetite, nervousness, [and] difficulty sleeping." In support of her claim, plaintiff, at the conference hearing, presented a list of possible side effects from Adderall as given to her by her pharmacy but did not argue that the medication caused the deficiencies cited in the recommendation for dismissal. Shore subsequently terminated plaintiff's employment with DSS effective 14 January 2000.

At the hearing on defendants' motions to dismiss and for summary judgment, plaintiff conceded she had no claim against defendants under N.C. Gen. Stat. § 168A-5, which relates to employment dis-

crimination, and no claim against Shore in his individual capacity under the ADA and the Rehabilitation Act but maintained she was entitled to relief under the remaining causes of action raised in her complaint. Finding that there were no genuine issues of fact and that defendants were entitled to judgment as a matter of law, the trial court granted the summary judgment motion on 27 December 2001.

The dispositive issues are whether: (I) plaintiff suffered from a disability and (II) plaintiff had a property interest in her employment.

I

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2001). The burden is on the summary judgment movant to establish the lack of any triable factual issue. *Trexler v. Norfolk S. Ry. Co.*, 145 N.C. App. 466, 469, 550 S.E.2d 540, 542 (2001).

> The movant may meet its burden by: (1) demonstrating that an essential element of the plaintiff's claim is nonexistent; (2) establishing through discovery that the plaintiff[] cannot produce evidence to support an essential element of the claim; or (3) showing that plaintiff cannot survive an affirmative defense, such as governmental immunity.

Id.

[1] Plaintiff first argues the trial court erred in granting defendants' motion for summary judgment because there were genuine issues of material fact as to whether she suffered from a disability under the ADA and the Rehabilitation Act.

The ADA prohibits discrimination against qualified individuals with a disability, 42 U.S.C. § 12112(a) (2003), disability being defined as either (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," (2) "a record of such an impairment," or (3) "being regarded as having such an impairment," 42 U.S.C. § 12102(2) (2003). For purposes of proving a disability, "the Rehabilitation Act of 1973 . . . is interpreted substantially identically to the ADA," *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 31 n.4 (1st Cir. 1996); *see EEOC v. Amego*, 110 F.3d 135, 144 (1st Cir. 1997); thus the same case law applies.

In this case, plaintiff only argues disability as defined by "a physical or mental impairment that substantially limits one or more . . . major life activities." 42 U.S.C. § 12102(2)(A) (2003). She claims that her mental impairment of ADD/ADHD coupled with the negative side effects from the increased dosage of Adderall substantially limited the major life activity of working, resulting in her wrongful termination from DSS. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 480, 144 L. Ed. 2d 450, 461 (1999) (working is a major life activity); *but see* 29 C.F.R. § 1630.2(j)(3)(i) (2003) ("The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person . . . . The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."). Assuming plaintiff suffers from a mental impairment, *see Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 155 n.18 (1st Cir. 1998) (questioning whether ADHD qualifies as a mental impairment under the ADA), we must first consider whether a person qualifies as disabled if the underlying impairment is controlled by medication but the medication, because of negative side effects, creates substantial limitations under the Act.

In *Sutton*, the United States Supreme Court held, "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity." *Sutton*, 527 U.S. at 482-83, 144 L. Ed. 2d at 462. The Supreme Court, however, also stated "that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." *Id.* at 482, 144 L. Ed. 2d at 462. Accordingly, the negative effects of treatment measures for an impairment, including the side effects of medication, must be considered in determining whether a disability exists. *See Nawrot v. CPC Int'l*, 277 F.3d 896, 904 (7th Cir. 2002) ("courts may consider only the limitations of an individual that persist after taking into account mitigation measures (e.g., medication) and the negative side effects of the measures used to mitigate the impairment"); *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 309 (3d Cir. 1999) (considering the severe side effects of the plaintiff's medication for her bipolar and manic depressive disorders for purposes of finding disability); *Treiber v. Lindbergh Sch. Dist.*, 199 F. Supp. 2d 949, 960 (E.D.Mo. 2002) (although chemotherapy for the plaintiff's breast cancer affected

her ability to have children, plaintiff did not assert any interest in having children and, therefore, that side-effect of her treatment did not render her disabled under the ADA).

Our analysis thus turns to whether plaintiff's ability to work was substantially limited by side effects from her ADD medication Adderall.

> (1) The term substantially limits means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner[,] or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (2003). In this case, there is no evidence plaintiff was unable, due to side effects from Adderall, to perform a major life activity, i.e. work, that an average person could perform. From the time plaintiff started taking Adderall until after she lost her position with DSS, she never reported any side effects to her doctor, and her doctor did not observe any side effects during any of plaintiff's office visits, including after plaintiff's termination. Plaintiff also made no requests for ADA accommodations based on ADD until 17 December 1999, the date she was recommended for termination. Moreover, plaintiff had been taking the increased dosage of 40 milligrams of Adderall per day for at least a month prior to her first performance evaluation at DSS on 19 July 1999 on which she received the second-highest rating. This tends to indicate that the use of the drug had no impact on plaintiff's job performance and that other, non-drug-related factors contributed to the decline in her work performance leading to her poor evaluation in December 1999 and subsequent termination from DSS. As we see nothing in this record to substantiate plaintiff's disability claim, the trial court did not err in granting defendants' summary judgment motion with respect to this claim. *See Trexler*, 145 N.C. App. at 469, 550 S.E.2d at 542 (summary judgment proper if an essential element of the plaintiff's claim is nonexistent).

II

[2] We next consider whether summary judgment was proper as to plaintiff's section 1983 claim.

Section 1983 provides in pertinent part that:

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

42 U.S.C. § 1983 (2003).

In the case *sub judice*, plaintiff argues her property rights under the due process clauses of the United States and North Carolina constitutions were violated because DSS failed to comply with the warning requirements set forth in Regulation 28 of the Guilford County Personnel Regulations, which deals with disciplinary action, including the dismissal of Guilford County personnel. We disagree.

"The procedural safeguards encompassed by the due process clause extend to [an employee's] continued employment only if she had a property interest in that employment," *Pittman v. Wilson County*, 839 F.2d 225, 226 (4th Cir. 1988), and absent a contractual agreement specifying a definite period of employment, only "[a] statute or ordinance may create a property interest in continued employment," *Kearney v. County of Durham*, 99 N.C. App. 349, 351, 393 S.E.2d 129, 130 (1990); *see Pittman*, 839 F.2d at 227 ("absent a contractual guarantee, an exception to the 'employee-at-will' rule specifically is recognized under North Carolina law when a statute or ordinance provides for restrictions on the discharge of an employee"); *Presnell v. Pell*, 298 N.C. 715, 723, 260 S.E.2d 611, 616 (1979). In *Kearney*, this Court further held that "[i]n the absence of evidence that [a] resolution was adopted with the same formality and characteristics of an ordinance, it is insufficient to create a property interest analogous to that of a statute or ordinance." *Kearney*, 99 N.C. App. at 352, 393 S.E.2d at 130; *see Pittman*, 839 F.2d at 227-29.

"Generally, measures that prescribe binding rules of conduct are ordinances while measures that relate to administrative or housekeeping matters are categorized as resolutions." *Kearney*, 99 N.C. App. at 351-52, 393 S.E.2d at 130 (citation omitted) (internal quotations omitted). "Like a statute, an ordinance is a law binding on all concerned. Therefore, certain important procedures generally are

prescribed for its adoption. These normally require a prescribed record vote, a public hearing, and published notice." *Pittman*, 839 F.2d at 228 n.7.

In this case, the minutes of the Board of Commissioners indicate that the Board specifically adopted the Guilford County Personnel Regulations, including Regulation 28, "by *resolution* and not by ordinance" for the purpose of providing "a lawful, orderly and fair system of personnel *administration* for Guilford County" (emphasis added). The Board thus expressly conveyed its intention to adopt a resolution on administrative matters regarding the County personnel. *See Kearney*, 99 N.C. App. at 351-52, 393 S.E.2d at 130. While the minutes further state that the regulations "may be supplemented or amended by the Board from time to time as necessary," there is no provision requiring formalities such as "a prescribed record vote, a public hearing, and published notice." *Pittman*, 839 F.2d at 228 n.7. As there is thus no evidence that Regulation 28 was "adopted with the same formality and characteristics of an ordinance," *Kearney*, 99 N.C. App. at 352, 393 S.E.2d at 130, plaintiff did not acquire a property interest in her employment with DSS and the trial court properly granted summary judgment to defendants on plaintiff's section 1983 claim based on due process violations.

Affirmed.

Chief Judge EAGLES and Judge LEVINSON concur.

IN THE MATTER OF: NORTH WILKESBORO SPEEDWAY, INC.

No. COA02-660

(Filed 1 July 2003)

1. Taxation— valuation of property—weight assigned conflicting evidence

The Property Tax Commission's findings concerning the value of a race track were supported by sufficient evidence. Although the taxpayer introduced evidence that the property had a lower value, the Commission assigned greater weight to the County's independent appraiser and its decision was not arbitrary or capricious.

2. Taxation— property tax commissioner—knowledge of case—failure to recuse

A property tax commissioner's failure to recuse herself from a hearing was not error even though the taxpayer contended that certain questions and comments by the commissioner exhibited a bias against the taxpayer. The mere fact that a decision-maker enters a hearing with knowledge of the subject does not necessarily lead to the conclusion that the decision-maker is closed to the evidence. All of the commissioners in this case repeatedly asked questions through both sessions of the hearing in a diligent attempt to understand the facts and opinions presented to them.

3. Taxation— property tax commission hearing—procedure—evidence presented after motion to dismiss denied

The County waived its right to appeal the property tax commission's denial of its motion to dismiss by presenting evidence. Although the Rules of Civil Procedure do not apply strictly in proceedings before these commissions, the Administrative Code does not set out a procedure for motions to dismiss, the principles of sound trial management apply, and there is no reason to depart from the usual approach. Furthermore, the Commission has broad discretionary power to examine documents.

Appeal by taxpayer from final decision entered by the North Carolina Property Tax Commission on 18 January 2002. Heard in the Court of Appeals 13 March 2003.

McElwee Firm, P.L.L.C., by John M. Logsdon, for the taxpayer-appellant.

Vannoy, Colvard, Triplett, & Vannoy, P.L.L.C., by Anthony R. Triplett, for appellee Wilkes County.

HUDSON, Judge.

North Wilkesboro Speedway, Inc. ("Taxpayer" or "Speedway"), a North Carolina corporation, owns real property ("the Property") located in Wilkes County, North Carolina. Located on the Property is a race track facility. Prior to 1995, NASCAR sponsored two annual races at North Wilkesboro Speedway as part of its Winston Cup Series. In 1995, New Hampshire International Speedway, Inc., and Speedway Motorsports, Inc., each acquired fifty percent of the shares

of North Wilkesboro Speedway, Inc. Before these entities purchased the Speedway, NASCAR assured them that the Winston Cup race dates used by the Speedway could be moved to other race tracks. After the transfer of ownership, one race date was moved to Texas Motor Speedway and the other race date was moved to New Hampshire International Speedway. The last NASCAR-sanctioned race held at the Speedway was on 29 September 1996.

The Property consists of a 43.2 acre tract adjoining, but without direct access to, U.S. Highway 421. Improvements to the Property include a five-eighths mile oval paved race track with a pit and garage area; bleachers, grandstands and towers with private viewing suites; and various other structures, including restrooms and concession stands.

In 1998, Wilkes County ("the County") performed a county-wide tax reappraisal, and assigned a value of $8,580,400 to the Property. In early 1999, taxpayer requested an appraisal review. On 12 May 1999, the Tax Administrator's office advised taxpayer that it had inspected and reviewed the Property and recommended an increase in valuation to $9,560,300. Taxpayer requested a hearing on this valuation before the Wilkes County Board of Equalization and Review ("the Board"). After a hearing at which taxpayer presented an appraisal and testimony of an independent appraiser, the Board upheld the $9,560,300 valuation. From that decision, taxpayer appealed to the Property Tax Commission.

On 26 October 2001, the Property Tax Commission held a hearing on the Taxpayer's appeal. Taxpayer presented evidence through the testimony and appraisal report of its independent appraiser, Harvey P. Jeffers, and through the director of real estate for Speedway Motorsports, Inc., Robert E. Rourke. Mr. Jeffers appraised the Property at $2,800,000, concluding that its best and highest use is as a local (non-NASCAR) race track.

The County offered the testimony of its tax supervisor, Alexander Hamilton, and its independent appraiser, Arthur W. McElhannon. Hamilton testified that the County based its valuation of the Property on an appraisal using the cost approach, and assigned to the property a value of $9,560,300. McElhannon, on the other hand, appraised the Property using both the cost approach and the income approach. McElhannon concluded that the highest and best use of the Property is as a racing test and practice facility, and that the value of the Property was $7,125,000.

On 18 January 2002, the Commission issued a final decision concluding that the County had employed an arbitrary and capricious method when it appraised the Property and that the value assigned to the Property substantially exceeded the true value in money of the Property. The Commission ordered the County to revise its tax records to reflect a value of $7,125,000.

ARGUMENT

Taxpayer first argues that the findings and conclusions of the Commission regarding the income approach to valuation are arbitrary and capricious and not supported by the evidence. We disagree.

We review final decisions of the Property Tax Commission under the "whole record" test as governed by G.S. § 105-345.2, which provides that a decision may be reversed or modified if appellant's substantial rights have been prejudiced because the Commission's findings, conclusions, inferences, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

G.S. § 105-345.2(b) (2001).

"The 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Owens*, 132 N.C. App. 281, 286, 511 S.E.2d 319, 323 (1999), *appeal after remand*, 144 N.C. App. 349, 547 S.E.2d 827 (2001), *disc. review denied*, 354 N.C. 361, 556 S.E.2d 575 (2001). Under the "whole record" test, we must determine "whether the [Commission's] findings are supported by substantial evidence contained in the whole record." *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.*

Our courts have long held that "it is the function of the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 126-27 (1981). As the reviewing court, "[w]e cannot substitute our judgment for that of the agency when the evidence is conflicting." *Id.* at 87, 283 S.E.2d at 127. Thus, we may not "weigh the evidence presented to the [Commission] and substitute [our] evaluation of the evidence for that of the [Commission]. *In re Amp*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975).

Moreover,

> The "whole record" test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached.

Floyd v. N.C. Dept. of Commerce, 99 N.C. App. 125, 128, 392 S.E.2d 660, 662 (1990), *disc. review denied*, 327 N.C. 482, 357 S.E.2d 217 (1990) (citations omitted). As to the credibility of the witnesses, this Court has noted that:

> Credibility determinations and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness. Moreover, even though the ALJ has made a recommended decision, credibility determinations, as well as conflicts in the evidence, are for the agency to determine.

Oates v. N.C. Dept. of Correction, 114 N.C. App. 597, 601, 442 S.E.2d 542, 545 (1994) (internal citations and quotation marks omitted).

We note initially that taxpayer has brought forth arguments concerning only exceptions 1, 2, 3, 4, 5, and 7. Thus, the exception 6 is deemed abandoned. N.C. R. App. P. 10(a).

[1] Taxpayer first argues that the Commission's findings of fact numbers 9, 14, and 19 are not supported by the evidence. The enumerated findings of fact read as follows:

> 9. A typical fee paid by Winston Cup race teams for practice sessions on NASCAR-sanctioned tracks would be $5,000 per day plus

additional expenses for emergency medical personnel. The fee for practice sessions on non-sanctioned tracks, such as the subject property, by Winston Cup race teams, would range between $3,000 and $3,5000 per day.

14. The highest and best use of the subject property, which represents a former NASCAR-sanctioned Winston Cup racetrack, is the use as a practice and test facility. The numerous race teams located within the proximity of the subject property would contract for use of this facility to perform practice and test sessions.

19. The true value in money of the subject property as of January 1, 1999, was $7,125,000.

After a review of the whole record, we find that there is sufficient evidence to support these findings of fact. As to finding number 9, Mr. McElhannon, explained both in his testimony before the Commission and in his appraisal report that he arrived at the $3,500 figure based upon his interviews with various NASCAR team members:

Mr. Jerry Freeze, team manager for Petty Enterprises, . . . indicates typical fees on Winston Cup Series tracks for practice sessions at $5,000 per day with an additional expense to the team for emergency medical personnel to be on standby. This fee was also confirmed with Mr. Bob Bahre [owner of New Hampshire International Speedway] who indicates practice sessions at his New Hampshire Speedway are also $5,000 per day. Based on additional interviews with other race team managers, such as Mike Brown with Bill Davis Racing, Richard Yates with Robert Yates Racing, and Steve Hmeil with Dale Earnhardt, Inc., (DEI), this is a typical fee for Winston Cup teams on NASCAR-sanctioned tracks. Mr. Mike Brown with Bill Davis Racing indicated that their team would probably be reluctant to pay the $5,000 per day for non-Winston Cup-sanctioned tracks, but would be more inclined to pay between $3,000 and $3,500 per day.

In addition, Mr. McElhannon testified before the Commission that:

the majority of people that . . . that I interviewed said that they would be reluctant to pay the $5,000 a day since it wasn't a sanctioned track. So, I've heard $3,800 a day for Charlotte and I've heard $1,700 a day for Bristol. I'm going based on information of people who would be using this, on what they'd be willing to pay.

Mr. McElhannon also testified that there are more than eighty-five race teams within a 100-mile radius of the Speedway and that there is an ongoing demand by these race teams to use the Speedway as a practice and test facility. The race teams in close proximity to the Speedway include the Winston Cup Series, Busch Grand National Division Series, Craftsman Truck Series, NASCAR Late Model Stocks, SMART Modifieds, Late Model Super Trucks, Limited Late Model Super Sport, Mini Stocks, Super Mini Stocks, Legends, Street Stocks, Six Cylinders, U Cars, Goodys-Series, Hooters Pro Cup, and numerous other classifications. Based upon demand and the number of race teams in close proximity to the Speedway, Mr. McElhannon concluded "that the maximally productive use of the subject facility is for a test and practice track." This evidence supports finding 14 as well as others that appellant does not challenge.

Based upon the projected income from the use of this facility as a practice and test facility, combined with the value of other structures located on the Property, Mr. McElhannon valued the Property at $7,125,000, the value the Commission settled on in finding 19.

Although taxpayer introduced evidence that tended to show that the Property had a much lower value, it is clear that the Commission assigned greater weight to the County's expert appraisal. As "[c]redibility determinations and the probative value of particular testimony are for the administrative body to determine," *Oates*, 114 N.C. App. at 601, 442 S.E.2d at 545, we "cannot say that the Commission erred in adopting the position of certain experts over that of others." *In re Appeal of Westinghouse Electric Corp.*, 93 N.C. App. 710, 716, 379 S.E.2d 37, 40 (1989). Thus, we conclude that the substantial evidence in the record is sufficient to support the Commission's findings of fact. In light of this conclusion, we also hold that the Commission's decision was neither arbitrary nor capricious, as the Commission reasonably concluded from the evidence that the market value of the Property is $7,125,000.

[2] Taxpayer next argues that "the participation of Commissioner Linda Absher in the consideration of the evidence and the Final Decision" prejudiced taxpayer because "Commissioner Absher exhibited a bias for the County and against taxpayer during the hearing" and that it was error for her not "to recuse herself upon taxpayer's motion to do so." We disagree.

This Court has held that there is a "presumption of honesty and integrity in those serving as adjudicator" on a quasi-judicial tribunal.

Taborn v. Hammonds, 83 N.C. App. 461, 472, 350 S.E.2d 880, 887 (1986) (citations and quotation marks omitted), *appeal after remand*, 91 N.C. App. 302, 371 S.E.2d 736 (1988), *reversed*, 324 N.C. 546, 380 S.E.2d 513 (1989). "A party claiming bias or prejudice may move for recusal and in such event has the burden of demonstrating objectively that grounds for disqualification actually exist." *JWL Invs., Inc. v. Guilford County Bd. of Adjust.*, 133 N.C. App. 426, 430, 515 S.E.2d 715, 718 (1999) (citation and quotation marks omitted), *disc. review denied*, 351 N.C. 357, 540 S.E.2d 349 (1999). Bias has been defined as

> a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination. However, in order to prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way.

Smith v. Richmond County Bd. of Education, 150 N.C. App. 291, 299, 563 S.E.2d 258, 265-66 (2002) (citation and quotation marks omitted), *disc. review denied*, 356 N.C. 678, — S.E.2d — (2003). There is a critical distinction between disqualifying bias against a particular party and permissible pre-hearing knowledge about the party's case. *Farber v. North Carolina Psychology Board*, 153 N.C. App. 1, 9, 569 S.E.2d 287, 294 (2002), *cert. denied*, 356 N.C. 612, 574 S.E.2d 679 (2003). The mere fact that a decision-maker enters a hearing with knowledge of the subject matter does not necessarily lead to the conclusion that the decision-maker is close-minded to the evidence and set as to the final decision. *In re Application of the City of Raleigh*, 107 N.C. App. 505, 514, 421 S.E.2d 179, 184 (1992). In *Smith*, we noted that

> Our Supreme Court has recognized that prior knowledge and discussion of the facts related to a given adjudicatory hearing are inevitable aspects of the multi-faceted roles which Board members play. As long as Board members are able to set aside their prior knowledge and preconceptions concerning the matters at issue, and to base their considerations solely upon the evidence presented during the hearing, constitutionally impermissible bias does not exist.

Smith, 150 N.C. App. at 299, 563 S.E.2d at 266 (citation and quotation marks omitted).

Here, taxpayer refers to certain questions posed and comments made by Commissioner Absher during the hearing. After a thorough review, we are persuaded that the record as a whole shows no impermissible bias on the part of Commissioner Absher, or on the part of any of the other commissioners. We note that all of the commissioners repeatedly asked questions throughout both sessions of the hearing in a diligent attempt to understand the facts and opinions being presented to them. This assignment of error is without merit and is overruled.

Cross-Appeal

[3] The County has filed a cross-appeal assigning as error the Commission's denial of its motion to dismiss made at the close of taxpayer's evidence. Specifically, the County argues that the appeal before the Commission should have been dismissed because taxpayer failed to carry its burden of showing that the County employed an arbitrary or illegal method of appraising the Property, that a reappraisal of the Property for the year 1999 was not permitted under G.S. § 105-287, and that the County misapplied its schedule of values in reappraising the Property. We disagree.

Although the North Carolina Administrative Code specifically states that Rules of Civil Procedure "do not strictly apply to proceedings before the Commission," *see* 17 N.C.A.C. 11.0209 (2002), our courts have long held that, by presenting evidence, a party waives its right to appeal the denial of a motion to dismiss. *Hamilton v. Hamilton*, 93 N.C. App. 639, 642, 379 S.E.2d 93, 94 (1989) (citing 9 C. Wright & A. Miller, Federal Practice and Procedure, sec. 237, p. 221 (1971)). Those provisions of the Administrative Code that do apply, however, do not set forth a procedure for motions in general, or motions to dismiss in particular. Thus, we are left to analogize. We see no reason to depart from the usual approach here, even though the Rules of Civil Procedure do not apply, because by analogy, the same principles of sound trial management do.

Here, the County moved to dismiss taxpayer's appeal at the close of taxpayer's evidence. The Commission denied the motion, and the County proceeded to present evidence. Thus, we agree that the County has waived its right to appeal the denial of its motion to dismiss.

Even if we were to conclude that the County did not waive its right to appeal the denial of its motion, the Commission has broad

discretionary power to examine documents and witnesses. G.S. § 105-290 provides that "Upon its own motion or upon the request of any party to an appeal, the Property Tax Commission . . . shall examine witnesses under oath . . ., and examine the documents of any person if there is ground for believing that information contained in such documents is pertinent to the decision of any appeal pending before the Commission, regardless of whether such person is a party to the proceeding before the Commission." G.S. § 105-290(d) (2001). The Commission was, thus, empowered to hear the testimony of the County's tax supervisor and independent appraiser, as well as examine any documents they may have compiled or relied upon in forming their opinions.

Affirmed.

Judges McGEE and STEELMAN concur.

CARLOS ALBERTO GUERRERO, EMPLOYEE, PLAINTIFF v. BRODIE CONTRACTORS, INC., EMPLOYER, AND AMERISURE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA02-1103

(Filed 1 July 2003)

1. **Workers' Compensation— temporary total disability benefits—justifiable refusal of position**

The Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff employee justifiably refused the position offered by defendants, concluding the Form 24 application was improvidently approved, and concluding plaintiff's temporary total benefits should be reinstated until further order of the Commission. The finding and conclusion that plaintiff enjoys a presumption of disability that defendants failed to rebut were unnecessary to the Commission's resolution of the present controversy.

2. **Workers' Compensation— temporary total disability benefits—maximum medical improvement**

Although defendants contend the Industrial Commission erred in a workers' compensation case by awarding plaintiff

employee temporary total disability benefits beyond the date plaintiff allegedly reached maximum medical improvement, the issue of maximum medical improvement was not germane to the Commission's decision and the absence of findings on the issue was not error.

3. Workers' Compensation— permanent partial disability benefits—credit for lump sum payment

Although the Industrial Commission erred in a workers' compensation case by neglecting to award a credit to defendants for payment of the lump sum permanent partial disability award, defendants cite no law to support their assertion that plaintiff employee is barred from contesting the validity of the permanent partial disability benefits merely based on the fact that he accepted the award.

4. Workers' Compensation— medical compensation—limitations

The Industrial Commission did not err in a workers' compensation case by awarding plaintiff employee medical benefits allegedly without limitation, because the award is not overly broad and would be subject to the limitations of N.C.G.S. § 97-25.1 should the conditions arise under which the limitations operate.

5. Appeal and Error— cross-assignment of error—cross-appeal

Although plaintiff employee cross-assigns error to the Industrial Commission's failure to award sanctions against defendants under N.C.G.S. § 97-88.1, this issue is not properly before the Court of Appeals because it is raised as a cross-assignment of error rather than a cross-appeal and it does not assert any error by the Commission which deprived plaintiff of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

6. Workers' Compensation— attorney fees—cross-assignment of error

Although plaintiff employee contends the Court of Appeals should award plaintiff attorney fees under N.C.G.S. § 97-88 if it affirms the amended opinion and award of the Industrial Commission in a workers' compensation case, this request is not properly raised as a cross-assignment of error and even assuming

that plaintiff properly moved for expenses and fees, the Court of Appeals declines in its discretion to issue such an order.

Appeal by defendants from the amended opinion and award entered 30 April 2002 by the Full Commission. Heard in the Court of Appeals 21 May 2003.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff-appellee.

Wishart, Norris, Henninger & Pittman, P.A., by William A. Navarro, for defendant-appellants.

MARTIN, Judge.

Defendants appeal from an opinion and award of the Full Commission reinstating payment of temporary total disability compensation to plaintiff. Plaintiff sustained a laceration and fracture to his neck when he fell down an elevator shaft on 3 April 1997 while he was working for defendant-employer as a masonry laborer. Defendants filed an I.C. Form 19, Employer's Report of Injury to Employee, on 14 April 1997, and plaintiff filed an I.C. Form 18, Notice of Accident to Employer and Claim of Employee, on 20 May 1997. Defendants later executed an I.C. Form 63, Notice to Employee of Payment of Compensation Without Prejudice to Later Deny the Claim Pursuant to N.C. Gen. Stat. § 97-18(d), to commence payment of disability compensation on 1 May, which was filed with the Commission on 27 October 1997. As a result of the injury, plaintiff underwent "extensive medical treatment," including surgery, and began treatment with Dr. Thomas A. Dimmig in December 1997.

According to uncontested findings of fact of the Full Commission, on 15 December 1997, the case manager assigned by defendant-carrier to plaintiff's claim submitted a job description to Dr. Dimmig for approval. Plaintiff then attempted to return to work with defendant-employer several times. However, he was placed in a position involving heavier work than that approved by Dr. Dimmig and was only able to work a few hours on each occasion due to neck pain and dizziness. On 13 April 1998, plaintiff reported to Dr. Dimmig that the job to which he had returned was different than the one the physician had approved. On the same day, defendants filed a Form 24, Application to Terminate or Suspend Payment of Compensation Pursuant to N.C. Gen. Stat. § 97-18.1, seeking to terminate plaintiff's disability benefits because "[c]laimant was

released to return to light duty work 12/15/97. Light duty was available. Job description approved by the treating physician. Claimant has refused to return to work." On 11 May 1998, Dr. Dimmig wrote to defendant-carrier to explain that the proffered job was outside plaintiff's medical restrictions. Defendant-employer sent no alternative job descriptions to Dr. Dimmig for approval and offered plaintiff no other position.

After a telephonic hearing, the Form 24 application was approved and plaintiff's benefits terminated from 30 March 1998. After plaintiff's Motion for Reconsideration was denied, plaintiff filed a Form 33, Request That Claim Be Assigned For Hearing, on 17 May 1999. Defendants filed a Form 33R on 22 February 2000 and a hearing was held before a deputy commissioner on 23 February 2000. On 1 March 2000, plaintiff made a motion to reinstate temporary total disability benefits, which was denied on 4 April 2000. The deputy commissioner's Amended Opinion and Order, filed on 12 March 2001, awarded plaintiff, *inter alia*, temporary total disability benefits from 30 March 1998 to 12 October 1998, the date Dr. Dimmig declared plaintiff had reached maximum medical improvement, and 30 weeks of permanent partial disability benefits based on the 10 percent permanent partial disability rating Dr. Dimmig had assigned to plaintiff. Plaintiff appealed to the Full Commission, which reinstated plaintiff's temporary total disability benefits from 30 March 1998 "and continuing until further Order of the Commission." The Commission also concluded defendants' filing of a Form 63 and subsequent defense of the claim did not merit sanctions and fees under G.S. § 97-88.1.

I.

The record on appeal contains fourteen assignments of error, which are presented in five arguments by defendants in their brief. Defendants argue the Full Commission erred as a matter of law in (1) granting plaintiff a presumption of disability, (2) awarding plaintiff temporary total disability benefits beyond the date of maximum medical improvement, (3) awarding plaintiff ongoing temporary total disability benefits where the findings of the Commission do not indicate plaintiff met his burden of proving the extent and degree of disability, (4) awarding plaintiff ongoing temporary total disability benefits where plaintiff had already accepted the award of permanent partial disability benefits awarded by the deputy commissioner, and (5) awarding medical benefits without limitation. We reject defendants' arguments, but remand the case for entry of an award properly cred-

iting defendants for any payments made pursuant to the deputy commissioner's award of permanent partial disability benefits.

[1] Defendants first argue the Full Commission erred in according plaintiff a presumption of disability where defendants had paid benefits pursuant to a Form 63 and plaintiff had failed to satisfy his initial burden of establishing disability. This Court's review of a decision of the Full Commission is limited to whether there is competent evidence in the record to support the findings of fact and those findings support the conclusions of law. *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). The primary issue before the Commission was whether the approval of the Form 24 filed by defendants to terminate plaintiff's benefits was proper. We believe the record supports the conclusion that it was not.

The statutory provision authorizing payment of temporary disability benefits without prejudice is G.S. § 97-18(d), which states in pertinent part:

> (d) In any claim for compensation in which the employer or insurer is uncertain on reasonable grounds whether the claim is compensable or whether it has liability for the claim under this Article, the employer or insurer may initiate compensation payments without prejudice and without admitting liability. The initial payment shall be accompanied by a form prescribed by and filed with the Commission, stating that the payments are being made without prejudice. Payments made pursuant to this subsection may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury . . . . If the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim under this Article.

N.C. Gen. Stat. § 97-18(d) (2001). Once an employer and/or carrier commences payment of temporary total benefits without prejudice, payment of the benefits may be terminated or suspended pursuant to G.S. § 97-18.1(b) or (c):

> (b) An employer may terminate payment of compensation for total disability being paid pursuant to G.S. 97-29 when the

> employee has returned to work for the same or a different employer, subject to the provisions of G.S. 97-32.1, or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder. . . .
>
> (c) An employer seeking to terminate or suspend compensation being paid pursuant to G.S. 97-29 for a reason other than those specified in subsection (b) of this section shall notify the employee . . . in writing of its intent to do so on a form prescribed by the Commission. . . . This form shall contain the reasons for the proposed termination or suspension of compensation, be supported by available documentation, and inform the employee of the employee's right to contest the termination or suspension . . . .

N.C. Gen. Stat. § 97-18.1(b) & (c) (2001). In the present case, defendants continued to pay plaintiff benefits beyond the 90-day period without contesting the compensability of or liability for the claim. Therefore, defendants, alleging an unjustified refusal to return to work by plaintiff, properly filed a Form 24 application to terminate benefits in accordance with G.S. § 97-18.1(c). However, defendants failed to convince the Commission that plaintiff's refusal to return to work was unjustified and a termination of benefits proper.

Defendants assign error to Finding of Fact 9 in the Amended Opinion and Award, which states:

> The greater weight of the competent evidence establishes the job procured for Plaintiff and to which Plaintiff actually returned with Defendant-Employer was heavy-level work as a Masonry Assistant. Dr. Dimmig opined that the Plaintiff could work within the confines of "medium type work," as outlined in the FCE. This job was improper for Plaintiff as it was outside of the work restrictions assigned by Dr. Dimmig. Because the work actually assigned was outside his work restrictions and because he was unable to perform the work offered, Plaintiff did not return to work with Defendant-Employer.

Defendants failed to assign error to other similar findings of the Commission on the same issues. N.C.R. App. P. 10(a) (2003). In addition, we hold there is competent evidence in the record to support Finding of Fact 9. Therefore, we decline to disturb the finding on appeal. The finding and conclusion that plaintiff enjoys a presumption of disability that defendants failed to rebut were unnecessary to

the Commission's resolution of the present controversy, thus we need not evaluate whether they are supported by the record or law. The Commission did not err in finding and concluding that plaintiff justifiably refused the position offered by defendants, concluding the Form 24 application was improvidently approved, and concluding plaintiff's benefits should be reinstated until further order of the Commission. This determination as to defendants' first argument also resolves defendants' third argument.

[2] Defendants next argue the Commission erred in awarding plaintiff temporary total disability benefits beyond 12 October 1998, the date plaintiff allegedly reached maximum medical improvement. Defendants also point to the fact that the Commission made no findings regarding the issue of maximum medical improvement, and argue that the case should be remanded for resolution of these issues. Due to our holding as to defendants' first argument, the issue of maximum medical improvement was not germane to the Commission's decision and the absence of findings on the issue is not error. We note, however, that the issue raised by defendants as to whether the Commission may award payment of temporary total disability benefits beyond the date of maximum medical improvement was recently resolved in *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 562 S.E.2d 434 (2002), *affirmed*, 357 N.C. 44, 577 S.E.2d 620 (2003).

[3] In their fourth argument, defendants contend the Commission erred in awarding plaintiff ongoing temporary total disability benefits after he had accepted the award of permanent partial disability benefits awarded by the deputy commissioner pursuant to G.S. § 97-31. Defendants correctly assert that an employee may not receive benefits simultaneously under G.S. §§ 97-29 or 97-30 and 97-31. The Commission found that pursuant to the deputy commissioner's opinion and order:

> Defendants made a lump sum compensation payment to Plaintiff for benefits beginning on March 30, 1998 and continuing until October 12, 1998 and Plaintiff's 10% permanent partial disability rating for his back in the amount of $7,200.03.

In its conclusions of law and award, the Commission declared defendants were entitled to a "credit for all amounts earned in Plaintiff's failed attempt to return to work [and] compensation paid to plaintiff between March 30, 1998 and October 12, 1998."

Defendants cite no law to support their assertion that "[b]y accepting [the award for permanent partial disability] benefits the Employee is barred from contesting its validity" and we decline to make the argument for them. N.C.R. App. P. 28(b)(6) (2003). However, it does appear that the Commission neglected to award a credit to defendants for payment of the lump sum permanent partial disability award. Therefore, we remand the case in part for entry of an award fully crediting defendants and preventing any double recovery by plaintiff.

[4] Lastly, defendants argue that the Commission erred by awarding plaintiff medical benefits "without limitation," when, in fact, "[t]he award . . . is necessarily limited by the operation of N.C.G.S. § 97-25-1 [sic]." Defendants do not argue that plaintiff is not entitled to medical compensation for treatment related to his compensable injury under G.S. § 97-25. G.S. § 97-25.1 states that:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation.

N.C. Gen. Stat. § 97-25.1 (2001). The Commission concluded "[p]laintiff is entitled to have Defendants pay for medical treatment incurred or to be incurred as a result of his compensable injury by accident of April 3, 1997. N.C.G.S. § 97-25." In its award, the Commission declared that "[d]efendants shall pay for all medical treatment incurred or to be incurred as a result of Plaintiff's compensable accident for so long as such treatment effects a cure, gives relief, or tends to lessen Plaintiff's period of disability." The award does not appear to override the provisions of G.S. § 97-25.1 and the record does not indicate that the issue of whether the two-year statute of limitations had begun to run was before the Commission. Therefore, we hold that the award is not overly broad and would be subject to the limitations of G.S. § 97-25.1, should the conditions arise under which the limitations operate.

II.

Plaintiff presents three cross-assignments of error. By arguments that correspond to the cross-assignments of error, plaintiff argues that (1) if this Court held the Commission erred in awarding temporary total disability benefits beyond the date of maximum medical improvement, the proper remedy would be to remand for entry of an award of permanent and total disability, (2) the Commission erred in failing to award sanctions against defendants under G.S. § 97-88.1, and (3) if this Court affirms the Amended Opinion and Award of the Commission, it should award plaintiff attorneys' fees pursuant to G.S. § 97-88.

[5] Due to our resolution of defendants' arguments regarding maximum medical improvement, we need not address plaintiff's first argument. Plaintiff's second argument is not properly before this Court because it is raised as a cross-assignment of error rather than as a cross-appeal; it does not assert any error by the Commission "which deprived [plaintiff] of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 10(d) (2003); *Williams v. North Carolina Dep't of Economic & Community Dev.*, 119 N.C. App. 535, 539, 458 S.E.2d 750, 753 (1995).

[6] With regard to plaintiff's third cross-assignment of error, we note that a request to this Court for an award of fees pursuant to G.S. § 97-88 is also not properly raised as a cross-assignment of error. N.C.R. App. P. 10(d) (2003). G.S. § 97-88 provides that:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, . . . , to the injured employee, the Commission or court *may* further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88 (2001) (emphasis added). Even assuming plaintiff had properly moved for expenses and fees under G.S. § 97-88, this Court declines in its discretion to issue such an order. The Amended Opinion and Award of the Commission is affirmed in

part and remanded in part for entry of an award properly crediting defendants for the lump sum payment of the permanent partial disability benefits awarded by the deputy commissioner.

Affirmed in part; remanded in part.

Judges HUNTER and GEER concur.

LONNELL CARTER, PLAINTIFF v. ROCKINGHAM COUNTY BOARD OF EDUCATION, JOHNSON CONTROLS, INC. AND LONNIE SECHRIST, OFFICIALLY AND INDIVIDUALLY, ALL JOINTLY AND SEVERALLY, DEFENDANTS

No. COA02-716

(Filed 1 July 2003)

1. **Appeal and Error— appealability—denial of motion to add defendants—possibility of separate trials**

A substantial right was affected and defendant could immediately appeal where the trial court allowed plaintiff's motion to add two claims but denied his motion to add two individual defendants. Plaintiff may bring separate actions against these defendants with the possibility of two trials and inconsistent verdicts.

2. **Parties— motion to add denied—undue delay or prejudice**

The denial of plaintiff's motion to amend his complaint to add two defendants was not an abuse of discretion where the court found that the amendment would cause undue delay or prejudice to defendants.

Judge HUNTER dissenting.

Appeal by plaintiff from order entered 7 February 2002 by Judge Catherine Eagles in Rockingham County Superior Court. Heard in the Court of Appeals 12 May 2003.

Gray, Newell, Johnson & Blackmon, L.L.P., by Angela Newell Gray, for plaintiff-appellant.

Foley & Lardner, by Latasha A. Garrison, pro hac vice, for defendant-appellee Johnson Controls, Inc.

EAGLES, Chief Judge.

Lonnell Carter ("plaintiff") appeals from an order denying his motion to amend his complaint to add two individual defendants. After careful consideration of the briefs and record, we affirm.

Rockingham County Board of Education ("Board") employed plaintiff in December 1996 to work as a custodian for the school system. Beginning in August 2000, plaintiff performed custodial services at the S.C.O.R.E. Center in Wentworth. On 20 November 2000, Cliff Lauten ("Lauten") and Larry Clark ("Clark"), two employees of Johnson Controls, Inc., allegedly saw the plaintiff engaged in "improper conduct" with an unidentified individual on school property. The Board contracted with Johnson Controls, Inc. ("Johnson Controls") to maintain the heating, ventilation and air conditioning systems at their schools.

Lauten and Clark informed Lonnie Sechrist ("Sechrist"), Assistant Superintendent for Human Resources for Rockingham County Schools, that they observed plaintiff engaging in "improper conduct" with an unidentified person on school property. The Board and Sechrist "removed [plaintiff] from school property" and terminated plaintiff's employment.

Plaintiff commenced this action on 6 June 2001 against the Board, Sechrist, and Johnson Controls alleging negligent supervision, tortious interference with business relations, defamation, wrongful discharge in violation of G.S. § 143-422.2, and unfair and deceptive trade practices. On or about 24 September 2001, plaintiff received the Board's interrogatory responses which identified Lauten and Clark as the individuals who reported the alleged incident of "improper conduct" to Sechrist. On 19 November 2001, plaintiff moved to amend his complaint to add the claims of intentional infliction of emotional distress and negligent infliction of emotional distress and to add Lauten and Clark as defendants.

The trial court heard plaintiff's motion to amend at the 22 January 2002 Civil Session of Rockingham County Superior Court before Judge Catherine Eagles. The trial court granted plaintiff's motion to amend his complaint to add the additional claims and denied plaintiff's motion to add the individual defendants. Plaintiff appeals.

On appeal, plaintiff contends that the trial court's interlocutory order affects a substantial right and is immediately appealable and that the trial court erred in denying his motion to amend his com-

plaint to add two individual defendants. After careful consideration, we affirm.

[1] Plaintiff first contends that the interlocutory order is immediately appealable because it affects a substantial right. Plaintiff argues that he will be able to bring the negligent and intentional infliction of emotional distress claims against Clark and Lauten in a separate action. Plaintiff contends that the possibility of inconsistent verdicts exists if his appeal is not allowed. Plaintiff further argues that if the denial of his motion to amend is affirmed, the statute of limitations will prevent plaintiff from bringing a defamation action against Clark and Lauten.

"An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002). "[A]n order denying a motion to amend pleadings is an interlocutory order, and is not immediately appealable." *Buchanan v. Rose*, 59 N.C. App. 351, 352, 296 S.E.2d 508, 509 (1982). However, a party may appeal an interlocutory order when "(1) the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to [G.S.] § 1A-1, Rule 54(b); or (2) when the challenged order affects a substantial right that may be lost without immediate review." *McConnell v. McConnell*, 151 N.C. App. 622, 624, 566 S.E.2d 801, 803 (2002). "Whether a substantial right is affected is determined on a case-by-case basis and should be strictly construed." *Flitt*, 149 N.C. App. at 477, 561 S.E.2d at 513. "[T]he right to avoid the possibility of two trials on the same issues is a substantial right that may support immediate appeal." *Alexander Hamilton Life Ins. Co. of Am. v. J&H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 701, 543 S.E.2d 898, 900 (2001).

Here, the trial court allowed plaintiff's motion to add the two claims of intentional and negligent infliction of emotional distress. The statute of limitations for these claims is three years. *See* G.S. § 1-52(5) (2001). The statute of limitations has not expired on these claims. Plaintiff may bring a separate action against Clark and Lauten for intentional and negligent infliction of emotional distress. The possibility of two trials on the same issues exists. Accordingly, on these facts, we hold a substantial right is affected and the trial court's order denying plaintiff's motion to add Clark and Lauten is immediately appealable.

[2] Plaintiff next contends that the trial court erred in denying his motion to amend his complaint to add two individual defendants. Plaintiff argues that at the time his complaint was filed, he did not know the identity of Clark and Lauten. Plaintiff argues that as soon as he received the Board's interrogatory responses identifying Clark and Lauten, he moved to amend his complaint to add them as defendants. Plaintiff further argues that Johnson Controls, the Board, and Sechrist did not show how they would be materially prejudiced by the amendment. We disagree.

Rule 15(a) of the North Carolina Rules of Civil Procedure states that:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

G.S. § 1A-1, Rule 15(a) (2001). "A motion to amend the pleadings is addressed to the sound discretion of the trial court." *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185-86, *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001). "The exercise of the court's discretion is not reviewable absent a clear showing of abuse." *Development Enterprises v. Ortiz*, 86 N.C. App. 191, 195, 356 S.E.2d 922, 925, *disc. review denied*, 320 N.C. 630, 360 S.E.2d 84 (1987). The party opposing the amendment has the burden to establish that it would be prejudiced by the amendment. *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986). "Reasons justifying denial of an amendment are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985).

Here, defendants Johnson Controls, the Board, and Sechrist argued at the hearing that plaintiff's amendment should be denied because it was futile because the plaintiff's own deposition refuted allegations necessary for the additional claims, that plaintiff made his motion late in the proceedings, and that plaintiff had already been

deposed. In denying plaintiff's motion to add Clark and Lauten, the trial court stated that:

> [a]s to the new parties, it seems to me totally clear that you would have to put the trial off because these people would have to be served, and then they would have 30 days to answer, and then they could get an automatic extension, and then—I just don't see—you know, you can deal with that otherwise, I think.

From this, we conclude that the trial court found that the amendment to add the parties would have caused undue delay or undue prejudice to defendants. "[P]roper reasons for denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party." *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 166, 510 S.E.2d 690, 694, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999). We can discern no abuse of discretion in the trial court's decision to deny plaintiff's motion to add Clark and Lauten as defendants.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judge LEVINSON concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority's opinion which affirms the trial court's decision to deny plaintiff's motion to amend his complaint to add two individual defendants, Lauten and Clark.

Before expounding upon the reasons for my disagreement with the majority, I believe it is important to review the procedural history of this case, paying particular attention to the proximity of relevant dates. Lauten and Clark reported plaintiff's alleged improper conduct on 20 November 2000. Plaintiff commenced his action against the Board, Sechrist, and Johnson Controls on 6 June 2001. On 21 September 2001, plaintiff received interrogatories from those defendants that identified Lauten and Clark as his accusers. Not having known the identity of his accusers prior to receiving the interrogatories, plaintiff moved to amend his complaint to add these individuals as defendants on 19 November 2001. The trial court filed an order on

28 December 2001 that (1) scheduled any pending motions for hearing on 21 January 2002, (2) required discovery to be completed by 22 March 2002, and (3) set the trial date for 15 April 2002, with an alternate trial date of 8 July 2002. All pending motions were actually heard on 22 January 2002, and the trial court denied plaintiff's motion to amend his complaint to add Lauten and Clark as defendants entered on 7 February 2002.

As recognized by the majority, " '[a] motion to amend is addressed to the [sound] discretion of the trial court. Its decision will not be disturbed on appeal absent a showing of abuse of discretion.' " *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996) (quoting *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984)). "However, amendments should be freely allowed unless some material prejudice to the other party is demonstrated. The burden is upon the opposing party to establish that that party would be prejudiced by the amendment." *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986) (citations omitted).

Here, defendants have failed to establish how allowing plaintiff to amend his complaint to add Lauten and Clark as defendants would have prejudiced them in any way. During the hearing on plaintiff's motion, defendants argued the motion should be denied solely on the basis that discovery was essentially completed and it would be "a tremendous amount of waste of time and money[]" to engage in additional discovery or redo discovery. However, this Court has held that "[t]he fact that additional discovery may be required . . . does not amount to prejudice or make the delay 'undue.' " *Coffey v. Coffey*, 94 N.C. App. 717, 723, 381 S.E.2d 467, 471 (1989). This holding is especially relevant in the instant case considering the parties had until 22 March 2002 to complete discovery, and the only discovery that had been officially completed at the time of the hearing was the deposition of plaintiff. Three additional depositions (two of which were Lauten and Clark) were scheduled for 22 January 2002, the day plaintiff's motion to amend was heard, and a few interrogatory responses from the Board were still outstanding.

Moreover, plaintiff's motion to amend was filed within the applicable statute of limitations period for each claim raised in the action; therefore, plaintiff could have filed a new complaint initiating a separate action against these defendants instead of filing a motion to amend. By granting the motion to amend, the court would have "promoted judicial economy by avoiding the necessity for separate trials or for plaintiff to file first a separate complaint and then a motion to

join the two actions." *Mauney*, 316 N.C. at 72, 340 S.E.2d at 400. Instead, by the court denying the motion, plaintiff lost his opportunity to bring a defamation action against Lauten and Clark because his motion to amend was filed one day before the statute of limitations on that claim expired. Defendants failed to show they were prejudiced by plaintiff's choice.

Accordingly, I would reverse the trial court's decision denying plaintiff's motion to amend his complaint because defendants failed to meet their burden of establishing how they would be prejudiced by the addition of Lauten and Clark.

STATE OF NORTH CAROLINA v. TRAVIS KATRELL McCORD

No. COA02-345

(Filed 1 July 2003)

Jury— selection—peremptory challenges—*Batson* hearing—nondiscriminatory reasons

The trial court did not err in a first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary case by failing to find after a *Batson* hearing that the State engaged in intentional racial discrimination when exercising its peremptory challenges to strike two prospective African-American jurors, because: (1) the record contains no evidence the State made any racially motivated statements or asked any racially motivated questions during voir dire, and one African-American juror served on the panel; (2) there was no evidence of historical discrimination; (3) defendant failed to point to any white juror who possessed the three qualities relied upon to dismiss one of the prospective jurors including youth, marital status, and employment by an unfamiliar business; (4) the State also used a peremptory challenge to excuse a prospective white juror who was a similar age to the defendants, was single, and worked for a company the prosecutor did not know; (5) defendant did not offer any evidence that would suggest that the State's concerns about the other prospective juror's familiarity and relationship with a codefendant was pretextual; (6) the prosecutor accepted one African-American juror while it still had an unused peremp-

tory challenge; and (7) five of the State's witnesses, including its key witness, were African-American.

Appeal by defendant from judgment entered 6 September 2001 by Judge Richard L. Doughton in Cleveland County Superior Court. Originally scheduled to be heard in the Court of Appeals on 30 October 2002. Reassigned to this panel by order dated 16 January 2003 of the Chief Judge of the North Carolina Court of Appeals.

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

Haakon Thorsen, for defendant-appellant.

GEER, Judge.

On this appeal, we address the trial court's ruling after a *Batson* hearing. Defendant argues that the trial court erred in failing to find that the State engaged in intentional racial discrimination when exercising its peremptory challenges to strike two prospective jurors. We affirm.

On 5 December 2000, this Court addressed defendant's appeal of judgments finding him guilty of first-degree murder, first-degree rape, first-degree kidnapping, robbery with a firearm, and first-degree burglary. The detailed facts of this case are set out in that opinion. *See State v. McCord*, 140 N.C. App. 634, 538 S.E.2d 633 (2000), *disc. review denied*, 353 N.C. 392, 547 S.E.2d 33 (2001) ("*McCord I*").

Defendant, who is African-American, was indicted together with three other individuals, one of whom was African-American and two of whom were white. The victim was white. At defendant's trial, the State used peremptory challenges to excuse four prospective African-American jurors, including Loretta Clemmons, Vernon Pressley, Itaska White, and Patricia Hartgrove. One additional prospective African-American juror was excused for cause. The jury was ultimately composed of eleven white jurors and one African-American juror. The African-American juror became the foreperson of the jury.

During the jury *voir dire*, defendant objected on the grounds of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986) to the excusal of Clemmons and Pressley. Prior to determining whether defendant had stated a *prima facie* case of discrimination, the trial court allowed the prosecutor to state his reasons for excusing the two

jurors. With respect to Pressley, the State relied on the fact that he did not own his own home, he had not lived in his residence for more than five years, and he knew a co-defendant. As for Clemmons, the State argued that she knew a co-defendant and had previously been charged with aiding and abetting a murder. The trial court found that these reasons were legitimate grounds unrelated to race and denied defendant's *Batson* motion.

Later during *voir dire*, when the State excused White and Hartgrove, defendant again objected based on *Batson*. Without requiring the State to articulate reasons for excusing White and Hartgrove, the trial court overruled defendant's objection on the grounds that defendant had not made a *prima facie* showing of a pattern of racial discrimination.

On appeal, this Court found no error in defendant's trial with the exception of the trial court's denial of defendant's *Batson* challenge as to White and Hartgrove. With respect to Pressley and Clemmons, the Court held that the trial court's denial of the *Batson* motion was not clearly erroneous. On turning to White and Hartgrove, however, the Court concluded that evidence that the victim was white and the defendant was African-American, that the State used its peremptory strikes to excuse four of the six African-American jurors in the jury pool, and that the jury ultimately had only a single African-American juror was sufficient to raise a *prima facie* inference of intentional discrimination by the State in its use of its peremptory challenges. *McCord I*, 140 N.C. App. at 653, 538 S.E.2d at 645. The Court, therefore, ordered that the case be remanded for a *Batson* hearing limited to the State's excusal of White and Hartgrove:

> [A] judge presiding over a criminal session shall hold a hearing and provide the State with an opportunity to give a race-neutral reason for striking White and Hartgrove. If the trial court finds the State's explanation is not race-neutral, Defendant is entitled to a new trial. If the trial court finds the State's explanation is race-neutral, Defendant shall be given the opportunity to demonstrate that the explanation was a mere pretext. If Defendant meets his ultimate burden of proving intentional discrimination, he is entitled to a new trial. If he does not meet this burden, the trial court will order commitment to issue in accordance with the judgment appealed from and dated 7 April 1999.

Id. at 654, 538 S.E.2d at 645-46.

On 14 May 2001, a *Batson* hearing was conducted by a new superior court judge rather than the judge who had presided over the original trial. At this hearing, the prosecutor, William C. Young, testified and was cross-examined as to his reasons for using peremptory strikes to excuse prospective jurors White and Hartgrove. In addition, the parties jointly submitted the transcript of the jury *voir dire* in the original trial and defendant offered a jury selection form and jury panel notes. Defendant presented no other evidence.

After reviewing the evidence and briefs and hearing argument, the trial court found that the State excused prospective juror White because she was single and the district attorney preferred to have married jurors; because she was only 21 and the district attorney did not want jurors of the same age as defendant and the three co-defendants; because she was employed at a business with which the district attorney was unfamiliar; and because White would not make eye contact. The court found that the State excused Hartgrove because she was divorced; because she had heard about the case; because she knew the family of a co-defendant; and because she was related to one of the co-defendants. The court then found that the reasons articulated by the State were race-neutral and believable and not a pretext for discrimination. Defendant challenges those findings in this appeal.

In *Batson*, the United States Supreme Court set forth a three-step inquiry to be followed by a trial court in determining the constitutionality of a State's use of a peremptory challenge. The North Carolina Supreme Court has adopted this test. *State v. Barden*, 356 N.C. 316, 342, 572 S.E.2d 108, 126 (2002), *cert. denied*, —— U.S. ——, 155 L. Ed. 2d 1074 (2003). Under *Batson*, the defendant must first make a *prima facie* showing that the State exercised a peremptory challenge on the basis of race. *Id.* If defendant meets this burden, then the burden shifts to the State "to offer a facially valid and race-neutral rationale for the peremptory challenge or challenges." *Id.* Finally, the trial court determines whether the defendant has carried his ultimate burden of proving purposeful discrimination. *Id.*

Even when the State articulates facially race-neutral rationales for striking African-American jurors, defendant may rebut this showing by offering evidence of pretext: that the reasons presented "pertained just as well to some white jurors who were not challenged and who did serve on the jury." *Miller-El v. Cockrell*, 537 U.S. 322, 343, 154 L. Ed. 2d 931, 954, 123 S. Ct. 1029, 1043 (2003). In other words, "even though the prosecution's reasons for striking

African-American members of the venire appear race neutral, the application of these rationales to the venire might have been selective and based on racial considerations." *Id.* Additionally, defendant may rely upon evidence such as statistics, disparate questioning, comments or conduct of the district attorney suggestive of discrimination, or past racial discrimination by the district attorney's office. *Id.* at 342-43, 154 L. Ed. 2d at 953-54, 123 S. Ct. at 1042-43. The trial court must weigh defendant's evidence against the State's articulated reasons to determine whether defendant has proven that the State engaged in racial discrimination.

The issue of discrimination is a question of fact and the trial court's ruling will be upheld unless the appellate court is convinced that the trial court's decision is "clearly erroneous." *McCord I*, 140 N.C. App. at 652, 538 S.E.2d at 644. Deference to the trial court is appropriate because a critical aspect of the determination is an assessment of credibility. *State v. Nicholson*, 355 N.C. 1, 21, 558 S.E.2d 109, 125, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71, 123 S. Ct. 178 (2002). While the trial judge presiding over the *Batson* hearing in this case was not the same judge who presided over jury selection, he still had the ability to observe the testimony of the prosecutor firsthand.

Nevertheless, as the United States Supreme Court has stressed, "deference does not imply abandonment or abdication of judicial review." *Miller-El*, 537 U.S. at 340, 154 L. Ed. 2d at 952, 123 S. Ct. at 1041. After, however, a thorough review of the record and consideration of this Court's prior opinion, we cannot find that the trial court's ruling was clearly erroneous as to either White or Hartgrove.

This Court has already found that "the record contains no evidence the State made any racially motivated statements or asked any racially motivated questions during *voir dire*, and the record shows one black juror served on the panel." *McCord I*, 140 N.C. App. at 652, 538 S.E.2d at 645. There is also no evidence of historical discrimination. Instead, defendant relied primarily on evidence that he argues demonstrates pretext.

As to White, Young testified that his reasons for using a peremptory strike to excuse her from the jury pool were that she was "a single female of the . . . approximate same age, of the participants [in the crime]; she was employed at a place that I had never heard of; and I could not make . . . eye contact[] with her." Young explained that he did not want any unmarried persons to serve on the jury in this case because the victim and all the defendants were young and single and

he did not want jurors who could relate to the defendants. Defendant contends that the trial court should have found this explanation pretextual because Young only asked two jurors (one of whom was white) their age, did not object to other white jurors who were unmarried, and reacted differently toward white jurors who worked at unfamiliar businesses. Young testified that he only asked the age of those prospective jurors who appeared to be similar in age to the defendants. Defendant has not challenged this testimony. In addition, defendant did not point to any white juror who possessed all three qualities relied upon by Young—youth, unmarried status, and employment by an unfamiliar business. The State, on the other hand, points to the fact that it used a peremptory challenge to excuse a prospective white juror, who like White was a similar age to the defendants, was single, and worked for a company that Young did not know.

As to Hartgrove, Young testified that not only was Hartgrove divorced and had heard about the case prior to being called for jury duty, "but she knew Ruff, a co-Defendant; she was related to Ruff's grandmother; and she knew his aunts and uncles." Young explained, "I was not going to leave a family member of Mr. Ruff on the jury and I exercised a peremptory challenge." Defendant reiterates his argument that unmarried white jurors were accepted and points to white jurors who had also heard about the case. He does not, however, offer any evidence that would suggest that the State's concern about Hartgrove's familiarity and relationship with a co-defendant was pretextual. *See McCord I*, 140 N.C. App. at 652-53, 538 S.E.2d at 645 (Pressley and Clemmons properly excused in part because they knew a co-defendant).

In addition, the State points out that Young accepted one African-American juror while it still had an unused peremptory challenge. *See State v. Jackson*, 322 N.C. 251, 255, 368 S.E.2d 838, 840 (1988) (trial court could consider fact that State left an African-American on the jury when it still had three peremptory challenges left), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). Further, five of the State's witnesses—including its key eye witness—were African-American, a fact that undercuts the claim that the State was motivated to discriminate. *See, e.g., Nicholson*, 355 N.C. at 22, 558 S.E.2d at 125 (noting that "[s]everal of the state's key witnesses were also African-American"); *State v. Williams*, 339 N.C. 1, 17-18, 452 S.E.2d 245, 255 (1994) ("That a black witness played such a key role in defendant's prosecution substantially undercuts any incentive on the prosecu-

tor's part to remove blacks on the basis of their race."), *cert. denied*, 516 U.S. 833, 133 L. Ed. 2d 61 (1995), and *overruled on other grounds*, *State v. Warren*, 347 N.C. 309, 492 S.E.2d 609 (1997).

As stated above, this Court's duty is to examine the record to determine whether the trial court's ruling was clearly erroneous. After a careful review of the record and our case law on *Batson* challenges, we are unable to conclude that the trial court's ruling was clearly erroneous.

Affirmed.

Judges McGEE and HUDSON concur.

STATE OF NORTH CAROLINA v. MICHAEL FARMER

No. COA02-1405

(Filed 1 July 2003)

1. **Rape— attempted second-degree rape—sufficiency of evidence**

The trial court properly denied defendant's motion to dismiss an attempted second-degree rape charge where there was sufficient evidence of intent and overt acts in defendant's initial subterfuge; his suggestive touching of the victim and expression of desire; his assault on her, which included pulling her pants down while he was lying on top of her; and his threats when she tried to escape.

2. **Rape— attempted—pattern jury instruction**

An almost verbatim rendition of the pattern jury instruction on attempted rape was not erroneous. Although defendant argued that the instruction was incomplete because it did not define penetration and did not adequately explain intent, he had no authority for his contention and none was found by the Court of Appeals.

3. **Jury— verdict form marked incorrectly—second form supplied—no mistrial**

The trial court did not err in a second-degree rape prosecution by giving the jury a second verdict form, and did not abuse

its discretion by denying defendant's motion for a mistrial, where there was a disturbance when the clerk read the verdict and the jury indicated that the original form had been incorrectly marked.

Appeal by defendant from judgment entered 15 May 2002 by Judge Milton F. Fitch, Jr. in Superior Court, Wilson County. Heard in the Court of Appeals 30 June 2003.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Rudolph A. Ashton, III for defendant-appellant.

WYNN, Judge.

From his conviction on the charge of attempted second-degree rape and sentence to a presumptive term of 94-122 months imprisonment, defendant—Michael Farmer—contends the trial court erred by (1) denying his motion to dismiss, (2) denying his motion to set aside the jury verdict, (3) improperly instructing the jury on the elements of attempted second-degree rape, and (4) denying his motion for a mistrial. We find no error in his trial.

At trial, the State's evidence tended to show that, on 9 January 2000 at approximately 2:00 a.m., defendant gained access to a female's apartment under the guise of warning her of threats against her by her estranged husband who was also defendant's cousin. At defendant's suggestion, the female agreed to ride with him to the Wilson County Sheriff's Department to swear out a warrant against her estranged husband for communicating threats.

Once in the car, however, defendant began to make sexual advances towards the female, and admitted that the story about her estranged husband's threats was a fabrication. The female rebuffed defendant's advances. Nevertheless, defendant took her back to her apartment where the female attempted to escape by closing the apartment door before defendant could enter. Defendant, however, forced his way into the apartment, and told the female that he had coveted her for a long time. When the female explained to defendant that she was in a relationship with another man, defendant became violent, assaulting her and knocking her to the floor. Defendant stated, "I can't believe you're cheating on my cousin." Defendant insisted, "you're going to give me some." Defendant pulled off her pants while she was on the floor. When the female attempted to move

away from defendant, defendant threatened to shoot her with a gun, which defendant claimed to have in his pocket. In order to get away, the female feigned cooperation, and suggested to defendant that they go to defendant's house. Defendant agreed and allowed her to get dressed.

Thereafter, the female suggested, and defendant agreed, that defendant follow her in his own car. However, instead of driving to defendant's residence, the female drove to the home of her male friend's residence; got out the car and ran to tell her male friend of defendant's actions. Defendant pursued the female, grabbed her by the arm, and threatened: "You tell anybody[,] I'm going to kill you." Defendant also threatened to shoot her male friend. The female broke away from defendant and ran to her male friend, whereupon defendant left. Thereafter, the female reported the incident to the Wilson Police Department.

Defendant presented the alibi testimony of his girlfriend who stated that on the morning of the alleged incident, 8 January 2000, she was at the Wilson Memorial Hospital giving birth to a child fathered by defendant. She testified that defendant was with her the entire day of 8 January 2000, left the hospital at about 10:00 p.m., and returned to the hospital at 4:00 a.m. on the morning of 9 January 2000. Defendant testified that he spent the entire day of 8 January 2000 with Ms. Farmer and did not leave the hospital until 10:00 p.m. He testified that his friend, David Ferguson, picked him up from the hospital, and the two men went to a nightclub at around 11:00 p.m. where they remained until the club closed at around 3:00 a.m. on 9 January 2000. After leaving the club, Mr. Ferguson took defendant back to the hospital. Mr. Ferguson corroborated defendant's testimony.

[1] By his first argument, defendant contends the trial court erred in denying his motion to dismiss and motion to set aside the verdict because there was insufficient evidence to support a conviction for attempted second-degree rape. We disagree.

"In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997). "[T]he question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense." *State v. Brayboy*, 105 N.C. App. 370, 373-74, 413 S.E.2d

590, 592 (1992). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Williams*, 133 N.C. App. 326, 328, 515 S.E.2d 80, 82 (1999) (citation omitted).

To obtain a conviction for attempted second-degree rape, the State must prove beyond a reasonable doubt that (1) the accused had the specific intent to commit rape; and (2) the accused committed an overt act for the purpose, which goes beyond mere preparation, but falls short of the complete offense. *State v. Robertson*, 149 N.C. App. 563, 567, 562 S.E.2d 551, 554 (2002). The element of intent is seldom proved by direct evidence, but must be generally inferred for the facts and surrounding circumstances. *State v. Morris*, 156 N.C. App. 335, 340, 576 S.E.2d 391, — (2003). In *State v. Oxendine*, for instance, we noted that the "[i]ntent to rape may be 'proved circumstantially by inference, based upon a defendant's actions, words, dress, or demeanor.' " 150 N.C. App. 670, 674, 564 S.E.2d 561, 564 (2002) (citation omitted). The intent to commit an attempted rape may be established "if the evidence shows that [the] defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part." *State v. Schultz*, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855-56 (1987); *see also State v. Dunston*, 90 N.C. App. 622, 625, 369 S.E.2d 636, 638 (1988) Furthermore, "[e]vidence that an attack is sexually motivated will support a reasonable inference of an intent to engage in vaginal intercourse with the victim even though other inferences are also possible." *Oxendine*, 150 N.C. App. at 674, 564 S.E.2d at 564 (citation omitted).

Although defendant argues to the contrary, we conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to prove each element of the offense charged. Defendant's initial subterfuge; subsequent suggestive touching of the female along with the expression of his desire for her; later assault, which included pulling the female's pants down while lying on top of her; and threats of harm when she tried to get away from him, are sufficient to permit a reasonable fact-finder to infer that defendant had the requisite intent to rape the female and committed sufficient overt acts toward that end. Accordingly, the trial court properly denied defendant's motion to dismiss. It also follows that the trial court did not abuse its discretion in denying defendant's post-trial motion to set aside the verdict as contrary to the weight of the evidence.

[2] By his next argument, defendant contends the trial court erred by incorrectly instructing the jury on the elements attempted second-degree rape. As defendant failed to properly preserve this matter for review under N.C. R. App. P. 10(b)(2), defendant seeks plain error review of the court's jury instructions. After carefully reviewing the record, we find no error.

"In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). Significantly, the *Odom* Court noted, "it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 661, 300 S.E.2d at 378 (citation omitted).

In the case *sub judice*, the trial court instructed the jury on the elements of attempted second-degree rape as follows:

> Now, I charge for you to find the Defendant guilty of attempted second degree rape, the State must prove beyond a reasonable doubt that on the alleged date the Defendant intended to have vaginal intercourse with the victim by force and against her will, and that he performed acts which were calculated and designed to bring about vaginal intercourse by force and against the victim's will, and it would have resulted in such intercourse had the Defendant not been stopped or prevented from completing his apparent course of action.

While defendant does not argue that the instruction, which is almost a verbatim rendition of the pattern jury instruction for attempted rape, is an incorrect statement of the law, he contends that the instruction is incomplete. Defendant contends that the instruction is fatally flawed because it (1) failed to define penetration, and (2) failed to adequately explain the intent to commit intercourse. Notably, however, defendant references no authority for his contention in this regard. Furthermore, our review of the relevant case law has revealed an absence of support for defendant's position. Taking the instruction as a whole, we conclude that defendant cannot show error—plain or otherwise—in the trial court's charge. *See State v. Robinson*, 97 N.C. App. 597, 603, 389 S.E.2d 417, 421 (1990) (rejecting the defendant's argument that the trial court erred in instructing the jury on the elements of attempted second degree rape and finding that the charge was "sufficient to provide the jury with a

correct statement of the law to apply to the evidence before them," where the court properly charged that in order to find the defendant guilty of attempted rape, the jury must determine that the defendant intended to have "vaginal intercourse with the victim *by force and against her will*") (emphasis supplied).

[3] By his final argument, defendant contends the trial court erred in submitting a second verdict form to the jury and denying his motion for mistrial after the jury indicated that the initial verdict form had been incorrectly marked. Specifically, defendant argues that a "disruptive outbreak" by defendant's family, which occurred after the reading of the initial, and erroneous, verdict "resulted in substantial and irreparable prejudice to the defendant's case," and therefore, he was entitled to a mistrial. We disagree.

The trial court's ruling on a motion for mistrial generally "lies within the sound discretion of the trial court." *State v. Lippard*, 152 N.C. App. 564, 574, 568 S.E.2d 657, 664 (citation omitted). Such a ruling will be reversed only upon a showing of a manifest abuse of discretion. *Id.*

In the instant case, the jury returned to the courtroom after reaching an unanimous verdict. The clerk read the verdict as being "not guilty," and apparently there was a brief disturbance in the courtroom. The judge warned against any further "outbreaks" and proceeded to ask the jurors if that was their verdict. The jurors responded in unison, "no." The judge asked the jurors again if the verdict was theirs, and again, the jurors told the court that the verdict, as read by the clerk, was incorrect. The jury reiterated that their verdict was unanimous. Over defendant's objections, the judge ordered the clerk to give the jury a second verdict sheet so that they could accurately record their unanimous verdict. The jury subsequently left the courtroom and went back to the jury room to complete the second verdict sheet. Some eight minutes later, the jury returned to the courtroom and submitted a unanimous verdict finding defendant guilty as charged. The jury foreman explained that he had erroneously marked the first verdict sheet, and that the verdict had always been guilty. The judge specifically inquired of the foreman: "And that there was nothing regarding an outbreak in this courtroom that caused this jury to change its position from the first verdict pronounced to the second sheet that you now possess?" The foreman replied: "Not to my knowledge, Your Honor." The jury thereafter in unison and individually declared that the second verdict form of

guilty was the true verdict. The trial judge then accepted the guilty verdict and ordered that it be recorded.

It is well settled that "[a] verdict is not complete until accepted by the court." *State v. Best*, 280 N.C. 413, 419, 186 S.E.2d 1, 5 (1972). Further, although not controlling law, we are persuaded by an earlier unpublished opinion of this Court in which we addressed a similar set of circumstances, *State v. McCallum*, 149 N.C. App. 977, 563 S.E.2d 308 (2002) (unpublished). In *McCallum*, this Court held that the trial court did not err in submitting a second verdict form and instructing it to correct a clerical error. *Id.*

While defendant attempts to distinguish the facts in the present case by drawing the Court's attention to the "disruptive outburst" that allegedly occurred here, those attempts fail. Accordingly, we conclude that the trial court did not err in giving the jury a second verdict form to correct the clerical error made by the foreman, and that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

In sum, we hold that defendant received a fair trial, free of prejudicial error.

No error.

Judges TYSON and STEELMAN concur.

LYNETTA DRAUGHON, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAX DRAUGHON, DECEASED, PLAINTIFF v. HARNETT COUNTY BOARD OF EDUCATION AND BARRY HONEYCUTT, JACKIE SAMUELS, STEPHEN AUSLEY, JASON SPELL, ANTHONY BARBOUR, PERRY SAENZ, DON WILSON, JR., RAYMOND MCCALL, AND BRIAN STRICKLAND, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA02-1142

(Filed 1 July 2003)

1. Appeal and Error— appealability—interlocutory order—substantial right—right to avoid two trials

Although this appeal in a wrongful death action concerns only one of the defendants and the trial court did not certify the judgment under N.C.G.S. § 1A-1, Rule 54(b), plaintiff's right to

avoid two trials on the same or overlapping issues constitutes a substantial right allowing an immediate appeal.

2. Wrongful Death— summary judgment—sufficiency of evidence

The trial court did not err in an action for the wrongful death of a high school football player from a heatstroke by granting summary judgment in favor of defendant assistant coach, because: (1) the complaint could not rebut the summary judgment motion where the complainant lacked personal knowledge; (2) conclusory allegations, unsworn statements, and inadmissible hearsay cannot be relied upon to overcome evidence showing defendant is entitled to summary judgment; and (3) plaintiff acknowledged that she could not establish that defendant committed any of the alleged acts, thus showing that plaintiff cannot satisfy the elements of her claim and cannot show either that defendant breached a legal duty to decedent or that a breach proximately caused decedent's death.

3. Jurisdiction— ruling on summary judgment while prior appeal pending—consideration of entire record

The trial court did not err by ruling on defendant's motion for summary judgment while a prior appeal from summary judgment for other defendants was pending and by allegedly failing to consider the entire record, because: (1) the trial court stated that it reviewed the admissible facts and concluded that there was no genuine issue of material fact; and (2) the trial court was not divested of jurisdiction of the claims against defendant merely based on the fact that the appeal involving the other defendants was pending.

Judge WYNN dissenting.

Appeal by plaintiff from order entered 4 March 2002 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 22 May 2003.

Keith A. Bishop, PLLC, by Keith A. Bishop; and Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, by Linda E. Capobianco, for plaintiff appellant.

Tharrington Smith, L.L.P., by Jonathan Blumberg, for Brian Strickland defendant appellee.

McCULLOUGH, Judge.

Plaintiff Lynetta Draughon personal representative of the Estate of Max Draughon, appeals from an order granting summary judgment in favor of defendant Brian Strickland. We affirm. Previously, another panel of this Court affirmed summary judgment on behalf of defendants Stephen Ausley, Raymond McCall, Jason Spell and Don Wilson, Jr. *See Draughon v. Harnett County Board of Education*, 158 N.C. App. 208, 580 S.E.2d 732 (2003).

The facts pertinent to an understanding of this appeal are as follows: The decedent was a football player at Triton High School in Harnett County, North Carolina, who collapsed during a morning practice session on 8 August 1998 and died the next day at UNC Memorial Hospital from complications of heatstroke. A more detailed discussion of the facts and procedural history of the case can be found in this Court's earlier opinion filed on 3 June 2003. Like the other defendants, Strickland filed a motion for summary judgment which was granted by the trial court on 4 March 2002. Plaintiff appeals.

Interlocutory Appeal

[1] As this appeal concerns only one of the defendants and the trial court did not certify the judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001), we must first determine whether this appeal affects a substantial right.

As defendant Harnett County Board of Education's liability depends on the individual defendants' joint and several liability, plaintiff faces the possibility of having to undergo two trials on the same issue. The right to avoid two trials on the same or overlapping issues does constitute a substantial right, thus plaintiff's appeal is not interlocutory. *See Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982); and *Liggett Group v. Sunas*, 113 N.C. App. 19, 437 S.E.2d 674 (1993). A prior panel of this Court reached the same conclusion. *See Draughon*, 158 N.C. App. at 211, 580 S.E.2d at 735. We therefore turn to the merits of the appeal.

Summary Judgment

The standard of review on appeal from the granting of a motion for summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603, *disc. review*

denied, 354 N.C. 371, 555 S.E.2d 280 (2001). The moving party 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).A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

"Once 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 (2000). "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).

[2] To establish error on the part of the trial court, plaintiff must show that defendant Strickland failed to exercise proper care in the performance of a legal duty which resulted in the wrongful death of decedent.

> "In an action for recovery of damages for wrongful death, resulting from alleged actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed plaintiff's intestate under the circumstances in which they were placed; and second, that such negligent breach of duty was the proximate cause of the injury which produced the death—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."

Harris v. Wright, 268 N.C. 654, 658, 151 S.E.2d 563, 566 (1966) (quoting *Reeves v. Staley*, 220 N.C. 573, 582, 18 S.E.2d 239, 245 (1942)).

With these principles in mind, we turn to the record in the case *sub judice.*

Here, plaintiff attempts to rely on the complaint and the depositions of record. However, the complaint was not verified and thus cannot be relied upon as sworn testimony. The allegations in the complaint also rest upon the personal knowledge of third parties and not that of the complainant. Whether it was verified or not, the complaint could not overcome the evidence of record. *See Talbert v. Chopin*, 40 N.C. App. 360, 253 S.E.2d 37 (1979) (verified complaint not suitable to rebut summary judgment motion where complainant lacked personal knowledge). Plaintiff also attempts to create an issue of fact by relying on conclusory allegations, unsworn statements or inadmissible hearsay. Such evidence cannot be relied upon to overcome evidence showing that defendant is entitled to summary judgment. *See Eagle's Nest, Inc. v. Malt*, 70 N.C. App. 397, 399, 319 S.E.2d 685, 687 (1984).

In the present case the complaint alleged that defendant Strickland, an Assistant Coach, prohibited decedent from getting water while directing him to run wind sprints and failed to recognize the symptoms of heatstroke exhibited by decedent prior to his collapse. Defendant denied that he committed any of the acts complained of, and his denial is supported by the testimony of others.

In both her deposition and defendant's Request For Admissions, plaintiff acknowledged that she could not establish that Strickland committed any of the acts alleged. Thus, plaintiff cannot satisfy the elements of her claim and cannot show either that defendant breached a legal duty to decedent or that a breach proximately caused decedent's death. Accordingly, her claim must fail and this assignment of error is overruled.

Other Assignments of Error

[3] Plaintiff has also alleged that the trial court erred in ruling on defendant Strickland's motion for summary judgment while the prior appeal was pending and that the trial court failed to consider the entire record. Both assignments of error are without merit. In ruling, the trial court stated that

> [a]fter reviewing the facts that are admissible in evidence that appear from the pleadings, depositions and other documents of record, and after hearing the arguments of counsel, the Court is of the opinion that there is no genuine issue as to any material

> fact, and that [this] Defendant Brian Strickland is entitled to judgment as a matter of law.

Finally, the trial court was not divested of jurisdiction of the claims against defendant Strickland merely because the appeal involving the other defendants was pending. N.C. Gen. Stat. § 1-294 (2001) provides:

> When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

Based on the foregoing, we conclude plaintiff's arguments are meritless, and her remaining assignments of error are overruled.

Conclusion

As defendant made a showing through competent evidence that he was entitled to summary judgment, it became incumbent upon plaintiff to produce a forecast of evidence showing that she could at least establish a *prima facie* case at trial. *Gaunt*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664. This she could not do. Accordingly, summary judgment on behalf of defendant Brian Strickland is

Affirmed.

Judge CALABRIA concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

For the reasons stated in my dissenting opinion in *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, —, — S.E.2d —, — (June 3, 2003) (Wynn, J., dissenting), I respectfully dissent.

CURRIN & CURRIN CONSTRUCTION, INC., PLAINTIFF v. JAMES ERIC LINGERFELT AND JANA CAROLE LINGERFELT, DEFENDANTS

No. COA02-941

(Filed 1 July 2003)

1. Appeal and Error— appealability—interlocutory order—certification

Although plaintiff's appeal from the grant of summary judgment in favor of defendants is an appeal from an interlocutory order since it does not dispose of the entire case and leaves defendants' counterclaims intact, the order is immediately appealable because: (1) the order from which plaintiff appeals is final as to plaintiff's claims since the court entered summary judgment in favor of defendants and dismissed plaintiff's complaint with prejudice; and (2) the trial court certified that there was no reason to delay plaintiff's appeal.

2. Construction Claims— invalid general contractor's license—estoppel

The trial court did not err in an action to recover on a construction contract by entering summary judgment in favor of defendant homeowners, because: (1) plaintiff contractor is barred from recovering on the construction contract entered into by the parties based on the fact that plaintiff did not have a valid general contractor's license at the time the contract was formed; (2) an unlicensed contractor may not circumvent this rule by including a condition precedent that the contract will become effective after the contractor obtains a valid license; and (3) the doctrine of estoppel is unavailable to plaintiff when nothing in the licensing statute authorizes a person with whom an unlicensed contractor deals to waive the requirements of the statute or grants the unlicensed contractor immunity merely based on the fact that he advises one of his customers that he is acting in violation of the statute.

Appeal by plaintiff from judgment and order entered 4 June 2002 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 14 April 2003.

Bain & McRae, by Edgar R. Bain and Alton D. Bain, for plaintiff-appellant.

Akins, Hunt & Fearon, P.C., by Donald G. Hunt, Jr. and Belinda Keller Sukeena, for defendant-appellees.

HUNTER, Judge.

Currin & Currin Construction, Inc. ("plaintiff") appeals from summary judgment entered in favor of James Eric Lingerfelt ("defendant James") and Jana Carole Lingerfelt (collectively "defendants"). We affirm since plaintiff is barred from recovering on the construction contract entered into by the parties because plaintiff did not have a valid general contractor's license at the time the contract was formed.

In May of 1999, Durane Currin ("Currin"), President of plaintiff, orally agreed that plaintiff would construct a house for defendants on a "cost plus" basis. In a letter dated 5 May 1999, Currin wrote to BB&T Mortgage Loan Department and acknowledged plaintiff's agreement to build a house, estimated to cost approximately $380,000.00, for defendants. Subsequently, when defendant James went to the Wake County Planning Office to secure a building permit, defendant James discovered that plaintiff's general contractor's license had not been renewed. Defendant James immediately informed Currin that plaintiff's license had not been renewed. Currin advised defendant James that there was a mistake and that the license was in the process of being renewed. According to Currin, "[t]he Defendants agreed that the Plaintiff would perform the work on the contract as soon as [plaintiff's] license was renewed and the construction permit was issued." Plaintiff's license became invalid on 1 March 1999 but was renewed and reactivated on 30 June 1999.

Plaintiff began construction on defendants' house on 1 August 1999, after obtaining a valid license. Plaintiff continued construction on the house until 20 July 2000, at which time defendants had no funds with which to pay plaintiff for construction and the financial institution providing construction loans refused to advance further monies. At the time plaintiff ceased construction on the house, defendants owed plaintiff $42,057.81. Thereafter, on 19 September 2000, plaintiff filed a claim of lien against defendants' property in the amount of $42,057.81. Plaintiff then brought suit on 21 December 2001 against defendants to collect the amount of the lien. Defendants filed an answer and counterclaims. Included in defendants' affirma-

tive defenses was that plaintiff was not licensed pursuant to N.C. Gen. Stat. § 87-10 (2001) when the parties negotiated and formed their contract. Plaintiff replied to defendants' affirmative defenses and counterclaims on 12 March 2002. On 4 March 2002, defendants filed a motion for summary judgment which was granted by the trial court on 4 June 2002. Plaintiff appeals.

[1] As a threshold matter, we note that the order from which plaintiff appeals is interlocutory since it does not dispose of the entire case. *See Carriker v. Carriker*, 350 N.C. 71, 511 S.E.2d 2 (1999). The trial court granted defendants' motion for summary judgment but left defendants' counterclaims intact. Generally, there is no right of immediate appeal from an interlocutory order. *Myers v. Mutton*, 155 N.C. App. 213, 215, 574 S.E.2d 73, 75 (2002), *disc. review denied*, 357 N.C. 63, 579 S.E.2d 390 (2003). However, an interlocutory order

> is immediately appealable if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed.

Id. The interlocutory order at issue in the instant case is immediately appealable due to the following: (1) the order from which plaintiff appeals is final as to plaintiff's claims since the court entered summary judgment in favor of defendants and dismissed plaintiff's complaint with prejudice; and (2) the trial court certified that there is no reason to delay plaintiff's appeal. Accordingly, this case is properly before us to review.

[2] Plaintiff initially contends the trial court erred in granting defendants' motion for summary judgment because plaintiff asserts there were genuine issues of material fact as to when the parties entered into an effective contractual relationship and whether plaintiff was a licensed contractor at the time the contract was formed. We disagree.

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). When ruling on a summary judgment motion, the trial court is required to view the evidence in a light most favorable to the nonmoving party. *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001). The moving party

bears the burden of demonstrating that there is no triable issue. *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). This burden may be met "by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or *would be barred by an affirmative defense* . . . ." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (emphasis added). If the moving party satisfies this burden, then the burden shifts to the non-moving 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." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

Our General Assembly has enacted mandatory directives applicable to general contractors that are designed "to protect the public from incompetent builders." *Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968). A "general contractor" is statutorily defined, in pertinent part, as "any person or firm or corporation who for a fixed price, commission, fee, or wage, undertakes . . . to construct . . . any building . . . where the cost of the undertaking is thirty thousand dollars ($30,000) or more . . . ." N.C. Gen. Stat. § 87-1 (2001). A general contractor's certificate of license expires on the thirty-first day of December following its issuance or renewal and becomes invalid sixty days from that date unless renewed. N.C. Gen. Stat. § 87-10(e).

In the case *sub judice*, the evidence submitted to the trial court showed that plaintiff's general contractor's license became invalid on 1 March 1999 but was renewed and reactivated on 30 June 1999. Plaintiff entered into a contract in May of 1999, whereby plaintiff agreed to construct a house for defendants on a cost plus basis. Currin testified in an affidavit that after learning that plaintiff's general contractor's license had not been renewed, "[t]he Defendants agreed that the Plaintiff would perform the work on the contract as soon as [plaintiff's] license was renewed and the construction permit was issued."

Brady v. Fulghum, 309 N.C. 580, 308 S.E.2d 327 (1983) controls this case. In *Brady*, our Supreme Court expressly rejected the doctrine of "substantial compliance" with the general contractor's licensing statute and adopted the bright line "rule that a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor." *Id.* at 586, 308 S.E.2d at 331. The *Brady* Court further held that the contract "cannot be validated by the contractor's subsequent procurement of a license." *Id.*

In this case, the parties entered into a construction contract in May of 1999, at which time plaintiff's general contractor's license was invalid. Plaintiff argues, however, that the parties' later agreement that "the Plaintiff would perform the work on the contract as soon as [plaintiff's] license was renewed and the construction permit was issued[,]" was either a new contract or an oral modification of the original contract, which included a condition precedent that the contract was to become effective after plaintiff's license was renewed. Assuming *arguendo* that the later agreement was a new contract or modification of the original contract, containing such condition precedent, under *Brady*, the contract would still be unenforceable by plaintiff. The *Brady* Court "agree[d] that the existence of a license at the time the contract is signed is determinative and attach[ed] 'great weight to the significant moment of the entrance of the parties into the relationship.' " *Id.* (quoting *Latipac, Inc. v. The Superior Court of Marin County*, 411 P.2d 564, 568 (Cal. 1966)). Therefore, an unlicensed contractor may not circumvent *Brady* by including a condition precedent that the contract will become effective after the contractor obtains a valid license. Thus, we must, in following *Brady*, affirm the trial court's summary judgment entered in favor of defendants. Defendants met their burden of proving that plaintiff was barred from recovering on the construction contract because plaintiff did not have a valid general contractor's license at the time of the contract's inception. Accordingly, defendants were entitled to a judgment as a matter of law.

Plaintiff additionally argues that if this Court determines *Brady* controls and, therefore, upholds the trial court's entry of summary judgment in favor of defendants, the *Brady* rule should be reexamined due to the harsh and inequitable results arising from its application to the facts of this case. However, we are, of course, bound by *Brady* regardless of its harsh results unless either our Supreme Court or the General Assembly decides otherwise.

Plaintiff finally argues that defendants waived and are estopped from asserting the defense of lack of a contractor's license because defendants became aware that plaintiff was unlicensed but nevertheless chose to continue to have plaintiff perform construction on their home after plaintiff's license was renewed.

Plaintiff has not cited, nor have we found, any North Carolina cases in which our Courts have held that an owner may waive the statutory licensing requirements. In fact, this Court has previously stated: " '[N]othing in the licensing statute authorizes a person with

whom an unlicensed contractor deals to waive the requirements of the statute or grants the unlicensed contractor immunity merely because he advises one of his customers that he is acting in violation of the statute.' " *Allan S. Meade & Assoc. v. McGarry*, 68 N.C. App. 467, 471, 315 S.E.2d 69, 71-72 (1984) (quoting *Construction Co. v. Anderson*, 5 N.C. App. 12, 20, 168 S.E.2d 18, 23 (1969)). Therefore, the doctrine of estoppel is not available to plaintiff.

Affirmed.

Chief Judge EAGLES and Judge CALABRIA concur.

STATE OF NORTH CAROLINA v. RANDY ANTONE BURNETTE

No. COA02-1157

(Filed 1 July 2003)

1. **Jury— motion for new jury denied—no transcript in record—no appellate review**

The lack of a transcript of a jury voir dire prevented appellate review of whether the trial court abused its discretion in denying defendant's motion to impanel another jury. The trial court's discretion in impaneling a jury will not be disturbed absent a showing of abuse of discretion, and the appellant has the burden of providing a record which allows proper review.

2. **Evidence— destroyed by police dog—no evidence of bad faith**

An officer's disposal of the remaining pieces of a plastic bag destroyed by a police dog did not result in the dismissal of an indictment for cocaine possession. There was no evidence of bad faith. N.C.G.S. § 15-11.1.

3. **Drugs— possession of cocaine—evidence sufficient**

There was sufficient evidence of possession of cocaine with intent to sell and deliver where an officer saw defendant reach into his pants; the officer asked that defendant open his pants; the officer saw a plastic bag; defendant grabbed part of the bag and threw it down, then ran; defendant was apprehended in a

thicket; and a drug dog found and destroyed a plastic bag with the narcotics in the thicket.

4. Drugs— possession of paraphernalia

There was sufficient evidence of possession of drug paraphernalia where razor blades were found in a jacket lost by defendant when he was running from police and a set of digital scales was found in a vehicle which officers had seen defendant driving.

Appeal by defendant from judgment entered 3 April 2002 by Judge Wade Barber in Orange County Superior Court. Heard in the Court of Appeals 5 June 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

George E. Kelly, III for defendant.

TYSON, Judge.

Randy Antone Burnette ("defendant") appeals his jury conviction and sentence for possession of cocaine, possession of drug paraphernalia, and resisting a public officer. We find no error.

I. Background

Carrboro Police were called to the scene of a fight in the parking lot of a Pantry store in the early morning of 22 October 2001. Corporal Seth Everett was the first officer on the scene and immediately recognized Carlos Negrete and defendant as two of the three men fighting. Defendant was wearing blue jeans and a jacket. The third man was identified as a "running buddy" of Negrete. While another officer dealt with the third man, Corporal Everett ordered defendant and Negrete to the ground.

As he was handcuffing Negrete, Corporal Everett noticed defendant "with his hands start going in his belt buckle like this underneath his pants, putting something in his pants underneath his belt." Concerned for his safety, Corporal Everett asked defendant what he had put into his pants. After defendant stated he had nothing in his pants, Everett asked defendant to show him. Defendant opened his pants and Corporal Everett observed "a baggie sticking directly out of his—like a corner of a sandwich baggie sticking directly out of his underwear." After Corporal Everett asked defendant what was in the

bag, defendant reached into his pants, made a fist, threw part of the baggie to the ground, and ran.

The officers chased defendant without ever losing sight of him into the woods. Defendant's coat came off during his flight. Defendant ran into a barbed wire fence in the woods, fell down, and crawled into a thicket of briars. The officers dragged defendant out of the thicket and placed him under arrest.

Corporal Everett did not find the plastic baggie when defendant was searched. A K-9 unit arrived at the scene and located crack cocaine "[e]xactly where [defendant] had buried himself in the thicket." During the search of the woods, the police dog, Xaro, found a baggie with the narcotics, but destroyed it. The remaining pieces of the baggie were ultimately thrown away by Corporal Everett.

Xaro also searched a vehicle at the scene which officers identified as belonging to defendant. Officer Josh Wood testified that three weeks before the incident, he had stopped defendant driving the vehicle because it had a broken taillight.

Officer Lori Watkins searched the coat defendant was wearing before he fled and lost during his flight. She found four straight razor blades wrapped in brown security wrapping. Officer Watkins also searched the vehicle which she had seen defendant driving on multiple occasions. She found a set of digital scales inside the vehicle.

Defendant did not present any evidence. The charges of (1) possession with intent to sell and deliver cocaine and the lesser included offense of possession of cocaine, (2) possession of drug paraphernalia, and (3) resisting a public officer were submitted to the jury. The jury convicted defendant of possession of cocaine, possession of drug paraphernalia, and resisting a public officer. Defendant admitted to being an habitual felon pursuant to a plea agreement to consolidate the charges and to sentence in the mitigated range. Defendant appeals.

II. Issues

Defendant contends the trial court erred in (1) denying defendant's motion to repanel the jury (2) denying defendant's motion to dismiss the indictment based on destruction of evidence and (3) denying defendant's motion to dismiss for insufficient evidence.

III. Motion to Repanel the Jury

[1] During *voir dire*, a potential juror stated that she knew defendant through her brother. It was later developed by the State that the juror's brother had been involved in a controlled substance offense. Defendant objected and moved for a new jury to be selected. The trial court denied defendant's motion. Defendant contends that the jury was given "information obviously prejudicial—that defendant had a friendship with a convicted drug related offender" prior to being empaneled and that the trial court erred in denying defendant's motion. We disagree.

The record does not contain a transcript of the jury *voir dire* only the restatement by defendant's counsel on the record of what transpired. The trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled, and its rulings in that regard will not be reversed absent a showing of abuse of its discretion. *State v. Harris*, 283 N.C. 46, 48-49, 194 S.E.2d 796, 797, *cert. denied*, 414 U.S. 850, 38 L. Ed. 2d 99 (1973). The appellant has the burden of providing a record which allows the appellate courts to properly review the assignment of error. *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 585, 364 S.E.2d 416, 417 (1988). We are unable to determine whether the trial court abused its discretion in denying defendant's motion without a transcript. This assignment of error is overruled.

IV. Destruction of Evidence

[2] Defendant contends the trial court erred in denying defendant's motion to dismiss the indictment against him on the grounds that the arresting officers destroyed evidence when they deliberately threw the pieces of plastic bag allegedly containing the drugs found in a thicket into the trash. Defendant asserts his rights to due process were violated under the U.S. and N.C. Constitutions.

N.C. Gen. Stat. § 15-11.1 (2001) requires law enforcement officers to "safely keep [property seized pursuant to lawful authority] under the direction of the court or magistrate as long as necessary to assure that the property will be produced at and may be used as evidence in any trial." In *Arizona v. Youngblood*, 488 U.S. 51, 102 L. Ed. 2d 281 (1988), the Supreme Court held "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law" and does not require a dismissal of the indictment. 488 U.S. at

58, 102 L. Ed. 2d at 289. Our State adopted the reasoning and bad faith requirement of *Youngblood* in *State v. Hunt*, 345 N.C. 720, 483 S.E.2d 417 (1997).

The trial court found the plastic bag was "intentionally destroyed" but also found no evidence of bad faith on the part of law enforcement. Defendant has failed to provide any evidence or argument that Corporal Everett acted with bad faith. Without a showing of bad faith, the failure to preserve potentially exculpatory evidence does not constitute a denial of due process. This assignment of error is overruled.

V. Insufficient Evidence

Defendant contends the trial court erred in denying his motion to dismiss the charges of possession of cocaine with intent to sell and deliver and possession of drug paraphernalia.

The State must submit substantial evidence of every element of the crimes charged in order to survive a motion to dismiss. *State v. Bruton*, 344 N.C. 381, 387, 474 S.E.2d 336, 341 (1996). " 'Substantial evidence is evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt.' " *State v. McDowell*, 329 N.C. 363, 389, 407 S.E.2d 200, 215 (1991) (quoting *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986)). The evidence is to be viewed in a light most favorable to the State and the State is entitled to every reasonable inference from the evidence. *Id.* (citing *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982)).

A. Possession of Controlled Substance

[3] Defendant was charged with possession of cocaine with the intent to sell and deliver under N.C. Gen. Stat. § 90-95(a)(1) and convicted of and sentenced for the lesser included offense of felony possession of cocaine under N.C. Gen. Stat. § 90-95(d)(2). The elements of felony possession are (1) defendant (2) knowingly possesses (3) cocaine.

The State presented evidence that defendant reached into his pants and opened his pants at the request of law enforcement officers. Corporal Everett noticed part of a plastic bag sticking out of defendants' underwear. Defendant reached in, made a fist, grabbed part of the plastic bag, tore it, threw it to the ground, and ran. Corporal Everett pursued defendant and never lost sight of him. When defendant was apprehended after falling and crawling into

the thicket, he did not have possession of the plastic bag. Xaro located crack cocaine in the same location where defendant fell. The cocaine was found inside a plastic bag which had been shredded by Xaro.

Taken in a light most favorable to the State and with all reasonable inferences taken therefrom, sufficient evidence that defendant knowingly possessed cocaine was presented to survive defendant's motion to dismiss.

B. Possession of Drug Paraphernalia

[4] Defendant also was charged with and convicted of possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22. Possession may be either actual or constructive. "It is not necessary to show that an accused has exclusive control of the premises where paraphernalia are found, but 'where possession . . . is nonexclusive, constructive possession . . . may not be inferred without other incriminating circumstances.' " *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (quoting *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984)).

The State presented evidence that defendant was wearing a jacket that night while fighting at the Pantry. Defendant lost the jacket while he ran and was being pursued by the police. Officer Watkins testified that she searched the jacket she saw defendant wearing that night. She found four straight razor blades wrapped in brown wrapping.

Officer Watkins found a set of digital scales inside a vehicle located at the Pantry. She had seen defendant driving the same vehicle on multiple occasions. Officer Wood stopped defendant driving the same vehicle three weeks prior to this arrest. Taken in a light most favorable to the state, there is sufficient evidence to show defendant possessed drug paraphernalia. This assignment of error is overruled.

VI. Conclusion

Defendant has failed to show the trial court abused its discretion in denying defendant's motion for a new jury. The trial court did not err in denying defendant's motions to dismiss for violation of defendant's due process rights or for insufficient evidence. Defendant's trial and sentencing were free from errors which he assigned and argued.

No error.

Judges McGEE and CALABRIA concur.

IN THE MATTER OF THE WILL OF SHIRLEY G. SMITH, DECEASED

No. COA02-1323

(Filed 1 July 2003)

1. **Wills— caveat—acceptance of benefits**

The trial court erred by granting summary judgment against a caveator based on her acceptance of a car under the challenged will. A caveator cannot be estopped by accepting that to which she would be entitled in any event.

2. **Wills— caveat—testamentary capacity—summary judgment—no evidence of lack of capacity**

The trial court properly granted summary judgment for the executor on the issue of testamentary capacity. The caveator's affidavits show a general decline in decedent's health, that she knew the nature of her bounty, and that she did not want to bequeath her estate to the caveator. There was no direct evidence of defendant's lack of testamentary capacity at the time the will was executed.

3. **Wills— caveat—undue influence—summary judgment**

The trial court erred by granting summary judgment for the executor on the issue of undue influence. Whether factors showing undue influence existed presented questions of material fact.

Appeal by caveator from order entered 3 June 2002 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 10 June 2003.

William G. Barbour for caveator-appellant.

Wyatt Early Harris Wheeler, LLP, by William E. Wheeler, for executor-appellee.

TYSON, Judge.

Julie S. Michaux Pruitt ("caveator") appeals from the grant of summary judgment in favor of Carrie A. Allison ("executor"), dis-

missing the caveat proceeding, and admitting the "Last Will and Testament of Shirley G. Smith" ("Will") to probate. We affirm in part, reverse in part, and remand.

I. Background

On 6 February 2001, Shirley G. Smith ("decedent") executed the Will which revoked all prior testamentary dispositions and bequeathed her vehicle to caveator, her daughter. The Will named executor, decedent's "good friend", as the beneficiary of the remainder of the property and appointed her as executrix of the estate.

On 16 September 2001, decedent died at the age of sixty-one and was survived by the caveator, two grandchildren, a great-granddaughter and some siblings. In the five years prior to her death, decedent had executed at least three different wills. Each will substantially altered who would claim the majority of decedent's estate.

On 20 September 2001, executor submitted the Will for probate, qualified as executor, and was issued letters testamentary. On 12 October 2001, caveator filed a caveat proceeding alleging that decedent lacked testamentary capacity and that the Will was obtained by executor through undue and improper influence and duress. Executor responded by alleging that caveator received and accepted her bequest on 5 October 2001.

On 26 March 2002, executor moved for summary judgment. On 3 June 2002, the trial court found there was no issue of material fact as to the validity of the Will, decedent's testamentary capacity, and undue influence and granted summary judgment. It further found that "it appears without contradiction that Caveator acknowledged the validity of the Will on October 5, 2001, prior to filing this caveat proceeding on October 19, 2001, as a matter of law, by accepting a bequest to her under Item II, of the Will, to wit: a 1999 Chevrolet minivan." Caveator appeals.

II. Issues

Caveator contends the trial court erred in granting summary judgment on the issues of (1) estoppel, (2) testamentary capacity, and (3) undue influence.

III. Standard of Review

Summary judgment is appropriate if there is no genuine issue of material fact and any party is entitled to judgment as a matter of law.

N.C. Gen. Stat. § 1A-1, Rule 56 (2001). "The burden is on the moving party to show the absence of any genuine issue of fact and his entitlement to judgment as a matter of law." *In re Will of Lamanski*, 149 N.C. App. 647, 649, 561 S.E.2d 537, 539 (2002). A defendant may satisfy the burden by showing that the party asserting the claim cannot overcome an affirmative defense which would bar the action. *Id.*

IV. Estoppel

[1] Caveator contends that the trial court erred in granting the executor summary judgment on the grounds of estoppel. We agree.

"Although it is the general rule that one who accepts the benefits under a will is estopped to contest the will's validity, '[o]ne cannot be estopped by accepting that which he would be legally entitled to receive in any event.' " *Lamanski*, 149 N.C. App. at 651, 561 S.E.2d at 540 (citing *Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970); quoting *In re Will of Peacock*, 18 N.C. App. 554, 556, 197 S.E.2d 254, 255 (1973)).

In *Lamanski*, the decedent's sister was bequeathed "any tangible personal property in my home." *Id.* at 647, 561 S.E.2d at 538. Pursuant to the will, she selected and received numerous items of personal property. *Id.* at 648, 561 S.E.2d at 539. She subsequently filed a caveat proceeding contesting the validity of the will. *Id.* Decedent's sister would have been entitled to one third of the net estate if the will was set aside. *Id.* at 651, 561 S.E.2d at 540. This Court held that since "appellant-caveator would have had no legal right, outside the will, to the specific personal property which she received and retained pursuant to the specific bequest in [the will]" she was estopped from filing a caveat proceeding. *Id.*

In *Peacock*, the decedent's son received and accepted cash pursuant to the decedent's will which was less than the amount he would have received if the will had been set aside. *Peacock*, 18 N.C. App. at 556, 197 S.E.2d at 255. This Court reversed summary judgment based on estoppel and held that since the caveator would have been entitled to receive the money in any event, he was not estopped from asserting a subsequent caveat proceeding. *Id.*

The case at bar is more similar to *Peacock* than to *Lamanski*. Under the challenged Will, caveator received and accepted the decedent's vehicle. Under the prior will, caveator would receive the same vehicle. As the only child of decedent, caveator would receive the entire estate, including the vehicle. We hold that "[n]othing in the cir-

cumstances indicates any reason why it would be inequitable for appellant to proceed with his caveat." *Peacock*, 18 N.C. App. at 556, 197 S.E.2d at 255. The trial court erred in granting summary judgment based on estoppel.

V. Testamentary Capacity

[2] Caveator argues the trial court erred in granting summary judgment on the issue of testamentary capacity. We disagree.

"A testator has testamentary capacity if he comprehends the natural objects of his bounty; understands the kind, nature and extent of his property; knows the manner in which he desires his act to take effect; and realizes the effect his act will have upon his estate." *In re Will of Buck*, 130 N.C. App. 408, 412, 503 S.E.2d 126, 130 (1998), *aff'd*, 350 N.C. 621, 516 S.E.2d 858 (1999) (citing *In re Will of Shute*, 251 N.C. 697, 111 S.E.2d 851 (1960)).

"In our jurisprudence, a presumption exists that every individual has the requisite capacity to make a will, and those challenging the will bear the burden of proving, . . ., that such capacity was wanting." *In re Will of Sechrest*, 140 N.C. App. 464, 473, 537 S.E.2d 511, 517 (2000). A caveator cannot "establish lack of testamentary capacity where there [is] no specific evidence 'relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made.' " *In re Estate of Whitaker*, 144 N.C. App. 295, 298, 547 S.E.2d 853, 856 (2001) (quoting *Buck*, 130 N.C. App. at 413, 503 S.E.2d at 130). It is not sufficient for a caveator to present "only general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will, upon which [a caveator] based [her] opinion[] as to [the testator's] mental capacity." *Buck*, 130 N.C. App. at 412, 503 S.E.2d at 130.

In *Buck*, we stated that the evidence presented, "while showing testator's weakened physical and mental condition in general, did not negate his testamentary capacity at the time he made the will, i.e., his knowledge of his property, to whom he was giving it, and the effect of his act in making a will. Therefore, caveator's evidence was insufficient to make out a *prima facie* case of lack of testamentary capacity." *Id.*

The caveator's affidavits show only a general decline in decedent's mental and physical health in the years prior to the execution of the Will. This evidence also shows that decedent knew the nature

of her bounty and that she did not want to bequeath her estate to the caveator because she "didn't think [caveator] capable of managing herself and money and property." There was no direct evidence of decedent's lack of testamentary capacity at the time of the execution of the Will.

Caveator at bar "fails to set forth specific facts showing that [decedent] was incapable of executing a valid will at the time she did so, notwithstanding her alleged mental condition in the years surrounding the will's execution." *Whitaker*, 144 N.C. App. at 300, 547 S.E.2d at 857 (citing *In re Will of Maynard*, 64 N.C. App. 211, 227, 307 S.E.2d 416, 428 (1983), *disc. rev. denied*, 310 N.C. 477, 312 S.E.2d 885 (1984) ("the insane person during a lucid interval can make a valid will."")). The trial court properly granted summary judgment on the issue of testamentary capacity.

VI. Undue Influence

[3] Caveator contends the trial court erred in granting summary judgment on the issue of undue influence because there are genuine issues of material fact. We agree.

> In the context of a will caveat, "[u]ndue influence is more than mere persuasion, because a person may be influenced to do an act which is nevertheless his voluntary action." The influence necessary to nullify a testamentary instrument is the " 'fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.' "

Sechrest, 140 N.C. App. at 468-69, 537 S.E.2d at 515 (citations omitted). The four general elements of undue influence are: (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence. *Id.* Relevant factors include:

> "1. Old age and physical and mental weakness.
>
> 2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.
>
> 3. That others have little or no opportunity to see [her].
>
> 4. That the will is different from and revokes a prior will.
>
> 5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of [her] bounty.

7. That the beneficiary has procured its execution."

Id. (citations omitted).

Whether these or other factors exist and whether executor unduly influenced decedent in the execution of the Will are material questions of fact. The trial court erred in granting summary judgment to executor on the issue of undue influence.

VII. Conclusion

The trial court properly granted summary judgment on the issue of testamentary capacity. The trial court erred in granting summary judgment based on estoppel and on the issue of undue influence.

Affirmed in part, reversed in part and remanded.

Chief Judge EAGLES and Judge STEELMAN concur.

LAWRENCE AND KATHLEEN BROWN, PLAINTIFFS v. FOREMOST AFFILIATED INSURANCE SERVICES, INC. A/K/A FOREMOST SIGNATURE INSURANCE COMPANY, A FOREIGN CORPORATION DOING BUSINESS IN THE STATE OF NORTH CAROLINA, DEFENDANT

No. COA02-817

(Filed 1 July 2003)

1. **Discovery— admissions—not timely answered—deemed admitted—summary judgment for defendant**

Defendant's requested admissions were deemed admitted where plaintiffs' attorney did not prepare responses or forward the requests to plaintiffs within the time required to avoid admission under N.C.G.S. § 1A-1, Rule 36(a). The trial judge correctly granted defendant's motion for summary judgment because the admissions established that defendant had fulfilled its obligations under the insurance contract and that plaintiffs' claims for bad faith and unfair and deceptive trade practices were frivolous.

2. **Civil Procedure— Rule 60(b) motion—findings not requested—attorney's negligence not excusable**

The trial court's failure to find facts when denying plaintiffs' Rule 60(b) motion for relief was not an abuse of discretion where

plaintiffs did not request findings. Moreover, there was no basis for granting the motion because it was predicated on the errors of their attorney; an attorney's negligence cannot amount to excusable neglect for a Rule 60(b) motion.

Appeal by plaintiffs from judgment entered 1 October 2001 by Judge James L. Baker, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 20 February 2003.

James Michael Lloyd, P.A., by James Michael Lloyd, for plaintiff-appellants.

Golding, Holden, Pope & Baker, L.L.P., by Lisa F. Schwanz, for defendant-appellee.

HUDSON, Judge.

Plaintiffs Larry and Kathleen Brown ("Browns") sued to recover from defendant Foremost Affiliated Insurance Services, Inc. ("Foremost") for damages to their mobile home under their homeowners insurance policy. The Browns also alleged claims for bad faith and unfair and deceptive trade practices. Foremost filed an answer and then served requests for admissions upon the Browns. The Browns failed to respond, and the facts contained in the requests were deemed admitted. Foremost then moved for summary judgment, which the superior court granted. For the reasons set forth below, we affirm the superior court.

BACKGROUND

The Browns owned a 1,532 square foot manufactured home, appraised in July 1998 at $48,250.00, that was located on rental property. In 1998, they purchased a parcel of real property to which they planned to move their home. The Browns alleged that they purchased, in July 1998, a "mobile home owners" insurance policy from Foremost and that, in December 1998, they purchased a change in coverage that insured the home for $44,862.00. The policy also included a rider for trip coverage for the period during which they planned to move their home.

The Browns moved their home in December 1998. They contended that their home was damaged during the move and filed a claim with Foremost. The parties reached a partial settlement in April 2000, pursuant to which the Browns received $16,869.05. Moreover, the Browns reserved their right to additional payments for hidden

damages and for damages to the structure unknown at that time. After repeated inspections and attempts to correct structural damage to the home, Foremost acknowledged that the home was beyond repair but disputed its value. Foremost did not enter into a final settlement with the Browns and refused to pay the balance of the value of the home that they demanded. The Browns filed suit.

In their complaint, the Browns alleged that Foremost had failed and refused to pay them as provided under their policy. They also alleged that Foremost had acted in bad faith and had engaged in unfair and deceptive trade practices. In February 2001, counsel for Foremost served the Browns' attorney at the time with Defendant's First Set of Requests for Admissions to the Plaintiffs. The Browns' attorney, John MacLeod Tutterow, did not forward the requests to the Browns nor did he himself prepare any responses. Mr. Tutterow also failed to obtain an extension of time to respond to the requests. (Mr. Tutterow no longer represents the Browns.) Thus, the requests for admissions were deemed admitted by 1 April 2001, pursuant to Rule 36 of the North Carolina Rules of Civil Procedure.

In May 2001, Mr. Tutterow forwarded to the Browns a copy of Foremost's requests for admissions but did not mention that the responses were already past due and were deemed admitted. The Browns returned their responses to Mr. Tutterow within thirty days, although the record indicates that he failed to file or serve the responses at that time.

Foremost filed a motion for summary judgment in August 2001, contending that the Browns' admissions had become conclusively established facts in the case and therefore constituted a valid basis for summary judgment. Also in August 2001, Mr. Tutterow prepared responses to Foremost's request for admissions. On 10 September 2001, Mr. Tutterow had Mrs. Brown verify the responses to the admissions. There is no indication, however, that he filed these responses with the trial court prior to the summary judgment hearing.

The court heard Foremost's motion for summary judgment on 17 September 2001. At that time, Mr. Tutterow filed no affidavits or other documents on the Browns' behalf, nor did he move to have the admissions withdrawn or amended prior to the hearing. On 20 September 2001, the court granted summary judgment, and the order was filed and entered on 1 October 2001.

On 19 October 2001, the Browns filed a motion pursuant to North Carolina Rule of Civil Procedure 60(b) for relief from final judgment

together with an affidavit in which Mr. Tutterow described his difficulties in communicating with his clients. At the hearing on 7 February 2002, the Browns learned for the first time that Mr. Tutterow had not obtained any enlargements of time to respond to Foremost's requests for admissions, contrary to what Mr. Tutterow had led them to believe. Although Mr. Brown asked the court to allow him to testify, the court refused the request. On 11 March 2002, the court denied the Browns' motion.

The Browns now appeal.

ANALYSIS

A.

[1] The Browns concede that the trial court properly considered their deemed admissions resulting from their failure to respond to Foremost's requests. They argue, however, that the admissions failed to establish the lack of any genuine issue of material fact. We disagree.

Pursuant to Rule 36(a) of the North Carolina Rules of Civil Procedure, when a written request for admissions is properly served upon a party to a lawsuit:

> [t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.

N.C.G.S. § 1A-1, Rule 36(a) (1990). Any matter "admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." N.C. Gen. Stat. § 1A-1, Rule 36(b). Facts that are admitted under Rule 36(b) are sufficient to support a grant of summary judgment. *Goins v. Puleo*, 350 N.C. 277, 280, 512 S.E.2d 748, 750 (1999).

Here, the contract of insurance between the parties provided as follows:

> If settlement can't be agreed to, then both [the Browns] and [Foremost] have the right to select a competent and disinterested appraiser within 20 days from the date of disagreement. The

> appraisers will select an umpire. The appraisers will determine the amount of the loss. If they don't agree, then each appraiser will submit his amount of loss to the umpire. The agreement of any two will determine the amount of the loss. [The Browns] pay [their] appraiser and [Foremost] pays [its] appraiser.

In the request for admissions, Foremost requested that the Browns admit (1) that the parties submitted the controversy to appraisers; (2) that the appraisers agreed, on or about 4 November 1999, to an award of $16,969 to the Browns; (3) that the Browns were issued a check in January 2000 and a replacement check in April 2000 for $16,869; (4) that the Browns retained the check; (5) that the Browns previously had been paid the maximum limit of liability for additional living expenses under the policy; and (6) that the Browns had previously received checks from Foremost in the aggregate sum of $4774.78, plus an additional check for $219. We conclude that these admissions establish that Foremost fulfilled its obligations under the terms of the contract of insurance.

Further, Foremost requested that the Browns admit that their claims for bad faith and for unfair and deceptive trade practices were frivolous and groundless upon information known to them at the time of the filing of the complaint. Because these statements also are deemed admitted, we see no genuine issue of material fact with regard to these claims.

Summary judgment is properly entered in favor of the moving party if the movant establishes that an essential element of the opposing party's claim is nonexistent. *Goins*, 350 N.C. at 281, 512 S.E.2d at 751. One of the essential elements of a claim for breach of contract is that the defendant breached the terms of that contract. Because the Browns were deemed to have admitted that Foremost did not breach the contract, the court was required to grant Foremost's motion and enter an order of summary judgment in its favor. The same analysis applies to the claims involving bad faith and unfair and deceptive trade practices.

We acknowledge that the entry of summary judgment in favor of Foremost may appear to lead to a harsh result. *Goins*, 350 N.C. at 281, 512 S.E.2d at 751. "Nevertheless, the Rules of Civil Procedure promote the orderly and uniform administration of justice, and all litigants are entitled to rely on them." *Id.* Therefore, the "rules must be applied equally to all parties to a lawsuit." *Id.*

B.

[2] The Browns also contend that the trial court erred when it failed to make findings of fact in its order denying the Rule 60(b) motion. Again we disagree.

On appeal, a trial court's ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion. *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616, *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998). Abuse of discretion is shown when the court's decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (citation and quotation marks omitted).

Here, the Browns failed to specify why the court's ruling constituted an abuse of discretion. Rather, they argue that the trial court should be reversed for failing to make findings of fact in its order. A trial court, however, is not required to make findings of fact absent a party's request. *Gibson v. Mena*, 144 N.C. App. 125, 128, 548 S.E.2d 745, 747 (2001); N.C. Gen. Stat. § 1A-1, Rule 52(a)(2). Our Supreme Court consistently has held that when a trial court is not required to find facts, and does not do so, it is presumed that the court on proper evidence implicitly found facts to supports its judgment. *Watkins v. Hellings*, 321 N.C. 78, 82, 361 S.E.2d 568, 571 (1987). "We leave it to the discretion of the trial judge whether to make a finding of fact if a party does not choose to compel a finding through the simple mechanism of so requesting." *Id.*

Here, the Browns failed to request that the trial court find facts in its order denying the Rule 60(b) motion. Accordingly, based on *Watkins*, we presume as a matter of law that the trial court discerned the necessary facts, on proper evidence, and that it correctly denied the Rule 60(b) motion.

In addition, we see no basis for granting the Browns' motion. The motion was predicated on the errors of the Browns' former counsel. Our courts consistently have held that an attorney's negligence cannot amount to excusable neglect for the purposes of a Rule 60(b) motion. *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998) ("[C]learly, an attorney's negligence in handling a case constitutes inexcusable neglect and should not be grounds for relief under the 'excusable neglect' provision of Rule 60(b)(1)."). Allowing an attorney's negligence to be a basis for providing relief from orders would encourage such negligence and "present a temptation for liti-

gants to use the negligence as an excuse to avoid court-imposed rules and deadlines." *Id.*

In sum, the trial court did not err in refusing to grant the Browns' motion for relief pursuant to Rule 60(b).

CONCLUSION

For the reasons set forth above, we affirm the decision of the trial court.

Affirmed.

Judges McGEE and STEELMAN concur.

STATE OF NORTH CAROLINA v. CARLOS DARNELL NEVILLS

No. COA02-774

(Filed 1 July 2003)

Evidence— plea agreement of codefendant—false evidence—no expression of opinion by trial court

The trial court did not commit structural or plain error in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by admitting evidence that the trial court had consolidated charges against a codefendant for sentencing on the condition that she give truthful testimony in proceedings related to the victim and by allegedly giving the impression that the codefendant was testifying pursuant to an agreement with the court, because: (1) the actions of the judge and the State did not constitute presentation of known false evidence in violation of defendant's due process rights even though defendant contends the terms of the codefendant's sentencing condition were patently misleading to the jury since they improperly conveyed that the trial court possessed the authority to enter an agreement with the codefendant; (2) considering the totality of circumstances, it cannot be said that the judge expressed an impermissible opinion to the jury by permitting others to refer to the sentencing condition as an agreement; and (3) the jury was properly admonished by the trial court's instruction to carefully consider whether to believe the code-

fendant's testimony despite the court's reference to the sentencing condition as an agreement.

Appeal by defendant from judgments entered 9 November 2001 by Judge William C. Gore, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 15 May 2003.

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

Brian Michael Aus, for defendant-appellant.

CALABRIA, Judge.

Carlos Darnell Nevills ("defendant") appeals judgments entered 9 November 2001 by Judge William C. Gore, Jr. ("Judge Gore") in Cumberland County Superior Court. Defendant asserts Judge Gore erred admitting evidence of codefendant, Tameika Douglas' ("Douglas") sentencing condition. We find no error.

The State's evidence tended to show the following facts. Defendant was a member of a gang known as the Crips. Debra Alice Cheeseborough ("Cheeseborough") testified that in the early morning hours of 17 August 1998, she was leaving the Bojangles restaurant where she worked when she was approached by defendant, Douglas and another gang member. Defendant put a gun to her head and ordered her into the back seat of her car. Douglas then took Cheeseborough's jewelry and money. Defendant drove off, pulled over and forced Cheeseborough into the trunk of her car. They went to the trailer of one of the gang leaders. Through the trunk, Cheeseborough could hear people going through her belongings in her car. She heard a male voice say "we have to kill her." Cheeseborough felt the weight of more people getting into the car, and the gang drove to a secluded area. There, Cheeseborough was assisted out of the trunk and shot eight times. The final bullet, shot in response to a directive to shoot Cheeseborough in the head, grazed her eyelid, went through her glasses' lens and thumb.

Douglas testified the entire gang believed Cheeseborough was dead. They determined they needed another car, and Douglas and other gang members got into Cheeseborough's car and drove around searching for new victims. After following a number of cars, they finally followed and blocked a car occupied by Susan Raye Horne Moore ("Moore") and Tracy Rose Lambert ("Lambert"). They forced

Moore and Lambert out of the car and into the trunk. Douglas took their money and jewelry. They again returned to the trailer, and the gang then drove into the country. Defendant drove Moore's car, with the women in the trunk. The gang members circled the trunk of the car containing the victims. One member assisted Lambert out, and shut Moore in the trunk. Lambert was then taken by the arm, walked away from the group, forced to her knee and shot in the head. A different member then took the gun, and helped Moore out of the car. Moore began screaming when she saw that Lambert had been killed. The man walked Moore away from the group and attempted to shoot her. After the gun jammed, he took out a knife to kill her. Moore pled, "Please don't cut me. If you are going to kill me, please just shoot me. I don't want to suffer." The man then repeatedly attempted to fire the gun, which continued to jam; on the fourth attempt, the gun fired and shot Moore in the head. The gang returned to the trailer and dispersed.

The next day, upon learning Cheeseborough was alive, defendant, Douglas and other members of the gang took Cheeseborough's car and drove to Myrtle Beach where the police subsequently apprehended the group at a motel.

Defendant was arrested, charged and convicted of numerous crimes including, *inter alia*, attempted first-degree murder, first-degree murder, first-degree kidnapping and conspiracy charges. Defendant was sentenced to a total of 1,044 months to 1,365 months in prison and two terms of life imprisonment without parole. His sentences were imposed consecutively.

Defendant argues Judge Gore committed structural and plain error by improperly admitting evidence of codefendant Douglas' sentencing condition and giving the jury the impression that Douglas was testifying pursuant to an agreement with the court. We find no error.

" '[S]tructural error' is a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.' " *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 113 L. Ed. 2d 302, 331 (1991)). However, our Supreme Court has recognized the rarity of structural error, and noted the United States Supreme Court has found it in only a limited number of cases wherein the essential structure of our justice system was implicated. *Id.* Structural error may arise by the absence of an impartial judge. *Id.*, (citing *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927)).

Plain error is error that is " 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)).

Defendant asserts a transcript of Douglas' open plea with the court was improperly admitted. After Douglas pled guilty to all the charges, the court consolidated the charges "on condition that the defendant give truthful testimony in proceedings if called upon to do so by the State of North Carolina." The court then sentenced Douglas to concurrent sentences for her crimes, including two terms of life imprisonment without parole. Pursuant to this sentencing condition, Douglas testified for the State against defendant.

I. False Evidence

Defendant asserts the trial court committed structural and plain error because the evidence admitted and subsequent arguments constituted false evidence, and violated his constitutional right to due process. Defendant argues the "terms of the Douglas plea agreement were patently misleading to the jury" since they improperly conveyed the trial court possessed the authority to enter an agreement with Douglas. We considered these arguments in *State v. Frink*, 158 N.C. App. —, —, — S.E.2d —, — (2003), and found them to be without merit. We hold accordingly that "we cannot find the actions of the Judge and the State constituted presentation of known false evidence in violation of defendant's due process rights." *Frink*, 158 N.C. App. at —, — S.E.2d at —.

II. Impartial Tribunal

Defendant next asserts the trial court committed structural and plain error by violating his right to an impartial tribunal since "[t]he characterization of Douglas' plea agreement was an improper expression of opinion by the trial court." Defendant believes Judge Gore expressed an impermissible opinion by routinely referring to, and permitting the reference by others to, the sentencing condition as an "agreement" with the court through which the court ordered Douglas to testify truthfully. Defendant argues "Douglas' purported 'agreement' with the trial court to give truthful testimony materially bolstered the credibility of Douglas" and the effect was to imply to the jury "Douglas must be testifying truthfully—otherwise the court would not allow her to testify."

It is well established that "[t]he judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2001). Our Court considers the totality of the circumstances to determine whether the judge has expressed an impermissible opinion. *State v. Wilkerson*, 148 N.C. App. 310, 317, 559 S.E.2d 5, 10, *rev'd on other grounds*, 356 N.C. 418, 571 S.E.2d 583 (2002).

Considering the totality of the circumstances, we do not find Judge Gore expressed an impermissible opinion to the jury by permitting others to refer to the sentencing condition as an agreement. Douglas testified that she was testifying in fulfillment of the condition placed upon her by Judge Gore after she pled guilty to all the crimes for which she was charged. In closing argument, the prosecutor referred to "her plea" and an order by Judge Gore to testify truthfully if called upon by the State. The court permitted the term only during cross-examination, when defense counsel referred to her sentencing condition as an "agreement," and the court corrected defense counsel that Douglas had no agreement with the State. Accordingly, we cannot find the trial court erred in permitting others to routinely characterize Douglas' open plea and sentencing condition as an agreement since it appears from the transcript such a characterization was not routine, and was made by the defense.

Finally, defendant asserts Judge Gore erred by himself referring to the "agreement" in the following jury instructions:

> Now, there is evidence and, indeed, in this case it is not in dispute and all of the evidence tends to show that Tameika Douglas testified under an agreement with the Court to give truthful testimony in any proceeding against codefendants at the request of the state in order to have her charges consolidated for sentencing by the Court and it further shows that the defendant, Tameika Douglas, would receive life in prison without parole. It is uncontroverted that Tameika Douglas testified in whole or in part for this reason. You should, therefore, examine Tameika Douglas's [(sic)] testimony with great care and caution in deciding whether or not to believe it. If, after doing so, you believe her testimony in whole or in part, you should treat what you believe the same as you would treat and consider any other believable evidence.

Considering this instruction, the jury was properly admonished to carefully consider whether or not to believe Douglas' testimony, despite Judge Gore's reference to the sentencing condition as an

agreement. Therefore, we cannot find the court improperly expressed an opinion to the jury that Douglas was credible. Accordingly, we find neither structural nor plain error and overrule this assignment of error.

Defendant correctly asserts that our system is structured such that the judge remains impartial. With regard to plea bargains, the judge's role is limited to acceptance or rejection of the bargain negotiated between defendant and the State. N.C. Gen. Stat. § 15A-1021 to -1027 (2001). While our system permits the trial court judge to impose sentencing conditions, it does not permit this power to be utilized in substitution for the plea bargaining process. This Court has "expressly disapprove[d] of such a practice." *Frink*, —— N.C. App. at ——, —— S.E.2d ——. However, in the case at bar, we do not find the admission of evidence of Douglas' sentencing condition rises to the level of structural or plain error.

No error.

Judges McGEE and TYSON concur.

STATE OF NORTH CAROLINA v. CHERYL ANN MERRITT RUSH, DEFENDANT

No. COA02-56

(Filed 1 July 2003)

1. Probation and Parole— probation revocation—activated sentence

The trial court did not err in a probation revocation case by activating defendant's sentence after she violated her probation for a second time even though defendant contends the activated sentence violated her plea agreement and that the trial court lacked jurisdiction under N.C.G.S. §§ 15A-1342 and -1344, because defendant waived any challenge when: (1) defendant failed to file a motion to withdraw her guilty plea; (2) defendant failed to give oral or written notice of appeal within ten days after the judgment was entered; and (3) defendant failed to petition for writ of certiorari.

2. Probation and Parole— jurisdiction—three-year extension of probation—consent

The trial court did not lack jurisdiction to activate defendant's sentence on 20 August 2001 based on a probation violation even though defendant contends the record lacks any evidence that defendant had consented to the three-year extension of her probation two years earlier on 7 September 1999, because: (1) the record does indicate consent as required by N.C.G.S. § 15A-1342; and (2) defendant waived any right to appeal this issue since she did not raise it in the revocation hearing.

Appeal by defendant from judgment entered 21 August 2001 by Judge Sanford L. Steelman in Union County Superior Court. Heard in the Court of Appeals 10 February 2003.

Attorney General, Roy Cooper, by Special Deputy Attorney General, Lars F. Nance, for the State.

Kay S. Murray, for defendant-appellant.

GEER, Judge.

On this appeal, we are asked to consider whether the trial court erred in activating defendant's sentence after she violated her probation for the second time. Defendant makes two arguments: (1) the sentence that was activated violated defendant's plea agreement; and (2) the trial court lacked jurisdiction under N.C. Gen. Stat. §§ 15A-1342 and -1344 (2001). We affirm.

On 27 January 1997, defendant pled guilty to two counts of assault with a deadly weapon on a law enforcement officer and one count of attempted common law robbery. Defendant received a suspended sentence and was placed on probation for 36 months.

The plea agreement between defendant and the State as described in the transcript of plea provided that one of the assault counts would be consolidated for judgment with the attempted robbery count and that defendant would receive two 24-month suspended sentences. Defendant and her attorney signed the transcript of plea. The judgment suspending sentence provided, however, for a minimum term of 24 months and a maximum term of 38 months on each count. Defendant signed both judgment forms.

On 7 September 1999, defendant appeared at her first revocation hearing as a result of having absconded to Indianapolis. Although the

court found defendant in violation of her probation, the court extended her probation for another three years instead of activating her sentence.

Two years later, on 20 August 2001, defendant appeared for a second probation revocation hearing. Defendant admitted that she again violated her probation by failing to fulfill the monetary conditions of her probation and by absconding from the Salvation Army Women's Shelter. Judge Sanford Steelman activated defendant's suspended sentence. Defendant argued only that medical conditions had led to the probation violation and that the sentences should run concurrently given defendant's lack of a prior record.

[1] In activating defendant's sentence, the court stated that defendant's original sentence was 24 to 38 months for each offense. Defendant's attorney did not correct the sentence description or object that the sentence of 24 to 38 months was inconsistent with the plea agreement. Defendant now requests that she be discharged or alternatively that she be returned to the trial court for re-sentencing in accordance with her plea agreement.

Upon entry of a judgment inconsistent with her plea agreement, defendant had three options. First, defendant could have filed a motion to withdraw her guilty plea based on the judgment's being inconsistent with the plea agreement. N.C. Gen. Stat. § 15A-1024 (2001) allows a defendant to withdraw his or her plea if the sentence imposed is inconsistent with the plea agreement. *See State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) (discussing a defendant's attempt to withdraw a guilty plea after he hears and is dissatisfied with the sentence).

Second, defendant could have appealed immediately if defendant's assignments of error fell within the scope of N.C. Gen. Stat. § 15A-1444 (2001) (specifying grounds for appeal from sentence following guilty plea). At the time of defendant's plea agreement hearing, the time for filing notice of appeal was 10 days after entry of the judgment. *State v. Rannels*, 333 N.C. 644, 665, 430 S.E.2d 254, 266 (1993).

Defendant's final alternative was to file a petition for *writ of certiorari*, as provided in N.C. Gen. Stat. § 15A-1444(e). A *writ of certiorari* may also be issued "in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by fail-

ure to take timely action . . . ." N.C.R. App. P. 21(a)(1). Although our Rules of Appellate Procedure do not set forth a specific time period in which a defendant must file a petition for *writ of certiorari*, the "petition shall be filed without unreasonable delay . . . ." N.C.R. App. P. 21(c). Here, defendant has not filed a petition for *writ of certiorari* and, in any event, we conclude that, under the circumstances of this case, a four-year delay in challenging a judgment constitutes "unreasonable delay."

By failing to exercise any of her options, defendant waived her right to challenge the judgment. This appeal amounts to an impermissible collateral attack on the initial judgment. *State v. Noles*, 12 N.C. App. 676, 678, 184 S.E.2d 409, 410 (1971) ("Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is, we believe, an impermissible collateral attack."). *See also* N.C. Gen. Stat. § 15A-1027 (2001) ("Noncompliance with the procedures [governing guilty pleas in superior court] may not be a basis for review of a conviction after the appeal period for the conviction has expired.").

We hold that since defendant failed to file a motion to withdraw her guilty plea, failed to give oral or written notice of appeal within ten days after the judgment was entered, and failed to petition for *writ of certiorari*, she has waived any challenge to the 1997 judgment. Therefore, we need not consider the issue whether defendant assented to the 24 to 38 month term by signing the judgments suspending sentence.

[2] Defendant also contends that the trial court lacked jurisdiction to activate her sentence on 20 August 2001 because the record lacks any evidence that defendant had consented to the three-year extension of her probation two years earlier on 7 September 1999. We believe the record does indicate consent as required by N.C. Gen. Stat. § 15A-1342 (2001) (allowing three-year extension of period of probation beyond the original period with the consent of the defendant). Upon finding on 7 September 1999 that defendant had willfully violated the conditions of her probation, the trial court was entitled to revoke defendant's probation and activate her sentence. N.C. Gen. Stat. § 15A-1344(d) (2001). Instead of activating her sentence, the trial court chose to extend defendant's probationary period. The record does not contain any suggestion that defendant ever objected to this determination prior to this appeal, but rather reveals that she accepted both the terms and the benefits of the modified order. In

any event, because defendant did not raise this issue in the revocation hearing, she has waived any right to appeal this issue. *State v. Tozzi*, 84 N.C. App. 517, 520, 353 S.E.2d 250, 252 (1987).

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ALLEN v. HANEY No. 02-655	Gaston (01CVD41)	Affirmed
BLUM v. RHODES No. 02-1091	Mecklenburg (98CVD6400)	Affirmed
CALLOWAY v. ONDERDONK No. 02-1076	Buncombe (00CVD3943)	Affirmed
CARTER v. COOK No. 02-1215	Person (01CVS21)	Affirmed
DEESE v. B.C. MOORE & SONS, INC. No. 02-1308	Robeson (98CVS3084)	Dismissed without prejudice
EDWARDS v. NELSON No. 02-485	Hoke (98CVS456)	Affirmed
GARNER v. FOUR SEAS, INC. No. 02-1603	Onslow (01CVS3932)	Appeal dismissed
GIGOUS v. CITY OF GREENSBORO No. 02-1150	Ind. Comm. (I.C. 302307)	Affirmed
HAYWOOD CTY. v. PLIMPTON No. 02-748	Haywood (01CVD592)	Affirmed with instructions
HUGHES v. HUGHES No. 02-1236	New Hanover (01CVD1525)	Affirmed
HUTSON v. PHILLIPS FLOOR SERV. No. 02-1358	Ind. Comm. (I.C. 908646)	Affirmed
IN RE CRIPPEN No. 02-1302	Gates (00J7)	Affirmed
IN RE GAINEY No. 02-1525	Guilford (01J24)	Affirmed
IN RE LIBERATO No. 02-1468	Buncombe (01J121) (01J122) (01J162)	Affirmed
IN RE SMITH No. 02-1689	Guilford (01J321) (01J322)	Affirmed
KIER v. KIER No. 02-723	Pitt (00CVD2224)	Reversed and remanded

McCARTAN v. BARNUM No. 02-1352	Carteret (99CVS1224)	No error
PEOPLE UNLIMITED CONSULTING, INC. v. B & A INDUS., LLC No. 02-815	Mecklenburg (98CVS16126)	No error in part; affirmed in part
PERKINS v. WATSON No. 02-1086	Rockingham (99SP62)	Appeal dismissed
PHARMARESEARCH CORP. v MASH No. 02-757	New Hanover (01CVS2281)	Appeal dismissed
QUALITY MERCH. GRP., INC. v. SIDES No. 02-791	Catawba (02CVS295)	Affirmed
ROTEN v. CHURCH No. 02-1123	Caldwell (00CVS542)	No error
ROW v. ROW No. 02-1231	Cumberland (00CVD2694)	Affirmed in part, vacated in part and remanded
STATE v. BALLARD No. 02-963	Mecklenburg (99CRS28945) (99CRS145026) (99CRS145027) (99CRS145028)	No error in part, reversed in part, and remanded
STATE v. BARNES No. 02-682	Wayne (01CRS2005)	No error
STATE v. BOOKER No. 02-673	Cumberland (97CRS37393)	Affirmed
STATE v. BOWMAN No. 02-1295	Buncombe (01CRS54189)	Appeal dismissed
STATE v. BULLOCK No. 02-1564	Wake (98CRS71996)	No error
STATE v. CREASMAN No. 02-1498	Madison (98CRS1059) (98CRS1060) (98CRS1061)	No error
STATE v. DUCKWORTH No. 02-1373	Guilford (00CRS23626)	No error
STATE v. ELLIOTT No. 02-1324	Stokes (01CRS3557) (01CRS3558) (01CRS51060) (01CRS51061)	Affirmed

STATE v. GASTSON No. 02-1183	Mecklenburg (00CRS36243) (00CRS36244)	No error
STATE v. GIVENS No. 02-876	Mecklenburg (00CRS29474) (00CRS29475) (00CRS29476) (00CRS29477)	No error
STATE v. HAITH No. 02-1316	Guilford (01CRS24517) (01CRS24518) (02CRS23306)	No error, remanded for arrest of judgment upon the conviction of driving while impaired
STATE v. HARSHAW No. 02-1384	Forsyth (01CRS33843) (01CRS58228)	No error
STATE v. HICKS No. 02-1008	Gaston (00CRS63565)	No error
STATE v. HICKS No. 02-1517	Lenoir (01CRS52761)	No error
STATE v. LEGRAND No. 02-1170	Guilford (02CRS23046) (02CRS23047) (02CRS23048)	Affirmed
STATE v. LOWE No. 02-1354	Gaston (00CRS51907) (00CRS51908) (00CRS51909) (00CRS51911) (00CRS51912) (02CRS55780)	No error
STATE v. McMANUS No. 02-1362	Guilford (01CRS3315)	No error
STATE v. McNEIL No. 02-1401	Wake (99CRS67165)	No error
STATE v. McPHERSON No. 02-1187	Pasquotank (96CRS5138)	Remanded for correction of sentence
STATE v. MILLER No. 02-989	Rockingham (02CRS111) (02CRS112)	Affirmed
STATE v. PATTERSON No. 02-1685	Nash (01CRS51073)	No error

STATE v. PERRY No. 02-1496	Gaston (98CRS37318) (98CRS37319) (98CRS37320) (98CRS37321) (98CRS37322) (98CRS37323) (98CRS37324) (99CRS1634) (01CRS61372) (01CRS61373) (01CRS61374) (01CRS61375) (01CRS61376) (01CRS61377)	Appeal dismissed
STATE v. PESTRIKOFF No. 02-1380	Forsyth (01CRS10031) (01CRS10050)	No error
STATE v. PLUMMER No. 02-1304	Harnett (00CRS3396) (00CRS4223) (00CRS7814) (00CRS50840) (00CRS53549) (01CRS50862)	Appeal dismissed. The Petition for Writ of Certiorari is denied
STATE v. RAYNOR No. 02-1526	Hertford (99CRS1291) (99CRS1292) (99CRS1293) (99CRS1294) (99CRS1295) (99CRS1533) (99CRS2482)	Remanded for resentencing
STATE v. ROSSI No. 02-1461	Guilford (01CRS3090) (01CRS3091) (01CRS3092) (01CRS4483)	No error
STATE v. RUSSELL No. 02-513	Alamance (99CRS52737) (99CRS52781	No error
STATE v. SMITH No. 02-812	Rowan (00CRS53056) (00CRS53057) (00CRS53058) (00CRS53059) (00CRS53064)	No error

STATE v. SMITH No. 02-1089	Wake (01CRS22131)	No error
STATE v. UNDERWOOD No. 02-1458	Buncombe (02CRS50814) (02CRS50996)	No error
STATE v. WILLIAMS No. 02-1288	Forsyth (99CRS49897) (99CRS49898)	Affirmed
STATE v. WINSTON No. 02-1558	Wake (99CRS18801) (99CRS31552) (99CRS31553) (99CRS31554) (99CRS31555) (99CRS31557) (99CRS31558) (99CRS31559) (99CRS31560) (99CRS31561)	Remanded
STATE v. WOODS No. 02-1135	Gaston (01CRS55426) (01CRS55428) (01CRS55429)	No error
STATON v. CENTURA BANK No. 02-916	Forsyth (96CVS1409)	Affirmed
UNIVERSAL UNDERWRITERS CO. v. BAKER No. 02-1310	Lenoir (01CVS1333)	Affirmed
WALKER v. CITY OF DURHAM No. 02-1297	Durham (01CVS2229)	Affirmed
ZUMKEHR v. HIDDEN LAKES PROP. OWNERS ASS'N No. 02-547	Lee (00CVD746)	Affirmed in part, reversed in part and remanded

APPENDIX

THE CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE NORTH CAROLINA BUSINESS COURT

THE CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE NORTH CAROLINA BUSINESS COURT

IN THE SUPREME COURT OF NORTH CAROLINA BY ORDER OF THE COURT

In recognition of the need to assess the future of the North Carolina Business Court, the Court hereby creates THE CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE NORTH CAROLINA BUSINESS COURT.

SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION

The structure and composition of the Commission shall be as follows:

The Chair of the Commission shall be the Chief Justice or his or her designee. The Chair will appoint the Commission's other members. The Commission's members should reflect the Business Court's five main constituents: judges, court administrators, legislators, practicing lawyers, and the Commission on Business Laws and the Economy. The Chair will appoint the members of the Commission as follows:

1.1 Judges:

1.1.1 Supreme Court of North Carolina: one justice from the Supreme Court of North Carolina,

1.1.2 North Carolina Court of Appeals: one judge from the North Carolina Court of Appeals,

1.1.3 North Carolina Superior Court: six judges from the Superior Courts of North Carolina, giving due regard for diversity of geographical representation.

1.2 Court Administrators: two current administrative employees of the North Carolina Administrative Office of the Courts.

1.3 Legislators:

1.3.1 North Carolina Senate: three members of the North Carolina Senate, giving due regard for diversity of geographical representation, and

1.3.2 North Carolina House of Representatives: three members of the North Carolina House of Rep-

resentatives, giving due regard for diversity of geographical representation.

1.4 **Practicing Lawyers:** sixteen practicing lawyers, giving due regard for diversity of geographical representation.

1.5 **Commission on Business Laws and the Economy:** two members of the Commission on Business Laws and the Economy.

1.6 **At-Large Members:** Three members of the general public who are not attorneys-at-law.

SECTION 2: DURATION AND RESPONSIBILITIES OF THE COMMISSION

The duration and responsibilities of the Commission shall be as follows:

2.1 **Duration:** the members of the Commission shall serve for a term of three years.

2.2 **Responsibilities:** the Commission's major responsibilities shall include studying the functions and procedures of the North Carolina Business Court and the functions and procedures of other states' business courts, and providing recommendations regarding:

2.2.1 **Geographic Expansion:** geographic expansion and future locations of the North Carolina Business Court;

2.2.2 **Jurisdiction:** the scope of subject-matter jurisdiction of the Business Court, including, but not limited to, law and technology issues;

2.2.3 **Administrative Efficiency:** matters relating to administrative efficiency, including but not limited to, assignment and management of cases, funding requirements, judicial terms of office, administrative organization, and measurement of the effectiveness of the Business Court;

2.2.4 **Appellate Process:** the appellate process for Business Court cases;

2.2.5 **Arbitration:** the role of arbitration in Business Court cases;

2.2.6 **Continuing Judicial Education:** the appropriate subjects and amount of continuing judicial edu-

cation necessary for judges serving on the Business Court;

2.2.7 Other Issues: other issues relevant to the development of a sound business law jurisprudence in North Carolina.

The commission shall provide a report of its findings and recommendations to the Chief Justice and members of the North Carolina Judicial Council not later than 31 December 2004. Adopted by the Court in Conference this the 6th day of November, 2003. This Order shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This Order shall also be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page. (http://www.nccourts.org)

s/Lake, C.J.
LAKE, C. J.
For the court

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

avoid dismissal of an appeal as interlocutory. The record contains no intimation that the children's health or safety is in jeopardy or that irreparable harm would be caused by delaying the appeal until the final resolution of the case. **Evans v. Evans, 533.**

Appealability—interlocutory order—certification—Although plaintiff's appeal from the grant of summary judgment in favor of defendants is an appeal from an interlocutory order since it does not dispose of the entire case and leaves defendants' counterclaims intact, the order is immediately appealable because it is final as to plaintiff's claims and the trial court certified that there was no reason to delay plaintiff's appeal. **Currin & Currin Constr., Inc. v. Lingerfelt, 711.**

Appealability—interlocutory order—condemnation—substantial right—Orders from a condemnation hearing concerning title and the area taken affect a substantial right and may be appealed immediately even though they are interlocutory. **Department of Transp. v. Roymac P'ship, 403.**

Appealability—interlocutory order—governmental or sovereign immunity—substantial right—Although defendant's appeal of the denial of his motion for summary judgment on plaintiff's breach of contract action is an appeal from an interlocutory order, appeals raising issues of governmental or sovereign immunity affect a substantial right and are immediately reviewable on appeal. **Hill v. Medford, 618.**

Appealability—interlocutory order—substantial right—right to avoid two trials—Although this appeal in a wrongful death action concerns only one of the defendants and the trial court did not certify the judgment under N.C.G.S. § 1A-1, Rule 54(b), plaintiff's right to avoid two trials on the same or overlapping issues constitutes a substantial right allowing an immediate appeal. **Draughon v. Harnett Cty. Bd. of Educ., 705.**

Appealability—order to attend show cause hearing—no final decision—An order that an attorney withdrawing a request for class certification attend a show cause hearing was not ripe for appeal because the court did not decide whether the attorney had violated a court order and should be held in contempt. There was no final decision. **Alexander v. DaimlerChrysler Corp., 637.**

Appealability—requested relief granted—Plaintiffs were not aggrieved parties who could appeal the trial court's requirement that they receive approval from the court before withdrawing their request for class certification. Plaintiffs argued that the court approval required by N.C.G.S. § 1A-1, Rule 23(c) applies only after a request for certification has been granted, the court ruled that approval of the withdrawal was required in this case, and the court then granted plaintiffs the relief they sought and allowed the withdrawal. **Alexander v. DaimlerChrysler Corp., 637.**

Appealability—review of voluntary dismissal—not a final decision—The issue of whether an order that a voluntary dismissal would require court approval was not ripe for review because no final decision was made. The court did not approve or disapprove the settlement or the voluntary dismissal; it merely held that a review of the dismissal was necessary. **Alexander v. DaimlerChrysler Corp., 637.**

CITIES AND TOWNS—Continued

Demolition of house—no notice—sufficiency of threat to public—The City of New Bern's demolition of a house owned by plaintiff without the required notice should have resulted in summary judgment for plaintiff. Pursuant to N.C.G.S. § 160A-193, a city may demolish a building without providing notice or a hearing to the owner only if the building constitutes an imminent danger to the public health or safety. The record in this case does not establish that the condition of the house posed such a threat. **Monroe v. City of New Bern, 275.**

Shoestring annexation—intent to annex commercial property—contiguity requirement—The trial court did not err by finding and concluding that the Town of Oak Island had engaged in an impermissible shoestring annexation where there was sufficient evidence that the Town acted primarily to annex valuable commercial property and that the ordinance's boundaries were inconsistent with the contiguity requirement of N.C.G.S. § 160A-36(b). **Hughes v. Town of Oak Island, 175.**

Substandard dwelling—imposition of civil penalties for noncompliance—The trial court erred by concluding that the City of Charlotte improperly imposed a fine under Section 11-35(b) of the Charlotte Housing Code on a non-occupant owner of a substandard dwelling for her failure to comply with an order under the code to either repair or demolish the dwelling that she owned on or before 22 December 1996, and the case is remanded for a hearing to determine whether the penalty was properly imposed. **City of Charlotte v. King, 304.**

CIVIL PROCEDURE

Rule 60(b) motion—findings not requested—attorney's negligence not excusable—The trial court's failure to find facts when denying plaintiffs' Rule 60(b) motion for relief was not an abuse of discretion where plaintiffs did not request findings. Moreover, there was no basis for granting the motion because it was predicated on the errors of their attorney; an attorney's negligence cannot amount to excusable neglect for a Rule 60(b) motion. **Brown v. Foremost Affiliated Ins. Servs., Inc., 727.**

Rule 60(b) motion—mootness—Plaintiff's appeal in a medical negligence case of an order denying her Rule 60(b) motion to set aside a prior order of dismissal is moot because the Court of Appeals reversed the prior order dismissing the case. **Bass v. Durham Cty. Hosp. Corp., 217.**

Summary judgment—consideration of evidence—The trial court did not err when granting a summary judgment in its consideration of the record where the judgment stated that the court reviewed the admissible facts from the pleadings, depositions, other documents of record and considered the arguments of counsel. **Draughon v. Harnett Cty. Bd. of Educ., 208.**

Summary judgment—contingent upon claims against other defendants—The trial court did not err in a personal injury case by granting summary judgment in favor of the trust defendants when those defendants did not move for summary judgment and did not participate in the summary judgment hearing because plaintiffs' claims against those defendants are related to and contingent upon the claims against defendant local board of education. **Ripellino v. N.C. School Bds. Ass'n, 423.**

CONSTITUTIONAL LAW—Continued

Due process—failure to continue—review—The failure to continue a child custody and visitation trial raised a constitutional issue in that due process involves the fundamental element of reasonable time for preparation. The failure to formally request a continuance does not preclude review, and the constitutional issue involves a question of law which may be reviewed by examination of the circumstances. **Ruth v. Ruth, 293.**

Effective ssistance of counsel—factual issues—motion for appropriate relief—An assignment of error alleging ineffective assistance of counsel was dismissed without prejudice to a subsequent motion for appropriate relief where there were factual issues to be more fully developed before a proper review of the claim could be undertaken. **State v. Davis, 1.**

Effective assistance of counsel—motion for appropriate relief—Although defendant's motion for summary disposition of his motion for appropriate relief is denied, the motion for appropriate relief alleging ineffective assistance of counsel is remanded to the trial court. **State v. Thornton, 645.**

Effective assistance of counsel—opportunity to prepare—defendant fleeing prosecution—The denial of a continuance did not deny defendant the effective assistance of counsel where his attorney claimed inadequate opportunity to prepare, but defense counsel was appointed about one and a half years before trial and there was no evidence that defendant was unavailable until he fled the country. Defendant showed no evidence of attempting to contact counsel until a few days before trial and did not show that his incarceration rendered him inaccessible to counsel. **State v. Howard, 226.**

North Carolina—law of the land clause—monopolies—The trial court did not err in an action for injunctive relief claiming defendant nonprofit marketing association was engaged in unlawful actions in restraint of trade by denying plaintiff tobacco warehouses' motion for summary judgment and by granting summary judgment in favor of defendant even though plaintiffs contend defendant's actions violate Article I, Sections 19 (law of the land clause), 32 (exclusive emoluments), and 34 (monopolies) of the North Carolina Constitution. **Bailey v. Flue-Cured Tobacco Coop. Stabilization Corp., 449.**

Right to counsel—waiver—A pro se defendant who had been represented by six attorneys voluntarily waived his right to counsel and elected to proceed pro se where he clearly and unequivocally expressed his desire to proceed pro se to one judge in response to questions posed in accordance with N.C.G.S. § 15A-1242, stated a week later to a different judge that he had misunderstood the first judge, and said under oath that he nonetheless wanted to waive appointed counsel and would represent himself if he did not hire a lawyer. **State v. King, 60.**

Right to remain silent—custody—Although defendant contends the trial court erred in a first-degree murder case by concluding that a jail sergeant was not required to terminate her interrogation of defendant once defendant invoked his right to remain silent, defendant was not in custody for purposes of Miranda and the sergeant was not prohibited from inquiring into the motivation behind defendant's sudden change of heart regarding the fact that he had previously stated he wanted to make a confession to the pertinent crime and then changed his mind. **State v. Fisher, 133.**

EVIDENCE—Continued

causation testimony of four of plaintiff's experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). **Howerton v. Arai Helmet, Ltd., 316.**

Hearsay—medical diagnosis or treatment exception—The trial court did not commit plain error in a first-degree rape and taking indecent liberties with a minor case by failing to instruct the jury that statements made by the victim during interviews with a licensed clinical social worker were not substantive evidence. **State v. Thornton, 645.**

Hearsay—present sense impression—emotional content necessary—A murder victim's statements regarding her relationship with a defendant are often admitted into evidence pursuant to N.C.G.S. § 8C-1, Rule 803(3) as a present sense impression. Statements which merely recite facts without revealing emotion are not admissible, but statements of fact providing a context for expressions of emotion are admissible. **State v. Meadows, 390.**

Motion in limine denied—no contemporaneous objection—The question of whether the State's cross-examination of a murder defendant was proper was considered by the Court of Appeals in its discretion, even though defendant did not lodge contemporaneous objections at trial after his motion in limine was denied. **State v. Mays, 563.**

Murder victim—statements about defendant—state of mind—factual context—A murder victim's statements to a witness about her ex-boyfriend were admissible under the state-of-mind exception to the hearsay rule where the victim showed the witness a picture of defendant and said she was afraid of him, that he was crazy and abusive and had burned her with an iron, and that she was sick and tired of the abuse and wanted to get away. The witness plainly linked the contextual facts to the victim's statements of her emotions and state of mind. **State v. Meadows, 390.**

Murder victim—statements about defendant—state of mind—factual context—A murder victim's statements about defendant to a second witness were admissible under the state-of-mind exception to the hearsay rule even though the witness did not interject the victim's statements of emotion into every factual statement. The witness plainly testified to the victim's emotions and related those emotions to the precipitating actions. **State v. Meadows, 390.**

Plea agreement of codefendant—no expression of opinion by trial court—The trial court did not commit structural or plain error in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by admitting evidence that the trial court had consolidated charges against a codefendant for sentencing on the condition that she give truthful testimony in proceedings related to the victim and by allegedly giving the impression that the codefendant was testifying pursuant to an agreement with the court. **State v. Nevills, 733.**

Plea agreement of codefendant—no expression of opinion by trial court—The trial court did not commit structural or plain error in an attempted first-degree murder, first-degree murder, first-degree kidnapping, and conspiracy case by admitting evidence that the trial court had consolidated charges against a codefendant for sentencing on the condition that she give truthful testimony in proceedings related to the victim. **State v. Frink, 581.**

SEARCH AND SEIZURE—Continued

Investigatory stop—totality of circumstances—late night, lonely road—fleeing from officer—The trial court correctly concluded that an investigatory stop was justified by a reasonable suspicion of criminal activity where the stop occurred around 2:00 a.m.; there were no vehicles on the road other than defendant's car and patrol vehicles; a man on foot had fled from an officer a few minutes before and about fifty yards from the vehicle; and the officer inferred a connection between the two. Cocaine was found in defendant's pocket. **State v. Martinez, 105.**

Pat down—nervous defendant—object in pocket—no answer about weapons—A pat down search and the subsequent arrest of defendant and seizure of cocaine, currency, and a weapon were justified where a nervous defendant who was reaching around inside his vehicle did not respond when asked if he had weapons; the officer then properly asked about an object in defendant's pocket; defendant's reply that the object was "dope" justified the seizure of currency and cocaine and defendant's arrest; and the search of defendant's vehicle and seizure of a weapon were incident to arrest. **State v. Martinez, 105.**

Permission to enter hotel room—nonverbal conduct—A cocaine defendant's nonverbal conduct in a doorway (stepping back and opening the door) constituted a valid consent for officers to enter the hotel room. Defendant did not contend that he lacked authority to consent or that his consent was obtained through duress or coercion. **State v. Harper, 595.**

Plain view doctrine—lawfulness of officer's presence—first determination—The trial court erred by considering whether cocaine found within a house was in plain view without first determining whether officers had a right to be in the house. **State v. Barnes, 606.**

Plain view doctrine—scales seen in hotel room—Scales were lawfully observed and seized from a cocaine defendant under the plain view doctrine in the totality of the circumstances. A detective had received information that the occupants of a hotel room possessed drugs, the behavior of the occupants of the room indicated drug activity, and the detective saw the scales in the room after he knocked on the door, talked with defendant, and gained entry through a voluntary consent. **State v. Harper, 595.**

Search 24 hours after arrest—not incident to arrest—A search of defendant 24 hours after his arrest was not contemporaneous with the arrest and was thus not incident to the arrest. The permissibility of a warrantless search while defendant was in custody was not raised at the suppression hearing and was not addressed on appeal. **State v. McHone, 117.**

Suppression—court's evaluation of circumstances—no findings—The trial court did not err when suppressing a search under N.C.G.S. § 15A-974(2) by not making findings of fact about its evaluation of the circumstances. That statute does not require a court to make findings with respect to its evaluation of the circumstances and the order granting the motion to suppress indicated that the court took all circumstances into account. The State presented no evidence to the contrary. **State v. McHone, 117.**

Warrantless entry into house—no exigent circumstances—The entry into a house by officers was a warrantless, nonconsensual search, presumptively in vio-

TERMINATION OF PARENTAL RIGHTS

Abandonment—clear, cogent, and convincing evidence—Although respondent father contends the trial court erred in a termination of parental rights case by concluding that clear, cogent, and convincing evidence existed to show that respondent father abandoned his child, this assignment of error need not be addressed because the trial court's findings and conslusions regarding neglect were upheld. **In re Yocum, 198.**

Best interests of child—abuse of discretion standard—The trial court did not abuse its discretion by concluding that it was in the best interests of the minor child to terminate respondent father's parental rights. **In re Yocum, 198.**

Findings of fact—prevented from exercising parental responsibilities—The trial court did not err in a termination of parental rights case by omitting findings of fact that petitioner mother prevented respondent father from exercising his parental responsibilities with the minor child because respondent's testimony revealed that petitioner allowed him to schedule visits which he failed to keep. **In re Yocum, 198.**

Motion in the cause—subject matter jurisdiction—The trial court erred by terminating respondent mother's parental rights based on petitioner Department of Social Services' motion in the cause because the motion did not ask for termination of respondent's parental rights. **In re McKinney, 441.**

Neglect—clear, cogent, and convincing evidence—The trial court did not err in a termination of parental rights case by concluding that clear, cogent, and convincing evidence existed to show that respondent father neglected his minor child where defendant was incarcerated for only a portion of the child's life, maintained employment, never gave monetary support to the child, and had only limited contact with the child since her birth. **In re Yocum, 198.**

Permanency planning order—required findings—futility of reunification—health and safety of children—A permanency planning order for abused and neglected children was reversed where the order changed the plan from reunification to termination of parental rights but did not include the findings required by N.C.G.S. § 7B-507(b). **In re Weiler, 473.**

Statutory notice requirements—mandatory—An order terminating parental rights was reversed and remanded where DSS did not give adequate notice to respondents or their counsel. Although DSS argued that the notice provided through motions was sufficient and that there was no prejudice, this issue is governed by the mandatory requirements of N.C.G.S. § 7B-1106.1 rather than constitutional principles of dues process. Failure to comply with the statutory mandate in the word "shall" is reversible error. **In re Alexander, 522.**

Willfully leaving child in foster care—failure to make reasonable progress to correct conditions—The trial court did not err by terminating the parental rights of respondent parents under N.C.G.S. § 7B-1111(a)(2) based on clear, cogent, and convincing evidence that respondents willfully left their child in foster care for more than twelve months and failed to make reasonable progress in correcting the conditions that led to the child's removal from the home. **In re Baker, 491.**

WORKERS' COMPENSATION—Continued

contrary, an anesthesiologist who examined plaintiff several times over a year and a half testified that it was "likely" that plaintiff's fall caused her pain. His testimony, and the Commission's finding, focused on the probability rather than the possibility of causation. **Whitfield v. Laboratory Corp. of Am., 341.**

Compensable injury—sufficiency of evidence—The Industrial Commission's finding in a workers' compensation case that plaintiff's injury was compensable was supported by sufficient competent evidence. Defendant's argument that plaintiff's evidence about her back was not credible was in essence an argument that the Commission should be reversed based on disputed testimony. This the Court of Appeals cannot do. **Whitfield v. Laboratory Corp. of Am., 341.**

Consideration of all evidence—determination of weight—The Industrial Commission did not disregard medical records in a workers' compensation case, as defendants contended, where there were numerous findings regarding plaintiff's visits to care providers who produced the records. The Commission, as it was entitled to do, gave greater weight to the opinion of an anesthesiologist who was a pain management specialist and who had treated plaintiff longer than the other doctors. **Whitfield v. Laboratory Corp. of Am., 341.**

Continuing disability—underlying cause—The Court of Appeals affirmed an Industrial Commission decision terminating workers' compensation benefits based on a finding that plaintiff's back pain and disability were caused by a neurological disorder rather than a fall at work. Although plaintiff presented evidence to the contrary, the evidence in the record supports the Commission's findings, and the Commission is the sole judge of the weight and credibility of the evidence. **Drakeford v. Charlotte Express, 432.**

Credit for salary—available to employer and not to insurance carrier—The Industrial Commission did not err in a workers' compensation case by denying defendant insurance carrier a credit for salary paid to plaintiff by defendant employer after plaintiff's injury. **Smith v. First Choice Servs., 244.**

Detailed findings of fact—mutual mistake—The Industrial Commission did not err in a workers' compensation case by failing to make more detailed findings concerning the insurance application, the renewal audit reports, and the witnesses' differing testimony before reaching a conclusion regarding mutual mistake and draftsman's mistake, because: (1) the Court of Appeals already concluded that competent evidence existed to support the Industrial Commission's finding of fact that there was no mutual mistake between defendant insurance carrier and defendant employer; and (2) the Industrial Commission made findings on all ultimate facts in this case and no additional findings of fact were required. **Smith v. First Choice Servs., 244.**

Diminished earning capacity—sufficiency of evidence—The evidence supported an Industrial Commission finding of diminished earning capacity where plaintiff presented check stubs from her new job and a summary of earnings in relation to the stipulated amount from her job with defendant. **Whitfield v. Laboratory Corp. of Am., 341.**

Injury by accident—findings—A workers' compensation case was remanded to the Industrial Commission for further findings as to whether plaintiff was injured while performing his usual tasks in the usual way under the totality of

WORKERS' COMPENSATION—Continued

conditions. Plaintiff was an electrician assigned to pull wire from machinery without damaging it; the work was done while short-handed and under time constraints, and involved passing the wire through a control panel more than twenty feet above the floor. The Commission found that pulling wire in awkward positions was a normal part of plaintiff's job routine, but this is not dispositive. **Griggs v. Eastern Omni Constructors, 480.**

Injury not at work—Commission's finding—evidence supports—There was competent evidence to support the Industrial Commission's findings in a workers' compensation action that plaintiff did not injure his back at work. Plaintiff initially and repeatedly said that his back popped while rising from a chair while on vacation, he explained these statements by saying that he was afraid to jeopardize a corporate safety award, a co-worker and supervisor did not recall plaintiff indicating that he had injured his back at work, and plaintiff's doctors testified that plaintiff likely suffered from degenerative disc disease and that trauma would not have been necessary for his injury. **Holcomb v. Butler Mfg. Co., 267.**

Jurisdiction—insurance coverage—officer exclusion—mutual mistake—The Industrial Commission did not lack jurisdiction to apply the Workers' Compensation Act to plaintiff's claim even though defendant insurance carrier contends plaintiff was not considered an employee under the pertinent insurance contract based on an alleged officer exclusion, and no reformation of the pertinent contract is required. **Smith v. First Choice Servs., 244.**

Medical compensation—limitations—The Industrial Commission did not err in a workers' compensation case by awarding plaintiff employee medical benefits allegedly without limitation, because the award is not overly broad and would be subject to the limitations of N.C.G.S. § 97-25.1 should the conditions arise under which the limitations operate. **Guerrero v. Brodie Contrs., Inc., 678.**

Medical expenses—past and future—The Industrial Commission correctly ruled that a workers' compensation plaintiff should receive future medical expenses from defendants, but incorrectly approved past expenses. There were findings supported by competent evidence that the recommended future treatment was reasonably necessary to provide relief, and that the doctor approved by the Commission as the primary treating physician was qualified to provide that treatment. However, there was no evidence in the record that plaintiff sought approval for treatment by that doctor (before or after treatment) prior to the Commission's order and award. The case was remanded for findings as to whether plaintiff made that request. **Whitfield v. Laboratory Corp. of Am., 341.**

Permanent partial disability benefits—credit for lump sum payment—Although the Industrial Commission erred in a workers' compensation case by neglecting to award a credit to defendants for payment of the lump sum permanent partial disability award, defendants cite no law to support their assertion that plaintiff employee is barred from contesting the validity of the permanent partial disability benefits merely based on the fact that he accepted the award. **Guerrero v. Brodie Contrs., Inc., 678.**

Refusal of suitable employment—sufficiency of evidence—The Industrial Commission's refusal to find that a workers' compensation plaintiff refused suit-

WORKERS' COMPENSATION—Continued

able employment was supported by competent evidence. After a back injury, ongoing treatment, and attempts to return to work, plaintiff called in daily and was told that there would be no problem as long as she reported her status each day, plaintiff attempted to return to work once more and suffered pain, and the next day she was told that she was being discharged for missing work the previous week. **Whitfield v. Laboratory Corp. of Am., 341.**

Return to work—no more presumption of disability—failure to perform as required—The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff constructively refused suitable employment when she did not perform as required after returning from carpel tunnel surgery. The employer provided competent evidence that plaintiff's failure to perform the task she was given was not related to her prior compensable injury, the burden shifted to plaintiff, and she did not present evidence of disability as a result of her injury. All presumption of disability ended when plaintiff returned to work. **McRae v. Toastmaster, Inc., 70.**

Return to work—not refused—sufficiency of evidence—The Industrial Commission did not err in a workers' compensation case in its determination that plaintiff did not refuse to return to work where competent evidence supports findings that plaintiff was told by her employer that calling in every day until she was able to return to work was suitable, and that she did not learn that she was to be fired for staying home until her second day back after her recovery. **Whitfield v. Laboratory Corp. of Am., 341.**

Rules—contradicted by Commission—no prejudice—If the Industrial Commission makes rules, it should consider those rules in making its decisions. The Commission noted in this case that certain doctors were not deposed and that only their treatment records were in evidence, which contradicts Workers' Compensation Rule 12. However, the Commission used other, appropriate bases for giving weight to the deposition of another doctor. **Whitfield v. Laboratory Corp. of Am., 341.**

Temporary total disability benefits—justifiable refusal of position—The Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff employee justifiably refused the position offered by defendants, concluding the Form 24 application was improvidently approved, and concluding plaintiff's temporary total benefits should be reinstated until further order of the Commission. **Guerrero v. Brodie Contrs., Inc., 678.**

Temporary total disability benefits—maximum medical improvement—Although defendants contend the Industrial Commission erred in a workers' compensation case by awarding plaintiff employee temporary total disability benefits beyond the date plaintiff allegedly reached maximum medical improvement, the issue of maximum medical improvement was not germane to the Commission's decision. **Guerrero v. Brodie Contrs., Inc., 678.**

Weight of evidence—discretion of Industrial Commission—A workers' compensation finding that plaintiff's disability was proximately caused by head injuries suffered while he worked for his son's grading company was supported by the evidence. Although defendant pointed to plaintiff's pre-existing small vessel disease, the Industrial Commission was entitled to rely upon medical testimony that it was "possible," "probable," or "likely" that plaintiff's accidents

WORKERS' COMPENSATION—Continued

caused his disability. The level of the witnesses' certainty went to the weight of their testimony and not its competence. **Martin v. Martin Bros. Grading, 503.**

Wrongful discharge—assertion of workers' compensation rights—amendment of complaint—responsive pleading not filed—motion not futile—A plaintiff may state a claim for wrongful discharge in violation of public policy based upon an allegation that the dismissal resulted from an assertion of rights under the Workers' Compensation Act, and plaintiff was entitled to amend his complaint to add such a claim as a matter of right before defendants had filed a responsive pleading. The trial court could not properly deny as futile the motion to amend on the ground that plaintiff was a union employee who could only be dismissed for just cause rather than an at-will employee and thus could not sue in tort for wrongful discharge under *Trexler v. Norfolk S. Ry. Co.*, 145 N.C. App. 466 where the terms of the purported collective bargaining agreement were not before the court. **Brackett v. SGL Carbon Corp., 252.**

WRONGFUL DEATH

Summary judgment—sufficiency of evidence—The trial court did not err in an action for the wrongful death of a high school football player from a heatstroke by granting summary judgment in favor of defendant assistant coach. **Draughon v. Harnett Cty. Bd. of Educ., 705.**

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina