

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

SHELBY J. DODSON, WIDOW AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN E. DODSON, DECEASED, EMPLOYEE, PLAINTIFF v. DUBOSE STEEL, INC., EMPLOYER, AND AMERICAN MANUFACTURERS MUTUAL, CARRIER, DEFENDANTS

No. COA02-543

(Filed 15 July 2003)

Workers' Compensation— injury and death arising out of employment—workplace assault

The Industrial Commission did not err in a workers' compensation case by concluding that the evidence in the record supports the Commission's findings 11, 12, and 14, which in turn support its conclusions of law, that decedent truck driver's injury and death were rooted in the pertinent traffic merging incident involving a dispute over decedent's driving and that it arose out of decedent's employment, because: (1) the Commission properly analyzed this case according to assault cases when the incident was more closely analogous to a workplace assault than to any of the factual scenarios underpinning defendant's proposed alternative theories; (2) the dispute had as its root cause the merging incident which was related to driving and to the basic nature of decedent's work as a truck driver; (3) neither the appreciable benefits or increased risk analysis apply when decedent was driving his truck in the course of his business for defendant employer; and (4) defendant failed to prove by the greater weight of the evidence that decedent's injury and death

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resulted from decedent's willful intention to injure or kill himself or another.

Judge STEELMAN concurring in part and dissenting in part.

Appeal by defendants from opinion and award entered 18 January 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 February 2003.

Lore & McClearen, by R. James Lore, and Johnson & Parsons, P.A., by Dale P. Johnson, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Maura K. Gavigan and Erin D. Eveson, for defendant-appellants.

HUDSON, Judge.

Defendants Dubose Steel, Inc. (Dubose) and American Manufacturers Mutual appeal an opinion and award entered 18 January 2002 by the North Carolina Industrial Commission that awarded plaintiff medical expenses, death benefits and the statutory \$2,000 toward burial expenses, for the injury that led to the death of her husband. For the reasons that follow, we affirm.

BACKGROUND

Plaintiff's decedent John Dodson (Dodson), was employed by defendant Dubose as a truck driver, and was driving a load of steel to Virginia for his employer on 27 September 1999. As a result of the events at issue here, Dodson was struck by a vehicle while outside of his truck, and fell to the pavement on his head. After several days without regaining consciousness, Dodson died. His widow Shelby Dodson, the plaintiff, filed claims for workers' compensation benefits due while Dodson was still alive, and for death benefits.

The claims were consolidated and heard 27 September 2000, and, in an opinion and award filed on 30 November 2000, Deputy Commissioner William C. Bost found and concluded that Dodson's injury and death arose out of and in the course of his employment, and awarded benefits to plaintiff.

In an opinion and award filed 18 January 2002 by Commissioner Bernadine Ballance, the Full Commission essentially re-wrote the findings of fact and conclusions of law, but awarded the same benefits. Defendants now appeal.

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ANALYSIS

A. The Standard of Review

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 to construe the Workers' Compensation Act 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.

B. Appellants' Arguments

Defendants bring forward three questions presented, organized into two arguments in their brief. In the heading of Argument I, defendants refer to all but one of the nineteen assignments of error. In the body of the argument, however, defendants do not mention any specific findings by number, but argue generally that the evidence does not support that the Commission "found that [Dodson's] injury

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and subsequent death arose out of his employment.” In identically worded assignments of error 1 through 12, defendants challenge findings of fact 5 through 17 as not being supported by the “competent evidence of record.” Similarly, assignments of error 13 through 18 challenge, in identical language, conclusions of law 1 through 4, 6 and 7 as not supported by the evidence and as “contrary to law.” Assignment of error 19 challenges the award. We do not believe that this argument complies with the Rules of Appellate Procedure sufficiently to bring forward challenges to any of the specific findings of fact, with the possible exceptions of numbers 11, 12 and 14 and conclusions 1, 2 and 4, which read as follows:

11. The root cause of the confrontation between Dodson and Campbell originated when Dodson, while moving with the traffic, merged into Campbell’s lane of traffic forcing Campbell out of his lane. Neither Dodson nor Campbell knew each other prior to this incident. There is no evidence that Dodson intended to force Campbell out of his lane of travel. At the time that the root cause incident occurred, Dodson was driving his truck in the ordinary course of his business for defendant-employer, Dubose Steel, Inc. which was the basic nature of his work as a truck driver. Defendants admit that at the time Dodson was struck by Campbell’s vehicle he was an employee of Dubose Steel, Inc.
12. John Dodson’s injuries and death resulted from an assault upon his person by a vehicle operated by Troy Campbell. Although there had been gestures and verbal exchanges between Campbell and Dodson (which neither of them could hear), based on the greater weight of the evidence, Dodson did not have a wilful intent to injure or kill Campbell when he exited his vehicle and walked toward the driver’s side of Campbell’s vehicle. Dodson appeared to have acted spontaneously.

* * * * *

14. Dodson’s injury and death arose out of his employment. As a result of his injury and subsequent death, Dodson and now his estate have incurred ambulance and medical bills for treatment for the time that he lived prior to death, as well as burial expenses in excess of \$2,000 . . .

* * * * *

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CONCLUSIONS OF LAW

1. The injury to John Dodson occurring on September 27, 1999 and the resulting death occurring on October 4, 1999 constituted a compensable injury by accident arising out of and in the course of Dodson's employment with Dubose Steel, Inc. N.C. Gen Stat. §§ 97-2(6); 97-38.
2. John Dodson died as a result of an assault on his person by a vehicle driven by Troy Campbell. The assault originated from an argument based on the manner in which Dodson drove his truck in the course of his employment. *Hegler v. Cannon Mills*, 224 N.C. 669, 31 S.E.2d 918 (1944).

* * * * *

4. Decedent's employment as a long distance truck driver caused him to spend the majority of his working hours traveling on highways and streets. Due to the nature of decedent's work, the risk of driver error causing tempers to flare among strangers on the busy highways was increased. Dodson and Campbell did not know each other so the inciting incident was not due to personal reasons. "Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work." A truck driver's risk of being struck by a vehicle is a risk greater than that of the general public. 1 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation, Desk Edition*, § 8 Scope (2000).

Thus, we will first discuss whether the evidence supports these findings and conclusions.

After a careful review according to the standard articulated by the Supreme Court, we conclude that evidence in the record supports the Commission's findings 11, 12, and 14. First, Troy Campbell, the motorist who hit Dodson, testified that his vehicle and Dodson's tractor-trailer were trying to merge into one lane of travel from the two in which they were traveling, when Dodson's truck forced Campbell off the road, while Campbell was "laying on the horn when he [Dodson] was coming over." At the next stoplight, according to Campbell and witnesses Scott Cash and Mark Davis, Dodson got out of his truck and started walking toward Campbell, banging his fist onto the hood of Campbell's vehicle, at which point Campbell drove forward, striking

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Dodson. Several days later Dodson died from his injuries. Campbell could not hear what, if anything, Dodson said while walking toward Campbell's vehicle, and Campbell testified that Dodson "really didn't have any kind of facial expression." We believe that this evidence, among much more, fully supports the above findings of fact to the effect that Dodson's injury and death were rooted in the driving incident.

The Full Commission chose to accept certain testimony as credible, which is within its authority, even though there may be evidence from which one could draw a contrary inference. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. As we indicated earlier, the Full Commission is the "sole judge of the weight and credibility of the evidence" and need not explain its findings of fact to justify which evidence or witnesses it finds credible. *Id.* 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 11, 12, and 14, among others, support the Commission's legal conclusions and award regarding the root cause of Dodson's injury.

In their second "Question Presented," briefed as part B of Argument I, the defendants contend that the Commission erroneously analyzed this case according to the law pertaining to workplace assaults. Defendant's argue that the Commission's conclusions and award are contrary to applicable law, for three reasons. They contend that (1) the assault cases do not apply; (2) the employer received no "appreciable benefit" from Dodson's actions at the time of the injury according to the so-called Good Samaritan cases; and (3) that Dodson's work did not place him at increased risk of the type of incident in which he was injured.

We conclude, however, that the Commission properly analyzed this case according to the assault cases, because the incident was, we believe, more closely analogous to a workplace assault than to any of the factual scenarios underpinning defendants' proposed alternative theories. In reaching this conclusion we are guided, not only by the standard of review, but also by the clear and oft-articulated mandate of the Supreme Court that, in workers' compensation cases, the statute is to be broadly construed in favor of awarding benefits, in view of the remedial purpose of the Act. *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982). "Since the terms of the

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Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other." *Id.* 306 N.C. at 252, 293 S.E.2d at 199. Although we are mindful that the Worker's Compensation Act was not intended to provide a general insurance policy, our Courts have repeatedly held that "[t]he Workers' Compensation Act 'should be liberally construed to the end that benefits thereof should not be denied upon technical, narrow and strict interpretation.'" *Dildy v. MBW Invs., Inc.*, 152 N.C. App. 65, 73, 566 S.E.2d 759, 765 (2002), citing *Roberts v. Burlington Indus.*, 321 N.C. 350, 359, 364 S.E.2d 417, 423 (1988) (additional citations omitted).

In the assault cases the analysis of "arising out of" turns on whether the assault "originated in" something related to the job. In the opinion and award, the Commission cites *Hegler v. Cannon Mills Co.*, 224 N.C. 669, 31 S.E.2d 918 (1944), as a basis for its conclusion. There, the Supreme Court upheld an award of compensation where the injury and death resulted from an assault that followed a dispute between two cotton mill workers over one's attempt to supervise the other. The Court there pointed out:

Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or unimportant. Infirmary of temper, or worse, may be expected, and occasionally blows and fighting. Where . . . as a result of it one injures the other, it may be inferred that the injury arose out of the employment.

Id., 224 N.C. at 671, 31 S.E.2d at 920 (citations omitted). Plaintiff cites a number of cases in which this Court and the Supreme Court have held that an accidental injury is compensable where it results from an assault rooted in the performance of workplace duties. See *Wake County Hosp. System, Inc. v. Safety Nat'l Casualty Corp.*, 127 N.C. App. 33, 487 S.E.2d 789, *disc. review denied* 347 N.C. 410, 494 S.E.2d 600 (1997) (holding that death covered by workers' compensation where hospital social worker was abducted by hospital laundry worker, who took her to another location where he raped and murdered her, where record does not reflect whether decedent knew assailant.); *Pittman v. Twin City Laundry & Cleaners*, 61 N.C. App. 468, 300 S.E.2d 899 (1983) (upholding award of compensation where decedent was shot after an argument over whether another worker had been fired or not.)

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We believe that the findings of the Commission support the conclusion that Dodson's injury and death originated in the traffic merging incident, which was clearly a dispute about Dodson's driving. Since Dodson's work primarily consisted of driving, and his workplace comprised public roads and highways, including the one upon which he was driving at the time of the merging incident, the findings also support the conclusion that the "assault upon Dodson [by Campbell's vehicle] was rooted in and grew out of his employment," and occurred in his workplace. This case is not similar to those in which a worker has been assaulted because of a personal relationship, unconnected to the employment. See *Hemric v. Mfg. Co.*, 54 N.C. App. 314, 283 S.E.2d 436 (1981), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 806 (1982) (employee was shot during assault on co-worker by violent boyfriend); *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E.2d 350 (1972) (employee was assaulted at workplace by estranged husband); *Dildy*, 152 N.C. App. 65, 566 S.E.2d 759 (2002) (employee was assaulted at work by violent boyfriend.) Here the Commission has found as fact that the dispute had as its "root cause" the merging incident, which was related to driving and to "the basic nature of his work as a truck driver." Thus, according to the applicable case law, the Commission properly concluded that Dodson's injury and death resulted from an injury by accident arising out of and in the course of his employment.

Defendants argue that the Commission and the Court should analyze this case according to the cases in which an employee on a business trip interrupts his work to engage in personal conduct unrelated to the employer's business, such as the Good Samaritan cases, and that we should employ an "appreciable benefits" or "increased risk" test. See *Roman v. Southland Transp.*, 350 N.C. 549, 515 S.E.2d 214 (1999); *Roberts v. Burlington Indus.*, 321 N.C. 350, 364 S.E.2d 417 (1988). Because we have held that the evidence supports the Commission's findings, which in turn support its conclusions to the effect that Dodson's injury and death resulted from a dispute related to his business of driving, we do not believe that these cases apply. In so concluding, we again refer to the standard of review, according to which we are bound by the findings and conclusions of the Commission if there is any evidence to support them.

In *Roberts*, the employee was injured while on a business trip, during a stop to render aid to a third party. The Supreme Court affirmed the denial of benefits, holding that the employer received no "appreciable benefits" from the employee's stop. Here, however, the

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Commission found and concluded that at the time the “root cause” incident began, Dodson “was driving his truck in the course of his business for defendant-employer.” Thus, we do not believe that either the “appreciable benefits” or “increased risk” analysis—applicable to cases in which the employee was *not* engaged in the employer’s business, such as *Roberts*—applies here. In addition, although the Court in *Roman* also affirmed the denial of benefits where the decedent was shot while pursuing a robber, it did so in a three-to-three opinion, in which the Court noted that “the decision of the Court of Appeals is affirmed without precedential value.” As such, we decline to treat *Roman* as authority.

In Argument II (Question presented 3), defendants contend that the plaintiff is barred from any compensation because Dodson’s injury and death resulted from his wilful intention to injure Campbell. However, the Commission accepted as credible the evidence discussed above, and made findings of fact, including finding 12 quoted above, which support its conclusion number 3, that defendant failed to prove “by the greater weight of the evidence that [Dodson’s] injury and death resulted from [Dodson’s] wilful intention to injure or kill himself or another.” Because these findings and conclusion are supported by the evidence even though there may have been evidence to the contrary, we reject this argument.

CONCLUSION

In sum, we hold that the evidence supports the findings of fact, which in turn support the conclusions of law of the Commission. Since the Commission properly analyzed this case as an assault in the workplace, its conclusions are consistent with the applicable law. For the reasons set forth above, we affirm the opinion and award of the Industrial Commission.

Affirmed.

Judge McGEE concurs.

Judge STEELMAN dissents in part, concurs in part.

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

I respectfully dissent from the majority’s decision affirming the portion of the Commission’s Opinion and Award concluding Dodson’s injury and death arose out of and in the course of his

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employment and awarding death benefits to plaintiff. Although I concur with the majority's conclusion that Dubose's argument under N.C. Gen. Stat. § 97-12(3) (2001) must fail, I do so on different grounds. The facts in this case are not in dispute; however, I recite additional facts to clarify and support my decision on this matter.

On 27 September 1999, John Dodson ("Dodson") was transporting a load of steel to Virginia for his employer, defendant Dubose Steel, Inc. ("Dubose"). While Dodson was driving in the right lane of a divided highway having two lanes of traffic in each direction, Troy Campbell ("Campbell") was driving in the same direction in the left lane. The two drivers encountered a disabled recreational vehicle partially blocking the right lane and causing the two lanes of traffic to merge left into a single lane. Dodson moved his truck into the left lane and forced Campbell into a left-turn lane as Campbell blew his horn several times. Dodson returned to the right lane after passing the disabled vehicle.

Campbell pulled up beside Dodson's truck, looked over at him, motioned back and said "you almost hit me back there." Campbell made gestures toward Dodson, who responded by shaking his finger at Campbell. Campbell then moved forward in the left lane to where the vehicles ahead of him were stopped at the traffic signal. While the two vehicles were stopped for the traffic signal, Dodson got out of his truck and walked around the front of Campbell's vehicle, striking the hood with his fist and signaling Campbell to get out of his vehicle. Campbell and other witnesses were under the impression that Dodson was angry as he approached Campbell's vehicle.

When Dodson reached the left front headlight of Campbell's vehicle, Campbell turned the wheels to the left and accelerated in an attempt to move into the left-turn lane. Campbell's vehicle struck Dodson, causing him to fall and to suffer significant head injuries which ultimately resulted in his death on 4 October 1999.

On 25 October 1999, defendant American Manufacturers Mutual Insurance ("American Mutual") denied the workers' compensation claim filed by plaintiff, finding that "there was no causal relationship of the employee's injuries to his employment." Plaintiff requested a hearing before the North Carolina Industrial Commission regarding the denial of the workers' compensation claim to determine whether Dodson was acting in the course and scope of employment at the time of his injury.

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On 30 November 2000, the Deputy Commissioner filed an Opinion and Award concluding that Dodson's death arose out of and in the course of his employment and ordering defendants to pay death benefits to plaintiff. Both Dubose and American Mutual appealed the Deputy Commissioner's Opinion and Award.

On 18 January 2002, the Full Commission ("Commission") affirmed the Deputy Commissioner's Opinion and Award. The Commission found facts as detailed above and made additional findings of fact and conclusions of law as set out in the majority opinion. Dubose appealed the Commission's Opinion and Award. American Mutual did not participate in this appeal.

The issue presented in Dubose's appeal to this Court is whether the death of an employee who was engaged in an act of "road rage" at the time of his injury resulting in his death suffered an injury compensable under N.C. Gen. Stat. Chapter 97. In the event that there are procedural inadequacies in Dubose's appeal, I would exercise this Court's authority under N.C.R. App. P. 2 (2003) to suspend the rules and address Dubose's arguments in their entirety.

I.

Dubose first contends the Commission erred in awarding death benefits to plaintiff because the event causing Dodson's injury and resulting death did not arise out of and in the course of his employment with Dubose.

Whether an employee's injury arises out of and in the course of his employment is a mixed question of law and fact. *Hoyle v. Isehour Brick & Tile Co.*, 306 N.C. 248, 293 S.E.2d 196 (1982). This Court's review of the Commission's Opinion and Award is limited to whether its factual findings are supported by any competent evidence and whether its conclusions are adequately supported by its findings. *Allen v. Roberts Elec. Contractors*, 143 N.C. App. 55, 546 S.E.2d 133 (2001). If the findings of fact compel a conclusion opposite of that reached by the Commission, it is the duty of this Court to reverse the Commission. *Warren v. City of Wilmington*, 43 N.C. App. 748, 259 S.E.2d 786 (1979).

A. Background Law

The North Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-1, *et seq.* (hereinafter "the Act"), defines a compensable, accidental injury under the Act as one "arising out of and in the course of

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employment. . . .” N.C. Gen. Stat. § 97-2(6) (2001). The phrase “arising out of” relates to the origin of the accident and generally requires a causal connection between the nature of the employment and the injury. *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E.2d 350 (1972). “In the course of employment” refers to the time, place and circumstances giving rise to the injury. *Pittman v. Twin City Laundry & Cleaners*, 61 N.C. App. 468, 300 S.E.2d 899 (1983). Although these elements are interrelated, the claimant has the burden of establishing both to receive compensation. *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988); *Hoyle*, 306 N.C. at 251, 293 S.E.2d at 198.

B. Arising Out of the Employment

There are two lines of North Carolina cases decided under N.C. Gen. Stat. § 97-2(6) which potentially are controlling in our determination as to whether Dodson’s injuries arose out of his employment. The first line of cases, relied upon by the majority and the Commission, deals with injuries caused by assaults occurring in the workplace or assaults by co-workers. The second line of cases, relied upon by Dubose, addresses injuries to employees occurring when the employee interrupts his business for his employer to engage in personal conduct unrelated to his employer’s business.

1. Assaults in the Workplace

The Commission expressly relied on one of the workplace cases, *Hegler v. Cannon Mills Co.*, 224 N.C. 669, 31 S.E.2d 918 (1944), in finding that Dodson’s injuries and death were “rooted in” his employment. In *Hegler*, tensions between two co-workers, Hegler and Smith, developed over the course of a year and culminated in Hegler’s complaint to his employer about the quality of Smith’s work. *Id.* at 670, 31 S.E.2d at 919. Two days after the complaint, Smith assaulted and killed Hegler at their workplace. *Id.*

Our Supreme Court found that the tension between the two co-workers “had its origin in the employment.” *Id.* at 671, 31 S.E.2d at 919. The *Hegler* Court also found that the assault was “directly connected with” and “was rooted in and grew out of the employment.” *Id.* at 670-71, 31 S.E.2d at 919. *Hegler* affirmed the Commission’s findings and conclusions that the death had occurred in the course of and arose out of the employment. *Id.*

This Court reached a similar conclusion in *Pittman v. Twin City Laundry*, 61 N.C. App. 468, 300 S.E.2d 899 (1983). In *Pittman*, a quar-

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rel between two employees of the laundry service ended in one employee shooting and killing the other at the workplace. *Id.* at 470, 300 S.E.2d at 901. This Court held that the death “had its origin in a risk connected with [Pittman’s] employment and that his death was in direct consequence of that risk.” *Id.* at 474, 300 S.E.2d at 903. Thus, the *Pittman* Court, citing *Hegler*, found the shooting was causally connected to and arose out of the decedent’s employment. *Id.*

Pittman expressly distinguished those cases where the claimant is injured at the workplace by a non-employee assailant who committed the assaults for reasons unrelated to the employer’s business. In such cases, our courts have held “that an injury is not compensable when it is inflicted in an assault upon an employee by an outsider as a result of a personal relationship between them, and the attack was not created by and not reasonably related to the employment.” *Hemric v. Manufacturing Co.*, 54 N.C. App. 314, 318, 283 S.E.2d 436, 438-39 (1981); *see also, Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 233 S.E.2d 529 (1977) (holding that the employee’s death did not arise out of her employment where there was no evidence that the assault was motivated by her employment or that her employment affected her risk of being assaulted); *Robbins, supra*, (holding that the assault and killing of an employee at her workplace did not arise out of her employment since the risk of assault by her estranged husband was personal and not incidental to her employment); *Dildy v. MBW Invs., Inc.*, 152 N.C. App. 65, 566 S.E.2d 759 (2002) (holding that claimant’s injury at the store where she worked did not arise out of her employment because the risk that her boyfriend would carry out previous threats was based in a personal relationship independent of her employment).

In the present case, the incident giving rise to Dodson’s injury and death was not an assault by a co-worker occurring at the workplace. Therefore, I would hold that this case is not controlled by the decisions concerning assaults in the workplace or assaults by co-workers.

2. Increased Risk Analysis

The facts and issues presented here are more analogous to the cases where an employee interrupts his work for his employer to engage in personal conduct unrelated to the employer’s business, such as rendering assistance to a third person. In those cases, our courts primarily have relied on an increased risk analysis to determine whether injuries arose out of the claimant’s employment.

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The increased risk analysis requires a finding that the employee's injury was caused by an increased risk incidental to the employment. The key determination is whether the injury was "a natural and probable consequence of the nature of the employment." *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 532-33. A contributing proximate cause of the injury must be a risk unique to the nature of the employment and not a risk to which any member of the public would be equally exposed apart from the employment. *Id.* at 404, 233 S.E.2d at 533; *see also Roberts v. Burlington Indust.*, 321 N.C. 350, 364 S.E.2d 417 (1988). This risk also must be one "which might have been contemplated by a reasonable person . . . as incidental to the service when he entered the employment." *Bartlett v. Duke Univ.*, 284 N.C. 230, 233, 200 S.E.2d 193, 195 (1973).

In adopting the increased risk approach, our Supreme Court expressly rejected the "positional risk" doctrine, where an injury arises out of the employment if it "has its source in circumstances in which the employee's employment placed him." *Roberts*, 321 N.C. at 359, 364 S.E.2d at 423 (*quoting Bartlett*, 284 N.C. at 235, 200 S.E.2d at 196). Thus, even when employment provides "a convenient opportunity" for injury, it is not necessarily the contributing proximate cause. *Robbins*, 281 N.C. at 240, 188 S.E.2d at 354.

Our Supreme Court applied the increased risk analysis in *Roberts*, *supra*, where the decedent-employee worked as a furniture designer and often traveled to visit retail stores selling his employer's furniture. *Id.* at 351, 364 S.E.2d at 418. While he was returning home from a business trip, Roberts was struck and killed by a vehicle as he attempted to help an injured pedestrian who had no connection to his duties with his employer or his employer's business. *Id.* at 351, 364 S.E.2d at 419. The *Roberts* Court concluded that Roberts' employment did not increase the risk of being struck while assisting a pedestrian on the roadside and that "[t]he risk was common to the neighborhood, not peculiar to the work." *Id.* at 358, 364 S.E.2d at 423. The Court further held that although his employment may have placed him in the position to rescue the injured pedestrian, Roberts' own "decision to render aid created the danger," not the nature of his employment. *Id.* at 359, 364 S.E.2d at 423. Because it concluded Roberts' injury did not arise out of his employment, the Court ordered the reinstatement of the Commission's Opinion and Award denying compensation. *Id.* at 360, 364 S.E.2d at 424.

Here, the Commission found that the "root cause" of the *confrontation* occurred when Dodson merged into Campbell's lane while

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he was driving in the course of his business for Dubose as part of the “basic nature of his work as a truck driver.” By finding that Dodson’s employment was the “root cause” of his confrontation, the Commission tacitly acknowledged that his employment was merely a remote cause, and not a direct or proximate cause, of his injury.

The Commission also concluded that Dodson’s “employment as a long distance truck driver caused him to spend the majority of his working hours traveling on highways and streets.” For this reason, the Commission concluded, “the risk of driver error causing tempers to flare among strangers on busy highways was increased.” This conclusion is based upon a positional risk analysis, wherein Dodson’s employment as a truck driver placed him on the highway more frequently than other drivers and, therefore, increased his risk of confrontations with other drivers. However, our Supreme Court expressly rejected the positional risk doctrine in favor of the increased risk approach.

The Commission further concluded that “[a] truck driver’s risk of being struck by a vehicle is a risk greater than that of the general public.” While a truck driver may experience an increased risk of being in a collision or accident involving his truck, his employment cannot reasonably be seen as increasing the risk of the driver himself being struck by a vehicle after exiting his truck to confront another driver on the roadside. The risk of confrontations while driving, commonly referred to as “road rage,” is not unique to employment as a truck driver. It is something that can occur at anytime to any member of the general public in the normal course of operating a motor vehicle. The mere fact that Dodson drove on the highway more often as a result of his employment may have provided “a convenient opportunity” for exposure to “road rage,” but as our Supreme Court held in *Roberts* and *Robbins*, *supra*, demonstrating positional risk does not establish a compensable injury.

Furthermore, the facts demonstrate that Dodson’s injury was not the natural and probable consequence of his employment. The initial contact between Dodson and Campbell occurred when Dodson merged into Campbell’s lane, forcing him into the turn lane. After passing the disabled vehicle, Campbell shouted to Dodson then continued forward to meet the traffic in front of him. At this point, the incident effectively had come to an end. However, Dodson personally chose to renew the confrontation by getting out of his truck to confront Campbell without any additional provocation or contact between the two men or any contact between their vehicles. Once

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Dodson exited his truck to confront Campbell, his conduct was no longer related to his employment. As in *Roberts*, it was Dodson's independent and voluntary act of getting out of his truck to confront Campbell which created the risk that he could be struck by another vehicle. The risk of injury was not created by the nature of his employment.

The facts as found by the Commission compel the conclusions that the proximate cause of Dodson's injury was his decision to exit his vehicle to confront Campbell in an act of "road rage" and that the risk of such an act is not incidental or unique to nature of his employment as a truck driver but is a risk to which every member of the general public is equally exposed. Therefore, I would hold the Commission's findings do not support the conclusion that Dodson's injuries arose out of his employment with Dubose.

C. In the Course of the Employment

"In the course of employment" refers to the time, place and circumstances giving rise to the injury.

With respect to time, the course of employment begins a reasonable time before work begins and continues for a reasonable time after work ends. The place of employment includes the premises of the employer. *Where the employee is engaged in activities that he is authorized to undertake and that are calculated to further, directly or indirectly, the employer's business, the circumstances are such as to be within the course of the employment.*

Pittman, 61 N.C. App. at 472, 300 S.E.2d at 901-02 (citations omitted) (emphasis added). The circumstances element is fulfilled when " 'the employee is doing what a man so employed may reasonably do within a time which he is employed and at a place where he may reasonably be during that time to do that thing.' " *Harless v. Fynn*, 1 N.C. App. 448, 456, 162 S.E.2d 47, 53 (1968) (citations omitted).

In this case, there was no finding that Dodson's actions occurred at the time or place of his employment. Further, the incident does not meet the circumstances element. Dodson was not authorized to exit his truck to confront other drivers, and he was not engaged in any activity in furtherance of Dubose's business when he got out to confront Campbell. Dodson was not doing what a truck driver reasonably would do at the time and place of his employment when the injury

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occurred. Therefore, I would hold the Commission's findings do not support its conclusion that Dodson's injuries occurred in the course of his employment.

II.

In its second argument, Dubose contends the Commission erred pursuant to N.C. Gen. Stat. § 97-12(3) in awarding death benefits to Dodson where his death was proximately caused by his own willful intent to injure or kill himself or another. N.C. Gen. Stat. § 97-12(3) provides that "[n]o compensation shall be payable if the injury or death to the employee was proximately caused by: . . . (3) [h]is willful intention to injure or kill himself or another." The employee must intentionally and purposefully intend to injure another. "Neither acts by the claimant, nor mere words spoken by the claimant and unaccompanied by any overt act, will be a sufficient bar to compensation unless the willful intent to injure is apparent from the context and nature of the physical or verbal assault." *Rorie v. Holly Farms Poultry Co.*, 306 N.C. 706, 710, 295 S.E.2d 458, 461 (1982). N.C. Gen. Stat. § 97-12(3) provides an affirmative defense for which Dubose has the burden of proof. *Id.* at 709, 295 S.E.2d at 460.

Based on statements by Campbell and other witnesses, the Commission found that Dodson struck Campbell's vehicle with his fists, pointed at Campbell and generally seemed angry. The Commission did not find that Dodson verbally threatened Campbell or that any physical assault on Campbell occurred. The context of this incident does not make apparent the fact that Dodson willfully intended to injure Campbell, only that he intended to confront him. I would hold that Dodson is not precluded from receiving compensation under N.C. Gen. Stat. § 97-12(3).

In summary, because the Commission's findings do not support its conclusions that Dodson's injuries arose out of and in the course of his employment, I would hold the Commission erred in concluding that Dodson suffered a compensable injury under N.C. Gen. Stat. § 97-2(6) and in awarding death benefits.

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STATE OF NORTH CAROLINA v. JEFFREY BOWES, DEFENDANT

No. COA02-323

(Filed 15 July 2003)

1. Appeal and Error— mootness—likelihood of repeated action

The issue of whether DMV could disregard a limited driving privilege granted by a court was not moot even though the original revocation and the limited privilege had expired by the time of the Court of Appeals decision. It is reasonably likely that DMV could repeat its action in considering future cases.

2. Jurisdiction— subject matter—limited driving privilege issued by court—invalidated by DMV

The trial court had subject matter jurisdiction to consider the DMV's invalidation of a limited driving privilege because the court that issues a judgment (the limited privilege) is the appropriate court in which to seek enforcement of the judgment, and because the General Assembly specifically designated the district court to determine both civil and criminal remedies in N.C.G.S. § 20-179.3.

3. Motor Vehicles— invalidation of limited driving privilege—DMV—personal jurisdiction

The district court had personal jurisdiction over the DMV in an action concerning DMV's invalidation of a court-issued limited driving privilege. The district attorney is in privity with DMV because this involves a single criminal proceeding and because N.C.G.S. § 20-179.3 implicitly places the district attorney in privity with DMV for purposes of limited driving proceedings.

4. Immunity— sovereign—limited driving privilege—action to enforce against State

The State's enactment of N.C.G.S. § 20-179.3 waived sovereign immunity for enforcement of a limited driving privilege granted by a court and invalidated by DMV.

5. Constitutional Law; Motor Vehicles— separation of powers—due process—limited driving privilege—granted by court—invalidated by DMV

DMV violated both due process and separation of powers by unilaterally invalidating a limited driving privilege which had

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been granted as a judgment by a district court. The court was not notified and took no action to vacate its order.

Judge EAGLES dissenting.

Appeal by the State from judgment entered 10 December 2001 by Judge Charles M. Vincent in Pitt County District Court. Heard in the Court of Appeals 13 November 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.

The Robinson Law Firm, by Leslie S. Robinson, and Law Offices of Keith A. Williams, P.A., by Keith A. Williams, for defendant-appellee.

HUDSON, Judge.

The pertinent background of this appeal is as follows: On 3 August 2001, Jeffrey Bowes pled guilty to driving while impaired and was sentenced as a Level 5 offender. At the time of his plea, Bowes was nineteen years old. Judge Joseph A. Blick ordered Bowes placed on twelve months of unsupervised probation, to pay \$290.00 in costs and fines, to obtain a substance abuse assessment, to surrender his driver's license, to complete 24 hours of community service, to submit to any test for the detection of alcohol or drugs requested by a law enforcement officer, and not to operate a motor vehicle until properly licensed to do so.

On 6 August 2001, Judge David A. Leech signed an order in the same file (00 CR 64316) granting Bowes a limited driving privilege. By letter of 13 August 2001, the Division of Motor Vehicles (DMV) notified Bowes that the DMV "considers the [limited driving] privilege void and our records will not indicate [that he] has a limited driving privilege." Bowes then filed a "Motion in the Cause for Contempt and for Injunctive Relief" in the DWI case seeking to have the court hold the DMV in criminal and/or civil contempt for refusing to honor the limited driving privilege and seeking to enjoin the DMV from denying him a limited driving privilege.

On 10 December 2001, District Court Judge Charles M. Vincent entered an Order in which he concluded that the DMV's actions in invalidating Bowes' limited driving privilege violated the separation of powers doctrine and also violated Bowes' constitutional rights to

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due process and equal protection. The pertinent conclusions of law are as follows:

5. That G.S. 20-179.3(k) authorizing the Division of Motor Vehicles to reject and invalidate a Limited Driving Privilege Order issued by a District Court Judge without notice to the Defendant and an opportunity to be heard before the Judge, violates the separation of powers doctrine of the North Carolina Constitution by vesting judicial authority in an agency of the executive branch;

6. That the Division of Motor Vehicles has no authority to unilaterally reject a Criminal Judgment ordered and issued by a District Court Judge;

7. That the Division of Motor Vehicles without proper notification to the Court and by its inconsistent treatment of such privileges to other drivers similarly situated to the Defendant, has violated the Defendant's Federal and State Constitutional rights to equal protection of the law, and that there is no rational or reasonable basis for the Division's decision to treat the Defendant differently from other drivers who are similarly situated (that is, differently from other drivers who were also over eighteen years of age but under twenty-one years of age at the time they committed the offense of DWI);

8. That the Division of Motor Vehicles' actions in denying a privilege to the Defendant and invalidating the Court's Criminal Judgment has been arbitrary and capricious and is in violation of Defendant's procedural due process of law[.]

Judge Vincent further determined that the DMV was collaterally estopped from contesting or relitigating the issue because the DMV had failed to object to the court's ruling on 6 August 2001 that found that Bowes was eligible for a limited driving privilege, that the State has impliedly waived its sovereign immunity to a limited extent by the enactment of G.S. § 20-179.3, and that the DMV had the ability to comply with the orders entered by Judge Blick on 3 August 2001 and Judge Leech on 6 August 2001.

The State filed notice of appeal to this Court. Following a hearing, the district court dismissed the appeal, concluding that appeal should have been filed with the superior court within ten days of the order. The State filed a petition for writ of certiorari in this Court, which we allowed. Thus, the case is properly before us. For the following reasons discussed below, we affirm.

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Analysis

[1] Before discussing the State's argument, we first address a question of mootness on our own motion. Since Judge Vincent's 10 December 2001 Order was entered, the revocation of Bowes' license has run and his limited driving privilege has expired.

In general, "an appeal presenting a question which has become moot will be dismissed." *Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). This general rule is, however, subject to exception, and one such exception is that courts may review cases that are otherwise moot but that are "capable of repetition yet evading review." *In re Jackson*, 84 N.C. App. 167, 170-71, 352 S.E.2d 449, 452 (1987). "There are two elements required for the exception to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989) (citations omitted).

As we have noted, Bowes' limited driving privilege has expired and the revocation of his license has run since Judge Vincent's 10 December 2001 order. However, we believe it reasonably likely that the DMV, in considering future orders granting limited driving privileges, could repeat the action that is at issue here and face similar challenges. Consequently, we will proceed to consider the issues raised on this appeal.

A. Subject Matter Jurisdiction

[2] The State first argues that the trial court lacked subject matter jurisdiction over the issues presented and lacked personal jurisdiction over the DMV. We disagree.

G.S. § 20-179.3(a) provides that "[a] limited driving privilege is a judgment issued in the discretion of a court for good cause shown." Subsection (d) provides that the application for a limited driving privilege may be made at or after the time of sentencing in the criminal matter to the judge presiding over the defendant's criminal trial or to the Chief District Court Judge, and no hearing may be held until a reasonable time after notice is given to the district attorney's office. Thus, we conclude that, as with other judgments, the appropriate court in which to seek enforcement of the judgment issuing the limited driving privilege is the court that issued the judgment.

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Here, the district court granted Bowes a limited driving privilege on 6 August 2001. On 13 August 2001, the DMV sent Bowes the letter informing him that it considered the limited driving privilege void. Bowes then filed a motion in the cause for contempt and injunctive relief in the DWI case, in an attempt to have the court order the DMV to honor the limited driving privilege. The State argues that since Bowes sought both civil and criminal remedies, that Bowes' proper avenue to enforce the judgment was in a separate civil action. However, in G.S. § 20-179.3, the General Assembly has specifically designated the district court to determine both civil and criminal remedies. Thus, the district court was the appropriate forum to pursue these remedies, as well as the underlying judgment.

B. Personal Jurisdiction

[3] The State also argues that the district court lacked personal jurisdiction over the DMV and, thus, any order issued compelling the DMV to act is a nullity. We disagree.

In *Brower v. Killens*, this Court held that the district attorney and the DMV were in privity and as such the DMV was collaterally estopped from relitigating probable cause determinations made in a prior DWI case in which the district attorney was a party. 122 N.C. App. 685, 472 S.E.2d 33 (1996), *disc. review denied*, 345 N.C.625, 481 S.E.2d 86 (1997). Indeed, the *Brower* Court noted that “as DMV is also a servant of the people . . . , we conclude the district attorney and DMV actually represent the same interest in driving while impaired cases—that of the citizens of North Carolina in prohibiting individuals who drive under the influence of intoxicating substances from using their roads.” *Id.* at 688, 472 S.E.2d at 35.

Although the *Brower* Court limited its holding to collateral attacks upon probable cause determinations, we find it easily distinguishable because the *Brower* decision was based upon the “fundamental difference between criminal prosecutions and civil license revocation proceedings.” *Id.* at 690, 472 S.E.2d at 36. Here, we are faced not with two separate proceedings—one criminal and one civil—rather, we are faced with a single criminal proceeding. In addition, we note that section 20-179.3 mandates that the district attorney receive notice of the application for a limited driving privilege prior to a hearing on such. Since the DMV is the intended audience of a limited driving privilege, the statute implicitly places the district attorney in privity with the DMV for purposes of limited driving proceedings.

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C. Sovereign Immunity

[4] The State further contends that Bowes is barred by sovereign immunity from seeking to hold the DMV in contempt or from seeking injunctive relief against the DMV. We note that the doctrine of sovereign immunity does bar the Court from holding the DMV in contempt because the State has not waived immunity to that extent. *N.C. Dept. of Transportation v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993) (sovereign immunity bars the court from holding administrative agencies in contempt). However, the district court, having jurisdiction over the parties and the subject matter, could properly enter and enforce its judgment. *See Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) (“Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment”). Sovereign immunity acts as a bar to suit against the State unless the State has given consent to be sued or the legislature has waived immunity. *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002). We agree with the trial court that, by enacting G.S. § 20-179.3, the State has given the court the authority to order the state agency (DMV) to issue a limited driving privilege. Thus, we conclude that the State has waived immunity for the purposes of enforcement of such order.

D. Separation of Powers

[5] The State next argues that the trial court erred in determining that the statutory scheme through which the DMV invalidated Bowes’ limited driving privilege violates the separation of powers doctrine, and, to the contrary, that the DMV, an agency of the executive branch, has the authority to disregard judgments entered by a court when the DMV believes that the judgments do not comply with the law.

G.S. § 20-179.3(e) provides that “[a] limited driving privilege issued under this section authorizes a person to drive if his license is revoked solely under G.S. 20-17(a)(2) . . . ; if the person’s license is revoked under any other statute, the limited driving privilege is invalid.” Further, subsection (k) provides that “[i]f the limited driving privilege is invalid on its face, the Division must immediately notify the court and the holder of the privilege that it considers the privilege void and that the Division records will not indicate that the holder has a limited driving privilege.” The DMV argues that since Bowes was under the age of 21 at the time he was convicted of driving while impaired, his license was revoked under both section 20-17(a)(2)

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(impaired driving) and 20-13.2(b) (impaired driving while under the age of 21). Thus, his license was not revoked “solely under G.S. 20-17(a)(2),” and therefore the limited driving privilege was invalid on its face. Although true, for the following reasons, we affirm the district court.

Article I, section 6 of the North Carolina Constitution is entitled “separation of powers” and provides that the “legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” Article IV, section 1 provides that the judicial power of the state shall be vested in the General Court of Justice, and that “[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate branch of the government.” Further, in Article IV, section 3, the General Assembly has the authority to “vest in administrative agencies . . . such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.”

G.S. § 20-179.3(a) specifically provides that “[a] limited driving privilege is a *judgment* issued in the discretion of a court for good cause shown.” (emphasis added). This Court has previously held that:

a judgment of a Superior Court must be honored unless the judgment is void. Where a court has authority to hear and determine the questions in dispute and has control over the parties to the controversy, a judgment issued by the court is not void, even if contrary to law. Such a judgment is voidable, but not void *ab initio*, and is binding until vacated or corrected.

Hamilton v. Freeman, 147 N.C. App. 195, 204, 554 S.E.2d 856, 861 (2001), *disc. review denied*, 355 N.C. 285, 560 S.E.2d 802 (2002) (citations omitted).

G.S. § 20-179.3 specifically vests the district court with jurisdiction to issue limited driving privileges. Also, having previously held that the court had jurisdiction over the DMV in this matter, we hold that the judgment granting Bowes a limited driving privilege is not void, even if entered contrary to law. *See id.*

Though the North Carolina Constitution empowers the General Assembly to grant administrative agencies certain judicial powers, it may not do so in a way that violates the separation of powers doctrine. By enacting G.S. § 20-197.3, which allows the DMV to invalidate

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a judgment of the court, the General Assembly has, in effect, given the DMV the power to reverse the district court. The North Carolina Constitution, specifically Article IV, section 3, does not permit an administrative agency of the executive branch to exercise appellate review of decisions of the General Court of Justice. To the contrary, it provides that appeals from administrative agencies shall be to the General Court of Justice. This vesting of what is essentially appellate power in the DMV, we believe, violates the separation of powers doctrine of our Constitution. Thus, we conclude that by allowing the DMV to, in essence, invalidate a properly entered court order, G.S. § 20-179.3(k) violates the provisions requiring separation of powers contained in Article I, section 6; Article IV, section 1; and Article IV, section 3 of the North Carolina Constitution.

We find strong support for our conclusion in *Hamilton*. There, plaintiffs were inmates under the control of the North Carolina Department of Corrections serving prison terms resulting from plea agreements. Plaintiff Hamilton was serving a fourteen-year sentence as a Committed Youth Offender (“CYO”). At the time, CYO’s were eligible for parole consideration immediately upon entering DOC’s custody. However, when Hamilton entered DOC’s custody, DOC determined that Hamilton did not qualify for CYO status under our General Statutes and refused to consider her for immediate parole.

Similarly, plaintiffs Hayes and Huggins entered into plea agreements with the State, whereby the trial court sentenced them to concurrent terms of imprisonment. However, Hayes and Huggins were statutorily ineligible for concurrent sentences, and upon entering DOC’s custody, DOC informed them that their sentences would run consecutively rather than concurrently. The trial court granted plaintiffs’ declaratory relief, and the DOC appealed.

Addressing the issue of the propriety of DOC’s actions, this court held that:

It is well established that a judgment of a Superior Court must be honored unless the judgment is void. Where a court has authority to hear and determine the questions in dispute and has control over the parties to the controversy, a judgment issued by the court is not void, even if contrary to law. Such a judgment is voidable, but not void *ab initio*, and is binding until vacated or corrected. Because the sentencing courts had authority over the disputes and control over the parties, the resulting judgments were not void and must be honored as received by DOC.

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Furthermore, we note that “[t]he legislative, executive, and supreme judicial powers of the State government [are] . . . separate and distinct from each other.” The Department of Correction is a part of the executive branch of North Carolina. By independently amending judgments to reflect compliance with DOC’s interpretation of statutory authority, DOC has usurped the power of the judiciary, thereby violating separation of powers.

Hamilton, 147 N.C. App. at 204, 554 S.E.2d at 861 (citations omitted).

Here, Bowes was issued a limited driving privilege, in the form of a judgment, by the district court pursuant to G.S. § 179.3. Acting unilaterally under G.S. § 20-179.3(k), the DMV notified Bowes that the DMV determined that the limited driving privilege was invalid and that it considered the judgment void. Such an action, in which the DMV invalidates a court order, without the court itself taking any action to vacate or amend the order, thus violates the separation of powers clause of our Constitution.

In addition, we agree with the trial court that, by invalidating Bowes’ limited driving privilege without returning to court, or even notifying the court in accordance with the statute and its usual procedure, the DMV has violated Bowes’ rights to due process of law.

Affirmed.

Judge McGEE concurs.

Chief Judge EAGLES dissents.

EAGLES, Chief Judge, dissenting.

Because the doctrine of sovereign immunity bars all *in personam* contempt proceedings against the State and its administrative agencies; and because the action, as filed, was insufficient to give the district court either personal or subject matter jurisdiction, I respectfully dissent.

I begin by noting that I agree with the conclusion reached in section D of the majority opinion: To the extent that G.S. 20-179.3(k) permits the DMV to unilaterally invalidate a properly entered court order, it violates the separation of power provisions of the North Carolina Constitution. See N.C. Const. art. I, § 6. *Accord Hamilton v. Freeman*, 147 N.C. App. 195, 204, 554 S.E.2d 856, 861 (2001), *disc.*

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review denied sub nom., Hamilton v. Beck, 355 N.C. 285, 560 S.E.2d 802 (2002); *Thomas v. N.C. Dept. of Human Resources*, 124 N.C. App. 698, 706-10, 478 S.E.2d 816, 821-23 (1996), *aff'd per curiam*, 346 N.C. 268, 485 S.E.2d 295 (1997). However, for the following reasons, I believe the district court was without authority to enter the order that is at issue in this case.

First, our “contempt statutes refer generally to persons. ‘In common usage, the term ‘person’ does not include the sovereign and statutes employing the word are ordinarily construed to exclude it.’ ” *N.C. Dept. of Transportation v. Davenport*, 334 N.C. 428, 431-32, 432 S.E.2d 303, 305 (1993) (citations omitted). Accordingly, the doctrine of sovereign immunity bars the State and its administrative agencies, as entities, from being held in contempt. *Id.* at 430, 432 S.E.2d at 304. Sovereign immunity also bars the issuance of injunctions against the State and its administrative agencies, as entities, because “an injunction . . . use[s] the *in personam* contempt power of the court” *Orange County v. N.C. Dept. of Transportation*, 46 N.C. App. 350, 385, 265 S.E.2d 890, 912, *disc. review denied*, 301 N.C. 94, — S.E.2d — (1980).

Here, defendant sought to have “DMV . . . adjudged in willful criminal and/or civil contempt,” and “[a] preliminary and permanent injunction issue[d] from the court restraining and enjoining DMV from denying the defendant a limited driving privilege” (Emphasis added.) Nowhere in his motion did defendant seek to have any individual officer of the DMV held in contempt or enjoined. Furthermore, the district court entered an order “enjoining the *Division of Motor Vehicles* from denying the Defendant a Limited Driving Privilege[.]” (Emphasis added.) Since all of the remedies prayed for and granted were directed toward the North Carolina Division of Motor Vehicles, as an entity, and not toward any individual public officer, I would hold that the doctrine of sovereign immunity barred the district court from granting the prayed for relief.

The majority reasons that by enacting G.S. 20-179.3 and giving the court the authority to order the DMV to issue a limited driving privilege, the State has by necessary implication waived its sovereign immunity for purposes of enforcing these orders. I disagree. The State and its governmental units can only be deprived of sovereign immunity by a “‘plain, unmistakable mandate’ ” of the lawmaking body. *Wood v. N.C. State University*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001) (citations omitted), *disc. review denied*, 355 N.C.

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292, 561 S.E.2d 887 (2002). “[Sovereign immunity] should not and cannot be waived by indirection or by procedural rule.” *Id.*

Our Supreme Court has concluded that there are no North Carolina statutes in existence “in which the sovereign State of North Carolina has consented to be subject to the contempt power of the court.” *Davenport*, 334 N.C. at 431, 432 S.E.2d at 305. Nothing contained in G.S. 20-179.3 purports to alter this conclusion. Since sovereign immunity may not be waived indirectly, I would hold that it has not been waived here.

Second, while I agree with the majority insofar as it reasons that the district court must be able to enforce its own judgments, I do not agree that the mechanism chosen in this case was appropriate. “*Mandamus* is the proper remedy to compel public officials . . . to perform a purely ministerial duty imposed by law, where it is made to appear that the plaintiff, being without other adequate remedy, has a present, clear, legal right to the thing claimed and it is the duty of the respondents to render it to him.” *Hamlet Hospital and Training School for Nurses, Inc. v. Joint Committee on Standardization*, 234 N.C. 673, 680, 68 S.E.2d 862, 867 (1952). Although the statutory authority for the special remedy of *mandamus* by civil action has been repealed, *see* G.S. 1-511 *et seq.*, “the remedy formerly provided by the *writ of mandamus* is still available . . . and the substantive grounds for granting the remedy as developed under our former practice still control.” *Fleming v. Mann*, 23 N.C. App. 418, 420, 209 S.E.2d 366, 368 (1974) (citation omitted) (emphasis added). *See also* G.S. 4-1 (2001) (declaring all parts of common law not otherwise repealed or abrogated in full force and effect). Moreover, “in this State, where the court exercises both legal and equitable jurisdiction, in a suit against a public official or board there is no practical difference in the results to be obtained by the common-law remedy of *mandamus* and the equitable remedy of mandatory injunction.” *Sutton v. Figgatt*, 280 N.C. 89, 92, 185 S.E.2d 97, 99 (1971) (emphasis added). However, “neither a *mandamus* nor an injunction is effective against the public office; rather, they both use the *in personam* contempt power of the court to coerce the individual public officer in the performance of a plain duty or to prevent the official from taking actions outside of his legal authority.” *Orange County*, 46 N.C. App. at 384-85, 265 S.E.2d at 912 (citations omitted) (emphasis added).

Here, defendant did not seek relief against any individual public officer; rather, defendant sought a court order directing that the DMV,

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as an entity, comply with the order granting him a limited driving privilege. Therefore, notwithstanding the sufficiency of the remaining factual allegations, see *Figgatt*, 280 N.C. at 92, 185 S.E.2d at 99 (where allegations sufficiently allege cause of action for *mandamus*, the court may treat it as a petition and grant the appropriate relief), defendant's motion fails as a matter of law to sufficiently invoke the district court's subject matter jurisdiction to grant either *mandamus* or a mandatory injunction.

Furthermore, "[d]ue service of process is necessary to subject a party to the jurisdiction of the court." *Southern Mills, Inc. v. Armstrong*, 223 N.C. 495, 496, 27 S.E.2d 281, 282 (1943). "Jurisdiction in case of actions *in personam* can only be acquired by personal service of process within the territorial jurisdiction of the court . . . and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity" *Id.* at 497, 27 S.E.2d at 282 (citation omitted).

It is well established that a court may obtain personal jurisdiction over a defendant only by the issuance of summons and service of process by one of the statutorily specified methods. Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.

Glover v. Farmer, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997) (citations omitted), *disc. review denied*, 347 N.C. 575, 502 S.E.2d 590 (1998). See N.C.R. Civ. P. 4(j)(1).

Here, no complaint or petition was filed instituting the action. Likewise, no summons was issued and neither a complaint nor a summons were served on any DMV officer. While DMV, as an entity was given notice of the hearing and DMV's attorneys appeared on the agency's behalf, this was insufficient to establish personal jurisdiction over any individual DMV officer. Accordingly, I would hold that the district court lacked personal jurisdiction over the proper party defendants.

For all the foregoing reasons, I would hold that the decision of the trial court should be reversed.

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STATE OF NORTH CAROLINA v. LAURENCE PERRY

No. COA02-1356

(Filed 15 July 2003)

1. Criminal Law— venue—concurrent—joinable offenses

The trial court did not err in an involuntary manslaughter and practicing medicine without a license case by denying defendant's motion to dismiss based on improper venue, because: (1) N.C.G.S. § 15A-132(b) provides that when acts constituting the offense occur in multiple counties, each county has concurrent venue; (2) N.C.G.S. § 15A-132(b) also provides that if charged offenses which may be joined in a single criminal pleading under N.C.G.S. § 15A-926 occurred in more than one county, each county has concurrent venue as to all charged offenses; and (3) the offenses in this case are joinable offenses under N.C.G.S. § 15A-926(a).

2. Appeal and Error— preservation of issues—failure to object to later admission of same evidence

Although defendant contends the trial court erred in an involuntary manslaughter and practicing medicine without a license case by admitting into evidence a note from defendant naturopath's employee to the child victim's mother, this assignment of error is overruled because defendant failed to preserve this issue for appeal by failing to object to the later admission of the same evidence.

3. Evidence— refusal of questioning concerning business license—failure to prove prejudice

Even if it is presumed that the trial court erred in an involuntary manslaughter and practicing medicine without a license case by refusing to allow defendant naturopath to question a police lieutenant about whether the State would issue a license to an illegal business, this assignment of error is overruled because defendant failed to prove prejudice in light of other similar admitted evidence.

4. Evidence— medical records—failure to object

The trial court did not err in an involuntary manslaughter and practicing medicine without a license case by allowing a detective to testify that there were numerous phone consultations in defendant naturopath's progress notes that were included in the

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child victim's medical records, because: (1) the medical records were admitted into evidence and published to the jury without objection; and (2) defendant failed to preserve the objection or to show that there is a reasonable possibility that a different result would have been reached absent any alleged error.

5. Evidence— prior acts—treatment of another patient

The trial court did not err in an involuntary manslaughter and practicing medicine without a license case by admitting evidence regarding defendant naturopath's treatment of another patient, because: (1) N.C.G.S. § 8C-1, Rule 404(b) allows for the admission of evidence of prior acts to show defendant's plan, motive, intent, knowledge, and absence of mistake; (2) defendant's treatment of the other patient was similar to the evidence the State presented of defendant's treatment and actions with regard to the child victim in this case; and (3) defendant failed to show that there was a reasonable possibility that a different result would have been reached absent the alleged error.

6. Evidence— physical location of universities—relevancy

The trial court did not abuse its discretion in an involuntary manslaughter and practicing medicine without a license case by admitting evidence regarding the physical locations of the addresses of the universities listed on defendant's diplomas and resume, because the State was attempting to show that defendant naturopath was holding himself out as a medical doctor.

7. Appeal and Error— preservation of issues—failure to preserve issue on grounds asserted

Although defendant contends the trial court erred in an involuntary manslaughter and practicing medicine without a license case by refusing to admit character evidence of defendant naturopath's habit and character for being a law-abiding citizen and not holding himself out as a physician, this assignment of error is overruled because defendant failed to properly preserve the issue for appellate review on the grounds asserted.

8. Criminal Law— motion for mistrial—failure to move to strike or request curative instruction

The trial court did not err in an involuntary manslaughter and practicing medicine without a license case by denying defendant naturopath's motion for a mistrial based on a detective's testimony regarding his familiarity with a signature based on a law

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enforcement investigation, because: (1) defendant failed to move to strike or request a curative instruction; (2) defendant waited until seven other witnesses had testified and until the next morning before making his motion based on the detective's statement which was objected to and sustained; and (3) defendant failed to show that the trial court abused its discretion by denying the motion.

9. Homicide; Physicians and Surgeons— involuntary manslaughter—practicing medicine without a license—sufficiency of evidence

The trial court did not err by denying defendant naturopath's motion to dismiss the charges of involuntary manslaughter and practicing medicine without a license, because the State presented sufficient evidence of the elements of both charges.

10. Criminal Law— prosecutor's argument—medical records—note

The trial court did not abuse its discretion in an involuntary manslaughter and practicing medicine without a license case by overruling defendant naturopath's objections to the State's closing argument regarding the reading from the child victim's medical records from another doctor and the notes from an officer, because: (1) the defense referenced the medical records during its closing arguments; (2) the contents of the medical records and the existence of the medical records from the other doctor were in evidence; and (3) everything the State referenced to in closing regarding the notes from an officer was in evidence through the testimony of the officer.

Appeal by defendant from judgment entered 15 April 2002 by Judge James L. Baker in Buncombe County Superior Court. Heard in the Court of Appeals 11 June 2003.

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

James N. Freeman, Jr. for defendant.

TYSON, Judge.

Laurence Perry ("defendant") appeals from his convictions of and sentence for involuntary manslaughter and practicing medicine without a license. We find no error.

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[159 N.C. App. 30 (2003)]

I. Background

In March of 1997, Helena Rose Kolitwenzew (“Rose”) was six years old and was diagnosed with Type I Juvenile Diabetes. Rose’s mother, Marion Kolitwenzew (“Marion”), was informed that her daughter would be insulin dependent for the rest of her life. Marion tried many methods of alternative medicine for her daughter including blue shark embryo injections in Mexico and acupuncture. On several prior occasions, Rose had to be taken to a medical facility to be treated for low blood sugar when her mother either did not administer her insulin or reduced her insulin level. Rose was being treated by Simon Becker who believed “that what Rosie had was a virus, that it was acting viral.” During all of her alternative medicine treatments, Marion continued to take her daughter to a medical doctor.

In September 1999, Becker referred Marion and Rose to defendant, a naturopath. Defendant lived and worked in Polk County. On 20 September 1999, Marion took Rose for her first visit to defendant at his Polk County office. Marion listed her address in Transylvania County. Marion testified that defendant’s office was set up with examination rooms similar to a doctor’s office and that there were “medical instruments” in the cabinets in the room. Defendant wore a white coat. Marion testified that, at that first meeting, defendant informed her that “he was a consultant for the Government on viruses.” Defendant began rubbing olive oil on Rose’s feet and marking them with a magic marker.

Defendant started Rose on a vitamin C regimen to determine whether she was truly diabetic. On 4 October 1999, Marion again brought her daughter to defendant in Polk County who determined that Rose had a virus which caused Rose’s blood sugars to be elevated. His treatment attempted to “teach” Rose’s immune system to make the virus not affect the blood sugars. Defendant orally and in writing instructed:

Start 10/4/99, Arnica liquid extract, take five drops on tongue, five times a day, follow with water. Take for five days and stop. For blockages in the blood supply of the kidneys (arteries) pus type blockage. She has lot of poisons in her body and moving to Mexico will be good for patient to receive the care she needs. Remove all other supplements and medications for four weeks except Beyond Chelation Packets. Begin 10/9/99, Beyond Chelation Packets, take one dose each morning with food for four weeks and stop. To reduce infection and raise the immune sys-

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tem. Resume treatments in Mexico afterwards. Prepare to stop insulin in approximately four weeks. Diet, a lot of peanut butter and legumes with regular medications.

Marion testified that Defendant instructed her, through telephone conversations relayed by Janice, defendant's employee, to reduce Rose's insulin. On 19 October 1999, defendant instructed Marion to stop all insulin. Over the course of the next three days, defendant called the office "20 to 50 times." Marion testified:

[Rose] was vomiting. He told me not to take her blood sugar because we would go into shock because it would be so low, but I took her blood sugar and it was 477. He told me that this was a reaction, a shock reaction, it was just stress. I begged him to help me put her back on the insulin. I asked Janice, I told Janice, I said we need to put her back on the insulin, and Janice told me he can no longer see you if you— . . . If you put her back on the insulin, if you don't follow his directions. He told me—I explained to him that I didn't think this was the right time to do this, this wasn't working, and that we needed to put her back on the insulin, and I was talking to him directly and he said to me that her system was weak and that she could beat this virus now. It was like a moon shock and it was a window of opportunity now, and if we didn't take it now, she would never be able to overcome it, and if she didn't overcome it now, that she would be on dialysis in three months. And he assured me that he knew what he was doing, that he had done this hundreds of times and that I would have my little girl back without insulin.

On 21 October 1999, Rose died from diabetic ketoacidosis.

Defendant testified on his own behalf that he held himself out as a naturopath. He testified that it was hard to obtain information from Marion and he called her "one of the most difficult parents that I have ever had to deal with." During multiple calls to defendant from Marion, defendant told Marion to "give insulin now" to Rose. Defendant testified he "never told her to just quit insulin." He told her that he could not prescribe anything but that he could recommend.

I told her not to [stop insulin]. I told her in the way that insulin is something that—especially type 1, is something that a person is just going to have to take the rest of their life. You're not going to be able to get her off. However, you can supplement that insulin with supplementations of vitamins and so forth, nutrition that

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will help the person, whoever they are, cope with having to take insulin as a type 1 diabetic.

At 7:50 pm on 20 October 1999, defendant called Marion in response to multiple calls from her. Defendant was shocked by how high Rose's blood sugar level was and was "more in, if you will, an argument with her why she's not giving Rosie insulin." Defendant was indicted and tried in Buncombe County.

The jury found defendant guilty of involuntary manslaughter and practicing medicine without a license. The trial court entered judgment and sentenced defendant to a consolidated active sentence of twelve to fifteen months. Defendant appeals.

II. Issues

Defendant contends the trial court erred in (1) failing to dismiss for improper venue, (2) admitting into evidence a note from defendant's employee to Marion, (3) refusing to allow defendant to question Lieutenant Fredrickson whether the State would issue a license to an illegal business, (4) admitting testimony from an officer concerning what medical records stated, (5) admitting evidence regarding defendant's treatment of another patient, (6) admitting testimony and photographs regarding the appearance of the schools on defendant's diplomas, (7) refusing to admit character evidence of defendant's habit and character for being a law-abiding citizen and not holding himself out as a physician, (8) denying defendant's motion for mistrial because of statements regarding an SBI investigation, (9) denying defendant's motion to dismiss for insufficient evidence, and (10) failing to sustain objection to improper closing arguments.

III. Venue

[1] Defendant contends the trial court erred in denying defendant's motion to dismiss for improper venue.

Defendant was indicted for both the felony of involuntary manslaughter and the misdemeanor of practicing medicine without a license in Buncombe County. Defendant had lived and worked in Polk County for more than fourteen years. The face-to-face visits between Rose, Marion, and defendant occurred only in Polk County. The listed address for Marion and Rose was in Transylvania County. The cell phone used by Marion was based in Transylvania County. During the last days of Rose's life, she and her mother had been staying in a camp ground inside of Buncombe County. Marion placed cell phone calls

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from Buncombe County to defendant in Polk County. He returned those calls to her Transylvania cell phone number while she was in Buncombe County. Rose was admitted to a hospital in Buncombe County where she died.

N.C. Gen. Stat. § 15A-131(c) (2001) provides that “venue . . . lies in the county where the charged offense occurred.” “An offense occurs in a county if any act or omission constituting part of the offense occurs within the territorial limits of the county.” N.C. Gen. Stat. § 15A-131(e). When acts constituting the offense occur in multiple counties, each county has concurrent venue. N.C. Gen. Stat. § 15A-132(a) (2001). N.C. Gen. Stat. § 15A-132(b) (2001) provides “[i]f charged offenses which may be joined in a single criminal pleading under G.S. 15A-926 occurred in more than one county, each county has concurrent venue as to all charged offenses.” N.C. Gen. Stat. § 15A-926(a) (2001) provides for joinder when the offenses “are based on the same act or transaction or on a series of acts or transactions connected together constituting parts of a single scheme or plan.”

The State argues that while Rose and Marion were located in Buncombe County, defendant called them, talked with them, and committed both violation of a statute and criminal negligence. Rose died in Buncombe County. These are sufficient “acts or omissions constituting part of the offense” of involuntary manslaughter. N.C. Gen. Stat. § 15A-131. Because the offenses are joinable offenses under N.C. Gen. Stat. § 15A-926(a), venue is proper in Buncombe County for both of the charged offenses. N.C. Gen. Stat. § 15A-131. This assignment of error is overruled.

IV. Admission of Note to Marion

[2] Defendant contends the trial court erred in allowing Marion to testify to the contents of a “nutriscription” and admitting the “nutriscription” which Marion testified did not come from defendant but from an unknown employee of defendant. We disagree.

The State introduced a copy of a nutriscription from 4 October 1999 through Marion and over defendant’s objection. The State introduced, without objection, the original “nutriscription” and the medical records documenting it through Detective Constance. “Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.” *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995).

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By failing to object to the later admission of the same evidence, defendant has waived any benefit of the original objection and failed to preserve the issue for appeal. This assignment of error is overruled.

V. Evidence of Privilege License

[3] Defendant contends the trial court erred in failing to admit the offer of proof testimony of Lieutenant Fredrickson:

[Defendant's Counsel]: Officer, based on your investigations that you testified about the issuance of license by the State of North Carolina, the State of North Carolina would not issue a license or a privilege license for an illegal business; would it?

A: No.

Defendant contends the evidence was relevant to show that his practice was not illegal. Defendant was allowed to admit into evidence the following exchange between defendant's counsel and Lieutenant Fredrickson:

Q. What knowledge do you have as to what Laurence Perry had to produce to the State of North Carolina to get a privilege license?

A. We were interested in what—that same question, what you would have to have and we asked what the privilege license was. It was just a formality that any business had to have.

Q. Any legal business; isn't that correct? You couldn't get a privilege license to practice some business that's against the law; could you?

A. I don't know. I wouldn't think so.

To be reversible error, 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 out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443(a). Presuming error in failing to admit the evidence, defendant has failed to prove prejudice in light of the other similar admitted evidence. This assignment of error is overruled.

VI. Detective Constance's Testimony

[4] Defendant contends the trial court allowed Detective Constance to testify that “there are numerous phone consultations” in the progress notes.

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The testimony came while Detective Constance was reading to the jury parts of Rose's medical records seized from defendant. Detective Constance noted that there were "numerous phone consultations" in response to the question "In the progress notes, do the progress notes record when [Marion] would call in and report Rosie's condition?"

Detective Constance was looking at the medical records and indicated that the medical records showed "numerous" phone calls. The medical records were admitted into evidence and published to the jury without any objection. Defendant failed to preserve the objection or to show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C. Gen. Stat. § 15A-1443(a). This assignment of error is overruled.

VII. Treatment of Martin

[5] Defendant contends the trial court erred in admitting the testimony of Mary Martin and of Tekeela Suber regarding defendant's treatment of Mrs. Martin's daughter for type 1 juvenile diabetes starting in 1996. Mrs. Martin testified that during the initial examination of her daughter, defendant put marks on her feet, and "gave her a magnet to put on her back." Defendant presented only a general objection to the testimony which was overruled. Ms. Suber was a registered nurse working with Mrs. Martin and Dr. Boniface to treat the daughter's juvenile diabetes. Ms. Suber testified, "I called [the Martins] because her blood sugars were elevated and Dr. Boniface told me to tell [them] to put her back on insulin."

Rule 404(b) of the N.C. Rules of Evidence allows for the admission of evidence of prior acts to show defendant's plan, motive, intent, knowledge, and absence of mistake. N.C. Gen. Stat. § 8C-1, 404(b). It is a rule of inclusion and defendant's prior acts should be excluded if their "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). The rule of inclusion of evidence under Rule 404(b) is "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citing *State v. Lloyd*, 354 N.C. 76, 88, 552 S.E.2d 596, 608 (2001)).

Mrs. Martin testified to multiple aspects of defendant's treatment of her daughter for juvenile diabetes including his belief that her dia-

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betes was a virus, his plan to stop her insulin, and incremental decreases in her insulin. Mrs. Martin's daughter's blood sugar rose as a result of the treatment plan. Defendant's treatment of Martin's daughter was similar to the evidence the State presented of defendant's treatment and actions with regard to Rose.

Further, defendant has failed to show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached." N.C. Gen. Stat. § 15A-1443(a). These assignments of error are overruled.

VIII. Schools Defendant Attended

[6] Defendant contends the trial court erred in admitting evidence regarding the physical locations of the addresses of the universities listed on defendant's diplomas and resume. Defendant contends the evidence is not relevant and even if relevant, it should have been excluded under Rule 403 of the N.C. Rules of Evidence. We disagree.

Evidence is relevant if it has any tendency to make the existence of a fact in issue more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403. Whether evidence should be excluded under Rule 403 is discretionary with the trial court and will not be overturned absent a showing of abuse of that discretion. *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999).

The State attempted to show the physical locations of the universities which defendant's resume and diplomas showed he attended and which bestowed upon him his title of "doctor." The State argues that the evidence tends to show that defendant was holding himself out as a medical doctor. Defendant has failed to show that the trial court abused its discretion in admitting the evidence. This assignment of error is overruled.

IX. Character Evidence of Defendant

[7] Defendant contends the trial court erred in refusing to admit the testimony of Nancy Bahmueller, Carolyn Teague, and Joe Kownslar all of whom testified during an offer of proof that: (1) they knew the

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defendant between two and four years; (2) defendant never told them to stop taking medicines that physicians had prescribed; (3) defendant never told them to stop seeing other healthcare providers; (4) defendant did not hold himself out as a doctor; and, (5) defendant held himself out as a naturopath. At trial, defendant's theory for admissibility was that the State "opened the door" to specific instances by presenting evidence regarding defendant's dealings with and treatment of the Martins. Defendant asserts the right to refute the evidence. On appeal, defendant argues the evidence is admissible under Rule 404(a)(1) or Rule 406. Neither of these were argued before the trial court. "Because defendant failed to make this argument at trial, he cannot 'swap horses between courts in order to get a better mount in [this Court].'" *State v. Hamilton*, 351 N.C. 14, 22, 519 S.E.2d 514, 519 (1999) (quoting *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934))). Defendant has failed to properly preserve the issue for appellate review on the grounds asserted. This assignment of error is overruled.

X. Motion for Mistrial

[8] Defendant contends the trial court erred in denying his motion for a mistrial based on Detective Constance's testimony regarding his familiarity of a signature based on a law enforcement investigation.

A motion for mistrial is discretionary with the trial court and will not be overturned absent a showing of an abuse of discretion. *State v. Powell*, 340 N.C. 674, 692, 459 S.E.2d 219, 228 (1995). Defendant contends the trial court abused its discretion because no curative instruction was given and "the mountains of prejudicial and irrelevant evidence admitted."

Detective Constance was testifying to his knowledge of the signature of Gregory Cappenger who signed one of defendant's diplomas. Detective Constance stated, "I worked with or assisted and reviewed a case with the Federal Bureau of Investigation—." Defendant objected and the trial court sustained the objection. Defendant failed to move to strike or request a curative instruction. Defendant waited until seven other witnesses had testified and until the next morning before making his motion for a mistrial based on Detective Constance's statement which was objected to and sustained.

During the hearing on the motion for a mistrial, the trial court asked, "Out of curiosity, if you felt it was so prejudicial, why did

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[you] not make some statement about it immediately?” Neither the State nor the trial court remembered the explicit testimony which was the basis of the motion other than that defendant objected, the trial court sustained the objection, and the State did not continue the examination on that basis. The trial court concluded that “the court cannot find that the event which has been described by the defendant, even if it did occur in the manner in which the defendant has described, constituted an error or legal defect in the proceeding inside or outside the courtroom resulting in substantial and irreparable prejudice to the defendant’s case.” The trial court denied the motion for a mistrial.

Defendant has failed to show that the trial court abused its discretion in denying the motion for a mistrial. This assignment of error is overruled.

XI. Insufficient Evidence

[9] Defendant contends the trial court erred in denying its motion to dismiss for insufficient evidence made and renewed at the end of the State’s evidence and the end of all evidence. We disagree.

A motion to dismiss should be denied if, taking the evidence in a light most favorable to the State, substantial evidence exists of each essential element of the offense charged and of defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). “If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court’s duty to submit the case to the jury.” *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958).

A review of the record shows that the State presented sufficient evidence of the elements of both charges to survive defendant’s motion to dismiss. The trial court properly denied defendant’s motions. This assignment of error is overruled.

XII. Closing Arguments

[10] Defendant contends the trial court erred in overruling his objection to the State’s closing argument. We disagree.

“During a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record”

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N.C. Gen. Stat. § 15A-1230. Control of the arguments of counsel rests in the discretion of the trial court. This Court “ordinarily will not review the exercise of the trial judge’s discretion in this regard unless the impropriety of counsel’s remarks is extreme and is clearly calculated to prejudice the jury in its deliberations.” *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979) (citing *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976)). “[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.” *Id.*

Although closing arguments were not recorded, defendant noted in the record:

during the State’s closing argument, Mr. Hasty [counsel for the State]—that Mr. Hasty held up some medical records of Dr. Biddle which were not in evidence. He held them up in front of the jury and he read from them in front of the jury showing that what he was reading, that I objected to this, and I want the record to reflect that that—those documents had not been put in evidence and that the matter that he read had not been put into evidence.

The State responded that the argument was proper “because the defense referred to them in their argument.”

During the testimony of Marion, defendant’s counsel specifically asked Marion about Rose’s medical records from Dr. Biddle and read those records into the record through questioning of Marion. The actual medical record was not admitted into evidence. Defendant did not disagree with State’s argument that the defense referenced the records during its closing arguments. The contents of the medical records and the existence of the medical records from Dr. Biddle were in evidence. The State did not go outside the scope of the evidence when it read from the records during closing arguments.

Defendant also noted that he objected when the State did the same thing with notes from Officer Frederickson. The trial court responded, “I did not hear anything referred to in the closing argument though that was not testified to by Officer Frederickson.” Defendant does not contradict or argue against the trial court’s statement that everything the State referred to in closing was in evidence

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through the testimony of Officer Frederickson. The trial court did not abuse its discretion in overruling defendant's objections to the State's closing arguments. This assignment of error is overruled.

XIII. Conclusion

The trial court did not err in denying defendant's motion to dismiss for improper venue. We hold the trial was free from prejudicial error that defendant assigned and argued.

No Error.

Judges MARTIN and LEVINSON concur.

JEFFERSON PILOT FINANCIAL INSURANCE COMPANY F/K/A ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA F/K/A JEFFERSON-PILOT PENSION LIFE INSURANCE COMPANY, PLAINTIFF v. MARSH USA INC. F/K/A J&H MARSH & McLENNAN, INC., SUCCESSOR TO JOHNSON & HIGGINS CAROLINAS, INC., AND HARTFORD FIRE INSURANCE COMPANY, DEFENDANTS

No. COA02-1386

No. COA02-1484

(Filed 15 July 2003)

1. Appeal and Error— preservation of issues—failure to object

An issue was not preserved for appellate review where there was no objection.

2. Contribution— agency—lack of direct negligence—claims extinguished

A determination of agency was properly submitted to the jury to establish a contribution claim by an insurance broker (Marsh) against the company issuing a fidelity bond (Hartford).

3. Contribution— prima facie showing—agency

There was a prima facie showing of a contribution claim between an insurance broker (Marsh) and the company issuing a fidelity bond (Hartford). Marsh's receipt of commissions from Hartford and issuance of title binders and other documents on Hartford's behalf create an apparent authority for Marsh to

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act as Hartford's agent and are sufficient to withstand Hartford's motion for summary judgment or directed verdict on the issue of agency.

4. Contribution; Appeal and Error— amount of contribution mandated—verdict outside applicable law—no formal objection

The trial court erred in a contribution case by entering judgment upon a jury's determination of the amount of contribution when that amount was mandated by the Uniform Contribution Among Tort-Feasors Act (UCATA). A failure to formally object to the instruction was not fatal because the verdict was not allowed under applicable law.

5. Insurance— duty of insurer to monitor insured—instruction on general negligence

An assignment of error to the trial court's failure to instruct a jury on the duty of an insurer to monitor the business of the insured was not addressed where the trial court submitted the issue of the insurer's negligence without an instruction on any specific duty and the jury found the insurer liable as the principal of a broker.

6. Evidence— questions about irrelevant evidence—not prejudicial

The allowance of questions of questionable relevancy did not rise to the level of prejudicial error in an action to determine the liability of an insurer through the actions of a broker.

7. Insurance— fidelity bond—extension of coverage by company expansion—notice and consent required

The trial court did not err by granting summary judgment for an insurer on contract and declaratory judgment claims arising from the fidelity bonds issued to cover insurance agents at a company which expanded the number of agents.

Appeals by defendants from orders and judgments entered 19 January 2000 by Judge Catherine C. Eagles, 17 October 2001 by Judge James M. Webb, and 21 December 2001 and 3 July 2002 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 5 June 2003.

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Kennedy Covington Lobdell & Hickman, LLP, by Raymond E. Owens, Jr., Russell F. Sizemore and Susan Ballantine Molony, for defendant Marsh USA.

Faison & Gillespie, by O. William Faison, Michael R. Ortiz and John-Paul Schick, for defendant Hartford Fire Insurance Company.

TYSON, Judge.

I. Background

Hartford Fire Insurance Company (“Hartford”) provided Jefferson Pilot Financial Insurance Company (“JP”) with fidelity bond coverage. Hartford issued a Form 25 Financial Institution Bond that covered wrongful acts of JP’s insurance agents for three years, between 27 March 1992 and 27 March 1995. In September 1994, Martin Pallazza (“Pallazza”), Hartford’s bond underwriter in charge of the JP account, reviewed JP’s 1993 Annual Report and discovered JP had added over 3,000 new agents to its network and planned for further additions. Pallazza questioned, in a notation on the annual report, whether agent growth affected Hartford’s coverage to JP. Traska testified that Pallazza should have inquired to clarify how the information affected Hartford’s risk. Pallazza testified that he spoke with Barbara Haney of Marsh USA, Inc. (“Marsh”), the insurance broker for JP, on 27 September 1994. No resolution was reached concerning the coverage for the additional agents mentioned in JP’s Annual Report. Pallazza resigned from Hartford in 1994 and Patrick Cummings became the new underwriter for the account. No additional inquiries were made to JP or Marsh about the increase in agents.

In January 1995, Hartford contacted Marsh about renewing the bond. Marsh, an independent agent of Hartford, issued binders for Hartford and received a percentage of the collected premium and a contingent commission. Hartford requested Marsh to obtain pertinent information for the renewal from JP. Marsh informed Hartford that most of the information requested was inaccessible at the time due to internal restructuring. Hartford extended the period of the bond’s coverage. Hartford agreed to renew the bond effective 27 March 1995 after Marsh allegedly represented to Hartford that the number of JP insurance agents had not materially changed. Contrary to this alleged representation, the number of JP agents had substantially increased during the term of the original bond.

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On 6 October 1995, a subsidiary of JP purchased and merged with Alexander Hamilton Life Insurance Company of America for \$575 million. After this merger, the number of JP's insurance agents increased by 6,000. Neither JP nor Marsh informed Hartford of the merger prior to its consummation. On 16 April 1996, Marsh notified Hartford of the merger and acknowledged that JP was unaware the additional agents were not covered. Marsh began to provide Hartford with the additional documentation previously requested.

On 6 June 1996, Marsh informed Hartford that it had recently learned that Roger McCall ("McCall"), an Alexander Hamilton insurance agent, had embezzled a significant amount of funds. In August 1996, JP made an initial claim under the bond for approximately \$1,000,000 but specifically outlined only \$850,000 in losses it allegedly incurred as a result of McCall's malfeasance. Hartford denied the claim on the basis that fidelity coverage to Alexander Hamilton's agents was never provided. JP filed suit against Marsh and Hartford via an amended complaint on 26 August 1998 for (1) breach of contract, (2) declaratory judgment, (3) negligence by Marsh and liability therefor of Marsh and Hartford under a principal/agent theory, and (4) breach of contract by Marsh and liability therefor under a principal/agent theory. Hartford cross-claimed against Marsh for indemnity and contribution. Marsh moved to amend its answer on 19 November 1999 to cross-claim against Hartford for indemnity and contribution. On 6 December 1999, JP moved for summary judgment on its breach of contract and declaratory judgment causes of action, and for judgment of Hartford's derivative liability under JP's third and fourth causes of action. Marsh moved for partial summary judgment on 7 December 1999. On 8 December 1999, Hartford moved for summary judgment on all of JP's claims.

Judge Catherine C. Eagles heard the motions and issued an order on 19 January 2000 that: (1) denied JP's motion for summary judgment, (2) granted Hartford's motion for summary judgment as to JP's first and second causes of action but denied the motion with respect to JP's agency claims against Hartford in the third and fourth causes of action, (3) denied Marsh's motion for partial summary judgment and granted Marsh's motion for leave to amend its answer. JP appealed the denial of its summary judgment motion, and this Court dismissed JP's appeal as interlocutory. *Alexander Hamilton Life Ins. Co. of Am. v. J&H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 543 S.E.2d 898 (2001).

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On 10 September 2001, Hartford moved for summary judgment on Marsh's cross-claims for indemnification and contribution and on JP's alternative third claim relating to the negligence of Marsh. Judge James Webb entered an order dated 17 October 2001 which granted Hartford's motion for summary judgment regarding Marsh's cross-claim for indemnification, denied Hartford's motion regarding Marsh's cross-claim for contribution, and denied Hartford's motion for summary judgment on JP's negligence claim.

On the eve of the trial, JP and Marsh settled. Neither JP nor Marsh released Hartford. Marsh paid JP \$1,450,000 in exchange for JP's release of its claims against Marsh and assignment to Marsh of all of JP's claims against Hartford. Marsh dismissed with prejudice the negligence and breach of contract actions. On 27 November 2001, the trial court denied Hartford's motion to dismiss Marsh's contribution claim. Hartford attempted to assert its cross-claim for indemnity. The trial court in pre-trial motions informed Hartford that it could not pursue an indemnity claim but could allege it "as a defense, and an issue put to the jury to that effect." In the course of the trial, the trial court informed Hartford that its claim for indemnity had been extinguished.

A jury decided (1) whether Marsh was the agent of Hartford, (2) whether Hartford was negligent, (3) whether the settlement amount was reasonable, and (4) the amount, if any, Hartford should pay Marsh. The jury's verdict form was returned as follows:

1. Was Marsh the agent of Hartford at the time of the merger transaction between Jefferson-Pilot and Alexander Hamilton?

ANSWER: Yes

2. Did Hartford contribute by its negligence to the damage to Jefferson-Pilot/Alexander Hamilton/JP Alexander?

ANSWER: No

3. Was the amount paid by Marsh to Jefferson-Pilot for which it now seeks contribution from Hartford a reasonable amount to settle all of Jefferson-Pilot's claims?

ANSWER: Yes

4. What amount of damages, if any, should Hartford be required to pay for Marsh's settlement with Jefferson-Pilot?

ANSWER: \$150,000.00

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On 8 January 2002, final judgment was entered against Hartford in the amount of \$150,000. Hartford appealed. Marsh filed and was denied a motion to alter or amend the judgment or in the alternative, for a judgment notwithstanding the verdict or new trial. On 7 February 2002, Marsh cross-appealed from the final judgment. On 11 June 2002, Marsh's post-trial motion was heard and denied by order filed 2 July 2002. Marsh appealed. All issues from both appeals have been consolidated per stipulation of counsel and order of this Court.

II. Issues

The issues are (1) whether Hartford should have been allowed to prove its cross-claim of indemnity against Marsh, (2) whether the issue of agency was properly submitted to the jury, (3) whether Marsh failed to make a *prima facie* showing for contribution under N.C.G.S. § 1B-1, (4) whether the trial court erred by entering judgment on the jury's verdict regarding the amount of contribution after the jury found the settlement to be reasonable, (5) whether the trial court erred in refusing to instruct the jury on Hartford's negligence and erroneously finding Hartford was not negligent by failing to issue insurance coverage for JP, (6) whether the trial court erred in admitting evidence of Marsh's negligence when Marsh had admitted its negligence, and (7) whether the trial court erred by granting Hartford summary judgment on JP's breach of contract and declaratory judgment causes of action. The issue in appeal 02-1484 is whether the trial court abused its discretion in denying Marsh's motion to alter or amend the judgment or in the alternative for a judgment notwithstanding the verdict or new trial if the judgment entered on the jury's verdict of contribution due to Marsh was error as a matter of law.

III. Hartford's Indemnity Claim

[1] Hartford contends that the trial court erred by not allowing it to proceed on its indemnity cross-claim. Hartford requested to proceed on this claim during pre-trial motions. The trial court denied the motion but allowed Hartford the option to argue indemnity defensively and have "an issue put to the jury to that effect." Marsh argues this issue was not preserved for appeal and asserts that Hartford made no objection to the trial court's failure to submit the issue to the jury.

The record shows that the trial court dismissed Hartford's claim of indemnity during pre-trial motions and reiterated its ruling later in the case.

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MR. OWENS: . . . As I understand Hartford's positions, it contends presently that it has a crossclaim for indemnity against Marsh. I believe that claim is extinguished as a matter of law, Your Honor, simply because there is no pending contract claim against Hartford for—

THE COURT: I think I ruled on that before the trial began.

MR. OWENS: Well, I remember discussing it. I don't know whether it's been dismissed. . . .

THE COURT: I ruled at the beginning of the trial that that claim was extinguished.

MR. OWENS: Okay.

MR. FAISON: Well—

THE COURT: That was my ruling at the beginning. I've already ruled on that.

MR. FAISON: Well, I understand, Judge, but you ruled at the beginning of the trial they weren't going into—they weren't going to put on 2.8 million in damages and that they weren't going to get into the subsequent events, both of which they've done. And so, if I may just get you to revisit it just a moment. The indemnity claim is—

THE COURT: I already ruled on that matter.

MR. FAISON: Yes, sir.

THE COURT: All right, then.

This issue is more properly reviewed as a dismissal of the claim to which Hartford did not object, make an offer of proof, or request a jury instruction. Hartford did not make an objection of record to the trial court's dismissal of the "claim" during the pre-trial motions or during trial. We hold the error was not properly preserved and is not reviewable by our Court. *See State v. Farmer*, 138 N.C. App. 127, 132, 530 S.E.2d 584, 588, *disc. rev. denied*, 352 N.C. 358, 544 S.E.2d 550 (2000) ("[A] defendant waives his right to assign error to the omission of a jury instruction where he does not object to such omission before the jury retires to deliberate."). This assignment of error is overruled.

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IV. Agency Issue

[2] Hartford assigns error to the trial court's submission of the issue of Marsh's agency with Hartford to the jury. Hartford contends that agency was not necessary to settle controversies arising in Marsh's claim of contribution, and that Marsh, as a negligent defendant, cannot maintain a contribution claim against Hartford, on a principal/agent relationship theory.

The trial court submitted four issues and instructed the jury that if they found Hartford to be negligent or Marsh to be the agent of Hartford, they would then determine the amount Hartford should contribute toward Marsh's settlement. Hartford contends that whether Marsh was an agent of Hartford was irrelevant to Marsh's claim of contribution because agency is not an element of negligence and JP's claims of derivative liability against Hartford were dismissed by Marsh.

We disagree. A determination of agency was properly submitted to establish Marsh's contribution claim. The Uniform Contribution Among Tort-feasors Act ("UCATA") creates a contribution right where "two or more persons become jointly or severally liable in tort for the same injury." N.C.G.S. § 1B-1(a) (2001). In *Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 793-94, 412 S.E.2d 666, 669 (1992), our Supreme Court held that the UCATA expanded the definition of "tort-feasor" to include a vicariously liable master in the master-servant context. "Thus, the *release* of a servant did not release a vicariously liable master, unless the terms of the release provided for release of the master." *Wrenn v. Maria Parham Hosp., Inc.*, 135 N.C. App. 672, 679, 522 S.E.2d 789, 793 (1999), *disc. rev. denied, cert. denied*, 351 N.C. 372, 543 S.E.2d 149-50 (2000) (emphasis in original). Hartford urges this Court to not follow our Supreme Court's decision in *Yates* and contends that the decision was wrongly decided. We are bound by the rationale and holding of *Yates*. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (The Court of Appeals is bound by decisions of the Supreme Court).

Hartford also argues that the facts of *Yates* are distinguishable from those at bar. The *Yates* court allowed a plaintiff to recover from the master/employer after plaintiff settled with the servant/employee. The defendants in *Yates* shared a master-servant relationship; whereas Hartford and Marsh share a principal-agent relationship. The procedural context at bar is where one defendant seeks contribution

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from another defendant, whereas in *Yates*, plaintiff asserted contribution against a co-defendant.

While the procedural context is different, we are bound by *Yates*' definition of a "tort-feasor" under the UCATA. Hartford's lack of direct negligence, as found by the jury, is immaterial. The jury found that Marsh acted as an agent of Hartford. The terms of the settlement between JP and Marsh did not extinguish or release the claims of JP against Hartford. Those claims were assigned to Marsh as a condition of and as consideration for the settlement. Marsh dismissed the remaining claims of negligence and breach of contract against Hartford through its relationship with Marsh, but retained its claim to contribution and JP's claim of breach of contract against Hartford.

Hartford contends that Marsh's dismissal of the claims against Hartford premised on vicarious liability prohibits Marsh from pursuing contribution. This assertion contradicts the UCATA which expressly requires that tort cross-claims against the other tort-feasor must be extinguished before contribution. "A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable." N.C.G.S. § 1B-1 (d) (2001). By dismissing all of the claims relevant to tort liability, Marsh extinguished the claims required by the UCATA. Summary judgment extinguished the remaining contract and declaratory judgment claims before trial. This assignment of error is overruled.

V. Contribution Claim

[3] Hartford argues that Marsh failed to make a *prima facie* showing of a contribution claim under the UCATA because Hartford owed no duty to JP. Marsh contends that Hartford was independently liable to JP for breach of its common law duty to monitor the business of its insureds. No specific instruction was given to the jury regarding the law on such duty, but Marsh's contention was expressed. Marsh cross-appeals the trial court's failure to give such instruction. The jury found Hartford vicariously liable as principal for Marsh's negligence.

Hartford contends that the record is devoid of any agreement by Hartford to allow Marsh to act as its agent, and the trial court erred by submitting the issue of agency to the jury. The actions of an agent allow for an inference of agency. See *Powell v. Lumber Co.*, 168 N.C.

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632, 636, 84 S.E. 1032, 1033 (1915). The record indicates that Marsh received commissions from Hartford and issued title binders and other documents on Hartford's behalf. These actions create, at minimum, apparent authority for Marsh to act as Hartford's agent and are sufficient evidence to withstand Hartford's motion for summary judgment or directed verdict. This assignment of error is overruled.

VI. Entry of Judgment on Contribution Amount

[4] After the jury returned a verdict finding Marsh to be an agent of Hartford, and finding the settlement amount Marsh paid to JP to be reasonable, the jury awarded Marsh \$150,000 in contribution from Hartford. Marsh contends that an award of contribution under the UCATA is statutory and that a joint tortfeasor must contribute its pro rata share of the liability, regardless of the relative degrees of fault. A pro rata share of the settlement amount of \$1,450,000 would be \$725,000. The trial court entered judgment upon a jury verdict award of \$150,000. Marsh argues that the erroneous amount resulted from the trial court's inconsistent and incorrect re-instructions on the issues.

The jury was initially instructed that if they found the settlement amount Marsh paid to JP to be reasonable, Hartford's amount of contribution should be \$725,000. Both parties agreed during oral arguments that this was an accurate statement of the law. The jury entered the amount Hartford should contribute to Marsh after it was re-instructed by the trial court.

The UCATA provides that where two or more persons become jointly and severally liable for the same injury, the injured party may recover his or her entire damages against any one of the joint tortfeasors, but any of the joint tortfeasors who pays more than his or her pro rata share of the damages has a right to contribution from the others for any amount paid in excess of the pro rata share. N.C.G.S. § 1B-1(b) (2001). The pro rata share is computed by dividing the total damage award by the number of jointly and severally liable tortfeasors, without considering a tortfeasor's relative degree of fault. See N.C.G.S. § 1B-2 (2001); David A. Logan and Wayne A. Logan, *North Carolina Torts*, § 8.20[7] (1996); Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, § 22.62 (1999). "The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution." N.C.G.S. § 1B-3(f) (2001).

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The jury was re-instructed that after answering whether or not the JP-Marsh settlement was reasonable, they were to find whether or not Marsh was entitled to contribution from Hartford and the proper amount to be contributed. Marsh's trial counsel did not formally object to this re-instruction of the jury but invited the trial court to re-instruct again. The re-instructions gave the jury the latitude to determine the amount of the contribution award instead of mandating a pro rata share if the settlement amount was found reasonable.

The trial court erred in giving the incorrect re-instruction to the jury as a matter of law. Questions of law are reviewable *de novo*. *In re Greens of Pine Glen*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). We do not find Marsh's failure to more formally object to be fatal where the verdict returned after re-instruction is not allowed under applicable law. The trial court erred in entering judgment upon a verdict where the amount of contribution was mandated by the UCATA and not within the jury's discretion. This assignment of error is allowed.

VII. Failure to Instruct on Negligence

[5] Marsh assigns error to the trial court's failure to instruct on the duty of an insurer to monitor the business of its insured. The trial court submitted the issue of Hartford's negligence to the jury, but did not instruct on any specific duty of an insurer. The jury found that Marsh was an agent of Hartford and Hartford was liable for JP's injury as a principal. We found no error in the trial and the jury's verdict in this respect. We do not address this assignment of error.

VIII. Admission of Evidence of Marsh's Negligence

[6] Marsh argues that the trial court erred in allowing Hartford's trial counsel to question JP's representative about the failings of Marsh after Marsh had already admitted its negligence. While the relevancy of this evidence to the issues at trial may be questionable, it does not rise to the level of prejudicial error. Marsh has failed to show that but for this error, the jury's verdict would have changed. This assignment of error is overruled.

IX. Denial of JP's Motion for Summary Judgment

[7] Marsh, as assignee of JP's claims, contends that the trial court erred in granting summary judgment for Hartford on JP's contract and declaratory judgment claims. We disagree.

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Express language in the bond requires that if the insured merges with another entity, the insured

shall not have such coverage as is afforded under this bond for loss which (a) has occurred in or will occur in offices or premises, or (b) has been caused or will be caused by an employee or employees of such institution, or (c) has arisen or will arise out of the assets or liabilities acquired by the Insured as a result of such consolidation . . . or acquisition of assets or liabilities unless the Insured shall

(I) give the Underwriter written notice of the proposed consolidation, merger or purchase or acquisition of assets or liabilities prior to the proposed effective date of such action and

(ii) obtain the written consent of the Underwriter to extend the coverage provided by this bond to such additional offices or premises, Employees and other exposures, or

(iii) upon obtaining such consent, pay to the Underwriter an additional premium.

Marsh contends that the merger clause only applies to certain insuring agreements and does not apply to riders for general agents and soliciting agents. All specific riders amend and attach to the original fidelity bond and become incorporated into the original bond. The original bond required notice to be provided of the merger and consent to be given by Hartford in order to extend insurance coverage to the agents of the acquired entity. Neither requirement occurred before the merger was completed. This assignment of error is overruled.

X. Conclusion

We are mindful of the anomalous result of these appeals. This result is mandated by the application of the plain language of the UCATA and the precedent set forth in *Yates*. We are concerned with a party being forced to make contribution to a settlement agreement where that party did not have a voice in the settlement amount.

Hartford has no direct liability to JP or, through its assignment, to Marsh. The jury found Hartford's liability to be solely derivative of Marsh's negligence. The amount of Hartford's contribution is set by precedent and statute. Summary judgment in favor of Hartford on the bond is affirmed. We find no error in the trial. The damage award is vacated and remanded to the trial court with instructions to enter

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judgment for Marsh in the amount of \$725,000 as is statutorily required by N.C.G.S. § 1B-1(b).

As we found error in the trial court's entry of judgment, Marsh's consolidated appeal from the denial of its motion to alter or amend the judgment or in the alternative, for a judgment notwithstanding the verdict, or a new trial is dismissed as moot. Both parties are to equally share the costs of the appeals and are solely responsible for any other costs or fees.

No error in trial; Judgment vacated and remanded with instructions.

Judges McGEE and CALABRIA concur.



CAPITAL OUTDOOR, INC., HORIZON OUTDOOR ADVERTISING, INC.; MORRIS COMMUNICATIONS CORP., D/B/A FAIRWAY OUTDOOR ADVERTISING; LAMAR ADVERTISING OF MOBILE, INC.; SIGNATURE OUTDOOR ADVERTISING, INC.; AND UNISTAR OUTDOOR ADVERTISING, INC., PETITIONERS v. E. NORRIS TOLSON, AS SECRETARY OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

ADAMS OUTDOOR ADVERTISING OF CHARLOTTE, A MINNESOTA LIMITED PARTNERSHIP, PETITIONER v. DAVID McCOY, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

CAPITAL OUTDOOR, INC., PETITIONER v. DAVID McCOY, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

DASCO ENTERPRISES, INC., PETITIONER v. DAVID McCOY, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

MORRIS COMMUNICATIONS CORP., D/B/A FAIRWAY OUTDOOR ADVERTISING OF THE TRIAD, PETITIONER v. DAVID McCOY, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, RESPONDENT

No. COA02-94

(Filed 15 July 2003)

1. Highways and Streets— outdoor advertising—interpretation of DOT regulation

The words "height" and "sign structure" in a Department of Transportation regulation providing that the height of any portion of a sign structure as measured vertically from the adjacent edge

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of pavement of the main traveled way shall not exceed 50 feet were properly construed by the trial court by their ordinary meanings to refer to the top of the sign face.

2. Highways and Streets— outdoor advertising—billboard height regulation—arguments not raised below—authority of DOT

Arguments concerning a DOT regulation limiting the height of billboards not raised below were precluded in the Court of Appeals. In any event, petitioners did not forecast evidence to support their contention that the regulation exceeded the authority of the DOT because of purported difficulties in measuring the signs without violating various statutes and other regulations.

3. Highways and Streets— outdoor advertising—DOT billboard height regulation—substantive due process—no violation

A DOT regulation limiting the height of billboards did not violate petitioners' substantive due process rights. The regulation addresses safety as well as aesthetics concerns, and the means are rational and not overly burdensome. Although petitioners pointed to the difficulty of measuring the signs without violating statutes and other regulations, they submitted no evidence to support this contention.

4. Laches— DOT billboard height regulation—signs built after effective date—regulation not initially enforced

The doctrine of laches did not apply to DOT's enforcement of a billboard height regulation where petitioners built their signs after the effective date of the regulation, DOT did not give them assurances that their signs were in compliance, petitioners' conclusory statements of expenses were not sufficiently detailed, and petitioners' generalized statements about their ongoing sign business do not establish an issue of fact as to whether they were disadvantaged by DOT's initial non-enforcement of the regulation.

Appeal by petitioners from judgment entered 10 September 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 28 January 2003.

Waller, Stroud, Stewart & Araneda, LLP, by Betty Strother Waller, for petitioners-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver, for respondents-appellees.

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GEER, Judge.

Petitioners appeal from an order granting respondents' motion for summary judgment. This appeal involves primarily a facial constitutional challenge to N.C. Admin. Code tit. 19A, r. 2E.0203(1)(f) (December 1990). This regulation originally provided: "The height of any portion of the sign structure as measured vertically from the adjacent edge of pavement of the main traveled way shall not exceed 50-feet."¹ We affirm the trial court's granting of respondents' motion for summary judgment, holding that petitioners failed to establish the existence of genuine issues of material fact and that this regulation is constitutional on its face.

Petitioners are outdoor advertising companies. The regulation at issue was promulgated by the North Carolina Department of Transportation ("NCDOT") pursuant to the Outdoor Advertising Control Act ("OACA"), codified at N.C. Gen. Stat. § 136-126 (2001). The OACA was passed in 1967 to control the placement, maintenance, and removal of billboards adjacent to highways. The OACA delegates to NCDOT authority to further promulgate rules and regulations governing erection and maintenance of billboards, permitting procedures, appeal procedures related to administrative decisions denying or revoking a permit, and administrative procedures for appealing a decision that a billboard is illegal. N.C. Gen. Stat. § 136-130 (2001). NCDOT first adopted such regulations effective 1 July 1978 and over the years has revised the regulations on a number of occasions. See N.C. Admin. Code tit. 19A, r. 2E.0200 (June 2002), *et seq.*

The height limitation contained in N.C. Admin. Code tit. 19A, r. 2E.0203(1)(f) (June 2002) was adopted and became effective in December 1990, but NCDOT did not take action to enforce the provision until 1998. Between January 1998 and June 2000, NCDOT took inventories of the height of NCDOT controlled billboards and revoked the billboard permits for all those that were determined to exceed the 50-foot height limitation. Petitioners all had permits revoked for signs more than 50 feet tall.

Petitioners appealed the revocation of their permits to the Secretary of NCDOT, who affirmed that decision. Pursuant to N.C. Gen. Stat. § 136-134.1 (2001), petitioners sought review in Wake County Superior Court. N.C. Gen. Stat. § 136-134.1 provides for

1. The regulation has been amended since the petitions were filed in this case to clarify that the phrase "sign structure" excludes "cut outs or embellishments." N.C. Admin. Code tit. 19A, r. 2E.0203(1)(f) (June 2002).

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de novo review by the court sitting without a jury. The court may only consider whether the Secretary's decision (1) is in violation of constitutional provisions, (2) is not made in accordance with OACA or NCDOT rules or regulations, or (3) is affected by other error of law. *Id.*²

While the review proceedings were pending, the petitioners-appellants' cases were consolidated. Both sides filed cross-motions for summary judgment, which were heard on 24 May 2001. In an order entered 10 July 2001, the court granted respondents' motion for summary judgment. An amended order on judicial review was entered 10 September 2001 to correct technical errors in the original order. Petitioners have appealed the granting of summary judgment.

On review of a grant of summary judgment, this Court must review the whole record to determine (1) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) whether the moving party is entitled to judgment as a matter of law. *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001). As stated by this Court:

A genuine issue of material fact is of such a nature as to affect the outcome of the action. The moving party bears the burden of establishing the lack of a triable issue of fact. The motion must be denied where the non-moving party shows an actual dispute as to one or more material issues.

Johnson v. Trustees of Durham Tech. Cmty. College, 139 N.C. App. 676, 681, 535 S.E.2d 357, 361, *app. dismissed and disc. review denied*, 353 N.C. 265, 546 S.E.2d 101 (2000) (citations omitted). The non-movant may not "rest upon the allegations of its pleading to create an issue of fact, even though the evidence must be interpreted in a light favorable to the nonmovant." *Smiley's Plumbing Co., Inc. v. PFP One, Inc.*, 155 N.C. App. 754, 761, 575 S.E.2d 66, 70, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 698 (2003).

In considering a motion for summary judgment, it is the trial court's and this Court's duty to determine "whether genuine issues of

2. In *National Advertising Co. v. Bradshaw*, 48 N.C. App. 10, 13-14, 268 S.E.2d 816, 818 (1980), this Court held that the Administrative Procedure Act does not apply to appeals from the Secretary of NCDOT.

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material fact exist and does not extend to resolving such issues. . . . [T]he court's function at this juncture is to find factual issues, not to decide them." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citations omitted). "As a general principle, summary judgment is a drastic remedy which must be used cautiously so that no party is deprived of trial on a disputed factual issue." *Johnson*, 139 N.C. App. at 681, 535 S.E.2d at 361.

The Absence of Genuine Issues of Material Fact

[1] Petitioners contend generally that the trial court resolved disputed issues, but argue specifically only that there is a dispute as to what the words "height" and "sign structure" mean within the NCDOT regulation, N.C. Admin. Code tit. 19A, r. 2E.0203(1)(f). The construction of a regulation is a question of law and not of fact. *Ace-Hi, Inc. v. Dep't of Transp.*, 70 N.C. App. 214, 216, 319 S.E.2d 294, 296 (1984) (interpretation of regulation involves only "legal questions"). Petitioners have offered no evidence that their signs were in fact less than 50 feet tall. Instead, this case involves "legal questions of proper exercise of authority and of interpretation of statutes and regulations." *Id.* Consequently, this case was appropriate for summary disposition.

Petitioners' complaint regarding the trial court's finding that "height" and "sign structure" are self-explanatory terms used in their everyday sense" is not well-founded. Although mislabeling its assertion as a finding of fact, the trial court was correctly applying a principle of statutory construction. That principle, which governs equally in the construction of regulations, provides that "unless the words used [in the regulation] have acquired some technical meaning or the context otherwise dictates, they must be construed in accordance with their common or ordinary meaning." *Id.* at 218, 319 S.E.2d at 297.

The record contains no indication that the words "height" or "sign structure" have some technical meaning. The word "height" in common usage means "the highest part of something material," the "top part," or "the extent of elevation above a level." Webster's Third New International Dictionary 1050 (1968). In other words, the regulation refers to the top of the "sign structure." Respondents' witness Lacy Love, NCDOT's State Road Maintenance Engineer, confirmed that NCDOT interprets the regulation to mean the top of the sign face. Contrary to petitioners' contention otherwise, we find nothing in the

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record to suggest that this interpretation—that the measurement refers to the top of the sign face—is unreasonable or incorrect.³

Authority of NCDOT to Adopt the Height Regulation

[2] Unquestionably, NCDOT had authority to promulgate a rule governing the height of billboards. See N.C. Gen. Stat. § 136-130 (authorizing NCDOT to promulgate rules and regulations governing the erection and maintenance of outdoor advertising). Petitioners, however, contend that the height regulation exceeded NCDOT's authority and conflicts with State policy as set forth in various statutes. Petitioners do not argue that the 50-foot limitation is in and of itself a problem, but rather claim that in order to measure the height of the signs for purposes of complying with the regulation, they will have to engage in unsafe behavior and will have to violate other statutes including N.C. Gen. Stat. § 136-89.56 (2001) (prohibiting the authorization of “commercial enterprises or activities” on certain highways) and N.C. Gen. Stat. § 136-89.58 (2001) (prohibiting any person from stopping, parking, or leaving standing any vehicle on any portion of the right-of-way of specified highways). Petitioners also contend that their permits could be revoked for engaging in the conduct necessary to comply with the height requirement. See N.C. Admin. Code tit. 19A, r. 2E.0210(9).

It appears from the record that petitioners failed to raise these arguments below. They are, therefore, precluded from advancing them in this Court. N.C.R. App. P. 10(b)(1). In any event, petitioners have not forecast evidence to support their contentions.

This argument revolves around the technique required to obtain height measurements. The only evidence in the record regarding measuring techniques appears in the deposition of Mr. Love, who testified to various techniques and safety strategies that could be used. Additionally, Mr. Love testified that none of the petitioners has requested any assistance from NCDOT in complying with the height regulation and yet, of the 101 new signs built since 1999 by petitioners, only one has failed to meet the height limitation (and that sign was only off by eight inches). In addition, with respect to the older, non-compliant signs, respondents offered evidence that various sign companies, including two of the original petitioners, were success-

3. Although it is not material to the resolution of this case, we do note that the trial court erred in relying upon this Court's analysis in *Elliott v. N.C. Psychology Bd.*, 126 N.C. App. 453, 485 S.E.2d 882 (1997). That decision was reversed by the Supreme Court. 348 N.C. 230, 498 S.E.2d 616 (1998).

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fully able to lower those signs to comply with the regulation. Petitioners submitted no evidence countering Mr. Love's testimony regarding alternative techniques and offered no evidence indicating that they had experienced any problems in constructing new signs or lowering old signs to conform to the height regulation. The record thus contains no factual basis to support petitioners' contention on appeal that they cannot comply with the regulation.

The Constitutionality of the Regulation

[3] Petitioners also argue that the regulation at issue violates their substantive due process rights and is unconstitutional on its face. Petitioners specifically do not contend that the regulation is unconstitutional as applied.

This Court recently dealt with a facial challenge to a regulation promulgated by the North Carolina State Board of Dental Examiners pursuant to the Dental Practice Act in *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 571 S.E.2d 52 (2002). As explained in *Affordable Care*, the first step in analyzing whether a law violates substantive due process is to determine "whether the right infringed upon is a fundamental right." *Id.* at 535, 571 S.E.2d at 59. If the law infringes upon a fundamental right, "then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest." *Id.* at 535-36, 571 S.E.2d at 59. If there is no fundamental right involved, then "the party seeking to apply [the law] need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest." *Id.* at 536, 571 S.E.2d at 59. Under the "rational relation" test, "the law in question is presumed to be constitutional." *Id.*

While the General Assembly has declared "that outdoor advertising is a legitimate commercial use of private property adjacent to roads and highways," N.C. Gen. Stat. § 136-127 (2001), petitioners appropriately do not contend that this case involves a fundamental right. *See Transylvania County v. Moody*, 151 N.C. App. 389, 397, 565 S.E.2d 720, 726 (2002) (the right to construct outdoor advertising signs is not a fundamental right). Therefore, the height regulation need only survive a "rational basis" review.

The governmental interest in regulating outdoor advertising is:

to promote the safety, health, welfare and convenience and enjoyment of travel on and protection of the public investment in high-

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ways within the State, to prevent unreasonable distraction of operators of motor vehicles and to prevent interference with the effectiveness of traffic regulations and to promote safety on the highways, to attract tourists and promote the prosperity, economic well-being and general welfare of the State, and to preserve and enhance the natural scenic beauty of the highways and areas in the vicinity of the State highways and to promote the reasonable, orderly and effective display of such signs, displays and devices.

N.C. Gen. Stat. § 136-127. In short, governmental interests include both safety and aesthetic concerns.

Petitioners do not argue that the regulation lacks a rational relationship to these governmental interests, but instead contend that a billboard height limit is an aesthetic regulation only and that our Supreme Court has held that aesthetics-based regulatory ordinances are permissible only when they are reasonable. *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982). We find *Jones* to be inapplicable because the regulation at issue also addresses safety concerns, such as those included in N.C. Gen. Stat. § 136-127 (preventing unreasonable distraction of motorists). See *Summey Outdoor Advertising, Inc. v. County of Henderson*, 96 N.C. App. 533, 540, 386 S.E.2d 439, 444 (1989) (declining to find *Jones* applicable to county ordinance regulating outdoor advertising signs in size, height, and distance from road), *disc. review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990).

In *Affordable Care*, after finding that there was a legitimate governmental interest in the regulation promulgated by the Board of Dental Examiners, the Court addressed the plaintiffs' argument that "even if the [r]ule furthers a legitimate purpose, the means it provides to effectuate that purpose are not rational and the burden outweighs any public benefit." 153 N.C. App. at 538, 571 S.E.2d at 61. In response, the Court stated:

In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground. "An individual challenging the facial constitutionality of a legislative [a]ct 'must establish that no set of circumstances exists under which the [a]ct would be valid.'" "The fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.'"

Id. at 539, 571 S.E.2d at 61 (citations omitted).

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Petitioners in this case have similarly argued that the means adopted to effectuate the governmental purpose is not rational and is overly burdensome. Specifically, petitioners contend that even assuming that the height restriction furthers a legitimate State interest, the means chosen by NCDOT—requiring that the height not exceed 50 feet as measured vertically from the edge of the pavement—is unreasonable, cost prohibitive, unreliable, subjective, and inconsistent.

In support of this argument, petitioners again point to purported difficulties in measuring the signs without violating other statutes and regulations. As indicated above, however, petitioners submitted no evidence to the trial court in support of these difficulties. Mr. Love's testimony referred to different means by which petitioners could comply with the regulation; petitioners have not demonstrated an inability to comply if they obtained the assistance of NCDOT; and petitioners have, according to the record, experienced no problems with compliance since 1999. Petitioners have thus failed to meet their considerable burden of establishing "no set of circumstances . . . under which the [a]ct would be valid." *Id.*

With respect to petitioners' claim that compliance would be cost-prohibitive, petitioners offered no supporting evidence. Respondents submitted the only evidence of cost: \$250.00 per sign plus expenses. Although petitioners suggested that the amount might be higher, they made no attempt to offer evidence to create an issue of fact as to whether the cost was prohibitive or not.⁴

The Doctrine of Laches

[4] Finally, petitioners argue that the doctrine of laches applies here. That doctrine has most recently been described as follows:

To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of

4. Petitioners point to NCDOT's purchase of 14 laser range finders at a cost of \$3,000 each. Yet, petitioners do not explain how this fact reflects the likely cost to them and whether the purchase of a laser range finder, which could continue to be used for each sign built, would be cost-prohibitive.

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the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings L.L.C. v. City of Charlotte, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001).

As petitioners argue, North Carolina law has applied the laches doctrine to the untimely enforcement of sign regulations. *Abernethy v. Town of Boone Bd. of Adjustment*, 109 N.C. App. 459, 427 S.E.2d 875 (1993). This Court in *MMR Holdings*, however, limited *Abernethy* to its specific facts, noting that the doctrine of laches was appropriate in *Abernethy* because of assurances from city officials that the plaintiff's signs were in compliance and because the plaintiff had spent \$250,000.00 in reliance upon those assurances. *MMR Holdings*, 148 N.C. App. at 210, 558 S.E.2d at 198. In *MMR Holdings*, the Court declined to apply the doctrine of laches in the absence of express assurances of compliance from city officials and in the absence of any evidence that the plaintiffs had spent money or otherwise changed their position in reliance upon such assurances. *Id.* at 210-11, 558 S.E.2d at 198-99.

This case closely resembles *MMR Holdings*. Petitioners do not claim that NCDOT gave them any assurances that their signs were in compliance with the regulation at issue. In fact, petitioners acknowledge that they knew of the regulation when they erected their signs, but elected only to have their structures "pre-fabricated to a length which, when erected[,] would not violate the *spirit and intent* of the regulation . . ." (Emphasis supplied) Although petitioners complain that NCDOT did not notify them that their signs were nonconforming, since these signs were built after the effective date of the regulation, petitioners bore the responsibility of ensuring that their signs complied in the first instance. As this Court stated in *Bracey Advertising Co., Inc. v. North Carolina Dep't of Transp.*, 35 N.C. App. 226, 230, 241 S.E.2d 146, 148, *disc. review denied*, 295 N.C. 89, 244 S.E.2d 257 (1978), "[t]hose persons or parties, including petitioner[s], who erected outdoor advertising devices on or after [the effective date of an ordinance] without complying with the established standards did so at their peril."

In addition, *Abernethy* held that before laches may be used to prevent a governmental body from enforcing an ordinance, the party asserting laches must demonstrate that it suffered disadvantage

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“due to the delay.” 109 N.C. App. at 465, 427 S.E.2d at 878. Here, petitioners, in virtually identical affidavits, point in general language to various expenditures that they have made on their signs for repairs and improvements, to the fact that they have entered into long-term contracts with customers wishing to rent space on the billboards, and to unspecified business decisions made in reliance on the billboards being legal. Petitioners do not, however, make any attempt to demonstrate how they would have avoided these expenses or how they would have behaved differently had NCDOT notified them of non-compliance earlier.

Even if petitioners had tied these assertions to the delay, Rule 56(e)’s requirement that the non-moving party set forth “specific facts” is not met by petitioners’ extremely conclusory statements. While summary judgment is a “drastic remedy,” *Johnson*, 139 N.C. App. at 681, 535 S.E.2d at 361, without some modicum of detail, neither the trial court nor this Court is in a position to assess whether petitioners will be able to establish that they were wrongly prejudiced by the delay in enforcement.

Petitioners’ generalized statements regarding their ongoing sign business do not establish an issue of fact as to whether they were disadvantaged by NCDOT’s non-enforcement of the height regulation. The trial court therefore did not err in granting summary judgment as to petitioners’ claim of laches.

Conclusion

For the reasons stated herein, we hold that the trial court did not err in granting respondents’ motion for summary judgment.

Affirmed.

Judges WYNN and BRYANT concur.

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No. COA02-635

(Filed 15 July 2003)

1. Administrative Law— deadline for final agency decision— extension—showing of good cause by agency—required

An administrative agency did not extend the deadline for issuing a final decision for good cause, and the decision of the administrative law judge became the final decision, where the agency simply issued a letter stating that the time frame for the final decision was being extended. Grounds demonstrating good cause for extending the deadline under N.C.G.S. § 150B-44 must be stated.

2. Administrative Law— authority of administrative law judge—recommended decision adopted as that of agency

Whether an administrative law judge exceeded his authority was moot where the agency did not issue its decision within the statutorily mandated time frame and the administrative law judge's opinion was adopted as that of the agency.

Judge LEVINSON dissenting.

Appeal by respondent from judgment entered 24 January 2002 by Judge Stafford Bullock in Wake County Superior Court. Heard in the Court of Appeals 12 March 2003.

The Twiford Law Firm, by John S. Morrison, for petitioner appellee.

Poyner & Spruill, L.L.P., by Steven Mansfield Shaber, for petitioner-intervenor appellee.

Attorney General Roy Cooper, by Assistant Attorney General Grady L. Balentine, Jr., for respondent appellant.

TIMMONS-GOODSON, Judge.

The North Carolina Department of Health and Human Services, Division of Medical Assistance ("respondent") appeals from the judg-

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ment of the trial court declaring a final agency decision by respondent to be null and void. For the reasons stated herein, we affirm the judgment of the trial court.

The pertinent substantive and procedural facts of the instant appeal are as follows: On 29 June 2001, Albemarle Mental Health Center Developmental Disabilities, Substance Abuse Services (“petitioner”) and N.C. Council of Community Mental Health, Developmental Disabilities and Substance Abuse Programs, Inc. (“petitioner-intervenor”) filed a joint petition for judicial review of a final agency decision issued by respondent 30 May 2001. The 30 May 2001 final agency decision rejected a recommended decision by an administrative law judge, who determined respondent had unlawfully and arbitrarily withheld Medicaid reimbursements to petitioner in 1998. The recommended decision by the administrative law judge concluded that petitioner was entitled to 1.5 million dollars from respondent as reimbursement for deficient Medicaid payments.

On 22 January 2002, the petition for judicial review of the final decision by respondent came before the trial court. After reviewing the procedural facts of the case, the trial court determined that respondent had failed to issue its decision within the ninety-day time limit required under section 150B-44 of the North Carolina General Statutes. Because respondent did not timely enter its decision, the trial court concluded that respondent adopted the decision of the administrative law judge as its final decision as a matter of law, and that the 30 May 2001 decision purporting to reject the recommended decision by the administrative law judge was therefore of no effect. Accordingly, the trial court entered judgment declaring the 30 May 2001 decision by respondent to be null and void. From the judgment of the trial court, respondent appeals.

Respondent asserts that the trial court erred in declaring the 30 May decision void, in that respondent properly extended the deadline for issuing its final decision. Respondent further contends that the administrative law judge exceeded his authority in issuing his recommended decision. For the reasons stated herein, we affirm the judgment of the trial court.

[1] Respondent argues it complied with the statutory mandates for issuing a final decision under section 150B-44, and that the trial court erred in finding otherwise. During the time period relevant to the instant proceedings, section 150B-44 provided in pertinent part as follows:

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Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. An agency that is subject to Article 3 of this Chapter and is not a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. . . . If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision.

N.C. Gen. Stat. § 150B-44 (1999).¹ Respondent is an Article 3 agency and thereby subject to the mandates of section 150B-44. *See* N.C. Gen. Stat. § 150B-1(c) (2001). It received the official record of the contested case hearing in the instant case from the Office of Administrative Hearings on 22 January 2001. Thus, the final decision by respondent was due in ninety days, on 23 April 2001. By letter dated 12 April 2001, respondent notified the parties that "the time frame within which the Final Agency Decision will be made is hereby extended for an additional period of 60 days." Respondent issued its final decision 30 May 2001. Respondent asserts that it properly extended the deadline for issuing its decision under the statutory mandates of section 150B-44. We disagree.

In interpreting section 150B-44, as with any statutory construction, the primary function of this Court is to "ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980). To determine legislative intent, we examine the language and purpose of the statute. *See id.*; *Occaneechi Band of the Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 653, 551 S.E.2d 535, 538, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 575 (2001). It is moreover well established that where "the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to

1. Section 150B-44 has since been amended, shortening the applicable time period from ninety days to sixty days. The effective date of amendment, 1 January 2001, applies to cases arising after the instant case. *See* N.C. Sess. Laws 2000-190 § 14.

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interpolate, or superimpose, provisions and limitations not contained therein.' " *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998) (quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978)), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999).

The primary purpose of the North Carolina Administrative Procedure Act is to "provide procedural protection for persons aggrieved by an agency decision" and its provisions are "liberally construed . . . to preserve and effectuate such right." *Holland Group v. N.C. Dept. of Administration*, 130 N.C. App. 721, 725, 504 S.E.2d 300, 304 (1998) (quoting *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 594, 447 S.E.2d 768, 783 (1994)). The specific purpose of section 150B-44 is to "guard those involved in the administrative process from the inconvenience and uncertainty of unreasonable delay." *Id.* To that end, the statute requires a final agency decision to be issued within ninety days, and the failure of an agency to conduct its review and make a decision within the statutory time period is *prima facie* an unreasonable delay. *See, e.g.*, N.C. Gen. Stat. § 150B-44; *Occaneechi Band of the Saponi Nation*, 145 N.C. App. at 655, 551 S.E.2d at 539; *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 327 N.C. 573, 583-84, 398 S.E.2d 466, 473 (1990) (Whichard, J., dissenting). An extension of the ninety-day time period may occur only under two specific circumstances: (1) by agreement of the parties or (2) by the agency "for good cause shown." N.C. Gen. Stat. § 150B-44; *Occaneechi Band of the Saponi Nation*, 145 N.C. App. at 653, 551 S.E.2d at 538. The parties in the instant case did not agree to extend the deadline. Thus, the extension could only occur "for good cause shown." In its letter to the parties, respondent stated that it was "hereby extend[ing]" the ninety-day time deadline. Respondent offered no grounds for its action or other "good cause" to support the extension. Respondent argues that the requirement of "good cause shown" in section 150B-44 necessitates only that good cause to extend a deadline be shown *to* the agency rather than *by* the agency. Respondent asserts that, as an agency, its actions are presumed to be reasonable and lawful, and that it is not required to articulate any grounds for extension of the deadline under section 150B-44. We are not so persuaded.

As respondent notes, "the law presumes that a public official or governing body will discharge its duty in a regular manner and act within its delegated authority." *City of Raleigh v. Riley*, 64 N.C. App. 623, 636, 308 S.E.2d 464, 473 (1983). Further, under the North Carolina Administrative Procedure Act, respondent is prohibited from acting

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in an arbitrary or capricious manner. *See* N.C. Gen. Stat. § 150B-51(b) (2001). As such, respondent's interpretation of section 150B-44 would render the words "for good cause *shown*" superfluous. *See HCA Crossroads Residential Ctrs.*, 327 N.C. at 578, 398 S.E.2d at 470 (stating that "a statute must be construed, if possible, to give meaning and effect to all of its provisions"); *cf.* N.C. Gen. Stat. § 150B-4(a) (2001) (requiring an agency to issue a declaratory ruling "except when the agency for good cause finds issuance of a ruling undesirable"). Respondent argues that section 150B-44 requires it to have good cause to extend a deadline, yet such would be respondent's duty regardless of the statutory language of section 150B-44. The more reasonable interpretation of section 150B-44 is that, where respondent wishes to extend the ninety-day deadline, there must exist good cause to do so *and* respondent must state the grounds demonstrating such good cause. *Cf. Occaneechi Band of the Saponi Nation*, 145 N.C. App. at 656, 551 S.E.2d at 540 (noting that the agency informed the parties that good cause existed to extend the statutory deadline because of the complexity of the case). Because respondent failed to articulate any grounds for its decision, much less "good cause," the trial court did not err in concluding that respondent failed to properly extend the deadline. We note that, contrary to the views expressed in the dissent, our conclusion does not require an agency to seek judicial review of "good cause" before extending its deadline. Rather, an agency should merely articulate its grounds for extending the deadline to the parties. Whether or not these articulated grounds constitute "good cause" would then be one of the many aspects of an agency decision that may be reviewed by a trial court upon petition for judicial review. Respondent therefore did not issue its decision within the ninety-day deadline required under section 150B-44, and the recommended decision by the administrative law judge became the final decision in the case by operation of law. *See* N.C. Gen. Stat. § 150B-44; *Occaneechi Band of the Saponi Nation*, 145 N.C. App. at 655, 551 S.E.2d at 539; *Holland Group*, 130 N.C. App. at 729, 504 S.E.2d at 306. We overrule respondent's first assignment of error.

[2] By its second assignment of error, respondent argues that the administrative law judge exceeded his authority in issuing the recommended decision. The recommended decision determined that respondent had unlawfully deviated from the statutory methodology used to calculate Medicaid reimbursement in 1998, resulting in a reimbursement reduction of 1.5 million dollars to petitioner. In addition to ordering respondent to reimburse petitioner for the deficient Medicaid payments, the recommended decision states that "[a]ll

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future calculations for Medicaid reimbursement rates for ‘Y-Code’ reimbursement services should be based on the actual unit cost and weighted averages experienced by the petitioner.” Because the recommended decision mandates the manner in which future reimbursement rates are to be calculated, respondent argues that the administrative law judge exceeded his statutory authority. We have determined, however, that by failing to issue its decision within the statutorily-mandated time frame, respondent adopted the recommended decision as its own final decision by operation of law. The decision declaring future calculation methods for Medicaid reimbursement is now, therefore, the decision of the agency and not of the administrative law judge. Respondent’s assertion that the recommended decision exceeds the administrative law judge’s authority is thus moot, and we overrule this assignment of error.

For the reasons stated herein, we affirm the judgment of the trial court.

Affirmed.

Judge WYNN concurs.

Judge LEVINSON dissents.

LEVINSON, Judge dissenting.

Because I conclude that the agency properly extended the time for entry of its final agency decision, I respectfully dissent.

This appeal requires us to determine the proper interpretation of N.C.G.S. § 150B-44, “Right to judicial intervention *when decision unreasonably delayed*” (2001). (emphasis added). The statute as it existed at the time of this action provided in relevant part that:

Unreasonable delay on the part of any agency . . . in taking any required action shall be justification for . . . a court order compelling action by the agency[.] . . . An agency that is subject to Article 3 of this Chapter . . . has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings to make a final decision in the case.

This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. . . . If an agency subject to Article 3 of this Chapter has not

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made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's decision as the agency's final decision. . . .

(emphasis added).² The specific issue before this Court is the significance of the phrase "for good cause shown" within the statute. Upon consideration of longstanding principles of statutory construction, I conclude that the phrase "good cause shown" articulates the standard that the agency employs to determine whether an extension of time is appropriate in a given case.

"A cardinal principle governing statutory interpretation is that courts should always give effect to the intent of the legislature. The will of the legislature 'must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.'" *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996) (quoting *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)) (citation omitted). To determine the legislative intent, "[w]e first look to the words chosen by the legislature and 'if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings.'" *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 315, 526 S.E.2d 167, 170 (2000) (quoting *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 896 (1998)). However, "where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990) (citing *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E.2d 797 (1948)).

G.S. § 150B-44 is found within the N.C. Administrative Procedure Act (APA), whose "primary purpose" is "to provide procedural protection for persons aggrieved by an agency decision[.]" *Holland Group v. N.C. Dep't of Administration*, 130 N.C. App. 721, 725, 504 S.E.2d 300, 304 (1998). I conclude that the title of G.S. § 150B-44 unambiguously articulates its general purpose: the protection of a litigant's rights where a final agency decision is "unreasonably delayed." However, within N.C.G.S. § 150B-44, the phrase "for good cause shown" is ambiguous, as it fails to indicate *how*, *or to whom*, the "good cause" should be shown. Therefore, it is necessary to consider the possible interpretations of the provision allowing an agency for good cause shown to extend by up to 60 days the period within which it must render its final agency decision.

2. Effective 1 January 2001, both the initial time period and the allowable extension period were shortened to 60 days.

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I would reject an interpretation that the agency must appear before a superior court judge and submit evidence of “good cause” in order to obtain an extension of time. First, the statute *does not state* such a requirement. Where our legislature intends for the trial court to determine whether good cause has been shown, the statute invariably states so very plainly. For example, N.C.G.S. § 150B-45 (2001), the statute immediately following G.S. § 150B-44, states that “[f]or good cause shown, however, *the superior court may accept* an untimely petition.” (emphasis added). “It is a well-settled principle of statutory construction that where a statute is intelligible without any additional words, no additional words may be supplied . . . and the courts . . . are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *State v. Camp*, 286 N.C. 148, 151-52, 209 S.E.2d 754, 756 (1974) (citation omitted).

Moreover, in all probability, the factors evaluated by an agency head in determining whether to take an extension of time generally involve in-house allocation of agency resources and personnel, setting of internal agency priorities, and assessment of the best response to unexpected employee absences. Thus, as a practical matter, the determination of whether there is “good cause” for an extension would not lend itself to judicial review. Nor would such a review serve the statutory purpose of preventing “unreasonable delay.” Judicial review, with its attendant right to appeal, would likely lead to *delay* of the final agency decision. I would conclude that this Court is without authority to superimpose upon G.S. § 150B-44 the requirement that an agency must show its good cause to a judge before it may obtain an extension of time, and would further conclude that such a requirement would not further the purpose of the statute.

I would also reject the possibility that an agency must show to the petitioner, or must recite in the document taking an extension, the circumstances that the agency has determined constitute “good cause” for an extension. Again, the statute *does not state* such a requirement, and we are without authority to superimpose it upon the statutory language. Nor would such a requirement appear to serve much purpose, inasmuch as the petitioner lacks a forum to obtain review of the factual circumstances surrounding the agency’s need for an extension.

I believe the statutory language is intended to draw a distinction between an extension sought by the *plaintiff* (which requires “agreement of the parties”), and an extension sought by the *agency* (to which it is entitled, without the plaintiff’s agreement, provided the

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agency believes that good cause necessitates the extension). I would conclude, therefore, that the phrase “for good cause shown” refers to the standard the agency is to apply in determining whether to take an extension.

Because the agency's discretion is quite restricted, this interpretation does not undermine the statutory purpose of protecting litigants from unreasonable delay. The agency may obtain only one extension of time. *Holland Group v. N.C. Dep't. of Administration*, 130 N.C. App. 721, 728, 504 S.E.2d 300, 305 (1998) (“[p]ointedly, the statute does not allow for additional *periods*, thus limiting the agency to a *single* extension”) (emphasis in original). Further, G.S. § 150B-44 is “self executing”: that is, a decision by the ALJ automatically becomes the final agency decision if the agency fails to file its final decision within the statutory period. *Occaneechi Band of the Saponi Nation v. N.C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 651, 551 S.E.2d 535, 537 (2001) (“the pertinent portion of G.S. § 150B-44 is self-executing . . . when Respondent failed to issue a final decision on or before [the deadline], the Recommended Decision of the ALJ became the Final Agency Decision.”).

The substitution of a recommended decision of an ALJ for a state agency's final decision is a severe sanction. It is analogous to entry of a default judgment, which is not favored in North Carolina. *See Peebles v. Moore*, 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980), *modified and aff'd*, 302 N.C. 351, 275 S.E.2d 833 (1981) (“the law generally disfavors default judgments”). Therefore, imposition of this extreme penalty upon a state agency properly should be reserved for situations in which the agency has unreasonably delayed issuance of a decision. Accordingly, I find it significant that, in several recent cases affirming the judicial imposition of the ALJ opinion as the final agency decision, the evidence showed that the agency had unreasonably delayed its final opinion. *See, e.g., County of Wake v. Dep't of Env't & Nat. Res.*, 155 N.C. App. 225, 232, 573 S.E.2d 572, 579 (2002) (agency in violation of G.S. § 150B-44 “by taking multiple extensions of time in which to render its final agency decision” over a period of almost a year); *Occaneechi*, 145 N.C. App. 649, 551 S.E.2d 535 (agency failed to render final decision within extension period); *Holland Group v. N.C. Dep't of Administration*, 130 N.C. App. 721, 728, 504 S.E.2d 300, 305 (1998). In *Holland*, the agency attempted to take several extensions, ultimately “extending” the deadline retroactively at the time it issued its decision. This Court held:

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We cannot countenance the [agency's] attempt at retroactive extension of either the statutory or its self-imposed time limitations. First, such action appears contrary to the [purpose] of G.S. § 150B-44, *i.e.*, protection from unreasonable delays. In addition, in view of the previous advance written notice of extension of the deadline for good cause, it would be neither unfair [nor] unjust, to hold the [agency] to similar notification of any subsequent extension for good cause.

(citation omitted). Thus, in prior appellate decisions upholding substitution of the ALJ recommendation for the final agency decision, the agency had, as a factual matter, been unreasonably dilatory in issuance of a decision.

However, in the instant case, there is no evidence that the agency improperly delayed issuance of its decision. Within the initial 90 day period, the agency notified the petitioner that it was extending the time for up to 90 days. The agency took only one extension, and issued its decision well within the extension period. The record contains no evidence that the agency was guilty of "unreasonable delay" in issuing a final agency decision. Thus, even assuming, *arguendo*, that the better practice might have been to inform the petitioner of the factual basis for the extension, I conclude that on these facts it would be unfair and contrary to the statute to impose upon the agency the extreme sanction of adoption of the recommendation of the ALJ. I would hold that the agency was entitled to take an extension, and that its letter to petitioner sufficiently informed petitioner that it was doing so. Accordingly, I would reverse the trial court and reinstate the decision of the HHR.

IN RE: CLARK, A MINOR JUVENILE

No. COA02-1335

(Filed 15 July 2003)

1. Termination of Parental Rights— jurisdiction—DSS failure to file affidavit contemporaneous with juvenile petition

The trial court did not err in a termination of parental rights case by concluding that it had jurisdiction even though the Department of Social Services (DSS) failed to file an affidavit

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under N.C.G.S. § 50A-209 contemporaneously with the juvenile petition, because: (1) although it remains the better practice to require compliance with N.C.G.S. § 50A-209, failure to file this affidavit does not, by itself, divest the trial court of jurisdiction; (2) after the failure to comply with the statute was pointed out, the trial court gave DSS five days to comply and DSS complied by filing the affidavit within five days; and (3) respondent was not prejudiced when DSS was allowed five days to file the affidavit since the trial court was able to determine whether jurisdiction existed prior to rendering its decision.

2. Trials— inadequate recording of proceedings

Respondent mother in a termination of parental rights case was not prejudiced by the failure to record the entire proceeding over six different dates, because: (1) respondent made no attempt to use N.C. R. App. P. 9(c)(1) to provide a narration of the evidence in order to reflect the true sense of the evidence received to the extent the record does not do so; (2) although respondent has generally asserted prejudice, she points to nothing specific in the record to support her argument; (3) the record and transcript do not disclose the exact amount of testimony lost or the amount of time during which the recording equipment malfunctioned, although it appears that very little of the testimony was not recorded and the interruptions were only very brief; and (4) the trial court's extensive findings indicate a careful evaluation of all the evidence.

3. Termination of Parental Rights— willfully leaving child in foster care for more than twelve months

The trial court did not abuse its discretion in a termination of parental rights case by finding under N.C.G.S. § 7B-1111(a)(2) that respondent mother willfully left her child in foster care for more than twelve months without showing to the trial court reasonable progress under the circumstances, because: (1) respondent repeatedly failed to comply with the Department of Social Service's service agreements, failed to appear at the permanency planning meetings, and often missed visitations with her child; and (2) although respondent found stable housing, the interior of the home as well as the front yard area was littered with alcoholic beverage containers and there was at least one incident of underage drinking.

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Appeal by respondent mother from order filed 7 February 2002 by Judge Charles M. Neaves, Jr. in Stokes County District Court. Heard in the Court of Appeals 12 June 2003.

J. Tyrone Browder for petitioner-appellee.

Susan J. Hall for respondent-appellant.

BRYANT, Judge.

Corena Lynn Clark (respondent) appeals from an order filed 7 February 2002 terminating her parental rights over Kayla Leeann Clark (the juvenile). On 6 September 2000, the juvenile was adjudicated as neglected and dependent after she was injured when respondent dropped her on the ground during a physical confrontation involving the juvenile's father and others on 30 August 1998.¹ At the time, respondent and the juvenile's father were living in someone else's home, and the altercation occurred after respondent had been kicked out of the house. Following this incident, the juvenile was removed from the home that day, placed in the custody of the Stokes County Department of Social Services (DSS), and placed in a foster home. As part of the neglect disposition order filed on 6 September 2000, defendant was required to establish a stable residence.

Termination proceedings were instituted on 22 November 2000. The termination of parental rights (TPR) hearing took place over six different dates: 22 August 2001; 16 October 2001; 28 November 2001; 18 December 2001; 17 January 2002; and 18 January 2002. The transcript of these proceedings was transcribed from an open-microphone recording, and on four occasions a tape ended either in the middle of testimony or counsel's statements. Further, during the cross-examination of respondent, the recording device and the trial court's microphone malfunctioned. Thus, it appears portions of the hearing have not been preserved for appellate review, although there is little indication of the amount of lost testimony or what the content of that testimony might have been.

Prior to the presentation of evidence, respondent moved to dismiss the petition based on lack of jurisdiction, due to the fact that

1. The order adjudicating juvenile as neglected is dated 28 September 1998, however, it was not signed until 31 August 2000 and not filed until 6 September 2000. Although not applicable to this case, we note section 7B-807 was amended to add subsection (b), effective 1 January 2002, and now requires the adjudicatory order to be reduced to writing, signed, and filed within 30 days following the completion of the hearing. See N.C.G.S. § 7B-807(b) (2001).

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DSS had failed to file an affidavit as to the status of the child under section 50A-209 of the General Statutes. The trial court denied the motion and ordered DSS to file the affidavit within five days.

The evidence presented at the hearing and preserved in the transcript tends to show that between August 1998 and 2000, respondent had moved from residence to residence approximately five times. During that time, respondent failed to maintain stable employment. Respondent also failed to comply with DSS service agreements and did not appear for any of the five permanency planning meetings held by DSS. In addition, respondent missed numerous visitations with the juvenile.² At the time of the TPR hearing, respondent was living with her new husband and her two children by that marriage. A maternal outreach program worker testified that she had visited respondent at her current residence between thirty to forty times to help respondent with financial and transportation problems. On these visits, the worker observed beer and liquor bottles overflowing from trash cans at the residence and beer and liquor bottles scattered around the front yard of the house. She also observed a number of people other than respondent or respondent's family living in the house, including a fifteen-year-old boy, whom she witnessed consuming an alcoholic beverage. Further, the worker expressed concern over the lack of supervision of respondent's youngest child.

The trial court, *inter alia*, found:

84. [Respondent], willfully, and not due solely to poverty, left [the juvenile] in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the [trial court] that reasonable progress under the circumstances has been made within twelve months in correcting those conditions which led to the removal of the juvenile

From this finding the trial court concluded that grounds existed to terminate respondent's parental rights over the juvenile, and subsequently ordered those parental rights terminated.³

2. Respondent states in her brief to this Court that she missed twenty-three of seventy-two visitations.

3. The trial court in the case *sub judice* concluded there were three separate grounds upon which to base a termination of parental rights. Where, however, an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds. *See In re Greene*, 152 N.C. App. 410, 416, 568 S.E.2d 634, 638 (2002).

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The issues are whether: (I) failure by DSS to file an affidavit pursuant to N.C. Gen. Stat. § 50A-209 contemporaneously with the juvenile petition deprived the trial court of jurisdiction; (II) respondent was prejudiced by the failure to record the entire proceeding; and (III) there is sufficient evidence to support the trial court's finding that respondent willfully left the juvenile in foster care for more than twelve months, without showing to the trial court reasonable progress under the circumstances.

I

[1] Defendant first contends that failure by DSS to file an affidavit pursuant to section 50A-209 of the North Carolina General Statutes at the time of the filing of the juvenile petition deprived the trial court of jurisdiction to adjudicate this matter and further, that the trial court's failure to stay the proceedings until the affidavit was filed constituted error. We disagree.

N.C. Gen. Stat. § 50A-209 requires that a party filing a petition in cases involving child custody, including termination of parental rights actions, shall, under oath, either in the first pleading or in an attached affidavit, give information "if reasonably ascertainable, . . . as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period." N.C.G.S. § 50-209(a) (2001). The purpose of this affidavit is to assist the trial court in determining whether it can assume subject matter jurisdiction over the matter. *See Brewington v. Serrato*, 77 N.C. App. 726, 730, 336 S.E.2d 444, 447 (1985) (purpose of former section 50A-9 was to enable trial court to determine if jurisdiction existed in child custody matters). Although it remains the better practice to require compliance with section 50A-209, failure to file this affidavit does not, by itself, divest the trial court of jurisdiction. *See Pheasant v. McKibben*, 100 N.C. App. 379, 382, 396 S.E.2d 333, 335 (1990) (failure to comply with former section 50A-9 did not defeat subject matter jurisdiction where the trial court properly exercised jurisdiction).

In this case, after the failure to comply with the statute was pointed out, the trial court gave DSS five days to comply, and DSS complied by filing the affidavit within five days. Respondent does not argue that the contents of this affidavit do not support a finding that the trial court had jurisdiction over the juvenile. Accordingly, we reject the argument that failure to comply with section 50A-209

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divested the trial court of jurisdiction. Furthermore, the trial court was not required to stay the proceedings because allowing DSS five days to file the affidavit was not prejudicial to respondent, as the trial court was able to determine whether jurisdiction existed prior to rendering its decision.

II

[2] Respondent next argues that an inadequate recording of the proceedings and the continuation of the hearing over six different court sessions constitutes prejudicial error in that it deprives her of meaningful appellate review.

N.C. Gen. Stat. § 7B-806 requires that all juvenile “adjudicatory and dispositional hearings shall be recorded by stenographic notes or by electronic or mechanical means.” N.C.G.S. § 7B-806 (2001). Mere failure to comply with this statute standing alone is, however, not by itself grounds for a new hearing. *See Miller v. Miller*, 92 N.C. App. 351, 354, 374 S.E.2d 467, 469 (1988) (appeal dismissed where party alleged failure to record proceedings under former section 7A-198, now section 7B-806, but failed to assert prejudice and had not attempted to reconstruct the proceedings through a narration of the evidence). A party, in order to prevail on an assignment of error under section 7B-806, must also demonstrate that the failure to record the evidence resulted in prejudice to that party. *See id.*; *see also In re Wright*, 64 N.C. App. 135, 137-38, 306 S.E.2d 825, 827 (1983) (argument rejected where there was no showing of prejudice and no allegation of what transcript would have contained).

Furthermore, the use of general allegations is insufficient to show reversible error resulting from the loss of specific portions of testimony caused by gaps in recording. *See In re Peirce*, 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981) (no prejudice shown where party failed to allege or show in the record the contents of the lost testimony). Where a verbatim transcript of the proceedings is unavailable, there are “means . . . available for [a party] to compile a narration of the evidence, i.e., reconstructing the testimony with the assistance of those persons present at the hearing.” *Miller*, 92 N.C. App. at 354, 374 S.E.2d at 469. If an opposing party contended “the record on appeal was inaccurate in any respect, the matter could be resolved by the trial judge in settling the record on appeal.” *Id.*; *see also* N.C.R. App. P. 9(c)(1) (providing for narration of the evidence in record on appeal and, if necessary, settlement of the record by the trial court on form of narration of the testimony).

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“Although, . . . there is a long-standing rule . . . that there is a presumption in favor of the regularity and correctness in proceedings in the trial court, where the appellant presents evidence to rebut such a presumption, this Court will not turn a deaf ear to that evidence.” *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616 (1998) (internal quotations omitted) (citation omitted). While it is the appellant’s responsibility to make sure the record on appeal is complete:

where the appellant has done all that she can to do so, but those efforts fail because of some error on the part of our trial courts, it would be inequitable to simply conclude that the mere absence of the recordings indicates the failure of appellant to fulfill that responsibility.

Id. (stating it was error for trial court to fail to record proceedings, but concluding defendant failed to show prejudice).

In this case, portions of the testimony and the hearing are not available because tapes were changed in the middle of testimony as well as the malfunctioning of recording equipment and the trial court’s microphone. Evidence was lost briefly during the changing of tapes on four occasions. The first of these instances was during the cross-examination of Hugh Mann, a certified substance abuse counselor and therapist, who testified about his therapy sessions with respondent and having referred her for psychiatric and psychological evaluations as well as vocational rehabilitation. He also testified to respondent’s substance abuse. Mann further testified that respondent did not return for therapy after two visits and he had not heard from her since 6 April 1999. On cross-examination, respondent asked Mann:

Q. Do you know whether or not [respondent] moved out of Stokes County during—sometime after April—

(Tape ends mid sentence and begins mid sentence)

A. —hearsay.

Q. And you know that she was living in—she lived in Thomasville for [awhile]?

A. I didn’t know Thomasville. I had heard that she had gone to West Virginia for [awhile].

The remaining three instances took place during the recall testimony of Marsha Marshall, a social worker with DSS. Marshall testi-

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fied about the altercation leading to the removal of the juvenile, the initial neglect adjudication, and respondent's failure to make reasonable progress to regain custody of the juvenile following the neglect proceeding. On direct examination, Marshall testified about notes taken from visitations between respondent and the juvenile:

- A. (continuing) She noted on this date that [respondent] did not know how to set limits or discipline [the juvenile]. On August—(Tape ends mid sentence and begins mid sentence)—[respondent] sent clothes too small for [the juvenile].

On cross-examination Marshall was asked:

- Q. So there were actually seventeen [visits]—I mean fifteen of them that were missed but—(Tape ends mid sentence and begins mid sentence)—the reason for it?
- A. Yes.
- Q. Now what reasons were given for the fifteen that were missed?
- A. Do you want dates and reasons or just the various reasons given?

Later on cross-examination of Marshall, the tape was changed during a dialogue between the trial court and respondent's counsel, during which documents were handed up to the trial court but no testimony appears to have been lost. Thus, from our thorough review of the six volume transcript, covering over 600 pages of testimony, it appears the interruption in testimony due to changing of tapes was very brief.

The incident of most concern is the malfunctioning of the recording equipment and the trial court's microphone that occurred during the cross-examination of respondent. Her cross-examination testimony appears to end abruptly with the malfunctioning of the equipment, and the transcript does not continue until the next witness is called. There is nothing in the transcript, or elsewhere in the record on appeal, however, that divulges how much testimony was lost or the amount of time the equipment was malfunctioning.⁴

4. There are also instances where the transcript indicates that parts of statements are "inaudible." There is no indication, however, that this is a result of the recording equipment malfunctioning.

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Notwithstanding, respondent has made no attempt to use Rule 9(c)(1) of the rules of appellate procedure to provide a narration of the evidence in order to “reflect the true sense of the evidence received” to the extent the record does not do so. N.C.R. App. P. 9(c)(1). Furthermore, although respondent has generally asserted that the failure to record all of the testimony over the six different dates was prejudicial, she points to nothing specific in the record to support her argument. *See Peirce*, 53 N.C. App. at 382, 281 S.E.2d at 204. In addition, the record and transcript do not disclose the exact amount of testimony lost or the amount of time during which the recording equipment malfunctioned, although it appears that very little of the testimony was not recorded, and the interruptions were only very brief. Moreover, the trial court’s extensive findings indicate a careful evaluation of all of the evidence.⁵ Our review of the record, without the benefit of a narration of the missing evidence, fails to show any prejudice to respondent from the missing testimony. Thus, we reject respondent’s argument on this assignment of error.

III

[3] Respondent finally contends that the trial court abused its discretion by concluding grounds existed to terminate respondent’s parental rights over the juvenile. An order terminating parental rights will be upheld if there is clear, cogent, and convincing evidence to support the findings of fact and those findings of fact support the trial court’s conclusions of law. *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996).

In the case *sub judice*, the trial court concluded grounds existed to terminate respondent’s parental rights under section 7B-1111(a)(2). Section 7B-1111(a)(2) provides that parental rights may be terminated upon a finding that “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). Willfulness under this section is less than willful abandonment, and does not require a finding of fault.

5. Although respondent does assign error to the trial court’s ultimate findings of fact on the grounds supporting termination of parental rights, she does not assign error to the extensive evidentiary findings. To the extent those findings have not been assigned error they are deemed supported by sufficient evidence and are treated as conclusive on appeal. *See In re Caldwell*, 75 N.C. App. 299, 301, 330 S.E.2d 513, 515 (1985).

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Oghenekevebe, 123 N.C. App. at 439, 473 S.E.2d at 398. Willfulness may be found where even though a parent has made some attempt to regain custody of the child, the parent has failed to show "reasonable progress or a positive response to the diligent efforts of DSS." *Id.* at 440, 473 S.E.2d at 398.

In this case, it is undisputed that the juvenile was left in foster care or placement outside the home for more than twelve months. Respondent contends only that the juvenile was not willfully left in foster care. The record shows that DSS made diligent efforts through implementation of service agreements and holding permanency planning meetings to assist respondent in reuniting with her child. Respondent, however, repeatedly failed to comply with the service agreements, failed to appear at the permanency planning meetings, and often missed visitations with her child. Further, although respondent had apparently finally obtained stable housing, the interior of the home as well as the front yard area was observed to have been littered with alcoholic beverage containers and there was at least one incident of underage drinking. This constitutes clear, cogent, and convincing evidence that respondent has failed to show reasonable progress or a positive response to the diligent efforts of DSS. *See id.* at 440, 473 S.E.2d at 398 (finding of willfulness not precluded just because parent has made some efforts to regain custody). Thus, there is sufficient evidence upon which to base a finding that respondent willfully left the juvenile in foster care or placement outside the home, and this finding in turn supports the trial court's conclusion that grounds existed to terminate respondent's parental rights. As previously indicated, where we determine the trial court properly concluded that one ground exists to support the termination of parental rights, we need not address the remaining grounds. *See Greene*, 152 N.C. App. at 416, 568 S.E.2d at 638. Accordingly, the trial court did not err in terminating respondent's parental rights.

Affirmed.

Judges McGEE and GEER concur.

IN RE UNIV. FOR THE STUDY OF HUMAN GOODNESS & CREATIVE GRP. WORK

[159 N.C. App. 85 (2003)]

IN THE MATTER OF: THE UNIVERSITY FOR THE STUDY OF HUMAN GOODNESS
AND CREATIVE GROUP WORK

No. COA02-831

(Filed 15 July 2003)

**Taxation— ad valorem—nonprofit corporation—restaurant
operation—educational exemption**

The Property Tax Commission did not err by concluding that taxpayer nonprofit corporation's operation of a restaurant was not a use that qualified as an educational purpose and therefore was not exempt from ad valorem taxation pursuant to N.C.G.S. § 105-278.4, because: (1) there was substantial evidence to support the Commission's findings and conclusions that the restaurant is not of a kind commonly employed in or naturally and properly incident to the operation of an educational institution; and (2) the property was not held wholly and exclusively for educational purposes on the date of taxpayer's application for exemption since the students were not pursuing a restaurant-related degree while working at the restaurant and taxpayer was not teaching construction even though the students were renovating the restaurant building.

Appeal by taxpayer from final decision dated 16 January 2002 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 20 February 2003.

W. Thomas White for taxpayer-appellant.

Office of Forsyth County Attorney, by Assistant County Attorney B. Gordon Watkins, III, for Forsyth County-appellee.

McGEE, Judge.

The University for the Study of Human Goodness and Creative Group Work (taxpayer) filed an application for property tax exemption for the year 2000 with the Forsyth County Tax Office dated 17 May 2000. The Forsyth County Board of Equalization and Review (the Board) denied taxpayer's application on 21 September 2000. Taxpayer gave notice of appeal to the North Carolina Property Tax Commission (the Commission) in a letter dated 30 September 2000.

Evidence before the Commission tended to show that taxpayer is a North Carolina nonprofit corporation with a Section 501(c)(3) fed-

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eral income tax exemption. Susan Baggett (Ms. Baggett), a faculty member and vice president of taxpayer, testified that taxpayer was established as an educational institution focusing on community service and group work. Taxpayer has a three-member teaching group and provides learning opportunities in entrepreneurship, group work, and communication to its students. Taxpayer has course offerings consisting of four curriculum tracks. Full-time students receive free room, board, and tuition and receive a certificate upon completion of taxpayer's one year program. Taxpayer's program is not accredited by any other organization.

On 1 January 2000, taxpayer owned property known as the "California Fresh Buffet" (the restaurant) at Peters Creek Parkway, Winston-Salem, North Carolina. The restaurant was not open for business on 1 January 2000 but did open on 21 February 2000. During the year 1999, students and faculty spent 15,098 hours of unpaid time renovating the property for use as a restaurant and learning laboratory. The renovations were used as a teaching experience and students were assigned entrepreneurial tasks that related to their class discussions. Taxpayer hired contractors to conduct renovations for which the volunteers lacked the requisite skills to complete, such as plumbing, heating, and roofing.

Taxpayer intended to use the restaurant as a learning environment "for people to assimilate what they are learning in theory and be able to practice that effectively when they go out." The objective was for students to work in an environment where people had to deal with issues of "leadership, communication, time management, [and] money management, every single day." Ms. Baggett testified that the restaurant would not exist if it were not for taxpayer's educational purposes.

Ms. Baggett testified that taxpayer did not anticipate making a profit and that no one involved with the restaurant had experience in the restaurant business prior to its opening. However, during 2000, the restaurant had excess revenues of approximately \$200,000 after depreciation. Excess revenues that were generated were contributed to various charities and used to pay taxpayer's internal debt on the building. Taxpayer holds the restaurant out to the public as a learning laboratory and does not pay for restaurant advertising.

William A. Rodda (Mr. Rodda), a Forsyth County collector and assessor, was stipulated as an expert in tax collection and assessment and testified for Forsyth County. It was Mr. Rodda's expert opinion

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that the operation of a restaurant was not a use that was eligible for tax exemption because it was not an activity incidental to an educational institution and the restaurant was located on “restaurant row” rather than taxpayer’s campus. Mr. Rodda also stated that he believed that the restaurant was being operated predominantly as a business and that there was a material amount of “business and patronage with the general public.” He stated that he did not believe the property was used wholly and exclusively for educational purposes by taxpayer and believed any educational activity was incidental.

Dr.Carolynn Blount Berry (Dr. Berry) was accepted as an expert in the field of education and accreditation and also testified for Forsyth County. In Dr. Berry’s opinion, the restaurant was not part of an educational institution and there was no evidence of curriculum, learning outcomes, or measurement of outcomes. She stated that working forty-five hours a week at a restaurant was not educational when students were not pursuing a degree related to restaurants. Dr. Berry also testified that the characteristics of an educational institution included: formal curriculum that supports defined and assessable student learning outcomes, recognized degrees, qualified faculty, and recognition by peer institutions. She also opined that taxpayer was not using the building wholly and exclusively for educational purposes. Dr. Berry stated that she did not believe leasing or renovating property was educational in nature and saw no evidence that taxpayer was teaching construction. She also testified that experiential education was important and widely used in her educational experience.

After hearing evidence, the Commission made findings of fact that included the following:

8. The operation of a restaurant is not a use that qualifies under the statutes of North Carolina as an educational purpose.
9. The Taxpayer, University for the Study of Human Goodness and Creative Group Work did not show that the subject property is wholly and exclusively used for an educational purpose.

The Commission’s conclusions of law included:

4. The subject property is used by the Taxpayer as a restaurant that serves the general public. As such, the Taxpayer has not shown that subject property meets the statutory requirement of being wholly and exclusively used for an educational purpose.

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5. The Taxpayer has failed to prove that its use of the subject property in question was wholly and exclusively for an educational purpose.
6. The subject property, the California Fresh Buffet, is not of a kind commonly employed in or naturally and properly incident to the operation of an educational institution.
7. The subject property is not used for an educational purpose and is not entitled to exemption pursuant to G.S. 105-278.4.
8. The Taxpayer's exemption requests for the subject property must be denied under the North Carolina General Statutes.

The Commission affirmed the Board's decision denying the exemption in an order dated 16 January 2002. Taxpayer appeals.

The standard of review of decisions of the Commission is governed by N.C. Gen. Stat. § 105-345.2 (2001). This Court is responsible for reviewing the "whole record" to determine if the Commission's findings, inferences, conclusions, 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.
- (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

N.C.G.S. § 105-345.2(b)-(c). The whole record test requires the reviewing court to determine whether the Commission's decision is supported by substantial evidence. We will review all questions of law *de novo*, *In re Appeal of Parsons*, 123 N.C. App. 32, 38-39, 472 S.E.2d 182, 187 (1996), and apply the whole record test where the evidence is conflicting to determine if the Commission's decision has any rational basis, *In re Southview Presbyterian Church*, 62 N.C.

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App. 45, 47, 302 S.E.2d 298, 299, *disc. review denied*, 309 N.C. 820, 310 S.E.2d 354 (1983).

The “whole record” test does not permit the appellate court to substitute its judgment for that of the agency when two reasonable conflicting results could be reached, but it does require the court, in determining the substantiality of evidence supporting the agency’s decision, to take into account evidence contradictory to the evidence on which the agency decision relies.

Id. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). If the whole record supports the Commission’s findings, the decision of the Commission must be upheld. *In re Appeal of Southeastern Bapt. Theol. Seminary, Inc.*, 135 N.C. App. 247, 254, 520 S.E.2d 302, 307 (1999).

Taxpayer argues that the Commission erred in concluding that the restaurant was not of the kind commonly employed or incidental to the operation of an educational institution. Taxpayer also argues the Commission erred in concluding that the property was not used wholly and exclusively for an educational purpose and therefore was not exempt from ad valorem taxation. We disagree and affirm the decision of the Commission for the reasons stated herein.

Taxpayer argues it is entitled to an educational exemption, pursuant to N.C. Gen. Stat. § 105-278.4 (2001), which states:

- (a) Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if:
 - (1) Owned by an educational institution (including a university, college, school, seminary, academy, industrial school, public library, museum, and similar institution);
 - (2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner’s operations except reasonable compensation for services;
 - (3) Of a kind commonly employed in the performance of those activities naturally and properly incident to

the operation of an educational institution such as the owner; and

- (4) Wholly and exclusively used for educational purposes by the owner

The burden of establishing entitlement to a property tax exemption is on the taxpayer. N.C. Gen. Stat. § 105-282.1(a) (2001). The Commission found as a fact and concluded that taxpayer had failed to prove that its use of the restaurant property was wholly and exclusively for an educational purpose. After a review of the whole record, we agree that the record contains substantial evidence supporting the Commission's findings and conclusions that the restaurant is "not of a kind commonly employed in or naturally and properly incidental to the operation of an educational institution."

The evidence showed that taxpayer purchased the restaurant property for use as a learning laboratory and that students volunteered in renovating the premises for use as a restaurant. Mr. Rodda offered expert testimony that the operation of a restaurant was not an activity incidental to an educational institution. He noted that the restaurant was located on "restaurant row" in Winston-Salem rather than taxpayer's campus. Dr. Berry also offered expert testimony that there was no evidence of curriculum, learning outcomes, measurement of outcomes, or other characteristics generally attributable to an educational institution. She also stated that working forty-five hours a week at a restaurant was not educational when students were not pursuing a degree related to restaurants or the food industry. We do not believe the uniqueness of the property or taxpayer's educational focus means the property was of the type commonly used or incidental to the operation of an educational institution. We hold that the property was not used in a manner that was naturally and properly incidental to the operation of an educational purpose.

We also conclude that the record contains evidence supporting the Commission's finding and conclusion that the property was not used "wholly and exclusively for an educational purpose." N.C. Gen. Stat. § 105-278.4(f) defines educational purpose as one that "has as its objective the education or instruction of human beings; it comprehends the transmission of information and the training or development of the knowledge or skills of individual persons." Our Courts have stated that "it is not the nature or the character of the owning entity which ultimately determines whether property shall be exempt from taxation, but it is the use to which the property is dedicated

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which controls.’” *In re Appeal of Atlantic Coast Conference*, 112 N.C. App. 1, 9-10, 434 S.E.2d 865, 870 (1993) (quoting *In re Forsyth County Tax Supervisors*, 51 N.C. App. 516, 520, 277 S.E.2d 91, 94, *disc. review denied*, 303 N.C. 544, 281 S.E.2d 391 (1981)), *aff’d*, 336 N.C. 69, 441 S.E.2d 550 (1994).

There are several cases that assist us in determining the validity of taxpayer’s claim. Our Supreme Court recently held in *In re Appeal of the Maharishi Spiritual Ctr. of Am.*, 357 N.C. 152, 579 S.E.2d 249 (2003), that our Court erred in reversing a Commission’s decision in *In re Appeal of the Maharishi Spiritual Ctr. of Am.*, 152 N.C. App. 269, 569 S.E.2d 3 (2002), that denied an exemption for property owned by a nonprofit organization that offered educational programs in meditation. The property in question was used for related educational programming and meditating. *Id.* at 271-72, 569 S.E.2d at 5. Specifically, the evidence showed that the organization offered “training by self-study, lecture and practical experience” and that “training or development of skills of individuals occurs at the Spiritual Center.” *Id.* at 280, 569 S.E.2d at 10. Testimony in the case also showed that students were given less guidance than in classes at other universities because of the focus on experiential learning. *Id.* at 281, 569 S.E.2d at 10.

In adopting Judge Tyson’s dissent, the Supreme Court reaffirmed our standard of review and agreed that the Court of Appeals misapplied the standard of review which binds this Court to the Commission’s findings and conclusions when supported by substantive evidence, even though there was evidence that would have supported a finding to the contrary. *Id.* at 285, 569 S.E.2d at 12. In concluding that substantive evidence existed in the record to support the Commission’s findings, the dissent cited the expert testimony, which stated that the Spiritual Center was not an educational institution and that the practice of meditation eight hours a day did not constitute a learning activity. *Id.* at 285-86, 569 S.E.2d at 12. The center offered some educational activity; however, the primary purpose of the center was not educational. While there was conflicting evidence in the record, this testimony was sufficient to support the Commission’s finding that the property was not used “wholly and exclusively” for educational purposes. *Id.* at 286, 569 S.E.2d at 13. Accordingly, this Court was bound by the evidence and the Supreme Court reversed this Court’s decision, holding that the taxpayer was not entitled to a property tax exemption.

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Forsyth County points us to *In re Forestry Foundation*, 296 N.C. 330, 250 S.E.2d 236 (1979), in support of its decision to deny the exemption. In *Forestry Foundation*, a nonprofit organization owned a forest for the purposes of forestry research, education, and the production and preservation of timber. The Supreme Court held that the property was not held wholly and exclusively for an educational purpose because a paper company occupied the property, utilized it for commercial purposes, and maintained operational control over the forest. *Id.* at 338-39, 250 S.E.2d at 241-42. The Supreme Court reasoned that the commercial use of the property by a party other than the nonprofit organization made the educational use merely incidental to the commercial use. *Id.* Accordingly, the Court denied an exemption.

In *In re Appeal of Chapel Hill Day Care Ctr., Inc.*, 144 N.C. App. 649, 551 S.E.2d 172 (2001), *disc. review denied*, 355 N.C. 492, 563 S.E.2d 564 (2002), our Court held that a day care center that offered educational programming to pre-school children was not a traditional school and not “wholly and exclusively” used for educational purposes. In reaching our decision, our Court noted that the evidence showed the center did not maintain regular school hours, assign homework, or issue report cards. *Id.* at 658, 551 S.E.2d at 178. The evidence also contained testimony that stated the center’s teachers were child care providers and that the care provided was custodial in nature. *Id.* at 657-58, 551 S.E.2d at 177-78. Our Court held that the Commission’s denial of an exemption was not arbitrary and capricious because the Commission’s findings of fact and conclusions of law were supported by competent evidence in denying an exemption. *Id.* at 658, 551 S.E.2d at 178.

We find these cases controlling and agree with the Commission’s determination that the property was not held wholly and exclusively for educational purposes on the date of taxpayer’s application for exemption. In the case before us, Mr. Rodda offered expert testimony that the restaurant was being operated predominantly as a business and that there was a material amount of business and patronage with the general public. Mr. Rodda stated that taxpayer was not using the property wholly and exclusively for educational purposes and believed any educational activity occurring on the property was incidental. Additionally, Dr. Berry offered expert opinion that taxpayer was not using the building wholly and exclusively for educational purposes. Dr. Berry stated that taxpayer lacked many of the characteristics typical of an educational institution and university. She also

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stated that working at a restaurant was not educational in nature when students were not pursuing a restaurant-related degree and that renovating a building was not educational when taxpayer was not teaching construction.

This evidence is sufficient to support the Commission's findings and conclusions that the property was not used wholly and exclusively for educational purposes. Accordingly, we are bound by the Commission's finding of fact and conclusion of law even though there is evidence that would have supported a contrary result. *Maharishi*, 152 N.C. App. at 285, 569 S.E.2d at 12. We hold that the property was not used wholly and exclusively for an educational purpose by taxpayer.

After reviewing the whole record, we hold that there was substantial evidence supporting the Commission's order denying an exemption to taxpayer. We affirm the decision of the Commission.

Affirmed.

Judges HUDSON and STEELMAN concur.

OLD SALEM FOREIGN CAR SERVICE, INC., PLAINTIFF v. ANTHONY WEBB AND
WINSTON-SALEM CITY EMPLOYEES' CREDIT UNION, DEFENDANTS

No. COA02-630

(Filed 15 July 2003)

1. Judgments— entry of default—motion to set aside—good cause not shown

The trial court did not err by denying a defendant's motion to set aside an entry of default arising from the repossession of an automobile where defendant did not present grounds constituting good cause.

2. Unfair Trade Practices— mechanic's lien—removal of auto from mechanic's lot—not unfair trade practice

Plaintiff auto repair business was not entitled to recover treble damages from defendant credit union for an unfair trade practice based upon its allegations that defendant removed an auto from plaintiff's premises without permission or notice to

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plaintiff after defendant had notice of plaintiff's mechanic's lien on the automobile. Defendant's removal of the auto did not affect plaintiff's lien thereon, and plaintiff suffered no actual injury as a result of any deceptive or unfair act by defendant.

3. Liens— auto removed from mechanic's lot—no direct remedy from fellow lienholder

The trial court erred by awarding actual damages to an automobile repair business for the removal from its premises of a car on which it had a lien. Plaintiff is entitled to recover its costs if and when the automobile is sold, but has no basis upon which to recover the amount of lien directly from defendant, a fellow lienholder. The appropriate remedy for plaintiff lies with N.C.G.S. § 44A-6.1, which sets forth a process by which a lienor who involuntarily relinquishes possession of an automobile may regain possession of that vehicle. Once returned, plaintiff may sell the automobile to recover its interest in the property.

Appeal by defendant Winston-Salem City Employees' Credit Union from order and judgment entered 12 February 2002, *nunc pro tunc* 6 February 2002, by Judge Roland H. Hayes in Forsyth County District Court. Heard in the Court of Appeals 12 March 2003.

Rosbon D. B. Whedbee for plaintiff appellee.

Fisher, Clinard & Cornwell, PLLC, by Robert A. Lefkowitz, for defendant appellant Winston-Salem City Employees' Credit Union.

TIMMONS-GOODSON, Judge.

Winston-Salem City Employees' Credit Union ("defendant") appeals from an order of the trial court denying defendant's motion seeking relief from entry of default, as well as from default judgment entered against it. For the reasons stated hereafter, we reverse in part the judgment of the trial court.

On 1 October 2001, Old Salem Foreign Car Service, Inc. ("plaintiff") filed a complaint against Anthony Webb ("Webb") and defendant in Forsyth County District Court. In its complaint, plaintiff alleged that it was an automobile repair business with its principal office located in Winston-Salem, North Carolina. The complaint further alleged the following: On or about 14 June 2000, Webb delivered a 1992 Datsun 300ZX automobile to plaintiff's premises and requested

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an estimate of the costs of needed repairs for the automobile. In order to estimate the costs of repair, employees of plaintiff disassembled parts of the automobile and thereafter informed Webb that the costs for repair would be approximately \$2,600.00. Webb agreed to pay for the diagnostic expenses incurred by plaintiff, but did not authorize the repair. Webb thereafter discontinued his communication with plaintiff, failing to respond to plaintiff's repeated attempts to contact him. The automobile remained in plaintiff's possession and Webb neither retrieved it nor paid for plaintiff's diagnostic and other expenses.

On the afternoon of 12 September 2001, Jim Pegram ("Pegram"), president and chief operating officer of plaintiff corporation, telephoned the office of defendant, which possessed a financing lien on Webb's automobile. Pegram spoke with Anita Kimber-Crawford ("Kimber-Crawford"), an officer of defendant, and notified her that plaintiff was asserting a lien against the automobile pursuant to Chapter 44A of the North Carolina General Statutes. Pegram informed Kimber-Crawford that defendant could obtain possession of the automobile upon payment of the lien.

At approximately 1:30 a.m. on 13 September 2001, defendant removed the automobile from the plaintiff's premises without notifying plaintiff of its actions. Upon discovering defendant's actions, Pegram contacted Sam Whitehurst ("Whitehurst"), manager of defendant institution, and demanded payment of plaintiff's asserted lien on the automobile. Defendant did not respond to plaintiff's requests for payment of the lien.

Based on the above-stated allegations, plaintiff requested in its complaint that the trial court order defendant to either return the automobile or reimburse plaintiff in the amount of the asserted lien. Plaintiff further asserted that defendant's actions constituted unfair and deceptive trade practices and requested treble damages and attorneys' fees. Defendant was properly served with a summons and a copy of plaintiff's complaint on 24 October 2001.

On 28 December 2001, entry of default was entered against Webb and defendant for failure to respond to plaintiff's complaint. On 23 January 2002, plaintiff filed a motion for default judgment against Webb and defendant, which motion came before the trial court on 4 February 2002. Webb did not appear at the hearing for default judgment. Kimber-Crawford was present on behalf of defendant, but was unrepresented by counsel at the time of calendar call. By the time the

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case was called to hearing, however, defendant had obtained counsel. During the hearing, counsel for defendant submitted a handwritten motion entitled “Motion Under Rule 60 + 59 + 55(d) for Relief from Default Entry.” The motion set forth no grounds supporting relief from entry of default, however, and the trial court entered an order denying defendant’s motion.

Upon hearing the evidence at the default judgment hearing, including testimony by Pegram and Kimber-Crawford, the trial court made the following pertinent findings:

1. The additional Defendant, through newly retained counsel, Attorney Lefkowitz, moved the Court to continue the instant hearing on the grounds that he was just retained by the Additional Defendant’s officer, Ms. Anita Kimber-Crawford (during the lunch break on February 4th, 2002), and had inadequate time to prepare for the instant hearing;

2. Additional Defendant’s officer testified that she was the officer of her employer who was responsible for collections and legal matters; that she had received Plaintiff’s calendar request and notice of hearing; that her Company normally “did the suing” and had never been sued before to her knowledge, and that she did not know what would be happening at the instant hearing, but that she had not contacted counsel relative to representation . . . in this cause until the lunch recess just prior to the call of the instant case at 2:00 p.m. on February 4, 2002; she further testified that she had first learned about this civil action shortly after service when her boss handed her the papers that the Sheriff brought and served, and told her “to take care of this.”

3. The factual allegations of the Complaint are incorporated herein by reference;

. . . .

12. Plaintiff has provided notice to the North Carolina Division of Motor Vehicles that a mechanic’s lien is asserted against the subject vehicle, and that an enforcement sale of the subject vehicle is proposed;

13. The Additional Defendant presently has the subject 1992 Datsun automobile in its possession or under its control; and that the Plaintiff presently has possession of the subject automobile’s hood, motor, engine assembly, and transmission, which parts had

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been removed from the automobile and were inside of Plaintiff's garage facility at the time the automobile was removed from Plaintiff's premises on September 13th, 2001[.]

The trial court thereafter concluded that defendant had failed to show a meritorious defense to plaintiff's claims, and had committed unfair and deceptive trade practices. The trial court therefore entered judgment in favor of plaintiff and against defendant in the amount of \$11,274.24, the sum of plaintiff's actual damages trebled. From the order of the trial court denying its motion to set aside the entry of default and from the default judgment entered against it, defendant appeals.

[1] Defendant argues that the trial court erred in denying its motion for relief from entry of default, and in awarding plaintiff actual and treble damages pursuant to Chapter 75 of the North Carolina General Statutes. Although we affirm the order of the trial court denying defendant's motion for relief from entry of default, we conclude that plaintiff was not entitled to recover actual or treble damages from defendant, and we therefore reverse in part the default judgment entered against defendant.

Defendant contends the trial court erred in denying its motion to set aside the entry of default. "For good cause shown the court may set aside an entry of default . . ." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2001). A motion pursuant to this rule to set aside an entry of default is addressed to the sound discretion of the court. *See Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc.*, 140 N.C. App. 521, 528, 537 S.E.2d 227, 232 (2000); *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 108, 264 S.E.2d 395, 397 (1980). "In moving for relief of judgment pursuant to Rule 55(d), the burden is on the defendant, as the defaulting party, not to refute the allegations of plaintiff's complaint, nor to show the existence of factual issues as in summary judgment, but to show *good cause* why he should be allowed to file answer to plaintiff's complaint." *Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980). Whether "good cause" exists depends on the facts and circumstances of each particular case, and the trial court's determination will not be disturbed on appeal unless a clear abuse of discretion is shown. *See Byrd v. Mortenson*, 60 N.C. App. 85, 88, 298 S.E.2d 170, 172 (1982), *affirmed and modified in part*, 308 N.C. 536, 302 S.E.2d 809 (1983).

In *Britt*, the evidence tended to show that the legal department of the defendant corporation misplaced the lawsuit documents and did

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not locate them until the day entry of default was made. The trial court determined that defendant failed to show “good cause” to set aside entry of default, and this Court found no abuse of discretion by the trial court. *See Britt*, 46 N.C. App. at 108-09, 264 S.E.2d at 397. In the present case, defendant advanced no grounds constituting good cause. The evidence tended to show that defendant was properly served with the summons and complaint, but failed to respond. Defendant’s officer, Kimber-Crawford, acknowledged receipt of the documents, but explained that defendant normally “did the suing.” Kimber-Crawford offered no other explanation for defendant’s failure to respond to plaintiff’s summons and complaint. As such, we discern no abuse of discretion by the trial court in denying defendant’s motion to set aside entry of default. *See First Citizens Bank & Tr. Co. v. Cannon*, 138 N.C. App. 153, 157-58, 530 S.E.2d 581, 583-84 (2000); *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 375, 432 S.E.2d 394, 398-99 (1993).

[2] Once default is established, a defendant has no further standing to contest the factual allegations of plaintiff’s claim for relief. *See Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991); *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 509-10, 181 S.E.2d 794, 798 (1971). A defendant may still demonstrate, however, that the complaint is insufficient to warrant the plaintiff’s recovery. *See Hunter v. Spaulding*, 97 N.C. App. 372, 377, 388 S.E.2d 630, 634 (1990). Defendant argues that, even if the allegations contained in plaintiff’s complaint are accepted as fully established, they nevertheless fail to state a claim for unfair and deceptive trade practices. Specifically, defendant contends that the complaint fails to establish that plaintiff suffered an injury arising from an allegedly deceptive act by defendant. On this point, we agree with defendant.

Under section 44A-2 of the North Carolina General Statutes,

[a]ny person who repairs, services, tows, or stores motor vehicles in the ordinary course of the person’s business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle, except for a motor vehicle seized pursuant to G.S. 20-28.3, has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, storing, or for the rental of one or more substitute vehicles provided during the repair, servicing, or storage. This lien shall have priority over perfected and unperfected security interests. Payment for towing and storing a motor vehicle seized pursuant to G.S. 20-28.3 shall be as provided for in G.S. 20-28.2 through G.S. 20-28.5.

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N.C. Gen. Stat. § 44A-2(d) (2001). According to the allegations contained in the complaint, plaintiff provided services and incurred expenses pursuant to a verbal agreement with Webb regarding his automobile. The automobile remained on plaintiff's property for approximately four months, during which time Webb failed to respond to plaintiff's repeated attempts to contact him. Under section 44A-2(d), plaintiff could properly assert a motor vehicle lien on Webb's automobile. This lien had priority over defendant's security interest in the automobile. *See id.* Further, plaintiff's lien was not extinguished by defendant's removal of the automobile from plaintiff's premises. *See* N.C. Gen. Stat. § 44A-3 (2001) (stating that "[l]iens conferred under this Article do not terminate when the lienor involuntarily relinquishes the possession of the property."); *Case v. Miller*, 68 N.C. App. 729, 732, 315 S.E.2d 737, 739 (1984).

Plaintiff's complaint further alleged that defendant committed an unfair and deceptive act in violation of Chapter 75 by removing the automobile from plaintiff's premises without permission or notice to plaintiff, after defendant had actual notice of plaintiff's lien. *See* N.C. Gen. Stat. § 75-1.1 (2001) (declaring unlawful unfair or deceptive acts or practices in or affecting commerce). A practice is unfair and violates Chapter 75 if it offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *See Bailey v. LeBeau*, 79 N.C. App. 345, 352, 339 S.E.2d 460, 464, *modified and affirmed*, 318 N.C. 411, 348 S.E.2d 524 (1986). As an essential element of a cause of action for unfair and deceptive trade practices, the plaintiff must not only show that the defendant violated Chapter 75, but also demonstrate that he has suffered actual injury as a proximate result of the defendant's misrepresentations. *See Anders v. Hyundai Motor America Corp.*, 104 N.C. App. 61, 68, 407 S.E.2d 618, 622, *disc. rev. denied*, 330 N.C. 440, 412 S.E.2d 69 (1991).

In its complaint, plaintiff established that its actual damages, as well as its consequential damages, arose over Webb's failure to reimburse plaintiff for expenses it incurred in connection with the automobile. These damages formed the basis for plaintiff's lien upon the automobile, and defendant may no longer dispute the amount of the asserted lien. *See* N.C. Gen. Stat. § 44A-4 (2001); *Peace River Electric Cooperative v. Ward Transformer Co.*, 116 N.C. App. 493, 502, 449 S.E.2d 202, 209 (1994), *disc. review denied*, 339 N.C. 739, 454 S.E.2d 655 (1995). Plaintiff has not shown, however, that it suffered an actual injury as a result of any deceptive or unfair act by defendant.

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Plaintiff's basis for an action pursuant to Chapter 75 rests on one act by defendant; namely, defendant's act of removing the vehicle from plaintiff's premises without permission or notice to plaintiff, after defendant had actual notice of plaintiff's lien. Plaintiff's claim of injury arose before defendant removed the automobile, however, and this removal did not affect plaintiff's lien on the property. As there was no causal connection between plaintiff's injury and any act by defendant, plaintiff is not entitled to treble damages under Chapter 75. See *Mitchell v. Linville*, 148 N.C. App. 71, 79, 557 S.E.2d 620, 625-26 (2001) (concluding that, where the plaintiffs failed to show that the deceptive acts by the defendants adversely impacted the plaintiffs, the trial court erred in awarding plaintiffs damages pursuant to Chapter 75); *Miller v. Ensley*, 88 N.C. App. 686, 691, 365 S.E.2d 11, 14 (1988) (concluding that, where the plaintiff-subcontractor was able to fully protect his rights by a lien claim under Chapter 44A, "the harm caused by [the defendant's] deception was, at most, theoretical, and not actual" and thus the trial court erred in awarding treble damages pursuant to Chapter 75). The trial court therefore erred in awarding plaintiff treble damages pursuant to Chapter 75, and we reverse that portion of the default judgment awarding plaintiff treble damages.

[3] Defendant further argues that the trial court erred in awarding actual damages to plaintiff against defendant. Defendant contends that plaintiff's recovery from defendant is limited to recovery of the automobile. Again, we agree with defendant.

Both plaintiff and defendant have protected interests in the automobile. Under section 44A-2(d), plaintiff's lien has priority over defendant's interest in the automobile. Thus, if and when the automobile is sold to satisfy the interests of plaintiff and defendant in the property, regardless of which party has physical possession, plaintiff is entitled to recover its costs in the amount of the lien before defendant may do so. Plaintiff has no basis, however, upon which to recover the amount of the lien directly from defendant, a fellow lienholder. At the time of the default hearing, defendant had not yet sold the automobile to recover its security interest. Nor is it inevitable that the automobile will actually be sold. It is possible that Webb, as owner of the automobile, may yet take appropriate action to recover his property. Further, if the automobile is sold, there is no guarantee that the sale of the automobile will fully compensate plaintiff for the amount of its lien. When it agreed to perform services for Webb, plaintiff took a calculated business risk that it would be compensated for its

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services. Defendant took a similar risk when it agreed to finance the automobile. To permit plaintiff to proceed directly against defendant for the amount of its lien, without any cause of action against defendant and before sale of the automobile, would unfairly and prematurely allow plaintiff to fully recoup its interest in the automobile—in effect, guaranteeing plaintiff's interest where no guarantee is warranted.

The appropriate remedy for plaintiff's loss of possession of the automobile lies with section 44A-6.1 of the North Carolina General Statutes. Section 44A-6.1 sets forth a process by which a lienor who involuntarily relinquishes possession of an automobile may regain possession of that vehicle. Section 44A-6.1 provides as follows:

(a) When the lienor involuntarily relinquishes possession of the property and the property upon which the lien is claimed is a motor vehicle or vessel, the lienor may institute an action to regain possession of the motor vehicle or vessel in small claims court any time following the lienor's involuntary loss of possession and following maturity of the obligation to pay charges. The lienor shall serve a copy of the summons and the complaint pursuant to G.S. 1A-1, Rule 4, on each secured party claiming an interest in the vehicle or vessel. For purposes of this section, involuntary relinquishment of possession includes only those situations where the owner or other party takes possession of the motor vehicle or vessel without the lienor's permission or without judicial process. If in the court action the owner or other party retains possession of the motor vehicle or vessel, the owner or other party shall pay the amount of the lien asserted as bond into the clerk of the court in which the action is pending.

If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, neither the defendant nor a secured party claiming an interest in the vehicle or vessel files a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond which is not in dispute, upon application of the lienor. The magistrate shall:

(1) Direct appropriate disbursement of the disputed or undisputed portion of the bond; and

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(2) Direct appropriate possession of the motor vehicle or vessel if, in the judgment of the court, the plaintiff has a valid right to a lien.

N.C. Gen. Stat. § 44A-6.1(a) (2001). Plaintiff involuntarily relinquished possession of the automobile and is entitled to its return under section 44A-6.1. Once returned, plaintiff may sell the automobile, pursuant to section 44A-4, to recover its interest in the property. The statute provides no basis for a monetary recovery from a fellow lienholder, nor does the default judgment set forth grounds supporting any independent cause of action against defendant that would entitle plaintiff to actual damages from defendant. Because plaintiff has no cause of action against defendant, the trial court erred in awarding actual damages against defendant. We therefore reverse that portion of the default judgment awarding actual damages against defendant. Plaintiff is entitled, however, to recover the automobile from defendant.

In conclusion, we hold that the trial court did not abuse its discretion in denying defendant's motion for relief from entry of default. We further hold that the trial court erred in concluding that plaintiff was entitled to actual and treble damages from defendant, and we therefore reverse that portion of the default judgment awarding such damages. We otherwise affirm the default judgment. The order denying defendant's motion for relief from entry of default is

Affirmed.

The judgment of default is

Affirmed in part, reversed in part, and remanded.

Judges WYNN and LEVINSON concur.

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STATE OF NORTH CAROLINA v. NAEEM MAURICE EZELL, DEFENDANT

No. COA02-448

(Filed 15 July 2003)

1. Appeal and Error— preservation of issues—constitutional issue—raised below but not in exact words

Double jeopardy was raised in the trial court, even though the exact words were not used, where the substance of the argument was sufficiently presented and was addressed by the court.

2. Constitutional Law— double jeopardy—analysis

The double jeopardy analysis in *Blockburger v. United States*, 284 U.S. 299, (proof of a fact not present in each offense) is an aid to determining legislative intent in that it creates a presumption that may be rebutted by a clear indication of legislative intent.

3. Constitutional Law— double jeopardy—assault

A defendant's conviction for both assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32 and assault inflicting serious bodily injury under N.C.G.S. § 14-32.4 violated double jeopardy. N.C.G.S. § 14-32.4 punishes an assault inflicting serious bodily injury as a Class F felony "unless the conduct is covered under some other provision of law providing greater punishment." N.C.G.S. § 14-32 is a Class E felony, which carries a more severe punishment.

Appeal by defendant from judgments entered 14 November 2001 by Judge W. Douglas Albright in Hertford County Superior Court. Heard in the Court of Appeals 29 January 2003.

Attorney General Roy Cooper, by Assistant Attorney General Daniel D. Addison, for the State.

Winifred H. Dillon, for defendant-appellant.

HUDSON, Judge.

Defendant Naeem Maurice Ezell was indicted, convicted, and sentenced for (1) assault with a deadly weapon with intent to kill inflicting serious injury (No. 01 CRS 920) and (2) assault inflicting serious bodily injury (No. 01 CRS 2881), in the same trial and for a single incident. He appealed, contending that his right to be free from

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double jeopardy, guaranteed by the United States and North Carolina constitutions, was violated when he was punished for both offenses. We agree and reverse.

BACKGROUND

The evidence presented at trial tended to show that defendant went to a bar called Chubbie's on March 15, 2001. There he saw Donnita Taylor, his former girlfriend, who had gone to the bar with some co-workers to celebrate a promotion. Defendant and Taylor, who have a child together, went to the parking lot to talk. Defendant asked Taylor to leave with him, but she refused. Defendant then threw a beer bottle at Taylor and walked away.

Taylor had two drinks at the bar and then left around 2 a.m. She arrived home alone around 3 a.m. Defendant came to her home sometime after that. When she opened the door, defendant hit her and knocked her over the back of the couch. He then pulled her to the floor and kicked her. Taylor lost consciousness and, when she came to, was lying on the bed in her son's bedroom. She saw a pail next to the bed that contained vomit and blood. Taylor asked defendant, who was sitting across the room, to summon help. She blacked out again. When she regained consciousness, emergency personnel had arrived.

Ann Revelle, an emergency medical technician with the Hertford County Emergency Medical Service ("EMS"), responded to the call. She found Taylor lying on her side in a fetal position on a bed. Revelle testified that Taylor was in excruciating pain and was vomiting. The EMS transported Taylor to the local hospital, where she underwent surgery to repair a lacerated liver. Dr. Khan, who performed the surgery, testified that Taylor was in a lot of pain and that if the torn liver had not been repaired, Taylor could have bled to death. He also testified that the injury could have caused a build-up of chemical and bile, which could have resulted in life-threatening chemical peritonitis and infection.

At trial, defendant testified that he was living in the home with Taylor on the date of the incident. At about 10 p.m. on March 15, he went to the house, but Taylor was not there. Defendant spoke with Taylor's mother, who informed him that Taylor had gone out with some friends. Defendant went to a house located in front of Chubbie's and found Taylor there, upstairs. She came downstairs to talk to defendant, who asked her to come home. Taylor walked away, and defendant left. Defendant denied throwing a bottle at Taylor.

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Defendant testified that he then drove around until approximately 1:30 a.m. and then returned to Taylor's house. Taylor was not there, nor was she at her mother's house. Finally, about 3:30 a.m., defendant went to the home again. Taylor opened the door when he knocked. She accused defendant of being out all night with another woman, and an argument ensued. Defendant testified that Taylor, who was intoxicated, put her hands in his face, and he pushed them away. Defendant admitted that he pushed Taylor in the course of the argument and that at some point Taylor began to vomit and asked defendant to call a doctor. After some delay, defendant went to the store across the street and called an ambulance. Defendant denied punching or kicking Taylor.

Defendant was indicted in September 2001 for assault with a deadly weapon with intent to kill inflicting serious injury, pursuant to N.C. Gen. Stat. § 14-32(a), and assault inflicting serious bodily injury, pursuant to § 14-32.4. He was also indicted in October 2001 as a habitual felon. At trial, the jury convicted defendant of both assault offenses. Subsequently, the same jury found him to be an habitual felon.

The trial court sentenced defendant to prison for a minimum of 144 months and a maximum of 182 months for the assault with a deadly weapon inflicting serious injury. The court also sentenced defendant to a prison term of 96 months to 125 months for the assault inflicting serious bodily injury, to run consecutively. Defendant now appeals.

ANALYSIS

Defendant argues on appeal that he received multiple punishments for the same offense in violation of constitutional prohibitions against double jeopardy. Specifically, he contends that he was punished twice for the assault on Taylor, once when he was convicted and sentenced for assault with a deadly weapon with intent to kill inflicting serious injury, pursuant to N.C. Gen. Stat. § 14-32(b), and again when he was convicted and sentenced for assault inflicting serious bodily injury, under § 14-32.4. We agree.

A.

[1] Before reaching the merits, we must address the State's contention that defendant failed to raise the issue of double jeopardy before the trial court and that, as a result, he is precluded from raising that issue now. To preserve a question for appellate review, a

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party must have presented a timely request, objection, or motion to the trial court and have obtained a ruling thereon. N.C. R. App. Proc. 10(b)(1). We have carefully reviewed the transcript in this case. Although defendant did not raise his double jeopardy argument using those exact words, the substance of the argument was sufficiently presented and, more importantly, addressed by the trial court in finalizing its instructions to the jury. Accordingly, we proceed to the merits of defendant's argument.

B.

[2] Defendant contends that his conviction violates his right to be free from double jeopardy, as protected by both the Fifth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. The Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 19 of the North Carolina Constitution does not expressly prohibit double jeopardy, but the courts have included it as one of the "fundamental and sacred principle[s] of the common law, deeply imbedded in criminal jurisprudence" as part of the "law of the land." *State v. Ballard*, 280 N.C. 479, 482, 186 S.E.2d 372, 373 (1972) (internal quotations omitted).

The double jeopardy clause prohibits (1) a second prosecution for the same offenses after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple convictions for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656 (1969); *State v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986). We are concerned here with the third category, as defendant alleges that he received multiple punishments for the same offense.

For decades, the Supreme Court of the United States has applied what has been called the *Blockburger* test in analyzing multiple offenses for double jeopardy purposes. The Court in *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932), held as follows:

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.

Id. at 304, 76 L. Ed. at 309. If what purports to be two offenses is actually one under the *Blockburger* test, double jeopardy prohibits

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prosecution for both. *Brown v. Ohio*, 432 U.S. 161, 166, 53 L. Ed. 2d 187 (1977).

However, as the Supreme Court made clear in *Missouri v. Hunter*, double jeopardy does not prohibit multiple punishment for two offenses—even if one is included within the other under the *Blockburger* test—if both are tried at the same time and the legislature intended for both offenses to be separately punished. *Hunter*, 459 U.S. 359, 368-69, 74 L. Ed. 2d 535 (1983); *see also Gardner*, 315 N.C. at 454-55; 340 S.E.2d at 709. In other words, the “Double Jeopardy Clause plays only a limited role in deciding whether cumulative punishments may be imposed under different statutes at a single criminal proceeding—that role being only to prevent the sentencing court from prescribing greater punishments than the legislature intended.” *Gardner*, 315 N.C. at 460, 340 S.E.2d at 712. “Where our legislature ‘specifically authorizes punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct under *Blockburger*, a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishments under such statutes in a single trial.” *Id.*, *citing Hunter*, 459 U.S. at 368-69, 74 L. Ed. 2d at 544. Moreover, as our Supreme Court explained in *Gardner*:

[T]he presumption raised by the *Blockburger* test is only a federal rule for determining legislative intent as to violations of federal criminal laws and is neither binding on state courts nor conclusive. When utilized, it may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test. That is, even if the elements of the two statutory crimes are identical and neither requires proof of a fact that the other does not, the defendant may, in a single trial, be convicted of and punished for both crimes if it is found that the legislature so intended.

Id. at 455, 340 S.E.2d at 709, *citing Hunter*, 459 U.S. 359, 74 L.Ed.2d 535.

In *Gardner*, the North Carolina Supreme Court examined the subject, language, and history of the two statutes at issue to determine legislative intent. In concluding that the legislature intended that defendants could be punished for both felony larceny and breaking or entering, the Court noted that the two offenses each address “separate and distinct social norms,” the breaking into or entering the

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property of another and the stealing and carrying away of another's property. *Id.* at 461, 340 S.E.2d at 712. Moreover, the fact that the two offenses were placed in different subchapters of the criminal code was further indication that the legislature intended that the two crimes be separate. *Id.* at 462, 340 S.E.2d at 713. The Court also explained that it had uniformly and frequently held since the turn of the century that the two offenses are distinct crimes. In sum, the Court did not believe that "our legislature intended that the crime of breaking or entering should subsume the co-equal crime of felony larceny committed pursuant to the breaking or entering." *Id.* at 463, 340 S.E.2d at 714.

Similarly in *State v. Pipkens*, 337 N.C. 431, 446 S.E.2d 360 (1994), the North Carolina Supreme Court held that the defendant's convictions and punishments for trafficking in cocaine by possession and felonious possession of cocaine, based on the same contraband, did not violate the principles of double jeopardy. The Court first examined the intent and policy considerations behind each provision, holding that each was separate and distinct. The offense of felonious possession of cocaine is prohibited because the "possession by any person of any amount of controlled substances is against the public's interest, presumably because it enhances the potential for use of the substance, either by the possessor or by a person to whom the possessor distributes it." *Id.* at 434, 446 S.E.2d at 362. In contrast, the offense of trafficking in cocaine by possession was "responsive to a growing concern regarding the gravity of illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers." *Id.* (citation and quotation marks omitted). Unlike possession, which "combats the perceived evil of individual possession of controlled substances," the trafficking statute is intended to prevent the large-scale distribution of controlled substances to the public. *Id.* at 434, 446 S.E.2d at 362-63. Thus, the Court held that "[b]ecause the perceived evils these statutes attempt to combat are distinct, we conclude that the legislature's intent was to proscribe and punish separately the offenses of felonious possession of cocaine and of trafficking in cocaine by possession." *Id.* at 434, 446 S.E.2d at 363.

We are aware of the North Carolina Supreme Court's decision in *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997). There, the Supreme Court addressed, in dicta, whether double jeopardy precluded punishing the defendant for both first-degree murder and first-degree kidnapping where the kidnapping charge was elevated to

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first degree based on the murders. In reaching the conclusion that the defendant's sentence for both offenses was constitutional, the Court followed *Blockburger* and looked at whether each of the two crimes contained an element not required to be proved in the other. *Id.* at 19, 484 S.E.2d at 361. An "analysis of legislative intent [was] not necessary," the Court explained, "because the offenses at issue are not the same." *Id.*

However, this Court recently cited *Fernandez, Gardner, and Blockburger* in *State v. Bailey*, 157 N.C. App. 80, 577 S.E.2d 683(2003), and concluded that the presumption raised by the *Blockburger* test can be rebutted by a "clear indication of legislative intent" and that such intent must be "respected, regardless of the outcome of the *Blockburger* test." *Id.* at 86, 577 S.E.2d at 688. The Court in *Bailey* then held, based on the legislature's intent to create separate offenses of possession of stolen property under G.S. § 14-71.1 and possession of a stolen vehicle under G.S. § 20-100, that although the "defendant could have been indicted and tried [for both] based on his possession of the stolen [vehicle], he could only have been convicted once for possession of it." *Id.*

After careful analysis, we conclude that the present case is analogous to *Bailey* and not *Fernandez*. Here, N.C. Gen. Stat. § 14-32.4 contains specific language indicating that the legislature intended that § 14-32.4 apply only in the absence of other applicable provisions. Section 14-32.4 indicates that it applies "[u]nless the conduct is covered under some other provision of law providing greater punishment" (emphasis added). The murder and kidnapping statutes at issue in *Fernandez* contained no such clear language limiting how to apply the two provisions in tandem. We distinguish *Fernandez* on this basis.

Accordingly, we follow *Bailey* and conclude that we are not required to start and end our inquiry with a *Blockburger* analysis of elements. *Blockburger* is an aid to determining legislative intent in that it creates a presumption that, under *Missouri v. Hunter*, may be rebutted "by a clear indication of legislative intent." *Gardner*, 315 N.C. at 455, 340 S.E.2d at 709. We now proceed, therefore, to apply these principles here.

G.S. § 14-32

[3] The stated purpose of N.C. Gen. Stat. § 14-32 is to protect life or limb. *State v. Cass*, 55 N.C. App. 291, 304, 285 S.E.2d 337, 345, *disc.*

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review denied, 305 N.C. 396, 290 S.E.2d 366 (1982). The legislature intended to “create a new offense of higher degree than the common law crime of assault with intent to kill.” *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). Whereas the common law offense carried a fine or imprisonment, or both, in the discretion of the court, G.S. § 14-32 carries a stricter punishment. *Id.*

Under Section 14-32, an assault with a deadly weapon that inflicts serious injury is a Class E felony. The courts of this state have declined to define serious injury for purposes of assault prosecutions other than stating that the term means physical or bodily injury resulting from an assault, *State v. Alexander*, 337 N.C. 182, 188, 446 S.E.2d 83, 87, and that “[f]urther definition seems neither wise nor desirable,” *Jones*, 258 N.C. at 91, 128 S.E.2d at 3. In *State v. Hedgepeth*, 330 N.C. 38, 409 S.E.2d 309 (1991), the Supreme Court explained:

Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury.

Id. at 53, 409 S.E.2d at 318 (internal citations omitted).

G.S. § 14-32.4

In 1996, the General Assembly enacted G.S. § 14-32.4, which makes an assault inflicting serious bodily injury a Class F felony “[u]nless the conduct is covered under some other provision of law providing greater punishment.” N.C. Gen. Stat. § 14-32.4. The General Assembly also expressly defined what it meant by the term “serious bodily injury” as follows: “‘Serious bodily injury’ is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.” N.C. Gen. Stat. § 14-32.4. This Court has described the legislative intent in enacting § 14-32.4: “[W]e conclude that the General Assembly intended for N.C.G.S. § 14-32.4 to cover those assaults that are especially violent and result in the infliction of extremely serious injuries, and are not covered by some other provi-

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sion of law providing for greater punishment.” *State v. Williams*, 150 N.C. App. 497, 503, 563 S.E.2d 616, 619 (2002).

Accordingly, we believe that the legislature intended that G.S. § 14-32.4 make certain that conduct resulting in serious bodily injury, as defined, be punished at least at the Class F level, as the provision’s plain language makes abundantly clear. Defendant was indicted and convicted under G.S. § 14-32, a Class E felony. A Class E felony carries a more severe punishment than the Class F felony in G.S. § 14-32.4.¹ Thus, because defendant’s conduct is “covered under some other provision of law providing greater punishment,” we conclude that the court cannot convict and sentence him for both §§ 14-32 and 14-32.4 for the same conduct without violating the double jeopardy provisions of the United States and North Carolina constitutions.

CONCLUSION

Because we believe that G.S. § 14-32.4 is clearly an alternative to other provisions, we arrest judgment in case no. 01 CRS 2881 and remand for entry of judgment in case no. 01 CRS 920.

Reversed and remanded.

Judges MARTIN and STEELMAN concur.

DOROTHY HUNT, EMPLOYEE, PLAINTIFF-APPELLANT v. NORTH CAROLINA STATE UNIVERSITY, EMPLOYER, SELF-INSURED, KEY RISK MANAGEMENT SERVICES, ADMINISTERING AGENT, DEFENDANTS-APPELLEES

No. COA02-842

(Filed 15 July 2003)

1. Workers’ Compensation— permanent and total disability— failure to meet burden of proof

The Industrial Commission did err in a workers’ compensation case by concluding that plaintiff employee failed to prove

1. In conducting this analysis, we do not address defendant’s status as a habitual felon. Although his status ultimately requires that defendant be sentenced as a Class C felon for both offenses, N.C. Gen. Stat. § 14-7.6, the enhancement is imposed after he has been convicted and sentenced for the underlying offenses, N.C. Gen. Stat. §§ 14-7.5 & 7.6. Accordingly, we base our analysis on the original class of the underlying offenses.

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permanent and total disability, because: (1) the fact that a doctor gave an opinion of permanent and total disability at some point in his testimony did not operate to shift the burden to defendant employer when a review of the testimony as a whole revealed that plaintiff failed to prove she was permanently and totally disabled; and (2) there were no preexisting conditions to justify permanent and total disability.

2. Workers' Compensation— refusing to allow presentation of additional evidence—change of condition

The Industrial Commission did not err or abuse its discretion in a workers' compensation case by refusing to allow plaintiff employee to present additional evidence regarding the issue of change of condition under N.C.G.S. § 97-47, because: (1) the evidence predated the decision of the full Commission; and (2) plaintiff's contention would compel the full Commission to accept any new evidence submitted between the time of the hearing before the deputy commissioner and a hearing before the full Commission, which would be contrary to Rule 701(1) of the Workers' Compensation Rules and would divest the full Commission of its discretion to consider new evidence.

3. Workers' Compensation— sanctions—attorney fees

The Industrial Commission did not abuse its discretion in a workers' compensation case by failing to award to plaintiff employee sanctions and/or attorney fees under N.C.G.S. § 97-88.1.

Judge WYNN dissenting.

Appeal by plaintiff from Opinion and Award entered 6 February 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 March 2003.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff.

Roy Cooper, Attorney General, by Dahr Joseph Tanoury, Associate Attorney General, for defendants.

STEELMAN, Judge.

Plaintiff, Dorothy Hunt, appeals an opinion and award by the North Carolina Industrial Commission (Commission). For the reasons discussed herein, we affirm the opinion and award of the Commission.

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Plaintiff had worked as a library assistant at North Carolina State University (NC State) for 22 years. On 22 May 1998, she slipped on a wet floor at work, caught herself with her right hand and fell on the right side of her posterior. She reported her injury to Paula Barnes, NC State's workers' compensation disability benefits coordinator, who authorized her go to Blue Ridge Primary Care.

Subsequently, plaintiff visited her own physician, Dr. Edward B. Yellig, who referred her to a hand specialist, Dr. Krakauer. Dr. Krakauer determined that plaintiff sustained a small wrist fracture as a result of the fall. Plaintiff was also seen by Dr. T. Craig Derian for her back.

Plaintiff testified that after her fall on 22 May 1998, her back began hurting. It was eventually determined that plaintiff had degenerative disc disease, which had been non-symptomatic prior to her 22 May 1998 fall. Although her doctors testified the fall did not cause her degenerative disc disease, each of the doctors stated that the fall aggravated the condition and possibly triggered the back pain.

Plaintiff filed a Form 18, notice of injury, asserting wrist and back injuries. Thereafter, the parties entered into a Form 21 agreement for compensation for plaintiff's wrist fracture. The employer denied that any back injury was related to the accident.

After her injury on 22 May 1998, plaintiff continued to work until November 1999, when she was placed on state disability retirement. The Commission awarded plaintiff permanent partial disability compensation for all of her injuries. Plaintiff appeals.

The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Thus, on appeal, the appellate court "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." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965).

[1] In her first assignment of error, plaintiff argues that the Commission erred as a matter of law by concluding that she failed to prove permanent and total disability. We disagree.

In a claim for permanent and total disability, an employee must prove the existence of the disability and its extent. *Saunders v.*

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Edenton Ob/Gyn Ctr., 352 N.C. 136, 530 S.E.2d 62 (2000). An employee may meet this burden of proof in one of four ways: (1) the production of medical evidence that he or 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 he or she is capable of some work, but that he or she has, after a reasonable effort on his part, been unsuccessful in an effort to obtain employment; (3) the production of evidence that he or 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 he or she has obtained other employment at a wage less than that earned prior to the injury. *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 562 S.E.2d 434 (2002), *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003).

In this case, plaintiff contends that she met her initial burden to show that she was permanently and totally disabled based upon medical evidence presented by one of her treating physicians. She further contends that the burden then shifted to defendant to prove that she retained wage earning capacity. She asserts that to rebut the presumption, defendant cannot use evidence that she continued to work because her position had been highly modified due to her disability. She further asserts that although she was capable of some work, it would be futile to seek other employment based upon her preexisting conditions.

In a careful review of the record, we note that the only medical evidence of permanent and total disability was found in the testimony of Dr. Yellig. With respect to Dr. Yellig's testimony, the Commission made the following finding:

During his deposition, Dr. Yellig initially testified that the plaintiff was permanently and totally disabled. However, Dr. Yellig also testified that the plaintiff could work between two to six hours per day with limited time and exertion and limited demands for speed and productivity. Once presented with the definition of permanently and totally disabled as "an inability to earn wages", Dr. Yellig ultimately opined that plaintiff was not permanently and totally disabled.

The Commission then concluded that "[p]laintiff has failed to prove that she is permanently and totally disabled as a result of her injury by accident of May 22, 1998 and is therefore not entitled to permanent and total disability compensation."

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The Commission correctly viewed the testimony of Dr. Yellig as a whole and then determined that plaintiff had failed to prove that she was permanently and totally disabled. The fact that a doctor gives an opinion of permanent and total disability at some point in his testimony does not necessarily operate to shift the burden to the defendant. The Commission properly concluded that the medical testimony did not establish that plaintiff was permanently and totally disabled.

The Commission also considered preexisting conditions.

1. At the time of the hearing before the Deputy Commissioner, plaintiff was 55 years of age with a college degree in Spanish. Plaintiff's work history includes working in a hospital, working at Duke University's library and working as a library assistant for defendant-employer for 22 years.

2. Plaintiff's medical history includes high blood pressure, arthritis, and right thumb surgery due to an arthritic condition nine years prior to the hearing before the Deputy Commissioner. None of these conditions affected plaintiff's ability to work. Furthermore, plaintiff has no history of prior back problems.

....

6. By September 14, 1998, Dr. Yellig diagnosed plaintiff with fibromyalgia and degenerative disc disease of the lumbosacral spine. He also prescribed Prozac to treat plaintiff's depression. By February 19, 1999, Dr. Yellig thought that plaintiff suffered from chronic fatigue syndrome.

....

9. Upon referral from Dr. Yellig, plaintiff presented to Dr. T. Craig Derian, an orthopedic surgeon, on July 1, 1999. Dr. Derian ordered an MRI, which revealed that plaintiff had multiple level disc degeneration of the low back with no definite disc rupture or spinal stenosis. Dr. Derian found plaintiff to be at maximum medical improvement with a ten percent permanent partial disability of the back. He also found plaintiff capable of performing light duty work with frequent position changes and a fifteen-pound lifting restriction.

10. According to Dr. Derian, the symptoms for which he treated plaintiff were related to her fall of May 22, 1998 and plaintiff's fall aggravated her pre-existing, non-symptomatic degenerative disc condition. Dr. Derian also indicated that

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plaintiff may continue to experience some waxing and waning of her pain symptoms.

11. Plaintiff was seen by George Venters, an orthopedic surgeon, on July 27, 1999 for an independent medical examination. Dr. Venters indicated that the fall of May 22, 1998 did not cause plaintiff's degenerative disc disease and that no further active treatment was needed. He had a difficult time assessing a permanent partial rating based on plaintiff's subjective complaints, but he did indicate that plaintiff's permanent partial disability rating would be somewhere between five and ten percent. Dr. Venters also recommended that plaintiff avoid repetitive lifting and bending.

12. Throughout her medical treatment following her injury by accident of May 22, 1998, plaintiff continued to work in her regular job. Following the injury by accident of May 22, 1998, plaintiff demonstrated an ability to continue to earn wages. Accordingly, plaintiff is not permanently and totally disabled as a result of any injuries or conditions relating to her injury by accident.

There were no preexisting conditions to justify permanent and total disability. There is ample evidence in the record to support each of these findings by the Commission. These findings, in turn, support the Commission's conclusion of law that plaintiff was not permanently and totally disabled.

Plaintiff failed to meet her burden of proof of showing permanent and total disability. Thus, we need not discuss plaintiff's contentions concerning any modifications of her job. This assignment of error is without merit.

[2] In her second assignment of error, plaintiff argues that the Commission erred and abused its discretion by refusing to allow plaintiff to present additional evidence. We disagree.

Rule 701 of the Workers' Compensation Rules sets forth procedures applicable to an appeal to the Full Commission. Rule 701(6) provides that "[n]o new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits." In this case, following the ruling by the Deputy Commissioner on 20 October 2000, plaintiff moved, on 27 March 2001, for the Full Commission to receive additional evidence. This evidence was an affidavit from plaintiff stating that she had retired on disability, effec-

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tive 24 January 2001. It also contained documents concerning her retirement and rehabilitation evaluation dated 26 February 2001. The affidavit and attachments consisted of some twenty-nine pages of material. In its opinion and award, the Full Commission concluded that “[p]laintiff is not entitled to submit new evidence that concerns the issue of change of condition which is more appropriate for a full evidentiary hearing. The issue of change of condition is not properly before the Full Commission.”

Plaintiff contends that in order to show a change of condition under N.C. Gen. Stat. § 97-47, she would have to show a “substantial change in physical capacity to earn wages, occurring after a final award of compensation[.]” *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 654, 508 S.E.2d 831, 835 (1998). The final award of compensation here would be the opinion and award of the Full Commission. Since this evidence predated the decision of the Full Commission, plaintiff is precluded from introducing it at a subsequent hearing under N.C. Gen. Stat. § 97-47.

Taken to its logical conclusion, plaintiff’s contention would compel the Full Commission to accept *any* new evidence submitted between the time of the hearing before the Deputy Commissioner and a hearing before the Full Commission, if that evidence could be used in the future as a basis for a change in condition under N.C. Gen. Stat. § 97-47. This is clearly contrary to the provisions of Rule 701(1) and would divest the Full Commission of its discretion to consider new evidence. This assignment of error is without merit.

[3] In her third assignment of error, plaintiff argues that the Commission erred by failing to award sanctions and/or attorney fees pursuant to N.C. Gen. Stat. § 97-88.1. We disagree and summarily hold that the record fails to show that the Commission abused its discretion in declining to sanction NCSU.

AFFIRMED.

Judge TYSON concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

Because I conclude the North Carolina Industrial Commission (“Commission”) decided the claimant’s motion to add new and addi-

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tional evidence under a misapprehension of the law and opted not to exercise its discretion, I dissent.

On 21 July 1999, the Deputy Commissioner heard evidence in Ms. Hunt's claim for worker's compensation arising out of a 22 May 1998 work-related injury. After this hearing, Ms. Hunt was removed from work by her physician on 24 November 1999. After receiving short-term disability benefits for one year, she was notified on 20 February 2001 that she had been approved for long-term disability benefits by the North Carolina Department of Treasury, Retirement Division. After receiving this notification, she officially retired from N.C. State University on 23 February 2001. At the time of her hearing before the Deputy Commissioner, none of this information was available.

On 20 October 2000, the Deputy Commissioner rendered its Opinion and Award and thereafter, Ms. Hunt filed her notice of appeal to the full Commission. After preparation of the transcript, Ms. Hunt filed a Form 44, Application for Review, on 16 February 2001 which listed her assignments of error. On 26 February 2001, she provided a sworn affidavit detailing her new and additional evidence to her attorney, and then, on 27 March 2001, Ms. Hunt filed her motion to receive new and additional evidence pursuant to N.C. Gen. Stat. § 97-85 and Rule 701 of the Workers' Compensation Rules of the North Carolina Industrial Commission. Instead of ruling upon her motion, the Commission held her motion in abeyance until consideration by the Commission at the hearing on this matter.

In the full Commission's Opinion and Award, the Commission concluded:

7. Plaintiff is not entitled to submit new evidence that concerns the issue of change of condition which is more appropriate for a full evidentiary hearing. The issue of change of condition is not properly before the Commission.

On appeal, Ms. Hunt contends the Commission resolved her motion under a misapprehension of the law. Relying upon Rule 701 of the Workers' Compensation Rules, the majority held "since this evidence predated the decision of the Full Commission, plaintiff is precluded from introducing it at a subsequent hearing under N.C. Gen. Stat. § 97-47. Taken to its logical conclusion, plaintiff's contention would compel the Full Commission to accept any new evidence submitted between the time of the hearing before the Full Commission,

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if that evidence could be used in the future as a basis for a change in condition under N.C. Gen. Stat. § 97-47. This is clearly contrary to the provisions of Rule 701(1) and would divest the Full Commission of its discretion to consider new evidence.” I respectfully disagree.

While I agree with the majority’s conclusion that Ms. Hunt would not be able to seek consideration of her new and additional evidence under the provisions of N.C. Gen. Stat. § 97-47, I disagree with their conclusion that “plaintiff’s contention would compel the Full Commission to accept any new evidence submitted between the time of the hearing before the Deputy Commissioner and a hearing before the Full Commission.” Pursuant to N.C. Gen. Stat. § 97-85 and Rule 701(6) of the Workers’ Compensation Rules¹, whether the full Commission considers new evidence is within the sound discretion of the Commission which is reviewable by our appellate courts for manifest abuse of discretion. *See Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 366-67 (1992) (stating “the powers granted the Commission to review the award and to receive additional evidence are plenary powers to be exercised in the sound discretion of the Commission. Whether such good ground has been shown is discretionary and will not be reviewed on appeal absent a showing of manifest abuse of discretion.”); *see also Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 708 (1999), *aff’d by* 351 N.C. 42, 519 S.E.2d 524 (1999) (stating that “in exercising its discretion to receive additional evidence, the Commission should consider all the circumstances of the case, including the delay involved in taking additional evidence, and should not encourage a lack of pre-deposition preparation by counsel or witnesses”). In this case, however, the full Commission did not realize it was within its discretion to consider Ms. Hunt’s new and additional evidence. Accordingly, this case should have been remanded to the full Commission for a resolution of the claimant’s motion.

1. N.C. Gen. Stat. § 97-85 states “If application is made to the Commission . . . the full Commission shall review the award, and if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. . . . Rule 701(6) of the Workers’ Compensation Rules states “No new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits.”

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[159 N.C. App. 120 (2003)]

DAVID I.H. PARK, JUNHIE Y. PARK, AND PARK FAMILY DENTISTRY, PLAINTIFFS V.
MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, JEFFREY J.
LANE, ANTHONY (MIKE) CUOMO, AND DOUGLAS HORNBERGER, DEFENDANTS

No. COA02-859

(Filed 15 July 2003)

1. Appeal and Error— appealability—order denying arbitration

An order denying arbitration is immediately appealable because it involves a substantial right which might be lost if the appeal is delayed.

2. Arbitration and Mediation— retroactive application of SEC rules—signed agreements

The trial court erred by applying SEC rules retroactively to determine whether there was a valid arbitration agreement in IRAs and a cash management account. The validity of an arbitration agreement is determined by the application of basic contract law principles. Here, the working cash management account clearly calls for arbitration and plaintiffs signed this agreement. Although plaintiffs did not recall receiving IRA Agreements, defendant produced Adoption Agreements for each of the IRAs which were signed by plaintiffs, and in each Adoption Agreement plaintiffs acknowledged receipt of the Custodial Agreement which contained the arbitration clause.

Appeal by defendants from judgment entered 8 May 2002 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 25 March 2003.

Penry Riemann PLLC, by J. Anthony Penry, and Richard W. Rutherford for plaintiffs-appellees.

Smith Anderson Blount Dorsett Mitchell & Jernigan, LLP, by Donald H. Tucker, Jr. and J. Mitchell Armbruster, and Brobeck Phleger & Harrison, LLP, by Francis S. Chlapowski, for defendants-appellants.

STEELMAN, Judge.

Defendants, Merrill Lynch, Pierce, Fenner & Smith, Inc.; Jeffrey J. Lane; Anthony (Mike) Cuomo; and Douglas Hornberger, appeal an order of the trial court denying their motion to stay proceedings

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and compel arbitration. They set forth three assignments of error. For the reasons discussed herein, we reverse and remand this case.

In 1986, plaintiff Park Family Dentistry established a working cash management account (WCMA) with Merrill Lynch. Between 1994 and 2000, plaintiffs David Park and Junhie Park established four individual retirement accounts (IRAs) with Merrill Lynch. On each of the IRA accounts, an "Adoptive Agreement" was executed. The Adoptive Agreements incorporated by reference IRA Custodial Agreements which specifically provided for arbitration in the event of any controversies that may arise with the accounts.

The WCMA had a margin feature which was used to purchase stocks. The account was heavily invested in technology stocks. When the value of the technology stocks dropped sharply, Merrill Lynch called the margin accounts, resulting in substantial losses to plaintiffs.

Plaintiffs filed this action against Merrill Lynch and Lane, Cuomo and Hornberger, who are employees or former employees of Merrill Lynch who provided investment advice to plaintiffs. Plaintiffs alleged three claims under North Carolina law: (1) violations of Chapter 78 of the North Carolina General Statutes regarding sales of securities; (2) negligence in advising plaintiffs on investments and margin trading; and (3) breach of fiduciary duty. None of plaintiffs' claims are brought under federal securities law.

Defendants filed a motion to stay the proceedings and compel arbitration on 31 December 2001. Defendants alleged that plaintiffs executed agreements when they opened each of their accounts, which required that disputes involving the accounts be arbitrated.

The trial court conducted a hearing on defendants' motion. It concluded that: (1) defendants had the burden to demonstrate the existence of an enforceable arbitration agreement; and (2) defendants failed to demonstrate such an agreement. With respect to the WCMA signed in 1986, the trial court found that the arbitration clause contained in its eighth paragraph failed to comply with the standards established by the Securities and Exchange Commission (SEC) in 1989. With respect to each of the IRAs, the trial court found that plaintiffs did not recall receiving IRA Custodial Agreements and did not agree to the terms of those documents. Defendants appeal.

[1] We note that an appeal of an order denying defendants' motion to stay proceedings and compel arbitration is an interlocutory appeal.

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Generally, such orders are not immediately appealable. However, this Court has held that an appeal of an order denying arbitration is immediately appealable because it involves a substantial right which might be lost if the appeal were delayed. *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). Therefore, this appeal is properly before us.

[2] The Federal Arbitration Act (FAA) mandates the enforcement of arbitration agreements and is enforceable in both state and federal courts. *Perry v. Thomas*, 482 U.S. 483, 96 L. Ed. 2d 426 (1987). Section 2 of the FAA specifically provides that it applies to certain provisions in contracts involving interstate commerce:

[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . , or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1999). Securities brokerage agreements are contracts “involving” interstate commerce, and therefore, the FAA applies to them. *See Carpenter v. Brooks*, 139 N.C. App. 745, 749-50, 534 S.E.2d 641, 645, *rev. denied*, 353 N.C. 261, 546 S.E.2d 91 (2000). Thus, although plaintiffs’ claims were brought under state law, the FAA governs the arbitration clauses in the instant case.

However, state law generally governs issues concerning the formation, revocability, and enforcement of arbitration agreements. *See First Options v. Kaplan*, 514 U.S. 938, 131 L. Ed. 2d 985 (1995); *Cook Chocolate Co. v. Salomon, Inc.*, 684 F. Supp. 1177 (S.D.N.Y. 1988); *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 531 S.E.2d 874, *rev. denied*, 353 N.C. 268, 546 S.E.2d 129 (2000). The FAA only preempts state rules of contract formation “which single out arbitration clauses and unreasonably burden the ability to form arbitration agreements . . . with ‘conditions on (their) formation and execution . . . which are not part of the generally applicable contract law.’” *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 723-24 (4th Cir. 1990), *cert. denied*, 498 U.S. 983, 112 L. Ed. 2d 527 (1990) (citations omitted). *See also Doctor’s Assocs. v. Cassarotto*, 517 U.S. 681, 134 L. Ed. 2d 902 (1996).

In the instant case, the agreements stipulate that all controversies shall be governed by the laws of the State of New York. Choice of law

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clauses are enforceable in North Carolina. *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 141, 423 S.E.2d 780, 781 (1992). Therefore, the laws of the State of New York will determine whether the instant arbitration agreements are valid. We note that it does not appear that New York law conflicts with the FAA rules in this case. We further note that the law of North Carolina is substantially the same as that of New York in this case. The result would be the same if North Carolina law were to apply.

Section 7501 of the New York statutes provides:

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

N.Y. C.P.L.R. § 7501 (2001). “[T]he enforceability of agreements to arbitrate is governed by the rules applicable to contracts[.]” *Riccardi v. Modern Silver Linen Supply Co.*, 45 A.D.2d 191, 193 (N.Y. 1974), *aff’d*, 335 N.E.2d 856 (N.Y. 1975). “[I]t must be established that the arbitration clause was consented to by the parties.” *Id.* at 195. If so, “in the absence of an established ground for setting aside a contractual provision, such as fraud, duress, coercion or unconscionability, a court must enforce the parties’ arbitration agreement according to its terms.” *Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 647 N.E.2d 1298, 1302 (N.Y. Ct. App. 1995). In the instant case, no one asserts the setting aside of the arbitration clause based on any of these grounds.

Defendants presented evidence that the WCMA was signed by David Park and Junhie Park on behalf of Park Family Dentistry in 1986. It contained the following arbitration provision in its eighth paragraph:

It is understood that the following agreement to arbitrate does not constitute a waiver by the Customer of the right to seek a judicial forum where such waiver would be void under the federal securities laws.

The Customer agrees, and by carrying an account for the Customer, [Merrill Lynch] agrees, that except as inconsistent with

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the foregoing sentence, all controversies which may arise in connection with the WCMA Program, including but not limited to any transaction or the construction, performance or breach of this or any other agreement between the Customer and [Merrill Lynch], whether entered into prior, on or subsequent to the date hereof, shall be governed by the laws of the State of New York.

Any dispute hereunder shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Directors of the New York Stock Exchange, Inc. or pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. Arbitration must be commenced by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, therein electing the arbitration tribunal. In the event the Customer does not make such designation within five (5) days of such demand or notice, then the Customer authorizes [Merrill Lynch] to do so on behalf of the Customer.

The trial judge found this in finding of fact 3, but held that this provision was not enforceable because it failed to comply with disclosure standards adopted by the SEC in 1989. Although the trial court acknowledged that these standards were not adopted until three years after the execution of the WCMA, it found that the standards "are instructive and provide guidance as to the information that should be conveyed in order for an arbitration clause to be binding."

Prior to 1987, *federal* securities claims under the Securities Exchange Act of 1934 could not be arbitrated. *Wilko v. Swan*, 346 U.S. 427, 98 L. Ed. 168 (1953), overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 104 L. Ed. 2d 526 (1989) (upholding arbitration in federal claim). In *Shearson/American Express v. McMahon*, 482 U.S. 220, 96 L. Ed. 2d 185, *reh'g denied*, 483 U.S. 1056, 97 L. Ed. 2d 819 (1987), the U.S. Supreme Court held that federal claims could be arbitrated. These decisions prompted the SEC to promulgate new rules and standards pertaining to the arbitration of federal securities claims. (SEC Release No. 34-26805, 1989 SEC LEXIS 843). The trial court applied these rules in the instant case.

Here, all of plaintiffs' claims are state law claims. In 1985, prior to the execution of the WCMA, the U.S. Supreme Court held that where there were both state and federal securities claims arising from the

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same transactions, an arbitration agreement as to the state claims would be enforced even if the federal claims were not subject to arbitration and duplicative proceedings would result. *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 84 L. Ed. 2d 158 (1985).

It was therefore error for the trial court to apply the SEC rules retroactively to determine whether there was a valid agreement to arbitrate state law claims. The validity of an arbitration agreement is determined by the application of basic contract law principles. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 134 L. Ed. 2d 902 (1996). As aforementioned, the court must interpret the contract as written and according to its terms. *Salvano*, 85 N.Y.2d 173 at 182, 647 N.E.2d 1298 at 1302.

In the instant case, the WCMA agreement clearly calls for arbitration in the event of controversies involving the WCMA. Plaintiffs signed this agreement in 1986. Under New York law, a signed paper writing demonstrates full knowledge and assent as to what is therein contained. *See Level Export Corp. v. Wolz, Aiken & Co.*, 111 N.E.2d 218, 221 (N.Y. 1953).

As to the four IRAs, the trial court found that plaintiffs did not recall having received the IRA Custodial Agreements and did not agree to the terms contained therein. Each of the IRAs was established by the execution of an Adoption Agreement which contains the following language:

By signing this agreement (the "Adoption Agreement"), I acknowledge (1) that there are fees for this account, (2) receipt of a copy of the Adoption Agreement and of the Merrill Lynch IRA Disclosure Statement and IRA Custodial Agreement and (3) that, in accordance with section 6.4 of the IRA Custodial Agreement (on pages 21 and 22 of the Merrill Lynch IRA Disclosure Statement and IRA Custodial Agreement), I am agreeing in advance to arbitrate any controversies which may arise with the custodian.

The trial court recited this language in findings of fact 6 and 7. We note that the later signed Adoption Agreements refers to pages 23 and 24 of the Custodial Agreement. In finding of fact 8, the trial court cited paragraph 6.4 of the Custodial Agreement, which read as follows:

You agree that controversies which may arise between us, including, but not limited to, those involving any transaction or the con-

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struction, performance, or breach of this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration.

Applying New York law, the Second Circuit has held that arbitration clauses may be incorporated by reference as long as the additional document is described sufficiently in the written instrument. See *Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 97-98 (2d Cir. 2002); *Jones v. Cunard S.S. Co.*, 238 A.D. 172, 173 (N.Y. App. Div. 1933).

Plaintiffs' assertion that they do not remember having seen the IRA Custodial Agreements is not a defense to contract formation absent fraud or oppression, because parties to a contract have an affirmative duty to read and understand a written contract before signing it. See *Level Export Corp. v. Wolz, Aiken & Co.*, 111 N.E.2d 218, 220-21 (N.Y. 1953). Plaintiffs further contend that this case is controlled by *Sciolino v. TD Waterhouse Investor Servs.*, 149 N.C. App. 642, 562 S.E.2d 64, *rev. denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). In that case, the plaintiffs opened a joint brokerage account and executed a document designated as a "New Account Application," which referenced a "Customer Agreement" that contained an arbitration clause. The plaintiffs denied ever receiving the Customer Agreement and defendants did not produce a copy of that document bearing the plaintiffs' signatures. This Court held that the defendants failed to demonstrate that there was a valid agreement to arbitrate and affirmed the trial court's denial of defendants' motion to compel arbitration.

However, in the instant case, defendants produced Adoption Agreements for each of the IRAs which were signed by plaintiffs. In each Adoption Agreement, plaintiffs acknowledged receipt of the Custodial Agreement which contained the arbitration clause. Further, the Adoption Agreements specifically stated that plaintiffs were agreeing to arbitration. As aforementioned, a signed paper writing demonstrates full knowledge and assent as to what is contained therein. *Level Export Corp.*, *supra*.

Consequently, we hold that the trial court's findings of fact do not support its conclusions of law. Defendants demonstrated that there was a valid, written agreement to arbitrate as to both the WCMA and the IRAs by the provisions of the agreements referenced in the trial court's findings of fact. This matter is therefore reversed and remanded for entry of an order directing the parties to submit

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to arbitration in accordance with the terms of the WCMA and IRA Custodial Agreements.

REVERSED AND REMANDED.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. KORTNEY J. MADDOX

No. COA02-1489

(Filed 15 July 2003)

1. Witnesses— hostile—refusal to respond

The trial court did not abuse its discretion by allowing the State to treat an assault victim as a hostile witness and ask leading questions where the record showed that the witness refused to answer questions and was evasive when he did respond.

2. Evidence— hearsay—statement to police—admission not prejudicial—other evidence

The admission of a hostile witness's statement to police in an assault prosecution was harmless, even if defendant's general objection was sufficient, because other evidence revealed that defendant shot at the witness a number of times with a handgun as the witness ran behind a tree. There is no possibility that the jury would have reached a different result.

3. Assault— with a deadly weapon with intent to kill—sufficiency of evidence

There was sufficient evidence of assault with a deadly weapon with intent to kill where defendant shot at the victim five times with a nine-millimeter handgun as the victim attempted to flee, and the victim was spared serious injury or death only by jumping behind a tree.

4. Assault— multiple shots—single assault

The trial court erred by not dismissing four of five assault charges as part of a single assault where the shots were fired in a single place in rapid succession and were not separate events requiring defendant to employ his thought processes each time he fired the gun.

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5. Sentencing— offense committed during probation—evidence

The trial court did not err in sentencing defendant for assault with a deadly weapon with intent to kill by finding that the offense was committed while he was on probation and adding a point to his prior record level. Although the State did not move to admit the record check, it was handed up to the trial court and was sufficient to support the finding.

Appeal by defendant from judgments dated 22 May 2002 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 12 June 2003.

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

Duncan B. McCormick for defendant-appellant.

BRYANT, Judge.

Kortney J. Maddox (defendant) appeals from judgments dated 22 May 2002 entered consistent with jury verdicts finding him guilty on five separate counts of assault with a deadly weapon with intent to kill.

At trial, the State presented testimony from the alleged victim David McLean, Jr. (McLean). McLean testified that he “barely” remembered the incident in question, he and defendant had “made up,” and were now “friends.” McLean further asserted that he did not remember his conversation with the prosecutor the previous day and that he preferred “not to answer no questions, sir.” After continuing to evade the State’s questions, McLean stated he remembered telling the prosecutor the previous day that the incident began at the “liquor house” on 21 October 2000 after McLean thought defendant had made a comment about his girlfriend. The prosecutor asked if he was referring to Tate’s Liquor House. McLean responded, “Yes, that’s where I shot at [defendant] first, and then [defendant] shot back at me.” McLean could not recall how much time elapsed between the time he shot at defendant and when defendant shot at him, except that it was a short time later, and refused to state where that shooting occurred. Following further evasive answers and his reluctance or inability to remember events, the State requested that McLean be declared a hostile witness.

After arguments by counsel, the trial court allowed the State “wide latitude” to ask McLean leading questions on direct exami-

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nation. When questioning resumed, McLean admitted giving a statement to the police approximately thirty minutes after the shooting and reviewing that statement with the prosecutor the day before trial. The State moved to admit the statement into evidence, and defendant entered only a general objection. The trial court overruled the objection and admitted the statement into evidence without any limiting instruction.

McLean specifically recalled telling the police officer that he was at the intersection of Bell and Harrison Streets in Statesville, North Carolina on 21 October 2000 and observed defendant pointing a Tech-9 pistol. He remembered stating that he ran and defendant chased him firing a number of shots. McLean testified directly that he heard numerous shots fired at him from behind as he ran away and had jumped behind a tree to escape. He denied showing the officer the tree he ran behind or to pointing out the spot from where the shots had been fired.

Officer David Onley testified he was a police officer with the Statesville Police Department. On 21 October 2000, he responded to a call of "shots fired" on Harrison Street. He arrived on the scene less than a minute later and was approached by McLean, who came running up to the patrol car. McLean was sweating profusely and out of breath, and he told Officer Onley that defendant was trying to kill him. After securing the scene and unsuccessfully attempting to interview other witnesses, Officer Onley took defendant's statement. The next day, Officer Onley returned to the scene and, based on McLean's description of the incident, located five spent nine-millimeter shell casings in the road. Officer Onley knew that a Tech-9 pistol was a nine-millimeter handgun. McLean pointed out to Onley the tree behind which he had fled. Upon inspection of the tree, Officer Onley located five holes in it that seemed to be fresh. A photograph of the tree showing the five holes was admitted into evidence. Officer Onley's report was admitted into evidence with an instruction to the jury that it was to be considered as only corroborating or impeachment evidence and not as substantive evidence. In its final instructions to the jury, the trial court generally instructed that any prior out-of-court statements could be used to weigh only the credibility of the witnesses by corroborating or contradicting trial testimony and could not be considered as substantive evidence.

At sentencing, defendant stipulated to four prior misdemeanor convictions. The State further argued that defendant should be assessed an additional prior record point as the assault was commit-

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ted while defendant was on probation. The State then tendered a prior record level worksheet to opposing counsel and handed it to the trial court in support of the prior convictions. The State also handed up a criminal record check showing defendant was on probation at the time of the present offense, although the record check was not admitted into evidence. The trial court found defendant was on probation at the time of the offense, which resulted in defendant having five prior record points and being sentenced at Prior Record Level III.

The issues are whether: (I) the trial court erred by allowing the State to use leading questions to examine McLean and admitting McLean's prior statement; (II) there was sufficient evidence of assault with a deadly weapon with intent to kill; (III) defendant was properly convicted of five counts of assault arising from a single assault; and (IV) the trial court erred in finding defendant was on probation at the time of the offense.

I

Defendant first contends the trial court erred by allowing the State to treat McLean as a hostile witness by using leading questions to examine him and, further, that the admission of McLean's prior statement into evidence during this examination was improper.

A. Hostile Witness

[1] Rule 611(c) of the North Carolina Rules of Evidence provides: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." N.C.G.S. § 8C-1, Rule 611(c) (2001). Leading questions may be used during direct examination when a party calls a hostile or unwilling witness. *Id.* "Whether to allow a leading question on direct examination clearly falls within the discretion of the trial court." *State v. York*, 347 N.C. 79, 90, 489 S.E.2d 380, 386-87 (1997). Thus, a trial court's decision to allow or disallow leading questions will be upheld absent an abuse of that discretion. *See id.* at 90, 489 S.E.2d at 387; *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

In this case, the record shows McLean refused to answer some questions and was evasive in his answers when he did respond. He asserted that defendant and he were friends, they had "made up" following the shooting, and he preferred not to answer any questions. Based on this record, the trial court was within its discretion

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to allow the State to treat McLean as a hostile witness by asking leading questions.

B. Prior Statement

[2] Defendant further contends that the admission of McLean's prior statement to police following the shooting was an impermissible use of impeachment evidence as a subterfuge to present to the jury inadmissible hearsay testimony as substantive evidence. Defendant, however, entered only a general objection to the admission of the prior statement without stating specific grounds and, further, did not request a limiting instruction on the extent to which the jury could consider the statement. As such, defendant has waived appellate review of this issue. *See* N.C.R. App. P. 10(b)(2). Assuming without deciding, however, that defendant properly preserved his objection and the prior statement constituted inadmissible hearsay, the admission of this statement was not prejudicial error as we determine there was sufficient evidence upon which the jury could convict defendant of assault with a deadly weapon with intent to kill. The evidence reveals, even without the prior statement, that defendant shot at McLean a number of times with a nine-millimeter handgun in response to an earlier confrontation as McLean ran behind a tree. Officer Onley found five nine-millimeter shell casings and observed five holes in the tree behind which McLean indicated he had fled. Based on this uncontradicted and substantial evidence of all the elements of assault with a deadly weapon with intent to kill, there is no reasonable possibility that the jury in this case would have reached a different result. *See* N.C.G.S. § 15A-1443(a) (2001). Thus, admission of the prior statements was at most harmless error.

II

[3] Defendant next contends the trial court erred by not dismissing the charges of assault with a deadly weapon with intent to kill because there was insufficient evidence that defendant intended to kill McLean. We disagree.

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 evi-

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dence, both direct and circumstantial, in the light most favorable to the State, giving the State the benefit of every reasonable inference drawn therefrom. *Id.* “An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.” *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (citation omitted) (internal quotations omitted). “The nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred.” *Id.* (citation omitted) (internal quotations omitted). “Moreover, an assailant must be held to intend the natural consequences of his deliberate act.” *Id.* (citation omitted) (internal quotations omitted).

The evidence in this case reveals that defendant shot at McLean five times with a Tech-9 nine-millimeter handgun as McLean attempted to flee. McLean was only spared from serious injury or death by jumping behind a tree. The nature and manner of this assault and the weapon used is substantial evidence that defendant intended to kill McLean. Thus, the trial court did not err in dismissing the charges based upon the insufficiency of the evidence.

III

[4] Defendant also argues that the trial court erred in not dismissing four of the five assault charges on the ground that the five gunshots actually constituted only a single assault. We agree.

In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults. *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000). This requires evidence of “a distinct interruption in the original assault followed by a second assault.” *Id.* In *State v. Dilldine*, this Court noted that it was improper to have two indictments and two offenses arising out of a single episode simply because the victim was shot three times in the front and twice in the back. *Dilldine*, 22 N.C. App. 229, 231, 206 S.E.2d 364, 366 (1974). The Court went on to state that to conclude otherwise would make it reasonable to charge the defendant with five assaults simply because five shots had been fired. *Id.*

The scenario cautioned against in *Dilldine* is exactly the scenario presented in the case *sub judice*. There is no evidence that the five shots fired by defendant at McLean were separate assaults: the State presented no evidence of the time between each shot and what evidence does exist indicates that all five shots were fired in rapid suc-

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cession at approximately the same target, as indicated by the bullet holes in the tree. The State's attempts to analogize this case to *State v. Nobles*, 350 N.C. 483, 515 S.E.2d 885 (1999) and *State v. Rambert*, 341 N.C. 173, 459 S.E.2d 510 (1995) are unpersuasive. First of all, both cases are distinguishable in that neither involved charges of assault but instead multiple charges of discharging a weapon into occupied property. See *Nobles*, 350 N.C. at 504-05, 515 S.E.2d at 898-99; *Rambert*, 341 N.C. at 175-77, 459 S.E.2d at 512-13. The evidence in *Rambert* revealed that the victim's vehicle was parked in a parking lot when the defendant pulled up next to him. *Rambert*, 341 N.C. at 176, 459 S.E.2d at 512-13. The defendant produced a handgun and the victim ducked. *Id.* The defendant fired a single shot that entered through the front of the victim's windshield. *Id.* The victim then attempted to escape by driving forward; defendant shot a second time hitting the passenger side door. *Id.* Defendant then began pursuing the victim and fired a third shot into the rear bumper of the victim's vehicle. *Id.* In *Nobles*, the evidence revealed a total of seven bullets had been fired into a vehicle: two in the windshield; one below the windshield; one near a headlight; one near the top of the truck bed; one in the truck bed; and one that had shattered the driver's side door window. *Nobles*, 350 N.C. at 505, 515 S.E.2d at 898-99.

In both of these cases the North Carolina Supreme Court concluded the evidence was sufficient to support the multiple charges of discharging a weapon into occupied property as it showed each defendant had been required to "employ his thought processes each time he fired the weapon" and that each shot was an "act . . . distinct in time, and each bullet hit the vehicle in a different place." *Id.* (quoting *Rambert*, 341 N.C. at 176-77, 459 S.E.2d at 513). Both of these cases relied on evidence that defendant had not used an automatic weapon and that the shots fired into the property were located in numerous places around the respective vehicles. *Id.*

In this case, the evidence shows five bullets struck a single tree all in close proximity to each other, and there is no evidence to suggest anything other than that the shots were fired in rapid succession. Furthermore, the evidence indicates, and the State asserts, that the weapon used was a semi-automatic handgun. When a semi-automatic weapon is fired "it will fire the round that is in the chamber, eject the spent casing and move another round from the magazine into the firing chamber. Such a pistol automatically cocks itself for the second round." *State v. Stager*, 329 N.C. 278, 293, 406 S.E.2d 876, 884-85 (1991). Our Courts have recognized that a semi-automatic weapon

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“may be used normally to fire several bullets . . . in rapid succession.” *State v. Antoine*, 117 N.C. App. 549, 551, 451 S.E.2d 368, 370 (1995) (quoting *State v. Carver*, 319 N.C. 665, 667-68, 356 S.E.2d 349, 351 (1987)). Therefore, the evidence in this case, as distinct from both *Nobles* and *Rambert*, is that the shots were fired at a single place in rapid succession and were not separate events requiring defendant to employ his thought processes each time he fired the gun. This case is instead analogous to *Dilldine* and *Brooks* where, in each case, multiple gunshots constituted only a single assault. Thus, there was only evidence sufficient to support a single charge of assault with a deadly weapon with intent to kill, and the trial court should have arrested judgment on the remaining four counts.

IV

[5] Defendant finally contends that the trial court erred in finding that the offense was committed while he was on probation and adding an additional point to his prior record level determination for a total of five points, which resulted in defendant being sentenced at Prior Record Level III. See N.C.G.S. § 15A-1340.14(b)(7) (2001) (providing for an additional prior record point where the offense was committed while defendant was on probation, parole, post-release supervision, while serving a term of imprisonment, or while on escape).

The record in this case reveals that, although the State did not move to admit the record check, it was handed up to the trial court.¹ Our review of the record check considered by the trial court reveals that defendant was sentenced to twenty-four months probation on 26 January 2000. The offense in this case was committed on 21 October 2000, less than nine months later. We conclude the record check in this case is sufficient to support a finding that defendant was on probation at the time he committed the offense. Thus, we conclude defendant is not entitled to a new sentencing hearing.

Accordingly, we uphold defendant's conviction and sentence on a single count of assault with a deadly weapon with intent to kill but reverse and dismiss four of the five convictions. See N.C.G.S. § 15A-1447 (2001) (relief available on criminal appeal).

1. On 27 May 2003, this Court allowed the State's motions to amend the record to include the record check handed to the trial court. The State concedes this record check was not admitted into evidence but states it was handed to the trial court. Defendant, although asserting the record check was not admitted into evidence, does not contest the State's assertion that it was handed to the trial court.

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Case No. 00 CRS 56703: No error.

Case Nos. 01 CRS 1087-90: Reversed and Dismissed.

Judges McGEE and GEER concur.

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LIGHTING, INC., A DIVISION OF NATIONAL SERVICES INDUSTRIES, INC., DEFENDANTS

No. COA02-998

(Filed 15 July 2003)

1. Products Liability—breach of warranty—directed verdict—judgment notwithstanding the verdict

The trial court did not err by failing to grant a directed verdict or judgment notwithstanding the verdict in a products liability case based on a breach of warranty arising out of a fire at plaintiff's hosiery mill allegedly caused by a lighting fixture supplied by defendants, because: (1) the evidence at trial showed that both the fire investigators and plaintiff's expert opined that the fire originated in the ballast of defendants' fixture even though defendants' expert denied the ballast was at fault; and (2) the factual disagreement warranted submission of the case to the jury without regard to the law of the case doctrine.

2. Products Liability—breach of implied warranty—instruction

The trial court did not err in a products liability case based on breach of an implied warranty under N.C.G.S. § 25-2-314 by refusing to give defendants' requested jury instruction that the jury had to find defendants' product was defective when it left defendants' control, because: (1) defendants' proposed instruction misstates the law and evidence in the case, and the trial court was under no duty to remedy the defects contained in the proposed instruction; (2) whether the fixtures met any governmental standards was never at issue in this case; and (3) it does not need to be decided whether the trial court's view that the issue of whether the product was defective at the time it left the control of defendants was implied in the pattern instruction since the essence of the defense was that the product was not defective at all.

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3. Witnesses— expert—qualifications

The trial court did not err in a products liability case based on a breach of warranty by allowing over objection plaintiff's witness to testify as an expert in the fields of electrical engineering and fire cause and origin investigations, because: (1) given the witness's educational background and expertise, it cannot be concluded that the trial court abused its discretion by admitting his testimony; and (2) any deficiencies in the witness's qualifications or knowledge could be properly tested by cross-examination, presentation of evidence to the contrary, and appropriate jury instruction.

Appeal by defendants from judgment entered 6 December 2001 by Judge Richard L. Doughton in Catawba County Superior Court. Heard in the Court of Appeals 24 April 2003.

Pinto Coates Kyre & Brown, PLLC, by Richard L. Pinto and David L. Brown, for plaintiff appellee.

Smith Moore LLP, by James G. Exum, Jr.; Trauger, Ney & Tuke by Kathryn A. Stephenson; and Sigmon, Clark, Mackie, Hutton & Hanvey, P.A., by J. Scott Hanvey, for defendant appellants.

McCULLOUGH, Judge.

This case stems from a fire at plaintiff's hosiery mill on 13 March 1996. Plaintiff alleged that the fire was caused by a lighting fixture supplied by defendants. Defendants appeal from a jury verdict entered in favor of plaintiff at the 6 December 2001 Civil Term of Catawba County Superior Court. The procedural history of this case is as follows: Plaintiff filed suit on 31 December 1996, alleging two theories of liability: negligence and breach of warranty. On 12 January 1999, the superior court granted summary judgment on all grounds in favor of defendants and dismissed the suit. Plaintiff appealed to this Court. That appeal was heard on 22 February 2000 and resulted in this Court sustaining the granting of summary judgment on the negligence theory but remanded the case for trial on the breach of warranty issue. *Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.*, 138 N.C. App. 70, 530 S.E.2d 321, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 112 (2000) (*Red Hill I*). The subsequent trial resulted in a verdict of \$4,000,000 in favor of plaintiff from which defendants now appeal.

The forecast of evidence set out in *Red Hill I* proved accurate, and essentially the same evidence was introduced at the trial of the

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case and is summarized in our prior opinion. The evidence tended to show that in the early morning hours of 13 March 1996, a fire swept through plaintiff's hosiery mill located in Hickory, North Carolina. The mill was lighted by fixtures approximately 8 feet from the floor, which were appropriate for use in a mill, and were suspended by chains from the ceiling. As plaintiff manufactured socks made from lightly packed cotton, lint and dust were present in the mill. Testimony established that the building had a ventilation system that blew air across the upper regions of the building and that an employee vacuumed the lint from the top of the fixtures every three days.

Following the suppression of the fire, Hickory Fire Marshal, Tommy Richard Bradshaw (Bradshaw), began his investigation into the cause and origin of the fire. He interviewed the employees who first noticed the fire, the first fireman on the scene, and the responding firemen. Two agents of the North Carolina State Bureau of Investigation (SBI), Ernest Bueker and Jeffrey Sellers, conducted an independent investigation into the cause and origin of the fire. The Hickory Fire Inspector also inspected the premises. (These individuals are herein collectively referred to as "the investigators.")

The investigators noted that damage was concentrated in the south building, with the west end sustaining the heaviest damage. Damage was most significant overhead with only sporadic damage at floor level. Smaller fires at the ground level were found to have been started by falling debris. The investigators found a horizontal v-pattern starting in the northwest corner and moving across the ceiling. This pattern established to their satisfaction that the fire started above the ground level.

By interpreting this fire pattern, the investigators concluded that the fire originated within one of the fluorescent light fixtures which had sustained more damage than those adjacent to it. While the cover had been knocked off (probably by the firefighters), the fixture was significantly discolored and displayed extensive oxidation indicative of exposure to high heat. This fixture was in the immediate vicinity of the v-pattern described above. After excluding all possible sources of the fire, including the plant's electrical system or equipment as well as any fault in the fixture or its power cord, the investigators concluded that the fire was caused by the ignition of lint following the overheating of the ballast within the fixture. The ballast is a black metal box containing electrical components, a thermal protector, and potting compound, an asphalt-like substance that holds the compo-

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nents in place and dissipates the heat generated by the operation of the light fixture.

After Bradshaw made this determination, he released the fire scene to plaintiff for the beginning of clean-up operations. The suspect fixture was preserved and the scene was extensively photographed.

Approximately one week after the fire, plaintiff's expert, Dr. James McKnight reviewed the fire scene and the suspect fixture. The adjacent fixtures were discarded during clean-up. Dr. McKnight concluded that the ballast had overheated due to a malfunction within the ballast. His conclusion was based on the fact that the fixture displayed a specific area of heat intensity and over half of the potting compound had seeped out due to overheating. Dr. McKnight considered other possible sources for the fire but concluded that none were reasonable. Dr. McKnight wished to perform certain tests to see if he could determine the precise defect within the ballast but did not do so in order to preserve the ballast in its current condition for the manufacturer's expert.

Appellant MagneTek's expert, David Powell (Powell), disassembled the ballast to determine if it failed prior to the fire. Powell testified there was no damage to the ballast's interior. The thermal protector was tested and failed to perform within its specifications, but not at a heat hazardous to lint. At trial Powell disputed the investigator's fire pattern analysis and stated he believed the v-pattern was from an external heat source. Powell was unable to point to an alternate source for the fire, and concluded only that the ballast was not at fault.

Dr. McKnight observed Powell's examination of the ballast and testified that he did not observe evidence of arcing on the exterior, but did state that the ballast failure may have occurred in such a way that the temperature increased in part of the ballast rapidly enough to ignite the lint on top of the fixture before the thermal protector operated.

The ballast was manufactured by MagneTek and sold to Lithonia for incorporation into lighting fixtures made by Lithonia. MagneTek tested the ballast and represented that it met Underwriters Laboratories' standards.

On appeal, defendants argue the trial court erred by (I) denying their motions for directed verdict and judgment notwithstanding the

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verdict (JNOV); (II) refusing to give a jury instruction requested by them and failing to instruct that the jury had to find defendants' product was defective when it left defendants' control; and (III) in admitting over objection the testimony of plaintiff's expert, Dr. McKnight.

**I. Motion for New Trial and Judgment
Notwithstanding the Verdict**

[1] By their first assignment of error, defendants maintain that the trial court erred by failing to grant a directed verdict or JNOV in their favor after plaintiff presented its case and following the verdict. We do not agree.

The purpose of a motion for a directed verdict or JNOV is to test the legal sufficiency of the evidence. *Allison v. Food Lion, Inc.*, 84 N.C. App. 251, 253, 352 S.E.2d 256, 257 (1987). In considering such a motion, the trial court is required to take the plaintiff's evidence as true, consider all evidence in the light most favorable to the plaintiff, and give the plaintiff the benefit of all reasonable inferences, resolving all contradictions in the plaintiff's favor. *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990).

Plaintiff notes that the *Red Hill I* Court remanded this case for trial and found that the forecast of evidence warranted its submission to the jury. Plaintiff maintains this is the law of the case. *Stoan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997). The plaintiff further argues that the evidence at trial was not materially different from *Red Hill I*; thus denial of defendants' motions was proper. *Id.*

Subsequent to *Red Hill I*, our Supreme Court had occasion to determine when a products liability case (such as the case at bar) can be proven by circumstantial evidence. In the case of *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 565 S.E.2d 140 (2002), the Supreme Court stated:

Accordingly, the burden sufficient to raise a genuine issue of material fact in such a case may be met if the plaintiff produces adequate circumstantial evidence of a defect. This evidence may include such factors as: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) how soon the malfunction occurred after the plaintiff first obtained the

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product and other relevant history of the product, such as its age and prior usage by plaintiff and others, including evidence of misuse, abuse, or similar relevant treatment before it reached the defendant; (4) similar incidents, “ ‘when[] accompanied by proof of substantially similar circumstances and reasonable proximity in time,’ ” (5) elimination of other possible causes of the accident; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect. When a plaintiff seeks to establish a case involving breach of a warranty by means of circumstantial evidence, the trial judge is to consider these factors initially and determine whether, as a matter of law, they are sufficient to support a finding of a breach of warranty. The plaintiff does not have to satisfy all these factors to create a circumstantial case, and if the trial court determines that the case may be submitted to the jury, “ ‘[i]n most cases, the weighing of these factors should be left to the finder of fact[.]’ ”

Id. at 689-90, 565 S.E.2d at 151 (citations omitted). We believe the evidence in the case *sub judice* is adequate to meet the *Dewitt* test, and therefore conclude that the trial court did not err in submitting the case to the jury.

The evidence at trial showed that both the fire investigators and plaintiff’s expert opined that the fire originated in the ballast of defendants’ fixture, even though defendants’ expert denied the ballast was at fault. This sharp factual disagreement warranted submission of the case to the jury, without regard to the law of the case doctrine. Defendants’ first assignment of error is overruled.

II. Jury Instruction

[2] By their second assignment of error, defendants contend the trial court erred in its instructions to the jury. Again, we disagree.

A product liability claim based on breach of an implied warranty imposed pursuant to N.C. Gen. Stat. § 25-2-314 (Implied Warranty, Merchantability) was fully explained in *Red Hill I*:

A products liability claim grounded in *warranty* requires the plaintiff prove (1) the defendant warranted the product (express or implied) to plaintiff, (2) there was a breach of that warranty in that the product was defective at the time it left the control of the defendant, and (3) the defect proximately caused plaintiff damage. 1 *Products Liability* § 2.7, at 32-33; *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 301, 354 S.E.2d 495, 497 (1987).

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Thus, a products liability claim based on breach of warranty is not dependent upon a showing of negligence.

Red Hill I, 138 N.C. App. at 75, 530 S.E.2d at 326.

Defendants first argue that the trial court erred in instructing the jury in accordance with 1 N.C.P.I.—Civil 741.15. In its charge to the jury, the trial court stated:

The first issue reads: Did the defendants, Magnetek or Lithonia, breach the implied warranty of merchantability made to the plaintiff?

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove *by the greater weight of the evidence* that one of the defendants breached the implied warranty of merchantability made to the plaintiff. A breach of the implied warranty of merchantability occurs if the fluorescent light fixture is not fit for the ordinary purposes for which such merchandise is used.

(Emphasis added.) Defendants also contend the trial court should have given its requested instruction, which read as follows:

In order to recover for a breach of warranty, the Plaintiff must prove by a preponderance of the evidence that the defect complained of existed at the time of the sale of the ballast by MagneTek. In determining this issue, you may consider the age of the ballast at the time of the fire. You may also consider whether the manufacturer complied with government standards. Speculative allegations of a defect are not sufficient to meet the burden of proof of showing a defect at the time of sale.

Defendants' proposed instruction misstates the law and evidence in the case. The trial court was under no duty to remedy the defects contained in defendants' proposed instruction. *King v. Higgins*, 272 N.C. 267, 270, 158 S.E.2d 67, 69 (1967). The burden on the plaintiff is "the greater weight of the evidence" as previously noted in the pattern instruction. Further, whether the fixture met any governmental standards was never at issue in this case. In any event, compliance with governmental standards is not determinative of whether the product is defective. *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 17, 423 S.E.2d 444, 452 (1992).

The trial court felt that the issue of whether the product was defective at the time it left the control of defendants was implied in

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the pattern instruction. However, we need not decide whether this view is correct, as we note that the essence of the defense was that the product was not defective at all. Powell did not testify that the product became defective after the point of sale due to abuse, lack of maintenance or some other reason. Instead, defendants contended that the product *was not* defective at all and that plaintiff's expert and the investigators had misidentified the source and origin of the fire.

As this issue focuses on an alleged error that is harmless under the facts before us, this assignment of error is overruled.

III. Dr. McKnight's Testimony

[3] In their final assignment of error, defendants argue the trial court erred in allowing Dr. McKnight to testify over their objection, as an expert in the fields of electrical engineering and fire cause and origin investigations. We disagree.

Rule 702(a) of the North Carolina Rules of Evidence governs the admissibility of expert opinion and provides:

(a) 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.

The standards required by this Rule, expounded on in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993) and the North Carolina courts, *see, e.g., State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), require the trial court to act as a "gatekeeper" and ensure that an expert's testimony is both relevant and reliable. In performing this function, the trial court is accorded substantial latitude, *Wiles v. N.C. Farm Bureau Mut. Ins. Co.*, 85 N.C. App. 162, 354 S.E.2d 248, *disc. review denied*, 320 N.C. 517, 358 S.E.2d 533 (1987), and its determination will be sustained absent an abuse of discretion. *State v. Holland*, 150 N.C. App. 457, 566 S.E.2d 90 (2002), *cert. denied*, 356 N.C. 685 (2003).

Here, Dr. McKnight testified that he has a Bachelor's and Master's Degree in Electrical Engineering and a Doctorate in Physics from Duke University. He has over 23 years' experience in the field of fire cause and origin investigation and has examined lighting fixture ballasts in the past. He has also been recognized as an expert by the courts on other occasions.

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Given his educational background and expertise, we cannot conclude that the trial court abused its discretion in admitting his testimony. We believe the trial court properly exercised its “gatekeeping” function and that any deficiencies in Dr. McKnight’s qualifications or knowledge could be properly tested by cross-examination, presentation of evidence to the contrary, and appropriate jury instruction. *See Powell v. Parker*, 62 N.C. App. 465, 303 S.E.2d 225, *disc. review denied*, 309 N.C. 322, 307 S.E.2d 166 (1983). Upon careful review of the record, transcript, and arguments presented by the parties, defendants’ final assignment of error is overruled.

For the foregoing reasons, we believe the trial of this case was properly conducted and was free from reversible error.

No error.

Judges McGEE and LEVINSON concur.

STATE OF NORTH CAROLINA v. JIMMY LEE BELLAMY

No. COA02-1313

(Filed 15 July 2003)

1. Appeal and Error— preservation of issues—failure to include transcript

Although defendant contends the trial court abused its discretion in a robbery with a dangerous weapon case by failing to grant defendant’s motion for a mistrial based on a juror’s allegedly inflammatory statement during jury selection, this assignment of error is dismissed because: (1) defendant failed to include the actual transcript of the voir dire during which the comment was made; and (2) counsel’s statement cannot serve as a substitute for record proof.

2. Evidence— cross-examination—officer testimony—defendant under the influence

The trial court did not commit plain error in a robbery with a dangerous weapon case by allowing an officer to testify on cross-examination that based on his knowledge of defendant’s past, it was possible that defendant was under the influence, because: (1)

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the officer's testimony came in response to an attempt by defendant to show that he was impaired at the time of his arrest and confession; and (2) given the overwhelming evidence of defendant's guilt based on detailed testimony of a witness and an officer that defendant stole tapes through force and was subsequently caught with the tapes in his possession, defendant has failed to show plain error.

3. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence—pocketknife

The trial court did not err by failing to grant defendant's motion to dismiss the charge of robbery with a dangerous weapon at the close of the evidence, because: (1) there was substantial evidence that defendant threatened to use a pocketknife in a manner making it a dangerous weapon and that the victim perceived the knife as a dangerous weapon; (2) the evidence was sufficient for the jury to determine whether defendant's brandishing of the pocketknife constituted a threat to the victim's life; and (3) the taking and threatened use of force was so joined by time and circumstances as to constitute a single transaction.

4. Robbery— dangerous weapon—failure to instruct on lesser-included offense of misdemeanor larceny

The trial court did not err in a robbery with a dangerous weapon case by failing to submit the lesser-included offense of misdemeanor larceny given the overwhelming evidence of defendant's guilt of robbery with a dangerous weapon.

Appeal by defendant from judgment dated 23 May 2002 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 12 June 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmudar, for the State.

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

BRYANT, Judge.

Jimmy Lee Bellamy (defendant) appeals from a judgment dated 23 May 2002 entered consistent with a jury verdict finding him guilty of robbery with a dangerous weapon. At trial beginning on 21 May 2002, after the jury had been impaneled, defendant moved for a mis-

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trial. In support of this motion defendant stated that one of the jurors had indicated that she knew defendant and that he had been in jail. The parties and the trial court agreed that the juror had also indicated she could still be fair. The State contended the only statement the juror made was that she knew defendant from the jail. The juror's actual statement is not available as the transcript of jury selection is not included in the record on appeal.

The State's evidence against defendant tends to show that on 18 October 2001, defendant entered the Pic-A-Flick video store in Gastonia, North Carolina at about 10:45 p.m. Two store employees, John Edison and Tonya Curry, were present at the time. Defendant inquired where the adult videos were located, and Edison unlocked the room where those videos were stored. Defendant selected two empty video boxes, and Edison led him back to the counter. Edison handed the empty video boxes to Curry so she could place the actual videotapes in the boxes and Edison then returned behind the counter. Curry exclaimed, "He's bolting!" Edison saw defendant trying to run out of the store, so he grabbed a stapler from behind the counter and began pursuing defendant. Defendant first unsuccessfully attempted to flee through the store's entrance-only door, but then found the exit and ran across the parking lot with Edison in pursuit. As they came to the end of the lot, Edison threw the stapler at defendant but missed. The chase ended approximately twenty feet from the store when Defendant came to the entrance of a dead-end road. Defendant turned around waving a pocketknife and asked, "You want a piece of this?" Edison was within five or six feet of the defendant and decided that "movies are not worth getting cut over." Edison returned to the video store where he learned Curry had already called the police.

Officer Eric Howard testified that he responded to the call and began searching for the suspect. Officer Howard saw defendant, whom he recognized. Officer Howard chased defendant and ultimately caught and arrested him. Defendant was searched for weapons, and Officer Howard discovered the two adult videos and a donation can for the Children's Rights Fund Association. Edison identified defendant as the man who stole the videos. Officer Howard took defendant to the hospital for treatment of a cut he had received to his head. While being transported, defendant, despite Officer Howard's attempts to tell him not to say anything, admitted stealing "stuff" but denied having or using a knife. At the hospital, Officer Howard searched defendant's jacket and found a pocketknife with a two-to-three-inch blade. On cross-examination, defendant asked

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Officer Howard if it was possible that defendant might have been under the influence at the time of his arrest. Officer Howard responded that “it was possible because I know his past, but that night I don’t know for sure if he was or was not.” Defendant did not object to Officer Howard’s answer. Defendant presented no evidence, and the trial court denied his motion to dismiss. The trial court submitted the charges of robbery with a dangerous weapon and the lesser-included offense of common law robbery to the jury.

The issues are whether: (I) defendant sufficiently preserved for appellate review the grounds for his mistrial motion; (II) allowing Officer Howard’s testimony on cross-examination that, based on his knowledge of defendant’s past, it was possible defendant was under the influence constituted plain error; (III) the State presented sufficient evidence that defendant committed robbery with a dangerous weapon; and (IV) failure to submit the offense of misdemeanor larceny to the jury was prejudicial error.

I

[1] Defendant first argues the trial court abused its discretion by failing to grant his motion for mistrial based on the juror’s allegedly inflammatory statement, which defendant asserts resulted in substantial and irreparable prejudice to him. Defendant, however, has failed to include the actual transcript of the voir dire during which the comment was made. The only references in this record to the statement are the conflicting interpretations of defendant and the State made during a very brief hearing on defendant’s motion for a mistrial. Without an adequate record to fully reconstruct the juror’s comments, this Court has no ability to determine whether prejudicial error occurred. *See State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254-55 (1985).

“[A]s a rule of practice, counsel who seek to rely upon an alleged impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury voir dire.” *Jackson v. Housing Authority of High Point*, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988). Counsel’s statement “cannot serve as a substitute for record proof.” *Id.* Even if we assume defendant’s characterization of the statement is correct, we are unable to determine how it was prejudicial in light of the juror’s indication that she would remain impartial and without any other facts appearing in the record. Thus, the record before us is insufficient for appellate review and this assignment of error must be dismissed.

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II

[2] Defendant next asserts the trial court committed plain error by allowing Officer Howard to testify on cross-examination that, based on his knowledge of defendant, it was possible that defendant was under the influence. Defendant contends this was irrelevant, non-responsive, and highly prejudicial testimony. Officer Howard's testimony elicited on cross-examination, however, came in response to an attempt by defendant to show he was impaired at the time of his arrest and confession, thus undermining the reliability of the confession.

Due to defendant's failure to object to Officer Howard's testimony, such testimony would need to rise to the level of plain error to warrant a reversal. *See State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 398-99 (1988). Under plain error analysis, the burden is on the defendant to show that "absent the error the jury probably would have reached a different verdict." *Id.* (citations omitted). Given the overwhelming evidence of guilt in this case, based on the unequivocal and detailed testimony of Edison and Officer Howard that defendant stole the tapes through force and was subsequently caught with the tapes in his possession, defendant has failed to meet this burden. Thus, admission of Officer Howard's testimony was not plain error.

III

[3] Defendant also argues the trial court erred by not granting his motion to dismiss the charge of armed robbery at the close of the evidence. Specifically, defendant contends there was insufficient evidence that: (A) the pocketknife was a dangerous weapon; (B) Edison's life was threatened or endangered; and (C) the use of force was part of the same transaction as the taking of the videos.

In order to withstand a motion to dismiss a charge of robbery with a dangerous weapon, the State is required to present substantial evidence of all the essential elements of that crime. *State v. Powell*, 299 N.C. 95, 101-02, 261 S.E.2d 114, 119 (1980). The essential elements of robbery with a dangerous weapon are "(1) the unlawful taking or attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citation omitted).

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A. *Dangerous Weapon*

Defendant asserts that there was no evidence to support a finding that the pocketknife brandished by defendant was a dangerous weapon. A knife is not always a dangerous weapon *per se*; instead, the circumstances of the case are determinative. *See State v. Smallwood*, 78 N.C. App. 365, 368, 337 S.E.2d 143, 144 (1985). The determination of whether an object is a dangerous weapon “depends upon the nature of the instrument, the manner in which the defendant used it or threatened to use it, and in some cases the victim’s perception of the instrument and its use.” *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985). A pocketknife may be a dangerous weapon. *See State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 726 (1981).

In this case, defendant brandished a knife, submitted into evidence, with a two-to-three-inch blade. Defendant threatened Edison by asking, “do you want a piece of this?” Edison testified that it was not worth “getting cut over.” This is substantial evidence that defendant threatened to use the pocketknife in a manner making it a dangerous weapon and that Edison perceived the knife as a dangerous weapon.

B. *Life Threatened or Endangered*

Defendant also argues that Edison’s life was not in fact endangered or threatened because the pocketknife was not a dangerous weapon capable of inflicting death or great bodily harm. As we have already noted, the evidence was sufficient for the jury to determine whether the pocketknife was in fact a dangerous weapon; the evidence was also sufficient for the jury to determine whether defendant’s brandishing of it constituted a threat to Edison’s life. *See also id.* (“pocketknife . . . is unquestionably capable of causing serious bodily injury or death”).

C. *Continuous Transaction*

Defendant further argues that defendant’s taking of the videos and use of the pocketknife were not part of a single transaction, and thus, defendant could not be guilty of robbery with a dangerous weapon.

Robbery with a dangerous weapon requires that “the defendant’s use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous trans-

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action by time and circumstances as to be inseparable.” *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986). “[T]he exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction.” *State v. Lilly*, 32 N.C. App. 467, 469, 232 S.E.2d 495, 496-97 (1977). Defendant argues that, since he had already taken the videos and left the premises, his threatening of Edison with the knife could not have been part of a single transaction. For purposes of robbery, however, “the taking is not over until after the thief succeeds in removing the stolen property from the victim’s possession.” *State v. Sumpter*, 318 N.C. 102, 111, 347 S.E.2d 396, 401 (1986). Property is in the legal possession of a person if it is under the protection of that person. *State v. Barnes*, 125 N.C. App. 75, 79, 479 S.E.2d 236, 238, *aff’d*, 347 N.C. 350, 492 S.E.2d 355 (1997) (per curiam). “Thus, just because a thief has physically taken an item does not mean that its rightful owner no longer has possession of it.” *Id.*

In this case, defendant took the videos and fled with Edison in pursuit. The chase ended only about twenty feet from the video store; at no time did the chase cease or Edison lose sight of defendant; and defendant did not make good his escape until after threatening Edison with the knife. Defendant’s brandishing of a weapon, as in *Barnes*, was necessary to complete the taking of the videos by thwarting Edison’s attempt to retain lawful possession of them. *See id.* From these facts, the taking and threatened use of force was so joined by time and circumstances so as to constitute a single transaction. Thus, the trial court did not err in denying the motion to dismiss as there was substantial evidence that the pocketknife was a dangerous weapon used to threaten Edison’s life during the theft of the videos.¹

IV

[4] Defendant further argues that the jury should have been instructed on misdemeanor larceny. First, defendant again raises the contention that there was no continuous transaction between the taking and brandishing of the weapon, which we have already rejected. Alternatively, defendant claims his denial of possessing or using a knife to Officer Howard constituted conflicting evidence as to

1. Because we conclude that the taking and threat of force constituted a single continuous transaction, we reject defendant’s assignment of error that the trial court erred in submitting the offense of common law robbery to the jury. Under this same rationale, we also reject the contention that the trial court was required to separately submit to the jury the offenses of assault and assault with a deadly weapon.

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whether he was wielding a knife. Larceny is a lesser-included offense of robbery with a dangerous weapon. *State v. White*, 322 N.C. 506, 514, 369 S.E.2d 813, 817 (1988). Due process requires that a lesser-included offense should be submitted to the jury when there is evidence supporting a finding that the lesser included-offense has been committed. *See State v. Arnold*, 329 N.C. 128, 139, 404 S.E.2d 822, 829 (1991). The trial court is not required to submit a lesser-included offense “when the State’s evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged.” *State v. Smith*, 110 N.C. App. 119, 134, 429 S.E.2d 425, 432 (citations omitted), *aff’d*, 335 N.C. 162, 435 S.E.2d 770 (1993) (per curiam).

In this case, defendant’s statement to Officer Howard that he did not have or use a knife constituted conflicting evidence of the dangerous weapon element of robbery with a dangerous weapon and clearly supported submission of the offense of common law robbery to the jury. If we were to assume that defendant’s statement also amounted to evidence that defendant committed no robbery at all and instead committed only misdemeanor larceny, *see White*, 322 N.C. at 518, 369 S.E.2d at 819, failure to submit the misdemeanor offense to the jury was harmless beyond a reasonable doubt, *see N.C.G.S. § 15A-1443(b)* (2001) (violation of constitutional rights is prejudicial, unless appellate court concludes error is harmless beyond a reasonable doubt). Although, defendant denied possessing or using a knife to accomplish the taking, he did not deny his threat of force and even admitted to Officer Howard that he did in fact turn to Edison and state, “what you [sic] going to do.” Edison’s testimony unequivocally shows that in a single, continuous transaction defendant stole the videotapes and, in order to escape from Edison, threatened him with a knife after a pursuit that ended only about twenty feet from the store. That knife was found later that night by Officer Howard in defendant’s jacket pocket. It has been made an exhibit to the record on appeal and is available for review by this Court. Given the overwhelming evidence of defendant’s guilt of robbery with a dangerous weapon, we hold the trial court did not commit reversible error in failing to submit the offense of misdemeanor larceny to the jury.

No error.

Judges McGEE and GEER concur.

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STATE OF NORTH CAROLINA v. JAMES EDWARD BELL, JR.

No. COA02-1260

(Filed 15 July 2003)

1. Evidence— rape victim's statement—corroborative

A detective's testimony about a statutory rape victim's statement was properly admitted as corroborative evidence. The trial court is in the best position to determine whether the testimony of the detective corroborated that of the witness.

2. Criminal Law— reinstruction—verdict reached but not returned

The court's re-instruction of the jury on the age element of statutory rape was not erroneous where the court realized the error in the original instruction, correctly instructed the jury, and returned the jurors to the jury room after they had announced that they had a verdict but before the verdict was delivered. Defendant was not subjected to double jeopardy because there had been no final judgment before the re-instruction, and the court did not attempt to coerce a verdict.

3. Rape— sufficiency of evidence—identification of defendant

There was sufficient evidence that defendant was the perpetrator of a rape where the victim testified that defendant raped her, and had said this to her aunt, her mother, the police, the paramedics, and the doctors at the emergency room. The existence of contrary evidence is not controlling.

4. Rape— penetration—sufficiency of evidence

There was sufficient evidence of penetration in a rape case. Complete penetration need not occur.

Appeal by defendant from judgments entered 16 May 2002 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 11 June 2003.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Terry W. Alford for defendant.

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TYSON, Judge.

James Edward Bell, Jr. (“defendant”) appeals from the jury’s conviction and his sentence for first-degree statutory rape and second-degree forcible rape. We find no error.

I. Background

On 1 September 2001, Pamela Bell lived with her three children, a four-year old, a two-year old, and an infant, across the street from B.H.’s family. B.H. was twelve years and eleven months old and was babysitting Bell’s two youngest children. B.H. took the two-year-old to a store with her across the street for a snack and met defendant, who introduced himself as Pamela Bell’s uncle. Defendant was forty-two years old at the time.

Around 9:30 p.m., B.H. took the two-year-old back to Pamela Bell’s apartment to baby-sit for the night while the infant stayed with B.H.’s mother. When she arrived, defendant was sitting on the porch while Pamela Bell was in the apartment with her boyfriend. The three adults spent the evening talking, eating, and drinking. Pamela Bell and her boyfriend smoked marijuana.

B.H. remained in the living room with the two-year-old after Pamela Bell and her boyfriend went upstairs. Defendant left the apartment briefly before returning home and entering the living room where B.H. was located. Defendant began feeling B.H.’s legs and climbed on top of her. B.H. was unable to push him off. Defendant placed one hand over B.H.’s mouth and used the other hand to pull down B.H.’s pants.

B.H. testified that defendant placed his penis between B.H.’s legs and “it hurt.” Defendant attempted to insert his penis into her vagina but that “it was on the side.” B.H. testified, “[i]t didn’t never go in, it was on the outside, but he thought it was in and he just kept on pushing.” Defendant repeatedly told her “Let me put it in, I promise I won’t come.” B.H. testified that she was afraid throughout the attack.

B.H. finally pushed defendant off of her, told him she was going home, and would tell her mother what he had done. B.H. testified defendant went into the bathroom and began to cry. She left the apartment and ran home, without her shoes or jacket.

Although B.H.’s mother was not home when she arrived, B.H. related what had occurred to her aunt and to her sister. B.H. found blood on her underwear and experienced burning when she urinated.

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When her mother returned, B.H.'s sister told their mother that B.H. had been raped. Their mother called 911 to summon the police and an ambulance. B.H. then told her mother of the events.

B.H. also related the events to at least two police officers, the paramedic, the emergency room doctor and nurses, and to a social worker at the hospital. Kevin J. Reese, M.D., the emergency room doctor, treated B.H. and noted that B.H.'s labia minora, the inner lips, were "acutely swollen, tender to the touch and red" and opined that the injuries "appeared to be fresh."

Detective Christopher Hunt of the Wilmington Police Department arrested defendant at Bell's apartment at approximately 2:15 a.m. and took him to the police station. Detective Hunt interviewed defendant after defendant waived his *Miranda* rights. Detective Hunt testified:

The first question I asked him, was there anyone in the apartment except for family members? . . . The first response was that there was no one in the apartment. I asked him again and reiterated again, also there was no one there, but family members. I asked him a third time. He stated that—on the third response, that there was a little girl there baby-sitting. I asked him if he knew her and he stated no. He stated that the girl was "fast." So I asked him to explain what "fast" meant. He stated it meant grown up or trying to be an adult. I asked him if he had touched the girl in any way and he stated no. I then explained to him that she claimed that she had been raped by him and he replied again that she was being fast, that she had wanted him to kiss her. That is when the Defendant invoked his right to remain silent.

Defendant moved to dismiss the charges for insufficient evidence of actual penetration. The trial court denied the motion.

Defendant testified on his own behalf and stated that on 1 September 2001 he was living with Pamela Bell. He left to go to visit other family across town but returned later that evening. "As I opened the door [to the apartment], I heard noise and I noticed it was a boy and a girl on the sofa." The young man left out the back door of the apartment.

Defendant testified that he questioned the girl regarding whether Pamela Bell knew that she had a young man over at the apartment. "Her response was, 'none of your damn business'" and that "I'm grown.'" As defendant was calling for Pamela Bell, B.H. left through the front door. Defendant went upstairs to sleep without telling

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Pamela Bell or her boyfriend what he had seen. The next thing he remembered was waking up with “guns in my face” from the Wilmington Police.

Defendant renewed and was denied his motions to dismiss. The trial court instructed on and submitted the charges of (1) first-degree statutory rape, attempted first-degree statutory rape, and not guilty of first-degree statutory rape, and (2) second-degree rape, attempted second-degree rape, and not guilty of second-degree rape. The trial court instructed the jury that for defendant to be guilty of statutory rape, the State must prove that “the victim was a child of the age of 12 years or less. A child would be 12 years of age if she had reached her 12th birthday. If she has passed her 12th birthday by even a moment, she would be more than 12 years of age.”

After sending the jury in to deliberate, the jury requested re-instruction on the elements of the charges and B.H.’s date of birth. The trial court sent a copy of the jury instructions to the jury and told them to rely on their memory of the evidence regarding B.H.’s date of birth.

While the jury was deliberating, the trial court recognized that the instruction given on statutory rape was in error because the law required the victim to be “under the age of 13.” As the trial court called for the jury to return for re-instruction, the court was informed that the jury had reached a verdict. The trial court did not receive or read the verdict and sealed it for appellate review.

The trial court stated to the jury:

After the jury was sent to the jury room for your deliberations, the Court has discovered that as to one of the elements of one of the offenses, I read you an erroneous statement of the law.

Now, what I am going to do is to read you a correct statement of the law, then I’m going to send you back to the jury room and let y’all talk among yourselves to see if this correct statement of the law has any bearing on your decision . . .

Ladies and gentlemen, as to that second element, that was an incorrect statement of the law and the correct statement of the law is or should have read:

Second, that at the time of the acts alleged, the victim was a child under the age of 13 years; . . .

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After the new instruction, the jury deliberated for approximately fourteen minutes before returning a unanimous verdict finding defendant guilty of first-degree statutory rape and guilty of second-degree forcible rape. The original sealed jury verdict found defendant not guilty of statutory rape and guilty of second-degree forcible rape. Defendant was sentenced to concurrent sentences of 339 months to 416 months and 120 months to 153 months. Defendant appeals.

II. Issues

Defendant contends the trial court erred in (1) allowing into evidence Detective Hunt's testimony of B.H.'s statement to him, (2) refusing to accept the original verdict, re-instructing on statutory rape, and accepting the new verdict, and (3) denying defendant's motion to dismiss for insufficient evidence.

III. Detective Hunt's Testimony

[1] Defendant contends the trial court erred in allowing Detective Hunt to testify that on the night of the incident, "[B.H.] did state to me that he did get inside some before she pushed him off." Over defendant's objection, the trial court admitted the statement as corroborative evidence. Defendant argues that the statement is not corroborative because B.H. testified "it didn't never go in."

"Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980).

In order to be admissible as corroborative evidence, a witness's prior consistent statements merely must tend to add weight or credibility to the witness's testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates.

State v. Farmer, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993) (citations omitted). "If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement." *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). "A trial court has 'wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non-hearsay purposes.'" *State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596,

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617 (2001) (quoting *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998)).

The State tendered the testimony of Detective Hunt to corroborate the testimony of B.H. B.H. testified that defendant: (1) felt her legs; (2) pulled down her pants; (3) got on top of her; (4) held her down; (5) placed his penis between her legs and (6) that “it hurt;” (7) that defendant said “let me put it in, I won’t come;” (8) that she felt burning between her legs; (9) that she discovered blood in her underpants although she was not having her period; and (10) that it hurt for the doctor to examine her.

When this testimony is considered along with the testimony of Dr. Reese that although there was no indication of complete penetration, there was bruising of the inner lip of the labia minora near the hymen, B.H.’s testimony could be construed that defendant did not completely penetrate her beyond the inner lips of the labia minora. The trial court is in the best position to determine whether the testimony of Detective Hunt corroborated the testimony of B.H. *See State v. Williams*, 355 N.C. 501, 566, 565 S.E.2d 609, 647 (2002). The trial court did not err in admitting Detective Hunt’s testimony as corroborative evidence. This assignment of error is overruled.

IV. Verdict

[2] Defendant contends the trial court erred in entering judgment on the verdict of guilty of first-degree statutory rape when the jury had already returned a verdict of not guilty of statutory rape. Defendant also argues error for the trial court to send the jury back for further deliberation based on new instructions. Defendant argues that such action is barred by (1) the double jeopardy clause of the United States and North Carolina Constitutions and (2) *res judicata*. We disagree.

N.C. Gen. Stat. § 15A-1237(b) (2001) requires that “[t]he verdict must be unanimous, and must be returned by the jury in open court.” Here, the first verdict, based on an erroneous instruction of law, was never read in open court, never shown to the judge or either counsel, and sealed by the bailiff for appellate review. The verdict was never “returned by the jury in open court” as required by statute.

The trial court determined that new instructions on the element of the age of the victim had to be given to the jury prior to

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any notice of a verdict from the jury. Although defendant contends *res judicata* applies, there had been no “final judgment on the merits” entered in the case. Defendant was not subjected to double jeopardy by the trial court not accepting the first verdict and correctly re-instructing the jury.

Defendant also contends the trial court impermissibly attempted to coerce the jury into reaching a verdict. We disagree. The trial court explained to the jury that the previous instruction was in error, re-instructed on the correct statement of law, and sent the jury back “to see if this correct statement of the law has any bearing on your decision.” The jury had previously questioned the trial court regarding B.H.’s date of birth and the required elements of the offense. After fourteen minutes of continued deliberations, the jury returned a verdict of guilty of first-degree statutory rape. The trial court did not err in accepting the verdict of guilty of first-degree statutory rape and entering judgment. This assignment of error is overruled.

V. Motions to dismiss

Defendant contends the trial court erred in denying defendant’s motions to dismiss for insufficient evidence. Defendant makes two arguments: (1) insufficient evidence of any crime by defendant and (2) insufficient evidence of penetration. We disagree.

A. Standard of Review

A motion to dismiss should be denied if substantial evidence exists of each essential element of the offense charged and of defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). “In ruling on a motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence.” *State v. McAllister*, 138 N.C. App. 252, 259, 530 S.E.2d 859, 864, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000) (citation omitted). “If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court’s duty to submit the case to the jury.” *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958).

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B. Defendant as Perpetrator

[3] Defendant presented evidence that he was not the perpetrator of the crime, but that he walked in on B.H. with another male. The existence of evidence contrary to the State's evidence is not controlling in ruling on a motion to dismiss. The crucial question is whether the State presented substantial evidence of defendant as the perpetrator.

B.H. testified that defendant raped her. She repeated this story to her aunt, her mother, the police, the paramedics and the doctors at the emergency room. This assignment of error is overruled.

C. Penetration

[4] For defendant to be guilty of rape, complete penetration need not occur. "[T]he slightest penetration of the sexual organ of the female by the sexual organ of the male" is sufficient. *State v. Johnson*, 317 N.C. 417, 435, 347 S.E.2d 7, 18 (1986), superseded by statute on other grounds in, *State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994) (citing *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984); *State v. Robinson*, 310 N.C. 530, 533-34, 313 S.E.2d 571, 574 (1984); *State v. Stanley*, 310 N.C. 353, 366, 312 S.E.2d 482, 490 (1984)). B.H. testified that after defendant's penis was placed between her legs, he continued pushing and "it hurt." She experienced pain, burning, and found blood in her underwear when she was not having her period. Dr. Reese testified that although there was no indication of complete penetration, there was bruising of the inner lip of the labia minora near the hymen. Sufficient evidence of the penetration of "the sexual organ of the female by the sexual organ of the male" was shown. *Id.*

Further, the trial court submitted the issue of attempt in both charges. The jury found that actual penetration occurred. This assignment of error is overruled.

VI. Conclusion

The trial court did not err in allowing Detective Hunt to testify regarding B.H.'s statements or in re-instructing the jury with the correct statement of law and entering judgment based on the final verdict. The trial court properly denied defendant's motions to dismiss for insufficient evidence. Defendant's assignments of error are overruled.

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No Error.

Judges MARTIN and LEVINSON concur.

STATE OF NORTH CAROLINA v. CORRIE MAURICE MAY

No. COA02-1158

(Filed 15 July 2003)

1. Indictment and Information— obtaining property by false pretense—amendment to date of offense

The trial court did not commit plain error in an obtaining property by false pretense case by permitting the State to amend the date of offense on the indictment to accurately reflect the date of the offense rather than the date of arrest, because: (1) the date was not an essential element of the crime; and (2) the change in the date on the indictment did not affect defendant's planned defense.

2. Motor Vehicles— obtaining property by false pretense— driver's license

The trial court did not commit plain error in an obtaining property by false pretense case by entering judgment on the false pretense charge involving a driver's license, because an officer's testimony directly supported the indictment's allegation that defendant misrepresented both his identity and his name to an officer in order to procure a driver's license issued to defendant's alias.

3. Motor Vehicles— obtaining property by false pretense— driver's license—sufficiency of evidence

The trial court did not commit plain error in an obtaining property by false pretense case by allowing the false pretense claim involving the driver's license to go to the jury even though defendant contends an officer admitted he did not recall defendant or having any conversation with him, and that it was feasible the license found on defendant came from some other source, because: (1) the transcript revealed that the officer remembered all the essential facts; and (2) defense counsel's characterization of the officer's testimony did not comport with the transcript.

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4. Criminal Law—no contest plea—factual basis—consequences

The trial court did not commit plain error in an obtaining property by false pretense case by accepting defendant's no contest plea to both the false pretense charge involving tire rims and the accompanying habitual felon charge, because: (1) a factual basis existed for the plea regarding the false pretense charge based on the facts presented by the State and defendant's stipulation; (2) a factual basis existed for the plea regarding the habitual felon indictment when habitual felon status had already been established using the same underlying offenses in the false pretense charge involving a driver's license; and (3) the trial court sufficiently explained the consequences of defendant's no contest plea.

Appeal by defendant from judgments entered 2 January 2002 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 5 June 2003.

Attorney General Roy Cooper, by Assistant Attorney General James C. Holloway, for the State.

George E. Kelly, III, for defendant-appellant.

CALABRIA, Judge.

Corrie Maurice May ("defendant") appeals two judgments entered on two charges of obtaining property by false pretense, each accompanied by a separate indictment charging defendant with attaining habitual felon status. We find no error.

On 15 June 2001, defendant was apprehended by Raleigh Police Officer Kevin Gregson ("Officer Gregson") while exiting a department store after Officer Gregson learned defendant had an outstanding arrest warrant for robbery with a dangerous weapon and obtaining property by false pretense. Officer Gregson called out "Hey, Corrie" and defendant responded "What." Officer Gregson then asked defendant if he was Corrie May, and defendant confirmed he was. At that point, Officer Gregson placed defendant under arrest; defendant protested, asserting his name was Fred Campbell and asking Officer Gregson to confirm his identity by checking the driver's license in his pocket. Officer Gregson removed the driver's license from defendant's pocket. The license was issued 30 January 2001, bore the name "Fred Alfonso Campbell, III," and pictured defendant. Defendant was

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arrested, taken into custody, and fingerprinted. Fingerprint analysis revealed defendant was Corrie May.

Defendant was indicted for obtaining property by false pretense for possessing the false driver's license and for charges relating to the outstanding arrest warrant for robbery with a dangerous weapon and obtaining property by false pretense involving tire rims. Both indictments were accompanied by charges for attaining habitual felon status.

On 2 January 2002, defendant's case was called for trial in the Wake County Superior Court, the Honorable J.B. Allen, Jr. presiding. The trial court allowed amendment of the indictment for the false pretense charge involving the driver's license and the accompanying habitual felon indictment to reflect the correct date of the offense, 30 January 2001, rather than 15 June 2001, the date of arrest.

The State's evidence consisted of testimony by Officer Gregson and DMV Driver License Examiner Glen Barefoot ("Officer Barefoot"). Defendant presented no evidence, and the jury found defendant guilty. Defendant then pled no contest to the accompanying habitual felon charge, and was sentenced to 80 to 105 months' imprisonment. In the same session of court, defendant pled "no contest" to the other charges of obtaining property by false pretense involving tire rims and of attaining habitual felon status. The court sentenced defendant to 80 to 105 months' imprisonment to run concurrently with his first sentence. Defendant appeals.

Because defendant failed to object at trial, defendant asserts the trial court committed plain error by: (I) permitting the State to amend the date of offense on the indictments; (II) entering judgment on the false pretense charge involving the driver's license; (III) allowing the false pretense claim involving the driver's license to go to the jury; and (IV) accepting defendant's no contest plea to both the false pretense charge involving tire rims and the accompanying habitual felon charge.

"In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (2003).

In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or

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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) (2003). Plain error is “*fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . grave error which amounts to a denial of a fundamental right . . . a miscarriage of justice or . . . the denial to 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). “It is axiomatic that ‘[a] prerequisite to . . . engaging in a “plain error” analysis is the determination that the [action] complained of constitutes “error” at all.’” *State v. Parks*, 96 N.C. App. 589, 593, 386 S.E.2d 748, 751 (1989) (quoting *State v. Johnson*, 320 N.C. 746, 360 S.E.2d 676 (1987)). For the reasons that follow, we hold the trial court did not err.

I. Amendment to the Indictments

[1] Defendant asserts the trial court committed plain error by permitting the State to amend the date appearing on the indictments to accurately reflect the date of the offense rather than the date of arrest. Defendant contends this constituted a substantial alteration in violation of N.C. Gen. Stat. § 15A-923(e) (2001).

North Carolina General Statute § 15A-923(e) states “[a] bill of indictment may not be amended.”

This statute, however, has been construed to mean only that an indictment may not be amended in a way which “would substantially alter the *charge* set forth in the indictment.” *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475, *disc. rev. denied*, 294 N.C. 737, 244 S.E.2d 155 (1978). Thus, for example, where time is not an essential element of the crime, an amendment relating to the date of the offense is permissible since the amendment would not “substantially alter the charge set forth in the indictment.” *State v. Price*, 310 N.C. 596, 598-99, 313 S.E.2d 556, 559 (1984).

State v. Brinson, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (emphasis in original). Accordingly, allowing amendment of the indictment would not constitute reversible error unless the date was an essential element of the crime.

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The elements of the crime of obtaining property by false pretense are “(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). Since time is not an “essential element” of the crime, the amendment to the indictment did not affect a “substantial” alteration.

A habitual felon is “[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof[.]” N.C. Gen. Stat. § 14-7.1 (2001). An indictment charging a person of having established habitual felon status is sufficient where it

set[s] forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3 (2001). The date of the felony offense accompanying the habitual felon indictment is not an essential element of establishing habitual felon status. Rather, N.C. Gen. Stat. § 14-7.3 requires, in relevant part, only the dates of the underlying felony convictions or pleas and the dates the underlying felonies were committed. Accordingly, neither amendment affected a “substantial” alteration, and this assignment of error is overruled.

Moreover, we note the change in the dates on the indictment did not affect defendant’s planned defense. Following the State’s motion to amend the indictments, the following exchange took place between defense counsel and the court:

THE COURT: So you’re moving to amend the bill of indictment instead of June 15th, 2001, show it January 30?

[STATE]: 2001, yes, sir.

THE COURT: What says the defendant?

[DEFENSE COUNSEL]: Well, I was aware of that to begin with.

THE COURT: So no objection?

[DEFENSE COUNSEL]: I can’t object to it.

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THE COURT: All right, without any objections the motion is allowed.

In light of this exchange, it is difficult to conceive how defendant's planned defense was affected by the State's amendments.

II. Variance between the indictment and the proof offered at trial

[2] Defendant asserts the court committed plain error in entering judgment on the false pretense charge involving the driver's license because there was no direct evidence of how defendant came into possession of the driver's license. Specifically, defendant argues the State failed to prove he made a false representation as alleged in the indictment.

The indictment alleges "defendant represented his name to be Fred Alphonso Campbell, III . . . when, in fact, his name is Corrie Maurice May . . ." At trial, the State called Officer Barefoot, who issued the duplicate license, and he testified, in relevant part, as follows:

Q. Officer Barefoot, did this defendant, Corrie Maurice May, represent to you that he in fact was the person whose license he was requesting a duplicate for?

A. He did.

Q. And it was based on that that you issued [the driver's license bearing the name Fred Alphonso Campbell, III]?

A. That's correct.

This testimony directly supports the indictment's allegation that defendant misrepresented both his identity and his name to Officer Barefoot in order to procure the driver's license issued to defendant's alias. This assignment of error is overruled.

III. Sufficiency of the evidence

[3] Defendant asserts the trial court committed plain error by allowing the false pretense charge involving the driver's license to go to the jury because the State failed to present evidence that defendant obtained the false license by any actual deception. Specifically, defendant contends Officer Barefoot admitted he did not recall defendant or having any conversation with him, and it is "feasible" that the license found on defendant came from some other source.

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As illustrated above, Officer Barefoot did not testify as defendant contends in his brief. Instead, Officer Barefoot testified unequivocally that defendant came into the DMV, presented a defaced driver's license with the photograph missing and represented he was Fred Alphonso Campbell, III. Based upon defendant's representations, Officer Barefoot issued him a duplicate license. Furthermore, the trial transcript reveals Officer Barefoot remembered all the essential facts. On cross examination, he was unable to recall whether the conversation with defendant was limited solely to the subject of the driver's license and whether anyone accompanied defendant. Defense counsel's characterization of Officer Barefoot's testimony does not comport with the transcript; therefore, defendant's assignment of error is without merit and is overruled.

IV. Factual basis for defendant's no contest plea

[4] Defendant asserts the trial court committed plain error by failing to establish the prerequisite factual basis for the charge of obtaining property by false pretense involving tire rims before accepting defendant's plea of no contest in violation of N.C. Gen. Stat. § 15A-1022 (2001). A trial court may determine a factual basis for a plea exists based upon the following non-exclusive, statutory list:

- (1) A statement of the facts by the prosecutor.
- (2) A written statement of the defendant.
- (3) An examination of the presentence report.
- (4) Sworn testimony, which may include reliable hearsay.
- (5) A statement of facts by the defense counsel.

N.C. Gen. Stat. § 15A-1022(c). The trial court "may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea." N.C. Gen. Stat. § 15A-1022(d) (2001).

In the instant case, the prosecutor for the State briefly recited the facts of the charged offense by stating to the court that defendant agreed to sell car rims to Bruce Thomas, took the money from Bruce Thomas, and failed to deliver the rims. Defendant's arguments that he ultimately repaid the money to Bruce Thomas or that this was simply an unfulfilled contract are unavailing in light of the fact that, directly

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following the State's brief recital of the facts of the charged offense, defendant stipulated to the existence of a factual basis for his plea. Based on the facts presented by the State and the defendant's stipulation, the court properly determined a factual basis for the plea existed.

Defendant similarly asserts no factual basis was established for the no contest plea for the accompanying habitual felon indictment. However, habitual felon status had already been established using the same underlying offenses in the false pretense charge involving the driver's license, which defendant does not attack. Accordingly, the trial court properly determined a factual basis for the plea existed and entered a sentence of 80 to 105 months' imprisonment, which was to run concurrently with his first sentence.

Defendant contends, in the alternative, that the trial court erroneously failed to explain the consequences of a no contest plea. "The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt." N.C. Gen. Stat. § 15A-1022(d) (2001). The court stated the following to defendant: "And do you understand that upon your plea of no contest you'll be treated as being guilty whether or not you admit you are in fact not guilty?" Defendant answered in the affirmative. Defendant further acknowledged under oath that he understood that by pleading no contest he was giving up his constitutional rights to a jury trial and to confront and cross-examine witnesses against him and that he considered it in his best interest to plead no contest. This exchange adequately tracks the language of the statute and sufficiently explains the consequences of defendant's no contest plea. Accordingly, this assignment of error is overruled.

No error.

Judges MCGEE and TYSON concur.

JAEGER v. APPLIED ANALYTICAL INDUS. DEUTSCHLAND GMBH

[159 N.C. App. 167 (2003)]

HALVOR JAEGER AND ASTRID JAEGER, PLAINTIFFS-APPELLEES v. APPLIED ANALYTICAL INDUSTRIES DEUTSCHLAND GMBH AND FREDERICK SANCILIO, DEFENDANTS-APPELLANTS

No. COA02-877

(Filed 15 July 2003)

1. Jurisdiction— personal—minimum contacts

The trial court did not err in an action seeking to release certain funds to plaintiffs that were being held pursuant to an escrow agreement by denying defendant German company's motion to dismiss based on lack of personal jurisdiction, because defendant maintains sufficient minimum contacts with North Carolina under N.C.G.S. § 1-75.4 to permit our state's courts to exercise personal jurisdiction over them when: (1) defendant maintains a continuous and systematic presence within this state by and through its agent in Wilmington, North Carolina; and (2) defendant holds itself out as engaged in substantial activity within North Carolina by employing a managing director, negotiating and signing agreements in Wilmington, and by denoting Wilmington as the point of correspondence on its letterhead and in the escrow agreement.

2. Appeal and Error— appealability—motion to stay action— failure to petition for writ of certiorari

Although defendants contend the trial court erred in an action seeking to release certain funds to plaintiffs that were being held pursuant to an escrow agreement by failing to grant defendants' motions to stay the action under N.C.G.S. § 1-75.12(a), defendants failed to properly petition the Court of Appeals for a writ of certiorari and the Court of Appeals declines to treat defendants' assignment of error as a petition for writ of certiorari.

Appeal by defendants from order entered 7 February 2002 by Judge James R. Vosburgh in Superior Court, New Hanover County. Heard in the Court of Appeals 24 April 2003.

Daniel Lee Brawley and Barbara Allen Samples for plaintiffs-appellees.

Robinson, Bradshaw & Hinson, P.A., by David C. Wright, III and Joshua F. P. Long, for defendants-appellants.

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McGEE, Judge.

Halvor Jaeger and Astrid Jaeger (plaintiffs) filed an amended complaint against Applied Analytical Industries Deutschland GMBH (AAID) and Frederick Sancilio (Sancilio), collectively referred to as defendants, on 10 April 2001. Plaintiffs sought an order from the trial court instructing defendants to release certain funds to plaintiffs that were being held pursuant to an escrow agreement. AAID filed a motion to dismiss dated 11 June 2001, contending among other things, that the trial court lacked personal jurisdiction over AAID. AAID's motion alternatively asked the trial court to stay the action pursuant to N.C. Gen. Stat. § 1-75.12. Sancilio filed a motion to dismiss dated 11 June 2001 for lack of proper venue and failure to state a claim or, alternatively, to stay the action pursuant to N.C. Gen. Stat. § 1-75.12. The parties subsequently conducted discovery on the jurisdictional issues relating to AAID's motion to dismiss. Plaintiffs filed a motion to compel discovery on 15 October 2001.

A hearing was held by the trial court on 6 February 2002. The trial court entered an order on 7 February 2002 that found AAID was subject to personal jurisdiction in North Carolina and that the action should not be stayed. Defendants appeal.

The evidence before the trial court tended to show that plaintiffs are citizens and residents of Canada. Sancilio stated in his affidavit that AAID is a limited liability company formed under German law and registered in the District Court, Memmingen, Germany. Sancilio is the managing director of AAID and has an office located in Wilmington, North Carolina.

Plaintiffs and the corporate predecessor to AAID were part of a business transaction (the purchase agreement) in December 1996, that included the sale of a company in which plaintiffs owned a partnership interest. Due to a dispute plaintiffs had with the Finanzamt Neu-Ulm, a German tax collecting agency, part of the sale proceeds payable to plaintiffs was held pursuant to an escrow agreement dated 1 February 1997. The Canadian dollar equivalent of DM 505,000 was placed in escrow in Canada pursuant to the escrow agreement between plaintiffs and AAID. Under the terms of the escrow agreement, plaintiffs are entitled to receive the escrowed funds after the resolution of the tax issue with the Finanzamt Neu-Ulm. Plaintiffs stated that they attempted to contact defendants for more than a year to request the release of the funds, but defendants did not respond.

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Sancilio stated in his affidavit and deposition that AAID is a wholly-owned subsidiary of aaiPharma, Inc, which is headquartered in Wilmington, North Carolina. Sancilio is the chairman of the board and the chief executive officer of aaiPharma. Sancilio is also the managing director of AAID and signs documents on its behalf. He testified that his personal and business addresses were in Wilmington, North Carolina.

AAID is a holding company which owns one hundred percent of AAI Applied Analytical Industries Deutschland Verwaltungsgesellschaft mbH and AAI Applied Analytical Industries Deutschland GmbH & Co., KG. Sancilio stated in his deposition that AAID did not own any other assets. Sancilio stated in his affidavit that AAID's principal place of business is in Germany and AAID is not registered or required to register to do business in North Carolina. Additionally, he stated AAID has never owned or leased property in North Carolina, paid income or property taxes in North Carolina, filed a legal action in North Carolina, advertised, sold goods, or performed services within North Carolina. Sancilio testified that AAID has a revolving line of credit with Bank of America, but otherwise has never had a contract with a North Carolina company. He stated AAID has also served as a guarantor for a loan obtained by Applied Analytical Industries, Inc. and in the loan agreement it submitted to the jurisdiction and venue of the state and federal courts of North Carolina, agreeing that the bank had the option to enforce its rights under the loan agreement in the North Carolina courts.

Sancilio stated that he signed the purchase agreement on behalf of AAID's predecessor in Wilmington, North Carolina. Sancilio also testified that Forrest Waldon signed the escrow agreement on behalf of AAID and was serving as managing director of AAID and general counsel to aaiPharma at the time. The office of the general counsel is located in Wilmington, North Carolina. The escrow agreement between plaintiffs and AAID states that "all notices and other communications under the escrow agreement when given to AAID should be provided in care of Applied Analytical Industries, Attention: General Counsel, 5051 New Centre Drive, Wilmington, North Carolina 28403, U.S.A."

Albert Cavagnaro (Cavagnaro), associate counsel for aaiPharma, testified that he was assigned to coordinate the outside legal counsel in this case. Cavagnaro also was involved in the negotiation of the purchase agreement. Cavagnaro stated that AAID had no employees and that Sancilio was its only managing director. He testified that all

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notices and communications regarding the escrow agreement were to be sent to AAID in Wilmington, North Carolina. The letterhead of AAID contains a Wilmington telephone number and fax number. Cavagnaro also testified that Forrest Waldon executed the escrow agreement on behalf of AAID and was involved in negotiating various elements of the agreement with plaintiffs.

[1] Defendants argue the trial court erred in denying AAID's motion to dismiss for lack of personal jurisdiction because the North Carolina long-arm statute does not permit the exercise of personal jurisdiction over AAID. Defendants contend plaintiffs did not meet their burden of proof in that they failed to sufficiently allege facts in their complaint that allow the inference of personal jurisdiction over defendants. Defendants also argue the trial court erred in denying AAID's motion to dismiss because AAID lacked sufficient minimum contacts with North Carolina to satisfy due process in the exercise of personal jurisdiction.

Whether the courts of this State may exercise personal jurisdiction over a nonresident defendant involves a two-prong analysis: "(1) Does a statutory basis for personal jurisdiction exist, and (2) If so, does the exercise of this jurisdiction violate constitutional due process?" The assertion of personal jurisdiction over a defendant comports with due process if defendant is found to have sufficient minimum contacts with the forum state to confer jurisdiction.

Golds v. Central Express Inc., 142 N.C. App. 664, 665-66, 544 S.E.2d 23, 25, *disc. review denied*, 353 N.C. 725, 550 S.E.2d 775 (2001) (quoting *J.M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 424, 324 S.E.2d 909, 913, *cert. denied*, 313 N.C. 602, 330 S.E.2d 611 (1985)).

A plaintiff bears the burden of establishing that some ground exists for the exercise of personal jurisdiction over a defendant. *Golds*, 142 N.C. App. at 666, 544 S.E.2d at 26. The trial court may conduct an evidentiary hearing including testimony or depositions, but the plaintiff maintains the ultimate burden of proving personal jurisdiction by a preponderance of the evidence at the evidentiary hearing or at trial. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). The trial court is not required to make findings of fact when ruling on a motion to dismiss, but "it is presumed that the trial court found facts sufficient to support its ruling. If these presumed factual findings are supported by competent evidence, they

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are conclusive on appeal.” *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 672, 541 S.E.2d 733, 737 (2001) (citation omitted).

North Carolina’s long-arm statute provides:

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served . . .

- (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:

. . . .

- d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C. Gen. Stat. § 1-75.4 (2001).

“This statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process.” *DeArmon v. B. Mears Corp.*, 67 N.C. App. 640, 643, 314 S.E.2d 124, 126 (1984), *rev’d on other grounds*, 312 N.C. 749, 325 S.E.2d 223 (1985). Accordingly, “when evaluating the existence of personal jurisdiction pursuant to G.S. § 1-75.4(1)(d), ‘the question of statutory authorization “collapses into the question of whether [the defendant] has the minimum contacts with North Carolina necessary to meet the requirements of due process.” ’ ” *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 218 (quoting *Hanes Companies v. Ronson*, 712 F. Supp. 1223, 1226 (M.D.N.C. 1988)). Thus, we proceed directly to the due process inquiry to determine if defendants possess minimum contacts with North Carolina sufficient to permit jurisdiction over them.

Due process requires that a defendant have sufficient minimum contacts with the forum state before being subject to suit in that state’s courts. *First Union Nat’l Bank of Del. v. Bankers Wholesale Mortgage, LLC*, 153 N.C. App. 248, 252, 570 S.E.2d 217, 221 (2002). The minimum contacts should be of a nature such that the exercise of personal jurisdiction over the defendant 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)).

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In determining whether sufficient minimum contacts exist, the Court should consider (1) the quantity of contacts between defendants and North Carolina; (2) the nature and quality of such contacts; (3) the source and connection of plaintiff's cause of action to any such contacts; (4) the interest of North Carolina in having this case tried here; and (5) convenience to the parties. In addition to the 'minimum contacts' inquiry, the Court should take into account (1) whether defendants purposefully availed themselves of the privilege of conducting activities in North Carolina, (2) whether defendants could reasonably anticipate being brought into court in North Carolina, and (3) the existence of any choice-of-law provision contained in the parties' agreement.

First Union, 153 N.C. App. at 253, 570 S.E.2d at 221.

In the present case, defendants maintain sufficient minimum contacts with North Carolina to permit our state's courts to exercise personal jurisdiction over them. The trial court held a hearing and received evidence consisting of affidavits and depositions before ruling that defendants were subject to personal jurisdiction in North Carolina. Evidence considered by the trial court shows that AAID maintains an office in Wilmington, North Carolina and lists a Wilmington telephone number and fax number on its letterhead. All correspondence and communication relating to the escrow agreement is directed to Wilmington, North Carolina, as required by the terms of the escrow agreement. Plaintiffs' repeated letters to AAID requesting release of the escrowed funds were accordingly mailed to the Wilmington address.

AAID's current managing director, Sancilio, who signed the purchase agreement on behalf of AAID, resides and works in Wilmington. Sancilio is the sole employee of AAID. In his capacity as managing director of AAID, he also serves as an agent for service of process upon AAID. AAID's former managing director, Forrest Waldon, who assisted in negotiations of the escrow agreement and who signed in Wilmington on behalf of AAID, worked in Wilmington. Cavagnaro, who testified that he reviewed the purchase agreement at signing, also resides and works in Wilmington.

Additionally, aaiPharma's general counsel, who also serves as general counsel for AAID and aaiPharma's subsidiaries, has offices in Wilmington, North Carolina. While not pertinent to the facts of this case, AAID also maintains a line of revolving credit with Bank of America under a loan guaranty agreement with its parent company,

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aaiPharma. In conjunction with this agreement, AAID has also submitted to North Carolina jurisdiction and North Carolina law for the resolution of legal issues arising under that agreement and has agreed that venue is convenient in North Carolina.

Based on the foregoing evidence, we find that AAID maintains sufficient minimum contacts sufficient to satisfy the requirements of N.C.G.S. § 1-75.4 and due process. AAID maintains a continuous and systematic presence within this state by and through its agent in Wilmington, North Carolina. AAID holds itself out as engaged in substantial activity within North Carolina by employing a managing director and negotiating and signing agreements in Wilmington, North Carolina, and by denoting Wilmington, North Carolina as the point of correspondence on its letterhead and in the escrow agreement. AAID should have reasonably anticipated being haled into court in North Carolina and, therefore, the exercise of personal jurisdiction over AAID is proper. The trial court did not err in finding that AAID was subject to personal jurisdiction in North Carolina. This assignment of error is without merit.

[2] Defendants next argue the trial court erred in failing to grant defendants' motions to stay the action under N.C. Gen. Stat. § 1-75.12(a) because it would work a substantial injustice on them to be tried in a North Carolina court. Defendants concede they have no right to appeal from the trial court's determination on this issue. N.C. Gen. Stat. § 1-75.12(c) (2001) states that "[w]henever such a motion is denied, the movant may seek review by means of a writ of certiorari and failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion." Defendants have failed to properly petition this Court for a writ of certiorari and we decline to treat defendants' assignment of error as a petition for writ of certiorari. This assignment of error is without merit.

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

We affirm the order of the trial court.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

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ROBERT TUCKER AND CAROLYN TUCKER, PLAINTIFFS v.
THE CITY OF KANNAPOLIS, DEFENDANT

No. COA02-1038

(Filed 15 July 2003)

1. Appeal and Error— refusing to allow rebuttal of affidavits—incomplete record on appeal

The trial court did not err in an action seeking a declaratory judgment that the city lacked authority to condemn plaintiffs' property by refusing to allow plaintiff husband to testify orally to rebut the city's affidavits supporting the trial court's decision, because plaintiffs failed to demonstrate that the trial court's refusal was an abuse of discretion when: (1) the record does not contain any evidence that the trial court ever issued the ruling challenged on appeal; and (2) plaintiffs failed to include in the record the evidence or other documentation necessary for an understanding of the issue on appeal.

2. Cities and Towns— condemnation—public purpose

The trial court did not err in an action seeking a declaratory judgment that the city lacked authority to condemn plaintiffs' property by concluding that the proposed taking was for a permissible public purpose to extend sewer service, because: (1) the city's affidavits established that the condemnation met both the public use test and the public benefit test; and (2) the city's evidence established that the extension of sewer service was for three existing subdivisions, several homes, and numerous other properties, as well as any future developments in a newly-annexed area.

Appeal by plaintiffs from judgment entered 3 April 2002 by Judge James C. Davis in Cabarrus County Superior Court. Heard in the Court of Appeals 16 April 2003.

Helms Mullis & Wicker, P.L.L.C., by James G. Middlebrooks and Steven A. Meckler, for plaintiffs-appellants.

Hamilton Gaskins Fay & Moon, P.L.L.C., by Robert C. Stephens and George W. Sistrunk, III, for defendant-appellee.

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GEER, Judge.

Defendant City of Kannapolis sought to condemn the property of plaintiffs Robert and Carolyn Tucker in order to acquire an easement for expansion of the City's sewer system. The Tuckers filed a declaratory judgment action asking the trial court to declare that the City had no authority to condemn their property. Plaintiffs appeal from the trial court's order in favor of the City.

Plaintiffs contend on appeal that the trial court erred in refusing to allow Mr. Tucker to testify orally to rebut the City's affidavits and that those affidavits are insufficient to support the trial court's decision. Because plaintiffs have failed to demonstrate that the trial court's refusal to allow oral testimony was an abuse of discretion and because the evidence in the record establishes no genuine issue of material fact regarding the City's entitlement to a declaratory judgment in its favor, we affirm.

On 20 August 2001, Mr. Tucker received a letter from the City Manager for the City of Kannapolis advising him that the City would be entering the Tuckers' property to prepare for the placement of a proposed sewer line. Plaintiffs have alleged that this sewer line is intended for the private use of Ken Lingafelt, who owns property neighboring plaintiffs' tract and intends to develop a subdivision on that property. After the Tuckers objected that the City was exceeding its power of eminent domain they received a notice of condemnation, on 19 November 2001, stating that the City intended to file a condemnation action.

On 27 December 2001, plaintiffs filed an unverified complaint seeking a declaratory judgment that the City lacked authority to condemn their property because of the absence of any public benefit or use. Plaintiffs also sought a preliminary injunction prohibiting the City from appropriating or entering onto their property.

The City filed an answer denying the pertinent allegations of the complaint and asserting as an affirmative defense that the condemnation was for the public use and benefit. In addition, the City's answer contained a "Motion for Declaratory Judgment," seeking an order (a) declaring the City's condemnation of plaintiffs' property to be a valid exercise of the City's power of eminent domain, (b) denying plaintiffs' request for injunctive relief, and (c) dismissing plaintiffs' complaint.

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In March 2002, the City served plaintiffs with two affidavits: the affidavit of Wilmer Melton, III (the Water and Wastewater Resources Director for the City) and the affidavit of Michael Legg (the City's Assistant Manager responsible for the installation of sewer lines). Plaintiffs did not file any responsive affidavits.

On 1 April 2002, a hearing was held on the City's motion. According to plaintiffs' brief on appeal, Mr. Tucker was not allowed to testify. Plaintiffs have not, however, filed a transcript of that hearing with this Court.

On 3 April 2002, the trial court entered an order finding that the Tucker condemnation was part of and necessary to the City's plan to extend sanitary sewer service to newly annexed areas within the City's jurisdiction and that the condemnation was for a public use and provided a public benefit to the City's citizens. The court concluded, therefore, that the condemnation was a legitimate and valid exercise of the City's power of eminent domain pursuant to Chapters 40A and 160A of the North Carolina General Statutes. The court entered a declaratory judgment in the City's favor, denied plaintiffs' request for injunctive relief, and dismissed plaintiffs' complaint with prejudice.

I

[1] Plaintiffs first argue that the trial court erred in not allowing oral testimony from Mr. Tucker at the 1 April hearing. The record on appeal does not, however, contain the information necessary for us to review this assignment of error.

Rule 9 of the North Carolina Rules of Appellate Procedure provides that "review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9." The record on appeal is specifically required to contain "so much of the evidence . . . as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed." N.C.R. App. P. 9(a)(1)(e). As appellants, plaintiffs bore the burden of ensuring that all necessary information was included in the record on appeal as required by Rule 9. *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988) ("It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form."). Plaintiffs have, however, neither

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filed a transcript of the motion hearing nor included documents in the record that would enable us to review any refusal by the trial court to allow Mr. Tucker's testimony.

Because plaintiffs did not file a transcript, our review is limited to the record on appeal. The record contains nothing showing (a) that plaintiffs specifically requested that Mr. Tucker be allowed to testify, (b) the reasons they argued to the court to allow the testimony, or (c) the reasons that the court relied upon in refusing to grant plaintiffs' request. Without having some indication of the basis for the trial court's ruling, we cannot determine whether the court's refusal to allow oral testimony was an abuse of discretion. *See Lowder v. All Star Mills, Inc.*, 60 N.C. App. 699, 704-05, 300 S.E.2d 241, 244 (a trial court's decision to hear a pretrial motion only on affidavits is reviewed for abuse of discretion), *disc. review denied*, 308 N.C. 387, 302 S.E.2d 250 (1983). In fact, the record does not even contain any evidence that the trial court ever issued the ruling challenged on appeal.¹ Since plaintiffs have failed to include in the record the evidence or other documentation necessary for an understanding of the issue on appeal, this assignment of error is overruled.

II

[2] Plaintiffs also argue that the trial court erred in concluding that the proposed taking was for a permissible public purpose. We disagree.

Plaintiffs first contend that the affidavits submitted by the City were not competent evidence to support the trial court's conclusion because they amounted to inadmissible hearsay. Plaintiffs admit, however, that they did not object at the hearing to the admission of the affidavits. They have therefore waived any claim that the affidavits constituted hearsay. In any event, since the court was addressing a pretrial motion, affidavits were the preferred form of evidence. *Lowder*, 60 N.C. App. at 704-05, 300 S.E.2d at 244 (for pretrial motion hearings, affidavits and not oral testimony are the preferred form of evidence).

Although the City's motion was labeled "Motion for Declaratory Judgment," it appears that it was intended to be and was treated by the trial court as a motion for summary judgment. The record contains no indication that plaintiffs objected below to this approach.

1. In their assignments of error, plaintiffs cite only to the trial court's Declaratory Judgment, which makes no mention of plaintiffs' request to offer oral testimony.

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North Carolina courts have in fact held that summary judgment is an appropriate procedure in an action, such as this one, for a declaratory judgment. *Medearis v. Trs. of Myers Park Baptist Church*, 148 N.C. App. 1, 4, 558 S.E.2d 199, 202 (2001) (citing cases), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002). On appeal, this Court must review the whole record to determine (1) whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) whether the moving party was entitled to judgment as a matter of law. *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001).

The General Assembly has granted the power of eminent domain to municipalities “[f]or the public use or benefit,” including establishing or extending sewer and septic tank lines and systems. N.C. Gen. Stat. § 40A-3(b)(4) (2001). *See also* N.C. Gen. Stat. §§ 160A-311(3), 160A-312(a) (2001) (granting cities the authority to construct “public enterprises,” including septic and other disposal systems, in order to furnish services to their citizens). Whether a condemnor’s intended use of the property is for “the public use or benefit” is a question of law for the courts. *Stout v. City of Durham*, 121 N.C. App. 716, 718, 468 S.E.2d 254, 257 (1996). Our Supreme Court has held that courts must consider whether a proposed condemnation satisfies two separate tests: a public use test and a public benefit test. *Carolina Telephone and Telegraph Co. v. McLeod*, 321 N.C. 426, 430, 364 S.E.2d 399, 401 (1988).

Under the “public use test,” the dispositive determination is “whether the general public has a right to a definite use of the property sought to be condemned.” *Id.* The “public’s right to use, not the public’s actual use” is the key factor in making the required determination. *Id.* (emphasis original).

Under the “public benefit test,” the dispositive determination is “whether some benefit accrues to the public as a result of the desired condemnation.” *Id.* If the proposed condemnation would “contribute to the general welfare and prosperity of the public at large” and if that contribution cannot readily be furnished without the aid of governmental power, then the public benefit test is satisfied. *Id.* at 432, 364 S.E.2d at 402.

The City’s affidavits established that the condemnation of the Tuckers’ property meets both tests. These affidavits explained that

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the City had annexed certain real property in Rowan County in 1999 and that the City was in the process of extending sewer service to the annexed area. The plan to deliver sewer service to the annexed area was part of the City's provision of necessary sewer services to citizens residing within the City limits. Portions of the sewer system had already been completed, but the City wished to extend the sewer system north and east of a specified road in the annexed area, including an extension through a portion of the Tuckers' property. The proposed extension would serve three existing housing subdivisions, several other homes, and numerous other properties, as well as any future developments. According to the affidavits, even the Tuckers would potentially benefit from the extended sewer service. The record contains no evidence from plaintiffs countering the City's affidavits.

Because numerous property owners, all City residents, will have the equal right to connect to the expanded sewer system, the intended use of the Tucker condemnation satisfies the "public use" test. *Stout*, 121 N.C. App. at 719, 468 S.E.2d at 257. As for the "public benefit" test, this Court has already recognized:

that the provision of expanded sanitary sewer services is essential to growth and economic development, which is beneficial to the community and its citizens, and that such services are necessities which cannot generally be provided without governmental assistance. It follows the provision of sewer services to a substantial retail shopping center would contribute to the general welfare and prosperity of the community, which benefits from economic growth and, therefore, satisfies the "public benefit" test.

Id. It is equally undeniable that extension of sewer services to a newly-annexed area with multiple homes satisfies the "public benefit" test. *See also Charlotte v. Heath*, 226 N.C. 750, 756, 40 S.E.2d 600, 605 (1946) (exercise of power of eminent domain in order to provide water and sewerage services to small community of people was for a public benefit).

Plaintiffs rely on *City of Statesville v. Roth*, 77 N.C. App. 803, 336 S.E.2d 142 (1985) as support for their claim that the condemnation is not for a public use or benefit. Our Supreme Court in *McLeod*, however, rejected the argument found dispositive in *Roth* that since the proposed condemnation would benefit only a single property owner, it was necessarily for a private purpose. *Compare* 321 N.C. at 431-33,

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364 S.E.2d at 402-03 (involving extension of telephone service to a single customer) *with* 77 N.C. App. at 807, 336 S.E.2d at 144 (involving extension of water and sewer system to single manufacturing plant). We note *Roth* predates the Supreme Court's decision in *McLeod*.

Regardless, the *Roth* plaintiffs offered evidence that the new water and sewer line would only benefit a single plant located on property adjoining the condemned property and that the City did not plan to extend the lines beyond the plant. Here, the City's evidence establishes that the extension of sewer service is for three existing subdivisions, several homes, and numerous other properties, as well as any future developments in a newly-annexed area. Since this evidence was uncontradicted, the trial court did not err in entering an order declaring that the Tucker condemnation was for a public use and public benefit and that it was a legitimate exercise of the City's power of eminent domain.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

DEBRA B. GOLDSTON, PLAINTIFF V. DAVID B. GOLDSTON, JR., DEFENDANT

No. COA02-1245

(Filed 15 July 2003)

1. Divorce— equitable distribution—classification—sale of house and lot

The trial court erred in an equitable distribution action by classifying the proceeds of the sale of the pertinent house and lot as entirely marital property, because: (1) defendant acquired the house before the parties' marriage and it was his separate property; and (2) the act of physically transferring the location of the house onto the lot owned by the parties as tenants by the entirety, unaccompanied by any other evidence of donative intent by defendant, was insufficient to rebut the statutory mandate that separate property remain separate unless a contrary intention is expressly stated in the conveyance.

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[159 N.C. App. 180 (2003)]

2. Divorce— equitable distribution—unequal division of marital assets

The trial court did not abuse its discretion in an equitable distribution action by determining that an unequal division of the marital assets in favor of plaintiff wife was equitable based on: (1) substantial separate property owned by defendant husband; (2) post-separation use of the marital residence by defendant; (3) the income and liability of the parties; and (4) the duration of the marriage.

Appeal by defendant from judgment entered 12 March 2002 by Judge Jerry A. Jolly in Columbus County District Court. Heard in the Court of Appeals 4 June 2003.

The McGougan Law Firm, by Paul J. Ekster and Dennis T. Worley, for plaintiff appellee.

Soles, Phipps, Ray and Prince, by Sherry Dew Prince, for defendant appellant.

TIMMONS-GOODSON, Judge.

David B. Goldston, Jr. (“defendant”) appeals from an order and judgment of equitable distribution by the trial court. For the reasons set forth herein, we reverse in part the order and judgment of the trial court.

The pertinent facts of the instant appeal are as follows: On 24 April 2001, Debra B. Goldston (“plaintiff”) filed a complaint against defendant in Columbus County District Court seeking, in pertinent part, equitable distribution of the marital estate. The matter came before the trial court on 15 November 2001. Upon consideration of the evidence, the trial court made the following findings of fact:

13. That prior to the marriage, the Defendant owned a house situated on the lot at 302 Lakeshore Drive in Lake Waccamaw, North Carolina.

14. That the lot was deeded by the Defendant to the Plaintiff and Defendant as tenants by the entirety on January 9, 1996 by deed recorded in deed book 497 at page 239.

15. That before the lot at 302 Lakeshore Drive in Lake Waccamaw, North Carolina was deeded to the parties as tenants by entirety, the Defendant moved the house located at 302 Lakeshore Drive to Waccamaw Shores.

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16. That a lot at Waccamaw Shores was deeded to the Plaintiff and Defendant as tenants by entirety by Plaintiff's parents prior to the house being moved onto the lot.

17. That prior to the separation of the parties, the parties sold the house and lot in Waccamaw Shores to the Defendant's son for \$74,013.12.

18. That the Defendant has had possession of the money from the sale of the lot since the date of separation and has invested the same in an interest bearing account having a balance on the date of hearing of \$79,191.97.

Based on the above-stated findings of fact, the trial court concluded that "the Defendant moved his separate property, the home [originally located at 302 Lakeshore Drive] onto the lot [at Waccamaw Shores] thereby transforming the same to marital property." The trial court therefore classified the proceeds of the sale of the house and lot at Waccamaw Shores as marital property. The trial court further concluded that an unequal division of the marital property in favor of plaintiff was equitable and entered judgment accordingly. From the judgment of the trial court, defendant appeals.

Defendant argues that the trial court erred by (1) classifying the proceeds of the sale of the house and lot at Waccamaw Shores as marital property and (2) determining that an unequal division of the marital assets in favor of plaintiff was equitable. For the reasons set forth herein, we reverse in part the judgment of the trial court.

[1] Defendant argues that the trial court erred in classifying the proceeds from the sale of the real property located at Waccamaw Shores as entirely marital rather than part marital and part separate. In an equitable distribution action, the trial court must first classify all property owned by the parties as marital or separate, as defined by the statute. *See* N.C. Gen. Stat. § 50-20(a) (2001); *McLean v. McLean*, 323 N.C. 543, 545, 374 S.E.2d 376, 378 (1988). Marital property includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties[.]" N.C. Gen. Stat. § 50-20(b)(1) (2001). Separate property is

all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by

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gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.

N.C. Gen. Stat. § 50-20(b)(2) (2001). “Property can have a dual nature, and can be classified as part separate and part marital.” *Nix v. Nix*, 80 N.C. App. 110, 113, 341 S.E.2d 116, 118 (1986). Where property is dual in nature, the trial court applies a “source of funds” approach to distinguish between marital and separate contributions to the property. *See Wade v. Wade*, 72 N.C. App. 372, 381-82, 325 S.E.2d 260, 269, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Under this approach, “when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property.” *Id.* at 382, 325 S.E.2d at 269; *see also McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E.2d 910, 916, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985).

In the instant case, the property at issue is \$74,013.12, the proceeds of the sale of the house (originally located at 302 Lakeshore Drive) and lot at Waccamaw Shores. Defendant acquired the house and lot located at 302 Lakeshore Drive prior to his marriage to plaintiff. The house and lot were therefore clearly defendant’s separate property unless transformed to marital property by defendant. “Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.” N.C. Gen. Stat. § 50-20(b)(2). The lot located at 302 Lakeshore Drive became marital property when, on 9 January 1996, defendant deeded the lot to plaintiff and defendant as tenants by the entirety. Prior to deeding the lot, however, defendant removed the house located thereon, and moved it to the Waccamaw Shores lot, which was titled to defendant and plaintiff as tenants by the entirety. The trial court concluded that, by removing the house and placing it on a lot titled to plaintiff and defendant as tenants by the entirety, defendant transformed the house to marital property. We disagree.

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In *Wade*, the plaintiff-husband owned a lot prior to marriage. During the marriage, the parties constructed a residence upon the lot, thereby substantially improving the property. The defendant-wife urged that the Court “adopt the theory of ‘transmutation through commingling’ and find that the improved real property [was] entirely marital property. Under that theory, affirmative acts of augmenting separate property by commingling it with marital resources is viewed as indicative of an intent to transmute, or transform, the separate property to marital property.” *Id.* at 381, 325 S.E.2d at 269. The Court expressly rejected the defendant’s argument, noting the “clear legislative intent that separate property brought into the marriage or acquired by a spouse during the marriage be returned to that spouse, if possible, upon dissolution of the marriage.” *Id.* Instead, the Court concluded that the house and lot were of dual nature and, applying the source of funds approach, concluded that “that part of the real property consisting of the unimproved land owned by plaintiff prior to the marriage should be considered separate in character and that part of the property consisting of the house which was constructed during the marriage with marital funds should be considered marital in character.” *Id.* at 382, 325 S.E.2d at 269.

Here, the house originally located at 302 Lakeshore Drive and moved to Waccamaw Shores was acquired by defendant prior to the marriage and was clearly his separate property. The trial court made no findings evincing an intent by defendant to transfer the house to the marital estate. Citing *Walter v. Walter*, 149 N.C. App. 723, 561 S.E.2d 571 (2002), plaintiff argues that, by moving the house to the Waccamaw Shores lot titled to both plaintiff and defendant as tenants by the entireties, defendant made a gift to the marital estate, and that it was defendant’s burden to overcome this gift presumption. We disagree.

The Court in *Walter* held that a house acquired by the parties *during* the marriage was not of dual nature but entirely marital, even though the defendant-husband contributed separate monies to the purchase price of the house. Because the house was acquired during the marriage, there was a rebuttable presumption of donative intent by the defendant-husband of the separate monies under the “interspousal gift provision” of section 50-20(b)(2). *See id.*; N.C. Gen. Stat. § 50-20(b)(2) (“property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance”). As the defendant-husband offered no clear and convincing evidence to rebut the pre-

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sumption of donative intent, the property was entirely marital. *See id.* In contrast to *Walter*, defendant here acquired the house *before* marriage, and thus there was no presumption of donative intent under section 50-20(b)(2). Rather, it was plaintiff's burden to prove that defendant intended the house to be a gift to the marriage. *See Caudill v. Caudill*, 131 N.C. App. 854, 857, 509 S.E.2d 246, 248-49 (1998). We conclude that the act of physically transferring the location of the house onto the lot owned by the parties as tenants by the entirety, unaccompanied by any other evidence of donative intent by defendant, was insufficient to rebut the statutory mandate that separate property remain separate "unless a contrary intention is expressly stated in the conveyance." N.C. Gen. Stat. § 50-20(b)(2). The proceeds of the sale of the lot and house are therefore dual in nature, and the trial court's order classifying the entire property as marital must be reversed. *See Walter*, 149 N.C. App. at 729, 561 S.E.2d at 570; *see also Cable v. Cable*, 76 N.C. App. 134, 137, 331 S.E.2d 765, 767 (concluding that, by treating the house and lot as separate property solely because the house built with marital funds was built on land acquired by the defendant prior to the marriage, the trial court erred in classifying the property), *disc. review denied*, 315 N.C. 182, 337 S.E.2d 856 (1985); *Lawrence v. Lawrence*, 75 N.C. App. 592, 595, 331 S.E.2d 186, 188 (concluding that "[t]hat part of the real property consisting of the unimproved property owned by defendant prior to marriage should be characterized as separate and that part of the property consisting of the additions, alterations and repairs provided during marriage should be considered marital in nature"), *disc. review denied*, 314 N.C. 541, 335 S.E.2d 18 (1985).

[2] Defendant further argues that the trial court erred in concluding that an unequal division of the marital estate was equitable. We discern no abuse of discretion by the trial court. *See Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (noting the general rule that only when the evidence fails to show any rational basis for the distribution ordered by the court will its determination be upset on appeal). The trial court found that in light of, *inter alia*, substantial separate property owned by defendant, the post-separation use of the marital residence by defendant, the income and liability of the parties, and the duration of the marriage, an unequal division was equitable. Defendant has advanced no compelling grounds to disturb the trial court's ruling in that respect, nor do we discern such. We overrule this assignment of error.

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[159 N.C. App. 186 (2003)]

In conclusion, we hold that the trial court erred in classifying the monies received for the sale of the lot and house at Waccamaw Shores as entirely marital. We therefore reverse the judgment of the trial court in part and remand this case for reclassification of the proceeds of the sale of the house and lot at Waccamaw Shores and for reevaluation of the equitable distribution award. We otherwise affirm the judgment of the trial court.

Affirmed in part, reversed in part and remanded.

Judges HUDSON and STEELMAN concur.



JO ANN UPCHURCH EMBLER, PLAINTIFF v. HENRY JAMES EMBLER, DEFENDANT

No. COA02-279

(Filed 15 July 2003)

1. Divorce— equitable distribution—distributive award—findings

An equitable distribution order contained insufficient findings of the source from which defendant was to pay a distributive award and was remanded. If defendant is to pay the award from a non-liquid asset or by obtaining a loan, the award must be recalculated to take into account the financial ramifications.

2. Divorce— equitable distribution—distributional factors—findings insufficient

The trial court's findings about distributional factors in an equitable distribution award were not detailed enough for appellate review and the order was remanded.

3. Divorce— equitable distribution—pension plan—marital property

The classification of a pension plan as marital property for an equitable distribution award was upheld. Defendant stipulated that the plan was marital property with a note that the marital portion was to be appraised, but never introduced evidence of the premarital value of the pension. Defendant had the burden of showing the portion of the plan that was separate property and cannot now complain.

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Appeal by defendant from judgment entered 7 September 1999 by Judge James M. Honeycutt in Iredell County District Court. Heard in the Court of Appeals 10 February 2003.

Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for plaintiff-appellee.

Anderson Korzen & Associates, P.C., by John J. Korzen, for defendant-appellant.

GEER, Judge.

Defendant, Henry Embler, appeals from an equitable distribution judgment, arguing that the trial court erred in: (1) ordering defendant to pay plaintiff, Jo Ann Embler, a distributive award of \$24,876.00 without making any finding as to the existence of liquid assets sufficient to pay the award; (2) concluding that an unequal division of the marital property was equitable and awarding sixty percent of it to plaintiff; and (3) classifying defendant's pension plan solely as marital property. We reverse in part and remand for further findings of fact as to the distributional factors that the court considered in making the equitable distribution award and the source of funds from which defendant is to pay any distributive award.

The detailed facts and procedural history of the case are found in *Embler v. Embler*, 143 N.C. App. 162, 545 S.E.2d 259 (2001) (dismissing appeal as interlocutory). The parties were married in 1976, had one child in 1986, separated in 1993, and divorced in 1996. Plaintiff is a teacher with a master's degree in education and earns approximately \$35,000.00 per year. Defendant is in management with BellSouth Telecommunications and earns approximately \$69,000.00 annually. In considering the issue of equitable distribution, the trial court awarded sixty percent of the marital estate to plaintiff and required defendant to pay a distributive award of \$24,876.00 to plaintiff within sixty days. Defendant claims that he has no liquid assets from which to pay this award and would incur penalties if he withdrew the necessary sums from his retirement account.

When reviewing a trial court's equitable distribution award, the appellate court's duty is to determine whether the trial court abused its discretion. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). "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." *Id.*

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at 777, 324 S.E.2d at 833. The trial court must, however, make specific findings of fact regarding each factor specified in N.C. Gen. Stat. § 50-20(c) (2001) on which the parties offered evidence. *Rosario v. Rosario*, 139 N.C. App. 258, 260-61, 533 S.E.2d 274, 275-76 (2000). We believe that the trial court's findings of fact in this case were insufficient.

I

[1] Defendant first argues that the trial court erred in ordering him to pay plaintiff a distributive award of \$24,876.00 without making any finding whether he had sufficient liquid assets to pay the award. We agree.

This case is analogous to *Shaw v. Shaw*, 117 N.C. App. 552, 451 S.E.2d 648 (1995). In *Shaw*, the trial court had ordered the defendant to pay the plaintiff an \$8,360.72 distributive award, but did not specify a source of funds for that payment. The evidence suggested that the only asset from which defendant could pay the distributive award was his thrift plan; yet the evidence also established that any withdrawal from that plan would result in harsh tax consequences. This Court remanded the case to the trial court for a determination whether the defendant had assets, other than the thrift plan, from which he could make the distributive award payment. *Id.* at 555, 451 S.E.2d at 650. If not, then the trial court was required to either "(1) provide for some other means by which the defendant [could] pay \$8,360.72 to the plaintiff; or (2) determine the consequences of withdrawing that amount from the thrift plan and adjust the award from defendant to plaintiff to offset the consequences." *Id.* See also N.C. Gen. Stat. § 50-20(c)(9), (11) (in determining whether an equal division of property is equitable, the court must consider the liquid or nonliquid character of all marital property and the tax consequences to each party).

While Mr. Emblers assets are greater than the defendant's in *Shaw*, the evidence suggests that those assets are still non-liquid in nature. Although defendant may in fact be able to pay the distributive award, defendant's evidence is sufficient to raise the question of where defendant will obtain the funds to fulfill this obligation. As in *Shaw*, the court below ordered defendant to pay the distributive award without pointing to a source of funds from which he could do so even though defendant had no obvious liquid assets. If defendant is ordered to pay the distributive award from a non-liquid asset or by obtaining a loan, the equitable distribution award must be recalculated.

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lated to take into account any adverse financial ramifications such as adverse tax consequences. *Shaw* requires that we remand for further findings as to whether defendant has assets, other than non-liquid assets, from which he can make the distributive award payment. If defendant has insufficient liquid assets, then the trial court must (1) determine the means by which defendant is to pay the amount; and (2) adjust the award from defendant to plaintiff to offset any adverse financial consequences of using the non-liquid assets.

II

[2] Defendant next contends that the trial court erred in concluding that an unequal division of the marital property was equitable and awarding sixty percent of it to plaintiff. We remand for further findings on the trial court's consideration of the distributional factors.

In order for this Court to conduct proper appellate review of an equitable distribution order, the trial court's findings must be specific enough that the appellate court can determine from reviewing the record whether the judgment represents a correct application of the law. *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). The trial court must make "specific findings as to the *ultimate* facts (rather than the *evidentiary* facts) found by the trial court to support its conclusion regarding equitable distribution . . ." *Rosario*, 139 N.C. App. at 260, 533 S.E.2d at 275 (emphasis original). Although the trial court need not find all possible facts from the evidence before it, "it [is] required to make findings sufficient to address the statutory factors and support the division ordered." *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988).

More specifically, this Court has held:

[W]hen a party presents evidence which would allow the trial court to determine that an equal distribution of the marital assets would be inequitable, the trial court must then consider all of the distributional factors listed in G.S. 50-20(c), *Smith v. Smith*, 314 N.C. 80, 331 S.E. 2d 682 (1985), and must make sufficient findings as to each statutory factor on which evidence was offered.

Locklear v. Locklear, 92 N.C. App. 299, 305-06, 374 S.E.2d 406, 410 (1988). This Court has previously held that a blanket statement that the trial court considered the distributional factors listed in N.C. Gen. Stat. § 50-20(c) is insufficient as a matter of law. *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276.

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Here, the trial court stated that it “considered the factors found and noted above in the findings of fact. *The Court also considered the other statutory distributional factors.*” (Emphasis added) In its findings of fact, the trial court recited various contentions of the parties, but found only that (1) the absolute value of defendant’s retirement portfolio greatly exceeds plaintiff’s; (2) defendant’s income is nearly double plaintiff’s; (3) the parties are almost the same age and have several more earning years ahead of them; (4) defendant has more retirement value accruing after the date of separation than his wife; (5) defendant paid certain marital debts after marriage; and (6) it is desirable to divide the estate without having to use a QDRO. Beyond the trial court’s general statement that it “considered the other statutory distributional factors,” the court made no specific reference to the factors under N.C.G.S. § 50-20(c). It is, therefore, impossible to determine whether the trial court found and relied upon any other statutory factors.

Even the factors expressly considered by the trial court lack sufficient detail. Although the court mentioned that defendant paid certain marital debts, the court did not value those debts. *See Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987) (court must both classify and value debt). In addition, although the court made findings regarding the value of defendant’s motor vehicles, the court made no finding whether the cars were liquid or nonliquid assets for purposes of the equitable distribution division, despite N.C. Gen. Stat. § 50-20(c)(9)’s requirement that the court consider the “liquid or nonliquid character of all marital property and divisible property.” And, even though the court found that the estate should be divided without a QDRO, the trial court made no findings as to how this should be accomplished or the tax consequences to defendant if he is required to dip into this retirement. *See* N.C. Gen. Stat. § 50-20(c)(11) (requiring consideration of the tax consequences to each party).

Without sufficient findings as to the § 50-20(c) distributional factors, we cannot determine whether the trial court appropriately applied the law in ordering the unequal distribution of the marital estate. As this Court has previously acknowledged:

We are not unmindful of the heavy caseload in the state’s district courts and realize that the district court judges do not have the luxury of spending unlimited time on each case. We are also aware that, almost without exception, district court judges provide considered expertise in a demanding and complex area of

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the law where the litigants' feelings often are inflamed. We are, however, unable to discharge our appellate responsibilities unless the trial courts reach reviewable conclusions of law based upon findings of fact supported in the record.

Rosario, 139 N.C. App. at 267, 533 S.E.2d at 279.

III

[3] Finally, defendant argues that the trial court erred in classifying his BellSouth pension plan solely as marital property. The trial court found:

Defendant has a pension plan with BellSouth with date of separation value of \$76,200.00. The plan had increased in value to \$180,557.00 by 1996. Defendant was employed with BellSouth (and contributed to this plan) for eight (8) years prior to marriage (1968-1976). The Court will consider this as a distributional factor (without being able to determine the exact pre-marital amount).

Our review is "limited to the question whether *any* competent evidence in the record sustains the court's findings." *Taylor v. Taylor*, 92 N.C. App. 413, 417, 374 S.E.2d 644, 647 (1988) (emphasis original). The evidence in the record here is sufficient to sustain the court's finding that the pension plan was marital property.

Defendant stipulated that the pension plan was marital property on the equitable distribution form. Even though he included in a footnote "marital portion to be appraised," he did not introduce any evidence of the pre-marital value of the pension. On appeal, defendant suggests that since one-third of defendant's employment with BellSouth occurred before his marriage, one-third of the pension should have been separate property. Yet, he offered no evidence that such a division would accurately reflect the actual value of the pension plan immediately prior to the marriage. The court thus had no evidence by which it could accurately calculate the pre-marital value of the pension. Defendant bore the burden of showing what portion of the pension was separate property and cannot now complain because he failed to meet his burden. *Johnson v. Johnson*, 317 N.C. 437, 454, 346 S.E.2d 430, 434 (1986). We find this assignment of error to be without merit.

Reversed in part and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

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[159 N.C. App. 192 (2003)]

SELBY SMITH, PLAINTIFF V. GILBERT G. WHITMER, M.D., AND CAROLINA REGIONAL
ORTHOPAEDICS, DEFENDANTS

No. COA02-1290

(Filed 15 July 2003)

**Medical Malpractice— standard of care—expert’s knowledge
not sufficient**

The testimony of a medical malpractice expert witness was properly excluded where the witness stated that he was familiar with a uniform or national standard of care, but provided no meaningful evidence that his community was similar to the community in which the alleged malpractice took place; offered no testimony regarding defendants’ training, experience, or resources; and there was no evidence that a national standard of care is the same standard practiced in defendants’ community. Summary judgment was properly granted for defendants because this witness was plaintiff’s only expert.

Appeal by plaintiff from orders entered 5 June 2002 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 4 June 2003.

Anderson Law Firm, by Michael J. Anderson, for plaintiff appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Mark E. Anderson and Heather R. Waddell, for defendant appellees.

TIMMONS-GOODSON, Judge.

Selby Smith (“plaintiff”) appeals from orders of the trial court excluding plaintiff’s expert witness and granting summary judgment in favor of Gilbert G. Whitmer, M.D. (“Dr. Whitmer”) and Carolina Regional Orthopaedics (“CRO”) (collectively, “defendants”). For the reasons stated herein, we affirm the orders of the trial court.

The pertinent facts of the instant appeal are as follows: On 6 December 2000, plaintiff filed a complaint against defendants in Nash County Superior Court, alleging that defendants were negligent in their medical treatment of plaintiff, resulting in permanent injury to plaintiff’s left wrist. The complaint further alleged that CRO was a health care facility with its principal place of business in Nash

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County, and that Dr. Whitmer was an orthopedic surgeon and partner in the practice.

In support of his complaint, plaintiff presented expert medical testimony by Dr. Melvin Heiman (“Dr. Heiman”), an orthopedic surgeon practicing in Abingdon, Virginia. During his deposition testimony, Dr. Heiman verified that he was familiar with the standard of care for orthopedic surgeons practicing in Tarboro and Rocky Mount, North Carolina, where defendants practiced. When further questioned, however, Dr. Heiman acknowledged that he was not licensed to practice medicine in North Carolina, had never visited Tarboro or Rocky Mount, and had no affiliation with any physicians practicing in those towns. When asked to describe the steps he had taken to familiarize himself with the relevant standard of care, Dr. Heiman stated that he understood “about the approximate size of the community and what goes on there. It seems comparable to Abingdon, perhaps a little bit bigger.” Dr. Heiman explained that his information concerning the community was based on statements by plaintiff’s counsel, but he could not remember any information told to him, and plaintiff’s counsel did not supply him with any written materials. Dr. Heiman explained that

[a]s I understand it, [the medical community of Tarboro and Rocky Mount is] a community not too different from the size of Abingdon and the hospital is somewhat the same. So, I would say it’s pretty similar to here, but I’ve not personally walked in the hospital doors and I’ve not personally met any physicians there. . . .

[Defense counsel]: So, it would be fair to say that you’re not acquainted with the medical community in Tarboro, North Carolina, and Rocky Mount, North Carolina?

. . . .

A: That would be fair to say. I’ve not been down there.

Q: Now, Doctor, I understood you to say just a minute ago when I asked that question that you believe that that community is similar to Abingdon.

A: That’s correct.

Q: And, therefore, you believe you can testify about [the] standard of care. Is that right?

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A: Well, you have to understand, in the orthopedic community, we pass certain examinations and become qualified to be orthopedic surgeons by adopting certain treatment programs if you're in Nome, Alaska, or Abingdon. It's all the same. So, it's not like it was at the turn of the century, you know, where medical practice was very different in different communities. I mean, there are some differences. We don't do open heart surgery here in Abingdon like in Washington, D.C. Maybe that's standard, you know, in the bigger hospitals. But as far as orthopedic surgeons are concerned, we're all trained and pass qualifying exams to treat people in similar fashions. So the standard of care for orthopedic surgeons all over the country is very, very similar.

Q: Are you saying there's a national standard of care for orthopedic surgeons?

....

A: Well, there is in a way. In other words, in this day and age, orthopedic surgeons are educated and asked to pass certain qualifying exams such that our general way of treating patients is pretty standard no matter where you're practicing.

Q: Doctor, would you agree that if the practice of medicine—the standard care—practice of medicine is different—if it is different—assuming for the sake of my question that it's different in Rocky Mount, North Carolina, and Tarboro, North Carolina, than it is in Abingdon, Virginia, would you agree that you would not be able to testify about those differences?

....

A: I'm just not—I don't know how to answer that question. I really don't.

....

A: I can comment on the standard of care as far as a reasonably prudent orthopedic surgeon anywhere in the country regardless of what the medical community in Tarboro, North Carolina might do.

On 3 June 2002, defendants filed a motion to exclude Dr. Heiman's testimony on the grounds that he was not qualified to testify as to the relevant standard of care. Upon consideration of Dr. Heiman's testimony, the trial court agreed with defendants and

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granted the motion to exclude his testimony. Because Dr. Heiman was plaintiff's sole expert witness, the trial court further granted a motion made by defendants for summary judgment. The trial court accordingly entered orders excluding Dr. Heiman's testimony and granting summary judgment to defendants. From the orders of the trial court, plaintiff appeals.

Plaintiff argues that the trial court erred in excluding Dr. Heiman's testimony and consequently, in granting summary judgment in favor of defendants. For the reasons stated herein, we affirm the orders of the trial court.

"In a medical malpractice action, a plaintiff must show (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998). Section 90-21.12 of the North Carolina General Statutes prescribes the appropriate standard of care in a medical malpractice action:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice *among members of the same health care profession with similar training and experience situated in the same or similar communities* at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (2001) (emphasis added). Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony. See *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 625, 504 S.E.2d 102, 108 (1998); *Weatherford*, 129 N.C. App. at 621, 500 S.E.2d at 468; see also N.C. Gen. Stat. § 8C-1, Rule 702(a) (2001). Further, the standard of care must be established by other practitioners in the particular field of practice of the defendant health care provider or by other expert witnesses equally familiar and competent to testify as to that limited field of practice. See N.C. Gen. Stat. § 8C-1, Rule 702(b), (d); *Heatherly*, 130 N.C. App. at 625, 504 S.E.2d at 108.

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Although it is not necessary for the witness testifying as to the standard of care to have actually practiced in the same community as the defendant, see *Warren v. Canal Industries*, 61 N.C. App. 211, 215-16, 300 S.E.2d 557, 560 (1983), the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care of similar communities. See, e.g., *Henry v. Southeastern OB-GYN Assocs., P.A.*, 145 N.C. App. 208, 210, 550 S.E.2d 245, 246-47, *affirmed per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001); *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997). The “same or similar community” requirement was specifically adopted to avoid the imposition of a national or regional standard of care for health care providers. See *Henry*, 145 N.C. App. at 210, 550 S.E.2d at 246; *Page v. Hospital*, 49 N.C. App. 533, 535, 272 S.E.2d 8, 10 (1980).

In *Henry*, the plaintiffs tendered a single expert witness, an obstetrician practicing in South Carolina, in support of their medical malpractice action against an obstetrician and medical facility located in Wilmington, North Carolina. In his deposition testimony, the expert witness failed to testify that he was familiar with the defendants’ training, experience, the standard of care or the resources available in defendants’ community. Instead, the expert witness asserted that the standard of care was the same throughout the United States, and that he was familiar with the uniform standard. Concluding that plaintiffs failed to present competent medical testimony establishing the relevant standard of care, the trial court granted directed verdict in favor of the defendants. On appeal, this Court rejected the plaintiffs’ argument that their expert witness was qualified to testify as to the applicable standard of care. “[I]t is clear that the concept of an applicable standard of care encompasses more than mere physician skill and training; rather, it also involves the physical and financial environment of a particular medical community.” *Id.* at 211, 550 S.E.2d at 247. Because the plaintiffs failed to establish that their expert witness was familiar with the standard of care practiced in Wilmington or a similar community, the testimony was properly excluded.

In the instant case, Dr. Heiman offered no testimony regarding defendants’ training, experience, or the resources available in the defendants’ medical community. Although Dr. Heiman asserted that he was familiar with the applicable standard of care, his testimony is devoid of support for this assertion. In preparation for his deposition, Dr. Heiman stated that the sole information he received or reviewed concerning the relevant standard of care in Tarboro or

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Rocky Mount was verbal information from plaintiff's attorney regarding "the approximate size of the community and what goes on there." Dr. Heiman could offer no further details, however, concerning the medical community, nor could he actually remember what plaintiff's counsel had purportedly told him. Dr. Heiman acknowledged that he had never visited Tarboro or Rocky Mount, had never spoken to any health care practitioners in the area, and was "not acquainted with the medical community in Tarboro, North Carolina, and Rocky Mount, North Carolina[.]" Instead, Dr. Heiman stated that "the standard of care for orthopedic surgeons all over the country is very, very similar" and that he could "comment on the standard of care as far as a reasonably prudent orthopedic surgeon anywhere in the country regardless of what the medical community in Tarboro, North Carolina might do."

Although Dr. Heiman stated that he was familiar with a uniform or national standard of care, there was no evidence that a national standard of care is the same standard of care practiced in defendants' community. Dr. Heiman likewise provided no meaningful evidence to establish that Abingdon, Virginia, was similar to Tarboro or Rocky Mount, North Carolina. As such, Dr. Heiman "failed to make the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community." *Tucker*, 127 N.C. App. at 198, 487 S.E.2d at 829; *Henry*, 145 N.C. App. at 210, 550 S.E.2d at 247. Further, Dr. Heiman offered no testimony regarding defendants' training, experience, or the resources available in the defendants' medical community.

We conclude that plaintiff's expert witness failed to demonstrate that he was sufficiently familiar with the standard of care "among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action" as to offer relevant and competent evidence regarding the alleged negligence by defendants. N.C. Gen. Stat. § 90-21.12. The trial court therefore properly excluded testimony by Dr. Heiman, and we overrule this assignment of error. Because Dr. Heiman was plaintiff's sole expert witness, exclusion of his testimony rendered plaintiff unable to establish an essential element of his claim, namely, the applicable standard of care. *See Weatherford*, 129 N.C. App. at 621-22, 500 S.E.2d at 468-69. As plaintiff was unable to support an essential element of his claim, summary judgment in favor of defendants was proper. The orders of the trial court are hereby

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Affirmed.

Judges HUDSON and STEELMAN concur.

THOMASINE F. SMITH, EMPLOYEE-PLAINTIFF v. HOUSING AUTHORITY OF
ASHEVILLE, EMPLOYER-DEFENDANT, SELF-INSURED

No. COA02-1138

(Filed 15 July 2003)

1. Workers' Compensation— injury by accident—psychological disorder—investigation of claim

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's psychological disorder was not the result of an injury caused by an accident arising out of and in the course of her employment with defendant, but was the result of the investigation of her claim for that injury or from perceived workplace retaliation for her injury.

2. Workers' Compensation— psychological disorder—investigation of claim not an accident

The Industrial Commission did not err in a workers' compensation case by concluding as a matter of law that plaintiff employee's psychological disorder was not compensable, because: (1) although an accident occurred, the Commission found the investigation thereof caused plaintiff's mental injury; and (2) the investigation into the accident cannot be considered an accident as it is not an unlooked for and untoward event involving the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.

Appeal by plaintiff from an opinion and award entered 17 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2003.

*Bailey and Bailey, by J. Todd Bailey, and Gum & Hillier, P.A.,
by Patrick S. McCroskey, for plaintiff-appellant.*

Root & Root, P.L.L.C., by Louise Critz Root, for defendant-appellee.

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CALABRIA, Judge.

Thomasine F. Smith (“plaintiff”) appeals the opinion and award of the North Carolina Industrial Commission (“Commission”) finding plaintiff’s psychological disorder was not the result of an injury caused by an accident arising out of and in the course of her employment with the Housing Authority of Asheville (“defendant”), but was “the result of the investigation of her claim for that injury or from perceived workplace retaliation for her injury.” The Commission concluded as a matter of law “[p]sychological injuries resulting from legitimate personnel action, including investigation of workers’ compensation claims generally are not compensable under the Workers’ Compensation Act.” For the reasons stated herein, we affirm.

The Commission found the following facts pertinent to this appeal. Plaintiff was fifty-four years old, and had worked for defendant for twenty-four years when, on 17 April 1997, plaintiff was injured by an accident at work. When plaintiff was returning from lunch, she discovered her new chair had arrived and was in her cubicle.

5. . . . When she sat in the chair, it rolled out from under her and plaintiff landed on the floor. She was not seriously injured or knocked unconscious. Her co-workers helped her up. Plaintiff was not visibly shaken and actually laughed at herself. She complained only of some neck pain and later about her knee.

Plaintiff was treated by a doctor for her minor physical injuries.

9. Within a week of the accident, plaintiff had a difficult interaction with William Wynn, the safety coordinator for the Asheville Housing Authority. Mr. Wynn had instituted a program to improve workplace safety. When he heard about plaintiff’s accident, Mr. Wynn spoke with plaintiff about her accident report. Plaintiff apparently believed that Mr. Wynn was accusing her of filing a lawsuit against the Housing Authority and she became upset. Renee Crane, a co-worker overheard the conversation and stated that Mr. Wynn was somewhat arrogant in his manner, but, that she did not recall Mr. Wynn stating that a suit was filed. Ms. Crane explained that plaintiff became upset and did not understand what Mr. Wynn was saying. This encounter with Mr. Wynn was upsetting to plaintiff, and Ms. Crane reported it to Constance Proctor, her supervisor.

Thereafter, plaintiff continued to work “without any apparent difficulties.” However, “[i]n August 1997, she developed a panic disorder”

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and throughout the Fall she was treated for mental illness. Plaintiff was thereafter diagnosed as paranoid delusional, a permanent condition “anticipated to preclude plaintiff from employment.” Dr. Anthony Sciara, Ph.D., a psychologist who has treated plaintiff since December 1997, testified and the Commission found the following:

17. . . . Although Dr. Sciara stated that plaintiff’s paranoid delusions were caused by the accident at work and the way it was handled by the employer, he was not able to explain how the accident (the fall in the new chair) caused the injury. Dr. Sciara explained that there was no evidence of a brain or other injury caused by the fall which would produce this condition and that her symptoms were not consistent with a traumatic head injury. In contrast, however, plaintiff was described by Dr. Sciara as a person with a significant moral structure who felt a need to follow the rules, perceived that her employer desired no lost day injuries at work, and that any accident at work would not be acceptable. Further, the perceived nature of the confrontation from Mr. Wynn accusing her of filing some type of legal action against the employer would significantly undermine her psychological stability and contribute to her decompression.

In finding of fact 21, the Commission gave greater weight to Dr. Sciara’s testimony that the psychological condition was “the result of the investigation of her claim for that injury or from perceived workplace retaliation for her injury.” Based on these facts, the Commission concluded that plaintiff’s paranoid delusional disorder is not compensable. Plaintiff appeals.

Plaintiff asserts the Commission erred by: (I) failing to find her psychological impairment arose out of her employment because there is “no evidence” to support the conclusion that her disorder did not arise from her fall; and (II) failing to conclude as a matter of law that her mental injury is compensable.

This Court’s review of workers’ compensation cases is “limited to the consideration of two questions: (1) whether the Full Commission’s findings of fact are supported by competent evidence; and (2) whether its conclusions of law are supported by those findings.” *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). “This Court does not weigh the evidence and decide the issue on the basis of its weight; rather, this Court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.” *Devlin v. Apple Gold, Inc.*,

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153 N.C. App. 442, 446, 570 S.E.2d 257, 261 (2002). "If there is competent evidence to support the findings, they are conclusive on appeal even though there is evidence to support contrary findings." *Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 498, 560 S.E.2d 809, 812 (2002). "The Industrial Commission's conclusions of law, however, are reviewable *de novo*." *Absher v. Thomas Built Buses, Inc.*, 156 N.C. App. 697, — S.E.2d — (2003).

I. Findings of Fact

[1] Plaintiff appeals asserting the Commission erred in findings of fact 17 and 21 because there was "no evidence" to support these findings. In finding of fact 17, set forth above, the Commission found that, although Dr. Sciara concluded "the incident" in April 1997 caused her illness, he could only explain how the investigation into the accident caused plaintiff's condition and he could not explain how the accident itself was the cause. Finding of fact 21 reads:

Plaintiff has developed a paranoid delusional disorder. The greater weight of the competent evidence is that the paranoid delusional disorder is related to the employer's investigation of her claim for the April 17, 1997 injury, including plaintiff's perception of her employer's desire for no work injuries and perceived retaliation for being injured on the job. The Commission gives greater weight to the testimony of Dr. Sciara that plaintiff's psychological condition was not caused by a traumatic injury to her head or other injury sustained in the fall. Plaintiff's psychiatric condition was not due to an injury by accident arising out of and in the course of her employment on April 17, 1997. Rather, this condition is the result of the investigation of her claim for that injury or from perceived workplace retaliation for her injury. Plaintiff has not established a psychological injury from an accident or untoward event.

Plaintiff's assertion that no evidence supports these findings is incorrect. When asked to describe how the April 1997 incident caused plaintiff's psychological demise, Dr. Sciara testified:

What I can do is to give you the best understanding that I have of it; to say absolutely beyond a doubt this is what occurred, I'm not sure anybody can do.

Ms. Smith is somebody with a significant moral structure in her own life, tries to follow all the rules, believes in doing the right thing, believes in taking absolute responsibility for herself,

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somewhat perfectionistic in her orientation to what she does and has a true belief in kind of right and wrong, that if you do the right things then good things will happen to you.

The understanding that I have is that while she had been an employee at the Housing Authority and although it was stressful at times, she felt she was doing a good thing, felt that she was following all the rules of the agency. She indicated a significant awareness that there were to be no lost day injuries at work, that this was a significant thing that was focused on a lot by the Housing Authority and that people were admonished not to take a day off if they didn't have to. And, that any accident related lost work days just was not acceptable and that's what she understood. She felt then very guilty that because of what happened to her and even though she was in significant pain that she wanted to take the day off and felt very coerced that she was to come to work.

It then began that she believed people were watching her to see if she was going to do anything against the Housing Authority and that began a psychological spiral from which she's not recovered.

As the Commission found, none of Dr. Sciara's explanation supports his conclusion that the patient's current psychiatric decomposition "is a direct result of her work related injury. . . ." Rather, Dr. Sciara referenced only the investigation in describing the cause of plaintiff's illness and further explained the confrontational investigation "would have significantly undermined her psychological stability. . . ." Accordingly, the testimony supports the Commission's finding that the investigation caused her mental illness. Although the evidence may have supported alternate findings, the Commission's findings are "conclusive on appeal" where they are supported by any competent evidence. Accordingly, we overrule plaintiff's assignment of error.

II. Conclusions of Law

[2] Plaintiff also asserts the Commission erred in concluding as a matter of law that her injury was not compensable.

We note that "as long as the resulting disability meets statutory requirements, mental, as well as physical impairments, are compensable under the Act." *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 119, 476 S.E.2d 410, 414 (1996). Therefore,

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the essential question is not whether a mental injury is compensable but rather whether the injury met the statutory requirements.

Although plaintiff argues “[t]his case does not present the claim of an individual who suffers mental injury merely as a result of an investigation,” that is precisely the case the Commission found was presented. Although plaintiff asserted the Commission’s findings were not supported by competent evidence, since Dr. Sciara’s testimony supports the Commission’s findings, these findings are conclusive on appeal. Accordingly, we must consider whether a mental injury resulting from an investigation into an accident, and not the accident itself, is compensable.

“[A]n injury is compensable under the North Carolina Workers’ Compensation Act only if (1) it is *caused by an ‘accident,’* and (2) the accident arises out of and in the course of employment.” *Pitillo v. N.C. Dep’t. of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 645, 566 S.E.2d 807, 811 (2002) (emphasis added). “An accident under the workers’ compensation act has been defined as ‘an unlooked for and untoward event which is not expected or designed by the person who suffers the injury,’” and which involves “‘the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.’”” *Id.*, (quoting *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999) (quoting *Adams v. Burlington Industries, Inc.*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983))); see also *Lovekin v. Lovekin & Ingle*, 140 N.C. App. 244, 248, 535 S.E.2d 610, 613 (2000) (discussing North Carolina’s interpretation of the term “accident.”) In *Pitillo*, this Court held plaintiff’s mental illness was not caused by an “accident” where plaintiff required psychiatric treatment after a job performance review. *Pitillo*, 151 N.C. App. at 646, 566 S.E.2d at 812. Similarly, in the case at bar, although an accident occurred, the Commission found the investigation thereof caused plaintiff’s mental injury. The investigation into the accident cannot be considered an “accident” as it is not “an unlooked for and untoward event” involving “the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.” Since the investigation is not an “accident,” and the Commission found the investigation caused plaintiff’s mental injury, we find the Commission properly determined plaintiff’s injury is not compensable under the Workers’ Compensation Act.

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Affirmed.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JEFFREY LEON OWEN

No. COA02-1224

(Filed 15 July 2003)

1. Rape— attempted first-degree—motion to dismiss—sufficiency of evidence—short-form indictment

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree rape even though defendant never removed any of his clothing or said anything to the victim about sexually assaulting her, and defendant contends the short-form indictment was fatally defective, because: (1) defendant's actions and words constitute sufficient evidence of defendant's intent to gratify his passion upon the victim, including defendant's repeated insistence that the victim remove her clothes and come toward him and his attempt to stab her with his knife; (2) the only evidence supporting an alternative motivation was defendant's statement to the police that he went in the house to commit a breaking and entering, and the surrounding circumstances do not corroborate defendant's assertion; and (3) North Carolina has consistently upheld the constitutionality of the use of the short-form indictment in rape cases.

2. Evidence— refusing to admit portion of defendant's statement to police—no prejudicial error

Although defendant contends the trial court erred in an attempted first-degree rape and breaking or entering case by refusing to permit a portion of defendant's statement to the police to be considered by the jury, this assignment of error is dismissed because: (1) defendant failed to meet his burden of showing that had the error in question not been committed, a different result would have been reached at trial; and (2) the excluded statement was relevant only to the crime of attempted first-degree forcible rape, and there was ample evidence of defendant's actions and intention.

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[159 N.C. App. 204 (2003)]

Appeal by defendant from judgment entered 22 May 2002 by Judge James F. Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 10 June 2003.

Attorney General Roy Cooper, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Hosford & Hosford, P.L.L.C., by Geoffrey W. Hosford, for defendant-appellant.

CALABRIA, Judge.

On 22 May 2002, Jeffrey Leon Owen (“defendant”) was convicted of attempted first-degree forcible rape and breaking or entering. For these offenses, the court sentenced defendant to a total of 151 months to 191 months’ imprisonment. Defendant appeals. We find no error and affirm the judgment of the trial court.

On 31 May 2001, Lauren Tyler (“the victim”), aged 17, was asleep on the top single bunk in the rear bedroom of her home. On the bottom double bunk, her older sister, Lucia Tyler, and their cousin, Toni Jimerson, were also sleeping. The Tyler girls’ father, Richard, was asleep in the adjoining bedroom.

At approximately 8:30 a.m., the victim awoke and saw defendant standing on the side of her bed holding a knife and putting socks on his hands. The victim had known defendant for approximately five or six years. Defendant pointed the knife at her and said: “Take your fucking clothes off.” The victim complied with defendant’s order to remove her clothing, but she moved away from defendant by retreating to the back corner of her bed. She twice refused defendant’s orders to come toward him. While she was in the corner of her bed, naked and on her knees, he approached her with his knife. When defendant leaned over her bed and stuck his knife at her, she grabbed the knife and pressed it down into the bed. In the ensuing struggle, defendant pulled her off the bed, and she sustained cuts to her right hand and right arm. The victim screamed thereby awakening her sister, cousin, and father. When they came to her aid, defendant jumped out the open bedroom window.

Detective William Britton of the Fayetteville Police Department testified that, after defendant was arrested and informed of his rights, he made the following statement, which was admitted into evidence: “I went in there to commit a B&E. That is what I do. I don’t have to rape girls. I swear to God, I did not touch Lauren or rape her, nor did

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I touch the other two girls. I have known Lauren and Lucia since I was about ten years old.”

Defendant asserts the trial court erred by: (I) denying defendant’s motion to dismiss the attempted first-degree rape charge and (II) refusing to permit a portion of defendant’s statement to the police to be considered by the jury.

I. Motion to Dismiss

[1] To review a motion to dismiss for insufficient evidence, this Court asks “whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). “Substantial evidence is that which a reasonable juror would consider sufficient to support the conclusion that each essential element of the crime exists.” *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). “In reviewing a motion to dismiss, the trial court should be concerned only with the sufficiency of the evidence, and not with its weight.” *State v. Oxendine*, 150 N.C. App. 670, 673, 564 S.E.2d 561, 564 (2002), *disc. rev. denied*, 356 N.C. 689, 578 S.E.2d 325 (2003). “[T]he evidence must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Payne*, 149 N.C. App. 421, 424, 561 S.E.2d 507, 509 (2002). “Review of the sufficiency of the evidence to withstand the defendant’s motion to dismiss is the same whether the evidence is direct, circumstantial, or both.” *Oxendine*, 150 N.C. App. at 673, 564 S.E.2d at 564.

The elements of attempted first-degree rape are as follows: “(i) that defendant had the specific intent to rape the victim and (ii) that defendant committed an act that goes beyond mere preparation, but falls short of the actual commission of the rape.” *State v. Schultz*, 88 N.C. App. 197, 200, 362 S.E.2d 853, 855 (1987), *aff’d per curiam*, 322 N.C. 467, 368 S.E.2d 386 (1988). Defendant argues the State failed to prove the element of intent.

“The element of intent as to the offense of attempted rape is 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.” *Id.*, 88 N.C. App. at 200, 362 S.E.2d at 855-56. “Sexual intent may be proved circumstantially by inference, based upon a defendant’s actions, words, dress, or demeanor.” *State v. Cooper*, 138 N.C. App. 495, 498, 530 S.E.2d 73, 75,

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aff'd per curiam, 353 N.C. 260, 538 S.E.2d 912 (2000). An "overt act manifesting a sexual purpose or motivation on the part of the defendant is adequate evidence of an intent to commit rape." *State v. Dunston*, 90 N.C. App. 622, 625, 369 S.E.2d 636, 638 (1988); *see also Oxendine*, 150 N.C. App. at 672-75, 564 S.E.2d at 563-64. Moreover, "evidence 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." *Id.*, 90 N.C. App. at 625-26, 369 S.E.2d at 638. "The State need not show that the defendant made an actual physical attempt to have intercourse or that he retained the intent to rape his victim throughout the incident." *Id.*, 90 N.C. App. at 625, 369 S.E.2d at 638.

In the case at bar, defendant's actions and words constitute sufficient evidence of defendant's "intent to gratify his passion upon the victim." *Schultz*, 88 N.C. App. at 200, 362 S.E.2d at 855. Specifically, defendant's repeated insistence that the victim remove her clothes and come toward him and his attempt to stab her with his knife are "overt act[s] manifesting a sexual purpose or motivation on the part of the defendant." *Dunston*, 90 N.C. App. at 625, 369 S.E.2d at 638. Even though defendant never removed any of his clothing or said anything to the victim about sexually assaulting her, the evidence is sufficient to satisfy the intent element of attempted rape.

However, defendant contends *State v. Brayboy*, 105 N.C. App. 370, 413 S.E.2d 590 (1992), favorably compares to this case. In *Brayboy*, the Court explained the evidence did "not support the conclusion that he intended to rape [the victim]" because

[t]here [was] no evidence that defendant forced himself upon her in a sexual manner or indicated that it was his intent to engage in forcible, nonconsensual intercourse with her. The evidence merely show[ed] that defendant grabbed [the victim], forced her to the ground, pinned her arms behind her back and then straddled her following [the co-defendant's] shooting [of another victim]. The only evidence which could [have given] any indication that defendant might have intended to commit some sexual act upon [the victim was the co-defendant's] statement, 'Go on and do what you want to do with her.'

Id., 105 N.C. App. at 374, 413 S.E.2d at 593. The Court concluded the State produced insufficient evidence of the element of intent to withstand defendant's motion to dismiss the charge of attempted rape. *Id.*

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Contrary to defendant's argument, we distinguish the case at bar from *Brayboy*. In *Brayboy*, the circumstances surrounding the shooting supported the inference that defendant's motivation in restraining the victim was "to prevent her from interfering with [the shooting of another person] or aiding [him] once he had been assaulted." *Id.*, 105 N.C. App. at 376, 413 S.E.2d at 594. In contrast, the only evidence supporting an alternative motivation here is defendant's statement to the police, "I went in there to commit a B&E." The surrounding circumstances do not corroborate defendant's assertion. Although defendant contends he entered the Tyler home for the purpose of "breaking and entering," he did not remove anything from their home. The house contained televisions, VCR's, stereos, jewelry and cell phones, yet nothing was stolen. Rather, as explained previously, the circumstances and evidence support the charge of attempted first-degree rape. Accordingly, we find *Brayboy* materially different from the case at bar.

We hold the evidence that defendant forced victim to undress at knifepoint and then attempted to stab her with his knife when she refused to come toward him, considered in the light most favorable to the State, constitutes an "overt act manifesting a sexual purpose or motivation on the part of the defendant" and was sufficient to support the intent element. *Dunston*, 90 N.C. App. at 625, 369 S.E.2d at 638. Accordingly, defendant's assertion of error is overruled on this basis.

Defendant asserts, in the alternative and for preservation of the issue, that the trial court erred in refusing to dismiss the charge of attempted first-degree rape on the basis that the short-form indictment utilized was fatally defective because it failed to allege "the essential elements of attempted first-degree rape." Defendant concedes North Carolina has consistently upheld the constitutionality of the use of the short-form indictment in rape cases as prescribed by N.C. Gen. Stat. §15-144.1. *State v. Bidgood*, 144 N.C. App. 267, 550 S.E.2d 198, *cert. denied*, 354 N.C. 222, 554 S.E.2d 647 (2001); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001). Thus, we hold accordingly.

II. Defendant's Statement to Police

[2] Defendant asserts the trial court erred in excluding from evidence the following portions of his statement to police: "What is funny is that [Lauren and Lucia] told my aunt that I tried to rape them. Now they're saying that I actually raped them." Defendant contends these statements were admissible under the North Carolina Rule of

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Evidence 106 and the trial court should not have excluded them as hearsay pursuant to Rule 802.

We need not address these arguments because even assuming *arguendo* defendant is correct, defendant has failed to meet his burden of showing that “had the error in question not been committed, a different result would have been reached at the trial. . . .” N.C. Gen. Stat. § 15A-1443(a) (2001). The excluded statement is relevant only to the crime of attempted first-degree forcible rape. Regarding this crime, there was ample evidence of defendant’s actions and intention. Accordingly, we cannot find that if the missing portion of defendant’s statement to the police had been admitted into evidence, there is a “reasonable possibility . . . a different result” would have been reached. *Id.*

Affirmed.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. JERMAINE McARN

No. COA02-918

(Filed 15 July 2003)

Search and Seizure— investigatory stop of vehicle—anonymous tip—motion to suppress cocaine

The trial court erred in a possession of cocaine case by denying defendant’s motion to suppress cocaine discovered following a stop of his vehicle based on an anonymous tip received by police that the vehicle was involved in illegal drug sales, because: (1) although the anonymous tipster’s providing of the location and description of the vehicle may have offered some limited indicia of reliability in that it assisted the police in identifying the vehicle the tipster referenced, the tipster never identified or in any way described an individual; and (2) the officer stopped defendant based solely on the anonymous tip, and the tip upon which the officer relied did not possess the indicia of reliability necessary to provide reasonable suspicion of criminal activity.

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[159 N.C. App. 209 (2003)]

Appeal by defendant from judgment entered 5 September 2001 by Judge James Floyd Ammons, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 26 March 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Janet Moore, for defendant appellant.

TIMMONS-GOODSON, Judge.

Jermaine McArn (“defendant”) appeals the trial court’s denial of his motion to suppress cocaine discovered following a stop of his vehicle. For the reasons discussed herein, we reverse the trial court’s denial of defendant’s motion to suppress and remand the case for a new trial.

The facts pertinent to the instant appeal are as follows: On 4 August 2001, Officer Thomas Lee Hall (“Officer Hall”) and Officer Smith of the Lumberton Police Department received a police radio communication dispatching the officers to investigate possible drug activity. An anonymous caller reported to the police department that a white Nissan vehicle on Franklin and Sessoms Street was involved in the sale of illegal drugs. Neither the record nor the trial court’s findings of fact reveal any information about the tipster. Upon receiving the police communication, Officer Hall proceeded to the dispatched location and observed a white Nissan vehicle leaving the area. Officer Hall stopped the vehicle, which was operated by defendant and occupied by passengers, Marcus McKinna (“McKinna”) and defendant’s children. Officer Hall had no reason to suspect the vehicle’s driver or occupants of illegal conduct apart from the anonymous tip.

Upon approaching defendant’s vehicle, Officer Hall ordered defendant to produce his driver’s license and vehicle registration. Defendant informed Officer Hall that his driver’s license was revoked. Defendant was ordered to exit his vehicle. Officer Hall patted down defendant for weapons, placed him in a patrol vehicle, issued him a citation, and asked for consent to search the vehicle. Defendant consented to a search of his vehicle; however, the search revealed no illegal substances or contraband. Subsequently, McKinna was placed under arrest based on outstanding warrants.

Prior to Officer Hall searching the vehicle, defendant was removed from the patrol vehicle and ordered to stand at the rear of

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the patrol vehicle. As Officer Hall searched defendant's vehicle, Detective Harold Jackson ("Detective Jackson") engaged in conversation with defendant. According to testimony from Detective Jackson, while talking to defendant he noticed that defendant appeared to have an object in his mouth. As a result, Detective Jackson asked defendant to "open his mouth and let [him] look [inside];" however, defendant did not respond to the request. Detective Jackson continued to talk with defendant and informed him that his children did not "need to see [him] going to jail for drugs," and that if he had drugs in his mouth he "needed to place them on the vehicle." On direct examination, defendant testified that Detective Jackson asked him if he had drugs in his mouth and that he did not respond. Defendant further testified that Detective Jackson continued to talk to him and stated "do not make us do this out here in front of the kids" and again requested to look inside of defendant's mouth. Subsequently, defendant removed a packet of cocaine from his mouth and placed the drugs on the rear of Officer Hall's patrol vehicle. Defendant was arrested and indicted for possession of a controlled substance.

At the close of the evidence, defendant's motion to suppress was denied and he entered a guilty plea to possession of cocaine; however, defendant reserved the right to appeal, pursuant to North Carolina General Statutes § 15A-979(b), from an order denying a motion to suppress. Defendant was sentenced to a suspended sentence of minimum five months' and a maximum of six months' imprisonment and twelve months of supervised probation. Defendant now appeals the trial court's denial of his motion to suppress.

The dispositive issue presented by this appeal is whether an anonymous tip received by police that a vehicle is involved in illegal drug sales is sufficient, without more, to justify an investigatory stop of the driver of the vehicle. For the reasons stated herein, we hold that it is not and reverse the judgment of the trial court.

"[T]he standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citations omitted), *cert. denied*, *Brewington v. North Carolina*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001)). This Court must not disturb the trial court's conclusions if

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they are supported by the court's factual findings. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). However, the trial court's conclusions of law are fully reviewable on appeal. *See State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). At a suppression hearing, conflicts in the evidence are to be resolved by the trial court. *See State v. Johnson*, 322 N.C. 288, 295, 367 S.E.2d 660, 664 (1988). The trial court must make findings of fact resolving any material conflict in the evidence. *See State v. Aubin*, 100 N.C. App. 628, 634, 397 S.E.2d 653, 657 (1990), *cert. denied*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991).

Here, defendant challenges the following findings of fact by the trial court:

.....

That on August 4th, 2000, Officer Hall of the Lumberton Police Department received information through the dispatch from an anonymous tip that there was a white Nissan, in the area of Franklin and Sessoms Streets, engaged in the sale of illegal narcotics or illegal drugs;

That the officer had been a police officer, at that time, for approximately 5 years and knew the area and knew that it had some reputation for being a crime area, although it was not the highest crime area of the city;

That, within 3 to 5 minutes of receiving this report, he proceeded to the area and saw a white Nissan [S]entra;

That he stopped the Nissan [S]entra primarily because of the information that the officer received from a citizen or informant via the communications from the anonymous call;

That, based on the officer's training, observation, experience, the area, and the details provided by the call and upon him finding a car that exactly matched the description of white Nissan [S]entra, he had reasonable suspicion to briefly stop the car;

The case before us involves the investigatory stop of defendant's automobile. We first note that before the police can conduct a brief investigatory stop of a vehicle and detain its occupants without a warrant, the officer must have a reasonable suspicion of criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968); *See also State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (holding that a seizure of a person includes a brief investigatory detention

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such as those involved in the stopping of a vehicle); *See State v. Bonds*, 139 N.C. App. 627, 628, 533 S.E.2d 855, 856 (2000). “Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if [the] allegations turn out to be fabricated, ‘an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.’” *Florida v. J.L.*, 529 U.S. 266, 270, 146 L. Ed. 2d 254, 260 (2000) (quoting *Alabama v. White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990)) (citations omitted). An anonymous tip may provide reasonable suspicion if it exhibits sufficient indicia of reliability and if it does not, then there must be sufficient police corroboration of the tip before the stop can be made. *Hughes*, 353 N.C. at 207, 539 S.E.2d at 630. When a tip is somewhat lacking in reliability it may still provide a basis for reasonable suspicion if it is buttressed by sufficient police corroboration. *Id.* “The reasonable suspicion must arise from the officer’s knowledge prior to the time of the stop.” *Id.* at 208, 539 S.E.2d at 631. An investigative 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.” *State v. Kincaid*, 147 N.C. App. 94, 98, 555 S.E.2d 294, 298 (2001). The police officer must have something more than an “unparticularized suspicion or hunch before” stopping a vehicle. *Id.* In determining whether reasonable suspicion exists, a court must consider the totality of the circumstances. *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70.

In the present case, Officer Hall testified that based on an anonymous tip he was dispatched to a specific location to “investigate possible drug activity . . . involving a white Nissan car.” Officer Hall testified that the area was residential and did not have a reputation for crime, although there had been prior complaints of drug activity in the area. Upon arriving at the scene, Officer Hall identified a white Nissan vehicle that would fit the description in the area as given by the anonymous tipster. He stopped the vehicle as it was leaving the area. Testimony from Officer Hall reveals that he stopped defendant based only on the description of the vehicle communicated by the dispatcher. Officer Hall had neither attempted nor made any independent observations or assessments regarding the operation of the Nissan vehicle, the activity of the occupants, or any illegal conduct.

In *Hughes*, our Supreme Court stated that:

“[a]n accurate description of a subject’s readily observable location and appearance is of course reliable in this limited sense: It

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will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”

Id. at 209, 539 S.E.2d at 632 (quoting *Florida*, 529 U.S. 266, 272, 146 L. Ed. 2d at 261).

Here, the fact that the anonymous tipster provided the location and description of the vehicle may have offered some limited indicia of reliability in that it assisted the police in identifying the vehicle the tipster referenced. It has not gone unnoticed by this Court, however, that the tipster never identified or in any way described an individual. Therefore, the tip upon which Officer Hall relied did not possess the indicia of reliability necessary to provide reasonable suspicion to make an investigatory stop. The anonymous tipster in no way predicted defendant’s actions. The police were thus unable to test the tipster’s knowledge or credibility. Moreover, the tipster failed to explain on what basis he knew about the white Nissan vehicle and related drug activity.

Officer Hall stopped defendant based solely on the anonymous tip and we hold that the tip, on its own, was not sufficiently reliable to create a reasonable suspicion of criminal activity. Accordingly, we conclude that the conclusion of the trial court, that the tip created a sufficient reasonable suspicion to justify stopping defendant’s vehicle, was error. Thus, we reverse the denial by the trial court of defendant’s motion to suppress and remand the case for a new trial.

Reversed and remanded for a new trial.

Judges BRYANT and GEER concur.

WARNOCK v. CSX TRANSP., INC.

[159 N.C. App. 215 (2003)]

DOUGLAS K. WARNOCK, PLAINTIFF V. CSX TRANSPORTATION, INC., DEFENDANT

No. COA02-568

(Filed 15 July 2003)

**Appeal and Error— inconsistent verdict—FELA action—
waiver of error**

Plaintiff railroad employee waived any claim of error based upon the inconsistency of the jury's verdict in an action under the Federal Employers' Liability Act when plaintiff's counsel declined the court's offer to resubmit the issues to the jury with further instructions and insisted that a mistrial was the only available remedy.

Appeal by plaintiff from judgment entered 1 June 2001 and order entered 1 November 2001 by Judge Robert F. Floyd in Richmond County Superior Court. Heard in the Court of Appeals 29 January 2003.

WARSHAUER, WOODRUFF & THOMAS, P.C., by Michael J. Warshauer, and KITCHIN, NEAL, WEBB, WEBB, & FUTRELL, P.A., by Henry L. Kitchin for plaintiff appellant.

MILLBERG, GORDON & STEWART, PLLC, by Frank J. Gordon, for defendant appellee.

TIMMONS-GOODSON, Judge.

Douglas K. Warnock ("plaintiff") appeals from judgment entered by the trial court in favor of CSX Transportation, Inc. ("defendant"). In a separate order dated 1 November 2001, plaintiff's motions for a new trial and judgment notwithstanding the verdict were denied. For the reasons stated herein, we conclude that the trial court committed no error.

The pertinent facts of the instant appeal are as follows: Plaintiff was employed by defendant, a railroad company, for thirty years as a locomotive engineer. In March of 1999, plaintiff was engaged in a "humping operation," which required him to move railroad cars in the rail yard. During the operation, plaintiff's locomotive derailed, causing him to suffer a back injury, which necessitated surgical treatment and prevented him from returning to work.

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On 7 October 1999, plaintiff filed a complaint against defendant under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, alleging that the derailment was caused by defendant's negligence and that defendant was strictly liable for the violation of safety regulations. The matter was heard in May 2001 before a jury and at the conclusion of trial, the jury returned the following verdict:

Issue #1: Was the plaintiff injured by the negligence of the defendant?

Answer: NO

Issue #2: Was the plaintiff injured by the defendant's violation of the provisions of a Federal Safety Regulation?

Answer: NO

....

Issue #3: Did the plaintiff by his own negligence contribute to his injury?

Answer: YES

Issue #4: What proportion or percentage of plaintiff's injury do you find to have been caused by the negligence of the respective parties?

Defendant 25%

Plaintiff 75%

....

Issue #5: What amount is the plaintiff entitled to recover for personal injury?

Answer: \$80,000.00

After reviewing the verdict, the trial court shared the verdict with counsels for defendant and plaintiff in a bench conference. Plaintiff's counsel objected to the verdict as inconsistent and requested a mistrial. Following the bench conference, the trial court struck the jury's answer to interrogatory four and interrogatory five, and then entered judgment for defendant. Plaintiff appeals.

The dispositive issue on appeal is whether plaintiff waived any claim of error based on the inconsistency of the jury's verdict where plaintiff insisted that the trial court declare a mistrial and the jury not

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be permitted to further deliberate. For the reasons stated herein, we conclude that plaintiff has waived his claim of error.

We note that plaintiff brought suit in Richmond County Superior Court under the Federal Employers' Liability Act ("FELA"). FELA suits may be brought in state court or federal court. *Lockard v. Missouri P. R. Co.*, 894 F.2d 299, 303, *cert. denied*, 498 U.S. 847, 112 L. Ed. 2d 102 (8th Cir. 1990). It is well established that "questions concerning the measure of damages in an FELA action are federal in character." *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493, 62 L. Ed. 2d 689, 693 (1980). "This is true even if the action is brought in state court." *Id.*

According to Rule 49(b) of the Federal Rules of Civil Procedure, when the answers to the special interrogatories are inconsistent with each other and with the general verdict, the court should not enter judgment but return the answers to the jury or order a new trial. Fed. R. Civ. P. 49(b) (2001). However, in *Lockard* the Court stated that

if trial counsel fails to object to any asserted inconsistencies and does not move for re-submission of the inconsistent verdict before the jury is discharged, the party's right to seek a new trial is waived. . . . The purpose of the rule is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury. . . . This prevents a dissatisfied party from misusing procedural rules and obtaining a new trial for an asserted inconsistent verdict.

Id. at 304 (citations omitted); see *White v. Celotex Corp.*, 878 F.2d 144, 146 (4th Cir.), *cert. denied*, 493 U.S. 964, 107 L. Ed. 2d 372 (1989); see also *Ludwig v. Marion Laboratories, Inc.*, 465 F.2d 114, 118 (8th Cir. 1972) (concluding that "the trial court should have been given the opportunity to correct error, if any existed, by resubmitting the matter to the jury."); *Chase Construction Co. v. Colon*, 725 So.2d 1144, 1145 (Fla. App., 3rd District, 1998) ("party's failure to seek jury reconsideration below is properly regarded as a conscious choice of strategy since a complaining party would naturally risk having the award unfavorable adjusted"); *Caterpillar Tractor Co. v. Donahue*, 674 P.2d 1276, 1284 (Wyo. 1983) ("a loser should not by design get two bites at the cherry. . . . The proper time to challenge the verdict was when the jury was still able to explain that which [the defendant] now considers to be an inconsistency").

In the instant case, the record reveals that the jury returned a verdict and the trial judge reviewed the verdict. Thereafter, the trial

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judge briefly excused the jurors and engaged in a bench conference, which does not appear to have been recorded. At the conclusion of the bench conference, the trial judge made the following recorded comments:

In accordance with our bench discussions, upon motion of the defendant, and the Court on its own motion, the Court will accept as consistent the answers of the jury to Issues 1, 2 and 3.

As to the answer of the jury to Issues 4 and 5 being inconsistent with the jury's response in answers to the issues of negligence, the Court will set aside the jury's verdict as to Issues 4 and 5, and render an amount of zero for the recovery of the plaintiff as to personal injuries.

The jury was then dismissed and the following colloquy took place between the Court and plaintiff's attorney:

THE COURT: Anything further from the parties at this time for plaintiff?

[PLAINTIFF]: The plaintiff, having advised the Court that we did not feel that any curative instructions would be helpful . . . It is clear, from the answers given by the jury, that they were confused. They gave such an inconsistent verdict that it defies logic to see how they got there . . . we'd ask the Court to declare a mistrial and let us retry this thing, . . .

We note that the trial court's order regarding post-trial motions reveals the following:

After reviewing th[e] verdict, the Court shared the verdict with counsel for both parties at the bench and sought their input as to how to proceed. Plaintiff's counsel suggested that the only alternative was for the Court to order a mistrial. The Court inquired as to whether plaintiff requested that the issues be resubmitted to the jury with further instructions. Plaintiff's counsel declined that offer and instead insisted that the jury not conduct further deliberations or receive further instructions. . . . Rather than objecting to the Court's acceptance of the verdict and seeking a re-submission of the issues to the jury, plaintiff's counsel moved for a mistrial and that motion was denied.

After a careful review of the record, it is clear that plaintiff's counsel refused to seek re-submission of the purportedly inconsistent

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issues to the jury. We note that the trial court twice gave plaintiff's counsel the opportunity to seek re-submission of the issues, and plaintiff's counsel refused. Plaintiff's counsel further stated that "we did not feel that any curative instructions would be helpful." Therefore, plaintiff made a conscious choice to allow the trial court to discharge the jury before any alleged inconsistencies could be properly addressed. Moreover, the only alternative submitted by plaintiff to the trial court was a mistrial. Plaintiff insisted that the jury not conduct further deliberations or receive further instructions.

We recognize that the requirement under Rule 49(b) is not whether plaintiff "feels that any curative instruction would be helpful," but whether the original jury is allowed to eliminate any inconsistencies without the need to present the evidence to a new jury. Under these set of facts, a grant of a mistrial by the trial court would eliminate the incentive of Rule 49(b) "for efficient trial procedure, and opens the door to the possible misuse of the rule's procedures by parties anxious to circumvent an unsatisfactory jury verdict by procuring a new trial." *United States Football League v. National Football League*, 644 F. Supp. 1040, 1049 n.8 (S.D.N.Y. 1986), *affirmed*, 842 F.2d 1335 (2d Cir. 1988); *Skillin v. Kimball*, 643 F.2d 19, 20 (1st Cir. 1981). Accordingly, counsel for plaintiff waived any right to complain about the alleged inconsistency in the jury verdict by failing to permit the trial court to resubmit the interrogatories to the jury.

For the foregoing reasons, we conclude that the trial court committed no error.

No error.

Judges TYSON and LEVINSON concur.

DOWNES v. STATE

[159 N.C. App. 220 (2003)]

RUTH E. DOWNES, FRANK C. REYNOLDS, JR., AND MARGUERITE C. REYNOLDS,
PLAINTIFFS-APPELLEES V. STATE OF NORTH CAROLINA, THE NORTH CAROLINA
DEPARTMENT OF REVENUE, E. NORRIS TOLSON, IN HIS CAPACITY AS SECRETARY
OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, AND THE HONORABLE ROY
COOPER, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA,
DEFENDANTS-APPELLANTS

No. COA02-969

(Filed 15 July 2003)

Taxation— gift—contingent transfers

The trial court erred by granting summary judgment for plaintiffs on a claim for a gift tax refund arising from contingent transfers of property to trusts. N.C.G.S. § 105-195 is unambiguous in giving the Secretary of Revenue the discretion to assess a tax on a contingent transfer based on the potential happening of any of the possible contingencies. There is no evidence in the record that the Secretary abused this discretion.

Appeal by defendants from order entered 24 April 2002 by Judge David Q. LaBarre in Superior Court, Wake County. Heard in the Court of Appeals 17 April 2003.

Webb & Graves, PLLC, by Rick E. Graves, for plaintiffs-appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General George W. Boylan, for defendants-appellants.

McGEE, Judge.

Ruth E. Downs, Frank C. Reynolds, Jr., and Marguerite C. Reynolds (plaintiffs) filed a complaint on 28 November 2001 against the State of North Carolina, the North Carolina Department of Revenue, E. Norris Tolson, and Attorney General Roy Cooper (defendants) seeking a refund under N.C. Gen. Stat. § 105-241.4 and N.C. Gen. Stat. § 105-267 for gift taxes paid pursuant to a final order of the North Carolina Department of Revenue (the Department). Defendants filed a verified answer dated 7 January 2002. Defendants filed a motion for summary judgment on 25 January 2002 and plaintiffs filed a motion for summary judgment dated 15 March 2002.

The evidence before the trial court tended to show that plaintiff Ruth E. Downs (Ms. Downs) transferred an interest in her residence

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to an irrevocable trust on 12 September 1997. Ms. Downs retained the right to occupy the residence for a term of five years or for her lifetime, whichever was shorter. The trust provided that if Ms. Downs died prior to the expiration of the five-year term, the residence would revert to her estate and be disposed as a part thereof. However, if Ms. Downs survived the five-year term, the residence would pass to her remainder beneficiaries.

Plaintiffs Frank C. Reynolds (Mr. Reynolds) and Marguerite C. Reynolds (Ms. Reynolds) each transferred an interest in their residence to separate irrevocable trusts in separate trust agreements dated 28 September 1999. The trusts contained the same five-year survival terms as Ms. Downs' trust.

The complaint states that the Department imposed (1) a gift tax of \$3,023.62, including penalties and interest, on Ms. Downs' transaction on 12 December 2000, (2) a gift tax of \$3,343.00, including penalties and interest, on Mr. Reynolds' transaction on 31 August 2000, and (3) a gift tax of \$3,948.60, including penalties and interest, on Ms. Reynolds' transaction on 5 September 2000. Ms. Downs paid her tax under protest on 27 December 2000 and Mr. and Ms. Reynolds paid their taxes under protest on 2 February 2001.

The trial court granted summary judgment for plaintiffs on 24 April 2002. The trial court ordered the Secretary of Revenue (the Secretary) to "apportion the fair market value of the gifts of the plaintiffs between the plaintiffs, as term of years beneficiaries, and the remaindermen of the trust." The trial court also ordered the Secretary to "consider contingencies, limitations or other factors that affect the fair market value of the gift . . . and consider, and assign a value to, the reversionary interest retained by the plaintiffs." Defendants appeal.

It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law."

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000)), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001). Alleged errors of law and questions of statutory interpretation are reviewed

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de novo. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999); *N.C. Reinsurance Facility v. N.C. Insurance Guaranty Assn.*, 67 N.C. App. 359, 362, 313 S.E.2d 253, 256 (1984).

The sole issue in this appeal is whether the trial court incorrectly interpreted the gift tax statute for property transfers in granting summary judgment for plaintiffs. Since this is a question of statutory interpretation, we will conduct a *de novo* review of the trial court's conclusions of law. N.C. Gen. Stat. § 105-195 (2001) governs the assessment of gift taxes on property transfers and states:

Said taxes shall be assessed upon the actual value of the property at the time of the transfer by gift. If the gift subject to said tax be given to a donee for life or for a term of years, or upon condition or contingency, with remainder to take effect upon the termination of the life estate or term of years or the happening of the condition or contingency, the tax on the whole amount shall be due and payable as in other cases, and said tax shall be apportioned between such life tenant or tenant for years and the remainderman, such apportionment to be made by computation based upon the mortuary and annuity tables set out in G.S. 8-46 and 8-47 of the General Statutes, and upon the basis of six per centum (6%) of the gross value of the property for the period of expectancy of the life tenant or for the term of years in determining the value of the respective interests. When property is transferred or limited in trust or otherwise, and the rights or interests of the transferees or beneficiaries are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate, within the discretion of the Secretary of Revenue, which on the happening of any of the said contingencies or conditions would be possible under the provisions of this section, and such tax so imposed shall be due and payable forthwith by the donor, and the Secretary of Revenue shall assess the tax on such transfers.

Our review of North Carolina case law reveals that N.C.G.S. § 105-195 has not previously been interpreted by our appellate courts. In interpreting statutory language, our goal is to give effect to the intent of the General Assembly. *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 354, 542 S.E.2d 668, 671, *disc. review denied*, 353 N.C. 450, 548 S.E.2d 524 (2001). We primarily consider the language of the

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statute itself. If the statute is free from ambiguity in its express terms, those terms will be enforced as written without the need for judicial construction. *Id.* at 354, 542 S.E.2d at 671-72.

We believe the wording of the statute is unambiguous in that it gives the Secretary the discretion to assess a tax on the contingent transfer based on the potential happening of any of the possible contingencies. The plain language of the statute does not require the Secretary to consider or assign a value to the reversionary interest retained by plaintiffs. The Secretary may consider the potential contingencies and factors in assessing the tax, but the statute does not set forth specific consideration that must be undertaken in this decision. The Secretary is not granted unlimited authority or discretion in assessing a tax, and a decision by the Secretary may be overturned upon an abuse of that discretion. The wording of the statute specifically permits the Secretary to assess a tax at the highest possible rate that could arise upon the happening of any of the potential contingencies, but this decision is left to the discretion of the Secretary. Since the assessment of taxes on contingent transfers are heavily fact based, the Secretary must have sufficient discretion to assess a tax that is appropriate under the circumstances. The General Assembly declined to fashion a hard and fast rule for the consideration, valuation, and taxation of contingencies and left the assessment of such taxes to the Secretary's discretion. We believe this is the result intended by the General Assembly; the wording of the statute is unambiguous and does not require judicial construction.

N.C. Gen. Stat. § 105-267 (2001) provides that a taxpayer is entitled to a refund of taxes paid if "it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive." After an examination of the record, we find there is no evidence that the taxes assessed on plaintiffs' transfers were illegal, unauthorized, invalid, or excessive. The Secretary is given discretion in assessing the tax, which may include a tax at the highest possible rate that would occur upon the happening of any of the said contingencies. There is no evidence in the record that the Secretary abused this discretion or otherwise improperly assessed the gift tax upon plaintiffs' transfers. The record lacks any evidence that plaintiffs were entitled to a refund for taxes paid. The trial court erred in granting summary judgment for plaintiffs.

We reverse the order of the trial court and remand for entry of summary judgment for defendants.

MIDDLETON v. MIDDLETON

[159 N.C. App. 224 (2003)]

Reversed and remanded.

Judges McCULLOUGH and LEVINSON concur.

DANA WALDROUP MIDDLETON, PLAINTIFF v. HAROLD EUGENE MIDDLETON,
DEFENDANT

No. COA02-1487

(Filed 15 July 2003)

1. Contempt— compliance with consent provisions—violation of spirit

The trial court did not err by finding defendant in contempt of an equitable distribution consent order requiring the sale of the home. Although defendant contended that he complied with all of the provisions of the order, he violated its spirit and intent by taking willful and deliberate action to make the house unattractive and undesirable to prospective purchasers.

2. Contempt— attorney fees—pursuit of contempt order

The trial court did not err by awarding attorney fees to plaintiff in an action seeking to enforce a consent judgment through contempt. The contempt power of the district court includes the authority to award attorney fees as a condition of purging contempt for failure to comply with an order; plaintiff's counsel submitted an affidavit to support the request for attorney's fees; defendant did not take exception to the finding that attorney fees were incurred; and the trial court's award was \$500 less than requested.

Appeal by defendant from an order entered 6 April 2002 by Judge John J. Snow, Jr., in Jackson County District Court. Heard in the Court of Appeals 7 July 2003.

Kay S. Murray for plaintiff-appellee.

Brown Queen Patten & Jenkins, PA, by Frank G. Queen, for defendant-appellant.

MIDDLETON v. MIDDLETON

[159 N.C. App. 224 (2003)]

STEELMAN, Judge.

Defendant, Harold Eugene Middleton, appeals a trial court order finding him in contempt of a consent judgment. For the reasons discussed herein, we affirm the trial court's determination.

Plaintiff, Dana Waldroup Middleton, and defendant were married on 24 July 1961 and were divorced on 31 December 2001. On 10 October 2001, plaintiff and defendant entered into a mediated settlement agreement, entered as a consent judgment on 12 November 2001, settling issues of equitable distribution between the parties. Paragraph 5 of the consent judgment provided that:

[t]he former marital residence and all adjoining property . . . shall be listed in priority order with Doug Sinquefield, Bobby Potts, and Wanda Jones, and put on the market no later than November 1, 2001 . . . The Husband shall remain in the home and pay all taxes and maintenance thereon until the sale of the house. The Parties agree to list the property at a price determined by the above realtor(s).

On 8 February 2002, plaintiff filed a motion for an order to show cause asking that defendant be found in contempt of the consent order. Plaintiff alleged that defendant had taken actions to thwart the sale of the home, including: (1) refusing to allow the house to be shown until 24 January 2002, almost three months after the house was to be put on the market; (2) draping a pair of plaintiff's underwear on a sign outside of the house; (3) posting a no trespassing sign outside the house with a list of plaintiff's putative lovers; (4) leaving notes on a bed, calling attention to stains on the bed; (5) leaving other inappropriate notes and poems around the house; and (6) leaving the house cluttered and in disarray.

On 8 April 2002, the trial court entered an order finding defendant in contempt. The trial court found that several of the conditions alleged by plaintiff existed on 24 January 2002, when the house was shown to prospective buyers, and continued to exist on the date of the hearing. Additionally, the court cited plaintiff's testimony and found that the "Husband has said he will not sell the house but will give it away." Thus, the court concluded that defendant was in civil contempt for violation of paragraph 5 of the consent agreement. The court stated that the condition of the marital residence "thwarted the sale of the former marital residence and was designed to embarrass

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the [plaintiff].” The court further concluded that the condition of the house when shown to prospective buyers violated the “spirit” of the consent agreement. Accordingly, the court ordered that defendant: (1) be confined to jail, but stayed the confinement; (2) clean up the marital residence, take down offending signs, and make the house presentable when shown to prospective buyers; (3) allow inspection of the home by plaintiff; (4) vacate the premises for a reasonable period of time in advance of a showing to allow plaintiff to enter the home to make certain it was presentable; and (5) pay attorney fees in the amount of \$1000. Defendant appeals.

[1] In his first assignment of error, defendant argues that the trial court erred in finding him in contempt. We disagree.

Defendant contends that he complied with every provision of the consent agreement, and that the finding of contempt was based on conduct not addressed in the consent agreement. He further contends that because he did not violate any of the terms of the consent agreement, the trial court’s findings of fact do not support a conclusion that he should be held in civil contempt. We disagree.

“The standard of review we follow in a contempt proceeding is ‘limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.’” *Miller v. Miller*, 153 N.C. App. 40, 50, 568 S.E.2d 914, 920 (2002) (quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)).

Our Supreme Court, in determining whether a party was in contempt for violating a temporary restraining order, stated that “[t]he order of the court must be obeyed implicitly, according to its spirit and in good faith.” *Rose’s Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 206, 212, 154 S.E.2d 313, 317 (1967) (quoting *Weston v. John L. Roper Lumber Co.*, 158 N.C. 270, 73 S.E. 799 (1912)). A party “‘must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so.’” *Id.* See also *American Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888, cert. denied, 297 N.C. 304, 254 S.E.2d 921 (1979) (telephone and electric companies found in contempt for violating the “spirit” of the discovery order). Here, defendant took willful and deliberate action with the intent to make the house unattractive and undesirable to prospective purchasers and thus thwart the sale of the home. Defendant violated the spirit and intent of the order, which was to effectuate the sale of

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the marital home in accordance with the agreement of equitable distribution. Accordingly, the trial court properly concluded, based on its findings of fact, that defendant was in contempt of the consent judgment. This assignment of error is without merit.

[2] In his second assignment of error, defendant argues that the trial court erred by awarding attorney fees to plaintiff. Defendant argues that the court lacked statutory authority to award attorney fees, and there was inadequate evidence to support a conclusion that the amount of fees was reasonable. We disagree.

Plaintiff's counsel submitted an affidavit to support the request for attorney's fees, and defendant did not take exception to the court's finding that attorney fees were incurred. After reviewing the affidavit, the trial court's award of "reasonable" attorney fees was \$500 less than requested. Plaintiff sought to recover attorney fees incurred while enforcing the consent judgment which settled the issue of equitable distribution between the parties. This Court has held that the contempt power of the district court includes the authority to award attorney fees as a condition of purging contempt for failure to comply with an order. See *Hartsell v. Hartsell*, 99 N.C. App. 380, 390, 393 S.E.2d 570, 576, *appeal dismissed, rev. denied*, 327 N.C. 482, 397 S.E.2d 218 (1990) (citing *Conrad v. Conrad*, 82 N.C. App. 758, 759-60, 348 S.E.2d 349, 349-50 (1986)). Thus, this assignment of error is without merit.

AFFIRMED.

Judges WYNN and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

BENDROSS v. TOWN OF HUNTERSVILLE No. 02-657	Mecklenburg (00CVS18187)	Affirmed
BURNS v. BURNS No. 02-825	Rutherford (01CVD772)	Dismissed
CROWDER v. CROWDER No. 02-1128	Vance (95CVD749)	Affirmed
FREEZE v. FREEZE No. 02-1092	Cabarrus (99CVD1864)	Reversed and remanded
GARDNER v. GARDNER No. 02-1333	Orange (01CVD384)	Affirmed
GREER v. STANFORD FURNITURE CORP. No. 02-1385	Ind. Comm (I.C. 761124)	Appeal dismissed
HALL v. STALEY No. 02-1020	Yancey (99SP5)	No error
HENNIS v. COTTEN No. 02-475	Guilford (01CVS10233)	Reversed and remanded
HOLCOMB v. JONES No. 02-1490	Harnett (02CVD200)	Vacated and remanded
IN RE CLAYTON No. 02-732	Wilkes (01J67)	Affirmed
IN RE DOYLE No. 02-1203	Gaston (99J98)	Affirmed
IN RE HUTCHINS No. 02-1322	Buncombe (99J249)	Affirmed
IN RE KALE No. 02-1244	Iredell (97J6)	Affirmed
IN RE M.M. No. 02-833	Guilford (01J880)	Reversed
JONES v. WILSON STORES No. 02-1172	Ind. Comm. (I.C. 841838) (I.C. 851924)	Affirmed
MERRICK v. CHARLOTTE- MECKLENBURG HOSP. AUTH. No. 02-808	Mecklenburg (01CVS5244)	Affirmed

NOVAK v. CITY OF HIGH POINT No. 02-727	Guilford (00CVS2434)	Affirmed
NOVAK v. CITY OF HIGH POINT No. 02-728	Guilford (00CVS2435)	Remanded with instructions
SHERRILL LUMBER INDUS. v. ESTES No. 02-993	Iredell (01CVS2757)	Reversed and remanded
STATE v. DAVIS No. 02-1537	Cumberland (00CRS16767) (00CRS62696)	No error
STATE v. GEORGE No. 02-1450	New Hanover (99CRS25062) (99CRS25063)	No error
STATE v. GREEN No. 02-895	Craven (00CRS3124) (00CRS53773) (01CRS54862)	No error
STATE v. HUGHES No. 02-1207	New Hanover (01CRS50136) (01CRS50137)	No error
STATE v. JACKSON No. 02-1240	Pasquotank (00CRS50853) (01CRS166) (01CRS167) (01CRS810) (01CRS811) (01CRS812)	No error
STATE v. JAMES No. 02-1625	Johnston (01CRS53901) (02CRS7943) (02CRS7944) (02CRS7945)	Vacated
STATE v. KELLY No. 02-541	Guilford (98CRS19268)	No prejudicial error
STATE v. McKENZIE No. 02-747	Guilford (01CRS23422) (01CRS75515) (01CRS75516)	Affirmed
STATE v. McKISSON No. 02-955	Henderson (01CRS3688) (01CRS51918) (01CRS51941)	No error

	(01CRS51942) (01CRS51950) (01CRS51951) (01CRS51952) (01CRS52194) (01CRS52372)	
STATE v. MITCHELL No. 02-1621	Gaston (01CRS56695)	No error
STATE v. NORFLEET No. 02-256	Wake (96CRS97136) (96CRS97137) (96CRS97138) (96CRS97139)	No error
STATE v. PHIFER No. 02-1374	Forsyth (01CRS59970)	No error
STATE v. POWELL No. 02-1258	Wake (99CRS22096)	No error
STATE v. ROBINSON No. 02-1608	Davidson (01CRS59792) (01CRS59793)	Dismissed
STATE v. SESSOMS No. 02-1365	Wake (01CRS75904) (01CRS75905)	Affirmed
STATE v. SHAW No. 02-537	Wake (00CRS87764) (00CRS87765) (01CRS49248) (01CRS49249) (01CRS49250)	No error
STATE v. SMITH No. 02-1226	Scotland (01CRS2317)	No error
STATE v. STRICKLAND No. 02-1556	Union (01CRS14073)	Affirmed
STATE v. SUMMERS No. 02-1666	Alamance (00CRS59333)	Affirmed
STATE v. SURLES No. 02-1566	Forsyth (01CRS59492)	No error
STATE v. TORRES No. 02-1726	Gaston (01CRS56698)	No error
STATE v. WILDER No. 02-1560	Durham (95CRS634)	Remanded for resentencing

STATE v. YATES No. 02-1572	Forsyth (01CRS55801)	No error
STEADMAN v. STEADMAN No. 02-1216	Halifax (98CVD1275)	Affirmed
STREIB v. HOCUTT No. 02-1232	Granville (00CVS1385)	Affirmed
WILLIAMSON v. ANDRAOS No. 03-44	Forsyth (01CVS6168)	Dismissed

STATE v. MESSICK

[159 N.C. App. 232 (2003)]

STATE OF NORTH CAROLINA v. IVORY LAMONT MESSICK, DEFENDANT

No. COA02-938

(Filed 5 August 2003)

1. Homicide— first-degree murder—motion to dismiss—failure to renew motion at close of all evidence—waiver

Although defendant contends the trial court erred by denying his motion to dismiss the charge of first-degree murder made at the close of the State's evidence, defendant waived this assignment of error because defendant failed to renew his motion at the close of all the evidence.

2. Evidence— exclusion of victim's uncommunicated threats—substantially same evidence presented

The trial court did not err in a first-degree murder case by excluding the victim's uncommunicated threats to defendant from the jury, because: (1) the evidence of uncommunicated threats was not admissible at the time of the proffer since defendant had not testified at that time and had not offered evidence of self-defense; (2) defendant was not prohibited from and failed to recall the pertinent witness after defendant had testified and had laid a proper foundation for admissibility of the testimony; and (3) defendant testified to substantially the same evidence.

3. Homicide— first-degree murder—proximate cause—expanded instruction

The trial court did not err by giving an expanded instruction on proximate cause in a first-degree murder prosecution that "defendant's act need not have been the last cause or the nearest cause. It is sufficient if concurred where some other cause acting at the same time which in combination with it proximately caused the death of the victim" where the State's evidence showed that defendant shot the victim in the head and shoulder from a range of two feet; defendant shot the victim a second time after the victim fell to the ground; defendant threw the gun down and fled; a friend of defendant retrieved the gun and shot the victim again; the friend then drove the victim's body from the scene and burned it; and the cause of death was two gunshot wounds to the victim's neck and face area. The issue of the omission of an additional instruction on reasonable foreseeability was not be-

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[159 N.C. App. 232 (2003)]

fore the appellate court where defendant failed to request such an instruction or to assign its omission as plain error.

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

A short-form indictment is constitutionally sufficient to allege first-degree murder based on premeditation and deliberation.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 29 October 2001 by Judge Ernest B. Fullwood in Pender County Superior Court. Heard in the Court of Appeals 15 April 2003.

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

Rudolph, Maher, Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for the defendant-appellant.

TYSON, Judge.

Ivory Lamont Messick (“defendant”) appeals from his jury conviction and sentence for the first-degree murder of Reginald Carr (“Carr”). We find no error.

I. Background

Carr died from gunshot wounds to his head and neck. His body was discovered burned beyond recognition. On 17 November 2000, Carr rode with Chauncy Robinson (“Robinson”) and Will Pigford (“Pigford”) to the home of defendant’s uncle. Carr walked with Robinson into the yard next to defendant’s home, where three other men were talking near a parked car. Sometime later, defendant and another man returned from buying beer for two men, who were cutting hair inside defendant’s house. Before defendant entered his home, Carr asked defendant if he had “any words” for him. Defendant replied that he did not.

A few minutes later, defendant returned outside and sat on a car while talking. Apparently, defendant turned his attention to Carr and Robinson and asked them to leave. According to the State’s evidence, Carr was walking away towards his car with his back toward defendant when Robinson yelled “watch out.” Carr turned in response and raised his hands. Defendant shot Carr in the face or shoulder area.

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After Carr fell, defendant shot him again. Defendant dropped the gun and fled the scene.

After defendant left, Jack Brown placed Carr's body in a car, drove the car to another location and burned the vehicle with Carr's body inside. Other evidence was presented to show that Jack Brown shot Carr twice before placing Carr's body in the vehicle.

Defendant offered evidence to show that Carr walked to the car in a sideways motion with his face turned toward defendant at all times and made statements from which one could infer Carr was "going to get defendant later." Someone yelled, "watch out he's got a gun," and defendant looked and saw something shiny in Carr's hand. Defendant pulled his gun from his waistband, shot once, dropped the gun, and ran away.

Defendant appeals his conviction of first-degree murder based upon premeditation and deliberation, and his sentence to life imprisonment without possibility of parole.

II. Issues

Defendant contends the trial court erred in (1) denying defendant's motion to dismiss for insufficient evidence, (2) excluding the victim's uncommunicated threats to defendant from the jury, (3) its instruction on proximate cause, and (4) failing to dismiss a defective indictment.

III. Motion to Dismiss

[1] Defendant argues that the trial court erred by refusing to grant his motion to dismiss made at the close of the State's evidence based on insufficiency of the evidence. Defendant failed to renew his motion at the close of all the evidence. N.C.R. App. P. 10(c)(3) (2002) ("If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.") Defendant has waived this assignment of error.

IV. Uncommunicated Threats

[2] Defendant argues the trial court erred in excluding the victim's uncommunicated threats to defendant into evidence because it was relevant to the issue of self-defense. We disagree.

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At trial, Pigford, a witness for defendant, testified on *voir dire* that three months prior to the incident he heard Carr say that he was going to rob defendant and kill defendant and his family if defendant did not give Carr money. This statement was not communicated by Carr or Pigford to defendant prior to the shooting. This evidence was proffered prior to defendant's testimony. The trial court sustained the State's objection to this testimony.

"Generally speaking, uncommunicated threats are not admissible in homicide cases." *State v. Minton*, 228 N.C. 15, 17, 44 S.E.2d 346, 348 (1947). However, under Rule 803(3) of the North Carolina Rules of Evidence, statements of a victim's state of mind are admissible if the victim's state of mind is relevant to the case. Where a defendant relies on the theory of self-defense and presented sufficient evidence, the uncommunicated threat is admissible under Rule 803(3) to show the state of mind of the victim and that the victim was the aggressor. *State v. Ransome*, 342 N.C. 847, 467 S.E.2d 404 (1996).

The State concedes that the testimony was admissible hearsay, but contends that the evidence was properly excluded because defendant had not presented any evidence of self-defense at the time of Pigford's testimony.

In *State v. Jones*, 83 N.C. App. 593, 599, 351 S.E.2d 122, 126 (1986), *disc. rev. denied*, 319 N.C. 461, 356 S.E.2d 9 (1987), this Court held that in order for evidence of uncommunicated threats to be admissible, the "defendant must do more than *claim* self-defense; he must put on evidence of self-defense[.]"

Self-defense is shown when: (1) it appeared to the defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; (2) the 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; (3) the defendant did not aggressively and willingly enter into the fight without legal excuse or provocation; and, (4) the defendant 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. McAvoy*, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992).

Defendant had not testified at the time Pigford's testimony was proffered and had not offered evidence of self-defense. At the time of the proffer, the evidence of uncommunicated threats was not admis-

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sible. The trial court properly sustained the State's objection. Defendant was not prohibited from and failed to recall Pigford after defendant had testified and had laid a proper foundation for admissibility of the testimony.

Also, defendant testified to substantially the same evidence. The jury heard from defendant: (1) Carr had planned to rob him; (2) Carr had a reputation for violence; (3) Carr was a drug dealer; and (4) prior confrontations had occurred between defendant and Carr. N.C. Gen. Stat. § 15A-1443(a) (2001) provides that:

A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States 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. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

N.C. Gen. Stat. § 15A-1443(a) (2001). “[N]o prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence.” *State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982). *See also State v. Walden*, 311 N.C. 667, 319 S.E.2d 577 (1984). The jury was aware of virtually the same evidence contained in Pigford's proffer through defendant's testimony. This assignment of error is overruled.

V. Jury Instructions

[3] Defendant argues that the trial court misstated the law and unconstitutionally reduced the State's burden of proof by its instruction on proximate cause. The trial court instructed:

Second, the state must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred. The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it concurred where some other cause acting at the same time which in combination with it proximately caused the death of the victim.

Defendant contends the charge was erroneous. He asserts that the instruction allowed the jury to convict him of first-degree murder

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without requiring the State to prove beyond a reasonable doubt he proximately caused the death of the decedent. Defendant argues, "it is not sufficient for defendant's act to occur along with another act, for which he is not responsible and could not foresee, where the latter act causes Carr's death." Defendant requests this Court to find reversible error and award a new trial for failure of the trial court to instruct on reasonable foreseeability. Defendant argues it is not reasonably foreseeable that a third person would shoot Carr after defendant left the scene without evidence of a conspiracy or agreement. We disagree.

The trial court gave the pattern instruction found in N.C.P.I.-Criminal 206.10, with additional language found in Footnote 7. Footnote 7 to N.C.P.I.-Criminal 206.10 states in part:

The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it occurred with some other cause acting at the same time, which in combination with it, proximately caused the death of (name victim).

In *State v. Lane*, 115 N.C. App. 25, 29, 444 S.E.2d 233, 236, *disc. rev. denied*, 337 N.C. 804, 449 S.E.2d 753 (1994), this Court upheld a similar instruction and held that "[t]here can be more than one proximate cause, but criminal responsibility arises as long as the act complained of caused or directly contributed to the death." (citing *State v. Cummings*, 301 N.C. 374, 271 S.E.2d 277 (1980)).

The State's evidence showed that defendant held a gun in Carr's face and shot him in the head and shoulder area from an approximate range of two feet. Defendant shot Carr a second time after Carr fell to the ground. Defendant threw the gun down and fled, leaving Carr bleeding on the ground. Jack Brown, a friend of defendant's family, retrieved the gun and shot Carr again. Brown then drove Carr's body away from the scene of the crime and burned it. An autopsy revealed two bullet wounds to Carr's neck and face area. Based upon the condition of the body, the pathologist opined that the cause of death was the two gunshot wounds.

Under these facts, the trial court properly gave the expanded proximate cause instruction for the second element of first-degree murder. Defendant's act does not have to be the *sole* proximate cause of death. It is sufficient that the act was a proximate cause which in combination with another possible cause resulted in Carr's death. See *State v. Gilreath*, 118 N.C. App. 200, 454 S.E.2d 871 (1995); see also

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State v. Minton, 234 N.C. 716, 68 S.E.2d 844 (1952). The trial court did not err in its instruction to the jury on proximate cause.

The dissent would hold that the trial court erred in refusing to give an instruction on foreseeability. Neither the transcript nor the record shows that defendant requested an instruction on foreseeability. Defendant objected and excepted to the use of the instruction in Footnote 7, as set out above. However, he did not request additional instructions. Nothing further was mentioned regarding foreseeability or proximate cause. After instructing the jury, the trial court asked, "Mr. Spivey, [on] behalf of the defendant, any objections, comments, questions or corrections?" Counsel for defendant responded, "[n]one from the defendant, Your Honor."

Defendant does not specifically cite this omission of an instruction on foreseeability as an assignment of error. In the absence of such a request or an assignment of plain error, the issue of an additional instruction on foreseeability is not properly before this Court to review. N.C.R. App. P. 10 (2002).

VI. Short-form Indictment

[4] Defendant contends the trial court erred in denying his motion to dismiss the indictment for failure to allege every element of first-degree murder. Our Courts have repeatedly and consistently held that the short-form indictment is constitutionally sufficient to allege first-degree murder based on premeditation and deliberation. *See e.g.*, *State v. Hunt*, 357 N.C. 257, 274, 582 S.E.2d 593, 604 (2003); *State v. Walters*, 357 N.C. 68, 79, 588 S.E.2d 344, 351 (2003) ("[T]his Court has repeatedly addressed and rejected this argument. Defendant has presented no compelling reason for this Court to reconsider the issue in the present case.") (citing *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 437-38 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 504-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000)). We have reviewed over fifty additional decisions in which this issue has been raised and rejected by our Supreme Court and this Court in the last three years. These decisions consistently hold that the short-form murder indictment is constitutional. This assignment of error is without merit and is overruled.

VI. Conclusion

Defendant waived his right to appeal the denial of his motion to dismiss for insufficient evidence. The trial court did not err in exclud-

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ing testimony of uncommunicated threats, instructing the jury, or denying defendant's motion to dismiss for insufficiency of the indictment.

No error.

Judge STEELMAN concurs.

Judge WYNN dissents.

WYNN, Judge, dissenting.

Following his conviction on the charge of the first-degree murder of Reginald Carr, defendant, Ivory Lamont Messick, presents the following pertinent issues on appeal:

(I) Whether the trial court erred in overruling defendant's objection to an instruction on proximate cause that unconstitutionally reduced the state's burden of proof by allowing the jury to convict without finding defendant himself caused the victim's death?

(II) Whether the trial court erred in excluding Reginald Carr's threats against defendant, even though communicated to another person, as this proffered evidence was relevant to self-defense by showing Carr was the aggressor in the fatal confrontation?

Contrary to the majority's holding, the record on appeal shows that the trial court insufficiently instructed the jury, and improperly excluded evidence of the uncommunicated threats; accordingly, defendant is entitled to a new trial.

Although the majority opinion offers an accurate factual summary of this case, there are additional facts worth pointing out to more fully understand the issues on appeal. In this case, the evidence at trial tended to show that Reginald Carr died on 17 November 2000 as the result of two gunshot wounds to the head and neck; afterwards, his body was burned beyond recognition. On the day of his killing, Reginald Carr rode with Chauncy Robinson and Will Pigford to defendant's uncle's home; thereafter, he walked with Chauncy Robinson into defendant's next door yard where three other men were talking near a parked car. Sometime later, defendant and another man returned from buying beer for two men cutting hair

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inside defendant's house. Before defendant entered his home, Reginald Carr asked defendant if he had "any words" for him; defendant replied he did not.

A few minutes later, defendant came back outside and sat on a car talking. Apparently, he turned his attention to Reginald Carr and Chauncy Robinson and asked them to leave. According to the State's evidence, Reginald Carr walked towards his car with his back to defendant when Chauncy Robinson yelled watch out; in response, Reginald Carr turned around and raised his hands. Thereafter, defendant shot Reginald Carr in the face or shoulder area. Reginald Carr fell and defendant shot him again.

However, according to defendant's evidence, Reginald Carr walked to the car in a sideways motion with his face turned to defendant at all times; made statements from which one could infer Reginald Carr was "going to get defendant later"; then, someone yelled "watch out he's got a gun" and defendant looked and saw something shiny in Reginald Carr's hand. Defendant then pulled his gun from his waistband, shot once, dropped the gun and ran away.

After defendant left, the evidence tended to show that, a third person shot Reginald Carr twice. After shooting Reginald Carr, it is uncontroverted that this third person placed Reginald Carr's body in a car, drove the car to another location and burned the car and the body.

From his conviction of first-degree murder based upon premeditation and deliberation, and sentence to life without parole, defendant appeals.

(I)

Whether the trial court erred in overruling defendant's objection to an instruction on proximate cause that unconstitutionally reduced the state's burden of proof by allowing the jury to convict without finding defendant himself caused the victim's death?

From the outset, it should be noted that notwithstanding defendant's request for a correct instruction on proximate cause, the majority dismisses the notion that this Court should review the trial court's failure to instruct on foreseeability because, "neither the transcript nor the record shows that defendant requested an instruction on fore-

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seeability.” However, the majority fails to cite a single case to support that proposition because no such requirement exists under our law when a defendant properly challenges a proximate cause instruction. Indeed, “every substantial feature of the case arising on the evidence must be presented to the jury even without a special request for instructions on the issue.” *State v. Watson*, 80 N.C. App. 103, 106, 341 S.E.2d 366, 369 (1986). “Implicit in this requirement is that the trial court must *correctly* declare and explain the law as it relates to the evidence. The failure of the court . . . to correctly instruct the jury on substantial features of the case arising on the evidence [constitutes] error for which [the] defendant is entitled to a new trial.” *Id.*; see also *State v. Ardrey*, 232 N.C. 721, 723, 62 S.E.2d 53, 55 (1950) (stating “a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error”); *State v. Mizelle*, 13 N.C. App. 206, 185 S.E.2d 317 (1971) (stating “foreseeability is a requisite of proximate cause”). Thus, I reject the majority’s conclusion that because the trial court instructed on proximate cause in accordance with the pattern jury instructions, the trial court’s instruction was proper.

Indeed, relying upon pattern jury instructions “does not obviate the trial judge’s duty to instruct the law correctly.” *State v. Jordan*, 140 N.C. App. 594, 596, 537 S.E.2d 843, 845 (2000) (stating the fact that the trial court’s language may come directly from the pattern jury instructions does not obviate the trial judge’s duty to instruct the law correctly and referencing *Johnson v. Friends of Weymouth, Inc.*, 120 N.C. App. 255, 258-59, 461 S.E.2d 801, 804 (1995) which ordered a new trial when the pattern jury instructions did not accurately reflect the law); see also *State v. Mizelle*, 13 N.C. App. 206, 185 S.E.2d 317 (1971) (finding a proximate cause instruction based upon the pattern jury instructions insufficient because it did not include all of the necessary elements of proximate cause). Moreover, the guide to the pattern jury instructions states:

These instructions are intended to state the law applicable in typical fact situations. In some instances the facts may call into play alternative rules of law or special rules, exceptions, or defenses and make the pattern instruction given in this book partially or totally inapplicable. The forms contain additional or substitute

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language at certain places in an attempt to suggest adjustment for frequently encountered factual variations, but to suggest all changes would be impossible.

N.C.P.I.-Criminal, xix. Accordingly, the trial court was required to give a proximate cause instruction that correctly stated the law based upon the facts of this particular case. *See State v. Pope*, 24 N.C. App. 217, 210 S.E.2d 267 (1974) (explaining that our Supreme Court held in *State v. Dewitt* that the trial court must instruct fully on proximate cause as it relates to the facts of the particular case); *State v. Rice*, 151 N.C. App. 750, 567 S.E.2d 465 (2002) (stating “in a criminal case, the trial court has the duty to instruct the jury on the law arising from all the evidence presented.”); *see also State v. Durham*, 149 N.C. App. 233, 562 S.E.2d 304 (2002) (stating “the trial court has the duty to instruct the jury on all substantial features of a case raised by the evidence”).

Furthermore, the record shows defendant complied with N.C. R. App. P. 10(b)(1), (2) which states:

(b) Preserving Questions for Appellate Review

(1) *General*. In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(2) *Jury Instructions; Findings and Conclusions of the Judge*. A party may not assign 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; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

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The charge conference transcript indicates:

MR. DAVID [prosecutor]: Your honor, we have 206.10 in front of us.

THE COURT: Well, you know that it's—

MR. DAVID: It could be different.

THE COURT: I'm sure it's the same but, in order to give it to the jury, I have to modify it to the extent that it's tailored to this case, and that's what I was suggesting.

MR. DAVID: Yes, we would like that, specifically to have footnote seven in there which says, where there's a serious issue as to proximate cause, further instruction may be helpful. Example, the defendant's action need not have been the last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the time which, in combination with it, proximately caused the death of the victim, Reggie Carr. We believe that there's an issue as to the cause of death on whether it was Barry Brown's acts and either burning the body or shooting the body after the defendant left, and it's necessary that this jury understand that that defendant is just as guilty of first degree murder if the wounds that he inflicted acted at the same time in combination with any wounds that Barry Brown inflicted to proximately cause the death of Reggie Carr, and we would ask for that instruction in there.

...

MR. SPIVEY [defense counsel]: Did Your Honor rule on that?

THE COURT: Do you wish to speak to it?

...

MR. SPIVEY: Your Honor, this situation covered by that subparagraph is not—doesn't cover this. That covers the situation where people are acting in concert, where there's evidence of that. There's absolutely no evidence in this case that after Lamont ran, Lamont Messick ran from that area he had anything to do with what Jack Brown did to that body. It's the defendant's position that that instruction would not be proper under these circumstances, Your Honor.

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THE COURT: I think it's proper. I'm going to overrule the defendant's objection, but let the record reflect that the defendant objects and excepts to the court's ruling. I'm going to add it as a part of it's instruction.

Accordingly, defendant timely objected to the proximate cause charge on foreseeability, stated distinctly that to which he objected, specifically stated the grounds of his objection, and obtained a ruling on his objection. Thus, the requirements of N.C. R. App. P. 10 were met in this case.

After properly preserving his objection, defendant raised this error in assignment of error 3 by referencing the relevant transcript pages and stating "the trial court erred in overruling defendant's objection to jury instructions on proximate cause as this instruction was not supported by the evidence or the applicable legal authorities and tended to confuse the jury in violation of defendant's constitutional and statutory rights." Finally, as previously explained, neither our appellate rules nor our case law require the defendant to proffer an instruction on foreseeability. Rather, the trial court is required to instruct correctly on all substantial features of the case even without a request for a special instruction. Accordingly, defendant properly preserved this issue for appellate review, this issue is properly before this Court, and this issue is not subject to plain error analysis.

Moreover, the majority only includes a portion of N.C.P.I.-Criminal 206.10, footnote 7 in its opinion. The full text of footnote 7 states:

where there is a serious issue as to proximate cause, further instructions may be helpful, e.g., 'The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it occurred with some other cause acting at the same time, which in combination with it, proximately caused the death of (name victim)

Accordingly in this case where all parties and the trial court recognized that based upon the facts, foreseeability was seriously in issue, the trial court was required to give an accurate proximate cause instruction even without a request for a special instruction.

This case presents a factual pattern that requires a greater examination of the proper instructions on proximate cause. The record on appeal shows that after the initial shootings by defendant, Jack Brown shot Reginald Carr, removed the body from the scene and

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burned it. No evidence was presented indicating defendant and Jack Brown acted in concert for a common criminal purpose.

The majority cites two factually distinguishable cases, *State v. Lane*, 115 N.C. App. 25, 444 S.E.2d 233 (1994), and its reference to *State v. Cummings*, 301 N.C. 374, 271 S.E.2d 277 (1980), as support for the instruction given in this case. In *State v. Lane*, utilizing the rule “neither negligent treatment nor neglect of an injury will excuse a wrongdoer unless the treatment or neglect was the sole cause of death,” this Court rejected the defendant’s argument that the primary responsibility for the victim’s death lay in the superseding act of the police taking the victim into custody without seeking timely medical attention. This Court found that “no evidence exists here to show that any action taken by the police was the sole cause of decedent’s death. There can be more than one proximate cause, but criminal responsibility arises as long as the act complained of caused or directly contributed to the death.” *Lane*, 115 N.C. App. at 29, 444 S.E.2d at 236. Essentially, the intervening negligence of a third party does not break the chain of causation. Similarly in *Cummings*, our Supreme Court found the simultaneous assault of the victim was a proximate cause of the victim’s death despite the doctor’s opinion that the victim’s intoxication caused the victim’s unconsciousness which led to an impairment of his gag reflexes which ultimately led to the immediate cause of death—the obstruction of his airway by vomit which he sucked into the airway system of his lungs. *State v. Cummings*, 301 N.C. 374, 271 S.E.2d 277 (1980). In *Cummings*, the Court based its decision upon the rule that “the act of the accused need not be the immediate cause of death. He is legally accountable if the direct cause is the natural result of the criminal act.” Thus, actions causing an unforeseeable result may be found to be a proximate cause. Neither of these rules are applicable to the case *sub judice* because the unforeseeable independent criminal actions of Jack Brown was sufficient evidence to allow a jury to conclude that his actions were intervening, superseding, and sole cause of Reginald Carr’s death.

Indeed, the facts indicate that as many as four to six shots may have been fired. Chauncy Robinson, the State’s only eyewitness, testified defendant shot Reginald Carr twice near Reginald Carr’s shoulder and neck area and that he heard two more shots as he ran away. Will Pigford, a defense eyewitness, testified that he saw defendant shoot Reginald Carr once and run away from the scene. Carlos Williams testified that after defendant shot Reginald Carr, he dropped the gun and another man, Jack Brown, picked up the gun and shot

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Reginald Carr twice. Jack Brown then placed Reginald Carr's body in the back seat of a car and drove away. Other evidence indicates Reginald Carr's body was subsequently set on fire.

The medical examiner testified that Reginald Carr's body was severely charred such that his race could not be identified; his lower arms had been burned away from his body; several of his organs had been "cooked" by the fire; and, two gunshot entrance wounds—on the right side of his neck and face—had been found on the body. As for the first entrance wound, there was no evidence that the bullet hit an artery, jugular vein, or an airway, and the bullet was recovered from the neck's muscle tissue. This bullet traveled in an upward direction. The second entrance wound indicated the bullet, recovered from the left side of the neck, traveled in a downward motion from its entrance on the right side of Reginald Carr's face. The medical examiner testified that she was presented with only Reginald Carr's upper torso, and that an x-ray of that area did not indicate any other gunshot wounds. She also testified that the first wound alone would not have been sufficient to cause death, but in her opinion, combined with the gunshot wound to the face to cause Reginald Carr's death.

From the testimony presented, the jury should have been allowed to determine whether the criminal actions of Jack Brown were the sole cause of Reginald Carr's death.

This case is governed by our Supreme Court's decision in *State v. Gibson*, 333 N.C. 29, 36-37, 424 S.E.2d 95, 98-99 (1992), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993) and *State v. Bell*, 338 N.C. 363, 450 S.E.2d 710 (1994). In analyzing a similar issue, our Supreme Court reiterated an established principle of our law that:

If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an *independent act*, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice. In such a case, the two persons could not be indicted as joint murderers, because there was *no understanding, or connection between them*.

Gibson, 333 N.C. at 37, 424 S.E.2d at 99 (1992). In *Gibson*, the defendant fired two shots at the victim, hitting him in the chest and the little finger. "Immediately after these shots by defendant, [another person] shot [the victim] in the head from point blank range." *Id.* In that

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case, our Supreme Court agreed with the defendant's contention that "the rule in this state . . . is that the conduct of the independent intervenor . . . terminated the criminal liability of the first assailant. . . . Thus, . . . the trial court erroneously permitted the jury to find proximate causation even if it found that defendant acted alone in shooting [the victim] and that [the intervenor's] conduct was an independent, intervening cause of death." *Id.*

Dissimilar to our case, in *Gibson*, the defendant was convicted of conspiracy to commit first-degree murder and robbery with a dangerous weapon. Accordingly, as the Court noted, "it is logically implausible that the jury could have found that defendant acted independently for the purpose of the first-degree murder conviction while, on the same facts, it found an agreement between defendant and a co-conspirator in convicting defendant on the conspiracy to murder charge." *Id.* In the case *sub judice*, there is no evidence of a conspiracy or agreement between Jack Brown and defendant.¹ Accordingly, if the jury determined Jack Brown's actions were unforeseeable and that Jack Brown was the sole cause of Reginald Carr's death, then defendant's actions were not the proximate cause of his death. However, under the instructions rendered in this case, the jury was not allowed to consider the actions of defendant and Jack Brown separately.

In sum, *State v. Gibson* controls this case. Moreover, "in the absence of conspiracy, one cannot, except in certain applications of the felony-murder doctrine, be lawfully convicted of homicide if the

1. The majority cites *State v. Minton*, 234 N.C. 716, 68 S.E.2d 844 (1952) and *State v. Gilreath*, 118 N.C. App. 200, 454 S.E.2d 871 (1995) as support for the charge given on the facts of this case. Neither *Minton* nor *Gilreath* analyzes proximate causation in the context of a superseding criminal act of an independent third party. In *Minton*, after the defendant wounded the victim, he left the victim outside on a frigid night. On appeal, our Supreme Court rejected the defendant's contention that cause of death was obscure because "an accused who wounds another with intent to kill him and leaves him lying out of doors in a helpless condition on a frigid night is guilty of homicide if his disabled victim dies as the result of exposure to the cold. This is true because the act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is the natural result of his criminal act." *Minton*, 234 N.C. at 722, 68 S.E.2d at 848. Similarly, this Court in *Gilreath* rejected the defendant's contention that the cause of death was the victim's decision against medical advice to undergo colostomy reversal surgery because (1) he is legally accountable if the direct cause is the natural result of the criminal act, and (2) the act complained of does not have to be the sole proximate cause of death, nor the last act in sequence of time . . . It is enough if defendant[']s unlawful acts join and concur with other causes in producing the result. *Gilreath*, 118 N.C. App. at 206-08, 454 S.E.2d at 874-75. In the case *sub judice*, the intervening and superseding criminal act of a third person is not the natural and probable consequence of defendant's criminal action.

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deceased dies from another and distinct wound inflicted by a different person". 40 Am. Jur. 2d *Homicide* § 16 (2002). Accordingly, on the facts of this case, defendant is entitled to a new trial with a proximate cause instruction that correctly defines the law.

(II)

Whether the trial Court erred in excluding Reginald Carr's threats against defendant, even though communicated to another person, as this proffered evidence was relevant to self-defense by showing Carr was the aggressor in the fatal confrontation?

Defendant also contends it was error for the trial court to exclude testimony from Will Pigford that three months prior to the incident he heard Reginald Carr, say he was "going to rob [defendant], tie his mother and his daughter up until he give up the money and kill them if he have to."

Our case law establishes that upon a proper showing that the accused in a homicide case may have acted in self-defense, a jury is entitled to hear and evaluate evidence of uncommunicated threats, communicated threats, and evidence of the general character of the deceased as a violent and dangerous man. *See State v. Allmond*, 27 N.C. App. 29, 31, 217 S.E.2d 734, 736 (1975). "However, as a condition precedent to the admissibility of such evidence, the defendant must first present viable evidence of the necessity of self-defense. There must be evidence . . . that the party assaulted believed at the time that it was necessary to kill his adversary to prevent death or great bodily harm, before he may seek refuge in the principle of self-defense, and have the jury pass upon the reasonableness of such belief." *Id.*

In this case, the State concedes that the "testimony in question *was* admissible hearsay, . . . since it fell under the state of mind exception to the hearsay rule as a statement of the declarant's intent." Nonetheless, the State contends that at the time this testimony was offered by defendant, it was not relevant because "the defendant had not at that point in the trial presented sufficient evidence of self-defense." Thus, the State contends, that the trial court did not err in excluding the testimony because "after defendant *had* presented his evidence of self-defense, defendant failed to renew his proffer of testimony." I disagree.

The majority, quoting *State v. Jones*, states "the defendant must do more than *claim* self-defense; he must put on evidence of self-

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defense[.]” However, as *State v. Jones* further explains, upon a proper showing that the accused in a homicide case may have acted in self-defense, a jury is entitled to hear and evaluate evidence of uncommunicated threats, communicated threats, and evidence of the general character of the deceased as a violent and dangerous man. *State v. Jones*, 83 N.C. App. 593, 351 S.E.2d 122 (1986) (quoting *State v. Allmond*, 27 N.C. App. 29, 31, 217 S.E.2d 734, 736 (1975)).

The record in this case shows that the defendant had presented viable evidence of self-defense prior to eliciting the proffered testimony from Will Pigford. Although the majority correctly points out the content of the uncommunicated threat was elicited during a *voir dire* examination of Will Pigford during redirect examination, the majority neither considers nor acknowledges any of the testimony elicited from Will Pigford prior to the State’s objection to defendant’s question regarding the uncommunicated threat. Before asking Will Pigford about the uncommunicated threat, the following information relevant to self-defense had been elicited: (1) upon defendant returning home from the store, the victim approached defendant and asked him whether he had “any words for him” and defendant replied “I have no words for you, I ain’t got nothing to say to you,” (2) the victim appeared bowed all up, chest sticking out, like he was bad, (3) one of the victim’s hands was not visible prior to the incident, (4) Pigford had seen the victim with a gun just prior to going to defendant’s home, (5) defendant asked the victim to leave four times, (6) after the fourth time, the victim began to walk towards his car sideways without taking his eyes off the defendant, (7) while the victim was walking he was saying “later, you’re going to feel the vibe,” (8) someone near the defendant said “Look out, he’s got a gun,” and (9) prior to the incident and prior to defendant returning home, defendant’s uncle, who lived next door to defendant, told the victim he needed to talk to defendant to get the problem he had with defendant straight.

The *Jones* requirement that as a condition precedent “there must be evidence . . . that the party assaulted believed at the time that it was necessary to kill his adversary to prevent death or great bodily harm” before the uncommunicated threat evidence may be presented was met in this case. Will Pigford had testified the victim had a gun before going to defendant’s home, that the victim had made a threat against defendant, and that someone had yelled a warning, “Look out, he’s got a gun” just before the defendant fired his weapon. Although whether the warning was meant for the victim or the defendant is dis-

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puted by the parties, it is still a part of defendant's factual basis for his self-defense claim. While this evidence may not have been sufficient at this point in the trial to warrant a self-defense instruction, *Jones* requires *viable evidence* only. Thus it was error for the trial court to exclude Will Pigford's testimony regarding the uncommunicated threat.

Significantly, the precondition of showing evidence of self-defense before eliciting evidence of uncommunicated threats is compellingly analogous to the precondition that the State must make a *prima facie* showing of the existence of a conspiracy before eliciting a co-conspirators' statement. *See State v. Lipford*, 81 N.C. App. 464, 467, 344 S.E.2d 307, 309 (1986) (stating "once a conspiracy has been shown to exist the acts and declarations of each conspirator, done or uttered in furtherance of a common illegal design are admissible in evidence against all"). It is well recognized that as to the admission of a co-conspirator's statement, our courts "often permit the State to offer the acts or declarations of a conspirator before the *prima facie* case of conspiracy is sufficiently established." *State v. Bell*, 311 N.C. 131, 142, 316 S.E.2d 611, 617 (1984). "Of course, the prosecution must properly prove the existence of the *prima facie* case of conspiracy before the close of the State's evidence in order to have the benefit of these declarations and acts. If inadmissible statements are admitted and it develops that a case of conspiracy has not been shown, then upon proper motion the trial judge may strike the evidence of declarations or acts of the co-conspirators or grant a defendant's motion for judgment as of nonsuit if there is insufficient evidence to take the case to the jury without the aid of such declarations or acts." *State v. Polk*, 309 N.C. 559, 566, 308 S.E.2d 296, 299-300 (1983). Since our case law allows the State to avoid the precondition that it must make a *prima facie* showing of the existence of a conspiracy before eliciting a co-conspirators' statement, I can discern no good reason why defendants should not in fairness be afforded the similar equitable courtesy of relief from the strict precondition of showing evidence of self-defense before eliciting evidence of uncommunicated threats. In common terms that simply means, "what's good for the goose is good for the gander."

Thus, as in the relaxation of the State's precondition to show a conspiracy before eliciting a co-conspirator's statement, it follows that a victim's uncommunicated threat should be admitted conditioned upon competent evidence of self-defense being presented by the defense. If competent evidence is not subsequently presented, the

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uncommunicated threat would not be subject to the jury's consideration. The prosecution could move to strike such evidence and, furthermore, if insufficient evidence of self-defense is presented, the jury would not receive a self-defense instruction and would not be allowed to consider such evidence in its deliberations.

Moreover, this procedure is expressly sanctioned by N.C. Gen. Stat. § 8C-1, Rule 104 which provides:

(a) *Questions of admissibility generally.*—Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). . . .

(b) *Relevancy conditioned on fact.*—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Accordingly, the trial court erroneously failed to admit evidence of Reginald Carr's uncommunicated threats against defendant.

Even though it was error for the trial court to exclude the victim's uncommunicated threat, the majority holds any error was non-prejudicial because the defendant presented similar evidence through other means. *See State v. Ransome*, 342 N.C. 847, 853, 467 S.E.2d 404, 408 (1996) (holding that "the exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or when the evidence is thereafter admitted or when the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence."). The majority contends the defendant presented substantially the same evidence through other means, such as: (1) defendant presented evidence that Carr planned to rob him, (2) Carr had a reputation for violence, (3) Carr was a drug dealer, and (4) defendant and Carr had prior confrontations. I disagree.

These facts do not have the same strength and import as a specific threat against the defendant and his family. *See id.* The fact that the victim made an uncommunicated threat against defendant has a stronger tendency to show that the victim may have been an aggressor in the incident with the defendant than the fact that the victim had robbed and threatened others and had a reputation for violence. Moreover, the victim's uncommunicated threat that he intended to

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rob defendant and would kill his family if necessary tends to corroborate and support defendant's testimony and contention that he acted in self-defense. *See State v. Baldwin*, 155 N.C. 494, 496, 71 S.E. 212, 213 (1911) (stating evidence of uncommunicated threats should have been received because it tended to throw light upon the occurrence). Accordingly, the trial court erroneously failed to admit evidence of Reginald Carr's uncommunicated threats against defendant.

In sum, defendant is entitled to a new trial wherein he is allowed to elicit testimony showing that the victim made threats towards him, and with a proper instruction on proximate cause.



STATE OF NORTH CAROLINA v. RAE LAMAR WIGGINS, A/K/A, RAE CARRUTH

No. COA02-959

(Filed 5 August 2003)

1. Evidence— hearsay—victim's handwritten statements— present sense impressions—harmless error

A shooting victim's handwritten statements about events leading up to and during the shooting made seven hours after the shooting and after the victim had undergone general anesthesia and surgery were not admissible under the present sense impression hearsay exception; however, the admission of these written statements was harmless error beyond a reasonable doubt where the same information contained in the statements was properly introduced into evidence through the victim's 911 call and the testimony of other witnesses.

2. Evidence— hearsay—defendant's drug deal/revenge theory of case

The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by excluding evidence of and failing to instruct on defendant's theory of the case that his two alleged coconspirators were seeking revenge on defendant based on the fact that they were angry with defendant for refusing to finance a drug deal, because: (1) the statements were self-serving, were sought to be admitted for the truth of the matter asserted, and were not evidence of defendant's state of mind; and

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(2) defendant's drug deal/revenge theory was not supported by any evidence admitted for substantive purposes at trial.

3. Jury— selection—peremptory challenges—black jurors— racial discrimination

The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by allowing the peremptory strikes of black jurors, because: (1) the prosecutor offered race-neutral explanations for striking each of the eight black jurors; and (2) where the only factor supporting an inference of discrimination is the disproportionate number of prospective black jurors peremptorily challenged by the State and other elements relevant to finding an inference of discrimination are not present, the trial court's determination that the State did not purposefully discriminate on the basis of race is not clearly erroneous.

4. Jury— selection—peremptory challenges—gender discrimination

The trial court in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case did not improperly fail to assess gender discrimination against black males in the juror selection, because: (1) after reviewing the totality of circumstances the trial court concluded as a matter of law that the reasons proffered by the State for its excusal of each juror are acceptable, non-pretextual, race-neutral, and gender neutral; and (2) the trial court's order indicated that in light of the State's rebuttal testimony, it accepted those justifications and concluded the State had acted in a gender neutral fashion.

5. Jury— recordation of numerical division—order to deliberate further

The trial court did not commit plain error in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by asking the jury to record its numerical division and to deliberate further, because: (1) the trial court did not ask the jurors for their numerical split, but requested they keep an internal record of the votes; (2) the trial court reinstructed the jury after making this request, reminding the jurors that they should continue to deliberate while remaining true to their convictions; and (3) given the total-

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ity of circumstances and substance of the instruction, no plain error was committed.

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

The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by finding the aggravating factor that defendant took advantage of a position of trust or confidence, because: (1) the crimes against the victim could not have been carried out without the active participation of defendant and the trusting relationship between defendant and the victim; and (2) although defendant contends the victim knew defendant was romantically involved with other women, it would not cause the victim to be in doubt for the safety of her life and that of her unborn child around defendant, who was the father of that unborn child.

7. Sentencing— mitigating factors—aid in apprehension of felon—support of family—extensive support system in the community

The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by failing to find the mitigating factors of aid in apprehension of another felon, defendant's support of his family, and presence of an extensive support system in the community, because: (1) whatever consideration defendant earned by helping the police was offset by his earlier denials of wrongdoing; (2) the fact that defendant provides money to various family members is not per se sufficient where there was evidence that defendant did not voluntarily provide other means of support, and a possible motive for the crimes was to avoid paying child support; and (3) although defendant presented evidence that he had many friends in Charlotte who liked and cared for him, defendant failed to show the existence of a support system in the community.

Appeal by defendant from judgments entered 11 January 2001 by Judge Charles C. Lamm in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 June 2003.

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

Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant.

TYSON, Judge.

Rae Lamar Wiggins, also known as Rae Carruth (“defendant”), appeals from judgments entered upon a jury’s verdict finding him guilty of conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child. Defendant was sentenced to an active term of imprisonment of 196 months to 245 months for conspiracy to commit murder. Concurrent sentences of 31 to 47 months were imposed for the remaining convictions.

I. BACKGROUND

On the evening of 15 November 1999, defendant and his eight-months pregnant girlfriend, Cherica Adams (“victim”), watched a movie at a Charlotte theater. The two left the movie theater and rode together to defendant’s house to retrieve the victim’s car. While there, defendant called Michael Kennedy (“Kennedy”) and told him that he and the victim were about to leave. Victim followed defendant in her vehicle toward her home. As they drove along two-lane residential Rea Road, defendant slowed or stopped his large sport utility vehicle in front of the victim’s car. Victim could not drive her car around defendant’s vehicle. Kennedy drove his rented vehicle beside the victim’s car. Van Brett Watkins (“Watkins”), a passenger, fired five shots from the rental vehicle into the victim’s car. The victim was wounded four times, once in the neck and three times in the back. Defendant’s and Kennedy’s vehicles fled the scene in different directions.

The victim called 911 from her cell phone at 12:31 a.m., pulled into a residential driveway, continuously blew the horn, and remained on the phone for over twelve minutes until an ambulance arrived. In her call to 911, the victim described the shooting in detail and informed the dispatcher and an emergency medical technician that she had been following defendant, who was her boyfriend and her baby’s father.

Mecklenburg Police Officer Peter Grant (“Grant”) arrived on the scene around 12:43 a.m. The victim identified defendant to Grant as the driver of the vehicle that she had also described in the 911 call.

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The victim was transported by ambulance to Carolinas Medical Center and arrived at 1:10 a.m. The victim gave Grant a complete chronology of the events that transpired during the night and early morning. Emergency surgery was performed to remove the bullets and deliver the baby from the victim at 1:30 a.m. At 4:00 a.m., the victim was taken to a trauma intensive care unit. Around 7:00 a.m., an endotracheal tube was inserted into victim's throat. Traci Willard ("Willard"), the morning nurse, asked the victim if she remembered what had happened to her. The victim nodded and motioned for Willard to bring a pen and paper to her. The victim handwrote notes describing the shooting and events of the morning and previous evening. Later, the victim's father asked her if there were any stop signs on the road that would provide defendant a legitimate reason to stop in the road. The victim shook her head negatively. The victim died 14 December 1999 as a result of the inflicted wounds. Victim's infant son survived.

Defendant was charged with and tried capitally for first-degree murder of the victim, conspiracy to commit murder, discharge of a firearm into occupied property, and the use of an instrument to destroy an unborn child. The State presented testimony from co-conspirators, Watkins and Kennedy. Defendant did not testify but presented evidence. A jury found defendant guilty of conspiracy to commit murder, discharge of a firearm into occupied property, and use of an instrument to destroy an unborn child. Defendant appeals.

II. Issues

Defendant's assignments of error raise the following issues: (1) whether the notes written by the victim at the hospital are inadmissible hearsay; (2) whether the exclusion of defendant's theory of the case and the trial court's failure to instruct the jury on his theory constituted reversible error; (3) whether the trial court erred in allowing the peremptory strikes of black jurors; (4) whether the trial court erred in failing to assess gender discrimination in the juror selection; (5) whether the trial court erred in asking the jury to record its numerical division and to deliberate further; and (6) whether the trial court erred in determining the aggravating and mitigating sentencing factors.

III. Hearsay Statements

[1] Defendant argues that the handwritten notes the victim wrote after awaking from surgery are inadmissible hearsay. The trial court

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admitted the hearsay statements as present sense impressions, an allowed exception under N.C. Rule of Evidence 803(1).

“[P]resent sense impression” is defined as “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or *immediately thereafter*.” N.C.G.S. § 8C-1, Rule 803(1) (2001) (emphasis supplied). Our Supreme Court analyzed the meaning of “immediately thereafter” in *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990).

Interpreting the identical Federal Rule, the federal courts have held that “there is no *per se* rule indicating what time interval is too long under Rule 803(1). . . . [A]dmissibility of statements under hearsay exceptions depends upon the facts of the particular case.” *United States v. Blakey*, 607 F.2d 779, 785 (7th Cir. 1979). Here, [the victim’s] statement was made in close proximity to the event—a reasonable inference would be the length of time it took to drive from Willow Springs to her mother’s house in Raleigh. Under the particular facts of this case, [the victim’s] statement to her mother was made sufficiently close to the event to be admissible as present sense impressions under Rule 803(1).

Id. at 314, 389 S.E.2d at 75. The reason for the present sense impression hearsay exception is that closeness in time between the event and the declarant’s statement reduces the likelihood of deliberate or conscious fabrication or misrepresentation. *State v. Gainey*, 343 N.C. 79, 87, 468 S.E.2d 227, 232 (1996).

The State argues that the victim’s statements made soon after the victim awoke from surgery qualify as a present sense impression. The State contends that the victim’s time in surgery should be removed from the length of time between the shooting and the writings because the victim could not communicate during the surgery. Even after subtracting the length of time the victim spent in surgery and recovery, nearly two additional hours elapsed between the event and the written statement. Defendant argues the victim’s written statements were not a present sense impression, but an inadmissible past sense impression. Although the risk is low that the victim formed or seized an opportunity to manipulate the truth, we cannot hold as a matter of law that statements made approximately seven hours after the shooting and after the declarant had undergone general anesthesia and surgery fit within the present sense impression hearsay exception. *See State v. Taylor*, 344 N.C. 31, 47, 473 S.E.2d 596, 605 (1996) (statement allowed as a present sense impression where it

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was made immediately after declarant had perceived the condition); *State v. Odom*, 316 N.C. 306, 313, 341 S.E.2d 332, 336 (1986) (statement allowed as present sense impression where declarant made statement within ten minutes of perceiving abduction).

The State alternatively argues that the statements were admissible under Rule 804(b)(5), which allows admission of trustworthy hearsay consistent with the interests of justice. We disagree. The trial court did not make findings for this hearsay exception to apply as required by *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986). The issue becomes whether this hearsay error was prejudicial or harmless beyond a reasonable doubt. If the same information contained in the victim's written statement was properly introduced into evidence through other witnesses or means, any error in admitting the victim's statement would be harmless beyond a reasonable doubt.

The written statements provide details about the events leading up to and during the shooting. The victim wrote that defendant called someone before they left his house and stated, "we were leaving now." Other comments in the statement included "[h]e was driving in front of me & stopped in the road & a car pulled [up] beside me & he blocked the front & never came back" and "[h]e insisted on coming to my house."

These statements corroborated other properly admitted evidence. Kennedy testified that he received a telephone call from defendant just after midnight on 16 November 1999. Defendant told Kennedy that "[defendant] was at his house and he was getting ready to leave the house." When asked specifically what defendant said, Kennedy replied, "'We're getting ready to leave the house.'" Kennedy also testified to the sequence of events that corroborated the victim's statements. "Rae went over a hill and then down in the dip. Then, he stopped his car; she stopped behind his; I stopped behind her. Then, Watkins told me to pull up beside her car. So, I pulled up beside her car and he started shooting in her car." When asked the distance between defendant's and the victim's vehicles, Kennedy replied "[m]aybe a foot or so; because he stopped, suddenly." Watkins began firing "[a]s soon as we pulled up beside." Defendant's vehicle "pulled off" as Kennedy turned his vehicle around in a driveway.

Officer Grant testified that he asked the victim at the scene if she knew who had shot her. The victim answered "Rae Carruth." Grant asked her if defendant was the person driving the vehicle she described in the 911 call. She replied, "Yes, yes. That's my baby's

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daddy.” She gave to Grant the defendant’s home address. Grant continued his questioning of the victim at the hospital. After Grant inquired, “Did your boyfriend do this to you?,” victim nodded affirmatively. When asked what happened, the victim told Grant that she and defendant had attended a movie that night and had traveled back to defendant’s house to retrieve her car. “She was following Rae Carruth, down Rea Road. She said that along Rea Road, Rae Carruth came to a stop. She had to stop; because at the point in time where they stopped, it was only a 2-lane road; and, she couldn’t to (sic) around, either way. And she said, when they stopped the car, a car pulled up next to her; and, shots began firing.”

Candace Smith (“Candace”), a girlfriend of defendant, came to the hospital and saw defendant the morning of the shooting. She testified that defendant told her “he wished that she [Cherica] would die.” Candace asked defendant outside the presence of others if he had anything to do with the victim being shot. “[H]e wouldn’t even look at me. And, he said that he had been trying to be nice to her; and, go to doctors appointments and give her money; and keep her happy. . . . And, that he had been getting money out the bank, a little bit at a time, so it wouldn’t look suspicious (sic), to give to the guy. And, he said he watched the guy—well, he hit his brakes, in his car, to slow her car down. And, he saw the guys pull up and shot into her car. . . . And, he said, ‘I just drove off and went to Hannibal’s house.’ ”

The victim’s recorded 911 call and the testimony of Kennedy, Grant, and Candace duplicate the victim’s written statements. The only portion of the victim’s statements allowed into evidence that was not directly corroborated by other evidence was that defendant “insisted on going to [the victim’s] house.”

The victim telephoned her cousin, Modrey Floyd, at 12:15 a.m. on 16 November 1999, and indicated that it was not the victim’s decision to go to her house. Floyd testified, “[Cherica] said that she and Rae were on their way over to the apartment. She asked if I could straighten up because she didn’t—she wasn’t expecting him to come over.”

Given the nature and extent of the State’s evidence implicating defendant’s involvement in the shooting, the recorded 911 call and witnesses’ testimony that duplicated the victim’s written statements, we hold that any error in admitting the victim’s written statement was harmless beyond a reasonable doubt.

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IV. Exclusion of Defendant's Theory and Failure to Instruct

[2] Defendant alleges his constitutional rights were violated when the trial court did not allow presentation of evidence and failed to instruct the jury on defendant's theory of the case. Defendant asserts that he was not part of any conspiracy to kill the victim, and contends that Watkins and Kennedy sought revenge for his failure to finance a drug deal. Their revenge was taken out against the victim.

Defendant put forth and the trial court admitted evidence supporting this theory through testimony of Mecklenburg County Sheriff Sergeant Shirley Riddle ("Riddle"). This evidence was limited to impeachment purposes by the trial court. Riddle testified that she walked inside Watkins' jail cell to retrieve his "do-rag." Watkins blocked her exit and said, "I've got to talk to you." Riddle explained to Watkins that she was not supposed to talk to him about his case.

Watkins said to Riddle, "I told Kennedy to pull up beside of Cherica's car; we had lost track of Rae; we wanted to see which way he was headed.' . . . I started waving my arms to get her to slow down.' . . . We were just going to ask her if she knew where Rae was going. And then, she slowed down.' . . . I was telling her to roll her window down so we could talk to her.' . . . She flipped me off.' . . . I just lost it; I lost control.' . . . If [Rae] had just given us the money, none of this would have happened.' "

Defendant's statements made to Leonard Kornberg, his prior attorney, were not allowed into evidence. The excluded evidence was defendant's belief that Watkins and Kennedy were angry with him because he had refused to finance a drug deal. The trial court excluded this evidence as a self-serving declaration and hearsay, not within the state-of-mind exception. Similar statements defendant made to James Lasco, his bail bondsmen, were excluded on the same basis.

Defendant argues that *Chambers v. Mississippi*, 410 U.S. 284, 35 L. Ed. 2d 297 (1973) supports his assertion that his constitutional rights were violated by the exclusion of this evidence. The United States Supreme Court in *Chambers* overturned a defendant's conviction where defendant was not allowed to examine a witness as an adverse witness because the witness did not accuse the defendant and a Mississippi rule would not allow a party to impeach its own witness. *Id.* at 297, 35 L. Ed. 2d at 310. The Court found as a second prong for overturning the conviction that hearsay evidence of a wit-

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ness's confession to the crime with which defendant was charged should have been admitted. *Id.* at 300-02, 35 L. Ed. 2d at 311-13. Defendant's assertion that *Chambers* applies at bar is misplaced. The witness in *Chambers* testified under subpoena at the defendant's trial and could be cross-examined regarding his prior statements. Defendant did not testify, could not be forced to testify against himself, and he was not subject to cross-examination concerning statements he reportedly made to his former attorney and bondsman. The statements were self-serving, were sought to be admitted for the truth of the matter asserted, and were not evidence of defendant's state of mind. Defendant's assignment of error is overruled.

Defendant also argues that the trial court erred in not instructing the jury on defendant's theory of the case. Defendant's drug deal/revenge theory is not supported by any evidence admitted for substantive purposes at trial. As we have found no error in excluding this evidence, the trial court did not err in failing to instruct the jury on a theory unsupported by the evidence. This assignment of error is overruled.

V. Peremptory Strikes of Black Jurors

[3] Defendant argues that the trial court erred in allowing the State to strike jurors based upon their race. Defendant objected to each peremptory challenge against a prospective black juror lodged by the district attorney. The trial court rejected defendant's first seven objections and ruled that defendant had failed to establish a *prima facie* case of racial discrimination. After the prosecutor used a peremptory challenge against the eighth black juror, the trial court required the district attorney to state his reasons for use of the challenges and held that defendant had made a "*prima facia* [sic]" showing of peremptory excusals against prospective black jurors. The trial court entered special findings of fact and concluded that the reasons "proffered by the State for its excusal of each of the eight minority jurors excused by the State . . . are acceptable, non-pretextual, race-neutral, and gender neutral." At this time, "the [S]tate ha[d] accepted three minority jurors out of the eleven that ha[d] been selected." The final jury was comprised of three black women, two non-black women, and seven non-black men. Defendant argues that the trial court's late inquiry and decision did not remedy the discriminatory effect of the State's challenges.

"The Sixth Amendment to the United States Constitution prohibits the arbitrary exclusion of certain groups or classes of citizens

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from the jury in federal and state cases.” *State v. Cole*, 343 N.C. 399, 414, 471 S.E.2d 362, 369 (1996), *cert denied*, 519 U.S. 1064, 136 L. Ed. 2d 624 (1997), *cert. denied*, 356 N.C. 683, 577 S.E.2d 900 (2003); U.S. Const. amend. VI. North Carolina’s Constitution expressly provides that “[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin.” N.C. Const. art I, § 26.

We apply the test set forth by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986) to evaluate whether individuals were impermissibly excluded from jury service. Our Supreme Court has stated the *Batson* analysis as follows:

First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant’s *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

State v. Cummings, 346 N.C. 291, 307-8, 488 S.E.2d 550, 560 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). The first step of the *Batson* analysis “is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge.” *State v. Barden*, 356 N.C. 316, 345, 572 S.E.2d 108, 128 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003) (quoting *State v. Hoffman*, 348 N.C. 548, 553, 500 S.E.2d 718, 722 (1998)). Regarding the second step on the *Batson* analysis, the law “does not demand [a race-neutral] explanation that is persuasive, or even plausible. ‘At this step of the inquiry, the issue is the facial validity of the prosecutor’s explanation. Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reason offered will be deemed race neutral.’” *Purkett v. Elem*, 514 U.S. 765, 768, 131 L. Ed. 2d 834, 839, *reh’g denied*, 515 U.S. 1170, 132 L. Ed. 2d 874 (1995) (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 114 L. Ed. 2d 395, 406 (1991)). At “the third step . . . persuasiveness of the justification becomes relevant . . . the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.” *Id.*, (citing *Batson*, 476 U.S. at 98, 90 L. Ed. 2d at 88-89).

Although *Batson* is usually applied in the context of racial discrimination, we have extended the *Batson* analysis to the issue of gender discrimination in jury selection. See *State v. Call*, 349 N.C.

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382, 403, 508 S.E.2d 496, 510 (1998), *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001) (holding that gender discrimination claims require a party to show a *prima facie* showing of intentional discrimination prior to requiring the prosecutor to explain the basis of the challenge and utilizing “the same type of factors which may be relevant in determining whether a *Batson* violation has occurred”).

In analyzing the jury selection process where a *Batson* challenge is raised, an appellate court looks to the following non-exclusive factors:

- (1) the characteristic in question of the defendant, the victim and any key witnesses;
- (2) questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of discrimination based upon the characteristic in question;
- (3) the frequent exercise of peremptory challenges to prospective jurors with the characteristic in question that tends to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members with the characteristic in question;
- (4) whether the State exercised all of its peremptory challenges; and,
- (5) the ultimate makeup of the jury in light of the characteristic in question.

See generally, Call, 349 N.C. at 404, 508 S.E.2d at 510 (1998); *State v. Gaines*, 345 N.C. 647, 671, 483 S.E.2d 396, 410, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) (regarding gender); *State v. Nicholson*, 355 N.C. 1, 22, 558 S.E.2d 109, 125, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002) (regarding race).

Our review accords deference to the trial court’s ultimate determination because the findings largely “turn on [an] evaluation of credibility[.]” *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21; *State v. Norwood*, 344 N.C. 511, 476 S.E.2d 349, *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1996). The trial court’s *Batson* decision “will be upheld unless the appellate court is convinced that the trial court’s determination is clearly erroneous.” *State v. Fletcher*, 348 N.C. 292, 313, 500 S.E.2d 668, 680 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 113 (1999). With these principles in mind, we turn to defendant’s assertions concerning jury selection.

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A. Racial Discrimination

Defendant asserts the trial court erred by finding the prosecutor did not intentionally discriminate on the basis of race. The trial court found defendant had made a *prima facie* *Batson* challenge to satisfy the first prong of the analysis. *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991). We review the second prong of *Batson*, the prosecutor's proffered reasons for striking the jurors, and the third prong of *Batson*, whether the trial court properly found these reasons were not pretextual and the defendant failed to prove intentional discrimination. *State v. Fair*, 354 N.C. 131, 557 S.E.2d 500 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002).

The prosecutor offered race-neutral explanations for striking each of the eight black jurors. The prosecutor stated he used a peremptory challenge against Mr. Farmer because he has a son who is the same age as defendant. The State was concerned Farmer would be overly sympathetic. Mr. Farmer also works as a detention officer, has had contact with defendant and several witnesses, has been supervised by one of the witnesses, and such supervision may re-occur in the future. Regarding Ms. McNeal, the prosecutor noted she was equivocal on the death penalty. Mr. Lee was challenged because counsel for the defendant had represented Lee within the past two years. Lee also appeared to suffer memory problems because he did not remember that defendant's counsel had represented him. Reverend Bethune gave equivocal responses on the death penalty and participated in a prison ministry. Ms. Maxwell was a convicted felon, stated that it would be hard for her to follow the law, and gave equivocal responses on the death penalty. Mr. Dobbins had a son the same age as defendant, knew and had played sports with some of the witnesses, was equivocal on the death penalty, and possessed an unstable employment history. Ms. Nimitz also has a son the same age as defendant. The prosecutor also believed that Nimitz was too authoritarian and might cause problems during deliberations. Finally, Ms. Cunningham was equivocal about the death penalty, articulated a higher standard of proof than that legally required, and stated that one of the witnesses is her doctor.

Defendant asserts these reasons, although facially race-neutral, were pretextual. Defendant argued at trial that other non-black jurors were not challenged despite being equivocal about the death penalty, articulating a higher standard of proof, having children who were defendant's age, or having had contact with some of the witnesses.

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Defendant also noted that white jurors, who appeared authoritarian, were not challenged by the State.

In considering the third prong of *Batson*, we consider the race-neutral explanation by the prosecutor, the argument of pretext by defendant, and the factors our appellate courts have deemed relevant. First, defendant and the victims were black and the witnesses were both black and white. Second, the prosecutor made no comments during jury selection to support an inference of racial discrimination. Third, the prosecutor exercised nearly 73% (eight of twelve) of his peremptory challenges against black jurors. Fourth, the State failed to exercise all of its fourteen peremptory challenges against prospective members of the jury. Finally, the seated jury was composed of three black jurors and nine non-black jurors.

The only factor supporting an inference of discrimination is the disproportionate number of prospective black jurors peremptorily challenged by the State. We previously held that, where this factor is approximately 70% “but other elements supporting an inference are not present[,]” we will not overturn the trial court’s decision that defendant failed to present a *prima facie* case of racial discrimination. *State v. Mays*, 154 N.C. App. 572, 577, 573 S.E.2d 202, 206 (2002).

In *State v. Smith*, 328 N.C. 99, 123, 400 S.E.2d 712, 725 (1991), “the State exercised 80% of the peremptories used to remove black potential jurors.” There, the Court held defendant had established a *prima facie* *Batson* case by proving an inference of racial discrimination. In *Smith*, however, there was also a statement by the prosecutor that “tends to support . . . an inference of discrimination.” *Id.* Moreover, the case “involved an interracial killing and attracted much attention,” and the “racial emotions and publicity surrounding the case were substantial enough for the defendant to successfully seek a change of venue.” *Smith*, 328 N.C. at 122, 400 S.E.2d at 725. As in *Smith*, defendant here was a young, African-American man, and the victims were both white. Unlike *Smith*, however, defendant’s motion to change venue was denied, and publicity was such that many jurors had never heard of the case. Therefore, while the percentages of peremptory challenges were high in both cases, other elements supporting an inference are not present in the case at bar.

Id.

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This Court in *Mays* addressed the trial court's determination of whether the defendant had established a *prima facie* case that peremptory challenges were exercised on the basis of race. Here, our review concerns the trial court's determination of whether the defendant has proven purposeful discrimination in the jury selection process. We conclude, as in *Mays*, that where the only factor supporting an inference of discrimination is the State's heightened use of peremptory challenges against prospective black jurors, and other elements relevant to finding an inference of discrimination are not present, the trial court's determination, that the State did not purposefully discriminate on the basis of race, is not "clearly erroneous."

B. Gender Discrimination

[4] Defendant demands a new trial and asserts (1) the trial court did not engage in a proper analysis of gender-based challenges and (2) that it failed to make an independent assessment of whether the challenges were motivated by gender. We disagree.

During arguments concerning peremptory challenges, the trial court stated "I don't think I have to find [the State's reason for peremptorily striking a potential juror is] a valid reason. I don't even have to agree with it. I just have to find that it is acceptable, non-pretextual. . . . And, non-racial and non-gender bias." The issue of gender bias was repeatedly brought to the court's attention during the process of jury selection. In its order concerning *Batson* issues, the trial court stated, "Defendant . . . failed to put forth a sufficient showing of purposeful discrimination on the basis of race or gender[.]" In its findings of fact, the trial court found the State had acted "substantially the same with regard to each juror, regardless of that juror's race or gender[.]" In its findings of fact, the trial court found the State had acted "substantially the same with regard to each juror, regardless of that juror's race or gender" in questions and actions towards all prospective jurors. After reviewing the totality of the circumstances, the trial court concluded as a matter of law that the "reason or reasons proffered by the State for its excusal of each [juror] . . . are acceptable, non-pretextual, race-neutral, and gender neutral." The court cited the justifications proffered by the State and considered by the court. The order clearly indicates that, in light of the State's rebuttal testimony, it accepted those justifications and concluded the State had acted in a gender neutral fashion. Defendant's argument, that the court did not adequately consider whether the challenges were motivated by gender, is overruled.

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C. Race-Gender Bias

The *Batson* inquiry remains the same whether the issue is race alone, or race in conjunction with gender. Purposeful discrimination against a cognizable group based on constitutionally-protected traits is prohibited. We consider whether individuals having the same race and gender have been singled out as a cognizable group.

Defendant and his victim-child are black males. The witnesses included male, female, black and white individuals. The prosecutor made no comments during jury selection which imply race-gender discrimination. While the prosecutor exercised only 33% (4 of 12) of his peremptory challenges against prospective black male jurors, every black male prospective juror not excused for cause was challenged. The State exercised only twelve of its fourteen allowed peremptory challenges against potential members of the jury. The final jury contained no black males.

The State's reasons for challenging the potential black male jurors included: (1) having a son the same age as defendant, (2) contact with witnesses, (3) prior representation by defense counsel, (4) memory problems regarding prior representation by defense counsel, (5) equivocal responses on the death penalty, (6) prison ministry experience, and (7) an unstable employment history. Defendant asserted these reasons were pretextual. Defendant's assertion is weaker here than regarding race alone because other jurors, who were not black males, were challenged for these same issues. All are non-discriminatory reasons for the State to challenge jurors. While the State challenged every potential black male juror, this amounted to only four of the State's fourteen peremptory challenges. Fewer challenges against a particular cognizable group makes it more difficult for a defendant to establish a pattern of strikes indicating that purposeful discrimination is the motivating factor. The absence of other factors to establish purposeful discrimination diminishes defendant's claim. In light of the evidence before and the inquiry by the trial court, we do not find that the court's determination that there was no purposeful discrimination against black males was "clearly erroneous." The *Batson* order of the trial court is affirmed.

VI. Record of Numerical Division by Jury

[5] Defendant argues that the trial court committed plain error in asking the jury to record its numerical division and requiring further deliberations. This argument is not supported by a correlating assign-

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ment of error in the record on appeal. Defendant moved this Court to amend the record on appeal to include a correlating assignment of error. We do not find that a late amendment prejudices the State. The issue is addressed and argued in both briefs. We allow defendant's motion in the interest of justice.

Defendant failed to object to the trial court's administrative instruction and argues the instruction to the jury constitutes plain error. Plain error review is appropriate where defendant alleges the trial court erred in instructing the jury or admitting evidence. *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, cert. denied, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000).

A totality of the circumstances test determines whether an inquiry into the jury's numerical division is coercive or whether the inquiry affected the jury's decision. *State v. Yarborough*, 64 N.C. App. 500, 502, 307 S.E.2d 794, 795 (1983). The trial court did not ask the jury for their numerical split, but requested they keep an internal record of the votes. The trial court re-instructed the jury after making this request, reminded them that they should continue to deliberate, while remaining true to their convictions, and stated, "none of you should surrender your honest conviction as to the weight or the affect (sic) of the evidence, solely because of the opinion of your fellow jurors; or for the mere purpose of returning a verdict." Given the totality of the circumstances and substance of the instruction, no plain error was committed by the trial court.

VII. Sentencing Factors

Defendant argues that the trial court erred in finding evidence of the statutory aggravating factor of "took advantage of a position of trust or confidence" and in not finding the mitigating factors of aid in apprehension of felon, defendant's support of his family, and presence of an extensive support system in the community.

A. Aggravating Factor

[6] Defendant argues that his relationship with the victim did not foster trust and confidence between them. Defendant contends that nothing leading up to, during, or after the shooting suggested it was accomplished through an abuse of trust. We disagree. But for the relationship between defendant and the victim, the victim would not have been following the defendant and would not have been forced to stop on a residential two-lane road just after midnight. The co-defendants would not have had the opportunity to "box" the victim's

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car from behind, pull beside the victim's vehicle, and shoot her while defendant's vehicle blocked her from the front. The crimes against the victim could not have been carried out without the active participation of defendant and the trusting relationship between defendant and the victim, who was following him to her home.

Although these factors square completely with the commission of the crime, our Court has found the existence of an aggravating factor of taking advantage of trust and confidence in very limited circumstances. *State v. Marecek*, 152 N.C. App. 479, 514, 568 S.E.2d 237, 259 (2002). *See also*, *State v. Rogers*, 157 N.C. App. 127, 130, 577 S.E.2d 666, 669 (2003).

See, e.g., *State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994) (factor properly found where nine-year-old victim spent great deal of time in adult defendant's home and essentially lived with defendant while mother, a long-distance truck driver, was away); *State v. Arnold*, 329 N.C. 128, 404 S.E.2d 822 (1991) (factor properly found in husband-wife relationship); *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), *disc. review denied*, 311 N.C. 406, 319 S.E.2d 278 (1984) (factor properly found where defendant shot best friend who thought of defendant as a brother); *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984) (factor properly found where adult defendant sexually assaulted his ten-year-old brother); *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, *disc. review denied*, 314 N.C. 546, 335 S.E.2d 318 (1985) (factor properly found where defendant raped nineteen-year-old mentally retarded female who lived with defendant's family and who testified that she trusted and obeyed defendant as an authority figure).

Id. The relationship of husband and wife does not *per se* support a finding of trust or confidence where “[t]here was no evidence showing that defendant exploited his wife's trust in order to kill her.” *Marecek* at 514, 568 S.E.2d at 259.

The State presented evidence through Candace that defendant had tried to be “nice” to the victim by going to doctor appointments with her. The victim was surprised, but seemed happy, that defendant wanted her to follow him to her apartment after retrieving her car. The evidence, when considered in conjunction with the manner in which the crime was carried out and the pretext of going to the victim's home, establishes the aggravating factor of abuse of “a position of trust or confidence” by a preponderance of evidence.

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Defendant contends the evidence also shows that the victim knew defendant was romantically involved with other women. While this information might preclude the victim from believing defendant's faithfulness as her boyfriend, it would not cause the victim to be in doubt for the safety of her life and that of her unborn child around defendant, the father of that unborn child. This assignment of error is overruled.

B. Mitigating Factors

[7] Defendant contends the trial court erred in failing to find three statutory mitigating factors that defendant: (1) "aided in the apprehension of another felon," (2) "supports the defendant's family," and (3) "has a support system in the community."

"The burden is on the defendant to establish a mitigating factor by a preponderance of the evidence." *Marecek*, 152 N.C. App. at 513, 568 S.E.2d at 259. The trial court must find a mitigating factor where evidence to support the factor is substantial, credible, and uncontradicted. *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983). To establish error on appeal, defendant "must show that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn and that the credibility of the evidence [to support the mitigating factor] is manifest as a matter of law." *State v. Hughes*, 136 N.C. App. 92, 100, 524 S.E.2d 63, 68 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000) (quoting *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 (1983)).

Defendant's evidence does not meet the required standard. Defendant gave the police the telephone number and hotel room at the Villager Lodge where Watkins, the shooter, was staying on 24 November 1999. Evidence indicated that defendant had previously lied to police and cooperated only after being pressed by police. In *State v. Brown*, 314 N.C. 588, 595-96, 336 S.E.2d 388, 392-93 (1985), our Supreme Court stated that whatever consideration defendant earned by helping the police was offset by his earlier denials of wrongdoing, and held the trial court had not abused its discretion in failing to find an early acknowledgment factor. The trial court did not err in failing to find this mitigating factor at bar.

As to the mitigating factors that defendant supported his family and had a support system in the community, we find no error in the trial court's failure to find either mitigating factor. Evidence regarding defendant's support for his family was contradicted. Defendant

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pays child support for his illegitimate son in California, but has not done so voluntarily. Evidence was presented that defendant wanted to eliminate the victim and her baby to avoid paying additional child support. That defendant provides money to various family members is not *per se* sufficient where there was evidence that defendant did not voluntarily provide other means of support, and a possible motive for the crimes was to avoid paying support.

Regarding defendant's community support system,

[t]estimony demonstrating the existence of a large family in the community and support of that family alone is insufficient to demonstrate the separate mitigating factor of a community support system. One witness' conclusory testimony as to the existence of a support structure is unsubstantial and insufficient to clearly establish the factor and does not compel a finding of the mitigating factor.

State v. Kemp, 153 N.C. App. 231, 241-42, 569 S.E.2d 717, 723, *disc. review denied*, 356 N.C. 441, 573 S.E.2d 158 (2002). Although defendant presented evidence that he had "many friends" in Charlotte who liked and cared for him, defendant failed to show the existence of a "support system in the community." This assignment of error is overruled.

VIII. Conclusion

We hold that any error in the trial court's admission of the victim's written statements as present sense impressions was harmless beyond a reasonable doubt. Defendant's remaining assignments of error are overruled.

No prejudicial error.

Chief Judge EAGLES and Judge CALABRIA concur.

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STEVE UDZINSKI, ADMINISTRATOR OF THE ESTATE OF LOUISE UDZINSKI AND ADMINISTRATOR OF THE ESTATE OF VICTOR UDZINSKI, PLAINTIFF v. JEFFREY D. LOVIN, M.D. AND HAYWOOD MEDICAL IMAGING, P.C., DEFENDANTS

No. COA02-480

(Filed 5 August 2003)

Statutes of Limitation and Repose— medical malpractice— wrongful death

The trial court did not err in a medical malpractice and wrongful death case by dismissing plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) based on both claims being time-barred, because: (1) the medical malpractice claim falls under the purview of N.C.G.S. § 1-15(c) which establishes a four-year statute of repose, and the complaint was filed more than four years after the last act giving rise to the complaint; and (2) the wrongful death claim falls under N.C.G.S. § 1-53(4) which establishes a two-year statute of limitations, the complaint was filed more than two years after decedent's date of death, and the order extending the statute of limitations in this case pertained only to the medical malpractice claim and not to a wrongful death claim.

Judge HUNTER concurring.

Judge BRYANT dissenting.

Appeal by plaintiff from judgment entered 29 January 2002 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 11 February 2003.

Comerford & Britt, L.L.P., by Clifford Britt, and Terre Yde for plaintiff-appellant.

Carruthers & Roth, P.A., by Richard L. Vanore, and Norman F. Klick, Jr. for defendant-appellees.

ELMORE, Judge.

Louise Udzenski (Mrs. Udzenski) had medical examinations yearly, and a chest x-ray as a part of the annual exam. On 17 February 1997 Dr. Jeffery D. Lovin (Dr. Lovin) interpreted Mrs. Udzenski's chest x-ray, failing at that time to diagnose that the decedent had a "progressive interval increase in a subtle right middle lobe mass" which

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may have indicated lung cancer. Dr. Lovin rendered no further medical care to Mrs. Udzenski after that time. From x-rays taken on 23 February 1998, Mrs. Udzenski was diagnosed by a Dr. Wieslawa Pekal as having cancer which was incurable due to its advanced stage. Despite multiple rounds of chemotherapy and other treatments, Mrs. Udzenski died from lung cancer on 1 April 1999 at the age of seventy-two.

Her husband, Victor Udzenski (Mr. Udzenski), suffered from deep depression and financial hardship in the months that followed his wife's passing. He died on 17 October 1999.

Steve Udzenski (plaintiff), the Udzenski's only child and executor of their estates, filed a complaint for damages on 27 July 2001 on their behalf. Prior to the complaint, on 27 March 2001, in response to plaintiff's motion, the trial court granted an "ORDER GRANTING EXTENSION OF THE STATUTE OF LIMITATIONS IN A MEDICAL MALPRACTICE ACTION PURSUANT TO N.C.R. CIV. P. 9(j)." The order gave the plaintiff an additional 120 days to file the medical malpractice claim. The complaint, filed 27 July 2001, alleged negligence of Dr. Lovin, vicarious liability of Haywood Medical Imaging, P.C., vicarious liability and negligence of Haywood Regional Medical Center, breach of contract, "severe emotional distress" of Mr. Udzenski, and wrongful death.

The complaint as it pertained to Haywood Regional was voluntarily dismissed, and the complaint against Dr. Lovin and Haywood Medical Imaging remained. The remaining complaint was dismissed with prejudice by the trial court, citing the statute of repose contained in section 1-15(c) of the General Statutes, which pertains to medical malpractice claims. Plaintiff appeals the judgment dismissing the complaint.

I.

The issue before this Court is whether the trial court properly dismissed the plaintiff's claim as barred by the statute of repose. The standard of review is *de novo* regarding the limitations issue. Ordinarily, a dismissal predicated upon the statute of limitations is a mixed question of law and fact. But where the relevant facts are not in dispute, all that remains is the question of limitations which is a matter of law. *Poultry Co. v. Oil Co.*, 272 N.C. 16, 21, 157 S.E.2d 693, 697 (1967); *Yancey v. Watkins*, 17 N.C. App. 515, 519, 195 S.E.2d 89, 92, *cert. denied*, 283 N.C. 394, 196 S.E.2d 277 (1973). Here, the

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issue is whether the trial court properly dismissed the complaint as barred by the statute of repose contained in N.C. Gen. Stat. § 1-15(c).

II.

The plaintiff and defendant disagree in arguments on appeal as to the exact nature of the complaint. Plaintiff contends that this is a wrongful death claim, which is the basis for his argument that the wrongful death statute of limitations should apply. Defendant asserts that this is a medical malpractice claim, and therefore N.C. Gen. Stat. § 1-15(c) applies and bars plaintiff's claim. Both a wrongful death claim and the underlying medical malpractice claim were articulated, even if imperfectly, in the complaint. However, both the wrongful death claim and the medical malpractice claim are barred by the limitations statutes, and therefore the complaint fails to articulate a claim for relief and was properly dismissed by the trial court.

III.

We must first determine the nature of the complaint. For the life of this case at the trial level, it has been treated as a medical malpractice claim. The order which extended the statute of limitations was entitled "ORDER GRANTING EXTENSION OF THE STATUTE OF LIMITATIONS IN A MEDICAL MALPRACTICE ACTION PURSUANT TO N.C.R. CIV. P. 9(j)." Plaintiff made no objection to the claim being characterized as a medical malpractice claim, and did not correct the court in the complaint. Since both plaintiff and defendant recognize the medical malpractice claim, we are left to determine whether the plaintiff also articulated a wrongful death claim.

The plaintiff has asserted this claim as one which entitled him personally to damages. The complaint, in the section entitled "damages," included a claim for "the reasonable value of services, protection, care and assistance of the decedent [Mrs. Udzenski], the loss of society, companionship, comfort, love, care, affection, guidance, kindly offices, advice of the decedent and lost income." These are damages alleged that "plaintiff is entitled to recover," with the damages of Mr. Udzenski alleged in the subsequent sentence. In a wrongful death action, the personal representative of a decedent, as such, has no beneficial interest in a recovery and is therefore not the real party in interest. *Long v. Coble*, 11 N.C. App. 624, 628, 182 S.E.2d 234, 237, cert. denied, 279 N.C. 395, 183 S.E.2d 246 (1971). Therefore, plaintiff cannot personally recover some of the damages which he seeks.

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However, in form and in some allegations for damages, the complaint was brought by plaintiff as administrator of the decedents' estates in his official capacity. This is appropriate for a wrongful death claim. *Hall v. R. R.*, 146 N.C. 251, 59 S.E. 879 (1907). The plaintiff alleged negligence and a death as a direct and proximate result. He made a claim for damages pursuant to the wrongful death statute, N.C. Gen. Stat. § 28A-18-2. He also prayed the court for recovery "for personal injuries and wrongful death." Plaintiff thus properly alleged a wrongful death cause of action, of which the medical malpractice claim was the basis.

We note at this point that the complaint, upon the scrutiny which this appeal has demanded, has proven unclear and ambiguous in the nature of the relief requested. In the absence of a clear and unambiguously pleaded complaint, a plaintiff will not be able to assert whatever form would be most beneficial to the argument he chooses to later make upon appeal. However,

[a] claim for relief should not be dismissed unless it appears beyond doubt that the party is entitled to no relief under any state of facts which could be presented in support of the claim. . . . Therefore, the essential question on a Rule 12(b)(6) motion, is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory.

Keys v. Duke University, 112 N.C. App. 518, 520, 435 S.E.2d 820, 821 (1993).

Even if not perfectly worded and jumbled with other claims, plaintiff has sufficiently alleged a wrongful death claim in addition to and based on his underlying medical malpractice claim.

III.

We next determine the effect of the limitations statute on the medical malpractice claim. Because this is a medical malpractice claim, it falls within the purview of N.C. Gen. Stat. § 1-15(c), the statute governing professional malpractice claims. The issue raised on appeal pertains to the statute of repose, and thus is distinct from a simple statute of limitations issue because the repose statute vests the defendant with an immunity from suit, and thus negates the claim altogether. When the statute of repose has run, the immunity is absolute.

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N.C. Gen. Stat. § 1-15(c), establishes a four-year statute of repose and a three-year statute of limitations. *McGahren v. Saenger*, 118 N.C. App. 649, 652, 456 S.E.2d 852, 853, *disc. review denied*, 340 N.C. 568, 460 S.E.2d 318-19 (1995). Section 1-15(c) provides in pertinent part:

Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or . . . defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. *Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action*[.]

N.C. Gen. Stat. § 1-15(c) (2001) (emphasis added).

This statute creates a statute of limitations and a statute of repose, both of which are based upon the date of the “last act of the defendant giving rise to the cause of action.” *Id.*; *Sharp v. Teague*, 113 N.C. App. 589, 593, 439 S.E.2d 792, 795 (1994), *disc. review improvidently allowed*, 339 N.C. 730, 456 S.E.2d 771 (1995). Our Supreme Court has stated:

Statutes of limitation are generally seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may be commenced after the cause of action has accrued. Statutes of repose, on the other hand, create time limitations which are not measured from the date of injury. These time limitations often run from defendant’s last act giving rise to the claim or from substantial completion of some service rendered by defendant.

Trustees of Rowan Tech. v. Hammond Assoc., 313 N.C. 230, 234 n. 3, 328 S.E.2d 274, 276-77 n. 3 (1985). A statute of repose “serves as an unyielding and absolute barrier that prevents a plaintiff’s right of

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action even before his cause of action may accrue." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985) (citations omitted). Therefore, if the statute of repose has run, plaintiff's action is barred. *Nationsbank of N.C. v. Parker*, 140 N.C. App. 106, 111, 535 S.E.2d 597, 600 (2000). See also *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784, *reh'g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994) (holding that a legal malpractice claim was barred by the statute of repose, although filed within the statute of limitations, under N.C. Gen. Stat. § 1-15(c)).

The last act of Dr. Lovin potentially giving rise to a claim was his diagnosis in February of 1997. The cancer was diagnosed in February of 1998 by Dr. Zlatev. In April of 1999 Mrs. Udzenski passed away. In March of 2001 an order was issued granting an extension of the statute of limitation, and in July of 2001 the complaint was filed, more than four years after the last act giving rise to the complaint.

This Court has determined that section 1-15(c) of the General Statutes was passed by the General Assembly in an attempt to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims. *Roberts v. Durham County Hospital Corp.*, 56 N.C. App. 533, 540, 289 S.E.2d 875, 880 (1982), *aff'd per curiam*, 307 N.C. 465, 298 S.E.2d 384 (1983). In pursuit of this legislative aim, the repose statute:

serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue . . . [and has] the effect of granting the defendant an immunity to actions for malpractice after the applicable period of time has elapsed.

Black v. Littlejohn, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985) (citations omitted).

We therefore affirm the trial court's order dismissing the complaint.

IV.

We next consider the effect of the limitations statute on the wrongful death claim. The trial court dismissed the complaint only on the basis of the statute of repose in section 1-15(c), and the dismissal would be in error if that statute did not govern all claims in the complaint. However, the error is harmless if the remaining claim is also

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barred, and the judgment that the plaintiff did not state a claim under N.C.R. Civ. P. 12(b)(6) would have been appropriate.

An action for wrongful death is an action created by statute, and distinct from any underlying claims, even the claim upon which the wrongfulness of the death depends. The limitations issue in a wrongful death claim is likewise distinct from that of the underlying claims. *See King v. Cape Fear Mem. Hosp.*, 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989) (analyzing the limitations issue in a wrongful death claim separately from underlying claims of medical malpractice, intentional infliction of mental distress, and loss of consortium), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 114 (1990).

The statute of limitations for a wrongful death claim is found in section 1-53(4) of the General Statutes, and was construed by the Supreme Court in the case of *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 418 S.E.2d 645 (1992). The *Dunn* case concerned a widow's wrongful death claim against her husband's employer based on an occupational disease contracted by her husband.

Section 1-53 provides a two year general statute of limitations for each of the specified subsections. Subsection (4) states:

(4) Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought.

N.C. Gen. Stat. § 1-53(4) (2001).

The Court in *Dunn* established a two-part test whereby the wrongful death claim was not barred if it was: 1) instituted within two years of decedent's death, and 2) on the date of her death the decedent's claim for injury would not have been time-barred. *Dunn* at 133, 418 S.E.2d at 647. The Court noted that a claim for wrongful death is "distinct and separate" from the underlying claim for injury. The *Dunn* Court also reasoned that it was the intent of the General Assembly not to cut short the time period for filing a wrongful death claim, but only to provide a limitations defense to a wrongful death action when the underlying claim for injury had become time-barred during the decedent's life. *Id.* at 134, 418 S.E.2d at 647-48.

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We note that in the *Dunn* case there was no allegation of medical malpractice, and the claim at the time of complaint was not barred by a statute of repose in 1-15(c), but instead fell within the purview of 1-52(16) which deals with personal injury claims. The same analysis, however, applies to a wrongful death claim based on an underlying claim brought under 1-15(c), since 1-15(c) is specifically referred to in 1-53(4) in same way as section 1-52(16).

On the date of Mrs. Udzinski's death, the medical malpractice action was not barred by the medical malpractice limitations statute as it was within three years of the last act giving rise to the claim. So the second part of the *Dunn* test was satisfied.

The complaint, however, was filed more than two years after the date of death, failing the first part of the *Dunn* test. An extension of the statute of limitations as to the medical malpractice claim was sought by the plaintiff, and an order was filed by the trial court on 27 March 2001. The order was captioned "ORDER GRANTING EXTENSION OF THE STATUTE OF LIMITATIONS IN A MEDICAL MALPRACTICE ACTION PURSUANT TO N.C.R. CIV. P. 9(j)," and extended the statute by "no more than 120 days in order to comply with and pursuant to N.C.R. Civ. P. 9(j)." This order clearly pertained only to the medical malpractice claim, and not a wrongful death claim. Because the medical malpractice claim was not time-barred at the time of Mrs. Udzinski's passing, there was no further issue of the viability of that claim for the purpose of supporting a wrongful death action. However, the extension was not directed to, and thus was not effective to extend, the wrongful death time limit.

Mrs. Udzinski passed away on 1 April 1999. The plaintiff filed the complaint on 27 July 2001, more than two years later. The action for wrongful death was thus barred by the statute of limitations.

Both claims being time-barred, the complaint did not state a claim upon which relief could be granted. The order of the trial court dismissing the complaint under Rule 12(b)(6) is therefore

Affirmed.

Judge HUNTER concurs by separate opinion.

Judge BRYANT dissents.

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HUNTER, Judge, concurring.

I concur in the result with the majority opinion, but write separately to articulate my reasoning as to why plaintiff's wrongful death claim was properly dismissed by the trial court based on the statute of repose in Section 1-15(c).

Initially, I note that Section 90-21.11 specifically provides, *inter alia*, that "the term 'medical malpractice action' means a civil action for damages for personal injury *or death* arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2001) (emphasis added). Since Section 1-15(c) governs the accrual of medical malpractice actions mentioned in Section 90-21.11, as well as other professional malpractice actions not otherwise provided for by statute, I interpret Section 1-15(c) to also govern the accrual of a wrongful death claim if the death arises out of the furnishing or failure to furnish medical services. My interpretation is further supported by the General Assembly's 1979 decision to repeal Section 1-15(b) which expressly provided an exception for the accrual of a wrongful death claim. *Raftery v. Construction Co.*, 291 N.C. 180, 187, 230 S.E.2d 405, 409 (1976); N.C. Gen. Stat. § 1-15(b) (2001). Section 1-15(c) replaced Section 1-15(b) and provides no exception for wrongful death claims, only an exception for medical malpractice claims involving foreign objects. *See* N.C. Gen. Stat. § 1-15(c). The absence of such an exception can be deemed as the General Assembly's intention that a claim for wrongful death now comes under the purview of 1-15(c) when that death arises from professional malpractice.

Here, the trial court dismissed plaintiff's complaint, citing the statute of repose contained in Section 1-15(c). As stated by our Supreme Court in *Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784 (1994), Section 1-15(c) establishes a time period in which a claim based on professional malpractice

"must be brought in order for [that] cause of action to be recognized. If the action is not brought within a specified period, the plaintiff 'literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.' "

Id. at 655, 447 S.E.2d at 787 (citations omitted) (emphasis in original). In *Hargett*, the plaintiffs' professional malpractice action against an

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attorney that allegedly acted negligently in drafting their father's will was barred by the statute of repose in Section 1-15(c) because the action began to accrue even before the father's death.

Moreover, in *Walker v. Santos*, 70 N.C. App. 623, 320 S.E.2d 407 (1984), this Court essentially established that if a wrongful death claim arises from an underlying medical malpractice action, both claims are governed by the statute of repose in Section 1-15(c). The plaintiff in *Walker* commenced a wrongful death action on 29 April 1983 based on the plaintiff's decedent dying on 10 May 1981¹ " [a]s a result of the faulty and negligently directed and administered' " radio-therapeutic treatment last received from the defendant-physician on 15 March 1966. *Id.* at 624, 320 S.E.2d at 408. This Court held:

G.S. 1-15(c), with one exception not pertinent here, provides that an action arising out of the performance of or failure to perform professional services shall in no event be commenced more than four years from the last act of the defendant giving rise to the cause of action. G.S. 1-53(4) precludes an action for wrongful death if G.S. 1-15(c) would have barred the decedent, when alive, from bringing an action for bodily harm. These statutes together, by their express terms, preclude[d] the bringing of [the plaintiff's wrongful death] action [arising from the defendant's medical malpractice].

Id.

With *Hargett* and *Walker* in mind, the facts in the present case show that the last act giving rise to plaintiff's wrongful death claim occurred on 17 February 1997 when Dr. Lovin allegedly misdiagnosed Mrs. Udzenski. On 27 March 2001, the trial court granted plaintiff an extension on the statute of limitations to file a medical malpractice action pursuant to Rule 9(j). Yet, when the extension was granted, four years had already passed from the date Dr. Lovin gave Mrs. Udzenski the diagnosis. Thus, the trial court could afford plaintiff no redress because the subsequent filing of his complaint on 27 July 2001 was untimely due to the passage of the four-year statute of repose in Section 1-15(c).

1. It should be noted that *Walker* actually states that the decedent died on 10 March 1981. However, a review of the records filed for that case with this Court clearly provide that the decedent died on 10 May 1981. Thus, we are charged with judicial notice of the correct date. See *Bizzell v. Insurance Co.*, 248 N.C. 294, 103 S.E.2d 348 (1958).

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Finally, I would like to address the dissenting opinion's conclusion that the order dismissing plaintiff's wrongful death claim be reversed. The dissent asserts that *King v. Cape Fear Mem. Hosp.*, 96 N.C. App. 338, 385 S.E.2d 812 (1989), rejected the argument that actions such as the one in the case *sub judice* are governed by Section 1-15(c). While I agree that *King* clearly establishes that the statute of limitations for wrongful death actions are governed by Section 1-53(4) and not by Section 1-15(c), it does not address the statute of repose issue and is therefore inapplicable in this case. The dissent also asserts, as does the majority, that *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 418 S.E.2d 645 (1992), is applicable to the facts in this case. However, the Supreme Court specifically stated in *Dunn* that "N.C.G.S. § 1-15(c) deals with professional malpractice claims and has no application to [a case concerning a widow's wrongful death claim against her husband's employer based on his contracting an occupational disease]." *Id.* at 132 n.1, 418 S.E.2d 647 n.1. Therefore, any reliance on *Dunn* is inappropriate in relation to a statute of repose issue in a medical malpractice action.

Accordingly, I would affirm the trial court's dismissal of plaintiff's wrongful death claim.

BRYANT, Judge, dissenting.

I agree that plaintiff has stated a claim for wrongful death based on medical malpractice; however, because I believe North Carolina General Statutes sections 1-53(4), governing wrongful death actions, and 1-15(c), governing professional malpractice claims, must be read in conjunction with one another, I respectfully dissent.

In a wrongful death action based on acts of medical malpractice, this Court has already held that a plaintiff is required to bring her claim within two years of the decedent's death pursuant to section 1-53(4) and explicitly rejected the argument that section 1-15(c), which contains discovery provisions not available under section 1-53(4), controlled the analysis in that case. *King v. Cape Fear Mem. Hosp.*, 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989).² Thus, our

2. Judge Elmore's opinion distinguishes *King* based on the contention that the Court separated the limitations issue of the wrongful death claim from those of the underlying claims of medical malpractice, intentional infliction of emotional distress, and loss of consortium. In *King*, however: (1) the plaintiff raised a *personal* cause of action for intentional infliction of mental distress, not one brought pursuant to the wrongful death claim, thus requiring a separate analysis under N.C. Gen. Stat. § 1-52(5); (2) this Court held that the plaintiff's underlying claim for loss of consortium failed because the wrongful death action was barred under section 1-53(4); and (3) this

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current analysis begins with section 1-53(4). This section, which provides for a two-year statute of limitations, states:

Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought.³

N.C.G.S. § 1-53(4). Section 1-53(4), including its proviso, was interpreted in *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 418 S.E.2d 645. While the *Dunn* case did not involve a wrongful death action based on malpractice, it did include an important, and binding, interpretation of section 1-53(4) that is relevant to a determination of the case *sub judice*.

In interpreting the proviso of section 1-53(4) barring a wrongful death claim when “the decedent would have been barred, had he lived, . . . because of the provisions of G.S. 1-15(c) or 1-52(16),” the *Dunn* Court held that this language “merely provides a limitations defense to a wrongful death action when the claim for injuries caused by the underlying wrong had become time-barred during the decedent’s life.” *Id.* at 134, 418 S.E.2d at 648. Thus, if “the decedent [was] not time-barred [under section 1-15(c) or 1-52(16)] at [her] death,” as opposed to the time the claim was actually filed, a plaintiff will be allowed to bring a wrongful death action, including one based on medical malpractice, within two years from the date of death. *Id.*⁴

Court did not analyze the medical malpractice claim separately from the wrongful death statute of limitations. *King*, 96 N.C. App. at 341-42, 385 S.E.2d at 814-15.

3. The concurring opinion contends that the absence of an exception in section 1-15(c) for the accrual of a wrongful death claim supports the legislative intent “that a claim for wrongful death now comes [solely] under the purview of 1-15(c) when that death arises from professional malpractice.” I, instead, believe such an exception does exist and was actually added by the legislature the same year section 1-15 was redrafted. This exception is found in the form of the proviso contained in section 1-53(4), added in 1979, see *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 132, 418 S.E.2d 645, 646 (1992), barring any action for the decedent’s death if “the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16),” N.C.G.S. § 1-53(4) (2001), and evinces a clear legislative intent to consider both 1-53(4) and 1-15(c) together.

4. The concurring opinion attempts to distinguish *Dunn* due to the fact that the Supreme Court stated section 1-15(c) had no application in that case because the claims were governed by section 1-52(16). The Court’s statement, however, pertains to the application of the facts and time lines involved in *Dunn*, not its interpretation of

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The Supreme Court's reading of the statutes in *Dunn* is further supported by *Walker v. Santos*, in which this Court looked to the provisions of sections 1-53(4) and 1-15(c) and held that these statutes should be read together. *Walker v. Santos*, 70 N.C. App. 623, 624, 320 S.E.2d 407, 408 (1984).

In this case, the alleged act of malpractice occurred in February 1997. Mrs. Udzinski was diagnosed with lung cancer in February 1998 and died in April 1999. Thus, at the time of her death, neither the three-year statute of limitations nor the four-year statute of repose under section 1-15(c) had expired. See N.C.G.S. § 1-15(c) (2001). Had Mrs. Udzinski lived, she would have had until February 2000 under the three-year statute of limitations and until February 2001 under the statute of repose of section 1-15(c) to file her claim. Accordingly, Mrs. Udzinski would not have been time-barred under section 1-15(c) at the time of her death from filing a claim for the bodily harm caused by the alleged mis-diagnosis, and her estate therefore had two years under section 1-53(4) from the time of death, until April 2001, to bring this action. Since this time period had not yet elapsed when the trial court granted plaintiff an extension of the statute of limitations in March 2001, the trial court's order dismissing plaintiff's claim should be reversed.

STATE OF NORTH CAROLINA v. MICHAEL DAMMONS

No. COA02-625

(Filed 5 August 2003)

1. Bail and Pretrial Release— failure to appear—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of failure to appear, because: (1) the secured order signed by defendant in the presence of the magistrate and

how section 1-53(4) and the sections mentioned in the proviso, sections 1-15(c) and 1-52(16), are to function in relation to one another. The concurring opinion also points out that *King* only dealt with the statute of limitations and not the statute of repose. Because the analysis in this dissent is based on a joint reading of *King* and *Dunn*, such a distinction is of no avail. Furthermore, the proviso in section 1-53(4) provides a blanket bar on wrongful death actions if "the decedent would have been barred," by either the statute of limitations or repose, "had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16)." N.C.G.S. § 1-53(4).

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read to him by a bail bondsman ordered defendant to appear in court for the charges against him; (2) an unsecured release order signed by defendant also ordered defendant to appear in court for the charges against him, and the fact that the magistrate's signature on that order was generated by a computer rather than handwritten was of no consequence; (3) defendant had actual knowledge of his duty to appear in court and he cannot claim ignorance of the law as an excuse; (4) there was evidence from which a jury could find that defendant violated either N.C.G.S. § 5A-12(a) or § 15A-543, and it was within the prosecutor's discretion to decide under which statute the State wished to proceed against defendant; and (5) assuming *arguendo* that defendant was the only person in the pertinent county to have been prosecuted for failure to appear, defendant failed to demonstrate that the district attorney exercised anything more than ordinary discretion in his prosecution of defendant.

2. Identity Fraud— financial identity fraud—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of financial identity fraud under N.C.G.S. § 14-113.20(a), because: (1) the indictment alleged that defendant misrepresented his identity for the purpose of avoiding legal consequences, and the State presented substantial evidence at trial tending to show that defendant assumed another person's identity without consent in order to avoid the trial of felony charges against him; and (2) the language of the indictment alleging that defendant also misrepresented his identity for the purposes of making a financial transaction was unnecessary and may properly be regarded as surplusage.

3. Identity Fraud— financial identity fraud—obstructing or delaying a law enforcement officer

The trial court did not err in a financial identity fraud case by failing to instruct the jury on obstructing and delaying an officer even though defendant contends it is a lesser-included offense of financial identity fraud, because obstructing or delaying a law enforcement officer is not a lesser-included offense of financial identity fraud since all of the elements of the offense of obstructing or delaying a law enforcement officer are not included in the offense of financial identity fraud.

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4. Identity Fraud— financial identity fraud—instruction—consent

The trial court did not err in a financial identity fraud case by allegedly failing to instruct the jury concerning consent, because the trial court properly instructed the jury that it was the State's burden to show that defendant's use of another person's identification documents at the time the offense was committed was without consent.

5. Sentencing— habitual felon—request to inform jury about potential punishment

The trial court did not err in a financial identity fraud and a failure to appear case by denying defendant's request to inform the jury about potential punishment based on defendant's status as an habitual felon if found guilty of the principal offenses, because although defendant has the right to inform the jury of the punishment that may be imposed upon conviction of the crime for which he is being tried, this principle does not support a defendant's right to inform the jury during a principal felony trial of the possible maximum sentence which might be imposed upon an habitual felon adjudication.

6. Sentencing— habitual felon—indictment—motion to dismiss

The trial court did not err in a financial identity fraud and a failure to appear case by denying defendant's motion to dismiss the habitual felon indictment on the ground that other similarly situated defendants are not so prosecuted, because: (1) defendant acknowledged that this issue has previously been decided against him; and (2) defendant advances no compelling grounds to circumvent this binding precedent.

7. Sentencing— habitual felon—Class C felon

The trial court did not err in a financial identity fraud and a failure to appear case by sentencing defendant as a Class C felon based on his status as an habitual felon, because: (1) where an habitual felon has been convicted of a felony offense, the felon must be sentenced as a Class C felon; (2) the legislature has specifically authorized the enhancement of sentences for recidivists; (3) the omission by the trial court in its original judgments to check Block Five, despite its sentencing of defendant as an habitual felon, was a technical error and the amendment of such judgments outside the presence of defendant does not invalidate the amended judgments; and (4) sentence enhancement based on

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habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment.

8. Sentencing—presumptive range—failure to make findings for aggravating or mitigating factors

The trial court did not err in a financial identity fraud and a failure to appear case by failing to make findings with regard to aggravating or mitigating factors, because the trial court was not required to make such findings when it sentenced defendant within the presumptive range.

Appeal by defendant from judgments entered 10 January 2002 by Judge James Floyd Ammons, Jr. in Lee County Superior Court. Heard in the Court of Appeals 12 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, for the State.

Bruce T. Cunningham, Jr., for defendant appellant.

TIMMONS-GOODSON, Judge.

Michael Dammons (“defendant”) appeals from the judgments of the trial court entered upon jury verdicts finding defendant guilty of financial identity fraud, failure to appear, and of being an habitual felon. For the reasons stated herein, we find no error by the trial court.

The State’s evidence at trial tended to show the following: On 22 June 2000, Douglas Ray Brownie (“Brownie”), a bail bondsman, posted a \$20,000.00 secured bond for defendant in connection with criminal charges against defendant. Upon posting the bond, Brownie and defendant signed a pretrial release order in the presence of a magistrate. The pretrial release order informed defendant that he was “ordered to appear before the court on all subsequent continued dates” and that if defendant failed to appear, he could be “imprisoned for as many as three years and fined as much as \$3,000.” Brownie read the document to defendant, who promised to be in court. Defendant also appeared in court on 5 July 2000 on charges of felonious assault, at which time he was released pursuant to an unsecured bond. The unsecured bond, signed by defendant and Lee County magistrate Sandra Jordan (“Magistrate Jordan”), recited that defendant was “ORDERED to appear before the Court as provided above and at all subsequent continued dates.” The unsecured bond, like the secured bond, notified defendant that “if you fail to appear,

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you will be arrested and may be imprisoned for as many as three years and fined as much as \$3,000.00.”

The charges against defendant were set for trial on 22 January 2001. Defendant, however, failed to appear in court for trial of his case. Prior to his court date, defendant informed his girlfriend, Joyce McNeill (“McNeill”) that he might not go to court. McNeill testified that defendant removed his possessions from her residence on or about 22 January 2001, and that she had no contact with him until two months later, when defendant telephoned her to “let [her] know that he was okay.”

On 14 June 2001, Sanford police officer Marshall McNeill (“Officer McNeill”) responded to a report of a suspicious vehicle. In responding to the report, Officer McNeill encountered defendant, who produced a false identification card and social security card, both of which identified defendant as “William Artis Smith” (“Smith”). Although a second responding officer raised doubts as to whether defendant was in fact Smith, Officer McNeill allowed defendant to leave because he “didn’t have any other information at that time other than [defendant] was who he said he was.” Before leaving, Officer McNeill issued to defendant a citation in Smith’s name. After further investigation, Officer McNeill discovered defendant’s true identity and issued an alert that same day. Later that afternoon, Officer McNeill discovered defendant in an abandoned mobile home, where he had hidden in an effort to elude pursuing police officers. Officer McNeill arrested defendant, who continued to assert that he was Smith. Upon searching defendant pursuant to his arrest, police officers found a credit card, birth certificate, and a ticket from a pawn shop, all of which bore the name William Artis Smith. Although several police officers and a magistrate who knew defendant positively identified him as Michael Dammons, defendant continued to assert that he was Smith.

William Artis Smith testified on behalf of the State. Smith stated that he had been acquainted with defendant for ten years, and that he had lost his wallet during the spring of the previous year. The wallet contained Smith’s birth certificate and other identification. Smith denied giving defendant permission to use his identity or his identification documents. Smith further denied receiving a citation from Officer McNeill or acquiring a pawn ticket.

Defendant testified and admitted that he possessed an identification card with his photograph and Smith’s name. Defendant stated

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that Smith gave him the birth certificate, social security card and school records in order for defendant to obtain identification for employment purposes. Defendant admitted that he knew he was due in court on 22 January 2001 to stand trial for charges of driving while impaired, assault with a deadly weapon inflicting serious injury, driving while license revoked, and careless and reckless driving, but instead traveled to Texas. Defendant stated that he returned to North Carolina in May with the intent of "turning himself in," but confirmed that when arrested, he continued to deny his true identity.

Upon consideration of the evidence, the jury found defendant guilty of financial identity fraud and failure to appear on a felony. The jury further found defendant guilty of being an habitual felon. The trial court thereafter sentenced defendant to two consecutive terms of ninety-five to 123 months' imprisonment. From his convictions and resulting sentence, defendant appeals.

Defendant brings forth eight assignments of error on appeal, arguing that the trial court erred by (1) denying defendant's motion to dismiss the charge of failure to appear; (2) denying defendant's motion to dismiss the charge of financial identity fraud; (3) failing to instruct the jury on a lesser included offense; (4) failing to instruct the jury concerning consent; (5) denying defendant's request to inform the jury about potential punishment; (6) denying defendant's motion to dismiss the habitual felon indictment; (7) sentencing defendant as an habitual felon; and (8) failing to make findings with regard to aggravating or mitigating factors. For the reasons stated herein, we conclude that the trial court committed no error with regard to defendant's asserted assignments of error on appeal.

Motion to Dismiss Charge of Failure to Appear

[1] By his first assignment of error, defendant contends that the trial court erred in failing to dismiss the charge of failure to appear. Defendant sets forth several arguments in support of this assignment of error. First, defendant asserts that there was no evidence that a judge or magistrate ordered him to appear in court on 22 January 2001, and that he therefore cannot be prosecuted for failure to appear. We disagree. The secured release order, signed by defendant in the presence of the magistrate and read to him by Brownie, clearly and plainly ordered defendant to appear in court for the charges against him. Further, Magistrate Jordan, whose name appears on the unsecured release order, testified that she processed defendant on

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his felonious assault charge. The unsecured release order signed by defendant also ordered defendant to appear in court for the charges against him. We reject defendant's argument that, because Magistrate Jordan's signature on the unsecured release order was generated by a computer, rather than handwritten, there is no evidence that he was "ordered" to appear on the charges against him.

Defendant further argues that dismissal of the charge was proper because he had no actual knowledge that failure to appear was a criminal act. This argument has no merit. The pretrial order signed by defendant specifically informed defendant that if he failed to appear in court he could be fined and imprisoned. Brownie also informed defendant that he could be imprisoned for failure to appear. The evidence tended to show that defendant knew that he was required to be in court on 22 January 2001, but deliberately fled the jurisdiction of the court. Because defendant had actual knowledge of his duty to appear in court, he cannot claim ignorance of the law as an excuse. *See Lambert v. California*, 355 U.S. 225, 229-30, 2 L. Ed. 2d 228, 232 (1957) (concluding that a California criminal statute requiring persons convicted of a felony to register violated due process where applied to a person with no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge).

In a related argument, defendant asserts that failure to appear is not a substantive crime. We do not agree. Section 15A-543 of the North Carolina General Statutes provides that "any person released pursuant to this Article who willfully fails to appear before any court or judicial official as required is subject to the criminal penalties set out in this section." N.C. Gen. Stat. § 15A-543(a) (2001). Where "[t]he violator was released in connection with a felony charge against him," violation of section 15A-543 is a felony offense. *See id.*; *see also State v. Messer*, 145 N.C. App. 43, 47, 550 S.E.2d 802, 805 (setting forth the elements of the offense of failure to appear), *affirmed per curiam*, 354 N.C. 567, 556 S.E.2d 293 (2001).

Further, defendant contends that his prosecution for failure to appear violated his due process rights, in that he could have been punished for his failure to appear under section 5A-12(a) of the North Carolina General Statutes. Section 5A-12(a) provides that, where a person willfully violates a court order, he may be punished for criminal contempt of court and sentenced to thirty days of imprisonment. *See* N.C. Gen. Stat. § 5A-12(a) (2001); *see also* N.C. Gen. Stat. § 5A-11 (2001) (defining criminal contempt). However, "[a] single act or transaction may violate different statutes." *State v. Freeman*, 59 N.C.

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App. 84, 87, 295 S.E.2d 619, 621 (1982), *reversed on other grounds*, 308 N.C. 502, 302 S.E.2d 779 (1983). Here, there was evidence from which a jury could find that defendant violated either section 5A-12(a) or section 15A-543. As such, it was within the prosecutor's discretion to decide under which statute the State wished to proceed against defendant. *See State v. Cates*, 154 N.C. App. 737, 740, 573 S.E.2d 208, 210 (2002) (concluding that it was within the prosecutor's discretion to select among the defendant's prior convictions for purposes of proving his habitual felon status and calculating his prior record level), *disc. review denied*, 356 N.C. 682, 577 S.E.2d 897 (2003).

Finally, defendant argues that the charge against him should have been dismissed, in that he was selectively prosecuted in violation of his right to equal protection under the law. To support a claim of selective prosecution, "[a] defendant must show more than simply that discretion has been exercised in the application of a law resulting in unequal treatment among individuals. He must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design." *State v. Spicer*, 299 N.C. 309, 312, 261 S.E.2d 893, 896 (1980); *State v. Wilson*, 311 N.C. 117, 123, 316 S.E.2d 46, 51 (1984). To demonstrate such intentional discrimination, the defendant must allege "that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Wilson*, 311 N.C. at 123-24, 316 S.E.2d at 51 (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 7 L. Ed. 2d 446, 453 (1962)). It must also be noted that

[d]istrict attorneys have wide discretion in performing the duties of their office. This encompasses the discretion to decide who will or will not be prosecuted. In making such decisions, district attorneys must weigh many factors such as "the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case." Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Columbia L. Rev. 1103, 1119 (1961). The proper exercise of his broad discretion in his consideration of factors which relate to the administration of criminal justice aids tremendously in achieving the goal of fair and effective administration of the criminal justice system.

Spicer, 299 N.C. at 311-12, 261 S.E.2d at 895.

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In the instant case, defendant alleges that he was selectively prosecuted based on the following evidence: (1) the clerk of court for Lee County testified that she knew of no person other than defendant to be prosecuted for failure to appear; (2) an editorial was published in the local newspaper criticizing the Lee County District Attorney's Office's handling of defendant's case; (3) the assistant district attorney who prosecuted defendant's case responded to the editorial by sending to the newspaper's editor a letter defending his office and its prosecution of defendant. Defendant asserts that this evidence is sufficient to demonstrate that he was singled out for prosecution. We disagree.

Assuming *arguendo* that defendant is the only person in Lee County to have been prosecuted for failure to appear, a fact not established by this record, defendant has nevertheless failed to demonstrate that the district attorney exercised anything more than ordinary discretion in his prosecution of defendant. Defendant presented no evidence that he was subjected to any intentional or deliberate discrimination based upon any unjustifiable standard such as race, religion, or other arbitrary classification. *See Spicer*, 299 N.C. at 312, 261 S.E.2d at 896; *Wilson*, 311 N.C. at 123, 316 S.E.2d at 51. On the contrary, the State advanced several compelling grounds for defendant's prosecution. At trial, the assistant district attorney stated that his office decided to prosecute defendant for failure to appear because defendant: (1) fled the jurisdiction for a "fairly substantial" period of time; (2) "made a concerted effort to conceal himself from authorities[;]" (3) was charged with committing a serious underlying offense; and (4) was an habitual felon. Because defendant failed to meet his burden of showing that he was selectively prosecuted based upon an unjustifiable standard, the trial court did not err in denying his motion to dismiss the charge of failure to appear. *See State v. Wilson*, 139 N.C. App. 544, 551, 533 S.E.2d 865, 870, *appeal dismissed and disc. review denied*, 353 N.C. 279, 546 S.E.2d 395 (2000). We overrule defendant's first assignment of error.

Motion to Dismiss Charge of Financial Identity Fraud

[2] By his second assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the charge of financial identity fraud. Defendant contends that there exists a fatal variance between the indictment and the evidence presented at trial such that the charge should have been dismissed. The indictment alleged that defendant had fraudulently represented himself as William Artis Smith "for the purpose of making financial or credit transactions and

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for the purpose of avoiding legal consequences in the name of Michael Anthony Dammons.” Defendant asserts there was no evidence presented at trial tending to show that he made any financial or credit transactions using the name William Artis Smith, and his conviction of financial identity fraud therefore cannot stand. We do not agree.

Under the North Carolina General Statutes, a person is guilty of financial identity fraud if he

knowingly obtains, possesses, or uses identifying information of another person without the consent of that other person, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person’s name *or* for the purpose of avoiding legal consequences

N.C. Gen. Stat. § 14-113.20(a) (2001) (emphasis added). The indictment alleged that defendant misrepresented his identity for the purpose of avoiding legal consequences, and the State presented substantial evidence at trial tending to show that defendant assumed Smith’s identity without consent in order to avoid legal consequences; namely, the trial of felony charges against him. Because the indictment alleged proper grounds for defendant’s charge of financial identity fraud, and because the State presented substantial evidence in support of these grounds, there was no fatal variance between the indictment and the evidence at trial. The language of the indictment alleging that defendant also misrepresented his identity for the purposes of making a financial transaction was unnecessary and may properly be regarded as surplusage. *See State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 7 (1989). We therefore overrule defendant’s second assignment of error.

Jury Instructions Regarding Lesser Included Offense

[3] By his third assignment of error, defendant argues the trial court erred in failing to instruct the jury on obstructing and delaying an officer. Defendant contends that this was a lesser included offense of the crime of financial identity fraud, and that there was evidence from which the jury could find that defendant merely obstructed and delayed Officer McNeill and the other police officers through use of the false identification documents. This argument has no merit.

“It is only when *all* essentials of the lesser offense are included among the essentials of the greater offense that the law merges them

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into one and treats the less serious charge as a 'lesser included offense.' ” *State v. Stepney*, 280 N.C. 306, 318, 185 S.E.2d 844, 852 (1972). As stated *supra*, in order to convict a defendant of financial identity fraud, the State must present substantial evidence tending to show:

- 1) that the defendant obtained, possessed, or used the personal identifying information of another person;
- 2) that the defendant acted knowingly and with the intent to fraudulently represent that he was the other person for the purpose of making a financial or credit transaction or for the purpose of avoiding legal consequences; and
- 3) that the defendant did not have the consent of the other person.

See N.C. Gen. Stat. § 14-113.20; N.C.P.I.—Crim. 219B.80 (2000). In contrast, the elements of obstruction or delay of an officer are as follows:

- 1) that the victim was a public officer;
- 2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
- 3) that the victim was discharging or attempting to discharge a duty of his office;
- 4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
- 5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

See N.C. Gen. Stat. § 14-223 (2001); 2 N.C.P.I.—Crim. 230.30 (1999). Because all of the elements of the offense of obstructing or delaying a law enforcement officer are not included in the offense of financial identity fraud, it is not a lesser included offense, and the trial court did not err in denying defendant's request to instruct the jury on obstruction or delay. We overrule this assignment of error.

Jury Instructions Regarding Consent

[4] Defendant also argues the trial court erred in denying defendant's request to instruct the jury concerning consent by Smith to use of his identification documents. During jury deliberations, the jury made the following inquiry of the court:

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[I]s the issue of consent by Mr. Smith for [defendant] to obtain and use an ID with Mr. Smith's name on it an issue only at the time the ID was obtained, July of 2000, or is it an issue both then and when it was used in June of 2001? Should consent in July of 2000 for a particular use imply much later consent for use for a different purpose?

Counsel for defendant requested that the trial court instruct the jury that "if Mr. Smith consented in July of 2000 that his consent would implicitly remain in effect . . . [and that] the burden of the State would be to show that his consent was withdrawn." The trial court declined defense counsel's request for such an instruction, but repeated its admonition to the jury that, in order to find defendant guilty, the State had to prove beyond a reasonable doubt that defendant did not have consent "at the time the offense was committed." The date of the alleged offense was 14 June 2001. The trial court properly instructed the jury that it was the State's burden to show that defendant's use of the identification documents on 14 June 2001 was without consent, and defendant's argument to the contrary is without merit. We overrule this assignment of error.

Potential Punishment

[5] In the fifth assignment of error, defendant asserts the trial court erred in denying his request to inform the jury during the first phase of the trial that, if convicted, he was subject to punishment as a Class C felon due to his status as an habitual felon. This argument was squarely rejected by this Court in *Wilson*, however:

Although defendant accurately maintains a criminal defendant has the right to "inform the jury of the punishment that may be imposed upon conviction of the crime for which he is being tried," *State v. Walters*, 33 N.C. App. 521, 524, 235 S.E.2d 906, 908-09 (1977) (citing N.C.G.S. § 7A-97 (1999)), *aff'd*, 294 N.C. 311, 240 S.E.2d 628 (1978), this principle does not support defendant's extrapolation therefrom of the right to inform the jury, during a principal felony trial, of the possible maximum sentence which might be imposed upon an habitual felon adjudication. *Walters* pointedly permits apprising the jury only of "the punishment that may be imposed upon conviction of the *crime for which he is being tried*." *Id.*

Further, the statutory provisions that an habitual felon trial be held subsequent and separate from the principal felony trial, and

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that an habitual felon indictment be revealed to the jury *only* upon conviction of the principal felony offenses, *see* G.S. § 14-7.5, logically preclude argument of issues pertaining to the habitual felon proceeding, specifically and particularly including punishment, during the principal felony trial. *See State v. Todd*, 313 N.C. 110, 120, 326 S.E.2d 249, 255 (1985) (“a defendant’s ‘trial’ on the issue of whether defendant should be sentenced as an habitual offender [is] analogous to the separate sentencing hearing . . . to determine punishment”).

Wilson, 139 N.C. App. at 548, 533 S.E.2d at 868. Defendant argues that *Wilson* is not controlling, in that the defendant in *Wilson*, unlike present defendant, had not previously been found to be an habitual felon. Defendant appears to argue that, because his status as an habitual felon was established during a prior trial, under *State v. Safrit*, 145 N.C. App. 541, 551 S.E.2d 516 (2001), defendant was precluded from re-litigating this issue during the trial of the instant case. In *Safrit*, this Court held that the State was collaterally estopped from attempting to convict the defendant of being a violent habitual felon based on the same two alleged prior violent felony convictions upon which a jury had already found the defendant not guilty of violent habitual felon status. *Id.* at 554, 551 S.E.2d at 525. The *Safrit* Court did not address, however, whether a defendant would similarly be precluded from re-litigating habitual felon status, and in fact, defendant *did* litigate his habitual felon status in the instant case. *Safrit* therefore does not apply here and the Court’s holding in *Wilson* controls. *See Wilson*, 139 N.C. App. at 549, 533 S.E.2d at 869 (“considering the statutory provisions, authorities and public policy noted above, we hold the trial court did not err in denying defendant’s request to argue to the jury the punishment he might receive as an habitual felon if found guilty of the principal offenses.”). We overrule this assignment of error.

Motion to Dismiss Charge of Habitual Felon Status

[6] By his sixth assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the habitual felon indictment on the grounds that other similarly situated defendants are not so prosecuted. Defendant acknowledges that this issue has previously been decided against him, *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*, 537 U.S. 832, 154 L. Ed. 2d 49 (2002), and he advances no compelling

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grounds to circumvent this binding precedent. This assignment of error is overruled.

Sentencing

[7] Defendant's next assignment of error addresses the sentencing of defendant as a Class C felon by the trial court. Defendant asserts that, because financial identity fraud is punishable as a Class H felony, he could not be sentenced at a greater level, regardless of his habitual felon status. We do not agree. Defendant was convicted of failure to appear and financial identity fraud, both of which are felony offenses. The jury further determined that defendant was guilty of habitual felon status. Where an habitual felon is convicted of a felony offense "the felon must . . . be sentenced as a Class C felon." N.C. Gen. Stat. § 14-7.6 (2001); *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 722 (1988). The trial court therefore properly sentenced defendant as a Class C felon.

Defendant also objects to his sentence as a violation of due process. Defendant argues that, because he was informed that his failure to appear in court could result in a fine and imprisonment for three years, the trial court was not permitted to sentence him to any term of imprisonment greater than thirty-six months on the failure to appear charge. As demonstrated *supra*, however, the legislature has specifically authorized the enhancement of sentences for recidivists. See N.C. Gen. Stat. § 14-7.6; *State v. Todd*, 313 N.C. 110, 117-18, 326 S.E.2d 249, 253 (1985). Because he was convicted as an habitual offender, the trial court properly enhanced defendant's sentence for his conviction of failure to appear.

Amendment of Judgments

Defendant next asserts that the judgments adjudicating defendant to be an habitual felon are void, in that they were amended to accurately reflect defendant's conviction of habitual felon status. At defendant's trial, the trial judge determined in open court that defendant was an habitual felon and that punishment as a Class C felon was appropriate. The judge then sentenced defendant to a minimum term of imprisonment of ninety-five months, with a maximum of 123 months. The original judgments filed by the trial court accurately reflected both of these facts; however, Block Five, which states that the court "adjudges the defendant to be an habitual felon to be sentenced as a Class C felon pursuant to Article 2A of G.S. Chapter 14" was not checked. The amended judgments are identical to the original ones, except that Block Five on each amended judgment has been

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checked to accurately reflect the trial court's adjudication of defendant as an habitual felon. Defendant now asserts that the amendment could not occur outside of his presence, and that the resulting amended judgments are void as a result. We do not agree.

A trial court is required to amend its records to correct technical errors, and may do so either in or out of term. *See State v. Dixon*, 139 N.C. App. 332, 338, 533 S.E.2d 297, 302 (2000); *State v. McKinnon*, 35 N.C. App. 741, 743, 242 S.E.2d 545, 547 (1978). "When a court amends its records to accurately reflect the proceedings, the amended record 'stands as if it had never been defective, or as if the entry had been made at the proper time[,]' " and the amended order becomes a *nunc pro tunc* entry. *Dixon*, 139 N.C. App. at 338, 533 S.E.2d at 302 (quoting *State v. Warren*, 95 N.C. 674, 676 (1886)). In the instant case, the omission by the trial court in its original judgments to check Block Five, despite its sentencing of defendant as an habitual felon, was clearly a technical error, and the amendment of such judgments outside the presence of defendant does not invalidate the amended judgments.

Cruel and Unusual Punishment

Defendant further argues that his sentence is excessive as a matter of law, in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. "Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983); *State v. LaPlanche*, 349 N.C. 279, 284, 507 S.E.2d 34, 37 (1998). Sentence enhancement based on habitual felon status does not constitute cruel and unusual punishment under the Eighth Amendment. *See Todd*, 313 N.C. at 118-19, 326 S.E.2d at 253-55; *State v. Smith*, 112 N.C. App. 512, 514-15, 436 S.E.2d 160, 161 (1993). In *State v. Clifton*, 158 N.C. App. 88, 580 S.E.2d 40 (2003), the defendant received a sentence of two consecutive terms of a minimum of 168 months and a maximum of 211 months' active imprisonment based on his convictions of two counts of obtaining property by false pretenses and of having attained the status of habitual felon. On appeal, the defendant argued that the trial court erred in sentencing him as an habitual felon because the sentence violated the prohibition against cruel and unusual punishment. After consideration of the defendant's argument in light of the recent United States Supreme Court's decisions in *Lockyer v. Andrade*, 538 U.S. 63, 155 L. Ed. 2d 144 (2003) and *Ewing v. California*, 538 U.S. 11, 155 L. Ed. 2d 108 (2003), the Court con-

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cluded that the defendant's sentence was not grossly disproportionate to the underlying offenses and did not constitute cruel and unusual punishment. *Clifton*, 158 N.C. App. at 96, 580 S.E.2d at 46.

In the instant case, defendant received two consecutive sentences of 95 to 123 months' imprisonment based on his convictions of failure to appear, financial identity fraud, and habitual felon status. The conviction of habitual felon status was based on evidence that defendant had been twice convicted of the crime of felony larceny, and once convicted of felonious escape from state prison. Like the Court in *Clifton*, we conclude that the facts of the instant case "do not meet the standard of an 'exceedingly rare' and 'extreme' case, in which the 'grossly disproportionate' principle would be violated." *Id.* at 94, 580 S.E.2d at 45; *see also State v. Hensley*, 156 N.C. App. 634, 639, 577 S.E.2d 417, 421 (rejecting the defendant's claim of cruel and unusual punishment and stating that "[d]efendant was not sentenced for 90 to 117 months in prison because he pawned a caliper obtained by false pretenses for approximately twenty dollars. Defendant was sentenced to that term because he committed multiple felonies over a span of almost twenty years and is [an] habitual felon."), *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003). We therefore overrule this assignment of error.

Aggravating and Mitigating Factors

[8] By his eighth and final assignment of error, defendant contends the trial court erred in failing to make aggravating or mitigating findings during its sentencing of defendant. The trial court sentenced defendant within the presumptive range, however, and was therefore not required to make findings in aggravation or mitigation. *See State v. Streeter*, 146 N.C. App. 594, 598, 553 S.E.2d 240, 242-43 (2001), *cert. denied*, 356 N.C. 312, 571 S.E.2d 211 (2002), *cert. denied*, 537 U.S. 1217, 154 L. Ed. 2d 1071 (2003). We overrule defendant's final assignment of error.

In the judgments of the trial court we find

No error.

Judges WYNN and LEVINSON concur.

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STATE OF NORTH CAROLINA v. DAVID PAUL SHELMAN

No. COA02-1261

(Filed 5 August 2003)

1. Evidence— package of methamphetamine—authenticity—chain of custody

The trial court did not err in a trafficking in methamphetamine by possession and by transportation case by admitting into evidence a package of methamphetamine found in defendant's possession even though defendant contends the State failed to present adequate evidence of authenticity and chain of custody, because: (1) the State presented sufficient evidence on the unity of identity between the methamphetamine delivered to an inspector and that which was admitted at trial; and (2) the issues raised by defendant essentially go to alleged weaknesses in the State's case and do not render the methamphetamine package inadmissible.

2. Drugs— trafficking in methamphetamine by possession and by transportation—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in methamphetamine by possession and by transportation under N.C.G.S. § 90-95(h)(3b), because: (1) knowing possession of any amount of methamphetamine is a felony, and the weight is relevant only as to whether trafficking can properly be charged; (2) the State is not required to prove that defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed or transported; and (3) the evidence established that several witnesses testified to observing defendant hold and carry a package that contained approximately 1700 grams of methamphetamine, defendant testified he went to his house for the express purpose of retrieving the package, and an inspector testified that defendant admitted knowing the package would contain drugs.

3. Confessions and Incriminating Statements— trafficking in methamphetamine by possession and by transportation—instruction on confession

The trial court did not err in a trafficking in methamphetamine by possession and by transportation case by instructing the

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jury that there was evidence tending to show defendant had confessed to trafficking in methamphetamine, because: (1) an instruction on confession is appropriate if defendant has admitted taking certain actions that, if true, would constitute a criminal offense; and (2) an inspector's testimony was sufficient to support the trial court's instruction to the jury on confession.

4. Appeal and Error— preservation of issues—peremptory excusal of black female jurors—insufficient record

Although defendant contends the trial court erred in a trafficking in methamphetamine by possession and by transportation case by failing to find that defendant presented prima facie evidence of prosecutorial discrimination in jury selection and by failing to require the prosecutor to articulate a race-neutral reason for his peremptory excusal of three black female jurors, the record is insufficient to permit proper appellate review of this issue because: (1) jury selection in this case was not recorded; and (2) the record does not include any other document that purports to reconstruct the relevant details of jury selection.

5. Sentencing— trafficking in methamphetamine by possession and by transportation—same punishment not required for different defendants

The trial court did not err in a trafficking in methamphetamine by possession and by transportation case by its sentencing of defendant, because: (1) defendant received the minimum sentence permitted by N.C.G.S. § 90-95(h); and (2) even though defendant received a greater sentence than his codefendant received pursuant to a plea bargain, there is no requirement of law that defendants charged with similar offenses be given the same punishment.

Appeal by defendant from judgment entered 19 February 2002 by Judge Donald M. Jacobs in Wayne County Superior Court. Heard in the Court of Appeals 11 June 2003.

Attorney General Roy Cooper, by Assistant Attorney General Margaret P. Eagles, for the State.

Paul M. Green, for defendant-appellant.

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LEVINSON, Judge.

Defendant (David Shelman) appeals from conviction of trafficking in methamphetamine by possession and by transportation. We conclude the defendant had a fair trial, free of prejudicial error.

The State's evidence tended to show, in relevant part, the following: U.S. Postal Inspector Charles Thompson testified that he was assigned to narcotics investigations and that in April, 2001, he was informed by postal inspectors from Indianapolis, Indiana, that a package of methamphetamine had been intercepted in Indianapolis. The box of methamphetamine was shipped to Inspector Thompson for investigation and delivered to him "under seal" on 30 April 2001. Inspector Thompson met with members of the drug enforcement unit of the Wayne County Sheriff's department, and together they planned a "controlled delivery." The officers conducted a preliminary field test of the box's contents to confirm that it contained a controlled substance, then resealed the package, attaching an electronic device that would emit a signal if someone attempted to break the seal.

The box was addressed to a "David Pool" of "107 Squire Ridge Lane, Dueley, North Carolina," which Inspector Thompson determined was probably a misspelling of "107 Squirrel Ridge Lane" in Dueley. Accordingly, Inspector Thompson drove to defendant's family home at 107 Squirrel Ridge Road, posing as a letter carrier. There he spoke with defendant's sister, Veronica Shelman, who told him that the "David Pool" on the package was likely a misspelling of her brother's name, David Paul Shelman. Veronica signed for the package, and Inspector Thompson left it at the Shelman house.

After delivering the package of methamphetamine, Inspector Thompson and the other officers set up a surveillance team to watch the house. Several hours later, the officers observed defendant arrive at the house in a car driven by another man, Cesar Rivera. Defendant went inside briefly, then reappeared carrying the package. He got back into Rivera's car and the men began driving away. The electronic device attached to the package began beeping almost immediately, and the law enforcement officers converged upon the car. The box of methamphetamine was found on the floor of the car, between the defendant's feet. Defendant was taken out of the car and arrested.

Inspector Thompson interviewed defendant shortly after his arrest. Defendant was advised of his rights and agreed to speak with Inspector Thompson. At trial, Inspector Thompson summarized defendant's statements as follows: Defendant admitted to recent use

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of marijuana and methamphetamine. Several weeks before defendant's arrest, Rivera received a package at 107 Squirrel Ridge Road. Defendant's brother later gave him some methamphetamine and told defendant that it came from the first package. Defendant heard Rivera was a methamphetamine dealer, and when Rivera told defendant a week earlier that another package would be arriving at the house, defendant knew the package would contain methamphetamine. Defendant and Rivera worked for the same employer, and on 30 April 2001 defendant made a phone call to his sister Veronica from work. Veronica told defendant that the package had arrived and that she suspected it contained drugs. In response, he told Veronica, "I know." After work, defendant and Rivera drove directly to defendant's house to get the package. Defendant retrieved the package and he and Rivera were on the way to another friend's house when they were stopped by the police.

SBI Agent Linda Farren testified that she subjected the material found in the box to chemical testing and determined that the package contained approximately 1700 grams of methamphetamine. Additionally, DEA Agent Terry Beckstrom testified on rebuttal that he observed Inspector Thompson's interview with defendant, and that Thompson's testimony generally comported with his own recollection of defendant's statements.

Defendant testified that Rivera had lived with his family. He denied knowing the package would contain methamphetamine and denied telling Inspector Thompson that he knew Rivera was a methamphetamine dealer or that he knew the package held drugs.

[1] Defendant has raised five issues on appeal. He argues first that the trial court erred by admitting into evidence the package of methamphetamine. Defendant contends the State failed to present adequate evidence of authenticity and chain of custody. We disagree.

According to long-established precedent:

a *two-pronged test* must be satisfied before real evidence is properly received into evidence. The item offered must be identified as being the *same object* involved in the incident and it must be shown that the object has undergone *no material change*. The trial court . . . exercise[s] sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition. . . . Further, any *weak links in a chain*

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of custody relate only to the weight to be given evidence and not to its admissibility.

State v. Campbell, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984) (emphasis added) (citation omitted). In the instant case, defendant concedes that “the State presented sufficient evidence under this standard to support a finding that the package seized . . . and the controlled substance analyzed by the SBI lab, were the same package and controlled substance as had been received by [Inspector Thompson].”

Defendant, however, contends that in addition to meeting the standard enunciated in *Campbell, id.*, the State also was required to present evidence establishing the history of the drugs and of the package *before* Inspector Thompson received it. In support of this proposition, defendant cites only *State v. Mason*, 144 N.C. App. 20, 550 S.E.2d 10 (2001). However, in *Mason* the State failed to present sufficient evidence that a videotape introduced at trial was the same one that law enforcement officers obtained on the night of a robbery, and that the videotape was unchanged. As defendant acknowledges, in the present case the State presented sufficient evidence on the unity of identity between the methamphetamine delivered to Inspector Thompson and that which was admitted at trial. Therefore, *Mason* is not pertinent to the case *sub judice*.

We conclude that the issues raised by defendant essentially go to alleged weaknesses in the State’s case, and do not render the methamphetamine package inadmissible. This assignment of error is overruled.

[2] Defendant next argues that the evidence was insufficient as a matter of law to sustain his conviction for the charged offenses. We disagree.

Upon a defendant’s motion to dismiss for insufficiency of the evidence:

the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. If substantial evidence of each element is presented, the motion for dismissal is properly denied. ‘Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.’

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State v. Cross, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997) (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). “It is immaterial whether the substantial evidence is circumstantial or direct, or both.” *State v. Stephens*, 244 N.C. 380, 383, 93 S.E.2d 431, 433 (1956). “Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury[.]” *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

In determining whether the State has presented sufficient evidence to support a conviction, “the trial court is required to view the evidence in the light most favorable to the State, making all reasonable inferences from the evidence in favor of the State.” *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citation omitted). Thus, “[c]ontradictions and discrepancies must be resolved in favor of the State, and the defendant’s evidence, unless favorable to the State, is not to be taken into consideration.” *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984).

In the present case, defendant was convicted of trafficking in methamphetamine by possession and by transportation, pursuant to N.C.G.S. § 90-95(h)(3b) (2001). The statute provides in pertinent part that “[a]ny person who . . . transports, or possesses 28 grams or more of methamphetamine . . . shall be guilty of . . . trafficking in methamphetamine[.]” To convict a defendant of this offense, the State must prove the defendant (1) knowingly possessed or transported methamphetamine, and (2) that the amount possessed was greater than 28 grams. See N.C.G.S. § 90-95(d)(2) (2001); *State v. Rosario*, 93 N.C. App. 627, 634, 379 S.E.2d 434, 438 (“General Statute 90-95(h) provides that possession of specified amounts of controlled substances constitutes the offense of trafficking[.]”), *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989).

In the instant case, defendant does not dispute that he possessed and transported methamphetamine, or that the amount was well in excess of 28 grams. However, the State also must prove that the possession or transportation of a controlled substance was *knowing*. See, e.g., *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (“To convict defendant of trafficking in heroin . . . the state was required to prove that defendant *knowingly* possessed the [drugs]”.); *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E.2d 919, 922 (1977)

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(“Felony possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be ‘knowingly’ possessed.”). Defendant herein argues that, notwithstanding evidence that he knew the package would contain methamphetamine, the State also must present evidence of the package’s “origin” and must prove defendant knew the weight of methamphetamine in the package, in order to establish that the package was the one “to which defendant’s alleged knowledge pertained.” Defendant asserts that the “major issue for the jury to decide was whether or not defendant knew that the package contained a trafficking amount of methamphetamine.” On this basis, defendant contends that because the State failed to establish defendant knew the weight of the methamphetamine inside the package, the evidence was insufficient to establish that he “knowingly” possessed or transported the drugs. We disagree.

The gravamen of defendant’s argument is an assertion that knowledge of the *weight* or *amount* of methamphetamine is an essential element of the offense of trafficking in methamphetamine. Defendant cites no authority for this position, and our own review of the relevant law reveals none. Knowing possession of *any* amount of methamphetamine is a felony, and the weight is relevant only as to whether trafficking can properly be charged. N.C.G.S. § 90-95(b)(1) and (h)(3b) (2001). We discern no legal basis for grafting a new essential element—knowledge of the weight of the drugs—onto the offense of trafficking in methamphetamine. We hold, therefore, that to convict an individual of drug trafficking the State is *not* required to prove that defendant had knowledge of the weight or amount of methamphetamine which he knowingly possessed or transported. Instead, the statute requires only that the defendant knowingly possess or transport the controlled substances; if the amount exceeds 28 grams, then a conviction for trafficking may be obtained. This is in accord with holdings in other jurisdictions. *See, e.g., Ex parte Washington*, 818 So.2d 424 (Ala. 2001), and *State v. Wiley*, 80 S.W.3d 509 (Mo. App. W.D. 2002). We conclude the State’s evidence was more than adequate to support defendant’s conviction. Evidence established that the package contained approximately 1700 grams of methamphetamine. Several witnesses testified to observing defendant hold and carry the package; indeed, the defendant testified that he went to his house for the express purpose of retrieving the package. In addition, Inspector Thompson testified that defendant admitted knowing the package would contain drugs. Taken together, this evidence handily passes

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the threshold required to sustain his conviction. This assignment of error is overruled.

[3] Defendant argues next that the trial court erroneously instructed the jury that there was evidence tending to show defendant had confessed to trafficking in methamphetamine. We do not agree.

The instruction delivered by the trial court was taken from the North Carolina Pattern Jury Instruction 104.70:

There is evidence which tends to show that the defendant confessed that he committed the crime charged in this case. If you find that the defendant made that confession then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it.

Jury instructions must be “based upon a state of facts presented by some reasonable view of the evidence.” *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973). Thus, this instruction is proper only where evidence is presented that the defendant confessed to the charged offense.

A confession is a “voluntary statement made by one who is [a] defendant in [a] criminal trial at [a] time when he is not testifying in trial and by which he acknowledges certain conduct of his own constituting [a] crime for which he is on trial; a statement which, if true, discloses his guilt of that crime.” *State v. Cannon*, 341 N.C. 79, 89, 459 S.E.2d 238, 244-45 (1995) (quoting BLACK’S LAW DICTIONARY 296 (6th ed. 1990)) (upholding trial court’s use of the instruction at issue herein). Defendant acknowledges that the State presented evidence that he made certain statements to Inspector Thompson. However, he contends that these statements, even if true, do not constitute a confession to trafficking in methamphetamine.

We again note that conviction of drug trafficking requires proof that the defendant (1) knowingly (2) possessed or transported a given controlled substance, and also that (3) the amount transported was greater than the statutory threshold amount. *See* N.C.G.S. § 90-95(h)(3)(a) (2001); *State v. Acolatse*, 158 N.C. App. 485, 488, 581 S.E.2d 807, 809 (2003) (“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.”) (quoting *State v. White*, 104 N.C. App. 165, 168, 408 S.E.2d 871, 873 (1991)).

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Defendant asserts that he did not confess to “the crime charged” because his statements to Inspector Thompson did not include evidence that he knew “the very large amount of drugs” in the package. However, as discussed above, although conviction requires proof that defendant know the *nature* of the substance in his possession, neither the statute nor case law supports defendant’s contention that the State also must prove defendant knew the *weight* of the methamphetamine he possessed, or that the drugs weighed more than the threshold amount for trafficking.

Defendant also argues that his statements to Inspector Thompson were not a confession, but merely an “explanation of the circumstances leading up to his arrest[.]” This argument is without merit. Regardless of defendant’s characterization of the statements, or his intent in providing the information to Inspector Thompson, an instruction on confession is appropriate if defendant has admitted taking certain actions that, if true, would constitute a criminal offense. *See, e.g., State v. Hamilton*, 298 N.C. 238, 258 S.E.2d 350 (1979) (defendant’s statement properly characterized as “confession” where he admitted acts constituting the offenses of rape and burglary, even though defendant stated the acts were committed as part of consensual sexual encounter with eleven year old girl).

Defendant further contends that he cannot be deemed to have confessed to trafficking in methamphetamine because his statements to Inspector Thompson did not indicate that he had “an ownership interest” in the methamphetamine, nor that he had “any power or intent to control its use or disposition, or to sharing any plan or common purpose . . . with [Rivera].” However, the offense of trafficking does not require proof of “an ownership interest” in the drugs. Further, as defendant was not charged with conspiracy, evidence of a “common purpose” or plan with Rivera is not required. Regarding evidence of defendant’s “power or intent to control its use or disposition,” we note that “evidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession.” *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E. 2d 193, 194 (1976). In the present case, evidence established that the methamphetamine was delivered to defendant’s family home; that he was the one who entered the house and retrieved the package; and that it was seized from between his feet on the floor of the car. Moreover, defendant told Inspector Thompson that he and Rivera had gone to the house to

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obtain the package. We conclude that Inspector Thompson's testimony was sufficient to support the trial court's instruction to the jury on confession. This assignment of error is overruled.

[4] Defendant next argues that the trial court erred by failing to require the prosecutor to articulate a race-neutral reason for his peremptory excusal of three black female jurors.

Racial discrimination in the exercise of peremptory challenges is barred both by the Equal Protection Clause of the Fourteenth Amendment to the U. S. Constitution, and by Art. I, § 26 of the Constitution of North Carolina. *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83, (1986). In *Batson*, the United States Supreme Court:

outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. . . . First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59, 114 L. Ed. 2d 395, 405 (1991) (citing *Batson*, 476 U.S. at 96-98, 90 L. Ed. 2d at 87-89). "Although *Batson* is usually applied in the context of racial discrimination, we have extended the *Batson* analysis to the issue of gender discrimination in jury selection." *State v. Wiggins*, 159 N.C. App. 252, 262, 584 S.E.2d 303, 312 (2003) (citing *State v. Call*, 349 N.C. 382, 403, 508 S.E.2d 496, 510 (1998)). In reviewing a court's determination that defendant failed to make out a *prima facie* case, this Court must evaluate an array of relevant factors including:

- (1) the characteristic in question of the defendant, the victim and any key witnesses;
- (2) questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of discrimination based upon the characteristic in question;
- (3) the frequent exercise of peremptory challenges to prospective jurors with the characteristic in question that tends to estab-

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lish a pattern, or the use of a disproportionate number of peremptory challenges against venire members with the characteristic in question;

(4) whether the State exercised all of its peremptory challenges; and,

(5) the ultimate makeup of the jury in light of the characteristic in question.

Wiggins at 263, 584 S.E.2d at 312.

In the present case, the record indicates that after a number of jurors were selected, the defendant made a *Batson* motion alleging that the prosecutor exercised peremptory challenges in a discriminatory manner by excusing black female jurors. There was some discussion between defense counsel and the trial court regarding the race and gender of the jurors already selected. The trial court obtained a stipulation from the defendant that the panel included both white and black males, and white females. The trial court also made a “find[ing] for the record that there were no racial remarks made to the jury by the State in their questions . . . [and] no gender remarks[.]” Thereafter, the trial court ruled that defendant had failed to make out a *prima facie* case of discriminatory exercise of peremptory challenges, and denied defendant’s *Batson* motion. Defendant argues on appeal that the trial court erred by failing to find that he presented *prima facie* evidence of prosecutorial discrimination in jury selection, and by failing to require the prosecutor to offer a race and gender neutral reason for his use of peremptory challenges. We conclude, however, that the record is insufficient to permit proper appellate review of this issue.

Jury selection in this case was not recorded. Further, the record does not include any other document that purports to reconstruct the relevant details of jury selection. Without a transcript or some other document setting out pertinent aspects of jury selection, this Court does not have enough information upon which to assess defendant’s claim. For example, the record does not indicate the total number of potential jurors questioned by the prosecutor; their race or gender; the number or percent accepted; whether similarly situated prospective jurors received disparate treatment on the basis of race or gender; or whether the remarks to prospective jurors suggested any bias. Nor is the transcript of the trial court’s discussion with defense counsel regarding defendant’s *Batson* challenge an adequate substitute for these factual details:

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[Counsel's statement] cannot serve as a substitute for record proof. . . . We hold that as a rule of practice, counsel who seek to rely upon an alleged impropriety in the jury selection process must provide the reviewing court with the relevant portions of the transcript of the jury voir dire.

Jackson v. Housing Authority of High Point, 321 N.C. 584, 586, 364 S.E.2d 416, 417 (1988). See also *State v. Bellamy*, 159 N.C. App. 143, 146, 582 S.E.2d 663, 666 (2003) ("Without an adequate record to fully reconstruct the [jury selection issue], this Court has no ability to determine whether prejudicial error occurred. . . . [T]he record before us is insufficient for appellate review and this assignment of error must be dismissed.") (citing *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 254-55, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985)). We conclude that the record does not reconstruct jury selection in sufficient detail to enable this Court to conduct appellate review of the trial court's determination that defendant failed to make a *prima facie* showing of race and gender discrimination in the prosecutor's exercise of peremptory challenges. Accordingly, this assignment of error is dismissed.

[5] Finally, defendant argues that his sentence was "severe and disproportionate" in violation of his "state and federal constitutional rights." We disagree.

Defendant received the minimum sentence permitted by N.C.G.S. § 90-95(h) (2001), which provides in relevant part that:

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine . . . shall be guilty of a felony . . . known as 'trafficking in methamphetamine' . . . and if the quantity of such substance or mixture involved . . . (c)[is] 400 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined at least two hundred fifty thousand dollars (\$250,000).

N.C.G.S. § 90-95(h)(3b)(c). "It is well settled that the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes. The legislature alone can prescribe the punishment for those crimes." *State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986) (rejecting defendant's argument that "imposition of the mandatory

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minimum sentence and fine [for drug trafficking] violates . . . the due process and equal protection clauses of the United States Constitution”) (citing *State v. Jernigan*, 279 N.C. 556, 184 S.E.2d 259 (1971)). Moreover, this Court is bound by precedent of the North Carolina Supreme Court. *State v. Gillis*, 158 N.C. App. 48, 580 S.E.2d 32 (2003).

Nor did the court err by sentencing defendant to a greater sentence than that received by Rivera pursuant to a plea bargain. *See, e.g., State v. Garris*, 265 N.C. 711, 712, 144 S.E.2d 901, 902 (1965) (“There is no requirement of law that defendants charged with similar offenses be given the same punishment.”); *State v. Sligh*, 27 N.C. App. 668, 669, 219 S.E.2d 801, 802 (1975) (court did not err by “imposing a sentence against defendant which was greatly in excess of the sentence given his codefendant . . . under [his] plea bargaining arrangement”). This assignment of error is overruled.

We conclude that defendant received a trial free from prejudicial error.

No error.

Judges MARTIN and TYSON concur.

STATE OF NORTH CAROLINA v. NEIVUS RENORD POAG

No. COA02-773

(Filed 5 August 2003)

1. Homicide— attempted first-degree murder—motion to dismiss—sufficiency of evidence—specific intent

The trial court did not err by denying defendant’s motion to dismiss the charge of attempted first-degree murder, because there was sufficient evidence presented at trial to permit the jury to find that defendant possessed the specific intent to kill the victim during a robbery at a convenience store.

2. Criminal Law— prosecutor’s argument—questioning of witness—misstatement of law on acting in concert

The trial court did not err in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by failing to correct the prosecutor’s closing argu-

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ment that misstated the law on acting in concert and the State's question to a witness misstating the law by representing that mere presence at the scene of the crime and knowledge thereof was sufficient to find defendant guilty of acting in concert, because: (1) while the State misstated the law on acting in concert during closing argument, the trial court did not abuse its discretion in failing to correct the error *ex mero motu* when the trial court's instructions to the jury regarding acting in concert correctly stated the law and cured the improper statements made by the State during closing arguments; and (2) the trial court did not commit plain error by failing to correct the State's misstatement of the law on acting in concert while questioning a witness because defendant failed to show that the jury probably would have reached a different result had the trial court intervened to correct the State's misstatement, defendant failed to demonstrate that failure to correct the misstatement resulted in a fundamental miscarriage of justice, and the trial court correctly instructed the jury on the law of acting in concert, thereby curing the State's misstatements.

3. Criminal Law— instruction—acting in concert

The trial court did not commit plain error in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by instructing the jury on acting in concert, because the evidence sufficiently supported a conclusion that defendant acted in concert with three others to commit armed robbery.

4. Identification of Defendants— personal knowledge—discrepancies weighed by jury

The trial court did not commit plain error in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by allowing a victim to identify defendant as the shooter even though defendant contends the victim lacked sufficient personal knowledge to allow her to make such an identification, because: (1) the evidence showed that the victim had personal knowledge of defendant stemming from her perception of him gained during the robbery; (2) the extent of the victim's identification and the discrepancy between her testimony regarding defendant's height and his actual height go to the weight of the evidence rather than to its admissibility and is a matter to be considered by the jury; and (3) defendant has failed to demonstrate that the jury probably would have reached a different

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result had the victim's identification testimony been excluded or that inclusion of the testimony created a miscarriage of justice.

5. Sentencing— consecutive sentence—rejection of plea agreement

The trial court did not err in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by imposing a consecutive sentence for defendant's robbery conviction instead of a concurrent sentence even though defendant contends it was punishment based on his exercise of his right to a jury trial, because: (1) there was nothing in the record that indicated that the trial court imposed a consecutive sentence on defendant as punishment for his rejection of a plea agreement that would have imposed a concurrent sentence; and (2) the trial court was not limited by the initial terms of the plea bargain and was free to impose a fair and appropriate sentence after the jury returned a guilty verdict.

Appeal by defendant from judgments dated 10 October 2001 by Judge Steve A. Balog in Superior Court, Rowan County. Heard in the Court of Appeals 15 May 2003.

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

Daniel Shatz for defendant-appellant.

McGEE, Judge.

Neivus Renord Poag (defendant) was indicted on one count each of murder, attempted murder, and robbery with a dangerous weapon on 8 January 2001. The State's evidence at trial tended to show the following. Kunjbala Patel (Mrs. Patel) testified at trial that she and her husband, Pralhad Patel (Mr. Patel), operated the A OK Mart (the store) in Salisbury, North Carolina. Mrs. Patel stated that she was behind the cash register and Mr. Patel was sitting to her left talking with David Gray, a friend and customer, between 8:15 and 8:30 pm on 12 December 2000. Mr. Patel got up, moved towards her, and said "they are here." Mrs. Patel saw a man wearing a knit mask near the cash register, who shouted for her to give him the cash and started shooting. She ducked under the counter and attempted to hit a panic button. Mrs. Patel testified that she got up from the floor and opened the cash drawer. After opening the cash drawer, the man shot her, reached over the counter to the cash register, took approximately

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\$100 to \$150, and left. Mrs. Patel called 911. Mrs. Patel stated that she was shot twice and her husband was shot at least once, but that she does not remember who was shot first. Mrs. Patel was shot once in the head and once in the arm. Mrs. Patel testified that she could not remember if Mr. Patel reached for the gun he kept under the counter, but she stated that he did not fire the gun during the robbery. Mr. Patel died from gunshot wounds to the chest.

Mrs. Patel was unable to see the robber's face because of the mask he was wearing, but she told the police that she thought she knew the man's identity. She gave the police a description and told them that he was a friend of a woman who lived behind the store. In her statement to the police that night, Mrs. Patel described the man as wearing a dark knit mask with eye holes, but no holes for the nose or mouth. She described him as 5'6" tall, medium build, roundish face, in his thirties, short hair, and dark skin. She stated that she knew the identity of the man because of his eyes and the contour of his face. She could not remember what clothing the man was wearing except for gloves. Mrs. Patel identified defendant in court as the man who shot her and stated that he had been in the store numerous times previously, including two or three days before the robbery.

Tyron Chambers (Chambers) testified for the State pursuant to a plea agreement. Chambers testified that he, Corey Smith (Smith), Demetrius Neely (Neely), and defendant drove to the store to buy some "smokes." Chambers entered the store, purchased the "smokes," and returned to the car. After they drove away from the parking lot, defendant told Chambers to pull over because defendant had seen some money in the store and wanted to rob it. Defendant and Smith entered the store and committed the robbery while Chambers and Neely waited in the car. Chambers testified that defendant was armed with a .22 caliber handgun and Smith had a .380 caliber handgun. After defendant and Smith returned to the car, defendant said that he had to shoot Mr. Patel because he had a gun. After the robbery, the four men went to Chambers' house where Smith and defendant changed into some of Chambers' clothes. Chambers and Neely sold defendant some crack. Chambers stated that he threw Smith's and defendant's clothes into a dumpster and threw a bag containing the masks into the woods the day following the robbery.

Neely also testified for the State under a plea agreement. Neely stated that he, defendant, Smith, and Chambers stopped at the store and Chambers went into to by "smokes" while the other three waited

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outside in the car. After leaving the parking lot, defendant talked about robbing the store and Chambers pulled the car over. Smith was armed with a .380 caliber handgun and defendant was armed with a .22 caliber handgun, and both put on gloves and ski masks. Defendant and Smith entered the store and returned after a couple of minutes. Defendant said he had to shoot the Patels because Mr. Patel was reaching for a gun. The group went to Chambers' apartment where defendant threatened to kill them if anyone told. Neely denied seeing Chambers throw anything into the woods.

Smith also testified for the State pursuant to a plea agreement. He testified that the group went to the store to buy "smokes" and Chambers and Neely went inside while he and defendant remained outside. After everyone was back in the car, defendant suggested robbing the store. Chambers said no, but Smith stated that he would go along because he needed money to buy crack. Smith testified that he entered the store on 12 December 2000 with a gun, but that defendant was the person who shot the Patels. Smith stated that defendant was ahead of him and that Mr. Patel had already been shot and was lying on the floor when Smith entered the store. Smith said that defendant told Mrs. Patel to open the cash register and that when she said no, he hit her in the face with the gun and demanded money. Defendant told Smith to grab the money, but Smith said no, and ran out of the store. Smith said that after defendant returned to the car, defendant said he had some money and that he had "went out and shot some [expletives deleted]." Smith testified that they went to Chambers' girlfriend's house where they divided the money and Chambers and Neely sold defendant some crack.

Smith stated that defendant threatened to shoot him and his mother if Smith said anything about the robbery. In a statement to police, Smith said that defendant "first shot the lady one time, then shot the old man one time, then shot the lady again, and then I think he shot the old man two more times." However, Smith testified at trial that he only saw defendant hit Mrs. Patel with the gun and did not witness defendant fire any shots.

Detective Rita Rule (Detective Rule) of the Salisbury Police Department testified that she spoke with Mrs. Patel in the hospital on the night of the robbery. Detective Rule testified that Mrs. Patel stated that a black man wearing a ski mask entered the store, pointed a gun at her and Mr. Patel, and demanded money from the cash register. Detective Rule stated that Mrs. Patel described the suspect as approximately 5'6", in his thirties, with a medium build, short hair,

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and roundish face but not chubby cheeks. Detective Rule also said that Mrs. Patel identified the suspect as “JoAnn [Allison’s] ex-boyfriend” and was adamant about her identification because of the suspect’s eyes and the contour of his face. Detective Rule showed Mrs. Patel two photographic lineups on 22 December 2000, one of which contained defendant’s photograph, but Mrs. Patel was unable to identify the shooter from either lineup. The police investigation also showed defendant’s height was 6’1”, approximately seven inches taller than the description given by Mrs. Patel. Detective Rule also testified that, pursuant to a tip, she recovered some ski masks that had been disposed of in the woods, but that analysis by the State Bureau of Investigation did not reveal any transfer of hair from the suspects to the masks.

Defendant testified that he was at his cousin’s house on 12 December 2000 playing video games when Chambers came by and agreed to drive defendant to where defendant’s fiancé was staying. Chambers drove to the store to buy some cigars and pick up Neely. Defendant said that he used the pay phone to call his fiancé and did not enter the store, but that Chambers did enter the store. Defendant stated that he, Neely, Smith, and Chambers got into the car and Neely told Chambers to pull around the block. Neely and Smith got out of the car, and Chambers drove around the corner. Defendant stated that Neely and Smith got back into the vehicle about three to five minutes later and Neely told Chambers to drive. Defendant testified that he repeatedly asked Chambers to drop him off at his fiancé’s house. He also stated that he did not know what was going on, had not seen any guns or masks, and did not hear talk of a robbery. He also said that after asking Chambers to drop him off while Neely and Smith were gone, Chambers told him that he “was not going to leave them like that.” Defendant stated that he jumped out of the car when Chambers yielded at a stop sign.

Defendant testified that he knew the other three men, but was not close friends with them and did not “hang out” with them. Defendant said that he saw Neely at a K-Mart a week following the robbery and shooting and that Neely warned him to keep quiet and everything would be all right. Defendant gave a statement to police on 27 December 2000 and denied knowledge of the crimes. Defendant gave a second statement to police on 3 January 2001, which matched his trial testimony.

A jury convicted defendant of second degree murder, attempted first degree murder, and robbery with a firearm on 10 October 2001.

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The trial court sentenced defendant to a minimum of 189 months and a maximum of 236 months in prison for second degree murder, a minimum of 189 months and a maximum of 236 months in prison for attempted murder, and a minimum of 95 months and a maximum of 123 months in prison for robbery with a dangerous weapon. The sentences were imposed to run consecutively. Defendant appeals.

[1] Defendant first argues the trial court erred in denying defendant's motion to dismiss the charge of attempted first degree murder at the close of the evidence. Defendant concedes in his brief that the State's evidence regarding his identity as the shooter was sufficient to be submitted to the jury. Defendant contends that the State failed to present sufficient evidence that he specifically intended to kill Mrs. Patel.

"In ruling on a motion to dismiss, the trial court need only determine whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." Evidence is considered substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." The motion to dismiss should be denied if there is substantial evidence supporting a finding that the offense charged was committed.

State v. Craycraft, 152 N.C. App. 211, 213, 567 S.E.2d 206, 208 (2002) (citations omitted). The State is entitled to all reasonable inferences that may be drawn from the evidence. *State v. Scott*, 296 N.C. 519, 522, 251 S.E.2d 414, 416 (1979).

The elements of attempted first degree murder are: "(1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing." *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000). " 'An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred.' " *State v. Ferguson*, 261 N.C. 558, 561, 135 S.E.2d 626, 629 (1964) (quoting *State v. Cauley*, 244 N.C. 701, 708, 94 S.E.2d 915, 921 (1956)). "[T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred." *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982).

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There was sufficient evidence presented at trial to permit the jury to find that defendant possessed the specific intent to kill Mrs. Patel. The evidence shows that defendant fired several shots upon entering the store, hitting Mr. and Mrs. Patel, both of whom were behind the counter. After Mrs. Patel opened the cash drawer, defendant shot her and took the money. Mrs. Patel was shot in the head and arm while Mr. Patel was shot twice in the chest, killing him. The evidence also indicates that Mrs. Patel was shot before and after defendant took the money from the cash drawer. Additionally, there is no evidence in the record that either Mr. Patel or Mrs. Patel provoked defendant or resisted.

When viewed in the light most favorable to the State, there was sufficient evidence to permit the jury to conclude that defendant intended to kill Mrs. Patel. The trial court did not err in denying defendant's motion to dismiss the charge of attempted first degree murder. This assignment of error is overruled.

[2] Defendant next argues the trial court erred in failing to correct the State's question to a witness and the prosecutor's closing argument that misstated the law on acting in concert. Defendant contends that the trial court's failure to correct these misstatements of law effectively deprived defendant of his defense. Defendant concedes that he failed to properly object to the State's improper jury argument. The general rule is that failure to object to a prosecutor's alleged improper jury argument prior to the verdict constitutes a waiver of the alleged error. *State v. Taylor*, 337 N.C. 597, 612, 447 S.E.2d 360, 370 (1994), *cert. denied*, 533 S.E.2d 475 (1999). However, our Supreme Court has held that "appellate review of a prosecutor's argument for gross impropriety in absence of an objection at trial is not limited to capital cases, but may be invoked as well in noncapital cases." *State v. Jones*, 317 N.C. 487, 500, 346 S.E.2d 657, 664 (1986). Absent an objection at trial, our appellate review is limited to whether the prosecutor's argument was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error. *State v. Solomon*, 340 N.C. 212, 219, 456 S.E.2d 778, 783, *cert. denied*, *Solomon v. North Carolina*, 516 U.S. 996, 133 L. Ed. 2d 438 (1995); *Taylor*, 337 N.C. at 613, 447 S.E.2d at 370. "[W]here the trial court's instructions to the jury cure the prosecutor's alleged improper arguments, the court's failure to correct the arguments *ex mero motu* will not constitute prejudicial error." *State v. Shope*, 128 N.C. App. 611, 614, 495 S.E.2d 409, 412 (1998).

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During its closing argument, the State represented that defendant was guilty of the crimes if he was in the car with the other individuals. The two essential elements of acting in concert are: (1) being present at the scene of the crime, and (2) acting together with another person who commits the acts necessary to constitute the crime pursuant to a common plan or purpose. *State v. Wallace*, 104 N.C. App. 498, 504, 410 S.E.2d 226, 230 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, *North Carolina v. Wallace*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). While the State misstated the law on acting in concert, the trial court did not abuse its discretion in failing to correct the error *ex mero motu*. The trial court correctly instructed the jury on the issue of acting in concert, stating that

[f]or a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons join in a purpose to commit robbery with a firearm, each of them, if actually or constructively present, is not only guilty of that crime if the other commits the crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a firearm, or as a natural or probable consequence thereof.

The trial court also gave this jury instruction when it repeated jury instructions for first degree murder and felony murder pursuant to the jury's request. The trial court's instructions to the jury regarding acting in concert correctly stated the law and cured the improper statements made by the State during closing arguments. Defendant has failed to show that the trial court abused its discretion in failing to correct the error *ex mero muto*.

Defendant also concedes that he failed to object to the State's misstatement of the law of acting in concert while questioning a witness. Since defendant failed to object at trial, we review defendant's argument under a plain error review. N.C.R. App. P. 10(c)(4); *State v. Rourke*, 143 N.C. App. 672, 675, 548 S.E.2d 188, 190, *cert. denied*, 354 N.C. 226, 553 S.E.2d 396 (2001).

Plain error is an error which was "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result.

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State v. Jones, 137 N.C. App. 221, 226, 527 S.E.2d 700, 704 (citations omitted), *disc. review denied*, 352 N.C. 153, 544 S.E.2d 235 (2000). Our Supreme Court has stated that

“[t]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a ‘fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,’ or ‘where [the error] is grave error which amounts to a denial of a fundamental right of the accused,’ or the error has “‘resulted in a miscarriage of justice or in the denial to appellant of a fair trial.’” ’ ”

State v. Steen, 352 N.C. 227, 255, 536 S.E.2d 1, 18 (2000) (emphasis omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)), *cert. denied*, *Steen v. North Carolina*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

During trial, the State asked a witness: “You understand now that being in the car, and knowing the robbery was going to take place makes you legally responsible, don’t you?” While the State’s statements regarding acting in concert were incorrect, the error does not rise to the level of plain error. The State’s representation of the law while questioning the witness misstated the law by representing that mere presence at the scene of the crime and knowledge thereof was sufficient to find defendant guilty. However, defendant has failed to show that the jury probably would have reached a different result had the trial court intervened to correct the State’s misstatement. He also fails to demonstrate that failure to correct the misstatement resulted in a fundamental miscarriage of justice. As previously stated, the trial court correctly instructed the jury on the law of acting in concert, thereby curing the State’s misstatements. In light of the compelling evidence of defendant’s guilt presented at trial, we hold the trial court did not commit plain error in failing to correct the State’s misstatement of the law of acting in concert. *See State v. Parks*, 148 N.C. App. 600, 609, 560 S.E.2d 179, 185 (2002). This assignment of error is without merit.

[3] Defendant next argues that the trial court committed plain error by instructing the jury on acting in concert. Defendant contends that the evidence did not support an instruction on acting in concert. Since defendant failed to object to the jury instruction at trial, he must show plain error by establishing that the trial court committed error, and that absent that error, the jury probably would have

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reached a different result. *Jones*, 137 N.C. App. at 226, 527 S.E.2d at 704. It is generally prejudicial error for the trial court to instruct the jury on a theory of defendant's guilt that is not supported by the evidence. *State v. Brown*, 80 N.C. App. 307, 311, 342 S.E.2d 42, 44 (1986).

“A defendant acts in concert with another to commit a crime when he acts in harmony or in conjunction with another pursuant to a common criminal plan or purpose.” To be convicted of a crime under the theory of acting in concert, the defendant need not do any particular act constituting some part of the crime. All that is necessary is that the defendant be “present at the scene of the crime” and that he “act[] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.”

State v. Lundy, 135 N.C. App. 13, 18, 519 S.E.2d 73, 78 (1999) (quoting *State v. Moore*, 87 N.C. App. 156, 159, 360 S.E.2d 293, 295 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 664 (1988)), *disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000).

The evidence in the record tends to show that defendant traveled to the store with Chambers, Smith, and Neely and suggested that they rob the store. Defendant entered the store along with Smith, shot Mr. and Mrs. Patel, took money from the cash register, and left the scene in the vehicle along with the others. There is also evidence that defendant then traveled with the group to Chambers' apartment where they divided the money and defendant purchased drugs from Chambers and Neely. The evidence sufficiently supports a conclusion that defendant acted in concert with Chambers, Neely, and Smith to commit the armed robbery. Defendant has failed to demonstrate that instructing the jury on acting in concert constituted plain error. Accordingly, the trial court did not commit plain error in instructing the jury on acting in concert. This assignment of error is without merit.

[4] Defendant next argues the trial court committed plain error in allowing Mrs. Patel to identify defendant as the shooter. Defendant contends that Mrs. Patel lacked sufficient personal knowledge to allow her to make such an identification. Again, defendant must show plain error by establishing that the trial court committed error, and that absent that error, the jury probably would have reached a different result. *Jones*, 137 N.C. App. at 226, 527 S.E.2d at 704.

“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge

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of the matter.” N.C. Gen. Stat. § 8C-1, Rule 602 (2001). This rule is designed to prevent a witness from testifying to a fact about which he has no direct, personal knowledge. *State v. Cole*, 147 N.C. App. 637, 645, 556 S.E.2d 666, 671 (2001), *cert. denied*, 356 N.C. 169, 568 S.E.2d 619 (2002). “[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.” *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 602 (Commentary) (1999)).

Mrs. Patel testified at trial that she recognized defendant as the friend of a woman who lived behind the store. She stated that she was certain of her identification because of defendant’s eyes and the contour of his face. She also stated that defendant had come in the store previously and had last been in the store three or four days before the robbery. Mrs. Patel was also able to recognize several physical characteristics of defendant which she gave to the police in her statement.

The evidence in the record shows that Mrs. Patel had personal knowledge of defendant stemming from her perception of him gained during the robbery. The extent of Mrs. Patel’s identification and the discrepancy between Mrs. Patel’s testimony regarding defendant’s height and his actual height go to the weight of the evidence rather than to its admissibility and is a matter to be considered by the jury. *See State v. Bass*, 280 N.C. 435, 452, 186 S.E.2d 384, 396 (1972). Mrs. Patel’s perception of defendant during the robbery was sufficient to provide a basis for her in-court identification of defendant. Defendant has failed to demonstrate that the jury probably would have reached a different result had Mrs. Patel’s identification testimony been excluded or that inclusion of the testimony created a miscarriage of justice. The trial court did not commit plain error in permitting Mrs. Patel to identify defendant at trial. This assignment of error is without merit.

[5] Defendant finally argues that the trial court erred by imposing a consecutive sentence for his robbery conviction. Defendant contends the trial court unconstitutionally punished him for exercising his right to trial by jury by imposing a consecutive sentence instead of a concurrent sentence for the robbery charge. The trial transcript shows that the trial court stated that in order to “flesh out and put some further definiteness to the plea offer . . . if you accept the plea . . . the time for the robbery would run with or at the same time as the time for the murder and the attempted murder.” Defendant refused the plea bargain and after he was convicted, the trial court

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sentenced him to a minimum of 95 months and a maximum of 123 months in prison for robbery with a dangerous weapon to run consecutively with the sentences for murder and attempted murder.

Our courts have clearly established that a defendant may not be punished for exercising his constitutional rights to a jury trial. *State v. Boone*, 293 N.C. 702, 712-13, 239 S.E.2d 459, 465 (1977).

Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result.

State v. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

The trial court's decision to state that it would impose a concurrent sentence as part of an accepted plea bargain was an effort to make the plea bargain more definitive and eliminate any question that defendant might have about the resulting sentence that the trial court would impose in its discretion. There is nothing in the record that indicates that the trial court imposed a consecutive sentence on defendant as punishment for his rejection of the plea offer. The transcript does not show that the trial court threatened to impose a harsher sentence if defendant rejected the plea offer or that, at sentencing, the trial court indicated it was imposing a harsher sentence as a result of defendant's rejection of the plea offer. The trial court was not limited by the initial terms of the plea bargain and was free to impose a fair and appropriate sentence after the jury returned a guilty verdict. Defendant has failed to show the existence of a reasonable inference that the trial court imposed a consecutive sentence as a result of defendant's decision to exercise his right to a jury trial. This assignment of error is without merit.

No error.

Judges TYSON and CALABRIA concur.

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BASCOM VERNON BELK, JR., PLAINTIFF v. JOSEPH BLOUNT CHESHIRE, V,
INDIVIDUALLY AND AS CHESHIRE, PARKER, SCHNEIDER, WELLS & BRYAN, A
NORTH CAROLINA PARTNERSHIP, DEFENDANTS

No. COA02-1168

(Filed 5 August 2003)

Attorneys— legal malpractice—proximate cause

The trial court did not err in a negligence action alleging legal malpractice arising in the context of a criminal proceeding by granting summary judgment in favor of defendant law firm and one of its partners, because plaintiff failed to demonstrate that his injury proximately resulted from defendants' alleged negligence.

Judge STEELMAN concurring.

Appeal by plaintiff from judgment entered 29 May 2002 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 May 2003.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr., Fenton T. Erwin, Jr., and Peter F. Morgan, for plaintiff appellant.

Poyner & Spruill LLP, by E. Fitzgerald Parnell, III, and Rebecca B. Wofford, for defendant appellees.

TIMMONS-GOODSON, Judge.

Bascom Vernon Belk, Jr. ("plaintiff") appeals from an order of the trial court granting summary judgment in favor of the law firm Cheshire, Parker, Schneider, Wells & Bryan ("the Cheshire firm"), a North Carolina partnership, and one of its partners, Joseph Blount Cheshire ("Cheshire") (collectively, "defendants"). For the reasons set forth herein, we affirm the judgment of the trial court.

The facts pertinent to the instant appeal are as follows: On 27 February 2001, plaintiff filed a complaint against defendants in Mecklenburg County Superior Court asserting claims for professional negligence, breach of implied contract, negligent misrepresentation, and breach of fiduciary duty. Defendants thereafter filed a motion for summary judgment, which came before the trial court on 20 May 2002. At the hearing for summary judgment, the evidence tended to show the following: In July of 1997, plaintiff retained defendants to

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represent him with respect to federal criminal charges filed against plaintiff in the United States District Court for the Western District of North Carolina in the case of *United States of America v. Bascom Vernon Belk, Jr.* In the course of representation, plaintiff informed Cheshire that he was in fact guilty of the charges against him. Defendants also represented plaintiff with respect to forfeiture claims asserted by the federal government in connection with the criminal charges.

On 22 July 1997, Cheshire informed plaintiff that he had reached a tentative agreement with the federal attorney handling plaintiff's case. The proposed agreement required plaintiff to plead guilty to charges of gambling and money laundering and to forfeit 2.2 million dollars worth of property in exchange for a sentence recommendation of twenty-four months incarceration and waiver of all further forfeiture claims by the federal government. Under the specific terms of the proposed agreement, plaintiff would forfeit certain real property located at 4400 Park Road in Charlotte, North Carolina ("the Belk Building") and forfeit a series of scheduled cash payments representing the difference between the value of plaintiff's interest in the Belk Building and the \$2.2 million forfeiture amount.

In response to the proposed agreement, plaintiff informed Cheshire that he preferred to forfeit his interest in various parcels of real property rather than make any cash payments. To that end, defendants developed an alternate proposal involving the forfeiture of certain real property in addition to the Belk Building, including a parcel located at 8106 Lawyers Road, Charlotte ("the Lawyers Road Property"). Plaintiff testified that he advised Cheshire that the Belk Building and the Lawyers Road Property were subject to existing liens, and that any offer of forfeiture should be subject to the assumption of such liens by the government.

Cheshire testified that, on 31 October 1997 after lengthy negotiations, the federal attorney delivered to him the government's "best and final proposal to resolve its claims against" plaintiff. According to Cheshire, this final proposal was a "take-it-or-leave-it" offer, and that no further negotiations would be possible. That same day, Cheshire presented plaintiff with the proposed plea agreement and proposed "Stipulation for Compromise Settlement" ("the settlement agreement") for plaintiff's signature. In the settlement agreement, plaintiff warranted that the Lawyers Road Property was not subject to any existing lien. Contrary to this assertion, however, the Lawyers Road Property was subject to a mortgage balance of \$140,000.00

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at the time. According to plaintiff, he did not read the settlement agreement before signing it, but “merely relied upon Cheshire’s representations as to its contents.” Plaintiff testified that he did not learn of the error until he read the settlement agreement in early November of 1997 for the first time. When plaintiff then contacted defendants and advised them of the error, he asserts that Cheshire “assured [him] that the mistake was simply a typographical error on the part of the United States Attorneys’ Office and that the problem would be corrected.”

On 2 February 1998, plaintiff sent a letter by facsimile to Cheshire informing him that plaintiff had recently received a letter from the United States Department of Justice regarding the Lawyers Road Property. Based on the contents of the letter, plaintiff surmised that the alleged typographical error concerning the existing lien on the Lawyers Road Property had never been corrected, and plaintiff requested that Cheshire contact him in order to resolve the matter. In his response to plaintiff’s letter, Cheshire denied any knowledge of an existing lien on the Lawyer’s Road Property, and questioned plaintiff’s assertion that he signed the settlement agreement without being fully aware of its contents. Cheshire also strenuously denied having ever spoken with plaintiff regarding a lien, or having told plaintiff that the language in the settlement agreement was simply a typographical error. Cheshire advised plaintiff to either pay the balance due on the Lawyers Road Property lien or “have whomever [the federal attorney] told that this was a typographical error work with [the federal attorney] to correct the error immediately.”

On 28 May 1998, Cheshire sent plaintiff a letter indicating that the United States Attorneys’ Office would not agree to amend the settlement agreement to reflect the existence of a lien on the Lawyers Road Property. Cheshire suggested that plaintiff retain another attorney to represent him for purposes of setting aside the settlement agreement. On 8 December 2000, plaintiff received demands from various lien holders for payment of the \$140,000.00 lien on the Lawyers Road Property. Plaintiff filed the instant suit, alleging that defendants’ negligence caused him to incur monetary damages.

After considering the evidence, the trial court concluded that there were no genuine issues of material fact, and that defendants were entitled to judgment as a matter of law. From the judgment entered in favor of defendants, plaintiff now appeals.

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Plaintiff contends that genuine issues of material fact exist preventing the proper entry of summary judgment in favor of defendants, and that the trial court erred in concluding otherwise. For the reasons stated below, we affirm the judgment of the trial court.

On a motion for summary judgment, the movant has the initial burden of showing that an essential element of the opposing party's claim does not exist as a matter of law or showing through discovery that the opposing party has not produced evidence to support an essential element of the claim. *See Rorrer v. Cooke*, 313 N.C. 338, 354-55, 329 S.E.2d 355, 365-66 (1985). The opposing party must then come forward with a forecast of evidence showing the existence of a genuine issue of material fact with respect to the issues raised by the movant. *See id.* at 360, 329 S.E.2d at 369. In a negligence action alleging legal malpractice, summary judgment for the defendant is proper where the evidence fails to establish negligence on the part of the defendant, establishes contributory negligence on the part of the plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury. *See id.* at 355, 329 S.E.2d at 366.

Generally speaking, an attorney is

answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.

Hodges v. Carter, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954). With respect to proximate cause in an action for legal malpractice, the plaintiff must establish that the loss would not have occurred but for the attorney's conduct. *See Rorrer*, 313 N.C. at 361, 329 S.E.2d at 369. Where the plaintiff has lost a lawsuit allegedly due to his attorney's negligence, the burden of demonstrating proximate cause requires the plaintiff to prove that the original claim: (1) was valid; (2) would have resulted in a favorable judgment; and (3) would have been collectible. *Id.*; *Byrd v. Arrowood*, 118 N.C. App. 418, 420, 455 S.E.2d 672, 674 (1995).

In the instant case, plaintiff alleges that defendants' negligence occurred in the course of their representation of plaintiff during a forfeiture proceeding brought by the federal government in connection with federal criminal charges against plaintiff. Plaintiff forfeited his

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property pursuant to Title 18, entitled "Crimes and Criminal Procedure," section 981 of the United States Code. Section 981, entitled "Civil forfeiture," states that "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of . . . section 1956 or 1957 of this title, or any property traceable to such property" is "subject to forfeiture to the United States[.]" 18 U.S.C. § 981(a)(1) (2000). Plaintiff pled guilty to illegal gambling and money laundering in violation of sections 1955 and 1956, respectively, of Title 18 of the United States Code. Because plaintiff's property was connected to his illegal money laundering activities, such property was subject to civil forfeiture under section 981 of Title 18.

Civil forfeitures, in contrast to civil penalties, are designed to do more than simply compensate the Government [for the harms suffered by the Government as a result of a defendant's conduct]. Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct.

United States v. Usery, 518 U.S. 267, 284, 135 L. Ed. 2d 549, 565 (1996). They are not, however, intended as punishment, and therefore do not constitute penal measures in violation of double jeopardy prohibitions. *See id.* at 287-88, 135 L. Ed. 2d at 567-68. Plaintiff asserts that, because the forfeiture proceeding occurred pursuant to section 981, his present claims against defendants should be characterized as an action for legal malpractice arising in a civil, rather than a criminal context. We disagree.

Regardless of whether the forfeiture proceeded pursuant to section 981, it is uncontroverted that plaintiff's property was subject to forfeiture due to his own criminal behavior. As a convicted felon, plaintiff's property was subject to civil *or* criminal forfeiture under section 982 of Title 18 of the United States Code, *see* 18 U.S.C. § 982 (2000), and the federal prosecutor's decision to proceed with the forfeiture claim under section 981 instead of section 982 does not alter the root cause of the forfeiture. Plaintiff does not dispute the fact that he was actually guilty of money laundering and gambling activities in violation of federal law. To ignore these facts and attempt to divorce the forfeiture proceedings from plaintiff's criminal activities, as plaintiff urges, would clearly elevate form over substance. We conclude that, because the forfeiture claim arose in direct connection with the underlying criminal charges for which plaintiff was convicted, any alleged malpractice by defendants in connection with the forfeiture claim must be evaluated as legal malpractice arising in the

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context of a criminal rather than civil proceeding. We must now consider whether plaintiff presented sufficient evidence that, but for defendants' alleged negligence in the settlement of the forfeiture claim against plaintiff, he would not have incurred injury.

Because the alleged negligence arose in the context of a forfeiture proceeding, and not in connection with an underlying suit brought by plaintiff, plaintiff contends that the specific proximate cause burden announced in *Rorrer*, requiring the plaintiff to show that the original claim was meritorious and would have resulted in recovery, is inapplicable. Although we agree that the specific standard announced in *Rorrer* does not coincide with the facts of the instant case, its underlying reasoning on the issue of proximate cause in a legal malpractice case remains relevant. "To establish that negligence is a proximate cause of the loss suffered, the plaintiff must establish that the loss would not have occurred but for the attorney's conduct." *Rorrer*, 313 N.C. at 361, 329 S.E.2d at 369. The plaintiff in *Rorrer* could not show proximate cause because she failed to demonstrate that, had her attorney been more diligent, she would have prevailed in her underlying suit. *Id.*; see also *Murphy v. Edwards and Warren*, 36 N.C. App. 653, 660, 245 S.E.2d 212, 217 (concluding that directed verdict in favor of the defendant attorneys was proper in an action for legal malpractice where the plaintiff failed to show that the defendants proximately caused the alleged damages), *disc. review denied*, 295 N.C. 551, 248 S.E.2d 728 (1978).

In the instant case, plaintiff has similarly failed to demonstrate that, absent defendants' alleged negligence, he would not have been liable for payment of the \$140,000.00 lien on the Lawyers Road Property. First, it is uncontroverted that the forfeiture claim arose due to plaintiff's criminal activity. Under federal law, *all* of plaintiff's property was subject to forfeiture. See 18 U.S.C. §§ 981, 982. To allow plaintiff to now shift the financial burden of his criminal behavior would impermissibly allow plaintiff to profit from his illegal conduct. "The North Carolina Supreme Court has long recognized as a basic principle of law and equity that no man shall be permitted to take advantage of his own wrong or to acquire property as the result of his crime." *Porth v. Porth*, 3 N.C. App. 485, 492, 165 S.E.2d 508, 514 (1969).

Secondly, there is no evidence that the federal attorney handling plaintiff's case would have settled the forfeiture claim without plaintiff's warranty that the properties were free from encumbrances. According to evidence submitted by defendants and uncontradicted

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by plaintiff, the federal attorney informed Cheshire that the stipulation for compromise settlement signed by plaintiff was a “take-it-or-leave-it” offer, and that he was unwilling to further negotiate or modify any of its terms.

Finally, although our review of North Carolina case law yields no precedent involving legal malpractice arising in the context of a criminal proceeding, the overwhelming majority of states that have addressed this issue have concluded that “[p]ublic policy . . . dictates an augmented [proximate causation] standard in criminal malpractice actions.” *Mahoney v. Shaheen, Cappiello, Stein & Gordan, P.A.*, 143 N.H. 491, 496, 727 A.2d 996, 997 (1999); *see, e.g., Streeter v. Young*, 583 So. 2d 1339, 1340 (Ala. 1991) (affirming summary judgment in favor of the defendant attorney where the plaintiff failed to show that his conviction was the proximate result of the defendant’s alleged negligence); *Shaw v. State, Dept. of Admin.*, 861 P.2d 566, 571 (Alaska 1993) (“If a plaintiff in a criminal malpractice action against his former defense attorney has engaged in the criminal conduct he was accused of in the criminal trial, public policy prevents recovery on his part.”); *Wiley v. County of San Diego*, 19 Cal. 4th 532, 545, 966 P.2d 983, 991 (1998) (holding that actual innocence is a necessary element of the plaintiff’s cause of action in a criminal malpractice action); *Rowe v. Schreiber*, 725 So. 2d 1245, 1249 (Fla. App. 4 Dist. 1999) (a defendant must successfully obtain post-conviction relief for the cause of action to accrue in a case involving the legal malpractice of a criminal defense attorney); *Gomez v. Peters*, 221 Ga. App. 57, 59-60, 470 S.E.2d 692, 695 (1996) (where the underlying action is a criminal trial, the plaintiff is precluded from bringing a legal malpractice claim if he has pled guilty); *Lamb v. Manweiler*, 129 Idaho 269, 272, 923 P.2d 976, 979 (1996) (noting that the plaintiff did not dispute the proposition that actual innocence was an additional element of a criminal malpractice cause of action); *Kramer v. Dirksen*, 296 Ill. App. 3d 819, 822, 695 N.E.2d 1288, 1290 (1998) (holding that under Illinois law a plaintiff must prove his innocence before he may recover for his criminal defense attorney’s malpractice); *Hockett v. Breunig*, 526 N.E.2d 995, 999 (Ind. App. 2 Dist. 1988) (summary judgment was properly entered for the defendant attorneys because their conduct was not the proximate cause of the plaintiff’s alleged damages); *Ray v. Stone*, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (where the plaintiff pled guilty to criminal charges, he could not demonstrate that negligence on the part of his attorney was the proximate cause of his incarceration and alleged damages); *Berringer v. Steele*, 133 Md. App. 442, 484, 758 A.2d 574, 597 (2000) (reasoning that, absent

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relief from a conviction or sentence, the criminally convicted plaintiff's own actions are presumably the proximate cause of injury); *Glenn v. Aiken*, 409 Mass. 699, 707, 569 N.E.2d 783, 787 (1991) (in order to recover for attorney malpractice, a plaintiff must prove by a preponderance of the evidence that he is innocent of the crime charged); *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 503-04 (Mont. 1985); *Morgano v. Smith*, 110 Nev. 1025, 1028-29, 879 P.2d 735, 737 (1994); *Alampi v. Russo*, 345 N.J. Super. 360, 371, 785 A.2d 65, 72 (App. Div. 2001); *Carmel v. Lunney*, 70 N.Y.2d 169, 173, 511 N.E.2d 1126, 1128 (1987) (unless a plaintiff can assert his innocence, "public policy prevents maintenance of a malpractice action against his attorney"); *Bailey v. Tucker*, 533 Pa. 237, 247, 621 A.2d 108, 113 (1993) (plaintiff must prove that he is innocent of the crime charged or any lesser included offense); *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 498 (Tex. 1995); *Adkins v. Dixon*, 253 Va. 275, 282, 482 S.E.2d 797, 802 (stating that actual guilt is a material consideration on issue of proximate cause), *cert. denied*, 522 U.S. 937, 139 L. Ed. 2d 270 (1997); *Harris v. Bowe*, 178 Wis. 2d 862, 868, 505 N.W.2d 159, 162 (1993).

The majority of jurisdictions impose a stricter standard for criminal malpractice actions in apparent recognition of three basic public policy principles: (1) the criminal justice system affords individuals charged with crimes a panoply of protections against abuses of the system and wrongful conviction, including safeguards against incompetent and ineffective counsel; (2) a guilty defendant should not be allowed to profit from criminal behavior; and (3) the pool of legal representation available to criminal defendants, especially indigents, needs to be preserved. Although we decline to adopt a "bright-line" rule in this matter, we conclude that the burden of proof required to show proximate cause in an action for legal malpractice arising in the context of a criminal proceeding is, for public policy reasons, necessarily a high one.

Because plaintiff failed to demonstrate that his injury proximately resulted from defendants' alleged negligence, we hold that the trial court did not err in granting summary judgment to defendants. The judgment of the trial court is hereby

Affirmed.

Judge HUDSON concurs.

Judge STEELMAN concurs in a separate opinion.

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STEELMAN, Judge, concurring.

I concur with the majority's decision affirming the trial court's granting of summary judgment in favor of defendants in this matter.

The majority correctly holds it is appropriate to apply a standard for criminal malpractice rather than for civil malpractice because this action arises out of a criminal proceeding. However, it specifically declines to adopt a "bright-line" rule for criminal malpractice cases. The majority concludes that the burden of proof required to show proximate cause in a criminal malpractice case is "necessarily a high one" and that plaintiff failed to meet this burden in the instant case.

Our Supreme Court's previous decisions have addressed legal malpractice only in a civil context. In *Rorrer v. Cooke*, 313 N.C. 338, 329 S.E.2d 355 (1985), the Court set forth a "but for" causation standard to govern legal malpractice cases. Specifically, the standard requires a legal malpractice plaintiff to demonstrate his or her loss would not have occurred but for the attorney's conduct by showing: 1) the original claim was valid; 2) the claim would have resulted in a judgment in the plaintiff's favor; and 3) the judgment would have been collectible. *Rorrer*, 313 N.C. at 361, 329 S.E.2d at 369. The *Rorrer* test is expressed in terms of a civil action, under which the case arose.

Applying the *Rorrer* standard to a criminal context, the legal malpractice plaintiff must demonstrate that the attorney's conduct was the proximate cause of his conviction. However, it would hardly be possible to prove that the loss would not have occurred but for the attorney's negligence if the plaintiff could not establish his actual innocence of the actions underlying the criminal charges.

The vast majority of jurisdictions addressing the question of the standard for criminal malpractice cases have adopted an "actual innocence" standard. In *Mahoney v. Shaheen, Cappiello, Stein & Gordan, P.A.*, 727 A.2d 996 (N.H. 1999), the New Hampshire Supreme Court explained this standard as follows:

Public policy . . . dictates an augmented standard in criminal malpractice actions. While such an action requires all the proof essential to a civil malpractice claim, a criminal malpractice action will fail if the claimant does not allege and prove, by a preponderance of the evidence, actual innocence. It is not sufficient for a claimant to allege and prove that if counsel had acted differently, legal guilt would not have been established. As a matter

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of law, the gateway to damages will remain closed unless a claimant can establish that he or she is, in fact, innocent of the conduct underlying the criminal charge.

Mahoney, 727 A.2d at 998-99 (citation omitted).

The public policy concerns set forth by the majority dictate a more stringent standard for criminal malpractice cases than for civil cases. The actual innocence standard provides a clear, simple rule for our lower courts to follow and is consistent with our Supreme Court's holding in *Rorrer*. Therefore, I would adopt the actual innocence standard for criminal malpractice cases arising under North Carolina law.



CLARK DOUGLAS MONIN, PLAINTIFF V. PEERLESS INSURANCE COMPANY, ALL-STATE INSURANCE COMPANY, AND ALLSTATE INDEMNITY COMPANY, DEFENDANTS

No. COA02-1105

(Filed 5 August 2003)

1. Insurance— motor vehicle—insurance policy—residence— judgment notwithstanding verdict

A de novo review revealed that the trial court erred by granting judgment notwithstanding the verdict for plaintiff insured in a declaratory judgment action seeking motor vehicle liability insurance coverage, because testimony at trial established by more than a scintilla of evidence that plaintiff did not reside at his father's residence and was therefore not entitled to coverage under his father's policy.

2. Appeal and Error— appealability—sufficiency of notice of appeal

The Court of Appeals did not have jurisdiction to hear plaintiff insured's cross-appeal assigning as error the trial court's failure to use his requested special instructions and the trial court's failure to give a peremptory instruction in a declaratory judgment action seeking motor vehicle liability insurance coverage, because: (1) plaintiff's notice of appeal was faulty; and (2) it cannot be fairly inferred from the face of the notice of appeal that

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plaintiff intended to appeal from anything other than the judgment notwithstanding the verdict.

Appeal by defendant Peerless Insurance Company and cross-appeal by plaintiff from judgment notwithstanding the verdict entered 2 April 2002 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals 15 May 2003.

John E. Hodge, Jr., for plaintiff.

Dean & Gibson, L.L.P., by Thomas G. Nance, for defendant Peerless Insurance Company.

McGEE, Judge.

Clark Douglas Monin (plaintiff) filed a declaratory judgment action on 26 September 2000 seeking coverage under the uninsured motorists coverage and medical payment provisions of a Peerless Insurance Company (Peerless) policy of motor vehicle liability insurance (the Peerless policy) issued to plaintiff's father, James F. Monin. The complaint also sought a declaration of the rights of the parties under a motor vehicle liability insurance policy issued by Allstate Insurance Company or Allstate Indemnity Company (the Allstate policy) to Timothy Schwarz (Schwarz).

Plaintiff alleged in his complaint that on 27 September 1997, while riding as a passenger in an automobile owned and operated by Schwarz, he was seriously and permanently injured when Schwarz, impaired by alcohol and driving at a high rate of speed, lost control of his automobile and hit a tree on the side of the road. After plaintiff sought coverage under both the Peerless policy and the Allstate policy, Peerless admitted issuance of the Peerless policy to plaintiff's father, and that the policy was in effect at the time of the accident. However, Peerless denied plaintiff was entitled to coverage under the policy. Allstate Insurance and Allstate Indemnity also denied coverage under the Allstate policy, claiming that the Allstate policy had been cancelled due to non-payment of renewal premiums.

Peerless filed a motion for summary judgment. Allstate Insurance and Allstate Indemnity also filed a motion for summary judgment, claiming that the Allstate policy had been cancelled due to non-payment of premiums prior to the accident on 27 September 1997. The trial court granted Allstate Insurance's and Allstate Indemnity's motion for summary judgment on 11 October 2001. In the same order, the trial court denied Peerless' motion for summary judgment.

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Plaintiff's claim against Peerless was tried before a jury beginning on 13 March 2002. The evidence at trial showed that the Peerless policy provided uninsured/underinsured motorist coverage to plaintiff's father and to any "family member." "Family member" was defined in the Peerless policy to mean "a person related to [the named insured] by blood, marriage or adoption who is a resident of [the named insured's] household." The sole issue submitted to the jury was whether plaintiff was a resident of the household of plaintiff's father, James F. Monin, within the meaning of the Peerless policy.

Plaintiff's father testified at trial that he is the owner and president of The Jim Monin Agency (the Agency), an independent insurance agency, which he had owned for twenty-two years. One of the insurers for which he was agent was Peerless. Through the Agency, plaintiff's father purchased the Peerless policy in the early 1980s and renewed the policy annually. The policy had a coverage period of 7 August 1997 to 7 August 1998. Plaintiff's father was the named insured on the policy.

Plaintiff was 24 years old in 1997. His parents owned and lived in a house located at 717 Wingrave Drive, Charlotte, North Carolina (the Wingrave Drive house), where they had lived for the previous twenty-four or twenty-five years. Plaintiff had lived in the Wingrave Drive house continuously from the time the house was built in 1978 through his second year in college. Plaintiff graduated from high school in 1991 and attended Western Carolina University for two and a half years. After college, plaintiff stayed with various friends and would stay at the Wingrave Drive house for various lengths of time. Plaintiff and his parents were all living in the Wingrave Drive house at the beginning of 1997 and at that time plaintiff had been living continuously at the Wingrave Drive house for several months. He had his own bedroom, all of his clothes were at the Wingrave Drive house, and he had a key with full access to the house.

In January 1997, plaintiff left Charlotte to move to Florida to begin a career as a professional golfer. Plaintiff stayed in Florida until August 1997, when he returned to Charlotte after his attempt to become a professional golfer was unsuccessful. Plaintiff called from Florida indicating to his father that he would like to come back to Charlotte and talk to him about working at the Agency. Plaintiff returned to Charlotte on 31 August 1997 and moved most of his clothes back into the Wingrave Drive house. Plaintiff got a job at Pine Lake Country Club (Pine Lake) and told his father he would also be

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able to start working at the Agency on a part-time basis. Plaintiff also told his father that he would be sleeping most of the time at plaintiff's friends' place at 9001 Vicksburg Road (the Vicksburg Road house) because it was convenient to Pine Lake.

Plaintiff began working at the Agency during the daytime two or three days a week around 1 September 1997, and would then go to his Pine Lake job in the evening. Plaintiff began working full-time at the Agency on 22 September 1997. Plaintiff's father testified that if plaintiff's working for the Agency went well, plaintiff would become a permanent employee and would come to live at 717 Wingrave Drive. Before the date of the accident on 27 September 1997, plaintiff had spent one or two nights at the Wingrave Drive house and had eaten three or four meals there since his return from Florida. During the first week of plaintiff's working full-time at the Agency, plaintiff's father let plaintiff use his car. Plaintiff would drive to the Wingrave Drive house in the morning from the Vicksburg Road house to pick up his father and then would drive them to the Agency. After his day of work at the Agency, plaintiff would drive himself to Pine Lake for his night job. Plaintiff's father's plan was to give plaintiff the car after a trial period of working at the Agency; however, the accident occurred on the Friday of plaintiff's first full week of work at the Agency. Following plaintiff's hospitalization from the accident, plaintiff returned to the Wingrave Drive house, where he lived continuously for approximately the next six months.

Plaintiff's father testified that while plaintiff was in Florida, plaintiff's father filled out plaintiff's 1996 income tax return on 19 March 1997, listing plaintiff's address as 717 Wingrave Drive, Charlotte, North Carolina. Plaintiff's father also filled out an application for short-term medical insurance for plaintiff on 28 March 1997, listing plaintiff's address as 717 Wingrave Drive, Charlotte, North Carolina. The insurance issued in response to the application listed the insured as "Clark D. Monin" and mailed the policy to "717 Wingrave Dr., Charlotte, NC 28270." When plaintiff's father prepared a "new hire" form for plaintiff stating that plaintiff had been hired on 22 September 1997 by the Agency, the address listed for plaintiff was 717 Wingrave Dr., Charlotte, North Carolina. Plaintiff's father also filled out a work sheet for plaintiff's salary payments, which showed plaintiff's address as 717 Wingrave Drive, Charlotte, North Carolina. In addition, plaintiff's father testified that while plaintiff was in Florida and after plaintiff returned to Charlotte, plaintiff received mail addressed to plaintiff at the 717 Wingrave Drive address.

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Plaintiff's father testified that it was his intent that plaintiff was a resident of the family's household.

Plaintiff testified that he lived at an apartment off Monroe Road in Charlotte before he returned to live at 717 Wingrave Drive at the beginning of 1997. After living in the Wingrave Drive house for about three months, plaintiff moved to Florida where he got a Florida driver's license in order to gain employment there. Plaintiff moved back to Charlotte in August 1997. Plaintiff left 717 Wingrave Drive, Charlotte, North Carolina as his forwarding address when he moved from Florida. When plaintiff returned to Charlotte, he put his belongings in the Wingrave Drive house. Plaintiff did not stay at the Wingrave Drive house the first night back in Charlotte but stayed on the couch at his friend's house, the Vicksburg Road house. Plaintiff started working at Pine Lake on the night of 2 September 1997.

Tim Schwarz, Shawn Flanagan, and Brent Bishop were living in a three-bedroom house at 9001 Vicksburg Road, Charlotte, North Carolina. Plaintiff asked the three if he could stay on their couch due to the house's close proximity to Pine Lake and his need to save money. Plaintiff stayed on the couch at the Vicksburg Road house almost every night in September 1997 and kept his change of clothes for work in a small coat closet in the house. Plaintiff did not pay any rent or any share of utilities for the period he slept on the couch. Plaintiff did not have a key to the Vicksburg Road house, and on a couple of occasions had to sit outside the house for hours, waiting to get inside because he did not have a key. Plaintiff did most of his laundry during the month of September 1997 at the Wingrave Drive house; however, he did throw a shirt into the laundry at the Vicksburg Road house if he needed a clean shirt for work. Plaintiff ate most of his meals at Pine Lake; however, he ate three or four meals at the Wingrave Drive house, and also ate several times at the Vicksburg Road house. Plaintiff had a key to the Wingrave Drive house, a bedroom in the Wingrave Drive house, as well as furniture, clothes, and personal belongings in the Wingrave Drive house.

Plaintiff testified that the purpose of sleeping at the Vicksburg Road house was for the convenience of everyone involved. He said that since he got off work at Pine Lake between 10:00 p.m. and 12:00 midnight, he did not want to come in late and be disruptive at the Wingrave Drive house. Plaintiff also testified that it was more convenient for him to sleep on the couch than to have his friends drive him home after work at Pine Lake. However, during the week of 22 September 1997, when plaintiff began working full-time for the

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Agency and had use of his father's automobile, he continued to sleep on the couch at the Vicksburg Road house, driving to the Wingrave Drive house in the mornings to pick up his father for work.

When plaintiff reapplied for a North Carolina driver's license, he listed 717 Wingrave Drive, Charlotte, North Carolina as his address. Plaintiff also opened a checking account during September 1997, listing his address as 717 Wingrave Drive. During September 1997, plaintiff's address for voter registration was 717 Wingrave Drive, Charlotte, North Carolina. Plaintiff testified that it was his intent to have his residence as 717 Wingrave Drive upon moving back to Charlotte from Florida.

Shawn Flanagan (Flanagan) testified that he, Schwarz and Brent Bishop lived at 9001 Vicksburg Road in September 1997 as tenants under a lease. The rent for the house was divided among the three of them. Plaintiff did not have his own room at the Vicksburg Road house, but slept on a couch. Plaintiff did not have any furniture at the Vicksburg Road house, and Flanagan never saw any mail for plaintiff addressed to the Vicksburg Road house. Flanagan never collected any money from plaintiff for rent or utilities.

At the close of plaintiff's evidence, plaintiff and Peerless each moved for a directed verdict, which the trial court denied. Defendant presented no evidence at trial. Both motions for directed verdict were renewed at the close of all the evidence and both were denied.

Plaintiff filed a request for special instructions at the close of the first day of trial. He requested the court instruct that: (1) "where there is ambiguity and the policy provision is susceptible of two interpretations, one of which imposes liability upon the company and the other which does not, the provision must be construed in favor of coverage and against the company"; (2) the word "resident" is ambiguous and when an insurance company uses such a term to designate those who are insured by the policy, all who may by any reasonable construction of the word, be included within the coverage afforded by the policy, should be given its protection; and (3) "[i]n cases involving insurance policies extending coverage to members of the insured's household, the questioned terms are to be broadly interpreted in favor of coverage[,] . . . that the phrase 'resident of the same household' has no absolute or precise meaning, and, if doubt exists as to the extent or fact of coverage, the language used in an insurance policy will be understood in its most inclusive sense." At the jury

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instruction conference following the close of evidence, plaintiff's counsel emphasized the earlier request for special instructions. The trial court declined to give all of the requested special instructions. After the instructions were prepared, and again at the conclusion of the charge to the jury, plaintiff's counsel again made objections to the exclusion of the requested special instructions, both of which the trial court denied.

During the jury deliberations, the jury asked the trial court for additional instructions. The trial court gave a part of the charge again, and this time inserted additional language from plaintiff's special request. After further deliberation, the jury answered the single issue of whether plaintiff was a resident of the household of his father at the time of the accident on 27 September 1997, in favor of Peerless. The trial court, on its own motion, granted judgment notwithstanding the verdict in favor of plaintiff, which was entered on 3 April 2002. Peerless appeals from the judgment granting plaintiff judgment notwithstanding the verdict and plaintiff cross-appeals from the same judgment.

I.

[1] Peerless assigns as error the trial court's granting judgment notwithstanding the verdict for plaintiff on its own motion. We review the trial court's grant of a judgment notwithstanding the verdict *de novo*. See *In re Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999).

The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict is "whether, upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury."

Branch v. High Rock Realty, Inc., 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003) (quoting *Fulk v. Piedmont Music Center*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)). A motion for judgment notwithstanding the verdict "should be denied if there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Id.* at 250, 565 S.E.2d at 252 (quoting *Norman Owen Trucking Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998)). We must determine whether there is more than a scintilla of evidence that plaintiff was not a resident of his father's household.

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It is plaintiff's burden to show that he is a resident of his father's household, allowing him to recover under his father's uninsured motorist coverage. *Brevard v. Insurance Co.*, 262 N.C. 458, 461, 137 S.E.2d 837, 839 (1964) ("In an action to recover under an insurance policy, the burden is on the plaintiff to allege and prove coverage."). As the sole issue in this case is coverage, defendant is not required to prove any issue in this case and may properly decline to present evidence, and may simply rely on cross-examination in order to show that plaintiff cannot meet his burden of showing he was a resident of his father's household by a preponderance of the evidence. See *Fonvielle v. Insurance Co.*, 36 N.C. App. 495, 499-500, 244 S.E.2d 736, 739, *disc. review allowed*, 295 N.C. 465, 246 S.E.2d 215 (1978). Our Courts have determined that the term "resident," when used in an insurance policy and not defined by that policy, although subject to several different meanings, does not automatically result in coverage but instead is subject to its most inclusive definition. *Insurance Co. v. Insurance Co.*, 266 N.C. 430, 438-39, 146 S.E.2d 410, 416-17 (1966), *modified on other grounds*, 277 N.C. 216, 176 S.E.2d 751 (1970); see also *Fonvielle*, 36 N.C. App. at 497-98, 244 S.E.2d at 738 ("[A] rule of construction cannot supply a material element even in the case of a 'slippery' term as long as the term has some meaning."). Our State's courts have given several examples of this broad definition:

"Resident. One who resides in a place; one who dwells in a place for a period of more or less duration. *Resident* usually implies more or less permanence of abode, but is often distinguished from *inhabitant* as not implying as great fixity or permanency of abode."

Insurance Co., 266 N.C. at 438, 146 S.E.2d at 416 (quoting Webster's New International Dictionary (2d ed.));

"Resident" is defined as "one who makes his home in a particular place." . . . "Reside" is defined as "to live in a place for an extended or permanent period of time."

State Auto Prop. & Cas. Ins. Co. v. Southard, 144 N.C. App. 438, 440, 548 S.E.2d 546, 548, *disc. review denied*, 354 N.C. 370, 557 S.E.2d 535 (2001) (quoting American Heritage Dictionary 1051 (2d ed. 1985));

"Residence is dwelling in a place for some continuance of time, and is not synonymous with domicile, but means a fixed and permanent abode or dwelling as distinguished from a mere temporary locality of existence; and to entitle one to the character of a

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'resident,' there must be a settled, fixed abode, and an intention to remain permanently, or at least for some time, for business or other purposes."

Lumbermens Mutual Casualty Co. v. Smallwood, 68 N.C. App. 642, 644, 315 S.E.2d 533, 535 (1984) (citation omitted);

"Resident" is a word with varying shades of meaning In every case, however, it requires some kind of abode.

Marlowe v. Insurance Co., 15 N.C. App. 456, 460, 190 S.E.2d 417, 420, *cert. denied*, 282 N.C. 153, 191 S.E.2d 602 (1972). Because the word "resident" is subject to several definitions, we must use the most inclusive definition. See *C. D. Spangler Constr. Co. v. Industrial Crankshaft & Eng. Co.*, 326 N.C. 133, 152-53, 388 S.E.2d 557, 569 (1990). It is with these principles in mind that we must now determine whether there is more than a scintilla of evidence that plaintiff was not a resident of his father's household on 27 September 1997.

The undisputed evidence showed that plaintiff slept at the Wingrave Drive house a maximum of three nights from the time he returned to Charlotte until he was injured in the accident, and that the remainder of the nights plaintiff slept at the Vicksburg Road house. On cross-examination, plaintiff's father agreed that he had a discussion with plaintiff before 27 September 1997, "that if things worked out with [plaintiff] working full time for [his father], and things appeared to be going well, that [plaintiff] was either going to move back in with [his father] or move in with [plaintiff's] brother." Plaintiff's father also agreed that as of 27 September 1997, plaintiff "hadn't moved back in with [his father] because [plaintiff] still hadn't established that track record." Further, although plaintiff stated a major reason he was sleeping at the Vicksburg Road house was because he did not have an automobile and did not want to inconvenience everyone, the week before the accident, when plaintiff's father had given him an automobile to drive, plaintiff continued to sleep at the Vicksburg Road house. There was testimony by plaintiff that the situation at the Vicksburg Road house was going to continue "until [plaintiff] found a permanent residence." Finally, although plaintiff presented documents showing his address as 717 Wingrave Drive, through cross-examination defendant showed that: some of the documents were not relevant to establishing plaintiff's residence; the address listed on the documents had been 717 Wingrave Drive when plaintiff was actually living in Florida; and plaintiff's address was still

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listed on documents as 717 Wingrave Drive at the time of trial, when plaintiff was actually living in a new apartment and, as plaintiff admitted, was no longer a resident of the Wingrave Drive house. In a jury trial concerning the “residency” of a plaintiff for insurance coverage purposes, the trial court submits to the jury, for its determination, questions that can only be resolved by a weighing of the evidence. *Great American Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 657, 338 S.E.2d 145, 147-48, *disc. review denied*, 316 N.C. 552, 344 S.E.2d 7 (1986).

We hold that the testimony outlined is more than a scintilla of evidence that plaintiff did not reside at 717 Wingrave Drive, Charlotte, North Carolina on 27 September 1999. It was, therefore, error for the trial court to grant judgment notwithstanding the verdict for plaintiff.

II.

[2] Plaintiff also filed a cross-appeal in the present case, assigning as error the trial court’s failure to use his requested special instructions and the trial court’s failure to give a peremptory instruction. “Proper notice of appeal requires that a party ‘shall designate the judgment or order from which appeal is taken’” *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (quoting N.C.R. App. P. 3(d)). This Court does not acquire jurisdiction to hear the appeal without proper notice. *Id.* (citation omitted). In this case, plaintiff’s notice of appeal stated that he was appealing from the trial court’s grant of a judgment notwithstanding the verdict “entered on April 2, 2002.” Nowhere in the notice of appeal does it indicate plaintiff wished to appeal from the trial court’s denial of plaintiff’s request for special instructions or a peremptory instruction. Plaintiff’s notice of appeal does not properly present these issues for review. *See id.* (“Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review.”).

Even if notice of appeal is faulty, “we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction” *Id.* First, the notice of appeal should not be found faulty if, despite a mistake in designation, “the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake.” *Id.* at 156-57, 392 S.E.2d at 424 (citations omitted). In the present case it cannot be “fairly inferred” from the face of the notice of appeal that plaintiff intended to appeal from anything other than the judgment notwithstanding the

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verdict. *Id.* at 157, 392 S.E.2d at 424. The second exception concerns technical compliance with the procedural requirements in filing papers with the court and does not apply in this case. *Id.* at 157, 392 S.E.2d at 424 (citation omitted). We, therefore, have no jurisdiction to hear plaintiff's cross-appeal and it must be dismissed.

III.

In light of our determination of defendant's first assignment of error and plaintiff's cross-appeal, we need not address defendant's remaining assignments of error.

In summary, we reverse the decision of the trial court granting judgment notwithstanding the verdict for plaintiff. We also dismiss plaintiff's cross-appeal. We remand this case for reinstatement of the jury's verdict for defendant Peerless and entry of judgment for defendant Peerless.

Reversed and remanded; cross-appeal dismissed.

Judges TYSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. SHAWN WAYNE SCERCY, DEFENDANT

No. COA02-772

(Filed 5 August 2003)

1. Criminal Law— preliminary instructions—expression of opinion

The trial court did not express an opinion on defendant's guilt in a second-degree rape case when it stated, during preliminary instructions to the jury pool on the presumption of innocence and burden of proof, "and that's what we'll do—what will go on in this case," because although it is the better practice for a court to avoid even ambiguous comments that may imply that it and the prosecutor are on the same team, the court was merely commenting on the roles of the court and the attorneys in the trial which is not a question of fact to be decided by the jury.

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2. Rape— second-degree—constructive force—sufficiency of evidence

There was sufficient evidence of constructive force to support defendant's conviction of second-degree rape where the victim testified that defendant took her to an empty ballpark, threatened her by referring to a "9mm" that could be used to "persuade" her, and stated that he would get it the "easy way or the hard way."

3. Criminal Law— instruction—false, contradictory, or conflicting statements—guilty conscience

The trial court did not err in a second-degree rape case by instructing the jury that if it found defendant made false, contradictory, or conflicting statements, the same could be considered as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience, because: (1) defendant's statements to the police and his testimony not only were inconsistent with each other, but were also inconsistent with the evidence at trial; and (2) the variances in the statements were consistent with the conclusion that defendant tailored his explanation to fit the allegations as defendant became aware of more details.

4. Appeal and Error— preservation of issues—failure to object and argue in brief

Although defendant contends the trial court committed plain error in a second-degree rape case by refusing to provide the jury with a written copy of the jury instructions after the jury requested it, defendant waived appellate review of this issue because defendant failed to object and to argue in his brief that the trial court's instruction amounted to plain error.

5. Sentencing— miscalculation of prior conviction level—second-degree rape

The trial court erred in a second-degree rape case by miscalculating defendant's prior conviction level as level II under N.C.G.S. § 15A-1340.14 and the case is remanded for resentencing because defendant had no other prior conviction with assigned points under the sentencing scheme, and the appropriate prior record sentencing level for defendant was level I.

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Appeal by defendant from judgment entered 28 November 2001 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 25 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Y. Meacham, for the State.

Daniel Shatz, for defendant-appellant.

HUDSON, Judge.

Defendant Shawn Wayne Scercy was convicted of second-degree rape and sentenced to a prison term of 90 months to 117 months. He appealed, contending that the trial court (1) made preliminary remarks to the jury expressing an opinion regarding his guilt; (2) erred by denying his motion to dismiss; (3) erred by instructing the jury on false, contradictory, or conflicting statements; (4) erred in refusing to give the jury a written set of jury instructions; and (5) erred by sentencing defendant at prior record level II. We find no error in the trial but agree that the trial court erroneously sentenced defendant and accordingly remand the case for re-sentencing.

BACKGROUND

The State's evidence at trial tended to show that on 21 February 1999, defendant and his brother drove to the home of Rebecca Lynn Claytor. Ms. Claytor testified at trial that she and defendant had known one another for most of their lives but that they had not seen each other for five or six years. Defendant and Ms. Claytor spoke on the porch until defendant suggested that they go to his car to talk. Ms. Claytor got in the front passenger seat, while defendant was in the driver's seat, and defendant's brother was in the back seat. Defendant asked Ms. Claytor to ride while he drove his brother home. At first she said she was busy, but defendant said that it would not take long, and Ms. Claytor agreed.

After dropping off the brother, defendant drove toward Ms. Claytor's home. He pulled over in a nearby ballpark. Ms. Claytor asked why they had stopped, and defendant told her he just wanted to talk some more. She agreed. Defendant then began to tell Ms. Claytor that he wanted to go out with her. Defendant was married but told Ms. Claytor that he and his wife had separated.

Defendant began to try to kiss and fondle Ms. Claytor. Ms. Claytor asked to be taken home. Defendant then asked Ms. Claytor to perform oral sex, but she refused. He continued to ask, and she

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continued to say no. Ms. Claytor then tried to leave the car, but defendant reached across her to close the door. When she tried to leave again, he threatened her. Defendant told Ms. Claytor that if she did not do what he wanted, then he had a nine millimeter that would persuade her. He said it could be the easy way or the hard way, and defendant tapped the car console as he made this statement. Ms. Claytor believed that he was threatening her life.

At this point, defendant pulled out his penis and began to rub it. He also told Ms. Claytor to take off her shirt. She complied, and defendant pulled her over, pushed her head down, and forced her to perform fellatio. She stopped and began crying; defendant was upset and told her that he did not want to hear the baby stuff. He then came over to the passenger side of the car and told Ms. Claytor to pull down her pants so they could have sex. She continued to ask to go home. Defendant got on top of Ms. Claytor, pulled down her pants, and eventually succeeded in forcing himself upon her. Ms. Claytor repeated that she wanted to go home. Defendant then stopped, got off Ms. Claytor, and said that he did not know why he did it and that he was sorry. Defendant continued to apologize as he drove Ms. Claytor home. On returning home, Ms. Claytor told her mother about what had happened. Her mother called the police, and the two went to the hospital.

Detective David Miller interviewed Ms. Claytor at the hospital and took a written statement. Detective Richard Davis met Miller at the hospital and received information about the incident and Ms. Claytor's identification of defendant. Davis, along with two other deputies, located defendant at his mother's home on 22 February 2000. The officers took defendant into custody.

After the officers read him his rights, defendant provided a written statement. In that statement, he indicated that he and his brother had gone to Ms. Claytor's house and asked her to go for a ride. They took the brother home and then went to the China Grove basketball court. Defendant and Ms. Claytor sat and talked, and defendant asked Ms. Claytor to do something for him before he took her home. He said that she had removed her blouse and pants and performed fellatio at his request. She indicated that she needed to get home, but he persuaded her to have sexual intercourse. Defendant took Ms. Claytor back home where they talked for a few minutes, and he then left.

Detective Davis also took notes of comments defendant made while in custody. During a smoking break, defendant repeated his

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description of visiting Ms. Claytor and taking her to the ballpark. Defendant told the detective that he knew why the police were asking him about a gun. Defendant then described how he told Ms. Claytor that he had something in the console of the car to put her in the mood. Defendant told Davis that he had wanted Ms. Claytor to believe that he had some liquor.

Defendant was taken to the magistrate's office and was present when Davis testified. Davis testified about Ms. Claytor's claim that defendant had threatened her with a nine millimeter gun and that defendant had said he would get it the easy way or the hard way. After hearing this testimony, defendant stated that "I did tell her I had a 9 . . . But I meant a 9 inch d---, not a 9 millimeter gun." Defendant also stated that Ms. Claytor had opened the car door but that she had closed it herself.

Defendant gave an additional written statement to Detective Miller on 1 March 1999. In that statement, defendant described again how his brother and he had stopped at Ms. Claytor's house and talked for a while before leaving to drop off the brother and go to the ballpark. Defendant and Ms. Claytor then started fooling around, and he was kissing and touching her. Ms. Claytor said that she needed to go home, but defendant tried to talk her into staying. She opened the car door, and defendant reached over and shut it. He told her, "Maybe this 9 millimeter will influence you," although defendant also told Miller that he never had had a gun. Defendant said that he had asked for oral sex and had told Ms. Claytor that he would take her home afterward. She agreed to take off her shirt and perform fellatio and then stopped and asked defendant to take her home. Defendant requested intercourse, and Ms. Claytor asked why he was doing this. He replied, "I didn't have anything to lose, I've done lost everything anyway." The two had intercourse, then defendant drove Ms. Claytor home. They talked for a few more minutes, and defendant left.

Defendant testified at trial that Ms. Claytor and he had "made out" on a prior occasion in 1996, where the two had kissed, and Ms. Claytor had removed most of her clothing. That was the last time that he saw her prior to 21 February 1999. On that date, defendant and his brother drove to Ms. Claytor's home where they talked in the car for a while. Defendant asked Ms. Claytor to ride with him to take his brother home, and she agreed. After dropping off the brother, defendant asked Ms. Claytor whether she wanted to ride up to the China Grove ballpark. Defendant eventually admitted to the alleged sexual activities but insisted that Ms. Claytor had agreed to them.

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Defendant was indicted for first-degree rape and first-degree sexual offense. At the close of the trial, in November 2001, the trial court dismissed the first-degree elements from both charges and submitted the case to the jury on second-degree rape and second-degree sexual offense. On 28 November 2001, the jury found defendant guilty of second-degree rape and not guilty of second-degree sexual offense. At sentencing, the court found that defendant had a prior record level of II and imposed an active sentence of 90 months to 117 months from the presumptive range. Defendant appeals.

ANALYSIS

A.

[1] Defendant argues first that the trial court erred by expressing an opinion regarding the defendant's guilt during the preliminary instructions to the jury. Defendant contends that the judge's comments gave the appearance that the judge had aligned himself with the prosecution and that the judge expected the defendant to be proven guilty beyond a reasonable doubt.

The contested remarks occurred as the trial court addressed the jury pool prior to the selection of jurors. The judge stated the following:

Now the defendant in this case has entered a plea of not guilty; under our system of justice—under our constitution; a defendant who pleads guilty is not required to prove his innocence but is presumed to be innocent. This presumption remains with the defendant throughout the trial until the jury selected to hear the case is convinced from the facts of the law beyond a reasonable doubt of the guilt of the defendant. Now, I can assure you these lawyers—as I told you are very competent, and I can assure you that Mrs. Biernacki does not object to this law; she willingly takes this burden of proving to you beyond a reasonable doubt. And that's what we'll do—what will go on in this case. The burden of proof is on the State to prove to you that the defendant is guilty beyond a reasonable doubt. A reasonable doubt is not a vain or fanciful doubt. It is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack of insufficiency of the evidence, as the case may be. I can assure you that proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt, based upon your reason and common sense. Now, there is

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no burden or duty of any kind on the defendant. There mere fact that the defendant's been charged with a crime is no evidence of guilt. A charge is merely the mechanical or administrative way by which any person can be brought to a trial. Now, if the State proves guilty beyond a reasonable doubt then the function of this jury by its verdict is to say, "Guilty." If the State fails to prove guilt or you have a reasonable doubt, then your function is to say, "Not guilty."

(emphasis added).

As set forth in N.C. Gen. Stat. § 15A-1222, the "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." Moreover, trial judges "must be careful in what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury." *State v. Jenkins*, 115 N.C. App. 520, 524-25, 445 S.E.2d 622, 625, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 752 (1994) (citation and quotation marks omitted). "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985). "[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results." *Id.*

In *Jenkins*, the defendant argued that the trial judge improperly expressed an opinion in the presence of the jury when the judge turned his back to the jury for 45 minutes during the defendant's testimony on direct examination. This Court agreed, holding that the jury could reasonably infer from the judge's action in turning his back that he did not believe the defendant's testimony to be credible. *Id.* at 525, 445 S.E.2d at 625. This action was especially prejudicial because the defendant had asserted consent as a defense, and his testimony and his credibility were crucial to that defense. "Although the trial court may have not intended to convey such a message, we must find error where the trial court's actions may speak directly to the guilt or innocence of the defendant." *Id.*

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Here, however, we do not think that the trial judge's words to the jury pool spoke directly to the defendant's guilt or innocence. To the contrary, the judge's remarks are more aptly characterized as a description of the defendant's presumed innocence under the Constitution, as well as the State's obligation to prove its case. *State v. Hudson*, 54 N.C. App. 437, 441, 283 S.E.2d 561, 564 (1981) (holding that a court's comments on the roles that attorneys play in a criminal prosecution are not improper expressions of opinion as to the merits of either party's case). Although we do not condone the trial judge's use of the first person plural when he told the jury, "[a]nd that's what we'll do—what will go on in this case," we do not believe that the statement constituted an improper expression of opinion on a "question of fact to be decided by the jury." N.C.G.S. § 15A-1222. Although it is the better practice for a court to avoid even ambiguous comments that may imply that it and the prosecutor are a team, here we believe that the court was merely commenting on the roles of the court and the attorneys in the trial, which is not a question of fact to be decided by the jury. Accordingly, this argument is without merit.

B.

[2] Defendant argues next that the trial court erred in denying his motion to dismiss at the close of the evidence. Specifically, defendant contends that there was insufficient evidence of the element of force to support his conviction of second-degree rape.

In ruling on a defendant's motion to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Cockerham*, 155 N.C. App. 729, 574 S.E.2d 694, 697 (citation and quotation marks omitted), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003). Whether the evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and quotation marks omitted). Our courts have repeatedly noted that "[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. . . ." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citations omitted). "If all the evidence, taken together and viewed in the light most favor-

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able to the State, amounts to substantial evidence of each and every element of the offense and of defendant's being the perpetrator of such offense, a motion to dismiss is properly denied." *Cockerham*, 155 N.C. App. at 733, 574 S.E.2d at 697. (citations and quotation marks omitted).

The elements of second-degree rape are that the defendant (1) engage in vaginal intercourse with the victim; (2) by force; and (3) against the victim's will. N.C. Gen. Stat. § 14-27.3.

Here, the State relied on evidence of constructive force. Constructive force, applied through fear, fright, or coercion, suffices to establish the element of force in second-degree rape. *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987). It may be demonstrated by proof that the defendant acted so as, in the totality of the circumstances, to create the reasonable inference that the purpose of such acts was to compel the victim to submit to sexual intercourse. *Id.* At trial, the victim testified that defendant took her to an empty ballpark, threatened her by referring to a "9mm" that could be used to "persuade" her, and by further stating that he would get it the "easy way or the hard way." Defendant became angry when the victim refused to perform oral sex, and the victim repeatedly asked to be taken home. Under the circumstances, one could reasonably infer that defendant had both the intent and the means to harm Ms. Claytor if she did not submit to his demands, which evidence suffices to show constructive force. Thus, we conclude that the trial judge did not err in denying defendant's motion to dismiss on the basis of insufficiency of the evidence.

C.

[3] Defendant also contends that the trial court erred in instructing the jury that if it found defendant made false, contradictory, or conflicting statements, the same could be considered as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience. The trial court gave the following instruction:

Now, the State contends and the defendant denies that the defendant made false contradictory of [sic] conflicting statements. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed with a guilty conscience, seeking to divert suspicion or to exculpate himself and you should consider that evidence, along with all the other

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believable evidence in this case; however, if you find that the defendant made such statements, they do not create a presumption of guilt and such evidence standing alone is not sufficient to a—establish guilt.

Our Supreme Court has held that false, contradictory, or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate himself. *E.g.*, *State v. Walker*, 332 N.C. 520, 537, 422 S.E.2d 716, 726 (1992), *cert. denied*, 508 U.S. 919, 124 L. Ed. 2d 271 (1993). The probative force of such evidence is that it tends to show consciousness of guilt. *State v. Myers*, 309 N.C. 78, 86, 305 S.E.2d 506, 511 (1983). The instruction is proper not only where defendant's own statements contradict each other but also where defendant's statements flatly contradict the relevant evidence. *Walker*, 332 N.C. at 538, 422 S.E.2d at 726.

In our view, the instruction was proper in this case because defendant's statements to the police and his testimony not only were inconsistent with each other but also were inconsistent with the evidence at trial. During the trial, the State introduced four prior statements that defendant had made to police. The statements consisted of a written statement made by defendant on 22 February 1999, a few hours after the alleged crime; defendant's oral statements made to Detective Davis during some smoking breaks that same day; defendant's oral statements made to Detective Davis after defendant was taken before the magistrate later that same morning; and a written statement signed by defendant during a police interview on 1 March 1999. These versions were inconsistent with each other and also conflicted with defendant's direct testimony and cross-examination at trial. For example, defendant's version of "persuading" the victim to have sex differed. In his first written statement, defendant described a consensual episode. Then, talking to Detective Davis, he tried to explain why the victim thought he had had a gun. Defendant told Davis that he said to the victim that "I had something, maybe I could persuade you or put you in the mood. . . . I have something in my console to persuade you, or get you in the mood or whatever." Defendant told Davis that he wanted the victim to believe that he had a liquor bottle. Then, after hearing the victim's description at the probable cause hearing of his threat to use a "9 millimeter," defendant admitted, "I did tell her I had a 9 . . . but I meant a 9 inch d--, not a 9 millimeter gun." Later, in his second written statement, defendant

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explained that he told the victim that “Maybe this 9 millimeter will influence you.” And, at trial, after hearing the victim’s testimony that he had exposed himself, defendant testified that he had tried to persuade her by saying “Well, I got a 9 millimeter that might influence you,” while exposing and stroking himself. The variances in the statements are consistent with the instruction—and the conclusion—that defendant tailored his explanation to fit the allegations as he became aware of more details.

We conclude that the trial court did not err in giving the challenged instruction.

D.

[4] Defendant also argues that the trial court erred when it refused to provide the jury with a written copy of the jury instructions after the jury requested it. Again we disagree.

Here, the court charged the jury, which then retired to select a foreperson before going on a lunch break. Shortly after returning from the break, the jury sent a written request to the trial judge asking for “a copy of the 3 laws on the charge sheet.” The judge did not provide a written copy; he explained that there was no timely way to print the charge from the court reporter’s record and that his own copy was marked and included things that were inapplicable to the case. He did, however, offer to repeat the instructions as often as necessary and proceeded to re-instruct on the charges of second-degree rape and second-degree sexual offense.

Defendant did not object. Although in his assignment of error he “specifically and distinctly contended” pursuant to Rule 10(c)(4) of the Rules of Appellate Procedure that the error amounted to plain error, defendant failed to argue in his brief that the trial court’s instruction amounted to plain error. N.C. R. App. P. 28(a). Accordingly, defendant has waived appellate review of this assignment of error. *State v. Nobles*, 350 N.C. 483, 516, 515 S.E.2d 885, 904 (1999).

E.

[5] Lastly, defendant argues that the trial court miscalculated his prior conviction level pursuant to G.S. § 15A-1340.14. The State concedes the error, and thus we remand for re-sentencing at prior record level I.

Specifically, the court found that defendant had a prior conviction for misdemeanor financial card fraud, assigned one point for that

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conviction, and classified defendant at prior record level II. Based upon a prior record level II, defendant was sentenced within the presumptive range for second-degree rape, 90 months to 117 months, pursuant to G.S. § 15A-1340.17.

According to the record, defendant had a prior conviction of misdemeanor financial card fraud at the time of sentencing. Pursuant to G.S. § 15A-1340.14(c), the classification of a prior offense is the classification assigned to that offense at the time the offense for which the defendant is being sentenced is committed. On 22 February 1999, the classification for misdemeanor financial card fraud was a class 2 misdemeanor. G.S. § 15A-1340.14(b) assigns zero points to a class 2 misdemeanor. Because defendant had no other prior conviction with assigned points under the sentencing scheme, the appropriate prior record sentencing level for defendant was level I.

Accordingly, we find no error in the trial but remand this case for re-sentencing.

No error at trial, remanded for resentencing.

Judges MARTIN and ELMORE concur.

MARCEL ELUHU, PLAINTIFF v. VLADIMIR ROSENHAUS, DEFENDANT

No. COA02-1167

(Filed 5 August 2003)

Jurisdiction— personal—alienation of affections

The trial court did not err by dismissing plaintiff's alienation of affections action against defendant based on lack of personal jurisdiction, because: (1) the evidence before the trial court disclosed little, if any, connection between defendant's contacts with North Carolina and plaintiff's cause of action; (2) neither plaintiff nor defendant is a resident of North Carolina and almost all of the contact between defendant and plaintiff's wife occurred in Tennessee; (3) plaintiff's bare allegation concerning the commission of the alleged tort in this State was effectively refuted by the affidavits filed in support of defendant's motion to dismiss; and (4) without some showing of interest on the part of North

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Carolina in adjudicating this dispute, the inconvenience to defendant of defending the matter is not mitigated.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 25 March 2002 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 11 June 2003.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for plaintiff-appellant.

Manning, Fulton & Skinner, P.A., by Cary E. Close, for defendant-appellee.

MARTIN, Judge.

Plaintiff brought this action seeking compensatory and punitive damages upon allegations that defendant had alienated the affections of plaintiff's wife. Defendant made a special appearance in the matter in order to file a motion to dismiss for lack of personal jurisdiction. The trial court granted defendant's motion, dismissing the claim for lack of personal jurisdiction over defendant, and plaintiff appeals. We affirm.

In his verified complaint, plaintiff alleged that he is a citizen and resident of the State of Tennessee and that defendant is a resident of the State of California, "and maintains a home in Raleigh, Wake County, North Carolina." He also alleged that an exercise of personal jurisdiction over defendant by the trial court was proper because he committed a tortious act within the State of North Carolina. Aside from general allegations aimed at meeting the elements of the tort of alienation of affections, plaintiff also alleged, "[u]pon information and belief," that defendant and plaintiff's wife developed a "romantic affair that began in 1998 and has continued until the present. . . . Plaintiff's wife left the marriage and continued her romantic involvement with the Defendant. . . . For some length of time during the course of his romantic involvement with Plaintiff's wife, Defendant resided in Wake County, North Carolina."

Attached to defendant's motion to dismiss was a sworn affidavit, in which defendant attested that he had been a citizen and resident of California since August 1999, had resided in Nashville, Tennessee, from August 1997 to July 1999, and resided in Raleigh, North Carolina, from August 1991 to July 1997. He stated that after moving

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to Nashville, his only contacts with North Carolina included (1) the continued residence of his wife and son in Raleigh, where he visited them occasionally until April 1999, (2) a vacation in Atlantic Beach, NC, from 24 to 27 May 1999, and (3) ownership of a house in Raleigh which he rented to a third party from August 1999 to August 2000. Defendant attested that he sold the house in March 2001. Denying that he had ever had a “sexual relationship” with Ms. Eluhu, defendant stated that they worked together in Nashville and “developed a friendship.” He further attested that:

[t]he only time I have ever had any contact with Plaintiff’s wife in North Carolina was during a three-day vacation to Atlantic Beach in May of 1999, where she was also vacationing, with her three children. During that time, I saw Plaintiff’s wife only in public and for a short time at her rented condominium in the presence of her children.

Plaintiff’s former wife, Colette Calmelet-Eluhu, stated in an affidavit that she was a citizen and resident of Tennessee and had never lived in North Carolina. Her description of her friendship with defendant and their contact at Atlantic Beach was similar to that contained in defendant’s affidavit. She stated that she planned the beach vacation before she knew of defendant’s plans to be there at the same time and that her contact with defendant during the beach trip had no effect on her relationship with plaintiff.

Plaintiff’s ten assignments of error are organized into two main arguments in his brief. Plaintiff argues (1) the findings of fact in the trial court’s order dismissing his complaint were insufficient to permit meaningful appellate review and (2) the trial court erred in finding that federal due process limitations did not permit the exercise of personal jurisdiction over defendant and consequently dismissing plaintiff’s complaint. We reject both arguments.

“The trial court’s determination regarding the existence of grounds for personal jurisdiction is a question of fact.” *Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs*, 158 N.C. App. 376, 379, — S.E.2d —, —.

Absent a request by a party, a trial court is not required to make findings of fact when ruling on a motion. Rather, on appeal it is presumed that the trial court found facts sufficient to support its ruling. If these presumed factual findings are supported by competent evidence, they are conclusive on appeal.

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Filmar Racing, Inc. v. Stewart, 141 N.C. App. 668, 672, 541 S.E.2d 733, 737 (2001) (citations omitted). In the present case, plaintiff has not pointed this Court to any place in the record where he requested such findings and we can find none. “Accordingly, the dispositive issue before us is the sufficiency of the evidence to support [the] determination that personal jurisdiction did not exist.” *Id.*

A determination of personal jurisdiction involves 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.”

Id., at 671, 541 S.E.2d at 736 (quoting *Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 27, 519 S.E.2d 317, 320 (1999)). (citations omitted). In the present case, defendant conceded before the trial court that plaintiff had satisfied the long-arm statute. *See* N.C. Gen. Stat. § 1-75.4(3) (2003); *Godwin v. Walls*, 118 N.C. App. 341, 349, 455 S.E.2d 473, 480 (1995) (statute only requires plaintiff to claim listed injuries, not prove them). Therefore, our inquiry focuses on whether there was evidence in the record to support the trial court’s determination that “the exercise of personal jurisdiction over Defendant . . . would not comport with due process of law.”

In order to determine whether the exercise of personal jurisdiction comports with due process, the trial court must evaluate 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)).

“Factors for determining existence of minimum contacts include ‘(1) quantity of the 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.’” In cases which arise from or are related to

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defendant's contacts with the forum, a court is said to exercise "specific jurisdiction" over the defendant. However, in cases . . . where defendant's contacts with the state are not related to the suit, an application of the doctrine of "general jurisdiction" is appropriate. Under this doctrine, "jurisdiction may be asserted even if the cause of action is unrelated to defendant's activities in the forum as long as there are sufficient 'continuous and systematic' contacts between defendant and the forum state."

Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 617, 532 S.E.2d 215, 219, (citations omitted) *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

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, "the 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."

Adams, 158 N.C. App. at 378, — S.E.2d at —. The allegations in a complaint are taken as true and controlling unless the defendant supplements its motion to dismiss with affidavits or other supporting evidence, in which case the plaintiff must respond " 'by affidavit or otherwise . . . setting forth specific facts showing that the court has jurisdiction.' " *Bruggeman*, 138 N.C. App. at 615-16, 532 S.E.2d at 218 (citation omitted). 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.' " *Adams*, 158 N.C. App. at 382, — S.E.2d at — (quoting *Spinks v. Taylor and Richardson v. Taylor Co.*, 303 N.C. 256, 264, 278 S.E.2d 501, 506 (1981)) (citation omitted).

In the present case, plaintiff argues there are grounds to assert both specific and general jurisdiction over defendant. In terms of specific jurisdiction, plaintiff argues that "[t]he contacts between Defendant and North Carolina that are related to or give rise to the specific cause of action were those that occurred during the 'three-day vacation' during which Defendant connected with Plaintiff's wife in Atlantic Beach in May 1999." Plaintiff's complaint, however, contains no allegations with respect to this trip, but rather only general allegations as to defendant's relationship with Ms. Eluhu, several of

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which either contain no reference to place or time or do not qualify as evidentiary statements as they are based only “upon information and belief.” See *Tompkins v. Tompkins*, 98 N.C. App. 299, 304, 390 S.E.2d 766, 769 (1990) (allegations of misconduct, “absent any allegations going to a nexus between such misconduct and this State, are simply insufficient to permit the reasonable inference that personal jurisdiction over defendant could properly be acquired”). Thus, any information concerning the North Carolina beach vacation must be taken from the affidavits of defendant and Ms. Eluhu. Significantly, Ms. Eluhu attested that she “[knew] of no change whatsoever in my relations with Plaintiff, or my relations with Defendant during, right after or because of the beach trip to North Carolina.”

The evidence before the trial court, therefore, discloses little, if any at all, connection between defendant’s contacts with North Carolina and plaintiff’s cause of action. That defendant admitted to seeing Ms. Eluhu at Atlantic Beach does not permit a conclusion that he alienated her affection from plaintiff at that time. Moreover, nothing in plaintiff’s verified complaint successfully contradicts Ms. Eluhu’s statement that seeing defendant during the beach trip had no effect on her relationship with plaintiff. For our purposes, the statement renders this contact between defendant and North Carolina quite insignificant with respect to plaintiff’s claim for alienation of affection. In addition, although North Carolina does have an interest in providing a forum for actions based on torts that occur in North Carolina, the evidence presented to the trial court showed that neither plaintiff nor defendant is a resident of North Carolina and that almost all of the contact between defendant and Ms. Eluhu occurred in Tennessee. Given that the tort of alienation of affection has been abolished in both California and Tennessee, see *Dupuis v. Hand*, 814 S.W.2d 340 (Tenn. 1991), Cal. Civ. Code § 43.5(a) (2003), but not North Carolina, and that it is a transitory tort, to which courts must apply the substantive law of the state in which the tort occurred, see *Cooper v. Shealey*, 140 N.C. App. 729, 537 S.E.2d 854 (2000), plaintiff’s decision to sue defendant in North Carolina smacks of forum-shopping. See *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E.2d 629 (1977). Lastly, defending against a suit in North Carolina would clearly be inconvenient for defendant, who resides in California, and plaintiff, as a resident of Tennessee, has no claim on the State of North Carolina to provide a forum for the settlement of his general disputes. *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 787 (1986) (“It is generally conceded that a state has a ‘manifest interest’ in providing its residents with a convenient

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forum for redressing injuries inflicted by out-of-state actors.”). Considering all of these factors, especially the weak connection between defendant’s trip to Atlantic Beach and the instant cause of action, in light of “traditional notions of fair play and substantial justice,” the trial court did not err in finding defendant’s contacts with North Carolina were insufficient to subject him to specific *in personam* jurisdiction.

In terms of general jurisdiction, the record admittedly discloses continuous contacts between defendant and North Carolina during a period of several years prior to the filing of the complaint. From 1991 to 1997, defendant was a resident of this State. Although he moved to Tennessee in 1997 and lived and worked there until April 1999, his wife and son remained in Raleigh in a home the couple owned, and defendant admittedly traveled back to Raleigh during this period “occasionally” to visit his family. He took a three-day vacation in Atlantic Beach in May 1999. After his family relocated to California, he rented the Raleigh house from August 1999 to August 2000, and he sold it in March 2001. The complaint was filed in October 2001. Taken together, these contacts with North Carolina are more significant than those of the defendant in *Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989). In that case, this Court held that even though the defendant had not resided or worked in North Carolina after 1986, two years prior to the filing of the action in 1988, the substantial contacts he had with North Carolina from 1983 to 1986, along with related minor contacts through 1988, constituted continuous and systematic contacts for purposes of exercising general jurisdiction over him. *Id.* at 383-87, 386 S.E.2d at 234-37. *See also Metropolitan Life Ins. Co. v. Robertson-CECO Corp.*, 84 F.3d 560, 569-70 (1996) (“The minimum contacts inquiry is fact-intensive, and the appropriate period for evaluating a defendant’s contacts will vary in individual cases. In general jurisdiction cases, district courts should examine a defendant’s contacts with the forum state over a period that is reasonable under the circumstances—up to and including the date the suit was filed—to assess whether they satisfy the ‘continuous and systematic’ standard.”), *cert. denied*, 519 U.S. 1006, 136 L. Ed. 2d 398 (1996).

However, a finding of continuous and systematic contacts does not automatically authorize the exercise of general personal jurisdiction over a defendant. *See Fraser*, 96 N.C. App. at 386-87, 386 S.E.2d at 236-37. The exercise of jurisdiction over a defendant may nonetheless violate due process based on inconvenience to the defendant

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and/or a lack of interest of the forum state in the litigation. Other than the recognition by North Carolina of the claim for alienation of affections, nothing in the record indicates a reason for North Carolina to have an interest in the litigation. While this Court expressed an interest on the part of North Carolina in protecting the institution of marriage in *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000), that case involved a resident plaintiff whose marriage was allegedly destroyed by telephone calls and e-mails to her North Carolina resident spouse from the South Carolina defendant. In this case, neither plaintiff nor defendant is a resident of North Carolina; plaintiff's bare allegation concerning the commission of the alleged tort in this State was effectively refuted by the affidavits filed in support of defendant's motion to dismiss. Plaintiff neither alleged nor attested to the existence of witnesses or evidence within North Carolina necessary to his case. *Byham v. National Cibo House Corp.*, 265 N.C. 50, 57, 143 S.E.2d 225, 231 (1965); *Cooper*, 140 N.C. App. at 736, 537 S.E.2d at 858. Without some showing of interest on the part of North Carolina in adjudicating this dispute, the inconvenience to defendant of defending the matter here is not mitigated. Subjecting defendant to suit in North Carolina under these circumstances would not comport with due process and thus the trial court did not err in refusing to exercise general *in personam* jurisdiction over defendant.

The trial court's order dismissing plaintiff's action against defendant for lack of personal jurisdiction is affirmed.

Affirmed.

Judge LEVINSON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

Defendant engaged in sufficient minimum contacts within the State of North Carolina to subject him to personal jurisdiction consistent with due process, and to enable plaintiff to survive defendant's motion to dismiss. I respectfully dissent.

In *Cooper v. Shealy*, 140 N.C. App. 729, 537 S.E.2d 854 (2000) our Court found jurisdiction based upon sufficient contacts that satisfied due process in an action for alienation of affections where an out-of-state defendant called and emailed plaintiff's husband in North

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Carolina. The out-of-state calls were solicitations within the statutory language of the long-arm statute. *Cooper*, 140 N.C. App. at 734, 537 S.E.2d at 857; N.C.G.S. § 1-75.4 (2001). This Court noted the minimal requirements established by the federal courts, and held these contacts were sufficient to satisfy due process. *Id.* at 734-35, 537 S.E.2d at 858 (citing *Brown v. Flowers Industries, Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023, 75 L. Ed. 2d 496 (1983), and *J.E.M. Corporation v. McClellan*, 462 F. Supp. 1246 (D. Kan 1978) (exercising personal jurisdiction where defendant's only contact with the forum state was a single phone call from out-of-state)). See also, *Haizlip v. MFI of South Carolina, Inc.*, 159 N.C. App. —, — S.E.2d — (2003) (finding sufficient minimum contacts where defendant's only contacts were phone calls and mailings to North Carolina).

Defendant and the majority's opinion concedes jurisdiction under the long-arm statute, leaving the issue of minimum contacts for consideration. N.C.G.S. § 1-75.4. The due process test for minimum contacts requires inquiry into the five factors discussed in the majority's opinion. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 617, 532 S.E.2d 215, 219, *disc. review denied and appeal dismissed*, 353 N.C. 261, 546 S.E.2d 90-91 (2000) (citations omitted). The majority's opinion finds evidence to satisfy all requirements except for convenience to the parties and interest of the forum state.

The remaining factors of convenience and interest of the forum state have been termed the "fairness" factors and are viewed secondarily, after finding the existence of sufficient minimum contacts. See *Fraser v. Littlejohn*, 96 N.C. App. 377, 387, 386 S.E.2d 230, 237 (1989). The majority's opinion concludes that the two "fairness" factors outweigh the others in order to affirm the trial court.

I disagree. Although defendant now lives in California, and may be "inconvenienced" by this litigation, his substantial ongoing contacts and physical presence within North Carolina before, at, and after the time the cause of action arose mitigates against any inconvenience. "There is almost always some hardship to the party required to litigate away from home. But there is no constitutional requirement that this hardship must invariably be borne by the plaintiff whenever the defendant is a nonresident." *Byham v. House Corp.*, 265 N.C. 50, 60, 143 S.E.2d 225, 234 (1965). Although not a "resident" when the complaint was filed, defendant purposefully availed himself of the privileges of residing, raising his family, renting his house, and vacationing in North Carolina. Defendant could fairly anticipate being subject to litigation as a result of those contacts. If

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this action arose out of an alleged civil assault or battery occurring in North Carolina, there would be little doubt that North Carolina had personal jurisdiction over defendant. Allowing plaintiff to bring his claim will 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), *reh’g denied*, 312 U.S. 712, 85 L. Ed. 1143 (1941)).

As for the interest of the forum state, this Court in *Cooper* reiterated.

It is important to note that plaintiff cannot bring the claims for alienation of affections and criminal conversation in . . . (defendant’s resident state) since that state has abolished those causes of actions. (citation omitted) Therefore, North Carolina’s interest in providing a forum for plaintiff’s cause of action is especially great in light of the circumstances. Furthermore, North Carolina’s legislature and courts have repeatedly demonstrated the importance of protecting marriage. N.C. Gen. Stat. § 8-57(c) (spouses may not be compelled to testify against each other if confidential information made by one to the other would be disclosed); *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E.2d 315 (1984), *rev’d on other grounds*, 313 N.C. 313, 328 S.E.2d 288 (1985) (attorneys representing a client in a divorce proceeding may not use contingent fee contracts since they tend to promote divorce and discourage reconciliation); *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (the causes of action for alienation of affections and criminal conversation are still in existence).

Cooper, 140 N.C. App. at 735, 537 S.E.2d at 858.

North Carolina has personal jurisdiction over the defendant due to his “continuous and systematic” quantity and quality of contacts with North Carolina. The quantity and nature of the contacts, North Carolina’s interest in the litigation, and the relative inconvenience to the parties complies with due process in finding personal jurisdiction over the defendant. The nature of this tort and the perceived strength of plaintiff’s claim should not be considerations in a motion to dismiss for lack of personal jurisdiction. The trial court’s dismissal at this early stage of litigation is error. I respectfully dissent.

FARM BUREAU INS. CO. OF N.C., INC. v. BLONG

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FARM BUREAU INSURANCE COMPANY OF N.C., INC., PLAINTIFF V. MARGARET A. BLONG, ANCILLARY ADMINISTRATOR OF THE ESTATE OF MEGAN ANN BLONG, MARILYN S. GEIGER AND MICHAEL H. GEIGER, ANCILLARY ADMINISTRATORS OF THE ESTATE OF AMANDA MARIE GEIGER, BRENDA LAWLER, ADMINISTRATRIX FOR THE ESTATE OF SHANA MARISSA LAWLER, MICHAEL McGRADY, ANCILLARY ADMINISTRATOR OF THE ESTATE OF ANGELA NICOLE McGRADY, AND ANGELA AND DOUG HORNER, AND THEIR SON, MICHAEL HORNER, DEFENDANTS

No. COA02-651

(Filed 5 August 2003)

1. Insurance— motor vehicle—UIM coverage—subrogation

The trial court did not err by finding that plaintiff UIM insurer was entitled to be subrogated to the rights of the original plaintiffs in their independent dram shop settlement arising out of a drunk driving accident even though defendants allege the UIM policy at issue and the Financial Responsibility Act (Act) are silent on the issue and the stated public policy of North Carolina endeavors to make plaintiff whole in an underinsured motorist case, because: (1) plaintiff insurer, by the Act and the present policy, is subrogated to defendants' right to recover from any legally responsible party; and (2) contrary to defendants' contention that insureds will be kept hanging in limbo as they are forced to sue any and all possible persons or organizations for years before they could recover their UIM benefits, there is no entitlement or subrogation by the UIM carrier to proceeds from legally responsible parties unless payment to the insured was made when the underinsured vehicle's limits were exhausted or otherwise in accordance with the Act.

2. Costs— attorney fees—common fund—reduction of recovery

The trial court did not abuse its discretion by finding that plaintiff UIM insurer's subrogation recovery should be reduced by its proportionate share of attorney fees incurred by defendants in the prosecution of the dram shop actions, because: (1) the settlement from the dram shop lawsuits constituted a common fund for the purpose of shifting attorney fees; (2) otherwise, plaintiff will acquire its money without the accompanying costs associated with it; and (3) while defendants may have rebuffed plaintiff's efforts to take over the suit, principles of fairness still hold.

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Appeal by defendants from judgment entered 13 March 2002 by Judge Quentin Sumner in Pasquotank County Superior Court. Heard in the Court of Appeals 12 February 2003.

Baker, Jenkins & Jones, P.A., by Ronald G. Baker and Amy L. Elliott, for plaintiff appellee/cross-appellant.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by Hoyt G. Tessener and Elizabeth C. Todd for Blong, Geigers, Lawler, and Horner defendant-appellants; and C. Everett Thompson, II, for McGrady defendant appellant.

Bryce O. Thomas, Jr.; and Mark L. Killian, Amicus Curiae of the N.C. Academy of Trial Lawyers.

McCULLOUGH, Judge.

The facts surrounding this appeal stem from an automobile accident that occurred on 6 April 1999. While on vacation in Kill Devil Hills, five teenagers were traveling in a single vehicle: Megan Ann Blong, Amanda Marie Geiger, Shana Marissa Lawler, Angela Nicole McGrady, and Michael Horner. As their vehicle entered an intersection with Highway 158 at approximately 3:00 o'clock p.m., it was hit by another vehicle driven by Melissa Lynn Marvin. Ms. Marvin had been drinking since noon and ran the red light at the intersection. Of the five passengers, only Michael Horner survived. Ms. Marvin was convicted at trial of four counts of second-degree murder and one count of assault with a deadly weapon. Her conviction was affirmed by this Court in an unpublished opinion, *State v. Marvin*, 149 N.C. App. 490, 562 S.E.2d 469 (2002). Ms. Marvin remains in the custody of the Department of Corrections.

This appeal addresses the insurance settlements arising from the accident. Ms. Marvin's automobile liability insurance carrier tendered its limits of \$50,000.00 to the victims and their families almost immediately after the accident. This amount was inadequate to compensate the victims and their families. Plaintiff Farm Bureau waived any subrogation rights as to Ms. Marvin.

Subsequently, defendants filed suit against the bars that served alcohol to Ms. Marvin. As mentioned above, Ms. Marvin had been drinking the day of the accident, and her blood alcohol level was .21 approximately five hours after the accident. She had several drinks at two local bars. It was on this information that lawsuits were filed on

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behalf of the five passengers against the businesses that served Ms. Marvin. In fact, there were two “dram shop” lawsuits filed, contending that these businesses were in part responsible for the accident due to their negligence in serving alcohol to an already intoxicated person. *See* N.C. Gen. Stat. § 28A-18-1, *et seq.* (2001). One was filed by defendant Michael McGrady in United States District Court, Eastern District of North Carolina on 23 August 2000. The second was filed by the rest of defendants in the Dare County Superior Court on 12 September 2000.

Meanwhile, defendants in this case also sought further compensation from their own insurance coverage. At the time of the accident, each of the families had underinsured motorist (UIM) coverage. UIM exists to compensate the insured in the event the insured is injured by another with inadequate coverage of their own.

Of particular importance for the present appeal, Shana Lawler was insured under an automobile insurance policy issued by plaintiff Farm Bureau Ins. Co. of N.C., Inc., to her parents. This policy provided for UIM in the amount of \$100,000.00 per person/\$300,000.00 per accident. According to defendant Brenda Lawler, Administratrix for the Estate of Shana Lawler, they were forced by plaintiff to file a civil suit against Ms. Marvin to trigger their UIM coverage. Once triggered, plaintiff paid the full amount it owed under the policy (\$250,000.00): \$90,000.00 was paid to defendant Lawler and defendant Blong each; \$23,333.33 was paid to defendants Geiger, McGrady, and the Horners (collectively) each. Once plaintiff’s limits were tendered, defendant Lawler’s suit against Ms. Marvin was abandoned.

Before paying the limits on the Lawler UIM policy, however, plaintiff informed defendant Lawler that plaintiff would seek an offset of its UIM payments by any amounts recovered in the dram shop actions. The parties apparently agreed to disagree about who was entitled to what, and the payments were made and accepted without prejudice to plaintiff’s right to seek a determination of its subrogation rights. In addition, plaintiff claims that it sought to provide counsel to assist in the prosecution of the dram shop action, but was refused.

Eventually, the dram shop actions settled during court-ordered mediation for sums in excess of plaintiff’s UIM payments to defendants. Thereafter, on 9 May 2001, plaintiff brought this suit pursuant to the Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 to 1-267 (2001). The suit presented the following matter to the trial court:

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15. The Plaintiff is informed and believes that the Defendants contend that Plaintiff is not subrogated to the Defendants' rights to recover in the pending dram shop lawsuits to the extent of the payments made by Plaintiff under the Lawlers' underinsured motorist policy.

16. The Plaintiff requests that this Court declare the right of Plaintiff to be subrogated to the rights of the Defendants to recover in the pending dram shop lawsuits . . . to the extent of the payments made by Plaintiff to Defendants under the Lawler's underinsured motorist policy.

The matter was considered by Judge Quentin Sumner, and judgment was entered on 13 March 2002. The trial court held:

Based on the foregoing undisputed facts, the language in the [defendant Lawler's] insurance policy and the provisions of G.S. 20-279.21(b) (3) and (4) the Court concludes as a matter of law that the Plaintiff is subrogated to the rights of the Defendants with respect to their dram shop claims and is entitled to be reimbursed, to the extent of its payments, from the proceeds of the settlements of those claims.

In addition, the trial court found as fact:

13. Attorneys for the Defendants provided valuable services in recovering from the Dram Shops. As a result of the work of the attorneys, Plaintiff should pay its percentage of attorney's fees and expenses.

The trial court ordered that plaintiff "is entitled to be, to the extent of its payments, reimbursed from the proceeds of the settlements of those lawsuits less Plaintiff's proportionate share of attorney's fees and expenses." All parties appeal from the judgment.

Defendants assign as error the trial court's finding that plaintiff was entitled to be subrogated to the rights of the original plaintiffs in their independent dram shop settlement.

Plaintiff assigns as error the trial court's finding that the plaintiff's subrogation rights to defendants' recovery in their dram shop actions shall be reduced by plaintiff's proportionate share of attorneys' fees incurred by defendants in the prosecution of those actions.

I.

[1] Defendants contend that the trial court erred by finding for plaintiff even though the UIM policy at issue and the Financial

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Responsibility Act are silent on the issue, and the stated public policy of North Carolina endeavors to make the plaintiff whole in an underinsured motorist claim.

Defendants argue that the Financial Responsibility Act (the Act), particularly the sections dealing with uninsured and underinsured motorist coverages is silent on the present issue. N.C. Gen. Stat. §§ 20-279.1 through -279.39 (2001). We disagree.

The Act “is a remedial statute and the underlying purpose is the protection of innocent victims who have been injured by financially irresponsible motorists.” See *Haight v. Travelers/Aetna Property Casualty Corp.*, 132 N.C. App. 673, 678, 514 S.E.2d 102, 106, *disc. review denied*, 350 N.C. 831, 537 S.E.2d 824 (1999); *Sanders v. American Spirit Ins. Co.*, 135 N.C. App. 178, 181, 519 S.E.2d 323, 325 (1999). The terms of the Act are written into every North Carolina automobile liability policy, and where the terms of a policy conflict with those of the Act, the Act will prevail. See *Sanders*, 135 N.C. App. at 183, 519 S.E.2d at 326. In addition, the Act is to be liberally construed in order that its beneficial purpose is accomplished. *Id.* at 181, 519 S.E.2d at 325. This purpose is “best served when the statute is interpreted to provide the innocent victim with the *fullest possible protection*” from the negligent acts of an underinsured motorist. *Id.* at 181-82, 519 S.E.2d at 325 (citation omitted).

The Act defines an underinsured motor vehicle as

a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner’s policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2001).

The Act then states the triggering language:

Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted.

Id.

Thus, to trigger UIM coverage, the limits applicable to the underinsured vehicle must be exhausted. Exhaustion is defined by the Act as follows:

Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.

Id.

Further, to determine the amount of UIM coverage available

the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.

Id.

The Marvin vehicle was an underinsured vehicle. As stated in the facts, the “sum of the limits of liability under all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle,” specifically the Marvin policy, were indeed less than the available limits under the Lawler UIM coverage. The type of policies being referred to in (b)(4), ones providing coverage for bodily injury caused by the “ownership, maintenance or use” of the underinsured vehicle, are motor vehicle policies. *See* N.C. Gen. Stat. § 20-279.21(b)(1) and (2) (2001). Marvin’s insurer paid out its entire liability coverage, thereby exhausting her coverage. According to the Act, this being the only applicable policy, UIM coverage was “deemed to apply.” This is presumably why plaintiff paid out its UIM limits. As per the Act, the \$50,000.00 paid by Marvin’s insurer was subtracted from the Lawler UIM limit of \$300,000.00, coming to the total amount of coverage of \$250,000.00. This amount was then distributed amongst defendants.

The inquiry still remaining is how to treat the proceeds of the settlement of defendants with the dram shops. Plaintiff contends that the Act does indeed give them rights to the proceeds.

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Plaintiff's claim comes from the following provisions. The UIM portion of the Act, N.C. Gen. Stat. § 20-279.21(b)(4), makes the provisions of the uninsured portion of the Act, N.C. Gen. Stat. § 20-279.21(b)(3), specifically applicable to it. *See* N.C. Gen. Stat. § 20-279.21(b)(4). Section (b)(3) contains the following provision:

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of coverage, *the insurer making payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of that person against any person or organization legally responsible for the bodily injury for which the payment is made, including the proceeds recoverable from the assets of the insolvent insurer.*

N.C. Gen. Stat. § 20-279.21(b)(3) (2001) (emphasis added).

Defendants contend that this section of N.C. Gen. Stat. § 20-279.21(b)(3) only refers to the proceeds of the insured's action against the owner/operator of the motor vehicle involved in the collision, i.e., the suit against Marvin that was abandoned and which plaintiff waived its subrogation rights. Defendant argues that provision does not include all liability actions, including those maintained against persons wholly separate from the motor vehicle collision, i.e., the dram shops.

The meaning of this section has not been addressed by this Court. The question arose but was not answered in the case of *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 11-12, 367 S.E.2d 372, 378 (1988), *modified and remanded*, 324 N.C. 289, 378 S.E.2d 21 (1989) (noting that jurisdictions that have interpreted similarly worded statutes are split on whether this provision gives an insurer a right to subrogation in the UIM context). In that case, an insurer was claiming a right of subrogation against the negligent driver of the motor vehicle. *Id.* However, this Court focused on the phrase "subject to the terms and conditions of such coverage" from the aforementioned section. N.C. Gen. Stat. § 20-279.21(b)(3). According to the policy in effect, the insurer had waived any rights to subrogation, and the question was left unanswered. *Silvers*, 90 N.C. App. at 12-13, 367 S.E.2d at 378-79.

In the present case, the policy does not present the same impediment. In the UIM portion of the policy, subheading "Limit of Liability" provides that "[a]ny amount otherwise payable for damages

under this coverage shall be reduced by all sums paid because of the **bodily injury** or **property damage** by or on behalf of persons or organizations who may be legally responsible.” This tracks the language in (b)(3). In the General Provisions portion of the policy, sub-heading “Our Right to Recover Payment” provides that

A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:

1. Whatever is necessary to enable us to exercise our rights; and
2. Nothing after the loss to prejudice them.

However, our rights under this paragraph do not apply to:

....

2. Part C2 [UIM], against the owner or operator of an **under-insured motor vehicle** if we have been given written notice in advance of a settlement and fail to advance payment in an amount equal to the tentative settlement within 30 days following receipt of such notice[.]

The contingency in the latter provision has not been alleged, therefore no impediment from the policy exists. Further, this same provision continues:

B. If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:

1. *Hold in trust* for us the proceeds of the recovery; and
2. Reimburse us to the extent of our payment.

(Emphasis added.)

Plaintiff insurer, by the Act and the present policy, is subrogated to defendants’ right to recover from any legally responsible party.

As a rule of construction, it is fundamental that the intent of the legislature controls in determining the meaning of a statute. Legislative intent may be determined from the language of the statute, the purpose of the statute, “ ‘and the consequences which would follow [from] its construction one way or the other.’ ”

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Nonetheless, if a statute is facially clear and unambiguous, leaving no room for interpretation, the courts will enforce the statute as written.

Haight, 132 N.C. App. at 675, 514 S.E.2d at 104 (citations omitted).

The plain language of the policy and the Act appears to allow for the type of subrogation that plaintiff claims. The language from § 20-279.21(b)(3), “any person or organization legally responsible,” is very broad. By virtue of the dram shop lawsuits, defendants were seeking to make the two bars responsible, at least in part, for what happened on 6 April 1999.

We are mindful the UM/UIM statute is one that is remedial in nature. *See Williams v. Holsclaw*, 128 N.C. App. 205, 212-13, 495 S.E.2d 166, 171 (1998). However, the clear language before us compels this result. Therefore, we affirm the trial court’s judgment as it pertains to allowing plaintiff to be reimbursed to the extent of its payments.

The fears espoused by defendant that the intent of the UIM statute will be foiled and destroyed as we know it missed the mark. This case is an example of how the procedure may play out. The UIM carrier pays out what it owes its insured after judgment or settlement has been reached with the underinsured driver. If there are parties that exist that may be made “legally responsible” through proper court channels, the UIM insurer may pursue them via their subrogation rights. As it happened here, such an offer was made, but refused by the insured. As the structure of the Act and definition of exhaustion provide, a UIM carrier cannot require an insured to pursue these parties before exhaustion can occur. Recovered proceeds from legally responsible parties can only flow back to the UIM carrier after the fact. There is no entitlement or subrogation by the UIM carrier to those proceeds unless payment to the insured was made when the underinsured vehicle’s limits were exhausted, or otherwise in accordance with the Act. Money paid out by UIM insurer is to be recouped, not reduced then paid out. The fear of defendants that insureds will be kept hanging in limbo as they are forced to sue any and all possible persons or organizations for years before they could recover their UIM benefits are unfounded. Such actions on the part of UIM carriers would be in the realm of bad faith.

This assignment of error is overruled.

II.

[2] Plaintiff assigns as error the trial court's finding and order that its recovery be reduced by its proportionate share of attorneys' fees incurred by defendants in the prosecution of the dram shop actions.

Plaintiff points out that there is no statutory provision providing for such a discretionary award. Plaintiff also stresses that an offer was made to defendants by it to intervene and assist in the prosecution of the dram shop action which was rejected by defendants. Thus, plaintiff had no say in choice of counsel or compensation thereof. It was instead at the mercy of defendants' choice of counsel.

Defendants contend that the trial court was authorized to reduce the offset by a proportion of attorneys' fees by the "common-fund doctrine." See *Bailey v. State of North Carolina*, 348 N.C. 130, 159-60, 500 S.E.2d 54, 71-72 (1998), *disc. review allowed*, 351 N.C. 350, 543 S.E.2d 122 (2000); *Horner v. Chamber of Commerce*, 236 N.C. 96, 97-98, 72 S.E.2d 21, 22 (1952).

The "common-fund doctrine" is a long-standing exception to the general rule in this country that every litigant is responsible for his or her own attorney's fees. Attorney's fees are ordinarily taxable as costs only when authorized by statute. However, in *Horner*, the leading North Carolina case regarding the common-fund doctrine, this Court recognized:

[T]he rule is well established that a court of equity, or a court in the exercise of equitable jurisdiction, may in its discretion, and without statutory authorization, order an allowance for attorney fees to a litigant who at his own expense has maintained a successful suit for the preservation, protection, or increase of a common fund or of common property, or who has created at his own expense or brought into court a fund which others may share with him.

....

The primary problem faced by courts in determining whether a shifting of fees is appropriate under the common-fund doctrine is deciding whether some finite benefit flows to a determinable group of plaintiffs.

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We have found nothing in *Horner* or *Bailey* that would restrict the common-fund doctrine from being applied in the present case on account of their only being one beneficiary to the fund consisting of the settlement proceeds. In fact, this fact eases much of the determination. *See id.* at 161, 500 S.E.2d at 72 (“[T]he common-fund doctrine has been appropriately applied in cases (1) where the classes of persons benefitting from the lawsuit were small and easily identifiable, (2) where the benefits could be traced accurately, and (3) where the costs could be shifted to those benefitting with some precision.”). In the present case, defendants have created, at their own expense, a fund in which plaintiff will share.

We note that this case was, at least in part, equitable in nature. While plaintiff’s complaint asked for a determination of rights, the trial court’s order fashioned an equitable remedy. This remedy was creating what essentially is a constructive trust for the proceeds of the settlement in the amount of \$250,000.00. As per the applicable policy, such funds were to be held by the insured in trust for the insurer.

Thus, we are persuaded that the settlement from the dram shop lawsuits indeed constitutes a common fund for the purpose of shifting attorneys’ fees. Otherwise, plaintiff will acquire their money without the accompanying costs associated with it. While we realize that defendants may have rebuffed plaintiff’s efforts to take over the suit, these principles of fairness still hold. Even in light of the facts stressed by plaintiff, we believe that the trial court was within its discretion to reduce plaintiff’s recovery. *See Hoskins v. Hoskins*, 259 N.C. 704, 707, 131 S.E.2d 326, 328 (1963).

This assignment of error is overruled.

Affirmed.

Judges TYSON and CALABRIA concur.

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RIDGEFIELD PROPERTIES, L.L.C., RIDGEFIELD WOMEN'S CANCER CENTER PROPERTIES, L.L.C., CONTINENTAL TEVES, INC., ASHEVILLE ENDOCRINOLOGY PROPERTIES, L.L.C., RIDGEFIELD BUSINESS CENTER PROPERTY OWNERS ASSOCIATION, INC., GEORGE W. BEVERLY JR., HIGHWOODS REALTY LIMITED PARTNERSHIP, HIGHWOODS/FORSYTH LIMITED PARTNERSHIP AP SOUTHEAST PORTFOLIO PARTNERS, L.P., PETITIONERS V. CITY OF ASHEVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION, RESPONDENT

No. COA02-1110

(Filed 5 August 2003)

1. Cities and Towns— annexation—use test—ordinance invalid

The trial court erred by concluding that respondent city's annexation ordinance substantially complied with the "use test" of N.C.G.S. § 160A-48(c)(3) and therefore respondent's annexation ordinance is null and void, because: (1) future plans for use are irrelevant in determining whether a property may be involuntarily annexed; and (2) the proper inquiry is the actual use at the time of annexation.

2. Appeal and Error— substantial compliance for annexation—issue already resolved

Although petitioners contend the trial court erred by concluding that respondent city substantially complied with its annexation statute in combining the three pertinent lots into one tract and then counting that tract as a tract in commercial use, the merits of this argument need not be reached because the associated assignments of error are resolved by the Court of Appeals' preceding analysis reversing the trial court's classification of lots under development as commercial.

Judge McCULLOUGH dissenting.

Appeal by petitioner from judgment entered 20 February 2002 by Judge Richard L. Doughton in Superior Court, Buncombe County. Heard in the Court of Appeals 5 June 2003.

Adams, Hendon, Carson, Crow & Saenger, P.A., by S.J. Crow and Martin K. Reidinger, for petitioners-appellants.

Robert W. Oast, Jr., City Attorney and William F. Slawter, P.L.L.C., by William F. Slawter for respondent-appellee.

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[159 N.C. App. 376 (2003)]

WYNN, Judge.

This appeal arises from a determination that the City of Asheville (“Asheville”) substantially complied with the provisions of N.C. Gen. Stat. § 160A-48 (2002) in its annexation of the Ridgefield Area. On appeal, individual and corporate residents of the proposed annexed area (“the Ridgefield Parties”) challenge the involuntary annexation of their properties by assigning error to the trial court’s conclusions of law that: (1) tracts of land, which are under construction, can be classified as commercial property to meet the statutory requirement that at least sixty percent of the tracts in an area to be annexed must be used for commercial purposes at the time of annexation; and (2) that Asheville’s combination of three tracts into one tract, and its commercial classification of the combined tract, was permissible because the tracts shared a “common owner and were used for a common purpose.” After carefully reviewing the record, we reverse the trial court and hold that Asheville’s annexation ordinance does not substantially comply with Section 160A-48 for the reasons stated herein. Accordingly, we hold that Asheville’s annexation ordinance is null and void.

On 15 March 2000, Asheville adopted a resolution of intent to annex the Ridgefield Area (“the Service Plan”). After conducting a public informational hearing on the issue of annexation, Asheville officially adopted the annexation ordinance on 13 June 2000 with an effective date of 30 June 2001. On 9 August 2000, the Ridgefield Parties filed a petition for review of the annexation ordinance in Superior Court, Buncombe County, pursuant to N.C. Gen. Stat. § 160A-50. During a bench trial, held on the week of 10 December 2001, the Ridgefield Parties argued that Asheville failed to follow statutory procedures and failed to comply with the statutory mandates of N.C. Gen. Stat. §§ 160A-47 and 160A-48. After reviewing a comprehensive record of the Service Plan filed pursuant to N.C. Gen. Stat. § 160A-50(c), considering evidence, and hearing arguments from counsel, the trial court entered judgment for Asheville. On appeal, the Ridgefield Parties limit their challenge to Asheville’s failure to comply with the statutory mandates of Section 160A-48.

A. Standard of Review

Pursuant to N.C. Gen. Stat. § 160A-50, a party challenging an annexation ordinance may seek judicial review in Superior Court and, thereafter, in the Court of Appeals and Supreme Court. “Judicial review of an annexation ordinance is limited to determining whether

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the annexation proceedings substantially comply with the requirements of the applicable annexation statute.” *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 217, 447 S.E.2d 471, 473 (1994). “Absolute and literal compliance with [the annexation] statute . . . is unnecessary.” *In re New Bern*, 278 N.C. 641, 648, 180 S.E.2d 851, 856 (1971). “The party challenging the ordinance has the burden of showing error.” *Knight v. Wilmington*, 73 N.C. App. 254, 255, 326 S.E.2d 376, 377 (1985) “On appeal, the findings of fact made below are binding on this Court if supported by the evidence, even when there may be evidence to the contrary.” *Humphries v. Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980). However, “conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.” *Barnhardt*, 116 N.C. App. at 217, 447 S.E.2d at 473.

B. The Use Test

[1] By their first and second arguments, the Ridgefield Parties contend the trial court erred in finding Asheville’s annexation ordinance in substantial compliance with the “use test” of N.C. Gen. Stat. § 160A-48(c)(3). Furthermore, after appropriate adjustments are made to correct these errors, the Ridgefield Parties contend the Ridgefield Area does not qualify for annexation under the “use test,” and, therefore, the annexation ordinance is null and void. After carefully reviewing the record, we agree.

Pursuant to N.C. Gen. Stat. § 160A-48(c)(3):

- (c) Part or all of the area to be annexed must be developed for urban purposes at the time of approval of the report provided for in G.S. 160A-47 [The Service Plan]. . . . An area developed for urban purposes is defined as any area which meets any one of the following standards:

...

- (3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes

Accordingly, in order to apply this test, Asheville was required to make a determination about the “use” of each lot in the Ridgefield Area before approving its Service Plan. As of 15 March 2000,

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Asheville's Service Plan reflected a "determination that 22 of 32 lots in the Ridgefield Area, or 68.75%, were in use for one of the statutorily enumerated qualifying purposes." After a bench trial, the trial court affirmed this determination. According to the Ridgefield Parties, however, Asheville and the trial court erred by classifying certain lots as commercial, where those lots were under construction—and, therefore, not developed or "in use"—at the time the Service Plan was approved on 15 March 2000.

The facts pertaining to the construction of these lots is not in dispute. Accordingly, the Ridgefield Parties and Asheville substantially accept the trial court's findings of fact that:

17. [The Ridgefield Parties] contend that six lots within the Ridgefield Area that were designated in the Service Plan as being in commercial use were not in fact in use at the time of adoption of the Service Plan on March 15, 2000. Three of the lots [7588, 8412, and 8597] . . . had been occupied by mobile homes, a site-built home, and a tavern at or about the time that the City began to study the Ridgefield Area for annexation.
18. At or about the time of adoption of the Service Plan, the structures on the [three] properties identified above had been demolished, the site had been graded, the retaining wall constructed, building permits had been issued, and those properties were being redeveloped for combined use as a strip shopping center, which use is there now.
19. The other three properties [9962, 2253, and 2633] . . . are all located within [Ridgefield Business Center]
20. . . . On [a] February 2000 visit, [Asheville] observed activity on each of the sites identified in Finding No. 19—grading, construction equipment, partial structures—indicating that the sites were being developed for commercial uses, the only use allowed under the restrictive covenants that governed [the Ridgefield Business Center]. Petitioners' own evidence indicated that, as of March 15, 2000, construction was 28% complete with respect to the building on one of the identified lots, and 50% complete with respect to another. . . . All three buildings are currently in use for commercial purposes as professional offices.

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Based upon these detailed findings of fact, the trial court made the following conclusions of law which the Ridgefield Parties challenge:

3. (a) The three properties [7588, 8412, and 8597] had previously been used for a combination of commercial and residential purposes, and were under redevelopment as a shopping center as of March 15, 2000, when the Service Plan was adopted, and were properly classified therein as in being in commercial use.
- (b) The three properties [9962, 2253, and 2633] were under development as professional or medical offices as of March 15, 2000, when the Service Plan was adopted, and were properly classified therein as in being in commercial use.

For the Ridgefield Parties, Section 160A-48(c)(3) is quite clear in requiring that sixty percent of the annexed area “must *be developed* for urban purposes at the time of approval of the [Service Plan] report.” (emphasis added). Accordingly, the Ridgefield Parties contend it was error for the trial court to equate the act of construction with the state of development. We agree.

In *Arquilla v. City of Salisbury*, 136 N.C. App. 24, 523 S.E.2d 155 (1999), this Court invalidated Salisbury’s annexation ordinance. Salisbury attempted to classify certain lots as used for a “government purpose.” Salisbury argued, and the trial court agreed, that this classification substantially complied with the statute because the lots previously housed a government animal shelter, and, furthermore, the lots were the subject of future plans for an airport. In invalidating the ordinance, we noted that “the *use* of property determines whether it may be involuntarily annexed,” and that, based upon the statute, “[a]ctual minimum urbanization is an essential requirement of the annexation act.” *Id.* at 31, 523 S.E.2d at 161 (emphasis added). Because of its character as an essential element, we held that government statistics supporting annexation “must reflect actual urbanization, not reliance on some artificial means of making an annexation appear urbanized.” *Id.* at 32, 523 S.E.2d at 161. After responding to Salisbury’s arguments in *Arquilla*, based substantially upon past and future use, we made it eminently clear that “future plans for use are irrelevant in determining whether a property may be involuntarily annexed. Instead, the proper inquiry is the actual use at the time of annexation.” *Id.* at 36, 523 S.E.2d at 164.

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Asheville attempts to distinguish *Arquilla* by arguing that “the lots [in *Arquilla*] were not under development or in active use for any purpose.” In contrast, Asheville notes that in the case *sub judice* the lots 9962, 2253, and 2633 were actively under construction with the intent of creating commercial structures on 15 March 2000. However, in *Southern R. Co. v. Hook*, 261 N.C. 517, 135 S.E.2d 562 (1964), our Supreme Court reversed the trial court’s determination that twelve acres of land were held for an industrial use despite the fact that the property had been graded and was clearly ready and zoned for industrial use. In *Hook*, our Supreme Court held:

There is no evidence that the twelve acres of land in question were being used either directly or indirectly for industrial purposes. All of the evidence tends to show that it was not being used for any purpose. When Ideal Industries purchased the land, it was pasture and farm land; Ideal Industries graded it. It is being held for possible industrial use at some indefinite future time. It is industrially owned but not industrially used.

See also Lithium Corp. of America, Inc. v. Bessemer City, 261 N.C. 532, 135 S.E.2d 574 (1964); *Asheville Industries Inc. v. City of Asheville*, 112 N.C. App. 713, 436 S.E.2d 873 (1993).

Furthermore, Asheville’s attempt to distinguish prior case law does not relieve Asheville of its difficult burden of responding to the ordinary, clear, and unequivocal meaning of the terms “must be developed for urban purposes at the time” of the annexation Service Plan in N.C. Gen. Stat. § 160A-48(c)(3). Our Supreme Court has made it clear that “[w]ords in a statute generally must be construed in accordance with their common and ordinary meaning, unless a different meaning is apparent or clearly indicated by the context.” *State v. Hearst*, 356 N.C. 132, 137, 567 S.E.2d 124, 128 (2002). In the case *sub judice*, we cannot find a meaning for “must be developed” that equates to “under the process of development;” accordingly, we must reverse the trial court’s decision that lots 9962, 2253, and 2633, which were under construction for commercial use, were in “actual commercial use” for the purposes of Section 160A-48(c)(3).

[2] By their second argument, the Ridgefield Parties contend the trial court erred in finding that Asheville substantially complied with the annexation statute in combining lots 7588, 8412, and 8597 into one tract, and then counting that tract as a tract in commercial use. Under well settled law, when “appraising an area to be annexed[,] one of the methods which can be used to determine what is a tract is to consider

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several lots in single ownership used for a common purpose as being a single tract. These consolidated lots can then be used to determine the percentage of tracts used for urban purposes.” *Lowe v. Mebane*, 76 N.C. App. 239, 242, 332 S.E.2d 739, 742 (1985); *see also Adams-Millis Corp. v. Kernersville*, 6 N.C. App. 78, 169 S.E.2d 496 (1969). However, we need not reach the merits of this argument because the associated assignments of error are resolved by our preceding analysis reversing the trial court’s classification of lots under development as commercial. As noted, in Finding 18, the trial court found that at “the time of adoption of the Service Plan, the structures on the [lots 7588, 8412, and 8597, were] demolished, the site had been graded, . . . and those properties were being redeveloped for combined use as a strip shopping center.” Because lots can only be combined where they are “used for a common purpose,” we hold that these lots were improperly combined and erroneously classified as in commercial use where lots 7588, 8412, and 8597 were in the process of development rather than “in commercial use.” Therefore, we reverse the trial court’s order with respect to the combination and commercial classification of lots 7588, 8412 and 8597.¹

As noted, the trial court determined that Asheville’s 15 March 2000 Service Plan reflected a “determination that 22 of 32 lots in the Ridgefield Area, or 68.75%, were in use for one of the statutorily enumerated qualifying purposes.” Our review, however, has indicated that only 18 of 34² lots in the Ridgefield Area, or 52.9%, were actually in use for one of the statutorily enumerated qualifying purposes on 15 March 2000. Consequently, because the language of Section 160A-48 is free from ambiguity, and represents a legislative determination

1. In an unveiling attempt to persuade this Court to ignore the clear and ordinary import of the annexation statute, Asheville argues:

In a broad sense, [the Ridgefield Parties] First and Second arguments ask the Court to elevate form over substance, and to be blind to facts that are obvious to everyone else. The evidence in this case clearly indicates that the Ridgefield Area as a whole was rapidly developing . . . many buildings were under simultaneous construction, and other underutilized properties . . . were being bought out and redeveloped into more intensive uses. Nowhere is there evidence that the area was not under rapid development.

Although it might be prudent for the General Assembly to revisit the issue of annexation, this Court is not “blind to the facts,” rather this Court is duty bound to the rule of law.

2. We held, *supra*, that three of these lots, 9962, 2253, and 2633, were improperly classified as commercial. Furthermore, we held that three of these lots, 7588, 8412 and 8597, were erroneously combined into one lot and classified as commercial. Accordingly, the total number of lots was improperly calculated by Asheville as 32, rather than 34.

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which demands strict compliance with the use test, we must hold that Asheville's annexation ordinance is null and void.³ "It is not for us to determine the wisdom of this determination. The meaning of the law is plain and we must apply it as written." *Food Town Stores, Inc. v. Salisbury*, 300 N.C. 21, 36, 265 S.E.2d 123, 132 (1980).

Reversed and Remanded.

Judge ELMORE concurs.

Judge McCULLOUGH dissents.

McCULLOUGH, Judge, dissenting.

The majority opinion invalidates an annexation ordinance adopted 13 June 2000 and affirmed by the superior court. In finding the annexation ordinance null and void, the majority bases its decision on the conclusion that construction activity does not constitute commercial activity. From this conclusion I must respectfully dissent.

Petitioners contend that certain tracts do not meet the "use test" mandated by N.C. Gen. Stat. § 160A-48(c)(3), which provides:

(c) Part or all of the area to be annexed must be developed for urban purposes at the time of approval of the report provided for in G.S. 160A-47 [The Service Plan]. . . . An area developed for urban purposes is defined as any area which meets any one of the following standards:

* * * *

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes[.]

It is undisputed that, at the time the ordinance was adopted, significant construction activity was underway and the properties were being developed as a strip mall and offices in accordance with the zoning ordinance and certain restrictive covenants. The majority con-

3. In their brief, the Ridgfield Parties also assign error to the trial court's legal conclusion that N.C. Gen. Stat. § 148(d) allows a city to count the area of road rights-of-ways in order to meet the statutory requirement that non-urban areas do not exceed twenty-five percent of the total area to be annexed. However, we expressly decline to address this assignment of error as the annexation ordinance is invalidated on narrower grounds.

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cludes that the “use test” cannot be met until construction is over and the tenants are in place. I believe this view is too restrictive.

It is true that vacant land zoned for a future purpose, but with no activity underway cannot be considered for annexation based on the zoning alone. *See R. R. v. Hook*, 261 N.C. 517, 520, 135 S.E.2d 562, 565 (1964). I believe construction activity itself is in fact a commercial use. The common definitions of “commercial” or “commerce” include “[t]he exchange of goods and services,” *Black’s Law Dictionary* (7th ed. 1999) or “[t]he buying and selling of goods[.]” *American Heritage Dictionary* 280 (3d ed. 1997).

When a developer hires a construction company to erect shopping centers and/or offices, such would certainly seem to qualify as a “commercial” use of the property. The construction company is purchasing building materials and using them to erect the structures by the application of skilled labor in the hopes of making a profit on the transaction. Such activity is “commercial” by its very nature.

I do not believe that the City of Asheville was required to wait until the stores and offices were completed before adopting the annexation ordinance. Accordingly, I would affirm the decision of the superior court upholding the annexation.



HENRY G. LEWIS, PLAINTIFF-APPELLEE V. CHARLES K. EDWARDS,
DEFENDANT-APPELLANT

No. COA02-1104

(Filed 5 August 2003)

1. Partnerships— dissolution—valuation

The trial court in an action arising out of a partnership dissolution properly considered all the pertinent evidence regarding the parties’ adjustments to the 1 May 1996 valuation of the parties’ partnership.

2. Partnerships— dissolution—reimbursement—partnership debt

The trial court did not err in an action arising out of a partnership dissolution by determining that plaintiff was entitled to reimbursement of the \$72,085.09 plaintiff paid after 1 May 1996 to retire partnership debt.

LEWIS v. EDWARDS

[159 N.C. App. 384 (2003)]

3. Partnerships— dissolution—reimbursement—storage fee—law of case

The trial court erred in an action arising out of a partnership dissolution by awarding plaintiff \$862.00 as reimbursement for the storage fee plaintiff incurred to house partnership files and this amount must be subtracted from plaintiff's one-half interest in the partnership, because the decision by the Court of Appeals on this issue in a prior appeal is the law of the case.

4. Partnerships— dissolution—payment of interest

The trial court did not err in an action arising out of a partnership dissolution by calculating interest from 1 May 1996 even on amounts plaintiff did not pay to retire partnership debt until 1998.

Appeal by defendant from supplemental judgment entered 10 May 2002 by Judge Gary E. Trawick in Robeson County Superior Court. Heard in the Court of Appeals 20 May 2003.

Parker Poe Adams & Bernstein L.L.P., by Catharine B. Arrowood and R. Bruce Thompson II, for plaintiff appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper, PLLC, by Jim Wade Goodman, for defendant appellant.

McCULLOUGH, Judge.

This case concerns the dissolution of a partnership and the subsequent accounting that occurred to value the partnership and to award each party his share of the business. A previous appeal involving this case and these parties was decided by a panel of this Court in November 2001. See *Lewis v. Edwards*, 147 N.C. App. 39, 554 S.E.2d 17 (2001) (*Lewis I*). The pertinent facts are as follows: In 1978, plaintiff Henry G. Lewis and defendant Charles K. Edwards formed Edwards & Lewis, CPAs, a professional certified public accounting practice in Lumberton, North Carolina (the partnership). The parties were the sole partners and carried on the business without incident until 1995. In December 1995, plaintiff decided he no longer wanted to be an active participant in the business, and he and defendant agreed that defendant would be the managing partner and would earn an additional \$2,000.00 per week for his added responsibilities.

Over the next several months, plaintiff and defendant became increasingly dissatisfied with their working relationship. By letter

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dated 8 April 1996, plaintiff informed defendant of his “intent to dissolve the Accounting Partnership effective May 1, 1996.” Plaintiff also asked defendant to tell him whether he intended to continue operating as a sole practitioner, whether he intended to remain in the same office space, and whether he intended to continue using the equipment and other assets of the partnership. By letter dated 26 April 1996, defendant informed plaintiff that he would “continue in public accountancy as a sole practitioner” in the same office space.

One year after the parties dissolved their partnership, defendant had not formally accounted to plaintiff for plaintiff’s share of the partnership assets. On 9 May 1997, plaintiff filed a complaint requesting that defendant be required to account for the partnership’s property and assets he retained, pursuant to the partnership agreement and N.C. Gen. Stat. §§ 59-52 and 59-68(a) (2001). Plaintiff also requested that he recover his share of the partnership’s property and earnings, as well as interest, including prejudgment interest. Defendant answered, denied the allegations of plaintiff’s complaint, and asserted a counterclaim for plaintiff’s alleged breach of partnership duties, alleged breach of fiduciary duty, violation of the Trade Secrets Protection Act, and unfair and deceptive trade practices. Thereafter, on 1 June 1998, plaintiff filed an amended complaint and sought damages for defendant’s alleged negligence and breach of partnership duties, alleged breach of fiduciary duty, and unfair and deceptive trade practices. Defendant filed an amended counterclaim and answer specifically pleading unclean hands as a defense to plaintiff’s allegations concerning his breach of fiduciary duty. Defendant also counterclaimed for a declaratory judgment on plaintiff’s claim for a judicial accounting, unjust enrichment, and interference with prospective economic advantage.

On 21 May 1998, plaintiff moved for partial summary judgment on the issue of his entitlement to a judicial accounting and on defendant’s claims for an alleged violation of the Trade Secrets Protection Act and unfair and deceptive trade practices. He requested that all other issues be stayed pending the outcome of the accounting. On 7 July 1998, the trial court granted plaintiff’s motion for summary judgment on defendant’s two aforementioned claims and determined that plaintiff was entitled to summary judgment on his claim for a judicial accounting. The remainder of the claims were stayed pending the completion of the accounting.

On 20 July 1998, the trial court conducted a hearing on the accounting. Due to the complexity of the case, the trial court

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appointed a referee to determine the value of the partnership as of 1 May 1996, the date of dissolution. Thereafter, on 9 and 10 November 1998, Mr. Robert N. Pulliam, a referee, conducted a hearing and determined the partnership had a value of \$176,070.52 on 1 May 1996. Although both parties objected to Mr. Pulliam's report and his valuation of the partnership, the trial court adopted Mr. Pulliam's report and methodology of valuation. On 11 May 1999, the trial court entered an order stating that (1) plaintiff was entitled to receive \$88,035.26, plus interest, as his one-half share of the partnership; and (2) each party reserved its rights in further proceedings to present evidence of further appropriate adjustments to their one-half interests in the partnership.

In September 1999, both plaintiff and defendant moved for partial summary judgment. The trial court dismissed plaintiff's unfair and deceptive trade practices claim and otherwise denied the parties' motions. On 1, 2 and 3 November 1999, the trial court conducted a bench trial on the remaining issues. The trial court concluded that (1) both parties breached their fiduciary and partnership duties, but were not entitled to relief on those claims; and (2) defendant failed to show entitlement to relief for interference with prospective economic advantage or unjust enrichment. The trial court also concluded that the value of the partnership was \$176,070.52 on 1 May 1996, but an upward adjustment of \$18,000.00 was required because defendant collected that sum from a client. The trial court indicated that plaintiff was entitled to one-half of the total value of the partnership (\$97,035.26), plus 8% interest from 1 May 1996. The trial court also determined that defendant owed \$55,425.00 in rent to his landlord and owed plaintiff \$27,712.50 for the principal amount of his one-half interest in the principal sum defendant owed in rent, plus interest.

Defendant appealed to this Court. *See Lewis I*, 147 N.C. App. 39, 554 S.E.2d 17. The *Lewis I* Court affirmed a portion of the trial court's order, but reversed and remanded on the following issues: (1) "the trial court's finding of fact and conclusion of law concerning rent on the 5th Street building must be modified to reflect the rent Defendant owes through 9 July 1999[;]" (2) "the trial court's finding of fact and conclusion of law concerning money collected from JFJ should be adjusted on remand to conform to the evidence[;]" and (3) "this case must be remanded for consideration of each party's proposed adjustments so as to conform to Judge Floyd's order that each party have the right to 'prove that he has paid from his individual funds partner-

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ship liabilities existing at May 1, 1996, or that the [P]artnership has, since May 1, 1996, paid for the benefit of either party any amount that was not a liability of the Partnership . . . or that any other adjustments are appropriate.’ ” *Id.* at 49-51, 554 S.E.2d at 23-24.

On remand, the trial court conducted a two-day hearing in February 2002 and had access to the entire record. The trial court requested additional briefing and proposed supplemental judgments from the parties, which were submitted in March of 2002. In a supplemental judgment filed 10 May 2002, the trial court (1) increased the partnership value based on post-1 May 1996 payments made by both plaintiff and defendant which eliminated partnership debt; (2) accepted defendant’s arguments regarding the client fee he collected, changed the figure from \$18,000.00 to \$13,317.65, and added it to the partnership value; and (3) analyzed post-1 May 1996 adjustments that affected each party’s individual partnership interest and made ten adjustments to plaintiff’s one-half interest. Based on the adjustments, the trial court concluded that defendant owed plaintiff \$123,246.99, plus 8% interest from 1 May 1996 as his one-half interest in the partnership. Defendant was also required to pay plaintiff \$26,825.00 for the principal amount of his one-half interest in the principal sum defendant owed in rent, plus interest. Defendant again appealed.

On appeal, defendant argues the trial court erred by (I) failing to take into account all the pertinent evidence regarding the parties’ adjustments to the 1 May 1996 valuation of the partnership and the parties’ interests therein; (II) requiring him to reimburse plaintiff for the \$72,085.09 he paid to retire partnership debt; (III) awarding plaintiff \$862.00 in storage fees; and (IV) awarding interest from 1 May 1996 on amounts that plaintiff did not pay until after that date. For the reasons stated herein, we affirm in part, and reverse and remand in part.

“The applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings.” *In re Foreclosure of C and M Investments*, 123 N.C. App. 52, 54, 472 S.E.2d 341, 342 (1996), *aff’d in part, rev’d in part and remanded*, 346 N.C. 127, 484 S.E.2d 546 (1997). *See also American Continental Ins. Co. v. Phico Ins. Co.*, 132 N.C. App. 430, 433, 512 S.E.2d 490, 492, *aff’d*, 351 N.C. 45, 519 S.E.2d 525 (1999). The trial court fulfills its duty if it finds and states the ultimate facts and resolves the ultimate issues presented by the appeal.

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See Williams v. Insurance Co., 288 N.C. 338, 342-43, 218 S.E.2d 368, 371-72 (1975). With these principles in mind, we turn to the case before us.

[1] Defendant first contends the trial court failed to consider all the pertinent evidence regarding the parties' adjustments to the 1 May 1996 valuation of the partnership and the parties' interests therein. We do not agree.

The record clearly indicates that the trial court conducted a hearing in February 2002 and requested additional briefing and proposed supplemental judgments from the parties, which were tendered in March 2002. The trial court took the materials, considered them for almost two additional months, and rendered its supplemental judgment on 10 May 2002. The trial court stated that it conducted the hearing "and considered the arguments and briefs of the parties as well as the original trial record and trial exhibits, in light of the directives of the Court of Appeals." The supplemental judgment contained ten findings of fact and seven conclusions of law. Based on the foregoing, we believe the trial court considered all the pertinent evidence regarding the parties' adjustments to the 1 May 1996 valuation of the partnership. We therefore turn to the three specific errors alleged by defendant on this appeal.

(1) \$72,085.09 Reimbursement to Plaintiff

[2] Defendant argues the trial court did not properly take into account the \$72,085.09 he paid toward partnership loans because the effect of the trial court's ruling was to make him personally and unilaterally liable for reimbursing plaintiff for amounts he paid to retire partnership debt. We do not agree.

Mr. Pulliam's report indicated that the partnership was worth \$176,070.52 as of 1 May 1996, the date of dissolution. In reaching this figure, Mr. Pulliam recognized that the partnership owed debts to BB&T in the amount of \$150,000.00 and to First Union in the amount of \$8,170.36. Although plaintiff paid \$72,085.09 out of his personal funds to help retire the partnership debts after 1 May 1996, he was not entitled to recover that full amount because the partnership made payments from partnership funds on plaintiff's behalf after 1 May 1996. The trial court adjusted the value of plaintiff's interest for (1) payments made after 1 May 1996 by the partnership from partnership funds on behalf of plaintiff; and (2) payments plaintiff made after 1 May 1996 from his personal funds on behalf of the partnership. After

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taking both these considerations into account, the value of the partnership was \$320,240.70. The value of the partnership was increased by another \$13,317.65, which represents the fee defendant collected from JFJ, a client. Thus, the total value of the partnership on 1 May 1996 was \$333,558.35, and plaintiff was entitled to one-half that amount, \$166,779.17, before other adjustments were calculated.

The trial court further determined that defendant owed plaintiff \$862.00 in storage fees and \$190.00 for money that plaintiff paid to a chiropractor on defendant's behalf. The trial court also determined that the partnership made payments totaling \$42,425.36 on behalf of plaintiff.

Had defendant paid plaintiff his one-half interest on 1 May 1996, defendant would have taken the partnership subject to the debts to BB&T and First Union. Because plaintiff paid half of that debt and defendant took the partnership debt-free, plaintiff is entitled to have that amount added back into his one-half of the partnership value as of 1 May 1996. We reject defendant's contention that he received no credit for the fact that he paid the same amount to retire partnership debt as did plaintiff. Defendant's "credit" existed because he took the partnership debt-free. The trial court could also have made its calculation by adding back the entire amount of the debt paid by both plaintiff and defendant to the full value calculated by Mr. Pulliam and then dividing it equally. We believe the trial court correctly determined that plaintiff was entitled to reimbursement of the \$72,085.09 he paid after 1 May 1996 to retire partnership debt. This assignment of error is therefore overruled.

(2) \$862.00 Storage Fee

[3] Defendant next contends the trial court erred in awarding plaintiff \$862.00 as reimbursement for the storage fee he incurred to house partnership files. Specifically, defendant argues he was never given access to the files once plaintiff had them and that the trial court's initial order and judgment rejected plaintiff's claim for the storage fee. With regard to this point, the trial court stated:

34. Lewis' contention that he should be reimbursed by the Accounting Partnership for storage charges for files and records kept at Durham Lewis Furniture, Inc. is a transparent attempt by Lewis to require Edwards to reimburse Lewis when the money Lewis actually paid was paid to a corporation of which Lewis was an officer. Edwards was storing Accounting Partnership files at

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his mother's home and had never charged the Accounting Partnership for such storage. Until the date of dissolution, Lewis had never indicated that the Accounting Partnership would be expected to pay storage fees to Durham Lewis Furniture, Inc. The Court further finds that there was no arms-length transaction to bind the Accounting Partnership to pay for storage of the files and records at Durham Lewis Furniture, Inc., and that Edwards was never consulted nor agreed to have the Accounting Partnership pay for such storage.

The supplemental judgment adopted this finding of fact by reference.

Defendant maintains that the issue of the storage fee was resolved in his favor, rather than plaintiff's, and that this is now the law of the case.

Where an appellate court decides questions and remands a case for further proceedings, its decisions on those questions become the law of the case, both in the subsequent proceedings in the trial court and upon a later appeal, where the same facts and the same questions of law are involved.

Sloan v. Miller Building Corp., 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997). An appellate court's decision in a prior appeal governs the issues in the subsequent proceedings unless the evidence presented in the subsequent proceedings was materially different than that considered initially by the appellate court. *Cutts v. Casey*, 278 N.C. 390, 412, 180 S.E.2d 297, 308 (1971).

On the appeal, the same reasoning operates to deny plaintiff recovery of the storage fee, even though the files were moved from Durham Lewis Furniture, Inc. to Nobles Storage. We also note that the *Lewis I* Court did not discuss the issue of the storage fee, which leads us to believe that this is the law of the case. We believe the trial court erred in treating this sum as a "reimbursement for amounts paid by Henry Lewis" in the supplemental judgment. Accordingly, upon remand, the trial court must subtract this amount from plaintiff's one-half interest in the partnership.

(3) Calculation of Interest from 1 May 1996

[4] Lastly, defendant argues that the trial court erred in calculating interest from 1 May 1996 on amounts plaintiff did not pay until 1998. Specifically, defendant notes that plaintiff's one-half share of the part-

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nership (\$123,246.99) included both the \$862.00 storage fee and the \$72,085.09 amount plaintiff paid to retire the partnership debt, and that interest on these two amounts was to accrue beginning 1 May 1996. However, defendant points out that plaintiff did not pay his one-half share of the partnership debt until 30 December 1998 and the storage fee did not begin to accrue until June 1998. Thus, he maintains these amounts were improperly included in computing the value of the partnership as of 1 May 1996, and plaintiff should not have received interest until he made the payments. See *Appelbe v. Appelbe*, 76 N.C. App. 391, 394, 333 S.E.2d 312, 313 (1985).

Plaintiff, on the other hand, maintains that *Lewis I* affirmed the trial court's method of computing interest based on N.C. Gen. Stat. § 59-72 (2001) and that this is now the law of the case. Plaintiff argues that defendant continued the partnership without liquidating its affairs, thereby permitting interest to accrue from the date of dissolution. Plaintiff notes that defendant took the partnership debt-free as of 1 May 1996 and that payments made on behalf of the partnership increased its date of dissolution value. These factors warrant calculation of interest beginning 1 May 1996. Plaintiff also points out that Mr. Pulliam calculated interest as of 1 May 1996, and this methodology was adopted by the trial court. Defendant conceded during oral argument before the *Lewis I* Court that "he does not quarrel with the value of the Partnership as determined by Pulliam." *Lewis I*, 147 N.C. App. at 43 n.3, 554 S.E.2d at 20 n.3. Lastly, plaintiff notes that his one-half interest was valued at \$164,620.35 before the trial court made adjustments for payments he made on behalf of the partnership and payments the partnership made on his behalf after 1 May 1996. Thus, he contends an objective post-1 May 1996 adjustment requires that interest accrue from 1 May 1996, even though he made payments after that date because the payments affected the total value of the partnership assets defendant received. We believe plaintiff's arguments are persuasive, and we hold that interest should be calculated from 1 May 1996.

Upon careful review of the record and the arguments presented by the parties, we conclude the trial court considered all the evidence presented by the parties, but made an error warranting reversal and remand. The supplemental judgment of the trial court is hereby affirmed as to the \$72,085.09 reimbursement to plaintiff, reversed and remanded as to the \$862.00 storage fee added to plaintiff's one-half interest in the partnership, and affirmed as to the calculation of interest from 1 May 1996.

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Affirmed in part; reversed and remanded in part.

Judges WYNN and ELMORE concur.

ALICE MONROE NELSON, LINDA L. MONROE, R.B. MONROE KELLY, JULIAN D. KELLY JR., MOYNA MONROE, ALICE BLANC MONROE NELSON AND HUSBAND L. KENT NELSON, BUNROTHA LIMITED PARTNERSHIP, KATALANTA CORP., KATHRYN B. HEDRICKS, SUSAN B. INMAN, SAMUEL N. EVINS, JR., WALTER P. EVINS, MARGARET EARLY, MARY PRESSLEY, SIDNEY McCARTY, III, MILDRED JOHNSON, JOHN HENRY CHEATHAM, TRUSTEE OF THE LIELA BARNES CHEATHAM NORTH CAROLINA RESIDENCE TRUST, PLAINTIFFS V. TOWN OF HIGHLANDS, A MUNICIPAL CORPORATION, DEFENDANT

MICHAEL WENTZ, PLAINTIFF V. TOWN OF HIGHLANDS, A MUNICIPAL CORPORATION, DEFENDANT

No. COA02-619

(Filed 5 August 2003)

Cities and Towns—condemnation—injunctive relief

The trial court did not err by granting defendant town's motion to dismiss plaintiff property owners' actions seeking injunctive relief to prevent defendant from proceeding with the condemnation of plaintiffs' property because plaintiffs had the opportunity to present all affirmative defenses argued in their action for a permanent injunction during the condemnation proceedings, giving plaintiffs an adequate remedy at law.

Judge HUDSON dissenting.

Appeal by plaintiffs from orders entered 15 January 2002 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 13 February 2003.

Adams Hendon Carson Crow & Saenger, P.A., by Martin Reidinger and Cynthia Roelle, for plaintiffs-appellants.

Coward Hicks & Siler, P.A., by William H. Coward for defendant-appellee.

STEELMAN, Judge.

Plaintiffs own property along Bowery Road within the corporate limits of defendant Town of Highlands (“defendant” or “Highlands”).

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On 31 August 2001, defendant issued to plaintiffs notices of condemnation pursuant to N.C. Gen. Stat. § 40A-40 (2001) indicating its intent to initiate actions to condemn portions of plaintiffs' property for the purpose of widening and paving Bowery Road. These notices stated that defendant intended to file its action for condemnation on 1 October 2001, and specifically informed plaintiffs of their "right to commence an action . . . for injunctive relief."

Plaintiffs Alice Monroe Nelson, *et al.*, filed an action on 28 September 2001 (01 CVS 472) seeking to enjoin defendant from condemning plaintiffs' property. Plaintiff Michael Wentz filed an action on 2 October 2001 (01 CVS 475) also seeking to enjoin defendant's condemnation of his property. Plaintiffs' complaints essentially contained nine claims: (1) notices of condemnation given plaintiffs by defendant were deficient under N.C. Gen. Stat. § 40A-40; (2) the Highlands governing board did not properly authorize the undertaking of the condemnation; (3) the property to be condemned was registered with the National Register of Historic Places, and a reasonable alternative for condemnation existed which did not include the historic property; (4) the condemnation was not for a proper public purpose; (5) the condemnation was to be financed unlawfully through a private escrow account containing funds solicited by defendant based on misrepresentations that contributions were tax deductible; (6) the terms and conditions of the escrow had not been met to allow the condemnation to proceed; (7) the escrow further was unlawful in that it provided for the payment of attorneys' fees for private parties out of funds contributed to defendant as a municipal corporation; (8) the condemnation proceeding constituted an abuse of discretion by defendant; and (9) defendant failed to perform required archeological and environmental investigations and impact studies of the property to be condemned. Plaintiffs prayed that defendant "be permanently enjoined from condemning or otherwise altering the property of the [p]laintiffs."

On 4 October 2001, defendant filed twelve separate condemnation actions against plaintiffs and other owners of property along Bowery Road.

In December 2001, the two actions against defendant seeking injunctive relief were heard as a single matter by the Macon County Superior Court. On 15 January 2002, the trial court granted defendant's motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001) for failure to state a claim upon which relief may be granted.

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Plaintiffs appeal the trial court's granting of defendant's motion to dismiss.

The issue presented in the instant case is whether plaintiffs have a right under N.C. Gen. Stat. Chapter 40A to institute an action for injunctive relief to prevent defendant from proceeding with the condemnation of their property.

On appeal from a grant of a motion to dismiss, this Court must determine "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). An action may be dismissed for failure to state a claim if no law supports the claim, if sufficient facts to state a good claim are absent, or if a fact is asserted that defeats the claim. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

It is established law in North Carolina that an injunction is an equitable remedy and where "there is a full, complete, and adequate remedy at law, the equitable remedy of injunction will not lie." *Pelham Realty Corp. v. Bd. of Transp.*, 303 N.C. 424, 432, 279 S.E.2d 826, 831 (1981). N.C. Gen. Stat. § 40A-42 provides in part that "[u]nless an action for injunctive relief has been initiated, title to the property specified in the [condemnation] complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41." N.C. Gen. Stat. § 40A-42(a)(1) (2001). In condemnation actions commenced under N.C. Gen. Stat. § 40A-42(a), the condemnor is required to provide notice to landowners of its intent to initiate an action to condemn the property 30 days prior to filing the condemnation complaint. N.C. Gen. Stat. § 40A-40(a)-(b). "The notice shall contain a plain language summary of the owner's rights, including . . . [t]he right to commence an action for injunctive relief." N.C. Gen. Stat. § 40A-40(b)(4).

In *Yandle v. Mecklenburg County*, 85 N.C. App. 382, 355 S.E.2d 216, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 91 (1987), the Town of Matthews ("Matthews") certified a petition for voluntary annexation of five parcels of land owned by the Yandles on 8 October 1984. *Id.* at 384, 355 S.E.2d at 217. On 6 November 1984, after authorization by the Mecklenburg County Board of Commissioners, the County Manager mailed notices of the County's intent to condemn eight parcels of land, two of which were owned by the Yandles and were

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part of the petition for annexation. *Id.* at 384, 355 S.E.2d at 218. On 5 December 1984, the Yandles filed a civil action seeking a temporary restraining order, preliminary injunction and permanent injunction to prevent the County from condemning their land. *Id.* Two days later, on 7 December 1984, the County authorized the institution of condemnation proceedings against the Yandles' property and also sought a temporary restraining order, preliminary injunction and permanent injunction to prohibit Matthews from annexing the Yandle property. *Id.* at 385, 355 S.E.2d at 218.

On 31 December 1984, the trial court preliminarily enjoined the County from taking further steps to condemn the Yandles' property and preliminarily enjoined Matthews from further action on annexation of the Yandles' property. *Id.* On 21 July 1986, the case was tried without a jury to determine which party had the right to proceed in its actions on the Yandles' property. *Id.* The trial court concluded that because Matthews "took the first mandatory public procedural step" by approving the Yandles' petition for voluntary annexation, Matthews could proceed with its annexation while the County was prohibited from further action to condemn the same property. *Id.* at 386, 355 S.E.2d at 219.

On appeal by the County, this Court considered the injunctive order entered in December 1984 as to the condemnation action. Relying on *Centre Development Co. v. County of Wilson*, 44 N.C. App. 469, 261 S.E.2d 275, *disc. review denied and appeal dismissed*, 299 N.C. 735, 267 S.E.2d 660 (1980), the Court in *Yandle* stated that landowners could not seek to enjoin a county from condemning their land in a court of equity if the owners had an adequate remedy at law. *Id.* at 389-90, 355 S.E.2d at 221. This Court noted that N.C. Gen. Stat. § 40A-1 "provides that the provisions of Chapter 40A shall be the 'exclusive condemnation procedures to be used in this State by . . . all local public condemnors,'" and that N.C. Gen. Stat. § 40A-45 gives landowners the opportunity to assert affirmative defenses in an answer to the condemnation complaint. *Id.* at 390, 355 S.E.2d at 221. Because N.C. Gen. Stat. Chapter 40A provided the Yandles an opportunity to raise their pending annexation action, which sought to prevent the County from condemning their land, in an answer to the County's condemnation complaint, the *Yandle* Court held they were afforded an adequate remedy at law by the statute and, therefore, were not entitled to injunctive relief. *Id.*

In *Tradewinds Campground v. Town of Atlantic Beach*, 90 N.C. App. 601, 369 S.E.2d 365, *appeal dismissed and disc. review denied*,

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323 N.C. 180, 373 S.E.2d 126 (1988), the plaintiff received a notice on 13 July 1987 that the Town of Atlantic Beach (“Town”) intended to condemn its property. *Id.* at 601, 369 S.E.2d at 365. On 17 August 1987, the Town filed its complaint in the condemnation action. *Id.* Before it answered the complaint, the plaintiff filed an action for injunctive relief to prevent the condemnation. *Id.* On 14 December 1987, plaintiff filed an answer to the Town’s condemnation complaint asserting the same defenses claimed in its action for injunctive relief. *Id.* at 603, 369 S.E.2d at 366. The trial court granted the Town’s motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) (2001) on the grounds that the relief sought could be raised as an affirmative defense in an answer to the Town’s condemnation action. *Id.* at 601, 369 S.E.2d at 365.

On appeal to this Court, the *Tradewinds* plaintiff argued that N.C. Gen. Stat. § 40A-42(a), *supra*, granted “it a statutory right to bring an action for injunctive relief to bar the condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant.” *Id.* at 602, 369 S.E.2d at 365. This Court found that plaintiff had an adequate remedy at law under N.C. Gen. Stat. § 40A-45, which provides that a property owner whose land has been taken by the condemnor may file an answer to the condemnor’s complaint that includes “ ‘affirmative defenses or matters as are pertinent to the action. . . .’ ” *Id.* at 602-03, 369 S.E.2d at 366 (*quoting* N.C. Gen. Stat. § 40A-45). Citing *Yandle*, the *Tradewinds* Court held that the filing of an answer to the Town’s complaint for condemnation gave the plaintiff an adequate remedy at law and that the plaintiff was not entitled to injunctive relief. *Id.* at 603, 369 S.E.2d at 366.

We have reviewed plaintiffs’ substantive claims asserted in the complaints and find that each of these can be adequately addressed as affirmative defenses to the condemnation actions instituted by defendant. We recognize that the language of N.C. Gen. Stat. § 40A-42 provides some avenue of injunctive relief by limiting the right of immediate possession by the condemnor when “an action for injunctive relief has been initiated.” N.C. Gen. Stat. § 40A-42(a)(1). We also acknowledge that N.C. Gen. Stat. § 40A-42(f) states that “[t]he provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor.” However, we do not read the language of the statute as expanding the rights of landowners to seek injunctive relief in condemnation proceedings where an adequate remedy at law exists. There is no evidence that the General Assembly intended to overrule our well established case law

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regarding the availability of equitable relief. The language of the statute merely protects the right of landowners to seek “any remedy of injunction *available* to the owner or the condemnor.” N.C. Gen. Stat. § 40A-42(f) (emphasis added). Thus, the statute does not abrogate the remedy of injunction where there is no adequate remedy at law.

Absent evidence of an intent by the General Assembly to expand the right to seek equitable relief in condemnation proceedings, we hold that the statute’s references to “injunctive relief” refer solely to instances where there is no adequate remedy at law. While *Yandle* and *Tradewinds* relied upon *Centre Development*, which was decided by this Court prior to the enactment of N.C. Gen. Stat. Chapter 40A, we do not believe the new statute was intended to provide additional equitable remedies in condemnation proceedings. Accordingly, *Yandle* and *Tradewinds* are controlling and constrain this right where the property owners are deemed to have an adequate remedy at law through the condemnation proceeding.

We are bound by this Court’s previous decisions under the principle of *stare decisis*. *Reid v. Town of Madison*, 145 N.C. App. 146, 550 S.E.2d 826, *disc. review allowed*, 354 N.C. 365, 556 S.E.2d 576 (2001), *review improvidently allowed*, 355 N.C. 276, 559 S.E.2d 786 (2002). While “the doctrine of *stare decisis* is inapplicable where case law conflicts with a pertinent statutory provision to the contrary,” *Webb v. McKeel*, 144 N.C. App. 381, 384, 551 S.E.2d 440, 442, *disc. review denied*, 354 N.C. 371, 557 S.E.2d 537 (2001), *stare decisis* will operate where the previous decision expressly considered the seemingly contrary statute, as this Court did in *Yandle* and *Tradewinds*.

Like the landowners in *Yandle*, plaintiffs in the instant case filed an action for injunctive relief prior to the condemnor’s filing of its condemnation action. Asserting their statutory right under N.C. Gen. Stat. § 40A-42(a)(1), plaintiffs requested a permanent injunction against defendant’s condemnation of their property. The trial court’s order granted defendant’s motion to dismiss under Rule 12(b)(6) without prejudice to plaintiffs’ raising the same defenses in the condemnation actions filed by defendant. Plaintiffs had the opportunity to present all affirmative defenses argued in their action for a permanent injunction during the condemnation proceedings, giving plaintiffs an adequate remedy at law. Judicial economy counsels against litigating the same issues in an injunctive relief setting and in a con-

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demnation proceeding. Because we are bound by the *Yandle* and *Tradewinds* decisions, we hold that plaintiffs were not entitled to injunctive relief and their actions were properly dismissed.

AFFIRMED.

Judge MCGEE concurs.

Judge HUDSON dissents.

HUDSON, Judge, dissenting.

Because I disagree with the application of the principle of *stare decisis* here, I respectfully dissent. The cases relied upon by the appellee and discussed in the majority opinion as binding include *Yandle v. Mecklenburg County*, 85 N.C. App. 382, 355 S.E.2d 382 (1987), and *Tradewinds Campground, Inc. v. Town of Atlantic Beach*, 90 N.C. App. 601, 369 S.E.2d 365 (1988). The Court in *Tradewinds* relied entirely on *Yandle*, which in turn relied primarily on *Centre Development Co. v. County of Wilson*, 44 N.C. App. 469, 261 S.E.2d 275 (1980), on the issue of whether the landowner may pursue injunctive relief. Because the statute upon which *Centre Development* relied was repealed the year following the decision, and the relevant subsection here was not mentioned in either *Yandle* or *Tradewinds*, I do not believe we are bound to follow those decisions.

In *Centre Development*, the issue before the Court was whether the landowner should have been permitted to pursue a claim for injunctive relief under the statutory provisions that existed at that time. The provisions that the Court held set forth an “adequate remedy at law” were found in Chapter 160A, Article 11, specifically N.C.G.S. § § 160A-246 and 160A-255, neither of which mentioned injunctions at all. All of Article 11 of N.C.G.S. § 160A was repealed by the General Assembly the following year and replaced with Chapter 40A. These revisions to the statutes on eminent domain refer specifically to the landowner’s right to pursue injunctive relief. For example, N.C.G.S. § § 40A-28(g) and 40A-42(f), which set forth the procedures, plainly state that “[t]he provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor.” None of the cases relied upon by the majority mentions this section. It appears, therefore, that the General Assembly, in revising this chapter of the statutes, clearly intended to preserve the rights of all parties to pursue injunctive relief.

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Further, in *Yandle*, the plaintiff's claim was not dismissed upon a Rule 12(b)(6) motion. Rather, the appeal followed a full trial on the merits. Here, the plaintiffs' allegations in their complaint are sufficient to set forth a claim for injunctive relief, and, consistent with the revised statute, I would reverse and remand for further proceedings.



MARK STEPHEN LAMOND, PLAINTIFF V. EILEEN PATRICIA MAHONEY, DEFENDANT

No. COA02-379

(Filed 5 August 2003)

1. Child Support, Custody, and Visitation— visitation—temporary order

The trial court did not err in a parental visitation case by ruling that a 25 July 2001 order was a temporary order with respect to visitation and by applying a best interests of the child standard rather than requiring that plaintiff father demonstrate a change of circumstances, because: (1) a review of the order revealed that the trial court believed that additional gradually increasing visitation was necessary before the court could specify permanent visitation provisions; (2) when a court decides the issue of permanent visitation for the first time, the standard is the child's best interest; and (3) the changed circumstances standard urged by defendant is not relevant unless a permanent order exists.

2. Child Support, Custody, and Visitation— visitation—burden of proof

The trial court in a parental visitation case did not improperly shift the burden of proof from plaintiff father to defendant mother because when a trial court is applying the best interests standard, no party has the burden of proof.

3. Child Support, Custody, and Visitation— visitation—sufficiency of findings of fact

The trial court's findings of fact in a parental visitation case were insufficient to support the conclusions of law or the decretal portion of the order amending visitation, because: (1) while the evidence may justify the significant extension of regular, summer, and holiday visitation, the mere fact that plaintiff father's prior visits had been productive does not show why the trial

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court believed much more substantial visitation was appropriate at this time; (2) there are no findings specifying the facts the court believed justified the order's provisions for physical, telephonic, and electronic visual visitation; and (3) the Court of Appeals has no basis for determining whether the court abused its discretion regarding the decision to eliminate any role of the maternal grandparents in visitation or whether the decision is supported by the evidence.

Appeal by defendant from order entered 7 September 2001 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 10 February 2003.

Casstevens, Hanner, Gunter & Riopel, P.A., by Mark D.N. Riopel, for plaintiff-appellee.

Dozier, Miller, Pollard & Murphy, L.L.P., by Timothy H. Graham, for defendant-appellant.

GEER, Judge.

This appeal presents primarily two issues: (1) whether the district court applied the appropriate standard in reaching its decision on visitation; and (2) whether that order is supported by sufficient findings of fact. Although we hold that the district court did employ the correct standard, we do not believe that the court's very limited findings of fact are sufficient to permit appellate review and, therefore, must reverse and remand for further findings.

The parties, who were never married, are the parents of seven-year-old Liam Killian Mahoney. Plaintiff Mark Lamond filed this action 16 April 1998 seeking visitation. Defendant Eileen Mahoney filed an answer and counterclaim seeking custody and child support. Ms. Mahoney subsequently filed a motion for a psychological examination of Mr. Lamond. On 4 February 1999, Judge David S. Cayer entered an order requiring both parties to undergo psychological evaluations. He requested that the evaluation of Mr. Lamond include an assessment of the appropriateness of visitation and recommendations of how visitation should ultimately be structured. Judge Cayer found that Mr. Lamond "should not have visitation with the minor child until the evaluation has been conducted."

On 8 February 2000, Judge Rickye McKoy-Mitchell entered an order granting legal and physical custody of Liam to Ms. Mahoney.

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With respect to visitation, Judge McKoy-Mitchell ordered that Mr. Lamond have supervised visitation once a month with the matter to be reviewed six months from the date of Mr. Lamond's first visit. As a result of this order, from March 2000 through September 2000, Mr. Lamond visited Liam once a month for two to four hours each visit.

Following a trial on 18 October 2000, Judge McKoy-Mitchell entered an order on 25 July 2001 entitled "Order Regarding Permanent Child Custody, Visitation, and Child Support." The order awarded permanent custody to Ms. Mahoney. In addressing visitation, Judge McKoy-Mitchell found that Mr. Lamond needed to continue to develop a bond with the minor child because of his recent introduction to the child, the limited number of hours that he had spent with the child, and the extended period of time between visits. The court therefore directed that Mr. Lamond should have supervised visitation with Liam through February 2001. For visitation after February 2001, the court stated:

Upon completion of the February 2001 visits and assuming successful progress with the visits, the Court anticipates that Plaintiff will be allowed unsupervised visits with the minor child for an approximate period of three months, followed by a review hearing of said visitation. However, before unsupervised visits are allowed, the attorneys and the undersigned will have a conference to discuss the progress of the visits and the appropriateness of unsupervised visits. The Court will then decide the method of visits.

The court's order also provided that Mr. Lamond would have "reasonable telephone access to the minor child."

The review hearing required by Judge McKoy-Mitchell was scheduled for 15 August 2001 before Judge Regan A. Miller. On 3 August 2001, Mr. Lamond filed a pleading entitled "Motion for Judicial Assistance," seeking a variety of relief, including extended unsupervised visitation, access to Liam's school and medical records, more detailed provisions for telephone visitation, and the right to correspond through regular and electronic mail.

After a hearing conducted on 15 and 16 August 2001, Judge Miller entered, on 7 September 2001, an Order Amending Visitation. Ms. Mahoney appeals from this order.

This appeal involves a challenge to visitation provisions only. Our Supreme Court has held that because "[v]isitation privileges are but a

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lesser degree of custody,” we must apply the same principles to visitation orders that apply to custody determinations. *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978). When reviewing a child custody order, we are bound by the trial court’s findings of fact so long as those findings are supported by competent evidence. *Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 805 (2000). “The trial court is required to find the specific ultimate facts to support the judgment, and the facts found must be sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.” *Buckingham v. Buckingham*, 134 N.C. App. 82, 88-89, 516 S.E.2d 869, 874, *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999).

I

[1] In her first two assignments of error, Ms. Mahoney argues that Judge Miller erred in ruling that the 25 July 2001 order was a temporary order. Appellant contends that the trial court should have considered the July 2001 order to be a permanent order and required Mr. Lamond to show a substantial change of circumstances pursuant to N.C. Gen. Stat. § 50-13.7(a) (2001). We disagree.

While Judge McKoy-Mitchell’s July 2001 order was entitled “Order Regarding Permanent Child Custody, Visitation, and Child Support,” it is apparent from the terms of that order that she did not intend for the visitation portions of the order to be “permanent.” In any event, a trial court’s designation of an order as “temporary” or as “permanent” is not binding on this Court. *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000).

This Court has addressed the question whether a custody order is temporary or permanent when determining if an appeal from the order is interlocutory. Generally, a party is not entitled to appeal from a temporary custody order. In that context, this Court has held that a temporary or interlocutory custody order “is one that does not determine the issues, but directs some further proceeding preliminary to a final decree.” *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). In *Dunlap*, the Court found a May 1985 custody order to be temporary because it provided for further proceedings to occur in August 1985. In *Brewer*, this Court set forth two tests: an order is temporary if either (1) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (2) the order does not determine all issues. *Brewer*, 139 N.C. App.

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at 228, 533 S.E.2d at 546 (holding that a year between hearings is too long “in a case where there are no unresolved issues”).

Here, a review of the order reveals that Judge McKoy-Mitchell believed that additional, gradually increasing visitation was necessary before the court could specify permanent visitation provisions. The order speaks only of what the court “anticipates” will occur “assuming successful progress with the visits[.]” Judge McKoy-Mitchell’s order then expressly provides for further proceedings, including a conference to discuss the appropriateness of unsupervised visits and a review hearing to occur after a three-month period of unsupervised visits. The order further indicates that the court would, at a later date, decide on the method of unsupervised visits to occur during the three-month period. The order contains no provisions governing visitation after the anticipated three months of unsupervised visitation. Because of the outstanding issues and the order’s specification that a further review hearing would be held in a period of time reasonably brief under the circumstances, we hold that the 25 July 2001 order was not a permanent order with respect to visitation.

When, as here, a court decides the issue of permanent visitation for the first time, “[t]he standard by which the court is guided . . . is the child’s best interest.” *Kerns v. Southern*, 100 N.C. App. 664, 666, 397 S.E.2d 651, 652 (1990). *See also* N.C. Gen. Stat. § 50.13.2(b) (2001) (“Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child.”). The “changed circumstances” standard urged by defendant is not relevant unless a permanent order exists: “The rule established by section 50-13.7(a) and developed within our case law requires a showing of changed circumstances only where an order for permanent custody already exists.” *Regan v. Smith*, 131 N.C. App. 851, 853, 509 S.E.2d 452, 454-55 (1998).

Because the trial court correctly determined that the 25 July 2001 order was a temporary order with respect to visitation, it also properly applied a “best interests of the child” standard rather than requiring that Mr. Lamond demonstrate a change of circumstances. We overrule these assignments of error.

II

[2] In her next assignment of error, Ms. Mahoney contends that the trial court improperly shifted the burden of proof from plaintiff to

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her. We reject this argument because when a trial court is applying the “best interests” standard, no party has the burden of proof.

In *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998), this Court held that when a trial court is determining custody, “there is no burden of proof on either party on the ‘best interest’ question.” Instead, the parties have the obligation to present whatever evidence they believe is pertinent in deciding the best interests of the child. The trial court bears the responsibility of “requiring production of any evidence that may be competent and relevant on the issue. The ‘best interest’ question is thus more inquisitorial in nature than adversarial.” *Id.*

Our review of the transcript shows that Judge Miller properly followed this approach and did not place the burden of proof on either party. When considering requests that he considered generally reasonable on their face, Judge Miller gave Ms. Mahoney an opportunity to present evidence otherwise. Judge Miller stated:

Well, I don't see that there's any need for evidence on the issues . . . on [plaintiff's] part on A, B, it looks like C or D. . . . Well, actually I don't see any problems with any of these where you need to present any evidence on it. . . . [T]hese are simply requests for things that the Court would normally put in an order that both parents have . . . equal access to this type of information. Is there any particular reason why that shouldn't happen in this case?

By addressing this question to defendant, the court did not shift any burden because there was no burden to shift. Instead, his request to Ms. Mahoney represents an appropriate attempt to ensure that he had all the information necessary to decide what was in the best interests of the child.

III

[3] Third, Ms. Mahoney argues that the findings of fact of the district court are not sufficient to support the conclusions of law or the decratal portion of the order amending visitation. We agree.

Judge Miller significantly extended the visitation of Mr. Lamond with his son without making findings specifically related to those extensions. When the findings of fact relating to jurisdiction and the

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prior history of the case are omitted, Judge Miller's order is supported by only four findings of fact:

7. Father complied with the requirements of this Court's Order regarding visitation. His visits with his son have been productive and appropriate.

8. During his most recent unsupervised visits with his son, Father has taken the child to the house that he rents in Tega Cay, South Carolina.

9. The parties have difficulty communicating with each other and have had no direct contact with each other since the filing of this lawsuit.

. . . .

11. The following provisions regarding Father's visitation with his son are merited in this matter and in the best interests of the minor child.

Finding of fact 11, as a mere conclusory recitation of the standard, cannot support the order. *Dixon v. Dixon*, 67 N.C. App. 73, 77, 312 S.E.2d 669, 672 (1984) (custody orders are "routinely vacated" when findings of fact consist of conclusory statements regarding the child's best interests).

In contrast to the limited findings of fact, the trial court entered a very detailed visitation decree. The court ordered that Mr. Lamond be allowed to visit two weekends a month for approximately eight hours each on Saturday and Sunday for the first two visits, followed by overnight visits from Saturday morning through 6:00 p.m. on Sunday for all other visits. In addition, the court provided for two-weeks of visitation each summer and a week's visitation during the Christmas holidays at locations of Mr. Lamond's choosing. These provisions represent a substantial increase in visitation over the prior temporary order. Under the order, these visits "shall not be facilitated by or involve Mother's parents." The order also includes detailed requirements regarding telephonic and "electronic visual" visitation.

While our review of the record indicates that there may be evidence to support this decree, the trial court's sparse findings of fact do not. At most, the court found that the father has complied with prior visitation orders; that visits have been productive; that he took his son on a trip to South Carolina (although the order does

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not specify the relevance of that fact); and that the parties have difficulty communicating. These findings are not, standing alone, sufficient to support the extension of physical, telephonic, and electronic visitation.

Although the “trial judge is not required to find *all* the facts shown by the evidence[.]” *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) (emphasis original), the judge must find at least enough “*material* facts to support the judgment.” *Green v. Green*, 54 N.C. App. 571, 575, 284 S.E.2d 171, 174 (1981) (emphasis original). Any questions raised by relevant evidence that “bear directly on the best interests of the child” must be resolved by the trial judge. *Id.* Given the detailed nature of the decretal portion of the order below, it appears that the trial court implicitly resolved the issues raised by the evidence, but that resolution is not reflected in the findings of fact. This Court cannot, therefore, determine the basis upon which the trial court reached the decision that it did.

Thus, while the evidence may justify the significant extension of regular, summer, and holiday visitation, we cannot tell from the mere fact that Mr. Lamond’s prior visits had been productive why the trial court believed much more substantial visitation to be appropriate at this time. For example, when Mr. Lamond was asked if he believed Liam was ready to spend half of the summer with him, Mr. Lamond responded “at this point, no.” Yet, the findings of fact do not contain any explanation as to why the trial court believed, in the face of this testimony, that summer vacation visitation was in the best interests of Liam. Without findings specifying the facts that the trial court believed justified the order’s provisions for physical, telephonic, and electronic visual visitation, we are unable to determine with any confidence whether the order is supported by evidence and whether Judge Miller properly applied the “best interests” standard.

We recognize that the trial court must have broad discretion to resolve visitation issues because the trial judge “has the opportunity to see and hear the parties and the witnesses” *Hill v. Newman*, 131 N.C. App. 793, 798, 509 S.E.2d 226, 230 (1998) (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)). Further, “a trial court’s decision should not be reversed on a whim simply because the appellate court believes, based upon its reading of the cold record, that the trial court erred; rather, a trial court should only be reversed if the dissatisfied party demonstrates that the trial court committed a manifest abuse of discretion.” *Id.* at 798-99, 509 S.E.2d at 230. Nevertheless, without findings of fact to explain, for example,

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the trial court's reasoning in eliminating any role of the maternal grandparents in visitation, this Court has no basis for determining whether the court abused its discretion or whether the decision is supported by the evidence. See *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E.2d 26, 29 (1977) ("Without such findings and conclusions, it cannot be determined whether or not the judge correctly found the facts or applied the law thereto.").

Because we must remand this case for further findings of fact, we do not address whether the order is supported by the evidence. We recognize that Liam is now seven years old and some of the concerns raised by Ms. Mahoney, such as the appropriateness of e-mail communications, may no longer be relevant. We leave it to the trial court's discretion to decide whether to hear additional evidence prior to making new findings of fact.

Reversed and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

DARYL DENSON, PLAINTIFF v. RICHMOND COUNTY, DEFENDANT

No. COA02-672

(Filed 5 August 2003)

Cities and Towns—health and dental benefits—former deputy sheriff—disability retirement—authority of board of county commissioners and county manager

A de novo review revealed that the trial court erred by entering judgment in favor of plaintiff former deputy sheriff who is on disability retirement on his claim against defendant county for continuation of health and dental benefits and by denying defendant county's motion for judgment notwithstanding the verdict, because: (1) plaintiff failed to present evidence of a valid and binding contract for the claimed insurance benefits formally entered by the board of county commissioners acting in its corporate capacity; and (2) plaintiff failed to show that the county manager had the authority to enter into such a contract.

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Appeal by defendant from judgment entered 13 November 2001 and an order entered 8 January 2002 by Judge Larry G. Ford in Richmond County Superior Court. Heard in the Court of Appeals 13 March 2003.

Robert S. Pleasant, for plaintiff-appellee.

Womble Carlyle Sandridge and Rice, PLLC, by Tyrus V. Dahl, Jr. and Alison R. Bost, for defendant-appellant.

STEELMAN, Judge.

Plaintiff Daryl Denson (“plaintiff”) was a deputy sheriff for Richmond County (“County” or “defendant”) from 1986 to 1994. On 5 November 1993, plaintiff was directing traffic as part of his duties when he was struck by a drunk driver and severely injured. At the time of his injury, defendant provided plaintiff with health insurance coverage as an incident of his employment.

Plaintiff’s injuries prevented him from returning to active duty as a deputy sheriff. He was not offered another position with the County Sheriff’s Department, but he discussed with County Manager Richard Tillis (“Tillis”) other available employment with the County. After learning that none of the County’s available positions offered compensation comparable to that he had received as a deputy sheriff, plaintiff applied for disability benefits. He received a determination from the North Carolina Local Government Employees Retirement System that he was eligible for disability retirement benefits.

Before deciding to retire, plaintiff discussed with County employees and individual County Commissioners whether the County would continue providing health and dental insurance coverage after his retirement. Plaintiff met with Tillis and asked whether his health and dental insurance with the County would continue if he accepted disability retirement. As a result of his discussion with Tillis, plaintiff understood that he would continue to receive health insurance through the County after his retirement.

Plaintiff also discussed with Jimmy Maske, Bill McQuage and Herbert Diggs, all County Commissioners, whether he would continue to receive health insurance if he accepted disability retirement benefits. None of the Commissioners told plaintiff he would continue receiving health insurance, but “every one of them did say that they would do whatever deemed necessary to take care of it.” These discussions occurred in the community or at the Commissioners’ private

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places of business, not during a meeting of the Board of County Commissioners.

Plaintiff also asked Sara Kirk, payroll clerk for the County Finance Office, if his health and dental insurance would continue if he accepted disability retirement benefits, and Kirk responded affirmatively. Plaintiff testified that these discussions played an important role in his decision to retire and to accept disability retirement benefits rather than taking a different job with the County.

After plaintiff retired, the County paid his health insurance premiums from June 1994 until February 1997, while he also received disability retirement benefits. In July 1996, plaintiff executed a settlement and release of his workers' compensation claim against the County. The County had a practice of continuing to provide health insurance coverage for employees after retirement if they had pending workers' compensation claims but terminated coverage when their claims were resolved.

Plaintiff's attorney, Kelly Williams ("Williams"), received a letter dated 3 February 1997 from County attorney John T. Page, Jr. ("Page"), which informed Williams that Page had "instructed the [C]ounty officials they can no longer pay medical or dental benefits for [plaintiff]. His medical and dental benefits under [C]ounty policies will terminate on the 28th day of February, 1997." Plaintiff testified that this was the first indication that his health insurance coverage would terminate.

Plaintiff also received a letter dated 3 February 1997 from Jimmy Quick ("Quick"), County Human Resources Officer, stating that the County would no longer pay his medical and dental insurance premiums. This letter recited the County personnel policy providing "both individual hospitalization and dental insurance to all employees occupying budgeted positions established full time." The letter further stated that since plaintiff no longer occupied a budgeted position with the County and the County had not paid medical and dental insurance premiums for other employees who were unable to return to work, he was no longer eligible for the benefit.

After receiving the letters regarding the termination of his health insurance coverage, plaintiff filed a complaint against defendant. Plaintiff's amended complaint sought the following relief: (1) recovery of \$7,044.00, the difference between his salary and his workers' compensation benefits, which he contended defendant had agreed to pay him; (2) continuation of health and dental insur-

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ance benefits based upon an agreement with defendant; (3) payment of holiday pay; and (4) injunctive relief. On 8 March 1999, Judge Michael E. Helms granted summary judgment for defendant as to plaintiff's claim for \$7,044.00 but denied the motion as to the remaining claims.

Judge Larry G. Ford presided over a jury trial on the claims of continuation of health and dental insurance benefits and holiday pay. The jury found in favor of plaintiff on the health and dental insurance benefits issue and in favor of defendant on the holiday pay issue. The trial court denied defendant's motions for a directed verdict at the close of plaintiff's evidence and at the close of all evidence and denied defendant's motion for judgment notwithstanding the verdict.

Defendant asserts two assignments of error: (1) the trial court erred by entering judgment in favor of plaintiff on the claim for health and dental insurance benefits; and (2) the trial court erred by denying defendant's motion for judgment notwithstanding the verdict on the issue of health and dental insurance benefits.

Our standard of review of the denial of a motion for directed verdict and of the denial of a motion for judgment notwithstanding the verdict are identical. *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993) ("the same standard should be used in the determination of the sufficiency of the evidence with regard to both motions").

The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict [or a motion for directed verdict] is whether upon examination of all the evidence in the light most favorable to the non-moving party, and that party being given the benefit of every reasonable inference drawn therefrom and resolving all conflicts of any evidence in favor of the non-movant, the evidence is sufficient to be submitted to the jury.

Branch v. Highrock Realty, 151 N.C. App. 244, 249-50, 565 S.E.2d 248, 252 (2002), *disc. review denied*, 356 N.C. 667, 576 S.E.2d 330 (2003) (quoting *Fulk v. Piedmont Music Center*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)). We apply *de novo* review to both a trial court's denial of a motion for directed verdict and denial of a motion for judgment notwithstanding the verdict. See *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999) ("questions concerning the

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sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict present an issue of law”). A motion for either directed verdict or judgment notwithstanding the verdict “ ‘should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim.’ ” *Id.* at 250, 565 S.E.2d at 252 (quoting *Norman Owen Trucking Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998)).

At trial, plaintiff asserted that by virtue of an agreement with defendant, he was entitled to receive health and dental insurance benefits until he becomes eligible for medicare benefits. It is important to note that this claim was tried and submitted to the jury solely upon the theory of an express contract between plaintiff and the County. It was not tried upon a theory of estoppel, quasi-contract or any other equitable theory. The trial court charged the jury as follows on the health and dental insurance benefits issue:

The burden of proof on this issue is on Daryl Denson, the plaintiff, to satisfy you by the greater weight of the evidence that the County of Richmond did contract to provide health insurance benefits coverage as part of his retirement.

A contract is a promise or a set of promises which the law will enforce. A contract is an agreement to do or not to do a particular thing.

N.C. Gen. Stat. § 153A-92 provides that “the board of [county] commissioners shall fix or approve the schedule of pay, expense allowances, and other compensation of all county officers and employees. . . .” N.C. Gen. Stat. § 153A-92(a) (2001) (emphasis added). “A county may purchase life insurance or health insurance or both for the benefit of all or any class of county officers and employees as part of their compensation.” N.C. Gen. Stat. § 153A-92(d). A county has the power to enter into contracts. N.C. Gen. Stat. § 153A-11.

“[I]n order to make a valid and binding contract[,] the board of commissioners must act in its corporate capacity in a meeting duly held as prescribed by law.” *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 301-02, 34 S.E.2d 430, 436 (1945) (citations omitted); see also *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), *disc. review denied*, 316 N.C. 553, 344 S.E.2d 7 (1986). A member of the board of county commissioners cannot contractually bind the county when

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she acts "individually, informally, and separately." *Iredell County Board of Education v. Dickson*, 235 N.C. 359, 362, 70 S.E.2d 14, 18 (1952); see also *Davenport v. Pitt County Drainage Dist.*, 220 N.C. 237, 17 S.E.2d 1 (1941), *O'Neal v. Wake County*, 196 N.C. 184, 145 S.E. 28 (1928). An individual commissioner acting in her official capacity may make a contract binding on the county if so authorized by a formal action of the entire board. *Iredell, supra*; *London v. Board of Comm'rs*, 193 N.C. 100, 136 S.E. 356 (1927), *appeal after remand*, 195 N.C. 10, 141 S.E. 284 (1928).

We must therefore determine whether there is more than a scintilla of evidence that an agreement with plaintiff was made, authorized, or approved by the Board of County Commissioners, or that an official policy was adopted by the Board in its corporate capacity and applicable to all County employees at the time of plaintiff's retirement.

There is no evidence in the record of any written contract between plaintiff and defendant obligating defendant to provide health and dental insurance benefits to plaintiff until he becomes eligible for medicare. However, plaintiff points out there is evidence in the record that plaintiff had several conversations with individual County Commissioners and County employees concerning the continuation of health and dental insurance. These conversations included discussions with, among others, three individual County Commissioners and the County Manager.

Taken in a light most favorable to plaintiff, there is evidence that plaintiff had conversations with three individual County Commissioners who each assured plaintiff they would do whatever was needed to take care of the issue of plaintiff's health and dental benefits. However, there is no evidence that the full Board of County Commissioners ever took action on these assurances to continue plaintiff's health and dental insurance in order to make, adopt, or approve such an agreement, as would be required to turn these assurances by individual Commissioners into an agreement by the County to provide continuing health and dental insurance. *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 300-01, 34 S.E.2d 430, 435 (1945) ("[I]n order to make a valid and binding contract the board of commissioners must act in its corporate capacity in a meeting duly held as prescribed by law.")

Nevertheless, taken in a light most favorable to plaintiff there is more than a scintilla of evidence that the County Manager made

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assurances to plaintiff that his health and dental benefits would continue. Further, there is also evidence in the record that plaintiff did, in fact, continue to be provided health and dental insurance for an additional thirty-one months.

Thus, the key inquiry is whether the County Manager possessed the authority to bind the County to continue provision of plaintiff's health and dental insurance. There is no evidence in the record of any formal action by the Board of Commissioners delegating such authority to the County Manager. Therefore, we must determine whether a County Manager's powers under N.C. Gen. Stat. § 153A-82 allow the County Manager to bind the County in such a way without such express delegation by the Board of County Commissioners.

N.C.G.S. § 153A-82 provides:

The manager is the chief administrator of county government. He is responsible to the board of commissioners for the administration of all departments of county government under the board's general control and has the following powers and duties:

- (1) He shall appoint with the approval of the board of commissioners and suspend or remove all county officers, employees, and agents except those who are elected by the people or whose appointment is otherwise provided for by law. The board may by resolution permit the manager to appoint officers, employees, and agents without first securing the board's approval. The manager shall make his appointments, suspensions, and removals in accordance with any general personnel rules, regulations, policies, or ordinances that the board may adopt. The board may require the manager to report each suspension or removal to the board at the board's first regular meeting following the suspension or removal; and, if the board has permitted the manager to make appointments without board approval, the board may require the manager to report each appointment to the board at the board's first regular meeting following the appointment.
- (2) He shall direct and supervise the administration of all county offices, departments, boards, commissions and agencies under the general control of the board of commissioners, subject to the general direction and control of the board.

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- (4) He shall see that the orders, ordinances, resolutions, and regulations of the board of commissioners are faithfully executed within the county.

...

- (8) He shall perform any other duties that may be required or authorized by the board of commissioners.

These statutory provisions do not grant the County Manager the authority to enter into an agreement for the continuation of health and dental insurance without authorization from the Board of Commissioners.

Moreover, at the time plaintiff retired, the Board had not adopted a policy which applied to all County employees or to employees who retired on disability like plaintiff. The County's personnel policy, adopted March 1991, provides that law enforcement officers retiring early are entitled to a special separation allowance if they have completed 30 years of creditable service or if they have reached the age of 55 and have completed at least 5 years of creditable service. Further, the County policy sets out the procedures for determining when employees may be separated for disabilities that prevent them from performing their job duties. The County's personnel policy does not contain any provisions for health insurance coverage for employees retiring on disability.

The retirement benefits handbook for law enforcement officers published by the State discusses how retirement benefits are calculated and mentions "accident and sickness insurance" as a possible benefit under a separate insurance plan for death benefits and temporary disability. The handbook does not address health insurance coverage after disability retirement.

Because plaintiff failed to present evidence of a valid and binding contract for the claimed insurance benefits formally entered by the Board of County Commissioners acting in its corporate capacity or that the County Manager had the authority to enter into such a contract, we hold the trial court erred in entering judgment for plaintiff and denying defendant's motion for judgment notwithstanding the verdict. We remand this matter to the trial court for entry of judgment in favor of defendant.

REVERSED AND REMANDED.

Judges McGEE and HUDSON concur.

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MEDFORD L. AUSTIN, ADMINISTRATOR OF THE ESTATE OF MEDFORD JEROME AUSTIN, DECEASED, PLAINTIFF V. RICHARD AARON MIDGETT AND THEODORE STOCKTON MIDGETT, JR., DEFENDANTS

No. COA02-1127

(Filed 5 August 2003)

1. Insurance— Automobile—UIM coverage—prejudgment interest

Although the trial court erred in a wrongful death action seeking the recovery of UIM benefits by failing to award prejudgment interest on the judgment against defendant insurance company when the pertinent policy did not expressly exclude prejudgment interest from compensatory damages as it did with costs in the supplementary payments provision, defendant's liability limit is \$75,000, the \$100,000 UIM policy limit less a credit for \$25,000 paid by the tortfeasor's liability carrier to plaintiff, and it cannot be required to pay prejudgment interest that would raise the amount it paid above its \$75,000 liability limit.

2. Insurance— Automobile—UIM coverage—credit for workers' compensation payments

The trial court erred in a wrongful death action seeking the recovery of UIM benefits by denying defendant insurance company a credit for workers' compensation payments received by plaintiff, and defendant is only required to pay its share of the loss without exhausting payment of its UIM coverage before another insurance company would be required to pay on its coverage, because: (1) the current version of N.C.G.S. § 20-279.21(e) requires the UIM carrier to pay both the amount of the workers' compensation lien as determined under N.C.G.S. § 97-10.2 and the loss uncompensated by workers' compensation payments; (2) the current version of N.C.G.S. § 20-279.21(e) preserves a credit to the UIM carrier for workers' compensation benefits which are not subject to an employer's lien; and (3) defendant's policy contained the language that it would pay only its share of the loss which is the proportion that its limit of liability bears to the total of all applicable limits.

Appeals by plaintiff and unnamed defendant Integon National Insurance Company from judgment entered 21 March 2002 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 14 May 2003.

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Johnny S. Gaskins, for plaintiff-appellee.

Bennett, Guthrie & Dean, P.L.L.C., by Rodney A. Guthrie and Stanley P. Dean, for unnamed defendant-appellant, Integon National Insurance Company.

STEELMAN, Judge.

The deceased, Medford Jerome Austin (“Austin”), died on 25 October 2000 when he was struck by a vehicle operated by defendant Richard Aaron Midgett (“Midgett”). At the time of the accident, Austin was acting in the course and scope of his employment with the North Carolina Department of Transportation (“DOT”).

Midgett had liability insurance coverage with North Carolina Farm Bureau Mutual Insurance Company (“Farm Bureau”) which was in effect on the date of the accident. The limit of liability insurance coverage under this policy was \$50,000.00 per person.

At the time of the accident, Austin had underinsured motorist (“UIM”) insurance coverage with Integon National Insurance Company (“Integon”), an unnamed defendant in this matter. Austin’s Integon policy had been renewed on 14 June 2000 and was effective through 14 December 2000. Austin also had UIM insurance coverage through a policy issued to his father, Medford L. Austin, by State Farm Mutual Automobile Insurance Company (“State Farm”), another unnamed defendant in this matter. Each UIM policy had a liability limit of \$100,000.00.

Plaintiff filed a complaint seeking compensation for Austin’s wrongful death against Midgett and his father, defendant Theodore Stockton Midgett, Jr., owner of the vehicle Midgett was driving. The parties entered a stipulation of facts to allow the trial court to determine the amount available to plaintiff under the UIM policies. The parties stipulated that Midgett’s negligence was the sole proximate cause of the accident and resulting death of Austin. They further stipulated that the damages sustained by plaintiff exceeded \$200,000.00.

Austin’s employer, DOT, paid plaintiff workers’ compensation benefits in the amount of \$100,278.98. DOT asserted a lien in this amount against any third party recovery, including any proceeds plaintiff received from the UIM policies. Plaintiff filed a motion to extinguish this lien pursuant to N.C. Gen. Stat. § 97-10.2(j) (2001). Plaintiff and DOT subsequently entered a compromise agreement

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under which DOT would accept \$33,426.00 in full and complete satisfaction of its workers' compensation lien.

Pursuant to the agreement between plaintiff and DOT and its authority under N.C. Gen. Stat. § 97-10.2(j), the trial court entered an order reducing the workers' compensation lien to \$33,426.00 in full and complete satisfaction of the original lien of \$100,278.98. However, this order was to be "null and void if the plaintiff, for any reason, does not receive a total recovery of two hundred thousand dollars (\$200,000.00) from both the liability insurance carrier and the underinsured motorist carriers. . . ."

Plaintiff accepted payment from Farm Bureau in the amount of \$50,000.00, thereby exhausting the amount of recovery under Midgett's liability insurance coverage. The sum tendered by Farm Bureau was credited against any amounts paid to plaintiff by Integon and State Farm. Integon and State Farm agreed to divide the credit equally, with each receiving a credit of \$25,000.00.

Plaintiff and both unnamed defendants, Integon and State Farm, filed motions for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (2001) on the issue of the credits due to Integon and State Farm for liability insurance benefits and workers' compensation payments received by plaintiff. The trial court granted plaintiff's summary judgment motion and denied both motions for summary judgment of Integon and State Farm.

The trial court entered a \$200,000.00 judgment against Integon and State Farm and ordered each to pay plaintiff \$75,000.00, which represented the \$100,000.00 liability limit in each policy less the \$25,000.00 credit each carrier received for Farm Bureau's liability insurance payment to plaintiff. The order denied both UIM carriers a credit for any portion of the workers' compensation paid to plaintiff by DOT.

Plaintiff requested the trial court award prejudgment interest on the judgment against Integon and State Farm. The trial court awarded only post-judgment interest to plaintiff.

Plaintiff and Integon appeal the trial court's judgment. State Farm paid its judgment to plaintiff and is not a party to this appeal.

I.

[1] Plaintiff assigns as error the trial court's failure to award prejudgment interest on the judgment against Integon. Specifically,

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plaintiff contends that pursuant to the terms of the policy, Integon is obligated to pay prejudgment interest as compensatory damages up to the UIM policy limit of \$100,000.00.

N.C. Gen. Stat. § 24-5(b) (2001) provides:

In an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment until the judgment is satisfied.

Our Supreme Court has held that prejudgment interest up to the amount of the carrier's liability limit is part of compensatory damages for which the UIM carrier is liable. *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993), *appeal after remand*, 115 N.C. App. 718, 446 S.E.2d 597 (1994).

The Integon policy states that with regard to UIM coverage, “[Integon] will also pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because o[f] bodily injury sustained by an insured and caused by an accident.” The supplementary payments section of the Integon policy further states that in addition to the limit of liability, Integon will pay on behalf of the insured “[a]ll costs taxed against the insured and interest accruing after a judgment is entered in any suit we defend. Costs do not include prejudgment interest.”

The Integon policy did not expressly exclude prejudgment interest from compensatory damages, as it did with costs in the supplementary payments provision. Under *Baxley*, prejudgment interest is part of compensatory damages up to the liability limit. Thus, we hold that Integon is obligated to pay prejudgment interest on the amount owed to plaintiff up to its liability limit.

We disagree, however, with plaintiff's contention that Integon's limit of liability is \$100,000.00. According to the trial court's order, Integon received a \$25,000.00 credit against its UIM liability limit for the liability insurance proceeds paid by Farm Bureau to plaintiff. Therefore, Integon's liability limit is \$75,000.00, the \$100,000.00 listed limit less the \$25,000.00 credit, and it cannot be required to pay prejudgment interest over this amount. *See Baxley v. Nationwide Mut.*

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Ins. Co., 115 N.C. App. 718, 446 S.E.2d 597 (1994) (holding that the UIM carrier's limit of liability was \$75,000.00, representing the difference between the policy's listed liability limit of \$100,000.00 and a \$25,000.00 credit for liability insurance proceeds, and could not be required to pay prejudgment interest when it had paid the insured a total of \$75,000.00 for damages).

II.

[2] Integon argues the trial court erred in denying it a credit for workers' compensation payments received by plaintiff. It contends the trial court misinterpreted the current version of N.C. Gen. Stat. § 20-279.21(e) to preclude a credit to Integon for workers' compensation benefits received by plaintiff.

A. Background

Provisions of the Financial Responsibility Act ("Act"), N.C. Gen. Stat. Chapter 20, Article 9A (2001), are written into every insurance policy as a matter of law. *Wilmoth v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 260, 488 S.E.2d 628, *disc. review denied*, 347 N.C. 410, 494 S.E.2d 601 (1997). Where the language of an insurance policy conflicts with the provisions of the Act, the provisions of the Act prevail. *Baxley*, 334 N.C. at 6, 430 S.E.2d at 898.

Prior to 1999, N.C. Gen. Stat. § 20-279.21(e) provided that a UIM policy "need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workers' compensation law. . . ." Under this version of the statute, our Supreme Court held in *McMillian v. North Carolina Farm Bureau Mut. Ins. Co.*, 347 N.C. 560, 495 S.E.2d 352 (1998), that a UIM carrier was entitled to reduce its liability by the amount of the workers' compensation benefits received by the employee even though the employee also was required to reimburse the workers' compensation lien under N.C. Gen. Stat. § 97-10.2. This resulted in a double penalty against the employee.

N.C. Gen. Stat. § 20-279.21(e) was amended by the General Assembly in 1999 through legislation entitled "[a]n act to clarify that liability, uninsured, and underinsured coverage is not reduced by receipt of subrogated Workers' Compensation benefits." The current version of N.C. Gen. Stat. § 20-279.21(e) (2001) provides:

Uninsured or underinsured motorist coverage that is provided as part of a motor vehicle liability policy *shall insure that portion*

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of a loss uncompensated by any workers' compensation law and the amount of an employer's lien determined pursuant to G.S. 97-10.2(h) or (j). In no event shall this subsection be construed to require that coverage exceed the applicable uninsured or underinsured coverage limits of the motor vehicle policy or allow a recovery for damages already paid by workers' compensation.

(emphasis added). The amendment, effective for policies issued or renewed on or after 1 October 1999, requires UIM carriers to insure the amount of the employer's workers' compensation lien on UIM proceeds received by the employee in addition to the damages uncompensated by workers' compensation benefits. See George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance, 2002 Edition: A Handbook*, 68 (2002). Since the employee still must reimburse the employer for the workers' compensation lien from the amount received from both liability and UIM insurance proceeds pursuant to N.C. Gen. Stat. § 97-10.2, this amendment eliminates the double penalty to the employee which resulted from the *McMillian* decision while also preventing double recovery by the employee.

The amendment provides that the statute may not be construed to "allow a recovery for damages already paid by workers' compensation." Thus, the current version of N.C. Gen. Stat. § 20-279.21(e) preserves a credit to the UIM carrier for workers' compensation benefits which are not subject to an employer's lien.

B. Application

The UIM coverage section of Austin's Integon policy states that "[a]ny amount otherwise payable for damages under this coverage shall be reduced by all sums . . . [p]aid or payable because of the bodily injury under any of the following or any similar law: a. workers' compensation law. . . ." This policy language establishing a credit under any circumstances for *all* sums paid pursuant to workers' compensation law conflicts with the current version of N.C. Gen. Stat. § 20-279.21(e), which is applicable to the Integon policy renewed in June 2000. Therefore, the statute controls in this case.

As we have explained, N.C. Gen. Stat. § 20-279.21(e) requires the UIM carrier to pay both the amount of the workers' compensation lien as determined under N.C. Gen. Stat. § 97-10.2 and the loss uncompensated by workers' compensation payments. In the instant

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case, Integon and State Farm would be liable for the workers' compensation lien determined under N.C. Gen. Stat. § 97-10.2(j), \$33,426.00, plus the amount of the loss left uncompensated by the amount of workers' compensation benefits.

Although the trial court made no determination of the total amount of plaintiff's damages, the Integon policy states: "If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum amount payable for injuries to you or a family member caused by an underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each such policy." Both carriers cap their UIM coverage at \$100,000.00, for an aggregate liability limit of \$200,000.00. Thus, we conclude that plaintiff's uncompensated loss is \$200,000.00 less the total amount of workers' compensation benefits received, \$100,278.98, or \$99,721.02. Pursuant to N.C. Gen. Stat. § 20-279.21(e), Integon and State Farm are liable for \$99,721.02 plus the amount of the workers' compensation lien of \$33,426.00, for a total of \$133,147.02.

In its argument to this Court, plaintiff contends Integon provided primary UIM coverage for Austin, and State Farm provided secondary coverage through his father's policy. Therefore, plaintiff argues, Integon would have to exhaust payment of its UIM coverage before State Farm would be required to pay on its coverage. We disagree.

The Integon policy contains the following "other insurance" provision in the UIM section: "[I]f there is other applicable similar insurance, we will pay only our share of the loss. Our [share of the] loss is the proportion that our limit of liability bears to the total of all applicable limits." Accordingly, because Integon's \$100,000.00 liability limit is one-half of the \$200,000.00 aggregate liability limit, it is liable for one-half of the plaintiff's loss. We conclude that Integon and State Farm must prorate their liability and all applicable credits.

Prorating the total liability, Integon and State Farm each are liable for one-half of \$133,147.02, or \$66,573.51 each. Since Integon and State Farm are entitled to a credit for the liability proceeds received by plaintiff, the applicable UIM coverage for each carrier is the coverage limit of \$100,000.00 less the credit for liability proceeds, \$25,000.00 each, or \$75,000.00. Thus, we hold Integon must pay to plaintiff \$66,573.51 under its UIM coverage together with any accrued prejudgment interest up to its \$75,000.00 limit of liability.

We remand this matter for entry of judgment consistent with this decision.

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REVERSED AND REMANDED.

Judges TIMMONS-GOODSON and HUDSON concur.

STATE OF NORTH CAROLINA v. DONNIE RAY OUTLAW, DEFENDANT

No. COA02-584

(Filed 5 August 2003)

1. Drugs— trafficking in cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motions to dismiss the charge of trafficking in cocaine by possession even though defendant contends there was insufficient evidence to support a finding that defendant possessed 28 grams or more of cocaine, because the evidence was sufficient to permit a jury to find that defendant had the intent and capability to maintain control and dominion over at least the 63.5 grams of crack cocaine found in a tupperware container that belonged to defendant's girlfriend and came from defendant's apartment.

2. Drugs— conspiracy to traffic in cocaine by possession—failure of indictment to include weight of cocaine

Defendant was improperly convicted for conspiracy to traffic in cocaine by possession because the indictment failed to include the weight of the cocaine possessed, and that fact was an essential element of the offense charged.

Appeal by defendant from judgments entered 31 January 2002 by Judge Howard E. Manning, Jr., in Person County Superior Court. Heard in the Court of Appeals 17 February 2003.

Attorney General Roy Cooper, by Assistant Attorney General Robert R. Gelblum, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

GEER, Judge.

Defendant challenges his conviction for trafficking in cocaine by possession and for conspiracy to traffic in cocaine. He argues in this

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appeal (1) that the trial court should have granted his motions to dismiss for insufficient evidence; and (2) that the indictment for conspiracy to traffic in cocaine by possession was defective for failing to allege the amount of cocaine. We hold that the trial court properly denied defendant's motions to dismiss, but, based on *State v. Epps*, 95 N.C. App. 173, 381 S.E.2d 879 (1989), we arrest judgment as to the conspiracy charge.

On 8 January 2001, defendant was indicted for trafficking in cocaine by possession, conspiracy to traffic in cocaine, and maintaining a dwelling for the keeping and sale of controlled substances. The jury found defendant guilty of the first two charges, but found him not guilty of the maintaining a dwelling charge. The court sentenced defendant to a minimum of 35 months and a maximum of 42 months for each charge with the sentences running consecutively. Defendant appealed.

The State's evidence tended to show the following. Defendant lived with his girlfriend, Demetrius Smith, in Apartment 4 at 116 Lankford Street, Roxboro, North Carolina. Ms. Smith testified that defendant "made his money" selling drugs and that she had seen him both selling and packaging drugs. According to Smith, defendant, Senica Williams, and Gregory Trotter all sold drugs for Darrell Thompson, who lived in the same area.

On 26 September 2000 and 5 October 2000, the Person County Sheriff's Department conducted surveillance of Apartment 4. After observing traffic going in and out of the apartment, they sent a confidential informant into the apartment to buy drugs. On each occasion, officers had seen defendant standing outside the apartment prior to the confidential informant's entering the apartment.

On 25 October 2000, the Sheriff's Department conducted additional surveillance of the apartment. While Deputy Rodney Chandler was watching from behind the apartment, he saw defendant exit the back door, walk down a set of stairs, reach down and pick up an object from the right side of the steps, and then return to the apartment with the object. A little later, both Chandler and Narcotics Officer Joe Weaver saw another male, Senica Williams, walk out the back door, jump up on the handrail of the steps, either place something in or remove something from the rain gutter, and return to the apartment. The officers also saw a shovel lying in the middle of the woods behind the apartment.

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On the next day, 26 October 2000, the Person County Sheriff's Department obtained a search warrant for Apartment 4 at 116 Lankford Street. Before serving the warrant, officers again watched the apartment. Within 45 minutes, they observed seven or eight people enter the apartment, with each staying only two or three minutes and then leaving, behavior that Lt. Linwood Clayton described as "routine activity" for a place where drugs were being sold. They again sent a confidential informant into the apartment who was able to purchase a quantity of cocaine.

Weaver, who on 26 October 2000 was watching the back of the apartment with his partner Chandler, saw defendant come out of the apartment, sit down on the bottom step, reach down between his legs, and "fiddle with" something under the bottom step. He then stood up and went back into the apartment. A few minutes later, Gregory Trotter left the back door of the apartment and headed into the woods where Chandler was watching. The officers secured Trotter and proceeded to execute the search warrant.

When the officers entered Apartment 4, they found and arrested, in addition to Trotter, defendant, his girlfriend Demetrius Smith, her sister LaToya Smith, and Senica Williams. Lt. Clayton testified that when they searched defendant, they found no drugs, but did find \$794.00 in cash. In a search of the apartment—lived in by defendant and his girlfriend—the officers found two rocks of cocaine on the floor in one bedroom and one or two grams in defendant's bedroom. In the kitchen, the officers found clear tupperware bowls with blue covers owned by defendant's girlfriend, digital scales under the sink, and a small, manual scale. Smith testified that the scales had been used for packaging drugs.

The officers then conducted a search outside behind the apartment. Under the bottom step of the stairs, they found a tupperware bowl that matched the bowls inside the apartment. The bowl contained 63.5 grams of crack cocaine individually packaged in different selling amounts. The officers also searched the gutter above the stairs and found a small amount of crack cocaine. In the woods, next to the shovel and near the location where Gregory Trotter was arrested, the officers found 111.5 grams of crack cocaine.

Motion to Dismiss

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motions to dismiss, arguing that the State

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failed to present sufficient evidence to support a finding that defendant possessed 28 grams or more of cocaine. We disagree.

In considering a motion to dismiss in a criminal case, the trial judge must decide whether there is substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* In reviewing a trial court's denial of a motion to dismiss, the appellate court views the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in the evidence in favor of the State. *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994).

Trafficking in cocaine by possession of at least 28 grams but not more than 200 grams of cocaine is a violation of N.C. Gen. Stat. § 90-95(h)(3)(a) (2001). Possession of the drugs need not be exclusive. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) ("Proof of nonexclusive, constructive possession is sufficient."). It is, therefore, irrelevant that Trotter and Williams may also have had possession of the cocaine.

In addition, the prosecution is not required to prove actual possession; constructive possession is sufficient. *State v. Hamilton*, 145 N.C. App. 152, 155, 549 S.E.2d 233, 235 (2001). Constructive possession occurs when "a person has the intent and capability to maintain control and dominion over [a] thing." *State v. Morris*, 102 N.C. App. 541, 545, 402 S.E.2d 845, 847 (1991). If, however, the drugs are found on premises not within the exclusive control of the defendant, "constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *Brown*, 310 N.C. at 569, 313 S.E.2d at 589. "[M]ere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession." *State v. Balsom*, 17 N.C. App. 655, 659, 195 S.E.2d 125, 128 (1973) (internal quotation marks omitted).

Here, the State offered substantial evidence not only that defendant resided and was present at the premises where the cocaine was found, but also that twice he was seen handling an object located near the bottom step of the stairs from his apartment, precisely where the police found a tupperware container containing 63.5 grams of crack cocaine, and that the tupperware container belonged to his

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girlfriend and came from his apartment. In addition, the State offered evidence that crack cocaine was found in defendant's bedroom; that defendant sold drugs in that apartment; that defendant kept scales in his apartment used to weigh drugs; and that, at the time of arrest, defendant had a large quantity of money on his person, which—given his lack of any other job or source of income—a jury could conclude came from the sale of drugs. This evidence was sufficient to permit a jury to find that defendant had the intent and capability to maintain control and dominion over at least the 63.5 grams of crack cocaine in the tupperware container.

Because sufficient evidence exists in support of each element of the offense, the trial court did not err in denying defendant's motions to dismiss. This assignment of error is, therefore, overruled.

Conspiracy to Traffic in Cocaine by Possession

[2] Second, defendant challenges his conviction for conspiracy to traffic in cocaine by possession on the grounds that the indictment failed to allege the quantity of cocaine involved. Based on *State v. Epps*, 95 N.C. App. 173, 318 S.E.2d 879 (1989), we agree and arrest judgment as to the conspiracy charge.

Defendant did not object to the sufficiency of the indictment before the trial court. Although, generally, a failure to object to the indictment at trial would preclude review on appeal, “when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court.” *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001).

N.C. Gen. Stat. § 15A-924(a)(5) (2001) states that an indictment must contain “a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.” The conspiracy indictment in this case stated only that defendant “unlawfully, willfully and feloniously did conspire with Senica Jamar Williams, Demetrius Smith, Latoya Smith and Gregory M. Trotter to commit the felony of trafficking in crack cocaine, in violation of G.S. 90-95(i).” The indictment did not include the weight of the cocaine involved.

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Under identical circumstances, our Court, in *Epps*, 95 N.C. App. at 175-76, 381 S.E.2d at 881, arrested judgment on a conviction for conspiracy to traffic in cocaine because the indictment, by omitting any reference to the weight of the cocaine, “did not clearly allege all of the material elements to support a conviction for conspiracy to traffic in cocaine” Specifically, the Court held: “An indictment for conspiracy to traffic in cocaine must sufficiently demonstrate that the alleged offender was facilitating the transfer of ‘28 grams or more of cocaine.’ ” *Id.* at 175, 381 S.E.2d at 881.

The State makes no attempt to distinguish *Epps*, but rather argues that we should reject *Epps* in favor of the United States Supreme Court’s decision in *United States v. Cotton*, 535 U.S. 625, 152 L. Ed. 2d 860 (2002), discussing federal indictments. Since *Cotton* does not involve controlling constitutional analysis, it is not binding precedent on this Court and *Epps* remains the law in North Carolina. *See also State v. Hunt*, 357 N.C. 257, 273, 582 S.E.2d 593, 603 (2003) (“[I]n prosecutions where short-form indictments are not used and the indictment alleges elements of a lesser crime, there is no statutory authority (sometimes referred to as ‘jurisdiction’) to enter judgment based upon a verdict finding defendant guilty of the greater crime.”). Since the indictment in this case did not include the weight of the cocaine possessed and that fact was an essential element of the offense charged, judgment as relates to the conspiracy charge must be arrested.

Defendant has raised the additional argument that his conviction for conspiracy to traffic in cocaine must be vacated because of a fatal variance between the indictment and the evidence presented at trial regarding the identity of the co-conspirators. Because of our decision to arrest judgment on that conviction, we do not address that assignment of error.

No error in part; judgment is arrested as to 00 CRS 6363.

Chief Judge EAGLES and Judge MARTIN concur.

IN RE MORALES

[159 N.C. App. 429 (2003)]

IN THE MATTER OF: OLIVIA MORALES

IN THE MATTER OF: LILLY MORALES

No. COA02-1037

(Filed 5 August 2003)

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

Although respondent parents contend the trial court erred in a child sexual abuse and neglect case by admitting, over respondents' objection, the hearsay statements of one of their children, this issue was not preserved for appellate review because: (1) respondents did not assign error to the testimony of two social workers regarding statements by the child even though respondents now argue these statements were inadmissible hearsay; and (2) respondents failed to brief the issue of the testimony of a doctor being error, and the portion of the transcript referenced in the assignment of error is not addressed in the brief.

2. Child Abuse and Neglect— opinion testimony sexual abuse occurred—failure to object—waiver—failure to show prejudice

The trial court did not err in a child sexual abuse and neglect case by admitting the opinions of a social worker and a doctor that sexual abuse had in fact occurred, because: (1) respondents did not preserve the issue of the doctor's testimony since respondents made no objection to the doctor's testimony; (2) respondents waived their objection to the social worker's opinion since an objection to evidence may not be appealed if identical evidence was subsequently admitted without objection, and a doctor testified without objection identically to the social worker; and (3) while the opinions expressed by the experts were improper under the circumstances of this case, respondents failed to establish that they were prejudiced by the admission of this testimony when the trial court explicitly noted that it was not relying on the incompetent evidence and competent evidence existed to support the court's findings.

3. Child Abuse and Neglect— sexual abuse—motion to dismiss—sufficiency of evidence

The trial court did not err in a child sexual abuse and neglect case by denying respondent parents' motions to dismiss at the

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close of petitioner's evidence and at the close of all evidence, because: (1) at the close of petitioner's evidence, the trial court had ample evidence before it supporting a finding that respondents' older child had been sexually abused and that their younger child was living in an injurious environment, respondents' own counsel elicited from a social worker statements made by the older child that demonstrated sexual knowledge, another social worker testified extensively to statements of the older child describing sexual contact with respondent father, and a doctor testified without objection that the older child had very specific knowledge that a child would not have without exposure to sexual abuse; and (2) at the close of all evidence, respondents themselves introduced the videotaped interviews of their older daughter that they now argue the trial court should not have used in rendering its decision, and respondents cannot now complain simply based on the fact that the trial court saw the evidence in a different light than respondents intended.

Appeal by respondents from orders entered 11 February 2002 by Judge Leonard W. Thagard in Sampson County District Court. Heard in the Court of Appeals 16 April 2003.

Sampson County Department of Social Services, by Benjamin R. Warrick, for petitioner-appellee.

Philip E. Williams, for respondents-appellants.

Isaac Cortes, Jr., for Olivia and Lilly Morales.

GEER, Judge.

Respondents Jesus Morales and Alicia Locklear appeal the trial court's determination that their daughter Lillian ("Lilly") was an abused child and their daughter Olivia was a neglected child. Respondents argue primarily that the trial court should not have allowed social workers to testify as to statements made to them by Lilly and should have excluded the testimony of a social worker and a physician that they believed Lilly in fact to be abused. Since respondents have failed to preserve their arguments properly for review on appeal and have failed to demonstrate prejudice from any errors, we affirm.

Respondents Alicia Locklear and Jesus Morales are the parents of Lilly, born 17 September 1997, and Olivia, born 2 September 1998. Ms.

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Locklear is also the mother of a third child, Brittany, who at the time of the hearing was seven years old.

Brittany was living with her father and stepmother, Betty Smith, when her stepmother observed her sitting on top of a stuffed animal and moving in a sexual way. In response to questioning by Ms. Smith, Brittany identified Mr. Morales as someone who had touched her “a lot” in a way that was “not right.” Ms. Smith took Brittany to the doctor who called petitioner, Sampson County Department of Social Services.

As a result of the report regarding Brittany (received on 8 November 2001) and an evaluation of Brittany, DSS social worker Marissa Dempsey attempted to contact respondents regarding Lilly and Olivia. On 15 November 2001, petitioner filed petitions alleging Lilly Morales, age five, and Olivia Morales, age three, to be abused juveniles. Specifically, the petitions alleged that Lilly was an abused juvenile in that her father, Jesus Morales, “committed, permitted, or encouraged the commission of a sex or pornography offense with or upon the juvenile in violation of the criminal law.” Olivia’s petition alleged that she “resid[ed] in an injurious environment.” The court issued orders for nonsecure custody and the children were placed in foster care.

Lilly was interviewed on 30 November and 7 December 2001 by social worker Jeanne Arnts at the Center for Child and Family Health in Durham, North Carolina. In addition, Lilly was given a physical examination by Dana Leinenweber, M.D., also employed at the Center. Ms. Arnts and Dr. Leinenweber together prepared a report based on the interviews and physical examination, reached a diagnosis, and developed a plan and recommendations for Lilly and Olivia.

Judge Leonard W. Thagard conducted a hearing on the merits of the petitions from 29 January through 31 January 2002. After hearing testimony from eleven witnesses, reviewing videotapes of interviews of Lilly, and hearing argument, the court on 11 February 2002, in separate orders, found that Lilly was an abused child and that Olivia was a neglected child as defined by N.C. Gen. Stat. § 7B-101 (2001). Respondents filed notice of appeal on 21 February 2002.

I

[1] Respondents first argue generally that “[t]he trial court erred in admitting, over respondent’s objection, Lilly’s hearsay statements.” Only one of their assignments of error, however, even arguably chal-

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lenges the admission of Lilly's statements: "The trial court erred in allowing, over respondents' objection, Dr. Dana Leinenweber to testify as to statements made by Lillian Morales to Jean Arntz [sic] when Dr. Leinenweber did not hear the statements."

Although, in their brief, respondents now argue that Ms. Arnts' and Ms. Dempsey's testimony regarding statements by Lilly constituted inadmissible hearsay, that contention was not assigned as error and, therefore, was not preserved for review. N.C.R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"). As for the testimony of Dr. Leinenweber, assigned as error, respondents have failed to brief that issue. The portion of the transcript referenced in the assignment of error is not addressed in the brief. This assignment of error is, therefore, deemed abandoned. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

II

[2] Second, respondents argue that the trial court erred in admitting Ms. Arnts' and Dr. Leinenweber's opinions that sexual abuse had in fact occurred. It first should be noted that while respondents objected to Ms. Arnts' opinion, they made no objection to Dr. Leinenweber's testimony that she had diagnosed Lilly as being sexually abused. Respondents cannot now challenge Dr. Leinenweber's testimony. N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection . . .").

It is also well-established that an objection to evidence may not be appealed if identical evidence was subsequently admitted without objection. *State v. Hyman*, 153 N.C. App. 396, 401, 570 S.E.2d 745, 748 (2002) ("An objection to the admission of evidence is waived where the same or similar evidence is subsequently admitted without objection."), *cert. denied*, 357 N.C. 253, 583 S.E.2d 41 (2003). Since Dr. Leinenweber testified without objection identically to Ms. Arnts, respondents waived their objection to Ms. Arnts' opinion.

Further, while we agree that the opinions expressed by the experts were improper under the circumstances of this case, respondents have failed to establish that they were prejudiced by the

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admission of this testimony. In a bench trial, “the court is presumed to disregard incompetent evidence. Where there is competent evidence to support the court’s findings, the admission of incompetent evidence is not prejudicial.” *In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175 (citations omitted), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

As this Court pointed out in *In re Huff*, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000) (citations omitted; internal quotation marks omitted), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001):

The mere admission by the trial court of incompetent evidence over proper objection does not require reversal on appeal. Rather, the appellant must also show that the incompetent evidence caused some prejudice. In the context of a bench trial, an appellant must show that the court relied on the incompetent evidence in making its findings. Where there is competent evidence in the record supporting the court’s findings, we presume that the court relied upon it and disregarded the incompetent evidence.

Here, respondents have failed to meet their burden of proving that the trial court relied upon incompetent evidence in making its findings.

Our Supreme Court has held:

In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim’s credibility.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (emphasis original). Nevertheless, “an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.” *Id.* at 267, 559 S.E.2d at 789.

In a jury trial, the distinction between an expert witness’ testifying (a) that sexual abuse in fact occurred or (b) that a victim has symptoms consistent with sexual abuse is critical. A jury could well be improperly swayed by the expert’s endorsement of the victim’s credibility. In a bench trial, however, we can presume, unless an appellant shows otherwise, that the trial court understood the dis-

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inction and did not improperly rely upon an expert witness' assessment of credibility. *Cf. Stancil*, 355 N.C. at 266, 559 S.E.2d at 789 (limiting its holding to "sexual offense prosecution[s]").

In this case, respondents have not demonstrated that the trial court relied upon the improper expert opinions of Ms. Arnts and Dr. Leinenweber. In fact, the transcript establishes the contrary. At the end of the hearing and before rendering his decision, the trial court recognized that these expert opinions were likely inadmissible and stated "even if Dr. [Leinenweber] had not been allowed to express an opinion in this case, my decision on the facts would not change. And the same for Mrs. [Arnts]." The court specified that it was relying on the videotape of Lilly, offered by respondents, which the court found "powerful and convincing;" on Lilly's statements to the social workers (not objected to or assigned as error); and on the statements made by her half-sister Brittany. Since the trial court explicitly noted that it was not relying on the incompetent evidence and since competent evidence existed to support the court's findings, we overrule these assignments of error.

III

[3] Finally, respondents argue that the trial court erred in denying their motions to dismiss at the close of petitioners' evidence and at the close of all of the evidence. We disagree.

At the close of petitioners' evidence, the trial court had ample evidence before it supporting a finding that Lilly had been sexually abused and that Olivia was living in an injurious environment. Respondents' own counsel had elicited from DSS social worker Marissa Dempsey statements made by Lilly that demonstrated sexual knowledge. Ms. Arnts testified extensively—without contemporaneous objection by respondents—to statements of Lilly describing sexual contact with Mr. Morales. In addition, Dr. Leinenweber testified without objection that Lilly had "very specific knowledge that a child would not have without exposure to this sort of thing," referring to sexual abuse. This evidence was sufficient for denial of the motion to dismiss at the close of petitioner's evidence.

With respect to the motion to dismiss at the close of all of the evidence, respondents argue that the trial court should not, in rendering its decision, have relied upon the videotaped interviews of Lilly. Respondents themselves introduced the videotapes into evidence and urged the trial court to view them. Respondents cannot complain

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simply because the trial court saw their evidence in a different light than they intended. *See State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993) (“A defendant is not prejudiced by error resulting from his own conduct. N.C.G.S. § 15A-1443(c) (1988).”).

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

STATE OF NORTH CAROLINA v. DAVID VERNON SIMPSON

No. COA02-1195

(Filed 5 August 2003)

1. Criminal Law— joinder—two offenses

The trial court did not err in an obtaining property by false pretenses case by granting the State’s motion to join his two offenses under N.C.G.S. § 15A-926(a), because a transactional connection was evidenced by a common *modus operandi*, the short time lapse between the criminal activity, and similar circumstances in victim, location, and motive.

2. Indictment and Information— motion to amend—date of charged offense

The trial court did not err in an obtaining property by false pretenses case by granting the State’s motion to amend the indictment to change the date of the charged offense, because: (1) the change did not substantially alter the charge; and (2) time was not of the essence. N.C.G.S. § 15A-923(e).

3. False Pretense— obtaining property by false pretenses—deception of victim—sufficiency of evidence

The trial court did not err by denying defendant’s motion to dismiss the charges of obtaining property by false pretenses under N.C.G.S. § 14-100 even though defendant contends the victim pawn shop owner was not actually deceived by defendant’s false representations, because although the victim had a suspicion that the cameras were stolen, his testimony when viewed in the light most favorable to the State reasonably permits a jury to make an inference that he called a detective in order to confirm

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that the items were not stolen property and that the victim was in fact deceived.

Judge HUDSON dissenting.

Appeal by from judgment entered 20 May 2002 by Judge Loto G. Caviness in Superior Court, Henderson County. Heard in the Court of Appeals 10 June 2003.

Attorney General Roy Cooper, by Associate Attorney General Kimberly Elizabeth Gunter, for the State.

Mary March Exum, for the defendant-appellant.

WYNN, Judge.

From his two felony convictions of obtaining property by false pretenses, defendant, David Vernon Simpson, argues on appeal that the trial court erroneously (1) granted the State's joinder motion, (2) granted the State's motion to amend the indictment, and (3) denied his motion to dismiss for insufficient evidence. We find no error.

The underlying evidence tends to show that on 26 November 2001, Robert Hoyt, a manager for the photo lab at a Wal-Mart Store, noticed three cameras missing from the Wal-Mart display. Later that day, Tim Ward, the owner and operator of Hendersonville Jewelry and Pawn, purchased two cameras from defendant. About a week later, Mr. Ward purchased a third camera from defendant. Mr. Ward, who testified that he tends to "work closely with the Sheriff's Department," was suspicious that the cameras were stolen because he noticed a security device attached to one camera. He contacted Detective Cole at the Sheriff's Department who confirmed that the cameras were stolen and owned by Wal-Mart.

At trial, Mr. Hoyt identified by serial number the cameras sold to Mr. Ward as the same cameras stolen from Wal-Mart in November 2001. Furthermore, Mr. Ward identified defendant as the individual who represented that he owned the cameras and sold them to the pawn shop in November and December 2001. On 20 May 2002, the jury found defendant guilty of one count of misdemeanor possession of stolen goods and two counts of obtaining property by false pretenses. Defendant appeals.

[1] By his first assignment of error, defendant contends the trial court erred in granting the State's motion to join his two offenses

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under N.C. Gen. Stat. § 15A-926(a) (2002) which provides: “Two or more offenses may be joined . . . for trial when the offenses are based on the same act or transaction, or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.” In considering a motion to join under § 15A-926(a), our Supreme Court in *State v. Williams*, 355 N.C. 501, 529, 565 S.E.2d 609, 626 (2002) explained that,

the trial judge must first determine if the statutory requirement of a transactional connection is met. Whether such a connection exists . . . is a fully reviewable question of law. . . . The transactional connection required by [Section] 15A-926(a) may be satisfied by considering various factors. Two factors frequently used in establishing the transactional connection are a common modus operandi and the time lapse between offenses.

Williams, 355 N.C. at 529, 565 S.E.2d at 626 (citations omitted). Thus, for instance, in the earlier case of *State v. Bracey*, 303 N.C. 112, 116, 277 S.E.2d 390, 393 (1981), our Supreme Court held that the trial court properly consolidated three separate charges of common-law robbery because,

The evidence in the three cases shows a similar modus operandi and similar circumstance in victims, location, time and motive. All the offenses occurred within ten days on the same street in Wilmington. All occurred in the late afternoon. . . . The assaults were of a similar nature. Each was without weapons, involved an element of surprise and involved choking, beating and kicking the victim. In each case, the robbers escaped on foot. The evidence was sufficient to justify joinder based on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

Id. at 118, 277 S.E.2d 394.

Likewise, in the present case, we hold that the trial court properly allowed joinder of the subject offenses because a transactional connection was evidenced by a common modus operandi, the short time lapse between the criminal activity, and similar circumstances in victim, location, and motive. Indeed, in each case the cameras were taken from Wal-Mart and sold by defendant within 10 days to Henderson Jewelry and Pawn. Accordingly, we uphold the trial court’s decision to allow joinder of the offenses.

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[2] By his second assignment of error, defendant contends the trial court erred in granting the State's motion to amend the indictment to change the date of the charged offense. Under N.C. Gen. Stat. § 15A-923(e), "a bill of indictment may not be amended in a manner which substantially alters the charge set forth." *State v. Parker*, 146 N.C. App. 715, 718, 555 S.E.2d 609, 611 (2001) (citation omitted). For the reasons stated in *State v. Price*, we hold that amending the date of the charged offense, in the instant case, was not error. *See State v. Price*, 310 N.C. 596, 600, 313 S.E.2d 556, 559 (1984) (holding that "change of date . . . was not an amendment proscribed by N.C. Gen. Stat. § 15A-923(e) since it did not substantially alter the charge Time was not of the essence [And] [d]efendant's right to be indicted by the grand jury was not violated).

[3] By his final assignment of error, defendant contends the trial court erred by denying his motion to dismiss because of insufficient evidence of an essential element. Defendant argued:

I think one of the elements is that [defendant], in fact, does deceive the party listed as the victim. The victim in this [case] is not Wal-Mart, it's the Henderson Jewelry and Pawn. [However,] by the testimony of [Mr. Ward,] the pawn shop owner was [not] deceived whatsoever. [Mr. Ward] took the cameras . . . suspected [they were stolen] . . . called the Sheriff's Department . . . [and] didn't place [the cameras out] for sale. [Mr. Ward] knew there was a problem or certainly suspected there was [a problem]. The element of [actual] deception, I submit to the Court, is [not] present.

"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). Furthermore, in reviewing a trial court's denial of a motion to dismiss, "all contradictions and discrepancies are resolved in the State's favor." *State v. Forbes*, 104 N.C. App. 507, 510, 410 S.E.2d 83, 85 (1991).

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Under N.C. Gen. Stat. § 14-100:

(a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever . . . obtain or attempt to obtain from any person within this State any money . . . with intent to cheat or defraud any person of such money . . . such person shall be guilty of a felony

Our Supreme Court, in interpreting this statute, has expressly held that “the crime of obtaining property by false pretenses . . . [is] defined as follows: (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980) (citation omitted).

Defendant contends the State failed to present any evidence that the victim, Mr. Ward, was actually deceived by defendant’s false representations.¹ As a basis for that contention, defendant asserts that Mr. Ward’s suspicion that the cameras were stolen, coupled with the fact that the cameras were actually stolen, proves that the victim, Mr. Ward, was not, in fact, deceived. Defendant’s argument, however, relies on a retrospective interpretation of the facts. At the time of the transaction, Mr. Ward did not know that the cameras were stolen. In fact, Mr. Ward testified that he “called Detective Cole and told him that [he] had some cameras there that he needed to look at.” Although Mr. Ward had a suspicion that the cameras were stolen, Mr. Ward’s testimony, when viewed in the light most favorable to the State, reasonably permits a jury to make an inference that Mr. Ward called Detective Cole in order to confirm that the items were not stolen property. As this inference is reasonable, and adequate to support the conclusion that Mr. Ward was, in fact, deceived, this assignment of error is overruled. See *State v. Edwards*, 150 N.C. App. 545, 547, 563 S.E.2d 288, 290 (2002).

No Error.

Judge CALABRIA concurs.

Judge HUDSON dissents.

1. On appeal, however, defendant does not argue the State failed to present sufficient evidence that defendant (1) made a false representation which was (2) calculated and intended to deceive by which (3) defendant obtained value from Mr. Ward.

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HUDSON, Judge, dissenting.

Having thoroughly scrutinized the transcript of the defendant's trial, I find no evidence or testimony to support the element of these offenses that the alleged victim be actually deceived. The alleged victim was Tim Ward, the proprietor of the pawn shop in which the cameras were sold. He testified that when the defendant showed him the cameras, he was immediately suspicious that they were stolen, because one of them had a security device still attached. As soon as the defendant left the shop, Ward put the cameras "in the back" and called the Sheriff. He had given the defendant money for the cameras, for which he knew he would be reimbursed pursuant to his arrangement with the Sheriff's department, and he did not lose any money. He did not display the cameras for sale.

When asked why he accepted the cameras in November, in light of his suspicions, Ward responded: "Well, because I work closely with the Sheriff's Department and I wanted to, you know, if they were stolen, I wanted to give them back to the owners." Ward went on to testify, when asked if he knew who owned the cameras, that he "pretty much knew," at the time of defendant's December visit to the shop, because he had talked with Mr. Cole and "I knew that there was a problem with them." Mr. Ward did not testify that he was deceived, or that he even considered the possibility that the cameras were not stolen. Thus, even in the light most favorable to the State, I see no evidence from which a jury could infer that Mr. Ward was in fact deceived. Therefore, I respectfully dissent.



LYNDA NELSON, PLAINTIFF V. NOVANT HEALTH TRIAD REGION, L.L.C., FORSYTH MEMORIAL HOSPITAL, INC. D/B/A FORSYTH MEDICAL CENTER, AND SODEXHO MANAGEMENT, INC., DEFENDANTS

No. COA02-1192

(Filed 5 August 2003)

1. Premises Liability— slip and fall—duty of care—summary judgment—directed verdict

The trial court did not err in a personal injury slip and fall case by denying defendants' motions for summary judgment and directed verdict and the jury was properly allowed to reach a finding of fact as to whether the duty of care had been breached

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due to defendant's negligence, because: (1) defendants admitted to owning and exercising control over the hallway where plaintiff was injured, as well as the carts and trays littering the hallway and the kitchen where dishes were being washed; and (2) by admitting to ownership, defendant hospital owed a duty to plaintiff to keep the hallway safe for passage, its contemplated use.

2. Premises Liability— slip and fall—open and obvious dangerous condition—summary judgment—directed verdict

The trial court did not err in a personal injury slip and fall case by denying defendants' motions for summary judgment and directed verdict on the ground that defendant had no duty to alert plaintiff to a dangerous condition that was open and obvious, because the dangerous condition was not open and obvious as a matter of law when: (1) plaintiff stated she was not aware of the slippery condition of the floor and, even if she had looked at her feet, the film of water on the shiny linoleum floor would have been impossible to see; and (2) plaintiff neither admits to being fully aware of the dangerous condition of the hall nor acknowledges that she would have seen the water if she had looked.

3. Premises Liability— slip and fall—contributory negligence—summary judgment—directed verdict

The trial court did not err in a personal injury slip and fall case by denying defendants' motions for summary judgment and directed verdict even though defendant contends plaintiff has failed to offer evidence to refute allegations of contributory negligence, because the decision as to whether looking ahead to navigate the debris in a hall was more or less reasonable than looking down at the floor is a question of fact to be determined by the jury.

Appeal by defendant from judgment entered 1 May 2002 by Judge Melzer A. Morgan, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 13 May 2003.

Wells, Jenkins, Lucas & Jenkins, P.L.L.C., by Ellis B. Drew, III, for plaintiff-appellee.

Bennett, Guthrie & Dean, P.L.L.C., by Rodney A. Guthrie, for defendant-appellants.

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ELMORE, Judge.

Defendants appeal the denial of their motions for summary judgment and directed verdict in this personal injury slip-and-fall case. The jury returned a verdict for the plaintiff in the amount of \$14,500.00. The evidence heard at trial tended to show that plaintiff was an employee of a company that copies medical records and was assigned to the Medical Records Department at Forsyth Memorial Hospital. It is undisputed that when plaintiff arrived at the hospital in the mornings, her normal path to the Hospital's Medical Records Department took her down a basement hallway past the hospital dishwashing room. Plaintiff testified that it was normal for carts carrying meal trays to be lined up against the wall of this hallway opposite the kitchen door. The hall floor was "shiny and buffed" linoleum that had a "glassy appearance."

Plaintiff also presented evidence that when she attempted to traverse this hallway on 29 September 1998, she encountered trays and tray carts scattered across the hallway. As she attempted to pass through the hallway, she fell and severely injured her right knee. While in the emergency room, plaintiff noticed the back of her dress was wet with water. The jury found that plaintiff was injured due to the negligence of the defendants and that plaintiff was not contributorily negligent. Defendant appeals based upon the trial court's denial of summary judgment and directed verdict.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). On appeal, the standard of review is (1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). The evidence presented is viewed in the light most favorable to the non-movant. *See Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

The standard of review for a directed verdict is essentially the same as that for summary judgment. When considering a directed verdict on review, this Court must establish "whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (citations omitted).

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[1] Defendant argues for summary judgment and directed verdict on two grounds. First, that plaintiff has failed to show or forecast evidence that the defendant has breached a duty to the plaintiff. Second, that plaintiff was contributorily negligent, and has failed to offer evidence to refute that negligence. The trial court held that in this case there were genuine issues of material fact such that the case should be presented to the jury. We agree.

A property owner must “use the care a reasonable man similarly situated would use to keep his premises in a condition safe” for the contemplated use of the property. *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 474, 562 S.E.2d 887, 893 (2002). Defendant argues that no duty existed to warn or protect plaintiff from the debris in the hallway. Defendant cites *Williamson v. Food Lion, Inc.*, 131 N.C. App. 365, 507 S.E.2d 313 (1998), *aff’d*, 350 N.C. 305, 513 S.E.2d 561 (1999), to show that summary judgment and directed verdict are appropriate unless plaintiff presents evidence that defendant either created the dangerous circumstance or had real or actual notice that the dangerous circumstance existed. In *Williamson*, a customer at a grocery store slipped on a grape lying on the floor in the bread aisle. The trial court granted summary judgment because there was no proof that the defendant knew that the grape was on the floor or that defendant was responsible for it being there. This Court affirmed that decision. *Id.*

This reliance upon *Williamson* is misplaced. *Williamson* can be distinguished from the case at bar because defendants admitted to owning and exercising control over the hallway where plaintiff was injured, as well as the carts and trays littering the hallway and the kitchen where dishes were being washed. By admitting to ownership, Forsyth Hospital owed a duty to plaintiff to keep the hallway safe for passage, its contemplated use. Therefore, it was appropriate to deny motions for summary judgment or directed verdict on this basis. The jury was properly allowed to reach a finding of fact as to whether the duty of care had been breached due to defendant’s negligence.

[2] The defendant also argues summary judgment and directed verdict should have been granted because the plaintiff failed to show any evidence that defendant had a duty to alert plaintiff to a dangerous condition that was open and obvious. In *Newsom v. Byrnes*, 114 N.C. App. 787, 443 S.E.2d 365 (1994), the court granted summary judgment because the gray clay upon which plaintiff slipped would have been obvious to any person under the circumstances, yet the plaintiff did

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not avoid it. See *Newsom*, 114 N.C. App. at 788, 443 S.E.2d at 366 (granting summary judgment for the defendant when the plaintiff slipped on “gray clay” and injured her leg because any ordinary person under the circumstances would have known the clay was dangerous). *Newsom* can be distinguished from the case at bar because a film of water on a shiny linoleum floor is much less obvious and more difficult to see than gray clay.

Summary judgment is only appropriate based on an “open and obvious” condition when the plaintiff has a more intimate knowledge of the dangerous condition than the property owner, or the plaintiff would have noticed the dangerous condition if she had exercised proper care. See *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000), *aff’d*, 353 N.C. 445, 545 S.E.2d 210-11 (2001) (holding defendant not liable when plaintiff slipped on ice because plaintiff had equal or superior knowledge of the dangerous condition); *Swinson v. Lejeune Motor Co.*, 147 N.C. App. 610, 618, 557 S.E.2d 112, 118 (2001) (McCullough, J., dissenting) (asserting that plaintiff was contributorily negligent when nothing prevented her from seeing a hole in the parking lot), *rev’d*, 356 N.C. 286, 569 S.E.2d 646 (2002) (adopting the dissent); *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604, *disc. review denied*, 356 N.C. 297, 570 S.E.2d 498-99 (2002) (holding defendant not liable when plaintiff admitted she was able to see the floor and had at least equal knowledge of the floor’s treacherous conditions). In the case *sub judice*, plaintiff states she was not aware of the slippery condition of the floor and, even if she had looked at her feet, the film of water on the shiny linoleum floor would have been impossible to see. Plaintiff neither admits to being fully aware of the dangerous condition of the hall nor acknowledges that she would have seen the water if she had looked. Therefore, the dangerous condition was not open and obvious as a matter of law. Summary judgment and directed verdict are inappropriate.

[3] Alternatively, defendant contends that summary judgment and directed verdict should have been granted because plaintiff has failed to offer evidence to refute allegations of contributory negligence. Defendant compares this case to *Hall v. Kmart Corp.*, 136 N.C. App. 839, 525 S.E.2d 837 (2000), where a plaintiff was held to be contributorily negligent when she slipped on an empty box while carrying on a conversation with another customer. Similarly, in *Swinson*, a customer tripped in a hole in an automobile dealership parking lot. The Court held that she was contributorily negligent as a matter of law

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because she was looking for her car at the time and there was nothing to prevent her from seeing the hole. *Swinson v. Lejeune Motor Co.*, 147 N.C. App. 610, 618, 557 S.E.2d 112, 118 (2001), (McCullough, J., dissenting), *rev'd*, 356 N.C. 286, 569 S.E.2d 646 (2002) (adopting the dissent). In the case *sub judice*, the defendant argues that the plaintiff was similarly inattentive when walking down the hospital hall because at the moment she slipped plaintiff was looking ahead “to navigate the hall” instead of at her feet.

The standard by which contributory negligence is judged is that of a reasonable person. Our Supreme Court has stated, “[t]he question is not whether a reasonably prudent person would have seen the [defect,] . . . but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.” *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981) (reinstating verdict for plaintiff where jury had made factual determinations regarding reasonableness of plaintiff’s actions). In *Dowless v. Kroger*, 148 N.C. App. 168, 557 S.E.2d 607 (2001), a plaintiff whose attention was focused on pushing her shopping cart was not found contributorily negligent as a matter of law when she fell in a hole in the parking lot. In the case at bar, plaintiff argues that it was reasonable for her to look ahead down the hall to avoid the trays, carts, and other debris instead of directly at her feet because she was concerned for and acting to protect her own safety.

The decision as to whether looking ahead to navigate the debris in the hall was more or less reasonable than looking down at the floor is a question of fact to be determined by the jury. *See Jenkins v. Theaters, Inc.*, 41 N.C. App. 262, 254 S.E.2d 776, *disc. review denied*, 297 N.C. 698, 259 S.E.2d 295 (1979) (holding that the standard of care is a question of law, but whether defendant failed to exercise that degree of care is a question for the jury). Summary judgment and directed verdict were therefore properly denied.

We agree with the trial court that there were sufficient issues of material fact to present the question to the jury and to sustain a jury verdict in plaintiff’s favor.

No error.

Judges WYNN and McCULLOUGH concur.

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STATE OF NORTH CAROLINA v. TYRONE MICHAEL BRINKLEY

No. COA02-1417

(Filed 5 August 2003)

Criminal Law— trial court’s expression of opinion on witness credibility—disparaging comments about defense counsel

The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury case by expressing its opinions as to a witness’s credibility and by repeatedly making disparaging comments concerning the ability and character of defense counsel, and defendant is entitled to a new trial, because when all the incidents raised by defendant are viewed in light of their cumulative effect upon the jury, the atmosphere of the trial was tainted by the trial court’s comments to the detriment of defendant.

Appeal by defendant from judgment entered 9 March 2001 by Judge Evelyn W. Hill in Durham County Superior Court. Heard in the Court of Appeals 11 June 2003.

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

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

HUNTER, Judge.

Tyrone Michael Brinkley (“defendant”) was indicted on 18 December 1999 for assault with a deadly weapon with the intent to kill inflicting serious injury. The matter was tried before a jury, and on 9 March 2001, defendant was found guilty as charged and sentenced to a term of thirty-four to fifty months imprisonment. Defendant appeals the conviction and requests a new trial. For the reasons stated herein, we conclude defendant is entitled to a new trial.

At trial, the evidence tended to show that during the early morning hours of 6 July 1999, Michael Jackson (“Jackson”) was sitting on a Cadillac in front of the apartment of his sister, Margo Jackson (“Margo”), when he saw three men exit a white Montero Jeep and approach Margo’s front door. When Margo opened the door, one of the men pointed a gun in her face and forced himself inside the apart-

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ment. As Jackson ran to get help, it is disputed as to whether he warned Anthony Nesmith (“Nesmith”), an associate of his with whom Jackson had “done business” with earlier that evening, not to go near the apartment because the men had guns. Nevertheless, Nesmith learned of the incident and, concerned about the safety of several children inside the apartment, approached the apartment and began banging on the door. Suddenly, a man with long dreadlocks holding a rifle appeared from the side of the apartment. Jackson watched as Nesmith was shot in the back as he tried to run away.

Following the shooting, Jackson was unable to identify Nesmith’s assailant in a photo line-up, but did identify defendant as the shooter at trial. LaToya Ray (“Toya”), another person in Margo’s home that evening, also identified defendant as the man who shot Nesmith. Finally, Investigator W. C. Pitt (“Investigator Pitt”), of the Durham Police Department, testified that Toya had identified defendant as one of the men at her home on 6 July 1999. Investigator Pitt further testified that he had never seen defendant with dreadlocks. Additional facts will be provided in our analysis of defendant’s assignments of error.

Defendant’s first assignment of error argues that his conviction must be vacated because the trial judge erroneously expressed her opinions as to Jackson’s credibility by (1) taking over the State’s direct examination of him, (2) finishing his answers to certain questions, and (3) commenting on those answers. Defendant’s second assignment of error argues that he is entitled to a new trial because the trial judge repeatedly made disparaging comments concerning the ability and character of defendant’s counsel, Mr. Mark Simeon (“Mr. Simeon”). By these two assigned errors, defendant asserts the judge’s actions were not impartial during the trial and violated his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Due to their similarities, we shall address both arguments simultaneously.

A trial judge occupies an esteemed position whereby “jurors entertain great respect for [a judge’s] opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice’ any litigant in his courtroom.” *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). See also N.C. Gen. Stat. § 15A-1222 (2001). Nevertheless, this Court has recognized that “not every improper remark made by the trial judge requires a new

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trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error.” *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (1990) (citation omitted). In other words, “[w]hether the accused was deprived of a fair trial by the challenged remarks [of the court] must be determined by what was said and its probable effect upon the jury in light of all attendant circumstances, the burden of showing prejudice being upon the appellant.” *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E.2d 366, 369 (1979).

In the case *sub judice*, defendant offers several incidents by which he contends the trial judge’s extraneous comments were so improper and disparaging as to deprive him of a fair and impartial trial. While we note that each incident offered by defendant is somewhat inappropriate, there are three incidents that most strongly support defendant’s assertion that his constitutional rights were violated.

First, while cross-examining Jackson, Mr. Simeon attempted to pinpoint the ultimate location of the three men in the Montero Jeep who arrived at Toya’s apartment. The following exchange took place:

Q. And there was a third person who went around the back[?]

A. I don’t know what happened to the third person. I just seen two people go in the front door. But I know three people got out of the Jeep.

Q. And two went to the front door?

A. Yes.

THE COURT: We’ve established that to the point that if you want to go there one more time you’ll probably see *13 collective people throwing up*. We have established that two went to the front door. Now what we want to know is what happened next. Okay.

(Emphasis added.) Defendant contends that the judge’s crude comment showed little respect for Mr. Simeon and destroyed the jury’s respect for the defense counsel as well as the court system.

Thereafter, Mr. Simeon continued his cross-examination of Jackson, during which he asked questions that implied Jackson was standing guard outside a drug house on the night of the shooting. The following exchange ensued:

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Q. Were you standing guard or on watch on his Cadillac in connection with the business you just referred to?

A. The business we was doing, we was smoking a blunt. That's what we was doing. That was the business that we was doing. I thought that it would incriminate me. That's the reason why I didn't answer my business yesterday. That's the business that we was doing.

Q. Well, I'll ask you another kind of way then. Why was it that you were standing guard or on watch outside on Liberty Street again?

A. I was standing—

MR. HUNTER: Objection.

THE COURT: Sir, you know or should know, and frankly at this point the Court doesn't know whether you know or should know, that he has not testified. Every time you've tried to get him to say he was standing look out or guard he's answered that he wasn't. So you can't start your question with why you were standing guard and looking.

MR. SIMEON: I'm sorry, Judge. My recollection was that he did testify affirmatively that he was standing guard, standing watch.

THE COURT: He said he was just standing watch over his sister's house *as any good male would*. *Not in relation to any nefarious dealings*. So you need to phrase your question based on the testimony.

(Emphasis added.) Defendant contends that despite defense counsel's attempt to discredit Jackson, the judge's comments nullified Jackson's admission that he was engaged in an illegal act and left the jury with the impression that the court believed Jackson to be a "good male."

The final incident that most strongly supports defendant's assertion that the trial judge's extraneous comments violated his constitutional rights to an impartial trial took place during Mr. Simeon's cross-examination of Toya. Mr. Simeon made reference to two statements Toya allegedly gave the police following the shooting. Toya testified that she did not recognize one of the statements even though the signature on that statement looked like hers. The court ruled that

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the statement could not be admitted into evidence because Toya could not recall signing it. Thereafter, the following exchange took place in the presence of the jury when Mr. Simeon asked a question about the inadmissible statement:

Q. [Toya, d]o you have any idea of why your signature might appear on any statement that indicated that neither one of them had—

THE COURT: Sustained. Counselor, that is the statement that was not admitted into evidence, correct? Is that Number 8, Counselor?

MR. SIMEON: Yes, Judge. Withdrawn.

THE COURT: No. Forget withdrawn, Counselor. You moved to admit it and the Court denied admitting it into evidence. Then you deliberately went and asked a question using the information from that, which is not only *improper, unethical, but also in flagrant violation of what the Court ruled. I'm at my wit's end.*

(Emphasis added.) Defendant contends that the judge's unnecessarily harsh criticisms of Mr. Simeon in the presence of the jury may have (1) prejudiced the jury against defendant, and (2) given the jury the impression that defense counsel was not trustworthy or ethical. With respect to defendant's contentions on all three incidents, we agree.

It is fundamental to due process that every defendant be tried "before an impartial judge and an unprejudiced jury in an *atmosphere of judicial calm.*" *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951) (emphasis added). While we recognize that a trial judge may be justified in verbally reprimanding counsel for certain actions, care should be taken to conduct such reprimands outside the presence of the jury to ensure the court does not prejudice the jury against defendant. When all the incidents raised by defendant, particularly the three cited above, are viewed in light of their cumulative effect upon the jury, we are compelled to hold that the atmosphere of the trial was tainted by the trial judge's comments to the detriment of defendant. We feel certain the learned trial judge did not intend to prejudice the defense or in any manner belittle defense counsel; however, "when these inadvertences occur, they must be corrected, as they could have conveyed to the jury the

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impression of judicial leaning.” *State v. Hewitt*, 19 N.C. App. 666, 669, 199 S.E.2d 695, 697 (1973).

Accordingly, defendant is entitled to a new trial. This Court need not consider defendant’s remaining assignments of error as they may not recur. *Id.*

New trial.

Judges TIMMONS-GOODSON and ELMORE concur.

IN THE MATTER OF JAMARCUS OLIVER

No. COA02-911

(Filed 5 August 2003)

1. Constitutional Law— right of confrontation—right to cross-examine child witness about school disciplinary record

The trial court did not violate a juvenile’s right to confrontation in a juvenile delinquency hearing by allegedly denying defendant’s right to cross-examine a minor child witness about her school disciplinary record in an attempt to ascertain her credibility and whether she had any possible biases or motives because: (1) after seeing the witness’s disciplinary record prior to the witness’s testimony, defendant did not ask the witness about or direct the trial court’s attention to anything contained therein that was of an impeaching nature; (2) the court correctly determined that confidentiality concerns are at issue when considering the release of a child’s official student records; and (3) the fact that the witness had a disciplinary record cannot, in and of itself, establish the relevance of its content to determine possible credibility concerns.

2. Constitutional Law— right of confrontation—right to cross-examine principal about child’s school disciplinary record

The trial court did not violate a juvenile’s right to confrontation in a juvenile delinquency hearing by failing to allow the juvenile to cross-examine a principal about a minor child witness’s

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behavior or the contents of her disciplinary record, because: (1) N.C.G.S. § 8C-1, Rule 608(b) prevents defendant from cross-examining the principal about specific instances of the child's conduct for the purpose of attacking the child's character for truthfulness if the principal has not already testified regarding that character, and nothing in the record suggests the principal testified as to the child's character prior to being cross-examined regarding it; and (2) defendant failed to overcome the confidentiality concerns raised by defendant's questions with respect to the child's official student records.

3. Constitutional Law—right of confrontation—admission of school disciplinary record into evidence

The trial court did not violate a juvenile's right to confrontation in a juvenile delinquency hearing by refusing to admit a minor child witness's disciplinary record into evidence, because: (1) defendant did not make an offer of proof whereby the disciplinary record was made a part of the court record to support defendant's theory of relevance; and (2) the Court of Appeals reviewed the disciplinary record and concluded that it was devoid of any relevant information that would weigh on the child's credibility in this case.

Appeal by defendant from an order entered 5 December 2001 by Judge Richard G. Chaney in Durham County District Court. Heard in the Court of Appeals 14 May 2003.

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

UNC School of Law Criminal Law Clinic, by Supervising Attorney Joseph E. Kennedy and Certified Third-Year Law Student Derrick Charles Mertz, for defendant-appellant.

HUNTER, Judge.

Fifteen-year-old Jamarcus Q. Oliver ("defendant") appeals a juvenile adjudication order of delinquency based on findings that defendant committed second degree sexual offense and crime against nature when he inserted his penis into the mouth of a thirteen-year-old girl ("H.M.") by force and against her will. We affirm.

On 10 October 2001, defendant, H.M., and other students were riding home on a public school bus from Lowe's Grove Middle School

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in Durham, North Carolina. A significant amount of horseplay ensued, which eventually resulted in defendant getting on top of H.M. and pinning her down with his crotch in her face. Defendant admittedly began touching H.M.'s breasts and her buttocks without her permission. The next day however, H.M. told school officials that defendant had also pulled out his penis and inserted it into her mouth after pinning her down on the bus. Juvenile petitions were immediately filed against defendant alleging second degree sexual offense and crime against nature.

During the investigation and subsequent trial that followed, H.M. stated on several occasions that defendant had only *tried* to put his penis in her mouth. Only Tiernay Umstead ("Umstead"), another student on the bus, claimed to have seen defendant's penis in H.M.'s mouth. In an effort to ascertain Umstead's credibility and whether she had any possible biases or motives to corroborate H.M.'s accusation, defendant sought a duly subpoenaed school disciplinary record of Umstead. At the beginning of trial, the court declined to release the disciplinary record to defendant at that time due to the possible existence of some confidentiality issues, but stated it would reconsider that decision if Umstead testified. Thereafter, prior to Umstead's testifying, defendant was allowed a few minutes to view the disciplinary record. Despite defendant's request, the court refused to admit the disciplinary record into evidence; however, it was sealed and designated as "Exhibit I" for appellate review. At trial, defendant further sought to discredit Umstead by attempting to cross-examine Umstead and the school principal, Marsha Person ("Principal Person"), about the child's disciplinary record. The State's objections to those attempts were sustained by the court.

Defendant offered testimony from another student, Mark Ellis, who testified that he had overheard H.M. and three other girls conspiring to make up a story about defendant. However, the trial judge concluded that despite there being some conflict in the evidence,

I don't think that there is any reason to believe that these girls conspired to make up a story about [defendant]. So the question . . . is whether or not [H.M.'s] telling the truth when she says he actually did it.

And whether or not at the time he got on top of her he had the intent to insert his penis in her mouth, I believe that he got carried away with the situation and, in fact, did, and, therefore, I find him guilty beyond a reasonable doubt of both charges

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Defendant was adjudicated a juvenile delinquent on 5 December 2001. A juvenile disposition order was entered on 25 February 2002 sentencing defendant to twelve months of supervised probation. Defendant appeals.

The dispositive issue on appeal pertains to Umstead's corroboration of H.M.'s accusation against defendant and whether the trial court deprived defendant of the right to confront this corroborative evidence as guaranteed by both the United States and North Carolina Constitutions. Defendant argues his right to confrontation was violated when the court: (1) denied defendant's request to be provided with a duly subpoenaed school disciplinary record of Umstead at the beginning of trial; (2) refused to allow defendant to cross-examine Umstead with respect to her disciplinary record; (3) refused to allow defendant to cross-examine Principal Person about Umstead's disciplinary record; and (4) refused to admit Umstead's disciplinary record into evidence. Of these four arguments, defendant's brief primarily focuses on his second argument while vaguely mentioning his remaining three arguments. Thus, we shall address his arguments in a similar manner.

"The sixth amendment of the Constitution, made applicable to state criminal proceedings by *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), guarantees the right of an accused in a criminal trial to be confronted with the witnesses against him." *State v. Fortney*, 301 N.C. 31, 36, 269 S.E.2d 110, 112-13 (1980). However, a defendant's right to cross-examination is subject to the sound discretion of the court and is therefore not absolute. See *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990); *State v. Pallas*, 144 N.C. App. 277, 548 S.E.2d 773 (2001). The testimony sought to be elicited on cross-examination " 'must be relevant to some defense or relevant to impeach the witness[]' " and, in certain instances, may " 'bow to accommodate other legitimate interests in the criminal trial process[]' " such as the rules of evidence. *Id.* at 283, 548 S.E.2d at 779 (citations omitted).

Rule 608(b) of the North Carolina Rules of Evidence governs the admissibility of a witness' specific instances of conduct for the purpose of attacking that witness' credibility. It provides that a witness' prior conduct may,

in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthful-

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ness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. Gen. Stat. § 8C-1, Rule 608(b) (2001). Thus, an inquiry regarding a witness' prior conduct is relevant if it is probative of veracity, and its probative value is not outweighed by the prejudicial effect of the evidence. *State v. Leroux*, 326 N.C. 368, 382, 390 S.E.2d 314, 324 (1990).

[1] In the case *sub judice*, defendant sought to cross-examine Umstead about her school disciplinary record in an attempt to ascertain her credibility and whether Umstead had any possible biases or motives. Yet, defendant, having seen the disciplinary record prior to Umstead's testimony, did not ask Umstead about or direct the trial court's attention to anything contained therein that was of an impeaching nature. Moreover, the trial court correctly determined that confidentiality concerns are at issue when considering the release of a child's official student records. *See* N.C. Gen. Stat. § 115C-402 (2001) (providing that the official records of students in the North Carolina school system are not public and should be kept confidential). The fact that Umstead had a disciplinary record cannot, in and of itself, establish the relevance of its content to determine possible credibility concerns. Thus, it was in the trial court's discretion to preclude a line of questioning that would have resulted in the dissemination of information as to Umstead's behavior in school where defendant had not shown its relevance in impeaching her credibility.

[2] Defendant further argues that the trial court erred in not allowing him to cross-examine Principal Person about Umstead's behavior or the contents of her disciplinary record. However, Rule 608(b) prevents defendant from cross-examining Principal Person about specific instances of Umstead's conduct for the purpose of attacking the child's character for truthfulness if the principal has not already testified regarding that character. Nothing in the record suggests that Principal Person testified as to Umstead's character prior to being cross-examined regarding it. Also, as mentioned previously, defendant failed to overcome the confidentiality concerns raised by defendant's questions with respect to Umstead's official student records. Therefore, this argument of defendant's is overruled.

[3] Finally, despite the State's contention to the contrary, defendant did make an offer of proof whereby the disciplinary record was made

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a part of the court record to support defendant's "theory of relevance" that it might indicate a "pattern of behavior which reflects on the credibility of [Umstead]." It is firmly established that once the trial court refuses a defendant's line of questioning, that defendant can preserve his argument for appellate review by providing a specific offer of proof of the excluded evidence unless the significance of that excluded evidence was obvious from the record. *See State v. Braxton*, 352 N.C. 158, 213, 531 S.E.2d 428, 460 (2000). Nevertheless, having since reviewed the disciplinary record ourselves, we conclude that it is devoid of any relevant information that would weigh on Umstead's credibility in this case.

For the aforementioned reasons, we affirm the trial court's adjudication of defendant as a juvenile delinquent based on his committing second degree sexual offense and crime against nature.

Affirmed.

Judges MARTIN and GEER concur.

CENTURA BANK, PLAINTIFF V. JESSICA HAWKINS WINTERS AND
ROBERT RONALD FULLER, DEFENDANTS

No. COA02-1388

(Filed 5 August 2003)

1. Civil Procedure— two dismissal provision of Rule 41(a)(1)—different transactions

The trial court did not err by granting summary judgment in favor of plaintiff bank as to claims against defendant resulting from the breach of an automobile lease agreement even though defendant contends plaintiff's present action was barred by the two dismissal provision under N.C.G.S. § 1A-1, Rule 41(a)(1), because although plaintiff's prior lawsuits arose from breaches of the same lease agreement, each lawsuit in the present case was based on a default with respect to a separate set of payments thus involving different transactions.

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

Although defendant contends the trial court erred by granting summary judgment in favor of plaintiff bank as to claims against defendant resulting from the breach of a lease agreement because plaintiff failed to prove damages as a matter of law, this issue is overruled because: (1) defendant did not raise this issue before the trial court; and (2) defendant is not permitted on appeal to advance new theories or raise new issues.

Appeal by defendant Robert Ronald Fuller from judgment entered 28 January 2002 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2003.

Fields & Cooper, P.L.L.C., by Elizabeth H. Fairman and John S. Williford, Jr., for plaintiff-appellee.

Billie Ray Ellerbe for defendant-appellant Robert Ronald Fuller.

HUNTER, Judge.

Robert Ronald Fuller (“defendant Fuller”) appeals from the trial court’s grant of summary judgment in favor of Centura Bank (“plaintiff”) as to its claim against him for damages resulting from the breach of a lease agreement. We affirm for the reasons stated herein.

On 28 June 1995, defendant Fuller and Jessica Hawkins Winters (“defendant Winters”) (collectively “defendants”) entered into an agreement with plaintiff to lease a 1995 Lexus automobile. Pursuant to the terms of the lease agreement, defendants were required to pay monthly installments of \$625.99 per month for forty-eight months. Beginning in January of 1996, defendants failed to make payments in accordance with the lease agreement. On 5 March 1997, plaintiff filed a civil action (97-CVD-3326) to recover the balance due under the lease, plus interest, attorney’s fees, and other related costs which totaled \$13,572.74. On 10 March 1997, plaintiff and defendants entered into an agreement whereby defendants agreed to cure the default and make payments on the lease. Defendants paid \$3,050.00 towards the arrearage owed under the lease agreement. On 30 June 1997, plaintiff filed a voluntary dismissal without prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41 (2001) (“Rule 41”).

Shortly after the first action was dismissed, defendants defaulted again on the lease. Plaintiff initiated a second action (97-CvS-14787)

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against defendants on 13 November 1997 seeking the balance due under the lease, which totaled \$35,513.49. On 2 March 1998, plaintiff dismissed the second civil action without prejudice pursuant to Rule 41.

On 13 April 2000, plaintiff filed a third civil action (00-CvS-5673) seeking \$13,548.05, the remaining balance due under the lease. Prior to filing this action, plaintiff repossessed the vehicle and sold it for \$17,115.00. On 11 October 2000, defendant Fuller filed a response which contained an answer to plaintiff's complaint as well as a cross-claim against defendant Winters. Defendant Winters never filed a response to plaintiff's complaint or to defendant Fuller's cross-claim.

On 17 December 2001, plaintiff moved for summary judgment on the grounds that there was no genuine issue of material fact as to the remaining balance due under the lease. In support of its motion, plaintiff submitted the affidavits of a bank employee, Dave Thompson, and a bank attorney, Elizabeth Fairman. Mr. Thompson's affidavit set forth defendants' payment history, as well as the repossession and sale of the vehicle. Ms. Fairman's affidavit set forth facts regarding plaintiff's attorney's fees. On 18 January 2002, defendant Fuller filed a response to plaintiff's motion for summary judgment asserting that plaintiff had previously filed two voluntary dismissals and was barred from filing a third civil action pursuant to the provisions of Rule 41(a)(1). Based on this evidence, the trial court awarded summary judgment in favor of plaintiff in the amount of \$13,548.05, plus interest, costs and attorney's fees. Defendant Fuller appeals the trial court's grant of summary judgment. Defendant Winters did not appeal.

Rule 41(a) permits a plaintiff to dismiss, without prejudice, any claim without an order of the court by filing a notice of dismissal at any time before resting his case, and to file a new action based upon the same claim within one year after the dismissal. The rule also provides, however, "that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim." *Id.* This provision is commonly referred to as the "two dismissal" rule. The question raised by this appeal is whether plaintiff has twice dismissed claims "based on or including the same claim" so as to be barred by Rule 41(a)(1) from maintaining the present action.

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I.

[1] There are two elements of the “two dismissal” provision of Rule 41(a)(1). First, the plaintiff must have filed notices to dismiss under Rule 41(a)(1) (since this Court has held that the two dismissal rule does not apply where plaintiff’s dismissal is by stipulation or by order of court, *Parrish v. Uzzell*, 41 N.C. App. 479, 483, 255 S.E.2d 219, 221 (1979)). Here, the record indicates plaintiff filed a notice of dismissal without prejudice in the first action (97-CVD-3326), and in the second action (97-CvS-14787). Plaintiff’s dismissals, therefore, were obtained by plaintiff filing notice of dismissal per Rule 41(a)(1) and were not by stipulation of court.

The second element of the “two dismissal” rule provides that the second suit must have been “‘based on or including the same claim’” as the first suit. *City of Raleigh v. College Campus Apartments, Inc.*, 94 N.C. App. 280, 282, 380 S.E.2d 163, 165 (1989). With respect to this requirement, defendant Fuller contends plaintiff’s second dismissal operated as an adjudication upon the merits because these actions were based on or included the same claim. Defendant asserts the previous lawsuits were almost identical in their allegations toward defendants since both lawsuits stemmed from the 28 June 1995 lease, both included the same parties, and both sought relief for defendants’ breach of the lease agreement. Although we note the similarities between the two previous lawsuits filed by plaintiff, we disagree with defendant Fuller’s assertion that the suits were based on or included the same claim.

In determining whether a second action involves the same claim as an earlier action, we look to whether the second action was based upon the same transaction or occurrence as the first action. *Richardson v. McCracken Enterprises*, 126 N.C. App. 506, 509, 485 S.E.2d 844, 846 (1997). Where payments arising from a contract are at issue, this Court has previously recognized that more than one claim may arise from a single contract and that a dismissal with prejudice of a suit based on a default with respect to some payments does not bar future claims with respect to subsequent payments. See *Shaw v. LaNotte, Inc.*, 92 N.C. App. 198, 202, 373 S.E.2d 882, 884-85 (1988).

Each lawsuit in the present case was based on a default with respect to a separate set of payments. Plaintiff’s first civil action alleged defendants were in default for approximately four rental pay-

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[159 N.C. App. 456 (2003)]

ments totaling \$3,714.51. The complaint sought judgment in the amount of \$13,572.00. Plaintiff then voluntarily dismissed the complaint after defendants agreed to cure the default by paying plaintiff \$3,050.00 towards the arrearage. After the dispute regarding the previous payments was settled, plaintiff resumed the lease agreement with defendants. Subsequently, defendants defaulted again on the lease after which plaintiff filed a second action that sought a judgment in the amount of \$35,513.49. Although plaintiff's prior lawsuits arose from breaches of the same lease agreement, both suits were based on separate defaults. Thus, the prior suits involved claims which were based upon different transactions. Therefore, the trial court correctly determined that the two previously dismissed actions were not based on and did not include the same claim and that the present action is not barred by the provisions of Rule 41(a)(1).

II.

[2] Defendant Fuller also contends the trial court erred in granting plaintiff's motion for summary judgment because plaintiff failed to prove damages as a matter of law. Specifically, he argues a genuine issue of material fact exists as to whether the sale of the vehicle was conducted in a commercially reasonable manner. However, we note that defendant Fuller did not raise this issue before the trial court. As an appellate tribunal, we may only consider the pleadings and other filings that were before the trial court when reviewing a motion for summary judgment. *Hoisington v. ZT-Winston-Salem Assocs.*, 133 N.C. App. 485, 490, 516 S.E.2d 176, 180 (1999). Defendant Fuller is not permitted on appeal to advance new theories or raise new issues in support of his opposition to the motion. *Baker v. Rushing*, 104 N.C. App. 240, 246, 409 S.E.2d 108, 111 (1991). Accordingly, we hold the trial court did not err in granting summary judgment in favor of plaintiff.

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

IN RE STRATTON

[159 N.C. App. 461 (2003)]

IN THE MATTER OF: SPENCER STRATTON, DOB 01-14-84; ISAAH STRATTON, DOB 10-01-85; SOLOMON STRATTON, DOB 03-20-89; TANNA STRATTON, DOB 08-24-90; RACHEL STRATTON, DOB 04-14-92; SIMON STRATTON, DOB 03-01-94; MICHELLE STRATTON, DOB 08-24-95; MARIA STRATTON, DOB 09-06-96; STEPHANIE STRATTON, DOB 10-28-97; LEAH STRATTON, DOB 07-02-99

No. COA02-745

(Filed 5 August 2003)

1. Appeal and Error— motion to strike brief—improper appellate brief

The Department of Social Services' motion to strike a brief filed by the mother in a child neglect and dependency adjudication hearing is granted on the grounds that the brief was not a proper appellee brief.

2. Appeal and Error— appealability—mootness

Respondent father's appeal from a 31 January 2002 order adjudicating his children to be neglected and dependent was rendered moot by a 10 June 2003 order terminating respondent's parental rights where the trial judge who terminated respondent's parental rights did not rely on findings by the judge who adjudicated the children to be neglected and dependent but made an independent determination that the children had been and continued to be neglected.

Appeal by respondent father from order entered 31 January 2002 by Judge Elizabeth D. Miller (formerly Currence) in Mecklenburg County District Court. Heard in the Court of Appeals 24 February 2003.

Mecklenburg County Department of Social Services, by Associate County Attorney Tyrone C. Wade, for petitioner-appellee, Mecklenburg County Department of Social Services, Youth and Family Services.

Michael Schmidt for respondent-appellant father, Jack Stratton.

McDowell Street Center for Family Law, Inc., by Tina Renee' Ridge for respondent-appellee mother, Kathy Stratton.

Brett A. Loftis for Children.

Sheila Passenant, for Guardian Ad Litem.

IN RE STRATTON

[159 N.C. App. 461 (2003)]

GEER, Judge.

This appeal arises from the adjudication of the Stratton children as being neglected and dependent. Mr. Stratton raises in this appeal several issues regarding the conduct of the adjudication hearing and whether sufficient evidence exists to support the adjudication of neglect and dependency. Because we find that this appeal is now moot and should be dismissed, we do not address these issues.

On 30 January 2001, the Mecklenburg County Division of Social Services ("DSS") filed a juvenile petition alleging the Stratton children to be neglected and dependent as defined in N.C. Gen. Stat. § 7B-101(9), (15) (2001). On that same date, the district court issued a non-secure custody order placing the children in foster care.

Judge Elizabeth D. Miller conducted an adjudicatory hearing pursuant to N.C. Gen. Stat. §§ 7B-801(c) and -901 (2001) on 12 March 2001. Judge Miller entered a written order adjudicating the children to be neglected and dependent on 31 January 2002. Mr. Stratton filed notice of appeal from that order on 14 February 2002. The oldest of the Stratton children, Spencer Stratton, has since reached the age of eighteen and is not the subject of this appeal.

[1] Mrs. Stratton, the children's mother, has not appealed or petitioned this Court for writ of certiorari. Nevertheless, Mrs. Stratton has filed a brief, purportedly as an appellee, challenging the validity of the trial court's 31 January 2002 order. DSS has moved to strike that brief on the grounds that it is not a proper appellee brief. We agree and grant DSS' motion.

On 10 June 2003, while this appeal was pending, Judge Margaret L. Sharpe entered an order, following several months of hearings, terminating the parental rights of Mr. and Mrs. Stratton. Based on the evidence presented at the hearings, Judge Sharpe concluded that the Stratton children were neglected within the meaning of N.C. Gen. Stat. § 7B-101(15) and that DSS had proven by clear, cogent, and convincing evidence that grounds existed to terminate the parental rights of the Strattons under N.C. Gen. Stat. § 7B-1111(a)(1) and (a)(2) (2001). In the 10 June 2003 order, Judge Sharpe did not rely in any respect on the 31 January 2002 adjudication of neglect at issue on this appeal.

This Court is entitled to take judicial notice of this recent order. *State ex rel. Utilities Comm'n v. Southern Bell Telephone and Telegraph Co.*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976). As our

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Supreme Court has held, “[c]onsideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic” *Id.*, 221 S.E.2d at 324.

[2] The district court’s 10 June 2003 order renders this appeal moot. “A case is ‘moot’ when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.” *Roberts v. Madison County Realtors Ass’n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Further, “[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.” *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994) (internal quotation marks omitted).

The questions raised by Mr. Stratton on this appeal are now academic given Judge Sharpe’s order terminating his parental rights. Mr. Stratton asks this Court to reverse the 31 January 2002 adjudication of neglect, but all of the findings in that order have now been superseded by the findings in Judge Sharpe’s 10 June 2003 order. Although Judge Sharpe could have taken into account the 31 January 2002 adjudication of neglect, she chose not to do so and instead made an entirely independent determination that the Stratton children had been and continued to be neglected. *See In re Ballard*, 311 N.C. 708, 713-14, 319 S.E.2d 227, 231-32 (1984) (although the trial court may consider prior adjudications of neglect, these prior adjudications cannot serve as the sole basis for a finding of neglect at the time of the termination proceeding). Reversing the 31 January 2002 order would have no effect given this separate determination of neglect.

Moreover, the district court also found a second ground, independent of the finding of neglect, justifying termination of Mr. Stratton’s parental rights: N.C. Gen. Stat. § 7B-1111(a)(2) (allowing termination of parental rights when a parent has willfully left a child in foster care without demonstrating reasonable progress in correcting the conditions that led to the removal of the child). As a result, even if this Court were to reverse the 31 January 2002 order of adjudication and even if we did not consider the subsequent finding of neglect, the termination of parental rights order would still be binding, the children would not be returned to Mr. Stratton, and there would be no further reunification efforts.

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[159 N.C. App. 461 (2003)]

In short, Mr. Stratton has already received a new, independent adjudication of the neglect issue and any resolution of the issues raised on this appeal will have no practical effect on the existing controversy. The issues regarding the 31 January 2002 order have been rendered moot by the subsequent 10 June 2003 order. We therefore dismiss respondent's appeal. *Southern Bell*, 289 N.C. at 290, 221 S.E.2d at 324 ("When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal.").

Dismissed.

Chief Judge EAGLES and Judge MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ABBOTT v. EVANS-ABBOTT No. 02-1131	Watauga (02CVD27)	Affirmed
ALLEN v. POWELL No. 02-1223	Transylvania (99CVD343)	Affirmed
BARBER v. MYERS No. 02-1235	Rutherford (00CVD1167)	Reversed and remanded
BARNHILL v. BARNHILL No. 02-1283	Robeson (98CVD127)	Vacated and remanded
BUCKINGHAM v. BUCKINGHAM No. 02-122	Wake (96CVD11317)	Affirmed
CARY CROSSROADS ASSOCS., L.P. v. ATLANTA BREAD CO. INT'L, INC. No. 02-1178	Wake (01CVS14724)	Reversed and remanded
COASTAL CAISSON CORP. v. KLINE IRON & STEEL CO. No. 02-1319	Wake (00CVS658)	Affirmed
CONSECO FIN. SERVICING CORP. v. HOME CITY, LTD. No. 02-913	Wake (02CVS5931)	Dismissed
DEPARTMENT OF TRANSP. v. PEELE No. 02-80	Moore (00CVS975)	Dismissed
DEPARTMENT OF TRANSP. v. STOUT No. 02-79	Moore (01CVS180)	Dismissed
DOSHER v. MORETZ No. 02-800	Brunswick (00CVS1215)	Dismissed
DRAPER v. DRAPER No. 02-980	Buncombe (99CVD3572)	Affirmed in part; reversed and remanded in part
DUKES v. BERGMAN No. 02-1179	Durham (01CVS2537)	Reversed
EVANS v. ANDERSON No. 02-1107	Buncombe (00CVS3760)	Affirmed
FIRST UNION NAT'L BANK OF N.C. v. SELLA No. 02-1070	Mecklenburg (00CVD11494)	Vacated and remanded

GREENE v. ROGERS REALTY & AUCTION CO. No. 02-882	Surry (01CVS14)	Affirmed
HAIZLIP v. MFI OF S.C., INC. No. 02-1027	Guilford (01CVS4826)	Reversed
HARGROVE v. BATTS TEMP. SERV. No. 02-1397	Ind. Comm. I.C. 065431	Affirmed
IN RE ASCENCIO No. 03-283	Chatham (01J127)	Affirmed
IN RE FOSTER No. 02-1392	Johnston (00J222)	Affirmed
IN RE MARTIN No. 02-1081	Wayne (01J102) (01J103)	Affirmed
IN RE REDMON No. 02-778	Buncombe (00J260)	Affirmed
IN RE RESOR No. 02-1738	Guilford (02J352) (02J353)	Affirmed
IN RE SCHOEN No. 02-406	New Hanover (01J422)	Affirmed
IN RE THOMPSON No. 02-631	Rowan (99J72)	Affirmed
KING v. KELLY SPRINGFIELD TIRE CO. No. 02-685	Ind. Comm. (I.C. 538736)	Affirmed in part, remanded in part
LAMBERT v. HARRELL No. 02-799	Pasquotank (01CVS579)	Affirmed
LEE v. FANTASY LAKE, INC. No. 02-966	Cumberland (01CVS5858)	Affirmed
MATHIS v. MATHIS No. 02-1252	Henderson (01CVD641)	Affirmed
McKYER v. McKYER No. 02-1096	Mecklenburg (00CVD9237) (01CVD22855)	Affirmed
NATIONAL ALLIANCE FOR THE MENTALLY ILL v. COUNTY OF CUMBERLAND No. 02-1182	Cumberland (02CVS585)	Affirmed

OCWEN FED. BANK v. SELLA No. 02-1069	Mecklenburg (00CVD11493)	Vacated and remanded
PETHO v. WAKEMAN No. 02-1338	Mecklenburg (01CVS13961)	Affirmed
RUSSELL v. THORNTON No. 02-1351	Rutherford (00CVS935)	No error
SLOOP v. CHESTNUT HILL CONSTR. SERV., INC. No. 02-944	Buncombe (00CVS979)	New trial
STALLINGS v. DANIELS No. 02-1154	New Hanover (02CVS1204)	Reversed and remanded in part
STATE AUTO PROP. & CAS. INS. CO. v. RANKIN No. 02-1202	Forsyth (01CVS6633)	Affirmed
STATE EX REL. BLAKENEY v. REID No. 02-1298	Union (94CVD1525)	Remanded for a new trial
STATE v. ALLISON No. 02-1043	Henderson (94CRS5296) (94CRS8296)	No error
STATE v. BARTON No. 02-1675	Moore (02CRS3284) (02CRS3285)	Affirmed
STATE v. BITTING No. 02-1329	Forsyth (00CRS59912) (01CRS32257)	No error
STATE v. CHAMBERS No. 02-1472	Iredell (01CRS4289) (01CRS4290) (01CRS4292) (01CRS4293)	No error
STATE v. CLYBURN No. 03-64	Union (01CRS52150) (02CRS3709)	No error; motion for appropriate relief is denied; and defendant's "Notice" filing is dismissed
STATE v. FOGG No. 02-1421	Franklin (01CRS1131) (01CRS50331) (01CRS50332)	No error
STATE v. HOLBROOKS No. 02-1661	Cabarrus (02CRS5525)	No error

STATE v. HUDSON No. 02-684	Guilford (00CRS98514)	No prejudicial error
STATE v. JONES No. 02-1274	Davidson (00CRS51727) (00CRS51728) (02CRS543) (02CRS544) (02CRS545) (02CRS546)	No error in trial. Remand for correction of clerical error
STATE v. LOZA-RIVERA No. 02-951	Wake (01CRS8971) (01CRS8972) (01CRS8973)	Reversed
STATE v. McALLISTER No. 02-1171	Guilford (00CRS113364) (01CRS23610)	No error
STATE v. McCANN No. 02-459	Caswell (00CRS2163) (01CRS467)	No error
STATE v. MILES No. 02-893	Robeson (95CRS15621) (95CRS15622)	No error
STATE v. MUSE No. 02-1101	Dare (01CRS51298)	No error
STATE v. RICHARDSON No. 02-1082	Person (00CRS4506) (01CRS4925)	No error
STATE v. STRICKLAND No. 02-1507	Wake (01CRS112241) (02CRS2996)	No error in part; reversed and remanded in part
STATE v. THOMAS No. 02-1276	Forsyth (99CRS36198)	No error
STATE v. WHITTINGTON No. 02-818	Mecklenburg (00CRS1098) (00CRS1099) (00CRS1100) (00CRS19416) (00CRS19417)	No error
STATE v. WILLIAMS No. 02-761	Richmond (01CRS724) (01CRS2499)	No error

VISUAL OUTDOOR ADVER., INC. v. TOWN OF FRANKLINTON BD. OF COMM'RS No. 02-1055	Franklin (02CVS367)	Affirmed
WIDENER v. WIDENER No. 02-1242	Guilford (01CVD6327)	Affirmed
YOST v. WESTCHESTER SPECIALTY INS. SERVS., INC. No. 02-883	Mecklenburg (01CVS14668)	Affirmed

SLOAN FIN. GRP., INC. v. BECKETT

[159 N.C. App. 470 (2003)]

SLOAN FINANCIAL GROUP, INC., SLOAN HOLDINGS, INC., NEW AFRICA MANAGEMENT, LLC, NEW AFRICA INVESTMENT MANAGEMENT, LLC AND NEW AFRICA ADVISERS, INC., PLAINTIFFS AND CROSS-CLAIM DEFENDANTS, NEW AFRICA OPPORTUNITY FUND, L.P., D/B/A ZM AFRICA INVESTMENT FUND, L.P., PLAINTIFF-INTERVENOR AND CROSS-CLAIMANT V. JUSTIN F. BECKETT, DORIKA MAMBOLEO, MICHAEL SUDARKASA, TERESA CLARKE, MACEO K. SLOAN, AND JOHN DOES (1-10), DEFENDANTS

No. COA02-396

(Filed 5 August 2003)

1. Arbitration and Mediation— agreement to arbitrate— scope of agreement—analysis

The trial court's denial of a motion to compel arbitration was not reversed based on a failure to follow the Federal Arbitration Act in an investment fraud case involving multiple organizational layers, with a question as to whether the arbitration agreement applied to more than one partnership. North Carolina's stance on arbitration is very close, if not identical to the federal stance; under either analysis, a party is first found to have contractually agreed to arbitration, and then the determination is whether the dispute falls within the realm of the arbitration clause. The presumption in favor of arbitration is applied in the second step.

2. Arbitration and Mediation— multilayered investment fraud—relationship of allegations to agreement

The trial court did not err by finding that all but one claim arising from investment fraud fell outside an arbitration clause. The action involved defendants' multilayered organizational structure, with the question being whether the arbitration agreement for one partnership (NAIM) controlled the other organizational levels because NAIM was central to the scheme to siphon money away from the investment fund. The focus of the case is on the powers granted to another partnership (except for one claim), and the allegations do not bear a significant or strong relationship to NAIM's operating agreement and its arbitration clause.

3. Arbitration and Mediation— stay of claims not arbitrated—denied—no abuse of discretion

The trial court did not abuse its discretion by not staying claims not ordered to arbitration. The interest of efficiency

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would not be served by holding the main portion of a lawsuit while a side item is arbitrated.

Judge WYNN dissenting.

Appeal by defendants Justin F. Beckett and Dorika Mamboleo from order entered 27 November 2001 by Judge Giles R. Clark in Durham County Superior Court. Heard in the Court of Appeals 27 January 2003.

Thelen Reid & Priest, LLP, by Mark Fox Evens; and Brown & Bunch, PLLC, by LeAnn Nease Brown, for plaintiff appellees and defendant appellee Maceo K. Sloan.

Wilmer, Cutler & Pickering, by Brigida Benitez and Rachael A. Hill; Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr., Hope Derby Carmichael, and Paul T. Flick, for plaintiff appellee-intervenor.

Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins, Jr., and Michael J. Tadych; Pillsbury Winthrop, LLP, by Richard H. Block and David R. Lagasse, for defendant appellants.

McCULLOUGH, Judge.

This case arises out of a complex set of facts surrounding the formation and alleged mismanagement of an international private equity investment fund.

Maceo K. Sloan (Sloan), a vice president with North Carolina Mutual Life, formed NCM Capital, a wholly owned subsidiary of North Carolina Mutual, as a vehicle for the company to make investments. In 1991, North Carolina Mutual Life wanted to sell off some of its assets, so Sloan formed Sloan Financial Group, Inc. (SFG-N.C. Corporation), which purchased NCM Capital from North Carolina Mutual Life. Under Sloan's leadership, SFG became the largest African-American owned investment company in the United States, managing over \$3 billion by 1994. Sloan became chief executive officer (CEO) of Sloan Financial Group. Prior to the formation of SFG, Sloan had met Justin Beckett, and was impressed by his "drive and determination." Sloan hired him and Beckett rose to become the executive vice president and a director of SFG, as well as its second largest shareholder.

Beckett was interested in developing business opportunities in southern Africa once sanctions associated with apartheid had lifted.

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He convinced SFG to allow him to oversee investment there. As such, SFG formed New Africa Advisers, Inc. (NAA-Delaware Corporation), for this purpose and Beckett served as CEO and had day-to-day control. NAA traded securities on African stock exchanges.

Next, Beckett proposed that SFG create a private equity fund in southern Africa. Such a fund would act as a venture capital investment fund to make direct investments in the Republic of South Africa and surrounding countries, with Beckett at the helm as manager. This was about 1995.

SFG agreed to the proposal. SFG submitted its proposal, drafted by Beckett, of the multi-million dollar private equity fund to the Overseas Private Investment Corporation (OPIC), an agency of the United States government that funds foreign investment. OPIC was to make an \$80 million investment and a group of limited partners would provide capital contributions in the amount of \$40 million. OPIC approved the \$120 million plan on 4 September 1996, and began work with Beckett to draft the documents of the fund that was to be known as the New Africa Opportunity Fund (NAOF, the Fund-Delaware Limited Partnership).

In addition, Beckett had to find the limited partners willing to invest the \$40 million. Sloan, who said in the complaint that he “has a personal commitment to Africa,” assisted Beckett in obtaining limited partners. Together they secured Citicorp, Sun America, Inc., Northwestern Mutual Life Insurance Co., Burden & Co., Waycrosse, Inc., Challenger Capital Management, L.P., Allbrook International, NAF Investment, LLC, and Chancellor Corp. These limited partners and OPIC agreed to back the Fund largely because of the proposed purposes and objectives set forth in the 15 August 1997 Confidential Private Placement Memorandum (PPM). The PPM made Beckett responsible for management. The personal involvement of Beckett, Sloan and SFG was integral in getting investors on board with the project.

The documents for NAOF were soon after completed. Most notable was the Amended and Restated Agreement of Limited Partnership Agreement (partnership agreement) and a Finance Agreement, both dated 15 August 1997. Together with the PPM, the partnership agreement, the Finance Agreement, the commitment and subscriptions of the limited partners formed the NAOF documents that created the Fund and structured its management.

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Pursuant to these documents, New Africa Investment Management (NAIM-Delaware Limited Liability Company) was formed by SFG. NAIM was installed as the general partner to NAOF as per the partnership agreement. This was its sole purpose. The members involved with NAIM executed a Limited Liability Company Agreement on 15 August 1997. This agreement was made to deal with the creation and inner workings of NAIM. Beckett was the president and manager of NAIM, while Sloan was the vice president, and defendants Mamboleo and Clarke served as members of NAIM.

NAIM was authorized to, among other things, invest the funds of the Fund on the advice of the Investment Committee headed by Sloan, monitor the investments of the Fund, enter into a Finance Agreement with OPIC, maintain the bank accounts of the Fund, make payments on behalf of the Fund, enter into a Management Agreement, and take other actions necessary or convenient to transact the Fund's business by the partnership agreement of NAOF. An advisory board was also created by the partnership agreement, which included representatives from the limited partners and OPIC that served to review transactions that had potential conflicts of interest.

Sloan Holdings, Inc. (SHI-Delaware Corporation) was formed shortly prior to NAIM by Sloan and Beckett to be the only managing member of NAIM. This was its sole purpose. SHI held the majority stake in NAIM. Sloan served as chairman and CEO and owned two-thirds of the equity in SHI, and Beckett was the president, the manager, and owned the remaining equity.

Sloan executed the partnership agreement, which created the Fund, on behalf of SHI as managing member of NAIM, the partnership's general partner.

New Africa Management, LLC (NAM-Delaware LLC) was formed by SHI, which wholly owned NAM, to be the manager of the Fund and oversee its investments. This was its sole purpose. SHI installed Beckett as president and CEO of NAM. On 15 August 1997, NAIM entered into a "management agreement" with NAM on behalf of the Fund. Under this agreement, NAM was to provide management services for the Fund for a management fee. Under this management agreement, NAM had duties involving locating potential investments and monitoring the Fund.

All this was done in accordance with the documents involved in the formation of the Fund. To recap, SHI was formed to be the man-

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aging member of NAIM, which was formed soon after SHI to be the general partner of the Fund. SHI also formed NAM to be the manager of the Fund.

Beckett had substantial control over the Fund by virtue of his positions in the foregoing entities. He formed a team of advisors that included most of the named defendants. With his personnel in place, it is alleged that he proceeded to ignore Fund guidelines and allegedly misappropriate Fund money. They allegedly falsified information to OPIC and the rest of the overseeing bodies to make these investments appear to be valid. Excessive spending and salaries were implemented. The management fees that were supposed to go to respective plaintiffs were siphoned into this group's possession.

In addition to mismanagement, Beckett and other defendants allegedly devised another way to steal from the Fund. Beckett formed New Africa Finance Corporation (NAFC—formed in the African nation of Mauritius) under the guise that it would become a portfolio company in early 1999. Under normal operation, the Fund was not to be involved with the day-to-day operations of portfolio companies. However, with NAFC in place, Beckett could exploit portfolio companies in this manner as well. These companies had to keep funding to stay alive, so Beckett allegedly made them pay NAFC for excessive consulting and financing fees to stay within his good graces. Beckett thereby allegedly extorted large amounts of money from portfolio companies in this manner.

Eventually, in July of 2000, all this came to light and Beckett was forced to resign by agreement on 14 August 2000 and his supposed accomplices were terminated. NAA suffered annual losses in excess of \$1.5 million. NAIM was removed as general partner of the Fund on 20 September 2000. NAM lost an opportunity to manage another newly created but similar larger fund. The reputation of NAM was tarnished and it was removed as manager of NAOF. SHI lost the benefit of managing NAIM.

As a result of this, SFG, SHI, NAM, NAIM, and NAA filed suit on 26 February 2001 against Justin Beckett, his wife and fellow employee Dorika Mamboleo, Michael Sudarkasa, Teresa Clarke, and other unnamed defendants. There were several counts in this complaint: Fraud as to all defendants in the formation of NAFC; conversion/embezzlement as to all defendants by misappropriating management fees; conspiracy as to all defendants; tortious interference with prospective economic advantage as to Beckett; breach of fidu-

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ciary duty as to Beckett (officer and president of NAM, president and member of NAIM, director, president and CEO of NAA) and Sudarkasa (chief operations officer of NAA); breach of contract as to Beckett and Mamboleo by failing to comply with the NAIM operating agreement; unfair and deceptive trade practices as to all defendants; breach of employment agreement as to Beckett with NAM by forming NAFC; in the alternative breach of contract as to Beckett in the Separation Agreement and General Release (14 August 2000 contract); fraud in the inducement to contract as to Beckett and the 14 August 2000 contract; punitive damages as to all defendants; and an accounting.

The Fund successfully intervened in this lawsuit by order of the trial court on 30 May 2001. The Fund filed its complaint in the matter on 1 June 2001. This complaint added Sloan as a defendant and included him as being at least somewhat involved in the malfeasance surrounding the Fund, as well as including plaintiffs from the original complaint as defendants. This complaint had several counts: Fraud as to Beckett, Sudarkasa, NAIM and NAM by their involvement with NAFC; unfair and deceptive trade practices as to the same; breach of contract as to NAIM as per the partnership agreement; breach of fiduciary duty as to Beckett and NAIM because they defrauded the Fund; breach of fiduciary duty as to SFG and Sloan as they staffed all the corporations and should have known about the malfeasance; breach of contract as to Beckett as he had a contract with NAM to manage the Fund; breach of contract as to Beckett and Mamboleo as they were members of NAIM and parties to its operating agreement; aiding and abetting breach of fiduciary duty as to Sudarkasa, Mamboleo, and Clarke because they helped Beckett with NAFC; gross negligence as to SFG, NAIM, NAM, Beckett, and Sloan for lack of supervision; vicarious liability as to SFG; constructive trust as to all involved for money belonging to the Fund; and unjust enrichment as to NAM for management fees paid.

On 29 August 2001, the Fund filed an amended complaint, which removed the cause of action for breach of contract as to Beckett and Mamboleo as they were members of NAIM and parties to its operating agreement from the complaint.

After these respective pleadings, defendants Beckett and Mamboleo made motions to compel the matter to arbitration. They based this motion on the NAIM operating agreement, which provided the following provision:

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SECTION 10.1. Arbitration; Waiver of Partition/Action for Accounting. (a) To the fullest extent permitted by law, any dispute, controversy or claim arising out of or relating to this Agreement or to the Company's affairs or the rights or interests of the Members including, but not limited to, the validity, interpretation, performance, breach or termination of this Agreement, whether arising during the Company term or at or after its termination or during or after the liquidation of the Company, shall be settled by arbitration in New York City by three neutral arbitrators in accordance with the rules then obtaining of the American Arbitration Association.

It was defendants' contention that all parties should be compelled to arbitration on the basis of this provision. According to defendants' argument, the Fund was created by its partnership agreement. That partnership agreement put the operations and control of the Fund in the management of the general partner, which was NAIM. Backing up, SHI was formed to be NAIM's managing member, solely responsible for its management, as NAIM was a limited liability company. SHI was thus NAIM's agent. SHI signed and executed the operating agreement that created NAIM and gave it management power over NAIM. This was the document that contains the arbitration clause, quoted above. In addition, NAM, the manager of the fund, was directed by NAIM. Therefore, the operating agreement and NAIM, according to the original defendants, are at the heart of the matter. All funds flowed through it to the Fund. Defendant Beckett was the president of NAIM, which was in sole control of the operations of the Fund. Whatever wrongdoing was done with Fund monies, it was done via defendants' positions with NAIM and its affairs. Therefore, defendants argued the arbitration provision was binding on all parties.

The trial court did not agree with their argument, however, ruling for plaintiffs and intervenor that, with the exception of one cause of action by plaintiffs (Count VI, breach of NAIM Operating Agreement by Beckett and Mamboleo), all other claims by plaintiffs and all claims by intervenor fell outside the scope of the arbitration clause found in the NAIM operating agreement. The trial court stayed the litigation of Count VI pursuant to the Federal Arbitration Act, 9 U.S.C. § 3. The trial court denied defendants' motion to stay the litigation of all claims pending the arbitration of Count VI. Defendants appeal. After filing this notice of appeal, the appellees filed a motion to stay all proceedings pending the outcome of the present appeal. This motion was granted on 22 February 2002.

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Defendants assign as error: The trial court's denial of defendants Beckett and Mamboleo's (I) Motion to Compel Arbitration as to the complaint of plaintiff-intervenor and Counts I-V and VII-XI of the complaint of plaintiffs; (II) request for a stay of litigation as to the claims of plaintiff-intervenor and the claims contained in Counts I-V and VII-XI of the complaint of plaintiffs.

I.

[1] Initially, defendant appellants (Beckett & Mamboleo) contend that the trial court failed to apply the Federal Arbitration Act (FAA). 9 U.S.C. §§ 1, *et. seq.* The FAA, according to appellants, demands interpretation of an arbitration clause in light of the federal policy favoring arbitration. *See Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]”); *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574, 582-83, 4 L. Ed. 2d 1409, 1417 (1960) (“An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”). Instead, the trial court applied what appellants characterize as a “mistakenly narrow view of arbitration.”

Appellees (Sloan and the Companies) point out that appellants did not raise the FAA issue at trial and gave no facts to support a finding that the operating agreement “evidenc[es] a transaction involving commerce[.]” *See Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 382 (4th Cir. 1988) (scope of arbitration clause governed by FAA because the agreement “evidenc[ed] a transaction involving commerce”). All appellees agree that the trial court used the proper standard considering appellants’ motion.

Our review of the trial court’s order is *de novo*, whether the trial court employed the FAA or our state’s law construing arbitration clauses. *See Tohato, Inc. v. Pinewild Management, Inc.*, 128 N.C. App. 386, 391-92, 496 S.E.2d 800, 804 (1998). In any event, it appears that North Carolina’s stance on arbitration is very close, if not identical, to the federal stance. Recently, this Court stated:

As a general matter, public policy favors arbitration. *See, e.g., Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 74 L. Ed. 2d 765 (1983) (ambiguities or doubts as to the scope of arbitrable disputes are to be resolved in favor of arbitration);

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Johnston County v. R.N. Rouse & Co., 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992) (noting North Carolina's "strong public policy" in favor of resolving disputes by arbitration). However, before a dispute can be ordered resolved through arbitration, there must be a valid agreement to arbitrate. *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409 (1960); *LSB Financial Services, Inc. v. Harrison*, 144 N.C. App. 542, 548 S.E.2d 574 (2001). Thus, whether a dispute is subject to arbitration is a matter of contract law. *Ragan v. Wheat First Sec., Inc.*, 138 N.C. App. 453, 531 S.E.2d 874, *disc. review denied*, 353 N.C. 268, 546 S.E.2d 129 (2000). Parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate. *Futrelle v. Duke University*, 127 N.C. App. 244, 488 S.E.2d 635, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 412 (1997). *See also Ruffin Woody and Associates v. Person County*, 92 N.C. App. 129, 374 S.E.2d 165 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989) (court holds that dispute concerning architect's performance is within arbitration clause in construction contract, stating that determination of arbitrability of specific claim is governed by language of parties' contract). Moreover, a party cannot be forced to submit to arbitration of any dispute unless he has agreed to do so. *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 89 L. Ed. 2d 648 (1986) (citation omitted). *See also United Steelworkers*, 363 U.S. 574, 4 L. Ed. 2d 1409; *LSB Financial Services*, 144 N.C. App. 542, 548 S.E.2d 574 (court finds that securities transaction dispute is subject to arbitration clause, noting that arbitration is required only when parties have previously agreed to submit dispute to arbitration); *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 331 S.E.2d 726 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986).

The question of whether a dispute is subject to arbitration is an issue for judicial determination. *AT&T Technologies*, 475 U.S. 643, 89 L. Ed. 2d 648. The trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law, reviewable *de novo* by the appellate court. *Tohato, Inc. v. Pinewild Management, Inc.*, 128 N.C. App. 386, 496 S.E.2d 800 (1998). Whether a dispute is subject to arbitration involves a two pronged analysis; the court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether "the specific dispute falls within the substantive scope of that agreement." *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990). This Court has adopted the *PaineWebber* analysis.

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Ragan, 138 N.C. App. 453, 531 S.E.2d 874 (in considering a motion to compel arbitration, the trial court should determine the validity of the contract to arbitrate, and whether the subject matter of the arbitration agreement covers the matter in dispute); *Rodgers Builders*, 76 N.C. App. 16, 331 S.E.2d 726 (arbitrability is determined by relationship between claim and subject matter of arbitration clause).

Raspet v. Buck, 147 N.C. App. 133, 135-36, 554 S.E.2d 676, 678 (2001).

Under either analysis, once a party has been found to have contractually agreed to arbitration, what is left to determine is whether the claim or dispute between the parties falls within the realm of, or has a significant or strong relationship with, the agreed upon arbitration clause. See *American Recovery v. Computerized Thermal Imaging*, 96 F.3d 88, 93 (4th Cir. 1996); *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 24, 331 S.E.2d 726, 731 (1985), *disc. review denied*, 315 N.C. 590, 314 S.E.2d 29 (1986). It is in this second step of either analysis where the presumption in favor of arbitration exists. See *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002).

Therefore, we decline to reverse the trial court's ruling on the basis that it may not have followed the FAA.

II.

[2] Appellants contend that the trial court erred by finding that all the claims, save the one, by both appellees fell outside of the scope of the arbitration clause and denying its motion to compel. The clause at issue, which comes from the operating agreement of NAIM, is restated here in pertinent part:

To the fullest extent permitted by law, any dispute, controversy or claim arising out of or relating to this Agreement or to the Company's affairs or the rights or interests of the Members including, but not limited to, the validity, interpretation, performance, breach or termination of this Agreement . . . shall be settled by arbitration

Beckett was a member of NAIM, as well as its president and general manager. Ms. Mamboleo was a member of NAIM.

Appellants' argument is twofold as it pertains to two different groups of appellees: (A) NAIM and SHI, the so-called signatories to

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the NAIM operating agreement; and (B) SFG, NAM, NAA, and NAOF (the Fund), the so-called non-signatories.

A.

Appellants contend that NAIM and SHI are bound by the NAIM operating agreement and should have been compelled to arbitration per their motion before the trial court.

As stated above, the two-step analysis in considering a motion to compel parties to arbitration involves determining whether a valid agreement to arbitrate existed between the parties, and then whether or not the claims are embraced by that agreement.

Appellants' argument is generally straightforward. The operating agreement creates NAIM, and thus it is bound by the agreement. For argument's sake, we will assume this proposition. SHI was made the managing member by the operating agreement and signed it, making it bound. Beckett signed the agreement as an original member, and Mamboleo apparently became a member, making them bound. Further, Sloan signed individually as a member and for SHI.

As to the relationship of the bound signatories' complaint to the arbitration clause, appellants point to:

- Count I— The fraud claim for the misrepresentation by Beckett and Mamboleo that NAFC was actually an investment banking company, causing SFG to authorize Fund money to NAFC.
- Count III— The conspiracy claim against Beckett and Mamboleo for the plan to misappropriate funds of NAIM and SHI.
- Count IV— The breach of fiduciary duty claim against Beckett as, among others, president and member of NAIM.
- Count VII— The Unfair and Deceptive Trade Practice claim against Beckett and Mamboleo for establishing NAFC to siphon money from the Fund.
- Count IX— The breach of contract claim against Beckett for violating the release he signed when he left the Sloan companies' employ.
- Count X— The fraud in the inducement to contract against Beckett for the release.

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Count XI— The punitive damages and accounting claims against Beckett and Mamboleo for all the fraud and conspiracy allegations.

According to appellants, all of these claims “arise out of or relate to” the NAIM operating agreement. This is because it is appellants’ theory that NAIM was the central piece in this alleged scheme to siphon money out of the Fund as it stands at the center of the Fund’s management. NAIM controlled the flow of dollars through the Fund, and Beckett is alleged to have used his position at NAIM to accomplish these deeds.

Appellees (Sloan and the Companies) counter appellants’ NAIM-central theory by drawing a different picture that has NAFC at the heart of the dispute. According to Sloan and the Companies, the NAIM operating agreement was an internal agreement governing the conduct of its members, and its purpose was limited as such:

The parties wish to enter into this Limited Liability Company Agreement to (a) reflect the admission of persons as members and (b) make certain provisions for the affairs of the Company and the conduct of business.

The operating agreement dealt with the formation of NAIM, the duties of the managing member (SHI), indemnification among the members, contributions by and distributions to members, procedures in the event of dissolution; transfer of a member’s interest, etc. The only real mention of the Fund came in Article II, Section 2.6, under the purpose and powers provision:

The purpose of the [NAIM] shall be (i) to serve as, and perform the functions required of, the general partner of the Fund and to make capital contributions thereto, and (ii) to do all things necessary or incidental thereto, provided that the Company shall not undertake any activities unrelated to its obligations, duties and activities as general partner of the Fund as provided in the Fund Partnership Agreement

Appellees (Sloan and the Companies) propose this Court read the arbitration clause and interpret the phrase “arising out of or relating to this Agreement or to [NAIM’s] affairs or the rights or interests of the Members” in a narrow sense, only dealing with internal claims dealing with the specific dealings of the agreement. This is the path the trial court apparently took.

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Bolstering appellees' view of the NAIM operating agreement is the fact that the operational control of the Fund money stems from the Amended and Restated Agreement of Limited Partnership of New Africa Opportunity Fund (the partnership agreement). They contend that the NAIM agreement may have created the Fund's general partner, but the real story of the matter is the power granted by the partnership agreement.

The partnership agreement, as stated in the facts, was entered into by NAIM as general partner, and by all the limited partners (OPIC, the private corporations). It organized the Fund and set forth its goals in Article 2, Section 2.5:

(a) to purchase, hold, manage and sell Portfolio Investments for the purpose of realizing gain through capital appreciation;

....

(c) to conduct ancillary investment activities and all other activities related or incidental to the foregoing.

More importantly, the partnership agreement gave the general partner its powers with respect to the Fund in Article 2, Section 2.6. These powers include:

(1) to purchase, invest in, hold and sell or otherwise dispose of Portfolio Investments . . . and, in order to ensure that funds will be available when needed to invest in Portfolio Investments, to be applied to the payment of expenses or to be paid in connection with the termination of the Partnership . . . ;

(2) to monitor the performance of Portfolio Investments . . . ;

....

(4) to form Subsidiaries in connection with the Partnership Business;

(5) to enter into any kind of activity and to enter into, perform and carry out contracts of any kind necessary to, in connection with, or incidental to the accomplishment of the purposes of the Partnership set forth in Section 2.5 hereof, including, without limitation, the Management Agreement;

(6) to open, maintain, and close accounts with brokers . . . which power shall include the authority to issue all instructions

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and authorizations to brokers regarding securities and money therein and to pay, or authorize the payment and reimbursement of, brokerage commissions;

(7) to open, maintain and close bank accounts and draw checks or other orders for the payment of monies;

(8) to bring and defend actions and proceedings at law or in equity before any governmental, administrative or other regulatory agency, body or commission;

(9) to purchase, at the expense of the Partnership, liability, casualty and other insurance and bonds to protect the Partnership's properties and operations;

(10) to pay all reasonable fees and expenses of the Partnership; and

(11) to take any and all other actions which are determined by the General Partner to be necessary, convenient or incidental to the conducting of the Partnership Business.

Article 4, Section 4.1 gave NAIM, as general partner, the exclusive right to manage and control the Fund. Other provisions in that article gave NAIM other exclusive powers, such as contract powers.

Appellees maintain that it is these powers that are alleged to have been abused. It was with these powers that Beckett allegedly created NAFC and siphoned money out of the Fund by advising that it would eventually become a portfolio company, all the while draining the Fund of investment capital. Beckett and the others alleged transgressions against the Fund via NAFC are thus not related to the NAIM operating agreement.

The Fund partnership agreement does not exude a preference for arbitration. It contains no such clause. What it does contain is what appears to be a forum selection clause in Article 12, Section 12.8:

Jurisdiction for Disputes. Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or validity thereof, shall be submitted to a New York State or federal court sitting in the City of New York.

It appears to this Court that appellees are not suing on behalf of the NAIM agreement, except for Claim VI. The position of Beckett at NAIM is indeed key. In addition, the NAIM operating agreement

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creating the general partner of the Fund is certainly not merely incidental. However, it is the powers granted by the NAOF partnership agreement that are the true focus. These powers enabled Beckett and Mamboleo to carry out the alleged deeds relating to NAFC, which appears to have been the central instrument of their plot.

While it may be clear that NAIM, SHI, Beckett, Mamboleo, and Sloan are bound to the NAIM operating agreement and thus the arbitration clause, that clause does not encompass the current dispute. In making this determination, we are mindful of the presumption in favor of arbitration. However, we hold that the allegations made in this matter bear no significant or strong relationship to the operating agreement and its arbitration clause. It is unreasonable to compel arbitration in this case on the basis of the NAIM operating agreement and we decline to do so. We therefore affirm the trial court's ruling with respect to these parties. Assignment of error overruled.

B.

Appellants' second contention is that SFG, NAM, NAA, and NAOF (the Fund), the so-called non-signatories, are bound by the arbitration clause found in the NAIM operating agreement. *See E.I. DuPont de Nemours v. Rhone Poulenc Fiber*, 269 F.3d 187, 194 (3d Cir. 2001); *Inter. Paper v. Schwabedissen Maschinen & Anlagen*, 206 F.3d 411, 416-18 (4th Cir. 2000). This argument is tied to the previous argument. We do not address appellants' argument that the non-signatories are obligated to arbitrate due to overlapping ownership and claims and estoppel due to the fact that, even if true, the arbitration clause does not encompass the current dispute as adjudicated by the trial court.

The dissent acknowledges that it is the alleged abuse of the NAOF fund by defendants that led to this lawsuit. The dissent then oversimplifies a rather complex business structure arguing that merely because NAIM was the general partner, the arbitration clause in the NAIM agreement binds all of the NAOF limited partners, whether they signed the NAIM agreement or not, thus, in effect, reaching this issue. Suffice it to say that NAIM had no power to act, except for the NAOF partnership agreement and the powers conferred therein. As it is the alleged abuse of the NAOF delegated powers that is central to the case *sub judice*, we believe the trial court properly ruled the NAIM arbitration clause was not controlling for all but one of the counts of the complaints. This assignment of error is overruled.

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III.

[3] Appellants' final argument is that the trial court erred by failing to stay all claims not ordered to arbitration. The decision to grant or deny a stay rests within the discretion of the trial court, and review of that decision is for abuse of that discretion. *See American Recovery*, 96 F.3d at 96-97.

Appellants ask this Court to stay the majority of the claims in this matter while one claim is dealt with due to the "considerations of judicial economy and avoidance of confusion and possible inconsistent results[.]" *Am. Home Assur. v. Vecco Concrete Const. Etc.*, 629 F.2d 961, 964 (4th Cir. 1980). Appellants also point out that the trial court has twice recognized the interconnectedness of all the claims, once when the trial court allowed the Fund to intervene, and the second time when it stayed all proceedings pending the outcome of this appeal citing the interests of "consistency and efficiency." Appellants now cite the same interests.

We are being asked to stay numerous claims while a single claim goes through arbitration. Admittedly, factual issues overlap. However, we have already held that the NAIM operating agreement, while an important piece of the puzzle, was not the main piece. This position belongs to the Fund and NAFC. The numerous claims appellants wish to have stayed are based upon the powers granted by the Fund's partnership agreement. Thus, we hardly see how the interest of efficiency could be served by forcing the main portion of a lawsuit be put on hold while a side item is arbitrated. We find no abuse of discretion by the trial court in staying the claim that was ordered arbitrated. This assignment of error is overruled.

Affirmed.

Judge ELMORE concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

In this appeal, defendants Beckett and Mamboleo contend the trial court erred by denying their motion to compel arbitration. Though "mindful of the presumption in favor of arbitration," the majority holds that "[i]t is unreasonable to compel arbitration in this case." As I strongly disagree with the majority's application of the relevant law, I am compelled to respectfully dissent.

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Under the Federal Arbitration Act (“FAA”), codified in Title IX of the United States Code,

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2002). Our Supreme Court recognized in *Burke County Pub. Sch. Bd. of Educ. v. Shaver Partnership*, 303 N.C. 408, 422, 279 S.E.2d 816, 825 (1981), that “[t]he Federal Arbitration Act, by virtue of the Supremacy Clause [of the United States Constitution], is . . . part of North Carolina law.”

The United States Supreme Court has repeatedly emphasized that:

in enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration Section 2 . . . embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable upon such grounds as exist at law or in equity for the revocation of any contract.

Perry v. Thomas, 482 U.S. 483, 489 (1987). See also *Southland Corp. v. Keating*, 465 U.S. 1, 11-12 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

As noted by the majority, however, the United States Supreme Court has also held that “[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the ‘question of arbitrability,’ is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.” *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002) (citations omitted). In *Howsam*, Justice Breyer emphasized, notwithstanding, that the question of arbitrability is only “applicable in the kind of narrow circumstance where contracting parties . . . are not likely to have thought that they had agreed” to arbitrate the matter, and where court action would have the effect of “forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.” *Id.*

In this case, neither the majority nor the parties dispute that the contract evidenced a transaction involving commerce. Instead, the

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majority holds that the complaint contained counts which, as Section 2 and *Howsam* provide, were not “arising out of such contract or transaction,” and, thus, were not arbitrable.

My review of the record, however, indicates that this entire controversy involves the alleged mismanagement of monies flowing into and out of the New Africa Opportunity Fund. The Fund is a limited partnership, with only one general partner: New Africa Investment Management. Defendant Beckett was sued because he was the President, General Manager, and member of New Africa Investment Management. Defendant Mamboleo is a member of New Africa Investment Management. As the New Africa Investment Management agreement contained an express arbitration clause—a clause which extended its reach to “the fullest extent permitted by law”—I do not believe that an order compelling arbitration would force the “parties to arbitrate a matter that they may well not have agreed to arbitrate.” *Howsam v. Dean Witter Reynolds*, 537 U.S. 79. As this is the only plausible basis for the majority’s holding, I am compelled to respectfully dissent.

JEAN H. RICE (NOW JEAN MARIE), PLAINTIFF V. CHARLES E. RICE, III, DEFENDANT

No. COA02-953

(Filed 5 August 2003)

1. Divorce— equitable distribution—marital property—fees received by plaintiff’s firm

The trial court erred (under then applicable law) in an equitable distribution action by classifying as separate property fees that were received by defendant’s law firm before the separation but distributed to defendant after the separation. Defendant’s right to share in the funds as a partner of the firm was secured and established prior to the date of separation and could not be canceled. Furthermore, the court’s treatment of a marital debt paid with these funds was remanded.

2. Divorce— equitable distribution—valuation of law practice—undistributed fees

The trial court erred in an equitable distribution action in its valuation of defendant’s law practice by classifying fees received

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by the defendant's law firm before the separation and distributed to defendant after the separation as separate property and not including them in the value of the practice.

3. Divorce— equitable distribution—value of real property—reduction of mortgage—improvements

The trial court properly applied the source of funds rule in an equitable distribution action when distributing to the marital estate a portion of passive appreciation in real property based on reductions in the mortgage principal and improvements paid for with marital funds. There is no difference between financial contributions to reduce the mortgage and those to improve the property.

4. Divorce— equitable distribution—distributional factor—health

The trial court did not err in an equitable distribution action by finding the distributional factor that plaintiff was in good health. Plaintiff's assertion that the trial court ignored a previous judicial recognition that plaintiff suffered from arthritis and hypertension simply attacked an isolated phrase. Plaintiff made no assertion that her arthritis and hypertension affected her work ability.

5. Divorce— equitable distribution—distributional factors—assistance in bringing up spouse's child

The trial court did not err in an equitable distribution action by finding the distributional factor that defendant assisted with bringing up plaintiff's daughter by helping to pay for trips, private school tuition, and college expenses. Although support of the parties' children may not be considered, defendant was not the father of plaintiff's daughter and had no legal obligation to care for her. The distributional factor found by the court recognized defendant's voluntary assumption of responsibilities and was properly considered.

6. Divorce— equitable distribution—potential income and liabilities

Although it is proper in an equitable distribution action to consider the potential income and liabilities of the parties, it was improper for the trial court to consider plaintiff's potential rental income in this case due to findings about alimony issues.

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7. Appeal and Error— failure to include record page references—issue not considered

No error was found in an equitable distribution action where plaintiff asserted that the court failed to consider certain distributional factors, but did not include page references to the transcript or exhibits.

8. Divorce— equitable distribution—pension—distribution to one party

The trial court did not err in an equitable distribution action by distributing to defendant his entire pension even though a portion of it was marital property. Under the statute applicable to the case, N.C.G.S. § 50-20(b)(3) (1995), the court had a variety of distributive choices that did not restrict it to a proportionally equal division of the pension.

9. Divorce— alimony—findings—standard of living—potential rental income

The trial court's findings on remand were insufficient in a divorce action with alimony issues where the action had been remanded for findings on the parties' accustomed standard of living (among other things) and the court made findings regarding the separate "estates" of the parties during the marriage. Additionally, it was improper for the court to consider plaintiff's potential rental income of her North Carolina residence because her new, out-of-state job involved a probationary period and uncertainty as to her continued employment and residence.

10. Divorce— alimony—fault—dependency

The trial court did not abuse its discretion in a divorce action in its treatment of fault from defendant's adultery for purposes of alimony. The court found that fault had no effect on the marital economy or the parties' standard of living and should be disregarded. It is clear that the court considered fault only for dependency, and, having concluding that plaintiff was not a dependent spouse, did not need to reach the issue of fault under N.C.G.S. § 50-16.2(1).

Judge LEVINSON concurring in part and dissenting in part.

Appeal by plaintiff from order dated 19 October 2001 and from two separate, amended judgments dated 19 October 2001 by Judge Joseph M. Buckner in New Hanover County District Court. Heard in the Court of Appeals 19 May 2003.

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Wyrick Robbins Yates & Ponton LLP, by Charles W. Clanton and Heidi C. Bloom, for plaintiff-appellant.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for defendant-appellee.

BRYANT, Judge.

Jean Marie (plaintiff), formerly Jean H. Rice, appeals from an order denying her request for a new evidentiary hearing and from amended equitable distribution and alimony judgments dated 19 October 2001.

On 5 July 1995, plaintiff brought an action against her husband Charles E. Rice, III (defendant) seeking a divorce and equitable distribution of the marital property. Plaintiff later amended her complaint to also request alimony. Plaintiff and defendant had married on 14 February 1982, separated on 16 April 1994, and were divorced on 27 October 1995. In an equitable distribution judgment filed 12 November 1998, the trial court concluded that the evidence and distributional factors found by the trial court supported an unequal division of the marital estate in defendant's favor. In a concurrent judgment, the trial court denied plaintiff's claim for alimony on the basis that she was not a dependent spouse. Plaintiff appealed from these judgments, and this Court reversed the November 12 equitable distribution and alimony judgments and remanded the case to the trial court for additional findings and conclusions on the valuation of defendant's law practice and the former marital residence, the issue of fault, and the parties' accustomed standard of living. *See Rice v. Rice*, 138 N.C. App. 710, 536 S.E.2d 662 (2000) (COA99-513) (unpublished) [hereinafter *Rice I*]. On remand, plaintiff requested a new evidentiary hearing, but the trial court denied the motion in its 19 October 2001 order. The trial court then entered an amended equitable distribution judgment, which included the following findings:

Defendant's Law Practice

- A. . . . Defendant was a partner in a law practice known as Jackson & Rice from June 1992 through April 1993, and beginning in May 1993, . . . [d]efendant began practicing as a sole practitioner. As of the date of separation, . . . [d]efendant's solo law practice had been in existence less than one year.
- B. . . . Defendant was expected to receive a share of the fees from two cases . . . handled by the Jackson & Rice firm, but

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these fees had not been received by the Jackson & Rice firm before that firm dissolved. . . . Defendant ultimately received these “carryover” fees in four installments, as follows:

- (1) The sum of \$50,000.00 approximately five months prior to the date of separation
 - (2) The sum of \$100,000.00 on April 19, 1994, of which sum . . . [d]efendant transferred to . . . [p]laintiff the sum of \$22,554.96 on May 2, 1994.
 - (3) Two further payments totaling approximately \$42,811.00 in June 1994, of which . . . [d]efendant transferred to . . . [p]laintiff the sum of \$11,773.10 on June 24, 1994.
- C. The “carryover” fees received after the date of separation, totaling \$142,811.00, although arguably derived from “marital” effort, were not acquired before the date of separation. Accordingly, these fees do not fall within the definition of marital property[] and are properly excluded from the marital estate. However, the [trial] [c]ourt will consider these post-separation funds as a “distributional factor,” also to be included in . . . [d]efendant’s separate estate.

In subsequently valuing defendant’s law practice at \$7,400.00, the trial court in essence adopted the valuation of plaintiff’s expert but subtracted the \$100,000.00 carryover fee received by defendant on 19 April 1994, which plaintiff’s expert had included in his calculations, based on the trial court’s conclusion that these funds were defendant’s separate property.

With respect to the parties’ Parmele Boulevard property, the trial court concluded it was a mixed asset, part marital and part separate, and found:

- B. The fair market value on [the] date of marriage was \$90,000[.00].
- C. The property was encumbered by a mortgage at the date of marriage, with a principal balance due of \$28,125[.00]. The [trial] [c]ourt accepts the parties’ classification of this mortgage as a marital debt.
- D. The net value on the date of marriage was \$61,875[.00].
- E. The fair market value on the date of separation was \$185,000[.00].

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- F. On the date of separation, the principal balance of the mortgage was \$16,443[.00] . . . [and] was paid off shortly after the date of separation with “carryover” fees from Jackson & Rice This use of . . . [d]efendant’s separate funds to reduce marital debt should be treated as a distributional factor
- G. The net value on the date of separation was \$168,557[.00].
- H. Between the date of marriage and the date of separation, the net value of this property increased by \$106,682[.00]
- I. Between the date of marriage and the date of separation, the principal balance of the mortgage . . . was actively reduced by \$11,682[.00] through the use of marital funds. This portion of the active increase in net value should be classified as marital property.
- (1) . . . Plaintiff has apparently contended that a portion of the funds used to reduce the principal balance of the mortgage during the marriage[] were her separate funds from an inheritance. However, mortgage payments during the marriage were paid from the parties’ joint account, into which . . . [p]laintiff occasionally deposited and commingled her separate, inherited funds. . . . Plaintiff has failed to trace any such separate funds through the joint account as having been specifically “applied” to payment of the mortgage Accordingly, . . . [p]laintiff has failed to establish by a preponderance of the evidence the “source of funds” that she now claims to have been her separate property.
- J. During the marriage, the parties spent approximately \$30,000[.00] for improvements to the property, of which approximately \$12,000[.00] (or 40%) was marital and \$18,000.00 (or 60%) was the separate property of . . . [p]laintiff. These improvements actively increased the net value of the property by \$11,500[.00] as of the date of separation. Accordingly, \$4,600[.00] of this portion of the active increase in net value should be classified as marital . . . and \$6,900[.00] . . . as [plaintiff’s] separate property
- K. The remaining \$83,500[.00] of the total increase in net value as of the date of separation appears to have been the result of passive appreciation Although there is no exact way to divide this passive appreciation between the marital estate

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and the separate estate of . . . [p]laintiff, the [trial] [c]ourt will attempt to provide a proportionate return on the “investment” of each estate.

- L. During the marriage, the “principal” (active) contribution of . . . [p]laintiff’s estate to the net value of this property totaled \$68,775[.00] (i.e., \$61,875[.00] + \$6,900[.00]), and the “principal” (active) contribution of the marital estate was \$16,282[.00] (i.e., \$11,682[.00] + \$4,600[.00]). The combined “principal” (active) contribution of the marital and separate estates during the marriage totaled \$85,057[.00]. The proportion of this combined total that was marital was 19.14% and the proportion . . . that was separate was 80.86%.
- M. Applying the percentages derived from the preceding subparagraph to the total passive appreciation during the marriage (i.e., \$83,500[.00]), the marital share of the passive appreciation is therefore \$15,982[.00], and . . . [p]laintiff’s separate share . . . is . . . \$67,518[.00].
- O. Adding the active and passive shares of the total increase in net value between date of marriage and date of separation results in a marital share of \$32,264[.00] (i.e., \$16,282[.00] + \$15,982[.00]) and in a separate share for . . . [p]laintiff of \$136,293[.00] (i.e., \$68,775[.00] + \$67,518[.00]).

In the amended alimony judgment dated 19 October 2001 and written from the perspective of the date of trial, the trial court considered the parties’ respective incomes, expenses, earning capacities, and estates. With respect to plaintiff’s earning capacity, the trial court also considered the potential rental income plaintiff could have earned from the Parmele Boulevard residence because plaintiff was living in Mobile, Alabama at the time of the hearing. Based on its findings, the trial court ultimately concluded that plaintiff was not a dependent spouse. On the issue of fault, the trial court found as follows:

Defendant stipulated that he committed adultery under the statutory definition after the parties separated, and the [trial] [c]ourt finds that he committed adultery within the meaning of N.C. Gen. Stat. § 50-16.2(1). This “fault” on the part of . . . [d]efendant does not appear to have had any effect on the marital economy or the accustomed standard of living of the parties prior to the date of separation.

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Accordingly, the trial court denied plaintiff's request for alimony and attorney's fees.

The issues are whether the trial court: erred in (I) classifying the carryover fees received by defendant after the date of separation as his separate property; (II) valuing defendant's law practice; (III) calculating the marital estate's portion of the passive appreciation in the net value of the Parmele Boulevard property; and abused its discretion in (IV) finding certain distributional factors; (V) awarding defendant his entire pension even though it was part marital property; and (VI) denying plaintiff alimony.

Equitable Distribution

I

[1] In her first assignment of error, plaintiff argues that the trial court erred in classifying the carryover fees, received by defendant after the date of separation, as his separate property because defendant had a vested property interest in the carryover fees prior to the date of separation.

As an initial matter, we note that due to the timing of this action, our analysis is based on the equitable distribution law as it existed prior to 1 October 1995. In determining the equitable distribution of the parties' property under the prior law, the trial court must first classify property as either marital or separate. *Godley v. Godley*, 110 N.C. App. 99, 108, 429 S.E.2d 382, 388 (1993); *see also* N.C.G.S. § 50-20(a) (2001) (the current version of the statute provides for divisible property as a third classification). "[T]he party claiming the property to be marital must meet the burden of showing by a preponderance of the evidence that the property was acquired by either spouse or both spouses during the marriage, before the date of separation, and is presently owned." *Godley*, 110 N.C. App. at 108, 429 S.E.2d at 388; N.C.G.S. § 50-20(b)(1) (1995). The dispositive factor as to when property was acquired is whether the right to receive the property vested prior to the date of separation. *Godley*, 110 N.C. App. at 115, 429 S.E.2d at 392; N.C.G.S. § 50-20(b)(1)-(2) (1995) ("[m]arital property includes all vested . . . deferred compensation rights" whereas "[t]he expectation of nonvested . . . deferred compensation rights shall be considered separate property"); *compare* N.C.G.S. § 50-20(b)(1) (2001) (the current statutory scheme recognizes both vested and nonvested deferred compensation rights as marital property). Vesting occurs when "the right to the enjoyment of [an inter-

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est], either present or future, is not subject to the happening of a condition precedent." *Black's Law Dictionary* 816 (7th ed. 1999). Our case law has further defined a vested interest as "a right which is otherwise secured, established, and immune from further legal metamorphosis," *Gardner v. Gardner*, 300 N.C. 715, 718-19, 268 S.E.2d 468, 471 (1980); in other words, it is a right that cannot be canceled, *Fountain v. Fountain*, 148 N.C. App. 329, 337 n.11, 559 S.E.2d 25, 32 n.11 (2002) (holding that "the stock options were vested . . . because the right to exercise the options could not be canceled").

In this case, the trial court concluded that although the \$142,811.00 in carryover fees received by defendant were derived from marital efforts, they were received after the date of separation and therefore represent his separate property. The trial testimony pertinent to this issue, however, reveals that a settlement offer was conveyed to the Jackson & Rice law firm and subsequently accepted by the firm on behalf of its clients, and a settlement check was thereafter received by the firm and deposited into the firm's account prior to the date of separation. The firm being in receipt of the settlement check, the *condition precedent* for defendant's entitlement to a share of those fees had thus been met. See *Black's Law Dictionary* 816. This is notwithstanding the condition subsequent created by the dissolution of the law partnership and the settlement of the firm's affairs. Accordingly, defendant's right, as partner of the firm, to a share in the fees was secured and established prior to the date of separation and could not be canceled. See *Gardner*, 300 N.C. at 718-19, 268 S.E.2d at 471. This determination is consistent with our case law holding that "funds received after the date of separation may appropriately be classified as marital property under certain circumstances when the right to receive those funds is acquired during the marriage and before separation." *Smith v. Smith*, 111 N.C. App. 460, 483-84, 433 S.E.2d 196, 210 (1993) (finding time stock sold as opposed to post-date-of-separation time when check representing the proceeds of the stock sale was received determinative in concluding that proceeds were marital property), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994); see *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986) (settlement received after the date of separation upon a spouse's claim for personal injuries sustained during the marriage is marital property if it represents compensation for economic loss); *Talent v. Talent*, 76 N.C. App. 545, 554-55, 334 S.E.2d 256, 262 (1985) (funds collected by one spouse after the date of separation on a loan made during marriage with marital funds are marital property); see also *Godley*, 110 N.C. App. at 108, 115, 429 S.E.2d at 387-88,

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391-92 (finding no vested interest where the defendant had a contractual right to receive commissions but no commissions had become due on the date of separation because several hundred acres of the land from the sale of which the defendant would be paid remained to be sold). Thus, under the statutory provisions in effect at the time this action was filed, the trial court erred in classifying the \$142,811.00 as defendant's separate property.

In a related issue plaintiff contends that since the trial court erred in classifying the carryover fees received from the Jackson & Rice firm after the date of separation, it also erred in granting only defendant credit and assigning to him a distributional factor justifying an unequal division of the marital property for paying off marital debt with these funds. To the extent this was done by the trial court, it must be reversed, and the issue is remanded for treatment in accordance with this opinion.

II

[2] Plaintiff further contends the trial court erred in valuing defendant's law practice at \$7,400.00. In her brief to this Court, plaintiff states that because the \$100,000.00 carryover fee received by defendant on 19 April 1994 and included by plaintiff's expert in the valuation of the practice was marital property, the trial court's assessed value would only be correct if it had included the fee "as a personal marital asset outside the practice." But since the trial court failed to do so, plaintiff asserts that the amount, due to its marital nature, should have been included in the valuation of the law practice. As we determined that the trial court did indeed err by failing to classify the carryover fees as marital property, plaintiff's assertions are correct and must be addressed on remand.

III

[3] In her next assignment of error, plaintiff appears to argue that the trial court erred in distributing to the marital estate a portion of the passive appreciation in the net value of the Parmele Boulevard property based on reductions in the mortgage principal *and* improvements to the property paid for with marital funds. Plaintiff asserts that the marital estate's share of the passive increase in the property's net value may only be based on reductions in the principal mortgage balance. Plaintiff, however, cites no authority supporting this proposition.

"Increases in value to separate property attributable to the financial, managerial, and other contributions of the marital estate are

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'acquired' by the marital estate." *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 465, 409 S.E.2d 749, 751 (1991). Furthermore, under the source of funds theory:

[W]hen both the marital and separate estates contribute assets towards the acquisition [or improvement] of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property. Thus, both the separate and marital estates receive a proportionate and fair return on [their] investment.

Wade v. Wade, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269 (1985); see *Godley*, 110 N.C. App. at 109, 429 S.E.2d at 389; see also *supra* (the trial court's extensive findings with respect to the classification and valuation of the marital and separate interests in the Parmele Boulevard property). Accordingly, there is no difference between financial contributions to reduce the mortgage principal and those to improve the property itself. Because both types of active contributions entitle the marital estate to a proportionate return on its investment, the trial court properly applied the source of funds rule as required by this Court in *Rice I* and plaintiff's assignment of error is overruled.

IV

[4] Plaintiff also assigns error to the following distributional factors found by the trial court:

A. . . . Plaintiff is 51 years of age and appears to be in good health, such that she is capable of earning a sufficient amount of income to support herself.

. . . .

N. After the Deed of Trust was paid off in June of 1994, [p]laintiff had no Deed of Trust expense. The Deed of Trust payments were \$450.00 per month. She has enjoyed substantially free housing for the four years from the payoff of the Deed of Trust . . . until the hearing in June of 1998.

O. Plaintiff currently does not live in the residence and could at least rent the property for several thousand dollars during the summer vacation season. . . .

. . . .

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Q. . . . Defendant assisted with the upbringing of [p]laintiff's daughter by helping to pay for her private school tuition, college expenses, and trips.

As to the first distributional factor, plaintiff asserts that it ignores this Court's recognition in *Rice I* that plaintiff suffered from arthritis and hypertension. The trial court, however, only made a qualified statement about plaintiff's health, finding that the state of her health was such that she was capable of earning a sufficient amount of income to support herself. As plaintiff simply attacks an isolated phrase and makes no assertion in her brief that her arthritis and hypertension affected her work ability, we find no error with respect to this factor.

[5] Plaintiff next contends that factor Q was inappropriate because N.C. Gen. Stat. § 50-20(f) prohibits consideration during an equitable distribution proceeding of the "support of the children of both parties." N.C.G.S. § 50-20(f) (2001) (same as 1995 version). We disagree. Defendant was not the father of plaintiff's daughter and had no legal obligation to care for the daughter. As such, the distributional factor found by the trial court did not address defendant's child support obligations but instead recognized his voluntary assumption of responsibilities and was therefore properly considered under the catch-all provision of N.C. Gen. Stat. § 50-20(c)(12) (2001) (same as 1995 version).

[6] Plaintiff also argues that factors N and O were improper because the trial court considered her potential income and liabilities for the four-year period between the date of separation and the hearing. N.C. Gen. Stat. § 50-20(c)(1) requires the trial court to consider "[t]he income, property, and liabilities of each party at the time the division of property is to become effective." N.C.G.S. § 50-20(c)(1) (2001) (consistent with 1995 version). This Court has held that "[t]he factors listed under subsection (c) indicate that the legislature intended to grant the trial court the authority to consider the future prospects of the parties, as well as their status at the time of the hearing, in determining whether an equal division of marital assets would be equitable." *Harris v. Harris*, 84 N.C. App. 353, 359, 352 S.E.2d 869, 873 (1987); *see also Dolan v. Dolan*, 148 N.C. App. 256, 259, 558 S.E.2d 218, 220 (post-separation rental income can be a distributional factor), *aff'd*, 355 N.C. 484, 562 S.E.2d 422 (2002) (per curiam); *Chandler v. Chandler*, 108 N.C. App. 66, 69, 422 S.E.2d 587, 590 (1992). Accordingly, consideration of these post-separation factors is proper; nevertheless, for the reasons stated below in our discussion of the

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alimony judgment, we conclude it was error for the trial court to consider plaintiff's potential rental income in this case.

[7] Finally, plaintiff asserts the trial court abused its discretion in failing to consider certain distributional factors for which the parties offered evidence. See *Haywood v. Haywood*, 106 N.C. App. 91, 100, 415 S.E.2d 565, 571 (1992) (“[w]hen a party introduces evidence of a distributional factor under N.C.G.S. § 50-20(c), the trial court must consider the factor and make a finding of fact with regard to it”), *rev'd in part on other grounds*, 333 N.C. 342, 425 S.E.2d 696 (1993). Plaintiff, however, failed to include any page number references to the transcript or exhibits in her brief to this Court, thereby preventing meaningful review of the voluminous record on appeal. See N.C.R. App. P. 28(b)(5)-(6) (appellate briefs shall contain “all material facts . . . supported by references to pages in the transcript to the proceedings”); *Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 316, 533 S.E.2d 501, 504 (2000) (“such references [are] invaluable in directing the [C]ourt’s attention to the pertinent portions of the record”). Thus, this assignment of error is overruled.

V

[8] In addition, plaintiff assigns error to the trial court’s distribution to defendant of his entire pension even though a portion of the pension was marital property. In support of her argument, plaintiff relies on statutory provisions that were yet to be enacted at the time this action was filed. The statute applicable to this case provides for a distributive award of a pension:

- a. As a lump sum by agreement;
- b. Over a period of time in fixed amounts by agreement;
- c. As a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits; or
- d. By awarding a larger portion of other assets to the party not receiving the benefits, and a smaller share of other assets to the party entitled to receive the benefits.

N.C.G.S. § 50-20(b)(3) (1995). Accordingly, the trial court had various distributive choices that did not restrict it to a proportionally equal division of the pension itself as advocated by plaintiff. Thus, this assignment of error is without merit.

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Alimony

VI

[9] In *Rice I*, this Court determined that N.C. Gen. Stat. § 50-16.1, *et seq.*, applicable to actions filed before 1 October 1995, applies to the parties' alimony action. *Rice I*, 138 N.C. App. 710, 536 S.E.2d 662. According to section 50-16.1(3), a dependent spouse "means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C.G.S. § 50-16.1(3) (1995) (repealed). Conversely, a "[s]upporting spouse" means a spouse . . . upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support." N.C.G.S. § 50-16.1(4) (1995) (repealed).

If the court determines that one spouse is not actually dependent on the other for such support, the court must then determine if one spouse is "substantially in need of maintenance and support" from the other, i.e., whether one spouse would be unable to maintain his or her accustomed standard of living, established prior to separation, without financial contribution from the other.

Talent, 76 N.C. App. at 548, 334 S.E.2d at 258-59 (citations omitted). In doing so, the trial court must make findings as to the following:

(1) the standard of living, socially and economically, to which the parties as a family unit became accustomed during the several years prior to their separation; (2) the present earnings, prospective earning capacity, and any other condition, such as health, of each spouse at the time of the hearing; (3) whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the parties' accustomed standard of living, taking into consideration the spouse's reasonable expenses in light of that standard of living; and (4) the financial worth or "estate" of both spouses. The court must also consider fault and other facts of the particular case such as the length of the marriage and the contribution made by each spouse to the financial status of the family over the years.

Id. (citation omitted). Once a determination of dependency has been made, N.C. Gen. Stat. § 50-16.2 provides that "[a] dependent spouse is entitled to an order for alimony when . . . [t]he supporting spouse has

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committed adultery.” N.C.G.S. § 50-16.2(1) (1995) (repealed). This statute does not include any requirement that the adultery have an economic impact.

In *Rice I*, this Court reversed the alimony judgment and remanded for findings on the parties’ accustomed standard of living, the issue of fault based on defendant’s admitted adultery, and plaintiff’s health. In reviewing the amended alimony judgment before us, we note that the trial court once again failed to make any findings with respect to the accustomed standard of living during the marriage. Instead, the trial court simply made findings regarding the separate “estates” of the parties during the marriage. As the point in evaluating the parties’ accustomed standard of living is to consider the pooling of resources that marriage allows, the trial court’s findings are insufficient. *See Talent*, 76 N.C. App. at 548, 334 S.E.2d at 259 (“the court must determine and consider . . . the standard of living, socially and economically, to which the parties *as a family unit* became accustomed during the several years prior to their separation”) (emphasis added); *see Williams v. Williams*, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980) (term “contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact”).

In addition, it was improper for the trial court to consider plaintiff’s potential rental income of the Parmele Boulevard residence. As this Court found in *Rice I*:

In March of 1998, three months before the trial, plaintiff accepted a job with Adams Mark Motel in Mobile, Alabama for a gross annual income of \$42,000[.00]. At the time of the trial, plaintiff was in the probationary period with Adams Mark Motel and was not certain whether she would remain in Mobile.

Rice I, 138 N.C. App. 710, 536 S.E.2d 662. In light of the uncertainty as to plaintiff’s continued employment and residence, it was premature for the trial court to expect plaintiff to supplement her income with the rental of her North Carolina residence.

[10] Finally, plaintiff contends the trial court abused its discretion in its treatment of the issue of fault for purposes of alimony. In the amended alimony judgment, the trial court concluded that defendant’s adultery, found as fact by the trial court, did “not appear to have had any effect on the marital economy or the accustomed standard of living of the parties prior to the date of separation” and should there-

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fore be disregarded. Pursuant to *Rice I*, the trial court was directed to consider defendant's adultery for purposes of analyzing (a) the fault element listed in *Talent* as one of the factors to consider in determining plaintiff's status as a dependent spouse and (b), if plaintiff was found to be dependent, whether alimony must be awarded pursuant to section 50-16.2(1). Economic impact of marital fault would have an effect on the determination of dependency; however, it bears no weight on the second prong of the analysis as provided by section 50-16.2(1). In this case, it is clear that the trial court only considered fault for purposes of dependency, and because it concluded that plaintiff was not a dependent spouse, the trial court did not need to reach the issue of fault under section 50-16.2(1) addressed in *Rice I*. Accordingly, we find no abuse of discretion as to this issue.

Because of the errors found with respect to the amended alimony judgment, the alimony portion of this case is also remanded, with instructions to enter findings and conclusions consistent with this opinion. Furthermore, in light of the need to remand this case, we do not address plaintiff's remaining issues with respect to the alimony judgment.

Reversed and remanded.

Chief Judge EAGLES concurs.

Judge LEVINSON concurs in part and dissents in part.

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

I concur with the majority opinion in all respects except the following.

First, I disagree with the majority's conclusion that the trial court erred by considering "plaintiff's potential rental income" as a distributional factor. At issue is the trial court's distributional factor O, which provides in its entirety:

Plaintiff currently does not live in the residence and could at least rent the property for several thousand dollars during the summer seasons. The Plaintiff failed to explain or justify to the satisfaction of the [c]ourt her failure to maximize the income from this property (which is especially puzzling in light of the Plaintiff's asserted "need" for alimony from the Defendant).

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The majority reasons that, because plaintiff accepted an out-of-state job three months before the trial, “it was premature for the trial court to expect plaintiff to supplement her income with the rental of her North Carolina residence.” I disagree.

The trial court is afforded wide discretion in entering equitable distribution orders, enabling the court to fashion its orders with regard to the specific facts and circumstances of a given case. *Wall v. Wall*, 140 N.C. App. 303, 307, 536 S.E.2d 647, 650 (2000). Further, the trial judge is in a better position than this Court to evaluate witnesses’ credibility and the evidence. In the present case, the evidentiary facts underlying factor O are undisputed—that the plaintiff was in the probationary period of a new job, was living out of state, and had not rented her house for the summer.

Moreover, the trial court is charged with the exercise of discretion to determine whether O, standing alone or in combination with other factors, supports an unequal division of the marital estate. The majority acknowledges the trial court’s obligation under G.S. § 50-20(c)(1) to consider “[t]he income, property, and liabilities of each party at the time the division of property is to become effective[,]” and quotes *Harris v. Harris*, 84 N.C. App. 353, 359, 352 S.E.2d 869, 873 (1987), for the proposition that “the legislature intended to grant the trial court the authority to consider the future prospects of the parties, as well as their status at the time of the hearing, in determining whether an equal division of marital assets would be equitable.” That being so, the majority’s conclusion that the trial court abused its discretion is puzzling. In conducting our review, this Court may disagree with a trial court’s determination of whether the evidence should support an unequal division of the marital estate. However, this does not necessarily manifest error on the part of the trial judge who sits in the best position to make such a decision. “[T]he trial court’s rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision.” *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). In the present case, I conclude the trial court did not abuse its discretion by considering plaintiff’s decision not to rent her property when she could have done so. Accordingly, I would hold that plaintiff failed to demonstrate error with respect to factor O.

For similar reasons, I disagree with the majority’s conclusion that it was an abuse of discretion for the trial court to consider “plaintiff’s potential rental income of the Parmele Boulevard residence” in its

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determination that plaintiff was not a dependent spouse. The majority concludes that because of the “uncertainty as to plaintiff’s continued employment and residence, it was premature . . . to expect plaintiff to supplement her income with the rental of her North Carolina residence.” However, our trial courts are necessarily vested with wide discretion in alimony determinations and frequently assign varying degrees of significance to evidence that does not necessarily lend itself to one interpretation over another. In the present case, the court’s evaluation of the potential rental income, like its evaluation of many other facts and circumstances, is clearly permissible. Again, the relevant facts regarding plaintiff’s failure to rent out her North Carolina home were not disputed. I would hold that the trial court properly considered plaintiff’s potential rental income in making its determination of whether plaintiff was a dependent spouse.

With respect to the potential rental income issue for the equitable distribution and alimony determinations, the majority has erroneously replaced its own judgment for that of the trial court.

STATE OF NORTH CAROLINA v. JOSHUA DWAYNE FOWLER

No. COA02-730

(Filed 5 August 2003)

1. Evidence— demonstration by detective—strangling—admissible

A demonstration by a detective as to how an apron string used to strangle a murder victim was wrapped and tied around the victim’s neck was admissible where the demonstration was relevant to premeditation and deliberation and the State provided a proper foundation in that the detective testified to his familiarity with the autopsy photos and the apron string used for the strangling. The demonstration was not required to be excluded as prejudicial because it was brief and unemotional, not speculative, and the court sustained questions to the detective that were more properly within the jury’s sphere.

2. Criminal Law— instructions—confession—Pattern Jury Instruction

There was no plain error in a first-degree murder prosecution in the court’s instruction that there was evidence tending

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to show that defendant had confessed to the crime charged. Although the defense argument was that defendant had confessed to killing the victim rather than to premeditating the killing, a detective testified that defendant had admitted choking the victim with her apron string because he was angry with her and tired of her “junk.” The Pattern Jury Instruction “tending to show” language does not constitute an impermissible expression of opinion.

3. Criminal Law— requested instructions on motive—Pattern Jury Instruction given

The trial court did not err in a first-degree murder prosecution by denying defendant’s request for special instructions on lack of motive. The court gave the Pattern Jury Instruction on motive, but defendant argued that the instruction suggested that the absence of motive was relevant only to consideration of innocence of all charges, not to whether he was guilty of second-degree murder.

4. Criminal Law— instructions—differences between requested and given instruction—harmless

Any error in a first-degree murder prosecution in the court’s instructions on peacefulness was harmless. Defendant requested that the jury be instructed on nonviolence and peacefulness, but the court instructed only on peacefulness; peacefulness and nonviolence are almost synonymous. Furthermore, there is no significant difference in the given instruction on the likelihood of a peaceful person committing first-degree murder and the requested instruction on the likelihood of a peaceful person committing the alleged offense.

5. Criminal Law— instruction—reputation—evidence of general good reputation—not sufficient

There was no error in a first-degree murder prosecution in the court’s instruction on reputation evidence. Although defendant argued that evidence of his general good reputation should be considered, under our current rules of evidence the accused may only introduce evidence of pertinent character traits.

6. Criminal Law— requested instruction—defendant as law abiding—lack of criminal record—instruction not given

A first-degree murder defendant was not entitled to an instruction on being law abiding where the record suggests

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that defendant's lack of a criminal record resulted from not being caught.

7. Criminal Law— instruction—requested—given

There was no error in a first-degree murder prosecution where defendant contended that the court did not give an instruction on how to consider demonstrative evidence, but the court gave the instruction.

8. Homicide— short form indictment—murder

Use of the short form murder indictment was not error.

Appeal by defendant from judgment entered 31 January 2002 by Judge E. Lynn Johnson in Columbus County Superior Court. Heard in the Court of Appeals 12 May 2003.

Attorney General Roy Cooper, by Assistant Attorney General Thomas J. Pitman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for the defendant.

LEVINSON, Judge.

Defendant (Joshua Fowler) appeals his conviction of first degree murder. We conclude the defendant had a fair trial, free from prejudicial error.

Most of the relevant facts are not in dispute. Defendant and Stacey Jones were high school classmates and began dating in early 2001. Stacey was a strong, athletic girl who was a cheerleader at school, lifted weights, and held a part-time waitress job which required her to lift heavy trays. On 12 April 2001, Stacey and defendant attended their school prom together; shortly before the prom, Stacey's car was cleaned and waxed by her parents and Stacey gave herself a manicure. On the afternoon of 17 April 2001, Stacey dropped by defendant's house before her shift at the restaurant. After eating lunch, she and defendant left his house together, with defendant driving her car. They drove to several nearby places, then parked along a secluded dirt road frequented by local teenagers. While stopped at the side of the road, defendant and Stacey argued about their relationship. The dispute included profanity and some scuffling. At some point, defendant choked Stacey to death with a waitress apron from the back seat of her car. Defendant put her body into the trunk of the

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car and drove away. He eventually abandoned the car about a half mile from his house and walked home.

Meanwhile, Stacey's parents, who expected her home from the restaurant by midnight, became upset when she failed to return by 2:00 a.m. Lucy Jones, Stacey's mother, testified that she called the defendant's house several times over the following twelve hours, but that defendant claimed to know nothing about Stacey's whereabouts, saying only that "he hoped nothing bad had happened to her." While Ms. Jones waited by the phone, Stacey's father drove nearby rural roads, trying to find his daughter. At about 2:00 p.m. the next day, 18 April 2001, defendant's mother spotted Stacey's car where the defendant left it, and called local law enforcement agencies. Detective Gregg Cole of the Columbus County Sheriff's Department was dispatched to the car's location, along with Detective H.H. Coffman. When they discovered Stacey's body in the trunk, the law enforcement officers went to defendant's house.

Upon arriving at defendant's house, the law enforcement officers informed the defendant of his *Miranda* rights. Defendant then admitted that he killed Stacey by choking her and offered to show them where the killing occurred. Defendant rode with Detective Coffman. At trial, Coffman testified that during the drive defendant told him that on 17 April 2001 he and Stacey argued about the fact that she was pregnant, and that he had been impatient with "her constant bickering and arguing." Defendant also told Coffman he first strangled Stacey with his hands by accident, but then removed his hands; however, when Stacey renewed the argument, defendant "was mad and tired of her junk," and so he "took a thick string and wrapped it around her throat and pulled it tight . . . until she died."

SBI Agent Oaks, who examined the crime scene, testified that Stacey's car was clean and her nails were not broken. Her body was found face down in the trunk, with an apron string wrapped twice around her neck. The 'skirt' part of the apron had been torn from the string, and was found separately inside the trunk. When Stacey's body was discovered, the string was tied in two double knots located on the right side of her neck. Strands of her hair and bits of pine straw were caught up in the knots. Dr. John Butts, North Carolina Chief Medical Examiner, offered his expert opinion that Stacey died from strangulation with the apron string. She also had several bruises and abrasions on her upper body and head, including a bruise on the right side of her face which in Dr. Butts' opinion had been caused by "blunt force trauma." Butts testified that the overall pattern of bruising on

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Stacey's neck was consistent with an individual choking her from behind, by pulling on the apron string wrapped around her neck. Dr. Butts testified further that at the time she was killed Stacey was in the early stages of pregnancy.

Defendant's trial testimony confirmed many of the details offered by the State's witnesses. Defendant testified that on 17 April 2001 he and Stacey were arguing about issues associated with their relationship, and that when they arrived at the dirt road he got out of the car for a few minutes to "cool off." However, when he got back into the car they continued to quarrel and, after a brief exchange of profanity, Stacey hit him on the shoulder. Defendant testified that he put his hand around Stacey's neck to keep her away from him, but when she continued to struggle with him, defendant "leaned over where my seat reclined back" and saw Stacey's waitress apron. Defendant testified further that after he noticed the apron "all [he] remember[ed] was grabbing it and throwing it around her neck and holding it and she stopped moving." Defendant denied that he intended to kill Stacey, testifying that "I don't remember having no intent to do nothing. I just—after she hit me and we started fighting, I lost it; and I don't remember much at all." He also testified on direct examination that he became upset when he realized Stacey was not moving. He went around to the passenger side of the car, dragged her out on the ground, and attempted to revive her. He testified that when he strangled Stacey the apron was in one piece, but when he got her out of the car and tried to remove the apron from around her neck, the apron skirt ripped away from the apron string. When he could not get the apron string off and saw that Stacey's face was blue, defendant panicked and put her body in the vehicle's trunk.

On cross-examination, the State tried to establish that defendant had subdued or disabled Stacey *before* he strangled her, and that he had ripped the skirt part off the apron *before* twisting the apron string around her neck. The prosecutor confronted defendant with the contradiction between the evidence that defendant suffered no finger-nail scratches or serious bruises during the incident, and his testimony that Stacey was a strong girl who was struggling with him even while he was choking her. He was also cross-examined about the fact that although defendant testified he had choked Stacey while they were both inside the car and he was in the driver's seat to Stacey's left, the knots on the apron string were on the *right* side of Stacey's neck. Defendant was further challenged regarding his testimony that the apron was in one piece when he strangled Stacey, and was

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cross-examined about the difficulty of removing the skirt part of the apron *after* it had been wrapped twice around Stacey's neck and tied in two double knots. Defendant, however, continued to deny that he rendered Stacey unconscious before he strangled her, and testified repeatedly that he simply "didn't remember" the other details of the incident.

Following trial, the jury convicted defendant of premeditated and deliberate first degree murder, and the trial court sentenced him to a life sentence without parole. From this conviction and sentence, defendant appeals.

I.

[1] Defendant argues first that the trial court committed reversible error by allowing Detective Cole to demonstrate, over defendant's objection, how the apron string was wrapped and tied around Stacey's neck. He contends that the demonstration was inadmissible and that any probative value it may have had was greatly outweighed by its prejudicial effect. He also argues that the trial court erred by denying his motion for a mistrial based upon the demonstration. We disagree.

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2001). In a murder case, evidence is relevant if it "tends to shed light upon the circumstances surrounding the killing." *State v. Richmond*, 347 N.C. 412, 428, 495 S.E.2d 677, 685 (quoting *State v. Stager*, 329 N.C. 278, 322, 406 S.E.2d 876, 901 (1991)), *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2001). Further, decisions regarding "[a]dmission of evidence [are] 'addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown.'" *Lane v. R.N. Rouse & Co.*, 135 N.C. App. 494, 498, 521 S.E.2d 137, 140 (1999) (quoting *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997)), *disc. review denied*, 351 N.C. 357, 542 S.E.2d 212 (2000). The same standard applies to evidence offered on rebuttal, as "[i]t is within the trial judge's discretion to admit evidence on

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rebuttal which would have been otherwise admissible, and the appellate courts will not interfere absent a showing of gross abuse of discretion.’ ” *State v. Anthony*, 354 N.C. 372, 421, 555 S.E.2d 557, 588 (quoting *State v. Carson*, 296 N.C. 31, 44, 249 S.E.2d 417, 425 (1978)), *cert. denied*, 354 N.C. 575, 559 S.E.2d 184 (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002).

This Court has defined a demonstration as “an illustration or explanation, as of a theory or product, by exemplification or practical application.” *State v. Hunt*, 80 N.C. App. 190, 193, 341 S.E.2d 350, 353 (1986). In *Hunt*, this Court held that:

admissibility of demonstrative or experimental evidence depends as much, as for any other piece of evidence, upon whether its probative value is outweighed by the potential undue prejudicial effect it may have on defendant’s case. See Rule 403, N.C. Rules Evid. In the case of a courtroom demonstration, the demonstrator may not need to be qualified as an expert . . . but a proper foundation still must be laid as to the person’s familiarity with the thing he or she is demonstrating.

Id. (upholding admission of law enforcement officer’s demonstration of the operation of alleged assault weapon, offered to rebut defendant’s testimony that it discharged accidentally). Where the evidence on an issue is conflicting, the North Carolina Supreme Court has upheld demonstrations intended to illustrate flaws in the prosecution or defense theory, or to rebut a witness’s testimony. *See, e.g., State v. Murillo*, 349 N.C. 573, 509 S.E.2d 752 (1998) (where defendant testified that weapon discharged accidentally, victim’s sister properly allowed to demonstrate physical impossibility of wounds being inflicted as depicted in autopsy photograph unless weapon was fired intentionally), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *State v. Arnold*, 98 N.C. App. 518, 392 S.E.2d 140 (1990) (where State introduced xerox copies of love letters purportedly written by defendant, trial court erred by not allowing defendant to rebut this evidence with demonstration of how such a letter might be created by cutting and pasting pieces of several letters and then xeroxing the resulting document), *aff’d*, 329 N.C. 128, 404 S.E.2d 822 (1991).

Defendant herein was charged with first degree murder, defined in relevant part as “murder . . . perpetrated by means of a . . . willful, deliberate, and premeditated killing[.]” N.C.G.S. § 14-17 (2001). First degree murder differs from second degree murder in that:

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The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation. The elements of second-degree murder, on the other hand, are: (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation.

State v. Coble, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citation omitted). In the instant case, defendant testified that he killed Stacey by choking her with an apron, and the record contains no evidence that this killing was lawful. Indeed, defendant acknowledged both at trial and on appeal that he is guilty of at least second degree murder. We conclude defendant's testimony was sufficient to permit the jury to convict him of second degree murder. We agree, therefore, with the defendant's assertion that "the only truly contested issue at defendant's trial" was "whether defendant killed Stacey with premeditation and deliberation." It is in regards to this crucial issue—the existence of premeditation and deliberation—that the demonstration was relevant.

The defense theory, that defendant impulsively strangled Stacey while the two of them struggled and fought, was supported primarily by defendant's own testimony. Although the defendant conceded at trial that he lost his temper, grabbed a waitress apron, wrapped it around Stacey's neck, and choked her with it, he testified that he had not intended to kill Stacey. To support this assertion, defendant also testified that the apron was intact when he choked Stacey, and that the string was not ripped away from the skirt part of the apron until he tried to remove the apron from around her neck.

The State, however, tried to convict defendant of premeditated and deliberate first degree murder based on its theory that defendant (1) deliberately struck Stacey to disable or subdue her; (2) ripped the apron string away from the skirt to fashion a ligature with which to strangle her; (3) went to the passenger side of the car and dragged Stacey out of the car; and (4) choked her from behind with the apron string. To support this theory, the State cross-examined defendant regarding certain inconsistencies between his testimony and the physical evidence, including evidence that: (1) although the defendant claimed he killed Stacey inside the car during a struggle, the inside of the car was clean and pine straw was found under the apron string around Stacey's neck; (2) although defendant contended he and Stacey were fighting while he choked her, defendant suffered no scratches from Stacey's recently applied acrylic nails; (3) although

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defendant testified he was in the driver's seat on Stacey's left side when he choked her, the knots in the apron string were on the right side of her head; and (4) although defendant was insistent that the apron was in one piece when he took it from the back seat and threw it around Stacey's neck, her body was discovered with the string wrapped twice around her neck and tied with two double knots, in which strands of hair were entangled. The prosecutor vigorously cross-examined defendant about the difficulty or impossibility of removing the string from the skirt of the apron *after* it had been tied around Stacey's neck; the defendant just as strenuously denied having removed it prior to strangling her.

It was against the backdrop of this evidentiary conflict that the demonstration at issue was proffered. Using an apron string like the one found on Stacey's body and a Styrofoam mannequin's head, Detective Cole showed how the apron string was wrapped and knotted around Stacey's neck when her body was found. The State's purpose, clearly, was to show that the defendant had removed the skirt part before he choked Stacey, thus providing evidence of premeditation and deliberation. "[T]his evidence, in fact, was directly responsive to one of [defendant's] chief lines of defense[.]" *United States v. Russell*, 971 F.2d 1098, 1105 (4th Cir. 1992) (upholding admission of evidence from demonstration using weapon similar to murder weapon), *cert. denied*, 506 U.S. 1066, 122 L. Ed. 2d 161 (1993).

We conclude that the demonstration was relevant to the jury's determination of whether the defendant acted with premeditation and deliberation, and thus met the threshold test for admissibility. Moreover, Detective Cole testified to his familiarity with the apron string used to strangle Stacey, and with the autopsy photos depicting the position of the string and knots. We conclude that the State provided a proper foundation for admission of the demonstration.

We further conclude that its exclusion was not required on grounds of undue prejudice. The demonstration was brief and unemotional. Detective Cole employed a Styrofoam mannequin, rather than a live model. He was not asked to speculate on Stacey's physical or emotional experience of the choking. Additionally, the trial court sustained defendant's objections to questions that were properly within the jury's sphere, such as Detective Coles' opinion on whether it would be possible to remove the apron skirt from the apron string after it had been wrapped and tied. *See State v. Hunt*, 80 N.C. App. at 194, 341 S.E.2d at 353 (upholding demonstration of

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weapons's operation where "the officer was *not* attempting to say that . . . it could not fire in the position the defendant claimed").

A demonstration is not inadmissible merely because "[t]he evidence goes straight to the heart of the . . . issue, i.e., [premeditation and deliberation.]" *Reis v. Hoots*, 131 N.C. App. 721, 729, 509 S.E.2d 198, 204 (1998), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 481 (1999). Nor is it subject to exclusion simply because it might prejudice defendant.

We conclude that the demonstration was not excessively inflammatory, and that its prejudice to the defendant was limited to the prejudice inherent in all evidence that rebuts or undermines defense evidence. As we conclude that the demonstration was admissible, we necessarily conclude that the trial court did not err by refusing to grant a mistrial because of the demonstration. This assignment of error is overruled.

II.

[2] Defendant argues next that the trial court committed plain error in its instruction to the jury concerning evidence that the defendant had made a confession. The trial court instructed the jury as follows regarding evidence of a confession:

There is evidence which tends to show that the defendant confessed that he committed the crime charged in this case. If you find that the Defendant made that confession, then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it.

The defendant contends that this instruction "was inaccurate and misleading" because, although he confessed to killing Stacey, he did not confess to commission of premeditated first degree murder, which was "the crime charged." On this basis, he asserts that the trial court's instruction was an improper expression of opinion and constituted plain error. We disagree.

"Defendant made no objection to this jury instruction at trial. Accordingly, to prevail on appeal, defendant must show that the trial court's instruction constituted plain error." *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 59 (2003). "In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have

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reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected.’” *State v. Berry*, 356 N.C. 490, 523, 573 S.E.2d 132, 153 (2002) (quoting *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998)). We conclude that the trial court’s instruction constituted neither error nor plain error.

The instruction delivered by the trial court in this case was taken verbatim from the North Carolina Pattern Jury Instruction 104.70. The North Carolina Supreme Court has previously rejected defendant’s argument that use of this instruction constitutes an impermissible expression of opinion:

The use of the words tending to show or tends to show in reviewing the evidence does not constitute an expression of the trial court’s opinion on the evidence. Nor did the trial court’s statement that the evidence tended to show that the defendant had confessed that he committed the crime charged amount to an expression of opinion by the trial court, because evidence had been introduced which in fact tended to show that the defendant had confessed and to the crime charged, first degree murder.

State v. Young, 324 N.C. 489, 495 380 S.E.2d 94, 97-98 (1989); *see also State v. Cunningham*, 344 N.C. 341, 362, 474 S.E.2d 772, 782 (1996) (upholding trial court’s use of instruction). We conclude that the court’s instruction is proper in factually appropriate circumstances.

In the case *sub judice*, as in *Young*, the record includes evidence “tending to show” that defendant had confessed to the charged offense of first degree murder. “Confession is defined as a ‘voluntary statement made by one who is [a] defendant in [a] criminal trial at [a] time when he is not testifying in trial and by which he acknowledges certain conduct of his own constituting [a] crime for which he is on trial; a statement which, if true, discloses his guilt of that crime.’” *State v. Cannon*, 341 N.C. 79, 89, 459 S.E.2d 238, 244-45 (1995) (quoting BLACK’S LAW DICTIONARY 296 (6th ed. 1990)) (upholding trial court’s giving jury the same instruction as in the instant case). In the present case, Detective Coffman testified that the defendant admitted to him that he had choked Stacey with the apron string because he was angry with her and was “tired of her junk.” We conclude, therefore, that the trial court did not err by instructing the jury that there was evidence “tending to show” that he had confessed to “the crime charged.” This assignment of error is overruled.

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III.

[3] Defendant argues next that the trial court erred by denying his request for certain special instructions modifying the pertinent North Carolina Pattern Jury Instructions. We disagree. “In every jury trial, it is the duty of the court to charge the jury on all substantial features of the case arising on the evidence, whether or not such instructions have been requested.” *State v. Norman*, 324 N.C. 253, 267, 378 S.E.2d 8, 17 (1989). Moreover:

The purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict. The trial judge has wide discretion in presenting the issues to the jury. This responsibility cannot be delegated to or usurped by counsel.

State v. Harris, 306 N.C. 724, 727-28, 295 S.E.2d 391, 393 (1982) (citations omitted). “It is well established that a request for a specific instruction which is correct in law and supported by the evidence must be granted at least in substance.” *State v. Lundy*, 135 N.C. App. 13, 23, 519 S.E.2d 73, 81 (1999) (quoting *State v. Williams*, 98 N.C. App. 68, 71, 389 S.E.2d 830, 832 (1990)), *disc. review denied*, 351 N.C. 365, 542 S.E.2d 651 (2000). However, “‘a trial court is not required to repeat verbatim a requested, specific instruction that is correct and supported by the evidence, . . . if the court gives the instruction in substantial conformity with the request.’” *State v. Lloyd*, 354 N.C. 76, 92, 552 S.E.2d 596, 610 (2001) (quoting *State v. McNeill*, 346 N.C. 233, 239, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998)).

At trial, defendant requested a special instruction on lack of motive. The trial court delivered the North Carolina Pattern Jury Instruction 104.10, which states:

Proof of motive for the crime is permissible and often valuable, but never essential for conviction. If you are convinced beyond a reasonable doubt that the defendant committed the crime, the presence or absence of motive is immaterial. Motive may be shown by facts surrounding the act if they support a reasonable inference of motive. When thus proved, motive becomes a circumstance to be considered by you. The absence of motive is equally a circumstance to be considered on the side of innocence.

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Defendant requested that the trial court modify this instruction by (1) instructing the jury that “If you are convinced beyond a reasonable doubt that the defendant committed the crime of *First Degree Murder*, the presence or absence of motive is immaterial,” and by (2) replacing “absence of motive is equally a circumstance to be considered on the side of innocence” with “absence of motive is equally a circumstance to be considered on the side of *convicting the Defendant of some lesser degree of homicide*.” (emphasis added).

Defendant contends that the instruction misled the jury by suggesting that the absence of motive was relevant *only* to consideration of whether he was innocent of all charges, and not to whether he was innocent of first degree murder and guilty instead of second degree murder. Our case law does not support defendant’s position. For example, in *State v. Hales*, 344 N.C. 419, 423, 474 S.E.2d 328, 330 (1996), the trial court instructed the jury to consider motive in assessing the defendant’s guilt, but *omitted altogether* the instruction that “the absence of motive is equally a circumstance to be considered on the side of innocence.” The North Carolina Supreme Court did not find this to constitute prejudicial error:

When the court instructed the jury it could consider motive, the members could infer that absence of motive could be considered in determining guilt or innocence. The evidence against the defendant was strong. . . . This lapse in the charge could not have affected the jury verdict.

Id. Thus, in *Hales*, the North Carolina Supreme Court held that the *failure to give any instruction at all* on lack of motive is not prejudicial error if the trial court properly instructed the jury that motive may be considered in determining whether the defendant is guilty. This Court is bound by decisions of the North Carolina Supreme Court. See *State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000), *disc. review denied*, 353 N.C. 394, 547 S.E.2d 37, *cert. denied*, 532 U.S. 1032, 149 L. Ed. 2d 777 (2001). We conclude that the trial court did not err by instructing the jury in accord with the pattern jury instruction on lack of motive.

[4] Defendant argues next that the trial court erred in its instruction on defendant’s character evidence. Defendant presented evidence of his character through numerous witnesses. Members of his extended family testified that defendant witnessed incidents of serious domestic violence as a child; teachers remembered him as a student who did not cause trouble in class; adult neighbors recalled him to be gen-

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erally polite and helpful; Captain Singletary, of the Columbus County Sheriff's Department, testified that defendant behaved well during his incarceration while awaiting trial; and defendant's teenage friends testified that he was usually able to control his temper, was not known to be violent, and had been affectionate with Stacey. Thus, the essential import of defendant's character evidence was that, despite his early exposure to domestic violence, defendant was considered to be a decent individual who did not get into trouble or start fights, and who was well-liked by his friends.

On the basis of this evidence, defendant requested several special instructions, which we will consider separately. First, defendant requested the jury be instructed on the character traits of nonviolence and peacefulness. The trial court's instruction differed from defendant's request in that (1) the court instructed only on "peacefulness" but not on "nonviolence," and (2) the defendant requested the court to instruct the jury that a person with the trait of peacefulness may be less likely to commit "the *crime of first degree murder*," but the court instructed that a person with the trait of "peacefulness" may be less likely to commit "*the alleged crime*."

We note that peacefulness and nonviolence are almost synonymous. Additionally, as defendant was charged with first degree murder, we find no significant difference between an instruction on the defendant's likelihood of committing first degree murder and an instruction on the likelihood of his committing the alleged offense. We conclude that the trial court did not err in its instruction. Moreover, under N.C.G.S. § 15A-1443(a) (2001), a defendant is prejudiced by non-Constitutional errors at trial *only* "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." In the present case, we conclude that there is no probability that the difference between the instruction defendant requested and the one given by the court had *any* impact on the jury's verdict. Thus, the error, if any, is harmless.

[5] Defendant next argues that the trial court committed reversible error by denying his request for an instruction on the character trait of having a "good reputation in the community." Defendant misstates the law in this regard. He argues that he was entitled to an instruction that evidence of his general "good reputation" should be considered both with regards to his guilt of the substantive offense, and also as it bears on his credibility. Defendant cites several older cases to support his assertion that the trial court's failure to instruct on defend-

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ant's general good reputation constitutes reversible error. However, under the North Carolina Rules of Evidence, which have been in effect since 1 July 1984, "an *accused may no longer offer evidence of undifferentiated, overall 'good character,'* but may now only introduce evidence of 'pertinent' traits of his character." *State v. Bogle*, 324 N.C. 190, 198, 376 S.E.2d 745, 749 (1989) (emphasis added) (quoting N.C.G.S. § 8C-1, Rule 404, and *State v. Squire*, 321 N.C. 541, 546, 364 S.E.2d 354, 357 (1988)). Defendant also cites *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), in support of his contention that evidence similar to that elicited by defendant herein has been held by the North Carolina Supreme Court to constitute evidence of "good reputation" in the community. However, reputation evidence in *Ali* was introduced, not as character evidence for the trait of having a good reputation, but to support instruction on a mitigating factor for consideration by the jury in determining whether to impose the death penalty. Thus, the holding in *Ali* is not pertinent to the issue before us. We conclude that under the North Carolina Rules of Evidence the defendant was not entitled to an instruction on his general "good reputation" in the community, and that the trial court did not err by refusing this request.

[6] Defendant next contends that he was entitled to an instruction on the character trait of being law-abiding, and that the trial court erred by denying his request for such an instruction. We again disagree.

Defendant's evidence on the trait of being law-abiding consisted of Detective Cole's testimony that defendant had no prior criminal convictions. However:

evidence of the lack of prior convictions is not evidence of a trait of character but is merely evidence of a fact. It does not address a trait of defendant's character. Whereas being law-abiding addresses one's trait of character of abiding by all laws, a lack of convictions addresses only the fact that one has not been convicted of a crime. Many clever criminals escape conviction.

State v. Bogle, 324 N.C. at 200, 376 S.E.2d at 751. In the present case, defendant testified that he had, *inter alia*, purchased and smoked marijuana; drank alcohol although he was underage; initially lied to law enforcement officers who were engaged in a criminal investigation; and strangled his girlfriend to death. Each of these is a violation of criminal law. Thus, a review of the record suggests that defendant's lack of a criminal record did not result from his being law-abiding, but simply indicates that he had not been apprehended for any of his

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violations of the law. We conclude that he was not entitled to a special instruction on the character trait of being law-abiding. Accordingly, the trial court did not err by failing to deliver such an instruction.

[7] Defendant's next contention is that, upon defendant's request for an instruction on demonstrative evidence, the trial court "denied defendant's request and, instead, gave no instruction at all to the jury on how it was to consider the demonstrative evidence presented to it." The basic premise of defendant's argument—the trial court's refusal to instruct the jury on demonstrative evidence—is belied by the record. Upon defendant's request for a modified instruction on demonstrative evidence, the trial court agreed, stating:

COURT: Mr. Willis has asked for an instruction on demonstrative evidence. It appears to be appropriate with the following modification: That I simply indicate—have you been furnished a copy of it?

[PROSECUTOR]: Yes Sir.

COURT: All right. I'll modify it to the extent, "In deciding the issues in the trial of this case" as opposed to specifically referring to the first degree murder or second degree murder, so I modified it to that extent, so I'll give that instruction with the modification.

Thereafter, the trial court instructed the jury as follows on demonstrative evidence:

I instruct you that evidence which has been permitted for demonstrative purposes can be used for that purpose and that purpose only. If you find that demonstrative evidence which may have been admitted in this case does in fact demonstrate some fact in this case, you may consider that evidence together with all of the other evidence in this case in deciding the issues in the trial of this case.

This assignment of error is overruled.

IV.

[8] Finally, defendant argues that the trial court committed reversible error by denying defendant's motion to dismiss the charge against him, on the grounds that the "short form" indictment by which he was charged:

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did not allege that the killing was committed with premeditation and deliberation; did not provide notice to defendant or the public that he was accused of first degree murder and did not confer jurisdiction upon the trial court to try defendant for 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, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). This Court is bound by precedent of the North Carolina Supreme Court. *See Forsyth Memorial Hosp. 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.

We conclude the defendant had a fair trial, free of prejudicial error. Accordingly, his conviction is

Affirmed.

Chief Judge EAGLES and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. KEVIN CLARK

No. COA02-964

(Filed 5 August 2003)

1. Firearms and Other Weapons— weapon in vehicle—constructive possession—sufficiency of evidence

There was sufficient evidence to submit possession of a firearm by a felon to the jury where a gun was found under the driver's seat of a Jeep driven by defendant after an armed robbery. Defendant was a joint owner of the Jeep and had been the only driver the entire day of the robbery, the gun could be seen readily when the driver's door was open, there was no evidence

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of movement toward the driver's seat by the occupant of the passenger seat after the Jeep was stopped, and the seat frame and debris would have made it difficult for the passenger in the back seat to shove the gun under the seat.

2. Robbery— sufficiency of evidence—robbery by another—defendant's knowledge

The evidence was sufficient to submit robbery with a dangerous weapon to the jury where another person (Terry) got into defendant's Jeep immediately after the robbery; Terry had a ski cap and gloves, although it was a hot day in May, as well as a loaded gun and a paper bag with the stolen money; defendant drove off with a loaded gun under his seat; and defendant took the back way home with Terry lying down in the back seat of the car. These facts permit a reasonable inference of defendant's knowledge.

3. Evidence— hearsay—door opened

There was no error in the admission of testimony from a convenience store employee present during an armed robbery about hearsay statements from another employee. Defendant opened the door by asking the first employee what he had observed and what his investigation had uncovered about the number of robbers.

4. Evidence— present sense impressions and excited utterances—statements directing officer to robbery

Statements to an officer from unidentified witnesses to an armed robbery who flagged down an officer and later directed him to defendant's car were admissible as present sense impressions and excited utterances. N.C.G.S. § 8C-1, Rules 803(1) and (2).

5. Constitutional Law— effective assistance of counsel—further factual development necessary

A claim of ineffective assistance of counsel was not addressed where further factual development was necessary for a proper review.

6. Evidence— other offenses—child support arrears

A question about defendant's child support arrears in an armed robbery prosecution was not so prejudicial as to require polling the jury or granting a mistrial.

Judge TIMMONS-GOODSON concurring in the result.

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Appeal by defendant from judgment entered 14 February 2002 by Judge James C. Spencer, Jr. in Granville County Superior Court. Heard in the Court of Appeals 26 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Lauren M. Clemmons, for the State.

Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for defendant-appellant.

GEER, Judge.

Defendant Kevin Clark was found guilty of possession of a firearm by a felon and of robbery with a dangerous weapon. On appeal, defendant raises four issues: (1) Whether the trial court erred in denying his motion to dismiss both charges based on the insufficiency of the evidence; (2) whether the trial court erred in admitting certain hearsay evidence; (3) whether defense counsel's failure to present evidence of a co-defendant's inculpatory statements constituted ineffective assistance of counsel; and (4) whether the trial court erred in denying defendant's motion for a mistrial. We find no error in defendant's trial, but dismiss defendant's ineffective assistance of counsel assignment of error without prejudice to its being asserted in a later motion for appropriate relief.

Facts

The State's evidence tended to show that on 1 May 2001 at approximately 5:30 p.m., an armed robbery occurred at the Shell gas station and Rosemart Food Store located at 901 Linden Avenue, Oxford, North Carolina. At the time of the robbery, three store employees were at work: William Flanagan, who performs bookkeeping and computer-related operations for Rosemart, a new clerk Dana, and a second clerk Danita. Mr. Flanagan was helping the new clerk with the register and bagging when he heard Danita, who was at the front register, gasp. Mr. Flanagan looked up and saw a man pointing a gun at him.

The gunman told the two clerks to sit down and directed Mr. Flanagan to put the money from the cash register in a plastic bag that the gunman was holding. Mr. Flanagan showed him that there was no money in that particular register and offered to go to the other register. Mr. Flanagan opened the second register, removed the drawer from the register, and pushed it down the counter so that it was in front of the gunman. The gunman, who Mr. Flanagan later identified

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as Damon Terry, took approximately \$210.00 from the drawer and left the store through a back door. Mr. Flanagan did not see Terry get in any car, but he did see a Jeep leave the parking lot.

Officer Anthony Boyd of the Oxford City Police was on patrol and driving near the Shell station when two men ran towards his car yelling, "Those guys are robbing the Shell Station." Officer Boyd radioed dispatch, advised them of the possible armed robbery, and then pulled into a parking lot adjacent to the Shell station to observe the station's back door. Officer Boyd had just returned to his car and was driving back to the front of the Shell station when the same two men who had approached him before told him that he had just missed the robbers. The men told Officer Boyd that the robbers were in a gray Jeep and pointed out the direction that the Jeep had gone.

Officer Boyd radioed dispatch and reported that he was pursuing the Jeep. As he headed in the direction indicated by the two observers, he spotted the gray Jeep. Two other officers in separate patrol cars, Corporal Gresham and Officer Kearney, joined him to provide backup. Once the gray Jeep was no longer traveling in a residential area, Officer Boyd turned on his blue lights and stopped the Jeep.

Corporal Gresham used his PA system to order the occupants of the Jeep to exit the car. Defendant exited first from the driver's seat, followed by Anthony Peace from the front passenger seat. Damon Terry, who had been lying down on the back seat, left the Jeep last. The officers secured the men in patrol units.

Officer Kearney conducted an initial search of the Jeep, starting with the driver's compartment. When he opened the door, he could see the handle of a .38 derringer protruding from under the driver's seat. When he checked behind the driver's seat, he found a nylon lunch box that contained a black revolver, which was ultimately identified as the gun used in the robbery. On the other side of the car, he found a brown paper bag containing \$210.00 in cash stuffed under the passenger seat and a hat and gloves on the back seat. Both guns were fully loaded.

Defendant was indicted for felonious possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1 (2001) and for robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87 (2001). Defendant was tried at the 11 February 2002 Criminal Session of Granville County Superior Court and on 14 February 2002 was

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found guilty of both charges. The trial judge sentenced defendant to a minimum of 72 months and a maximum of 96 months.

I

Defendant first argues that the trial court erred in denying his motions to dismiss both charges due to the insufficiency of the evidence. In considering a motion to dismiss in a criminal case, the trial judge must decide whether there is substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* In reviewing a trial court's denial of a motion to dismiss, the appellate court views the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in the evidence in favor of the State. *State v. Taylor*, 337 N.C. 597, 604, 447 S.E.2d 360, 365 (1994).

It does not matter if the State has relied upon circumstantial, as opposed to direct, evidence. As our Supreme Court has stated:

Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only permit a reasonable inference of the defendant's guilt of the crime charged in order for that charge to be properly submitted to the jury. Once the court determines that a reasonable inference of the defendant's guilt may be drawn from the circumstances, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

Id. (internal quotation marks and citations omitted).

Possession of a Firearm by a Felon

[1] N.C. Gen. Stat. § 14-415.1 provides that it is unlawful:

for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c).

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Defendant challenges only the sufficiency of the evidence to establish his possession, custody, care, or control of the .38 derringer found under the driver's seat.

As this Court has previously explained, "Possession of any item may be actual or constructive. Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citations omitted). Because, in this case, the gun was not found on defendant's person, the State was required to offer evidence that defendant constructively possessed the derringer.

When, as here, the defendant did not have exclusive control of the location where contraband is found, "constructive possession of the contraband materials may not be inferred without other incriminating circumstances." *Brown*, 310 N.C. at 569, 313 S.E.2d at 589. In other words, the mere fact that defendant was in a car where a gun was found is insufficient standing alone to establish constructive possession. *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 318.

Defendant relies on *Alston* as support for this assignment of error. In *Alston*, however, the handgun at issue was owned by the defendant's wife, the defendant's wife was driving the car while the defendant was just a passenger, and the car was owned by someone else. This Court pointed out that while the defendant and his wife had "equal access to the handgun," which was lying on a console between the driver's and passenger's seat, there was no other evidence "otherwise linking the handgun to Defendant." *Id.*, 508 S.E.2d at 319.

By contrast, in this case, defendant jointly owned the Jeep with his girlfriend and had been the sole driver of the Jeep the entire day of the robbery. While defendant contends on appeal that someone else could have previously placed the gun under the seat, the State's evidence indicated that the gun could readily be seen when the driver's door was opened, suggesting that defendant must have known of the presence of the gun.

Defendant has also argued that Terry could have slid the gun under the driver's seat after defendant left the car. Although defendant has not suggested that Anthony Peace planted the gun, there was no evidence of any movement by Peace towards the driver's seat after the police stopped the Jeep. With respect to Terry, Warren Hicks (the crime scene detective and evidence technician for the Oxford Police

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Department) testified that there was so much debris under the driver's seat that no one could have shoved the gun under the seat from the back seat of the car. Additionally, according to Detective Hicks, even if nothing had been stored under the seat, because the seat frame of a Jeep is mounted on a hump, sliding even a small object would be difficult.

Viewed in the light most favorable to the State, this evidence was sufficient to raise a jury question regarding defendant's possession of the derringer. *See, e.g., State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 271 (2001) (drugs were found in rear seat of car with several passengers, but arresting officer testified that defendant was the only person who could have placed the drugs in the location where they were discovered); *State v. Boyd*, 154 N.C. App. 302, 307, 572 S.E.2d 192, 196 (2002) (although drugs were found under the driver's seat and defendant was passenger, evidence was sufficient when co-defendant driver testified that defendant had been left alone with the car and that defendant was the only person who could have placed drugs under seat). The trial court therefore correctly denied defendant's motions to dismiss and submitted the charge of possession of a firearm by a felon to the jury.

Robbery with a Dangerous Weapon

[2] Defendant also contends that the trial court should have dismissed the charge of robbery with a dangerous weapon. N.C. Gen. Stat. § 14-87 provides:

Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

A person who aids or abets another person in the commission of the offense of armed robbery is equally guilty as a principal. *State v. Donnell*, 117 N.C. App. 184, 188, 450 S.E.2d 533, 536 (1994). The intent to aid does not have to be expressly communicated, but can be inferred from the actions of the defendant. *State v. Sanders*, 288 N.C. 285, 291, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976).

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Here, the State offered sufficient circumstantial evidence to allow the jury to find that defendant aided and abetted Terry's armed robbery by driving the "get away" car. There is no genuine dispute that Terry robbed the Shell station at gunpoint of \$210.00 and that Terry escaped in defendant's Jeep. The primary issue is whether there was sufficient evidence that defendant knew Terry committed the robbery either before or after it occurred.

The evidence, viewed in the light most favorable to the State, showed that immediately after committing the robbery, Terry got into the Jeep at the Shell station with his loaded gun, a ski cap and gloves although it was a hot May day, and a paper bag with the stolen money. Defendant then drove off, with a loaded gun under his own seat, taking the "back way home." Terry lay down on the back seat of the car. Since a reasonable inference of defendant's knowledge may be drawn from these facts, the court properly submitted the issue to the jury.

Almost identical evidence was found sufficient by this Court in *State v. Monroe*, 78 N.C. App. 661, 662, 338 S.E.2d 137, 138 (1986). In *Monroe*, a gas station had been robbed by a single person. A police officer followed the robber until he entered a car and then pursued the car until it ran off the road and two men fled from the car. The defendant was the driver of the car. This Court held that the jury could find from this evidence that the defendant "was driving an automobile in the vicinity of the place where the armed robbery occurred with the intention of aiding the robber in his escape" and that the defendant "picked the robber up in his automobile a few minutes after the robbery and did aid the robber in leaving the scene." *Id.* at 663, 338 S.E.2d at 138. Here, defendant was not just in the vicinity of the robbery; he was in the car outside the gas station and picked up Terry moments after the robbery occurred. As in *Monroe*, this evidence is sufficient to permit, although not require, a jury to conclude that defendant intended to aid and abet Terry's armed robbery. *See also State v. Cannon*, 92 N.C. App. 246, 255, 374 S.E.2d 604, 609 (1988) (evidence sufficient when defendant was found hiding under house near robbery, he was in the presence of one of the robbers, and objects linked to the robbery were nearby), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990).

Defendant points to his evidence that, at the time of the robbery, he was driving his car through a car wash with his car wheels locked. He argues that if defendant "had known that Terry entered the store to commit a robbery, and if he wanted to assist in its commission, he

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would not have gone through the car wash that day.” The State, however, offered evidence that would permit a jury to find that defendant never used the car wash. Detective Chauvaux testified that the car wash did not have a blower so that cars emerging from the car wash were completely wet. Officer Boyd testified that when he first saw the Jeep, it was not wet. In addition, Detective Hicks, who examined the Jeep only a day and a half after it was impounded, testified that “[t]here was . . . a thick layer of dust on the vehicle. The outside was dirty as well as the inside” Whether defendant’s claim that he had been in the car wash during the robbery was true was a question for the jury to resolve.

II

Defendant next challenges the admission of testimony that he contends was inadmissible hearsay, including (1) Mr. Flanagan’s testimony as to statements made by the second clerk at the store, Danita, who did not testify at this trial; and (2) Officer Anthony Boyd’s testimony regarding the statements of the two unknown men describing the gray Jeep. We find no error.

William Flanagan’s Testimony

[3] On cross-examination of Mr. Flanagan, defense counsel asked the following questions:

Q. And based on your personal observations *and your own investigation of the—of this particular incident*, there was only, to your knowledge, one person who ever came in that store that robbed it, is that correct?

A. To my knowledge? I have information that other—to—contrary to that.

Q. And does Danita and Dana—are they still employed at Rosemart?

A. I don’t believe so.

(Emphasis added). Defense counsel thus tried to suggest not only that Mr. Flanagan had seen only a single robber, but that his own investigation of the robbery had indicated there was only a single robber. When Mr. Flanagan did not agree with defense counsel’s statement, counsel did not allow him to explain.

On redirect, the prosecutor followed up on Mr. Flanagan’s answer:

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Q. Mr. Flanagan, what is that information that you have that is contrary to the statement that Ms. Feimster made about —

A. (Interposing) Danita told me that—

MS. FEIMSTER: (Interposing) Objection, Your Honor.

A. —that she saw the other two men come into the store—

MS. FEIMSTER: (Interposing) Objection, Your Honor.

A. —with Mr. Terry

THE COURT: Overruled

In *State v. Williams*, 315 N.C. 310, 320, 338 S.E.2d 75, 82 (1986), our Supreme Court noted that “[i]t is well settled that evidence explanatory of testimony brought out on cross-examination may be elicited on redirect even though it might not have been properly admissible in the first instance.” In *Williams*, defense counsel on cross-examination asked an officer whether he had earlier been suspicious of some of a witness’ actions. The officer responded that his suspicions were directed at her knowledge of the killing rather than in regard to her actions. On redirect, the State asked the officer to explain what he suspected the witness knew about the killing and he answered that he believed the witness suspected the defendant of some involvement. Although that testimony might not otherwise have been admissible, the Court found no error since it “was designed to explain his cross-examination testimony.” *Id.*

Likewise, although Mr. Flanagan’s testimony regarding Danita’s statements would ordinarily be inadmissible hearsay, it became admissible when counsel asked Mr. Flanagan what he observed and what his investigation uncovered regarding the number of robbers. Defendant opened the door. *See also State v. Anthony*, 354 N.C. 372, 415, 555 S.E.2d 557, 585 (2001) (“ ‘Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.’ ”) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002).

Statements of Unidentified Eyewitnesses

[4] Officer Boyd testified that two unidentified men spoke to him twice concerning the robbery. The first time, Officer Boyd testified,

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the men “ran down from the Shell station by the car wash practically out in the street in front of my patrol car. At that time, the two individuals in concert stated that, ‘Those guys are robbing the Shell station.’” The court overruled defendant’s objection to this testimony and allowed the evidence to be considered “for the purpose of explaining the conduct of this officer after he heard those statements.”

In addition, Officer Boyd testified that, a little later, the same men told him, “hey, you just missed the guys. I said, missed them in what? They said, a gray Jeep. It just went that way. And when they said ‘that way,’ they was [sic] referring to Industry Drive, traveling towards 158.” Defense counsel raised no objection to this testimony at trial. Under Rule 10(b) of the North Carolina Rules of Appellate Procedure, only those questions properly preserved for review by objection at trial may be the basis of an assignment of error on appeal. N.C.R. App. P. 10(b)(1). Since defendant has also failed to argue that the admission of the description of the car constituted plain error, defendant has waived this argument. *State v. Haselden*, 357 N.C. 1, 17, 577 S.E.2d 594, 605 (2003).

In any event, both sets of statements were admissible under Rules 803(1) and 803(2) of the North Carolina Rules of Evidence. They qualify both as present sense impressions and excited utterances.

Under Rule 803(1), a present sense impression is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” N.C. Gen. Stat. § 8C-1, Rule 803(1) (2003). The key factor in deciding whether a statement falls under the present sense impression exception is the “closeness in time between the event and the declarant’s statement” because that proximity “reduces the likelihood of deliberate or conscious misrepresentation.” *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997).

Under Rule 803(2), an excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” N.C. Gen. Stat. § 8C-1, Rule 803(2) (2003). In order for a statement to qualify as an excited utterance, there must be “(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.” *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

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The statements of the unknown men that the store was being robbed and then, moments after the robbery, that the robbers had driven off in a gray Jeep described events either while they were happening or immediately afterwards. The statements therefore qualify as a present sense impression. There was also sufficient evidence of a startling experience—an armed robbery—and that the statements were a spontaneous reaction to justify admission as excited utterances. *See State v. Odom*, 316 N.C. 306, 313, 341 S.E.2d 332, 336 (1986) (officer could testify, under Rule 803(1), to deceased witness' description of the victim's car and the two assailants made ten minutes after the events); *State v. Markham*, 80 N.C. App. 322, 324, 341 S.E.2d 777, 778 (1986) (woman who had pursued a robber was allowed to testify that another woman yelled to her that the robber had gone into a lot behind some apartments; statement was admissible both as a present sense impression and an excited utterance). This assignment of error is overruled.

III

[5] Defendant argues that his trial counsel's failure to present evidence of Terry's allegedly inculpatory statements constitutes ineffective assistance of counsel because it deprived defendant of a fair trial. "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 indicates that additional factual development is necessary before a proper review of defend-

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ant'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

[6] Finally, defendant argues that the trial court erred in denying his motion for a mistrial after the State asked a question, in front of the jury, about child support arrears. "The allowance or denial of a defendant's motion for mistrial is largely within the discretion of the trial court and its ruling is not reviewable in the absence of an abuse of discretion." *State v. Johnson*, 78 N.C. App. 68, 74, 337 S.E.2d 81, 85 (1985). We find that the trial court did not abuse its discretion.

Defendant called Reverend Clarence Dale as a character witness. On cross-examination, the prosecutor asked Reverend Dale, "And did you know that Mr. Clark is close to eight thousand dollars (\$8,000.00) in arrears on child support?" The trial court sustained defense counsel's prompt objection and granted her motion to strike the testimony. The judge twice instructed the jury to disregard the prosecutor's question. This procedure appropriately addressed the improper question. *See State v. Franks*, 300 N.C. 1, 13, 265 S.E.2d 177, 184 (1980) ("[W]e note that the better procedure is to give the instruction to disregard the answer immediately after allowing the motion to strike."). This case does not involve such a serious impropriety as to warrant a finding that the trial court abused its discretion in not granting a mistrial.

Defendant argues that the court should have polled the jurors to determine if they could continue as fair and impartial jurors. We note that defendant did not request a polling of the jury at the time nor has he assigned error to the trial court's failure to poll the jury. In any event, the decision whether to poll a jury after potentially prejudicial information becomes known to the jury rests within the discretion of the trial court and we find no abuse of discretion. *State v. Sorrells*, 33 N.C. App. 374, 377, 235 S.E.2d 70, 73, *disc. review denied*, 293 N.C. 257, 237 S.E.2d 539 (1977).

Given the facts of this case, a question regarding possible child support arrearages was not so prejudicial as to require polling the jury or the declaration of a mistrial. *See State v. Costner*, 80 N.C. App. 666, 672, 343 S.E.2d 241, 245 (rejecting argument that question regarding \$17,000.00 in child support arrears required the granting of

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a mistrial), *disc. review denied*, 317 N.C. 709, 347 S.E.2d 444 (1986). This assignment of error is overruled.

After a careful review of the record, we find no error in the trial court's rulings.

No Error.

Judge BRYANT concurs.

Judge TIMMONS-GOODSON concurs in result only with separate opinion.

TIMMONS-GOODSON, Judge, concurring in the result.

Because I disagree with the majority opinion's application of *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986), to the facts of the instant case, I concur only in the result of Part II of the opinion. I otherwise concur.

The majority concludes that the hearsay testimony offered by Flanagan in the instant case was admissible under the rule cited in *Williams* that "evidence explanatory of testimony brought out on cross-examination may be elicited on redirect even though it might not have been properly admissible in the first instance." *Id.* at 320, 338 S.E.2d at 82. This rule allows admission of evidence elicited during redirect examination of a witness that would have been otherwise inadmissible as irrelevant if first offered during direct examination. *See, e.g.*, N.C. Gen. Stat. § 8C-1, Rule 404(a) (2001) (generally prohibiting character evidence as irrelevant, but allowing such evidence to be offered by the prosecution in order to rebut evidence presented by the defendant). The rule does not encompass evidence that is inadmissible for reasons of hearsay, however.

In *State v. Love*, 296 N.C. 194, 250 S.E.2d 220 (1978), the case cited by the *Williams* Court in support of the rule, the defendant objected to certain evidence elicited by the State during redirect examination of a police officer on the grounds that it was "offered solely to prejudice the jury against defendant" and was therefore irrelevant. *Id.* at 201, 250 S.E.2d at 225. The *Love* Court concluded that defendant's objection was without merit, as defense counsel had "opened the door" to this information during cross-examination. The defendant also objected to the testimony on the grounds that it constituted inadmissible hearsay, which argument the Court addressed separately. Clearly, if the rule allowing explanatory information to be

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elicited on redirect encompassed evidence otherwise inadmissible for reasons of hearsay, as well as relevancy, there would have been no need for the *Love* Court to address these arguments separately. I therefore disagree with the majority's conclusion that the hearsay evidence offered by Flanagan was properly admitted. As I conclude, however, that admission of this evidence was harmless, I agree with the result of the majority in finding no error.



STATE OF NORTH CAROLINA v. CARLOS ANTONIO LAWSON

No. COA02-1000

(Filed 5 August 2003)

1. Identification of Defendants— show up—no plain error

The admission of identification testimony at an armed robbery prosecution was not plain error where a clerk at the store identified defendant in a show-up, which is disfavored, but there was no substantial likelihood of irreparable misidentification under the totality of the circumstances. Since the out-of-court identification was admissible, there is no danger that it impermissibly tainted the in-court identification.

2. Evidence— videotape—convenience store robbery—foundation—no plain error

The admission of a videotape at an armed robbery prosecution was not plain error where the clerk present at the convenience store during the robbery testified that the store was equipped with cameras, that the manager had properly loaded the recorder, and that the tape accurately depicted the robbery. Moreover, defendant could not show that the tape had a probable impact on the verdict given the overwhelming evidence of guilt; in fact, defendant used the tape at trial and it may have helped his case.

3. Evidence— officer's testimony—defendant as liar

There was no plain error in an armed robbery prosecution in the admission of portions of an officer's testimony about defendant giving false information about his identity. The officer's testimony dealt with the reasons for the officer's sus-

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picion and his initial arrest of defendant for providing fictitious information. These were not district attorney's comments, nor was the officer invading the province of the jury or commenting on the credibility of a witness.

4. Constitutional Law— effective assistance of counsel— record not sufficiently developed for some claims—others overruled

Some of an armed robbery defendant's claims for ineffective assistance of counsel were dismissed without prejudice so that he could file a motion for appropriate relief in the trial court. Other claims involved issues decided elsewhere in the opinion and were overruled.

Appeal by defendant from judgments entered 28 March 2002 by Judge Dwight L. Cranford in Superior Court, Pitt County. Heard in the Court of Appeals 24 April 2003.

Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for the State.

Jeffrey Evan Noecker, for defendant-appellant.

McGEE, Judge.

Carlos Antonio Lawson (defendant) was convicted of robbery with a firearm and possession of a handgun by a felon on 28 March 2002. The trial court sentenced defendant to a minimum term of 103 months to a maximum term of 133 months active imprisonment for robbery with a firearm and a minimum term of 20 months to a maximum term of 24 months active imprisonment for possession of a handgun by a felon, to run consecutively. Defendant appeals.

The State's evidence at trial tended to show that on 4 November 2001, Anthony Johnson (Johnson) was working as a clerk at a Pantry in Grifton, North Carolina. Johnson was sitting behind the counter around 10:00 p.m., with his head down. When he looked up, there was a gun pointed at his face and he saw the gunman and another man in the store. The gunman had a slim build and was wearing bluish green coveralls, white tennis shoes, a black toboggan, and a blue bandana with little white diamonds. The bandana covered the lower part of the gunman's face. The other man was taller than the gunman and had a heavier build, was wearing a blue Adidas jacket with white stripes, and had a mask over his face.

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Both men, cursing at Johnson, demanded money from the cash register. Johnson was scared and had trouble opening the register. Johnson testified that he looked right at the gunman because he was too scared to look elsewhere. When Johnson got the register open, he gave all of the money in the register, approximately \$75.00, to the two men. Johnson was told to lie on the floor. Both men then ran from the store. The entire robbery lasted approximately twenty-five seconds. After the two men left the store, Johnson called the police and ran outside.

A witness, who was standing across the street from the Pantry at the time of the robbery, testified that he saw two men run from the Pantry. He testified that one of the men was dressed in a dark jumpsuit and was wearing white tennis shoes and that the other man was wearing a dark colored coat with white stripes down the sleeves. The witness identified an Adidas jacket seized from defendant's car, as the type of coat he saw one of the men wearing the night of the robbery.

Approximately two hours after the robbery, Officer C.L. Wilson (Officer Wilson), of the Kinston Police Department, stopped a car for running through a stoplight. The driver of the car, later identified as defendant, was wearing a jumpsuit and white sneakers. There were two passengers in the car with defendant. Officer Wilson testified that defendant was very nervous and that when Officer Lawson asked for defendant's driver's license, defendant could not produce it or other identification. Defendant claimed he had a North Carolina driver's license and gave the name "Antonio Lawson" and a date of birth. Officer Wilson ran a DMV information check for the name "Antonio Lawson," but the search returned no record of information on "Antonio Lawson." Officer Wilson testified that because he could not get DMV information on his computer for the name "Antonio Lawson," he "knew that [defendant] was lying" because if someone had ever had a North Carolina identification, it would be recorded in DMV's records.

During the stop, a report of an armed robbery in Grifton came over the police radio describing two black males, one of whom was wearing a blue coverall jumpsuit. Officer Wilson called for backup since the description matched defendant. While the name "Antonio Lawson" produced no results in the DMV search, information for the name "Carlos Antonio Lawson," with another date of birth did appear. Officer Wilson asked defendant if he was in fact Carlos Antonio

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Lawson. Defendant denied that he was and never gave Officer Lawson his correct name.

Other officers searched defendant's car and recovered a blue Adidas jacket and two black toboggans from the trunk. No gun was found in the car. A blue bandana was later found near the Pantry.

Defendant and his passengers were taken to the Grifton police station. Johnson was brought to the Grifton police station. Johnson testified that when he saw defendant at the police station, he was wearing the same jumpsuit and white tennis shoes he had on during the robbery, but that defendant was now wearing the jumpsuit with the upper half unzipped and the sleeves tied at his waist with a tee shirt underneath. Johnson also testified that when he looked through the window into the room where defendant was being held, defendant stood up, came to the door and in a face-to-face exchange, said to Johnson, "Yo, man, tell them it won't me. They got the wrong m----f---- man." Johnson testified that he recognized the voice of defendant as that of the robber. Johnson also testified that besides defendant's clothes and voice, he recognized defendant's eyes and his face from the nose up, which had not been covered by a bandana during the robbery. Johnson testified that "I mean when somebody has got a gun in your face . . . you're too scared to look anywhere else, so you are sitting right there looking right at their face in their eyes. . . . you don't forget his eyes." Johnson also testified, "[l]ike I said it's hard to forget somebody who puts a gun in your face."

A videotape and photographs of the armed robbery were admitted into evidence and viewed by the jury without objection. Johnson testified that the Pantry was equipped with two video cameras which fed into one recorder; that the Pantry's manager had loaded the recorder with videotapes, and that the recorder was properly working and that the videotape accurately depicted the robbery. Officer Chapman testified that he obtained the videotape from the Pantry the night of the robbery and turned it over to Deputy Pollock. A Deputy Pollock did not testify. However, Deputy Pollard did testify but did not testify as to the chain of custody of the videotape. During closing arguments, defense counsel used the videotape to argue: (1) that the robber was seen touching several things in the store, including the cash register, but no prints were found (T. p. 252) and (2) that the robbery only lasted twenty-five seconds and Johnson was lying on the floor, looking down, and looking at the cash register, for a portion of that time and thus had little time to look at the robber. Defendant presented no evidence.

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I.

[1] Defendant argues the trial court erred by admitting evidence of both the in-court and out-of-court identification of defendant by Johnson. Defendant did not object to either of the identifications at trial and thus argues these errors amounted to plain error. Plain error is an error which 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. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (citations omitted). The Courts in our State have applied the plain error rule to the admission of evidence. *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806 (1983).

Defendant first argues that the show-up identification procedure used by the police resulted in a substantial likelihood of misidentification of defendant as the robber. If defendant can show the pretrial identification procedures were so suggestive as to create a substantial likelihood of irreparable misidentification, the identification evidence must be suppressed. *State v. Grimes*, 309 N.C. 606, 609-10, 308 S.E.2d 293, 294-95 (1983). While show-up style identifications are disfavored, they “are not *per se* violative of a defendant’s due process rights.” *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982). We use a totality of the circumstances test in making this determination. *State v. Fisher*, 321 N.C. 19, 23, 361 S.E.2d 551, 553 (1987). The factors to be considered in this inquiry are:

- (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description of the criminal, (4) the level of certainty demonstrated at the confrontation, and (5) the time between the crime and confrontation.

State v. Powell, 321 N.C. 364, 369, 364 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830, 102 L. Ed. 2d 60 (1988).

In the present case, the robbery lasted approximately twenty-five seconds and defendant stood immediately in front of Johnson with a gun pointed at Johnson’s face. Johnson testified that he looked right at defendant during the robbery, taking special notice of defendant’s eyes. Johnson gave a description of defendant, acknowledging that although a bandana was covering the lower part of defendant’s face, he recognized defendant’s eyes, nose, and distinctive forehead. Defendant also gave other descriptions of defendant’s clothing and a

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comparative description of the other man in the store during the robbery, as well as the gun used in the robbery. Defendant was arrested while wearing a jumpsuit and white tennis shoes like Johnson had described. Further, black toboggans and a blue Adidas jacket were found in the trunk of defendant's car.

Upon seeing defendant at the police station, Johnson was certain that defendant was the man who had held him at gunpoint in the Pantry. Defendant also spoke to Johnson, giving Johnson a chance to hear defendant's voice and compare it to the voice of the gunman from the Pantry. At the time of the identification, only a few hours had passed since the robbery. We also note another indicia of reliability of the identification by Johnson. When Johnson looked through the window where defendant was being held, defendant immediately came forward and pleaded with Johnson not to identify him and to tell the police they had the wrong man, indicating defendant knew Johnson was the clerk he robbed, which is a proper consideration in the totality of the circumstances test.

Based on the totality of the circumstances, we do not believe there was a substantial likelihood of irreparable misidentification and thus evidence of the out-of-court identification was admissible. Since the out-of-court identification was admissible, there is no danger it impermissibly tainted the in-court identification. *Grimes*, 309 N.C. at 609-10, 308 S.E.2d at 294-95. Therefore, Johnson's in-court identification of defendant was admissible. Defendant has failed to show plain error and his first argument is overruled.

II.

[2] Defendant next argues that the trial court erred by admitting into evidence a videotape where the evidentiary foundation was insufficient. Defendant did not object to the admission of the videotape into evidence and therefore we apply the plain error test. *See Black*, 308 N.C. at 740-41, 303 S.E.2d at 806. As discussed above, plain error is an error which 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.' " *Collins*, 334 N.C. at 62, 431 S.E.2d at 193 (citations omitted).

In order to lay a proper foundation for the introduction of the videotape, the State could have used

"(1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes);

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(2) ‘proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape . . .’; (3) testimony that ‘the photographs introduced at trial were the same as those [the witness] had inspected immediately after processing,’ (substantive purposes); or (4) ‘testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area ‘photographed.’”

State v. Smith, 152 N.C. App. 29, 38, 566 S.E.2d 793, 800, cert. denied, 356 N.C. 311, 571 S.E.2d 208 (2002) (quoting *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), rev’d on other grounds, 326 N.C. 37, 387 S.E.2d 450 (1990)).

Johnson testified that the Pantry was equipped with two video cameras which fed into one recorder, that the Pantry’s manager had loaded the recorder with videotapes, and that the videotape accurately depicted the robbery. This testimony would be sufficient to survive an objection to the videotape’s admission into evidence on the basis of the fourth prong above, “testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area ‘photographed.’” *Id.*

Even assuming, *arguendo*, that defendant could have prevailed on an objection to the admission of the videotape at trial, under the plain error rule defendant must show that the admission of the videotape had a probable impact on the verdict of the jury. *See Black*, 308 N.C. at 740-41, 303 S.E.2d at 806. Given the overwhelming evidence of guilt in the record, defendant cannot meet this burden. In fact, as shown by defendant’s own use of the videotape at trial, it is possible that the videotape actually helped defendant’s case. This is not a case where the plain error test has been met. Defendant’s second argument is overruled.

III.

[3] Defendant next argues that the trial court erred in admitting the portions of Officer Wilson’s testimony wherein Officer Wilson intimidated defendant was a liar. Defendant did not object to the admission of this testimony, and we apply plain error review. *See Black*, 308 N.C. at 740-41, 303 S.E.2d at 806.

The relevant testimony is as follows:

[Officer]: I asked him for his driver’s license or ID. He told me he didn’t have them on him so I asked him for his name and his

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date of birth and he gave me the name of Antonio Lawson and a date of birth. I asked him had he ever had a North Carolina ID or a North Carolina driver's license and he stated that he had. I told him that I would be right back with him. . . . I ran the information and it came back with no information for DMV records of North Carolina.

Q: No information on Antonio Lawson?

[Officer]: With that DOB, yes, sir. At that point I knew that he was lying to me because if you've ever had a North Carolina ID whether it be three days ago, three years ago, thirty years ago, your information is in DMV files. With that name and that DOB there was no information. He had already stated to me that he had a North Carolina ID so I knew at that point that he was lying.

Q: What happened then?

[Officer]: While we [were] standing there talking about it, I told the deputy it came up with no information, I felt like he was lying to me. . . . I went back up there and proceeded to talk to Mr. Lawson to see if I could get the right date of birth. I told him, I said, "Look, I know you are lying to me. Do you just not have [a] license or are you just lying about that you don't have [a] license?" He said, "No, that is me." I had heard the name Carlos Antonio Lawson before. . . . I asked him, I said are you sure your name is not Carlos Antonio Lawson? "No, sir, that is not me." They came back and told me they didn't have an Antonio Lawson with that name and DOB but they did have a Carlos Antonio Lawson with a different DOB, and that was another reason why I asked him are you sure this isn't you, and he said "No, that is not me." We got our communications center to make contact with Grifton and they advised Grifton what we had, where we had the vehicle stopped, described it, the people we had in the vehicle, they asked us if we could detain them. Well I had enough with the fictitious information. Even though I hadn't gotten a real name yet I had enough fictitious information because I knew he was lying.

Q: You mean to charge him with fictitious information?

[Officer]: I did. So we got them out one at a time, told them that they were being detained, told them why, we asked for a consent to search the vehicle for any weapons or anything, and we sat

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them all on the curb. . . . I stayed with Mr. Lawson and tried to get the right name and the right information, and I was not able to do so. He never gave me the right name or information.

We note that in contrast to defendant's contentions on appeal, Officer Wilson did not characterize defendant as "a liar." In reviewing the testimony, it appears instead that Officer Wilson's testimony as to defendant's lying dealt with: (1) the special circumstances of asking for defendant's identification during a traffic stop, (2) why defendant's responses aroused Officer Wilson's suspicion, and (3) explaining why Officer Wilson initially arrested defendant for providing fictitious information.

Further, the present case can be distinguished from the cases defendant cites. In *State v. Locklear*, the district attorney characterized defendant as "lying" and "playing with a perjury count." 294 N.C. 210, 214-18, 241 S.E.2d 65, 68-70 (1978). The Supreme Court found these comments grossly inappropriate and noted that they perhaps violated the district attorney's ethical obligations as a lawyer. *Id.* In the present case, the statements are not from a district attorney, but from a testifying police officer. Further, even in cases where a district attorney makes such comments, they will only constitute plain error if grossly inappropriate. *State v. Jordan*, 49 N.C. App. 561, 569, 272 S.E.2d 405, 410 (1980). The statements by Officer Wilson were not of the same nature as those by the district attorney in *Locklear*, which focused on the reliability of the defendant's testimony in general and his actions in the courtroom. The statements by Officer Wilson centered directly around the purposes and rationale for Officer Wilson's conduct during a traffic stop and the subsequent arrest of defendant.

Defendant also cites *State v. Holloway*, 82 N.C. App. 586, 347 S.E.2d 72 (1986), which is also distinguishable from the case before us. In *Holloway*, expert witnesses testified that a State's witness was telling the truth. *Id.* at 587, 241 S.E.2d at 73. This Court held that such testimony constituted plain error as it invaded the province of the jury to determine the credibility of witnesses. *Id.* at 587, 241 S.E.2d at 73-74. In the present case, Officer Wilson's testimony was not that of an expert as to credibility; further, he was not invading the province of the jury as he was not commenting on the credibility of a witness. As noted above, Officer Wilson was testifying to the circumstances of the traffic stop and the reason for defendant's detention. The above testimony by Officer Wilson does not rise to the level of plain error. This argument is overruled.

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IV.

[4] Defendant's final argument is that he received ineffective assistance of counsel. To establish a claim for ineffective assistance of counsel, the United States Supreme Court has held that a defendant must show that his counsel's assistance was so deficient that counsel was not "functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and that counsel's deficient performance deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The statutorily enacted test in North Carolina for ineffective assistance of counsel mirrors this test. See N.C. Gen. Stat. § 15A-1443(a) (2001); *State v. Atkins*, 349 N.C. 62, 82-83, 505 S.E.2d 97, 127 (1998), cert. denied, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Judicial review of counsel's performance must be highly deferential so as to avoid the prejudicial effects of hindsight. *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694.

Defendant argues that there are five errors that his trial counsel made at trial that either singularly or collectively amounted to ineffective assistance of counsel. He argues that trial counsel: (1) agreed to waive indictment by a grand jury on the charge of possession of a firearm by a felon; (2) failed to move to sever the charges of robbery and possession of a firearm by a felon, thereby informing the jury that defendant had previously been convicted of a felony; (3) failed to object to evidence of Johnson's pre-trial and in-court identification of defendant; (4) failed to object to the introduction of the videotape of the robbery; and (5) failed to object to the testimony of Officer Wilson, who testified that defendant lied to him during a traffic stop by giving him the wrong name.

We note that the United States Supreme Court held in a recent decision that a defendant was not required to raise ineffective assistance of counsel claims on direct appeal in order to preserve the defendant's claims for collateral review. *Massaro v. United States*, 538 U.S. —, 155 L. Ed. 2d 714 (2003). The Supreme Court reasoned that

[e]ven meritorious claims would fail when brought on direct appeal if the trial record were inadequate to support them. Appellate courts would waste time and resources attempting to address some claims that were meritless and other claims that, though colorable, would be handled more efficiently if addressed in the first instance by the [trial] court on collateral review.

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Id. at —, 155 L. Ed. 2d at 721. The Supreme Court further reasoned that

“[w]hen an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. . . . The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because counsel’s alternatives were even worse. . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.”

Id. at —, 155 L. Ed. 2d at 720-21.

N.C. Gen. Stat. § 15A-1419(a)(3) requires a defendant to assert a claim for ineffective assistance of counsel or risk forfeiting state collateral review if such a claim should have been brought on direct review. *See State v. Hyatt*, 355 N.C. 642, 668, 566 S.E.2d 61, 78 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003); *State v. Fair*, 354 N.C. 131, 166-67, 557 S.E.2d 500, 524-25 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). The statute requires a defendant to raise on direct appeal “those [ineffective assistance of counsel] claims on direct review that are apparent from the record.” *Hyatt*, 355 N.C. at 668, 566 S.E.2d at 78. While we recognize that N.C.G.S. § 15A-1419 is “not a general rule that any claim not brought on direct appeal is forfeited on state collateral review,” *Fair*, 354 N.C. at 166, 557 S.E.2d at 525 (citations omitted), it is likely that counsel will err on the side of bringing claims for ineffective assistance of counsel on direct review even when they cannot be accurately determined at such a stage. *See Massaro*, 538 U.S. —, 155 L. Ed. 2d 714 (2003). Thus, at risk of losing the right to collateral review in state court, a defendant is in effect required to assert ineffective assistance of counsel claims, and our Court then determines whether an ineffective assistance claim was brought prematurely before the claim can progress under state collateral review. *Fair*, 354 N.C. at 166, 557

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S.E.2d at 524 (2001). We agree with the United States Supreme Court that such a procedure does not in reality foster efficient use of judicial resources. *See Massaro*, 538 U.S. at —, 155 L. Ed. 2d at 721. We note this inconsistency; however, *Massaro* dealt with federal collateral proceedings under 18 U.S.C. § 2255, and therefore does not affect the requirement of a defendant to raise ineffective assistance of counsel claims that are apparent from the record to preserve them for state collateral review.

We cannot determine at this time defendant's claim for ineffective assistance of counsel on direct appeal as to (1) trial counsel's agreement to waive indictment by grand jury on the charge of possession of a firearm by a felon and (2) trial counsel's failure to move to sever the charges of robbery and possession of a firearm by a felon. *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). We dismiss defendant's ineffective assistance of counsel claim as to those two grounds without prejudice so that defendant may file a motion for appropriate relief before the trial court.

The record is sufficient to enable our Court to rule on defendant's ineffective assistance of counsel claim as to the other three grounds asserted on direct appeal. *See Hyatt*, 355 N.C. at 62, 566 S.E.2d at 78. As to the failure to object to the identifications of defendant, we discussed above that such identification procedures were proper under the totality of the circumstances test. The evidence would have been admissible even if defendant's counsel had objected at trial. Therefore, defendant cannot show that his counsel's failure to object to the admission of the evidence of these identifications deprived defendant of a fair trial.

The failure of defense counsel to object to the introduction of the videotape likewise does not amount to ineffective assistance of counsel. Admitting the videotape into evidence can be classified as trial strategy on the part of defendant's counsel. Once in evidence, defendant's counsel used the videotape to show the man in the videotape touched several things in the Pantry, but that defendant's fingerprints were never found. He also used the videotape to illustrate the brevity of the robbery, attempting to show that Johnson had limited time to see defendant. We think that given the reasonable foundation laid by the State for the introduction of the videotape, as discussed above, and defendant's counsel's use of the videotape to illustrate several alleged weaknesses in the State's case, counsel's conduct does not rise to the level of ineffective assistance of counsel. *See State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986).

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As to Officer Wilson's testimony, as thoroughly discussed above, he was not testifying that defendant was a liar in general, nor was he attempting to destroy the credibility of defendant as a witness. We do not find that counsel's failure to object to such testimony deprived defendant of a fair trial.

Therefore, we overrule defendant's ineffective assistance of counsel claim in part, and dismiss it without prejudice in part, to file a motion for appropriate relief. *See Hyatt*, 355 N.C. at 62, 566 S.E.2d at 78.

No error in part, dismissed without prejudice in part.

Judges McCULLOUGH and LEVINSON concur.

STATE OF NORTH CAROLINA v. ANTONIO DURAND RILEY,
AKA ANTOINE DEANDRE RILEY

No. COA02-1102

(Filed 5 August 2003)

1. Appeal and Error— plain error—asserted in brief—combined errors

Defendant's plain error contentions were reviewed, but separately, where he specifically alleged plain error, but attempted to combine assignments of error concerning unrelated evidence.

2. Evidence— arrest for unrelated crimes—overwhelming evidence of guilt—not plain error

The admission of testimony that defendant was also arrested for crimes for which he was not on trial was not plain error, given the overwhelming evidence that defendant committed the crimes charged.

3. Evidence— photos—gang brands and tattoos—Miranda

There was no plain error in the admission of an officer's testimony about the meaning of photos of defendant's tattoos and brands, which allegedly depict gang membership, where defendant contended that the information was obtained after he had indicated that he did not want to be questioned without an attorney. Defendant did not object to testimony that the markings indi-

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cated membership in a gang, and there was other evidence in the record about the meaning of the marks and that the officer knew the meaning of the marks from other sources.

4. Assault— failure to instruct on lesser included offense— not plain error

The failure to instruct on misdemeanor assault with a deadly weapon as a lesser included offense of felonious assault with a deadly weapon with intent to kill was not plain error. All the evidence showed an intent to kill where it tended to show that defendant wore the colors of a rival gang and fired ten shots from a nine-millimeter handgun into a crowd which included members of that gang, killing one of the victims.

5. Homicide— failure to instruct on lesser included offense— not plain error

The failure to submit second-degree murder to the jury in a first-degree murder prosecution was not error where defendant approached a group that included members of a rival gang wearing that gang's colors, fired into the group ten times, continued to fire as the victims fled, and there was no evidence of provocation or excuse.

6. Sentencing— prior record level—proof—worksheet not sufficient

The trial court erred by setting defendant's prior record level based only upon a worksheet prepared and submitted by the prosecutor. There were no records of conviction, no records from agencies, and no evidence of a stipulation.

Appeal by defendant from judgments dated 1 May 2002 by Judge Henry W. Hight, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 22 May 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel F. McLawhorn, for the State.

Parish and Cooke, by James R. Parish, for defendant-appellant.

McGEE, Judge.

Antonio Durand Riley, a.k.a Antoine Deandre Riley, (defendant) was convicted of first-degree murder, three counts of assault with a deadly weapon with intent to kill, and possession of a firearm by a

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felon on 1 May 2002. The trial court determined defendant had a prior record level III and sentenced him to: life imprisonment without parole for first-degree murder; three consecutive terms of a minimum of 34 months to a maximum of 50 months active imprisonment for the three convictions of assault with a deadly weapon with intent to kill, to begin after the life sentence; and a minimum term of 16 months to a maximum term of 20 months active imprisonment for possession of a firearm by a felon, to begin at the expiration of the last sentence imposed for conviction of assault with a deadly weapon with intent to kill. Defendant appeals.

The evidence presented by the State at trial tended to show that Anthony Peaks and his wife Kristi Peaks (now Brown) walked to the Caroco Station on North Alston Avenue in Durham, North Carolina to visit Mr. Peaks' relatives and friends at approximately 1:00 a.m. on 24 July 2000. After going into the store, Ms. Brown came out and joined her husband who was talking to his relatives, Joseph Pipkin (Pipkin), Charles Johnson (Johnson), and Tyrone Merrill (Merrill). Ms. Brown was facing Leo's Seafood, the restaurant next door, when she saw a black male, later identified as defendant, run around the corner and stand on the loading dock. Ms. Brown was standing approximately eighteen feet from defendant. Pipkin also testified he saw the shooter and identified him as a black male wearing a white tee shirt, jeans, and red shoes. Ms. Brown and another witness described the shooter as wearing a blue baseball hat and having an Afro hairstyle. Defendant pulled out a nine-millimeter gun from his pants, pointed it in the direction of Ms. Brown and the group, shouted words to the effect of, "Blood time, I got you now," or "I got you now, I got you now, Blood—Blood's time," and began firing the gun. Defendant fired approximately ten shots from the gun.

Ms. Brown ran toward the store and was shot in the ankle. Mr. Peaks also began to run and a bullet passed through his left arm into his chest, piercing both lungs and his heart. Mr. Peaks collapsed near the kerosene tanks and died from the gunshot wound. Merrill and Johnson were also shot, each being grazed by a bullet. A store clerk at the service station called the Durham Police Department. An officer found ten shell casings on the loading dock at Leo's Seafood and on the ground nearby. The shell casings were all fired from a nine-millimeter Winchester. An officer also recovered a ball cap from the area of the kerosene tanks at the Caroco Station.

Officer Anthony Smith (Officer Smith), former gang investigator for the City of Durham, testified that the "8 Trey Crips" is active in

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Durham and is associated with the “Folk Nation,” a national gang also known as the “Crips.” The “Bloods” is another gang with members in Durham, associated with the “People Nation.” Officer Smith said that “Bloods” typically wear the color red and “Crips” wear the color blue, although at times, rival gang members will wear the other gang’s colors to get closer in order to commit violent acts.

Joseph Pipkin (Pipkin) testified that the “Crips” and the “Bloods” were “at war,” but that he did not know of many “Bloods” in Durham. Pipkin told Durham Police that he was a friend of “Crips” and that defendant was a “Blood” gang member.

At the time of the shooting, Mr. Peaks was talking with Johnson and Merrill, both associated with the “8 Trey gangsters.” Merrill testified that neither Mr. Peaks nor his wife were associated with any gang.

Officer Florencio Rivera (Officer Rivera), a gang investigator for the City of Durham, testified he arrested defendant in August 2000 for outstanding warrants “[f]or this case, homicide, and several armed robberies.” He testified that defendant had burn scars on his chest and right arm in the shape of a dog’s paw print, which were used by the “United Blood Nation” to identify its members. Officer Rivera took photographs of defendant showing these burn scars. Officer A. H. Holland, Jr. (Officer Holland) testified that defendant went by the nickname “Dirty.”

At trial, defendant and the State stipulated that defendant had been convicted of a prior felony before 24 July 2000 and that the State did not need to produce other evidence to prove the element of the prior felony for possession of a firearm by a felon.

Defendant’s sister, Carrie Riley (Riley), testified that she and her daughter lived with defendant. She said that on the evening of 23 July 2000 she cooked dinner for the three of them and defendant fell asleep on the couch. Riley testified that when she was awakened by a telephone call around 2:30 or 3:00 a.m., her brother was asleep on the couch. The call was from a friend telling her that there had been a shooting on Alston Avenue near the Caroco Station.

Defendant has failed to present an argument in support of assignments of error 3, 5, 6, 7, and 10, and these assignments are therefore deemed abandoned, pursuant to N.C.R. App. P. 28(b)(6).

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I.

[1] Defendant first argues two combined assignments of error. He contends that the trial court erred in allowing Officer Rivera to testify that he arrested defendant not only for the murder defendant was on trial for, but also for several armed robberies, for which defendant was not on trial. He argues the trial court erred in failing to strike such testimony *ex mero motu*. Defendant also argues that the trial court erred by allowing testimony by Officer Holland that defendant's nickname was "Dirty," because the testimony was not relevant and any probative value was outweighed by its prejudicial effect.

Defendant requests we review this issue for plain error because, as he points out in his brief, defense counsel did not object at trial to the admission of the challenged evidence. We note that normally, "if a defendant fails to assert plain error in an assignment of error, an appellate court will not conduct plain error review." *State v. Bartley*, 156 N.C. App. 490, 497, 577 S.E.2d 319, 323 (2003) (citing *State v. Truesdale*, 340 N.C. 229, 232-33, 456 S.E.2d 299, 301 (1995); *State v. Lovett*, 119 N.C. App. 689, 693-94, 460 S.E.2d 177, 180-81 (1995)). However, since defendant has specifically and distinctly stated in his brief that the error committed is plain error and has requested a plain error review, we will review this issue for plain error. *See* N.C.R. App. P. 10(c)(4).

First, defendant may not, as he attempts to do in his brief, combine assignments of error concerning unrelated evidence in order to show plain error. In *State v. Holbrook*, 137 N.C. App. 766, 529 S.E.2d 510 (2000), our Court stated:

As we have noted, the essence of the plain error rule is that it be obvious and apparent that the error affected defendant's substantial rights. If we were to adopt defendant's proposition that the plain error rule may apply cumulatively to several unrelated portions of evidence where the trial judge was not asked to, and did not, make any affirmative ruling, we would be departing from the fundamental requirements of the plain error rule of obviousness and apparentness of error. A trial judge would be required to review all evidence cumulatively for errors of admissibility even though defendant had made no objections to any evidence during trial. We agree with the State that under such a holding, a trial judge would be required to be omniscient. A defendant could fail to make any objection to the admission of evidence at trial, but could then require this Court to cumulatively review the evidence

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for possible errors amounting to plain error. Such rule would be in contradiction of our Rules of Civil Procedure and Rules of Appellate Procedure, and the plain error doctrine as defined by the North Carolina Supreme Court. *See State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 [(1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)]; *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 [(1983)]; *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 [(1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998)]; *State v. White*, 331 N.C. 604, 419 S.E.2d 557 [(1992)].

Holbrook, 137 N.C. App. at 769, 529 S.E.2d at 511-12.

We will therefore review each of these assignments of error individually for plain error. In order to show plain error, a defendant must show “‘that absent the error the jury probably would have reached a different verdict.’” *State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 399 (1988) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

“[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a ‘*fundamental*’ error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,’ or ‘where [the error] is grave error which amounts to a denial of a fundamental right of the accused,’ or the error has ‘“resulted in a miscarriage of justice or in the denial to appellant of a fair trial”’ or where the error is such as to ‘seriously affect the fairness, integrity or public reputation of judicial proceedings’ or where it can be fairly said ‘the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.’”

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (footnotes omitted) (emphasis in original)).

[2] In the present case, Officer Rivera testified that defendant was arrested for outstanding warrants “[f]or this case, homicide, and several armed robberies.” Defendant was not tried for any armed robberies in the present case. Defense counsel did not object to Officer Rivera’s testimony and the trial court did not strike Officer Rivera’s testimony on its own motion. Two eyewitnesses identified defendant as the shooter. The evidence also showed that the shooting was part of a gang war and that defendant was a member of the “Bloods” gang

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while several people standing around Mr. Peaks were members of the rival “Crips” gang. Given the overwhelming evidence in the record that defendant committed the crimes charged, defendant has not shown that the failure of the trial court to strike the testimony of Officer Rivera concerning defendant’s arrest for several armed robberies “had a probable impact on the jury’s finding of guilt.” *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citations omitted).

Officer Holland testified that defendant went by the nickname “Dirty.” Defendant argues that this evidence was irrelevant and any probative value it might have is substantially outweighed by its prejudice to defendant. However, under plain error review defendant must show that the alleged error “had a probable impact on the jury’s finding of guilt.” *Id.* (citations omitted). As explained above, given the overwhelming evidence in the record that defendant committed the crimes charged, defendant has not met his burden to show the admission of this testimony amounted to plain error. Defendant’s first argument is overruled.

II.

[3] Defendant next argues that the trial court erred in allowing into evidence, over defendant’s objection, several photographs of tattoos or brands on defendant’s body, allegedly depicting gang membership, since the information disclosing the existence of these markings was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). During *voir dire*, the trial court granted defendant’s motion to suppress a statement taken from the defendant in violation of *Miranda*, 384 U.S. 436, 16 L. Ed. 2d 694. However, during *voir dire*, the trial court allowed the State to introduce, over defendant’s objection, photographs of defendant taken by Officer Rivera after defendant’s arrest, which showed brands or burn marks on defendant’s body. When the State later offered the contested photographs into evidence, defendant did not object. Defendant’s argument is therefore subject to the plain error rule. See N.C.R. App. P. 10(c)(4). Defendant did not assert in his assignment of error, nor did he specifically and distinctly argue in his brief that the trial court’s admission of the photographs amounted to plain error. See *Bartley*, 156 N.C. App. at 497, 577 S.E.2d at 323. In fact, defendant admits that the Fifth Amendment offers him no protection against being compelled to be photographed. See *State v. Carson*, 296 N.C. 31, 38, 249 S.E.2d 417, 422 (1978).

Defendant does argue that the trial court should have excluded Officer Rivera’s testimony as to the meaning of the brand because

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Officer Rivera obtained the information “from interviewing the defendant and from information on the gang questionnaire filled out by the defendant after he had been advised of his *Miranda* rights and indicated he did not want to be questioned without an attorney.” Officer Rivera testified that the burn markings on defendant indicated that defendant was a member of the “Bloods” street gang. Defendant did not object to nor assign error to this testimony. When the error asserted on appeal is not grounded in the objection before the trial court the alleged error is not preserved for appellate review. *State v. Francis*, 341 N.C. 156, 160, 459 S.E.2d 269, 271 (1995). When the objection and assignment of error do not correspond to the argument in the brief, the assignment of error is deemed abandoned under N.C.R. App. P. 28. *State v. Purdie*, 93 N.C. App. 269, 278, 377 S.E.2d 789, 794 (1989). We also note there is other evidence in the record, not objected to or assigned as error by defendant, as to the meaning of defendant’s burn mark or tattoo. Further, there is plenary evidence that Officer Rivera knew the meaning of the burn mark or tattoo from sources other than the survey completed by defendant. Defendant therefore would not be able to show that the admission of this testimony amounted to plain error. We dismiss defendant’s argument.

III.

[4] Defendant next argues it was error for the trial court to fail to instruct the jury on the misdemeanor of assault with a deadly weapon as a possible lesser included offense of the charge of felonious assault with a deadly weapon with the intent to kill. At trial, defendant did not request that the trial court include the instruction for misdemeanor assault with a deadly weapon in its charge to the jury. As acknowledged in his brief, defendant must proceed under the plain error rule. *See Odum*, 307 N.C. at 660, 300 S.E.2d at 378 (“every failure to give a proper instruction [does not] mandate[] reversal regardless of the defendant’s failure to object at trial”). Under the plain error rule “[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.” *Id.* at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)). Although defendant did not allege plain error in his assignment of error, he did specifically and distinctly assert that the failure of the trial court to submit the instruction amounted to plain error. *See Bartley*, 156 N.C. App. at 497, 577 S.E.2d at 323.

The only difference in what the State must prove for the offense of misdemeanor assault with a deadly weapon and felony assault

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with a deadly weapon with intent to kill is the element of intent to kill. See *State v. Hunter*, 315 N.C. 371, 373, 338 S.E.2d 99, 101-02 (1986); *State v. Maynard*, 311 N.C. 1, 38 n.1, 316 S.E.2d 197, 217 n.1, cert. denied, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). Where all the evidence tends to show a shooting with a deadly weapon with the intent to kill, the trial court does not err in refusing to submit the lesser included offense of assault with a deadly weapon. See *State v. Oliver*, 334 N.C. 513, 523, 434 S.E.2d 202, 207 (1993).

“The defendant’s intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances.” *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988) (citation omitted). In the present case, the evidence shows that defendant, a member of the “Bloods” gang, deliberately shot a nine-millimeter handgun ten times into a crowd which included members of a rival gang, from approximately eighteen feet away, after shouting something to the effect of, “I got you now, I got you now, Blood—Bloods time.” The evidence also showed that defendant was wearing colors of the “Crips,” a technique often used by rival gang members to get close enough to their rivals to inflict injury. The evidence showed that defendant actually killed one of the shooting victims, and that the three counts of assault with a deadly weapon with intent to kill each involved a victim shot by defendant during the same incident. All of the evidence tends to show that defendant shot at the crowd with the intent to kill, and therefore it was not plain error for the trial court to refuse to submit the charge of misdemeanor assault with a deadly weapon to the jury. This argument is overruled.

IV.

[5] Defendant also argues that the trial court erred by denying defendant’s request to submit to the jury an instruction on the lesser included offense of second-degree murder. Defendant claims that there is not sufficient evidence of a plan or premeditation to kill and a second-degree murder instruction was required. Defendant argues that “[t]he evidence tends to show the defendant happened upon these individuals at the store and began firing.”

Second-degree murder is a lesser included offense of first-degree murder. *State v. Goodson*, 101 N.C. App. 665, 668, 401 S.E.2d 118, 120 (1991) (citation omitted). “With the exception of the element of premeditation and deliberation, the elements of the two [offenses] are the same.” *Id.* “[A] trial court does not have to submit a verdict of

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second-degree murder to the jury unless it is supported by the evidence.” *State v. Annadale*, 329 N.C. 557, 567, 406 S.E.2d 837, 843 (1991) (citations omitted). In *State v. Sparks*, our Supreme Court noted that

[t]he want of provocation, the absence of any excuse or justification for the shooting, the number of shots fired or attempted to be fired, the fact that defendant ran immediately after the shooting, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation, and was sufficient to be submitted to the jury on the issue of murder in the first degree.

Sparks, 285 N.C. 631, 643, 207 S.E.2d 712, 719 (1974) (citations omitted), *death sentence vacated*, 428 U.S. 905, 49 L. Ed. 2d 1212 (1976).

In the present case, the evidence showed that defendant came around the corner onto the loading dock approximately eighteen feet from the murder victim and a group of individuals that included members of the “Crips” gang, rivals of defendant’s gang, the “Bloods.” Defendant was wearing a blue hat and jeans, the colors worn by the “Crips”—a tactic often employed by gang members to enable them to get close to members of a rival gang. Defendant shouted out something to the effect of, “I got you now, I got you now, Blood—Bloods time,” and began shooting into the crowd where the murder victim and the other victims were standing. Defendant fired a total of ten shots into the crowd and continued firing shots even as the victims fled for cover. Defendant then ran from the scene of the shooting. There was no evidence of any provocation or excuse for the shooting. We hold that given the evidence in the record, it was not error for the trial court to refuse to instruct the jury on second-degree murder. Defendant’s argument is overruled.

V.

[6] Defendant next argues the trial court erred in sentencing defendant as a prior record level III as the State did not prove, nor did defendant stipulate to, such a record level pursuant to the North Carolina sentencing statutes. N.C. Gen. Stat. § 15A-1340.14 (2001) requires that each of a felony offender’s prior convictions be proven to determine the offender’s prior record level. N.C.G.S. § 15A-1340.14 also provides that the State bears the burden of proving any prior convictions by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f) (2001) lists several methods the State may use to prove prior convictions:

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- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

In the present case, the following conversation occurred between the prosecutor and the trial court:

[Prosecutor]: The first thing I would like to do is hand up a prior record worksheet (handing). This obviously is pertaining to the four charges that don't have a mandatory sentence, that being three counts of assault with a deadly weapon with intent to kill, and possession of a firearm by a felon.

I'm showing the worksheet which shows some prior felonies, three prior—actually, four prior felonies, some though—two of them on the same day, basically possession of schedule I and possession with intent to sell and deliver schedule II. Those were the subject of the prior felony. These were from 1999, and were the subject of the firearm by felon case that we have.

Also, in September of last year the defendant was convicted of assault with a deadly weapon inflicting serious injury; also possession of a firearm by a felon. So by the time you add the points, plus the extra point for having the same offense, the firearm by a felon, I'm showing seven points. That would make him a Level III offender for sentencing on those cases.

THE COURT: So he's a Level III on three of the cases, and he's a Level what on the other?

[PROSECUTOR]: Well, actually he's a Level III for everything but the first-degree murder. First-degree murder, he would technically be a Level III as well, but since there's a mandatory statutory sentence, it really doesn't matter what the record level is.

In addition to this discussion about defendant's prior record level, the State also contended that because the crimes were committed for the benefit of, or in the context of, gang activity, this should be considered as an aggravating circumstance. The State asked for aggravated range for the four sentences besides the first-

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degree murder sentence. Defendant asked for mercy with regard to any sentence imposed and did not object to the information on the worksheet or the statements made by the prosecutor in reference to defendant's prior record level.

The trial court sentenced defendant to life without parole for the first-degree murder charge, and for the remaining convictions, sentenced defendant to consecutive terms of imprisonment within the presumptive range for a prior record level III.

The State presented no evidence in the form of a stipulation by the parties, a copy of the court record of defendant's prior convictions, nor a copy of any record maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts. The State simply handed the trial court a worksheet filled out by the prosecutor and made the unsupported statements identified above as to defendant's prior record level.

We do not find evidence in the record that would indicate that the State carried its burden of proving each prior conviction by a preponderance of the evidence. As stated above, the State submitted no records of conviction, no records from the agencies listed in N.C.G.S. § 15A-1340.14(f)(3), nor is there any evidence of a stipulation by the parties as to prior record level. A statement by the State that an offender has seven points, and thus is a record level III, if only supported by a prior record level worksheet, is not sufficient to meet the catchall provision found in N.C.G.S. § 15A-1340.14(f)(4), even if uncontested by defendant. *State v. Mack*, 87 N.C. App. 24, 34, 359 S.E.2d 485, 491 (1987), *disc. review denied*, 321 N.C. 477, 364 S.E.2d 663 (1988); *see State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000). We must therefore remand this case for a resentencing hearing.

No error in trial; remanded for resentencing.

Judges McCULLOUGH and CALABRIA concur.

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[159 N.C. App. 558 (2003)]

FRANCES C. BRIGGS, MYRNA R. HENDRIX, ROSE INVESTMENTS, A NORTH CAROLINA GENERAL PARTNERSHIP, TRAVIS M. BACH, HAYWOOD PLOTT AND WIFE RUTH PLOTT, HOWARD W. MEECE AND WIFE DORIS B. MEECE, MARY ANN HICKLIN QUARNGESSER, ALLYN FAMILY REAL ESTATE LIMITED PARTNERSHIP, THANTEX SPECIALTIES, INC., HUBBELL REALTY DEVELOPMENT CORP., ALLIANCE-CAROLINA TOOL & MOLD CORPORATION, MEDICAL ACTION INDUSTRIES, INC., CUTLER-HAMMER, INC., AND EATON CORPORATION, PETITIONERS V. CITY OF ASHEVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION, RESPONDENT

No. COA02-1296

(Filed 5 August 2003)

1. Cities and Towns— annexation—amendments to record in superior court—classification of property

Amendments to the record in superior court in an annexation case did not prejudice residents' rights and were properly allowed. The change concerned the classification of a parcel as urban or non-urban, but the parcel was not included in any calculations to determine the percentage of urban development.

2. Cities and Towns— annexation—amendment of record in superior court—inclusion of enlarged map—available to public at time ordinance passed

The amendment of an annexation record in the superior court to include an enlarged color map of proposed sewer extensions was not erroneous where the map was available for public inspection before the adoption of the ordinance.

3. Cities and Towns— annexation—condominiums—residential rather than commercial

Condominium units should not have been classified as commercial (thereby excluding those areas from the subdivision test) in an annexation proceeding. Condominium owners hold exclusive ownership and possession of the unit, unlike an apartment unit, and condos are typically used as an owner's residence.

4. Cities and Towns— annexation—condominium common areas—residential

Condominium common areas should have been classified as residential in an annexation action. Each unit owner has an undivided interest in the common areas and facilities that cannot be separated from the unit.

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5. Cities and Towns— annexation—services plan—septic system maintenance and repair

Asheville failed to create an annexation services plan that complied with statutory requirements where it proposed provision of septic system maintenance and repair services in lieu of sewer service in a portion of an annexation area. Asheville argued that it had contracted with an independent agency for sewer services and had no control of whether that agency extended sewer services to the annexed area, but Asheville's delegation of its responsibility for providing sewer service did not relieve it of its duty to comply with statutory requirements. Moreover, although Asheville contended that it is not economically feasible to extend sewer lines into the annexed area (so that the provision of septic services is permissible), the record shows that sewer service is already being provided to a similar area. N.C.G.S. § 160A-47(3)(b); N.C.G.S. § 162A-68(h).

Appeal by petitioners from judgment entered 14 February 2002 by Judge Loto Greenlee Caviness, Superior Court, Buncombe County. Heard in the Court of Appeals 5 June 2003.

Adams Hendon Carson Crow & Saenger, P.A., by S.J. Crow and Martin K. Reidinger for petitioners.

City of Asheville, by City Attorney Robert W. Oast, Jr. and William F. Slawter, PLLC, by William F. Slawter, for respondent.

WYNN, Judge.

From the judicial review of an annexation ordinance, the residents of the proposed annexation area contend the superior court erred in holding that the City of Asheville ("Asheville") substantially complied with the provisions of N.C. Gen. Stat. § 160A-47 and -48 (2001) in its annexation of the Long Shoals Area near Asheville. We hold on appeal that the superior court: (I) properly allowed Asheville to amend the annexation record at the time of judicial review; (II) erred by classifying a condominium common area as commercial; and, (III) erred by failing to find Asheville's services plan was defective since it did not provide the statutorily required sewer service to the residents. Accordingly, we remand for further proceedings.

On 13 June 2000, Asheville adopted an annexation ordinance to extend its corporate limits after complying with the involuntary

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annexation procedures authorized by N. C. Gen. Stat. § 160A-49. The annexation area included an area known as the Long Shoals area in which the petitioner-residents own property. The residents sought judicial review of the annexation ordinance in superior court. On 14 February 2002, the superior court concluded Asheville complied with all procedural and statutory requirements. The residents appeal to this Court.

Preliminarily, we note that under N.C. Gen. Stat. § 160A-50, a party challenging an annexation ordinance may seek judicial review in Superior Court and, thereafter, in the Court of Appeals and Supreme Court. “Judicial review of an annexation ordinance is limited to determining whether the annexation proceedings substantially comply with the requirements of the applicable annexation statute.” *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 217, 447 S.E.2d 471, 473 (1994). “Absolute and literal compliance with [the annexation] statute . . . is unnecessary.” *In re New Bern*, 278 N.C. 641, 648, 180 S.E.2d 851, 856 (1971). “The party challenging the ordinance has the burden of showing error.” *Knight v. City of Wilmington*, 73 N.C. App. 254, 256, 326 S.E.2d 376, 377 (1985). “On appeal, the findings of fact made below are binding on this Court if supported by the evidence, even where there may be evidence to the contrary.” *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980). However, “conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.” *Barnhardt*, 116 N.C. App. at 217, 447 S.E.2d at 473.

I. Amendment to Record on Judicial Review

[1] On appeal, the residents first contend the superior court improperly allowed amendments to the annexation area record at the time of judicial review. Because we find that the amendments did not materially prejudice the residents’ rights, we uphold the court’s decision to allow the amendments.

Under N. C. Gen. Stat. § 160A-48(c)(3) and (d), the procedures that a municipality must undertake to involuntarily annex an area provide that:

(c) Part or all of the area to be annexed must be developed for urban purposes at the time of approval of the report provided for in G.S. 160A-47. . . . An area developed for urban purposes is defined as any area which meets any one of the following standards:

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(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts three acres or less in size. . . .

(d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area either:

(1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

Thus, in this case, to involuntarily annex the Long Shoals area, N. C. Gen. Stat. § 160A-48(c)(3) and (d) required Asheville to configure the annexation area to determine if the area to be annexed met the statutory percentages. In so doing, Asheville configured the annexation area by dividing the area into a portion to be qualified under G.S. 160A-48(c) as an urban area, and a portion to be qualified under G.S. 160A-48(d) as a non-urban area. However, while Asheville classified Parcel Number 94-4658, a vacant, wooded and unused 7.3 acre tract, as urban on its land use map; it classified this parcel as non-urban on the property inventory. Nonetheless, in presenting the ordinance for adoption, Asheville excluded this parcel's acreage from all calculations; thus, the ordinance was adopted without correction of this inconsistency.

In its judgment, the superior court found:

20. Property located in the southwest quadrant of the intersection of Old Shoals Road and Heywood Road, PIN 9644.16-94-4658, abutting the east side of Non-Urban Area C.d.4, and consisting of

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7.3 acres, is identified in the narrative parts of the Plan and the Annexation Ordinance as being part of Non-Urban Area C.d.4. However, the property is shown on the contiguity and land use maps in the Plan and Annexation Ordinance as being in use, and the calculations for the Non-Urban Areas in the Long Shoals Area were based on the maps.

21. . . . The failure to include this property as part of Non-Urban Area C.d.4 was unintentional.

22. If included as part of Non-Urban Area C.d.4, to which it is directly adjacent, the contiguity of Non-Urban Area C.d.4 with urbanized areas in the Long Shoals Area would not be negatively affected, and the total acreage of the Non-Urban Areas for the Long Shoals Area would compute to 19.78%.

On appeal, the residents contend the superior court should have reviewed the annexation ordinance utilizing the record as it existed when the ordinance was adopted. As such, they contend that the superior court should have included the 7.3 acres of Parcel 4658 in the urban area total making the urban area percentage 57.15% and thus, less than the 60% minimum required by G.S. 160A-48(c)(3). We disagree.

“When the record submitted in superior court by the municipal corporation demonstrates, on its face, substantial compliance with the applicable annexation statutes, then the burden falls on the petitioners to show by competent and substantial evidence that the statutory requirements were in fact not met or that procedural irregularities occurred which *materially* prejudiced their substantive rights.” (emphasis supplied) *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987), *aff’d by* 321 N.C. 589, 364 S.E.2d 139 (1988).

In this case, because Asheville substantially complied with the requirements of 160A-48(c)(3), the burden fell on petitioners to show by competent and substantial evidence that the exclusion of parcel 4658 materially prejudiced their substantive rights. However, although parcel 4658 was classified as both urban and non-urban, it was not included in any calculations. Moreover, the parties concede the lot was vacant, wooded and unused and should have been classified as non-urban. As the trial court found, if lot 4658’s 7.3 acres was included in the non-urban calculations, the percentage of non-urban acreage would total 19.78%, which would be acceptable under G.S.

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160A-48(d). Accordingly, we hold that the residents were not materially prejudiced by this amendment to the record.

[2] The residents also contend the trial court erroneously allowed Asheville to amend the record to include enlarged color maps of the proposed sewer extensions. They argue that Asheville initially filed with the trial court two sets of illegible maps that were noncompliant with N.C. Gen. Stat. § 160A-47. However, the record indicates Asheville moved to supplement the record with an enlarged color map of the sewer extension that was part of the services plan and available for public inspection before the adoption of the annexation ordinance. Specifically, the letter sent by Asheville to the residents in March 2000 states “Enclosed with this notification is a legible map outlining the area proposed for annexation and a written description of the boundary. Additionally, the services plan, which has been approved by the City Council, is on display for public inspection, with an enlarged map of the subject area.” Accordingly, since the map was in existence at the time the ordinance was adopted, the trial court did not err by allowing this amendment to the record.

II. Classification of Condominiums

[3] The residents next contend the trial court erroneously classified the Heywood Crossing Condominiums’ common areas as commercial thereby excluding the acreage from the subdivision test. We agree.

In classifying lots and tracts as either residential, commercial, industrial, institutional, or governmental, municipalities must look at the actual use of the land at the time of annexation. *See Thrash v. City of Asheville*, 327 N.C. 251, 393 S.E.2d 842 (1990); *Arquilla v. City of Salisbury*, 136 N.C. App. 24, 523 S.E.2d 155 (1999).

Under *Lowe v. Town of Mebane*, this Court upheld the commercial classification of a forty-unit apartment complex on 9.33 acres because “to allow petitioners to prevail would be an unreasonably restrictive interpretation of the law which would fly in the face of the policy behind annexation, which is to allow cities to annex contiguous urbanized areas to facilitate city planning.” 76 N.C. App. 239, 243, 332 S.E.2d 739, 742 (1985). Asheville, relying upon *Lowe*, contends that because “there [is] no essential difference for land use or zoning purposes between an apartment complex, where all units are under single ownership, and condominiums, where the units are separately owned, the condominiums could be classified as either commercial or residential in use. We disagree.

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Under N.C. Gen. Stat. § 47A-5, condominium unit ownership “vest[s] in the holder exclusive ownership and possession with all the incidents of real property.” Thus,

A condominium unit in the building may be individually conveyed, leased and encumbered and may be inherited or devised by will, as if it were solely and entirely independent of the other condominium units in the building of which it forms a part. Such unit may be held and owned by more than one person either as tenants in common or tenants by the entirety or in any other manner recognized under the laws of this State.

It follows that unlike an apartment unit renter, condominium unit owners hold exclusive ownership and possession of the unit. Moreover, apartment units are generally maintained for commercial rental use whereas condominiums typically are used as an owner's residence. This distinction leads to the conclusion that condominium units, unlike apartment units, are more appropriately classified as residential, rather than commercial. See *Tar Landing Villas Owners' Assoc. v. Town of Atlantic Beach*, 64 N.C. App. 239, 307 S.E.2d 181 (1983) (where this Court upheld an annexation ordinance by a city of less than 5,000 that classified condominiums as residential). Accordingly, we hold that the superior court erroneously classified the 77 condominium units of Heywood Crossing Condominiums as commercial.

[4] Notwithstanding our holding that the 77 condominium units should be classified as residential, Asheville contends further that the area common to the condominium units consisting of 6.38 acres, was properly classified as commercial. This common area consisted of a parking lot, recreational amenities, and landscaped areas between and around the condominium units.

In *Adams-Millis Corp. v. Town of Kernersville*, 6 N.C. App. 78, 169 S.E.2d 496 (1969), this Court upheld the residential classification of several pond lots jointly owned by owners of four adjacent lots. The owners considered the pond lots as an accessory use to their dwellings, such as a fish or lily pond. Similarly, in this case, each condominium unit owner owns an undivided interest in the common areas and facilities, which consists of parking lots, recreational amenities, and landscaping. See N.C. Gen. Stat. 47A-6(a). Furthermore, the undivided interest in the common areas can not be “separated from the unit to which it appertains and [is] deemed conveyed or encumbered with the unit even though such interest is not

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expressly mentioned or described in the conveyance or other instrument.” N.C. Gen. Stat. § 47A-6(c). Accordingly, following the reasoning of *Adams-Millis*, we hold that the superior court erred by failing to classify the common areas of the condominium as residential.

III. Annexation Service Plan—Sewer Services

[5] Finally, the residents contend the trial court erroneously upheld Asheville’s proposal to provide septic system maintenance and repair services in lieu of sewer service to a portion of the annexation area. We agree.

N.C. Gen. Stat. § 160A-47(3)(b) states that an annexing municipality “shall make plans for the extension of services to the area to be annexed and shall, prior to the public hearing . . . , prepare a report setting forth such plan” The statute specifically requires the plan to “[p]rovide for extension of major trunk water mains and sewer outfall lines into the area to be annexed . . . so that property owners . . . will be able to secure public water and sewer service, *according to policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.*” (Emphasis supplied). However, § 160A-47(3)(b) provides an exception to this requirement,

In areas where the municipality is required to extend sewer service according to its policies, but *the installation of sewer is not economically feasible due to the unique topography of the area*, the municipality shall provide septic system maintenance and repair service until such time as sewer service is provided to properties similarly situated.

(Emphasis supplied).

In this case, Asheville determined under § 160A-47(3)(b) that it was economically infeasible to provide sewer service to residents living in the Old Shoals area of Annexation Area C. Thus, instead of providing sewer service, Asheville chose to provide septic system maintenance and repair services for those affected parcels “until such time as sewer service to them is constructed and connected.” (Annexation Services Plan, C-21, R. p. 223). Asheville contended that since it had contracted with the Metropolitan Sewerage District to provide sewer services, its responsibilities under § 160A-47(3)(b) had been delegated to that independent agency. However, in rejecting a similar argument in *Wallace v. Town of Chapel Hill*, this Court stated:

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Section 160A-47 requires the [municipality] to provide in the annexed area 'each major municipal service performed within the municipality at the time of annexation.' The municipality may delegate responsibility for the providing of these services to others, such as [a metropolitan sewerage district]. However the municipality is not 'relieved of its primary duty' to comply with the statute. If such services are not provided, the residents of the annexed area are entitled to a Writ of Mandamus requiring the municipality to live up to its commitments.

Wallace, 93 N.C. App. 422, 429, 378 S.E.2d 225, 229 (1989); *see also Cockrell v. City of Raleigh*, 306 N.C. 479, 486, 293 S.E.2d 770, 775 (1982). We are therefore compelled to hold that while Asheville may delegate its responsibility for providing sewer service to the Metropolitan Sewerage District, it (like the Town of Chapel Hill) is not relieved of its primary duty to comply with § 160A-47(3)(b).

Similarly, we reject Asheville's argument that they have no control over whether the Metropolitan Sewerage District extends sewer services to the annexation area. Under N.C. Gen. Stat. § 162A-68(h) (2001), "the annexation by a city or town within a metropolitan sewerage district of an area lying outside such district shall not be construed as the inclusion within the district of an additional political subdivision or unincorporated area within the meaning of the provisions of this section; but any such areas so annexed *shall* become a part of the district and shall be subject to all debts thereof." Accordingly, the statute requires that the annexation area will become part of the metropolitan sewerage district.

Asheville also contends that because it is economically infeasible to extend the major sewer outfall lines into the annexed area, the statute enables it to provide septic system services in lieu of sewer service. We disagree.

N.C. Gen. Stat. § 160A-47(3)(b) provides that "in areas where the municipality is required to extend sewer services according to its policies, but the installation of sewer is not *economically feasible due to the unique topography* of the area, the municipality shall provide septic system maintenance and repair service until such time as sewer service is provided to properties similarly situated." (Emphasis supplied). Moreover, under § 160A-47(3)(b), the connection of individual lots to the main sewer outfall line is governed by the city's policies. In short, subsection (3)(b) allows the city to pro-

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vide septic system maintenance (1) when the unique topography of the land makes it economically infeasible to connect an individual lot to the main sewer outfall line, and (2) “until such time as sewer service is provided to properties similarly situated.”

In this case, John Echeverri, the assistant city engineer, testified that Asheville could service the area to be annexed with a pump station. He indicated that sewer service is provided to the northern side of Lake Julian, an area similar in topography to the southeastern side of Lake Julian where the property to be annexed is located. Thus, even assuming it was economically infeasible to extend the sewer lines to the individual homes, Mr. Echeverri’s testimony establishes that sewer service is already being provided to a “similarly situated” area.

Moreover, the record shows that with the exception of a few isolated properties on the northern side of the lake, residents on the northern, eastern, and western sides of Lake Julian had sewer service. On the southern side, all of the annexation area residents had sewer service with the exception of approximately 35 to 40 residences in the Old Shoals area. Since the record shows that sewer service is already being provided to an area similarly situated to the area to be annexed, we hold that Asheville failed to create an annexation services plan that complies with N.C. Gen. Stat. § 160A-47(3)(b). *See Wallace v. Town of Chapel Hill*, 93 N.C. App. 422, 428, 378 S.E.2d 225, 228 (1989) (“The purpose of [G.S. 160A-47] is to insure that major municipal services are provided to newly annexed areas on a nondiscriminatory basis.”).

Reversed and remanded.

Judges McCULLOUGH and ELMORE concur.

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KINGS MOUNTAIN BOARD OF EDUCATION, LARRY ALLEN, MELONY BOLIN, RONALD HAWKINS, SHEARRA MILLER, STELLA PUTMAN, JOANNE COLE, OTIS COLE, CHARLIE SMITH, FRANK SMITH, ANGELA SMITH, PETITIONERS v. NORTH CAROLINA STATE BOARD OF EDUCATION, RESPONDENT, AND CLEVELAND COUNTY BOARD OF COMMISSIONERS, RESPONDENT/INTERVENOR

No. COA02-529

(Filed 5 August 2003)

1. Schools and Education— merger plan—district over two counties—expansion not automatic with municipal annexation

A 1905 act establishing the Kings Mountain School district did not allow the automatic expansion of a school district by virtue of a city's annexation power. A municipality may not expand its school district boundaries without delegation of legislative authority, and the 1905 Act contained no such delegation.

2. Schools and Education— merger—boundaries of school district—de facto doctrine—not applicable

The de facto doctrine was not applicable to determining the boundaries of the Kings Mountain School District after the town of Kings Mountain expanded into a neighboring county.

3. Schools and Education— merger—district extending across county lines—certification of number of students in district—estoppel not applicable

The State Board of Education's annual certification of the number of Gaston County students in the Kings Mountain School District was not an implicit recognition by the Board that the Kings Mountain School District extended into Gaston County and did not estop the Board from approving a school merger plan for Cleveland County that included the Kings Mountain District. A governmental agency is not subject to an estoppel claim to the same extent as an individual or a private corporation; the estoppel doctrine will not apply when there is even the possibility that the exercise of governmental powers might be impeded by an estoppel claim.

4. Constitutional Law— due process—school merger plan—post-hearing affidavits

The admission of post-hearing affidavits by an administrative law judge considering a school merger plan was not a due

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process violation where the petitioners contended that they had understood that the parties were limited to a submission of a single post-hearing affidavit, but the transcript of the hearing indicates that they consented to “affidavits.” Moreover, petitioners did not show how the submission of additional affidavits substantively prejudiced their case.

Appeal by petitioners from order and judgment entered 6 August 2001 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 12 February 2003.

Schwartz & Shaw, P.L.L.C., by Richard A. Schwartz and Brian C. Shaw, for petitioner appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko and Assistant Attorney General Laura E. Crumpler, for respondent appellee.

TIMMONS-GOODSON, Judge.

The Kings Mountain Board of Education (“Kings Mountain Board”), along with individual Kings Mountain Board members and parents of children attending public school in the Kings Mountain School District (collectively, “petitioners”) appeal from an order and judgment of the trial court affirming a decision by the North Carolina State Board of Education. For the reasons stated herein, we affirm the judgment of the trial court.

The pertinent substantive and procedural facts of the instant appeal are as follows: On 7 November 2000, petitioners filed a petition in Wake County Superior Court seeking judicial review of a final decision by the North Carolina State Board of Education (“State Board”). The final decision by the State Board, dated 13 September 2000, approved a plan submitted by the Cleveland County Board of Commissioners to merge three independent school systems in Cleveland County: (1) the Cleveland County Schools; (2) the Shelby City Schools; and (3) the Kings Mountain District Schools.

In their petition for judicial review, petitioners objected to the school merger, asserting that the Kings Mountain School District was located in both Cleveland County and neighboring Gaston County. Petitioners asserted that, because the town of Kings Mountain extended into Gaston County, the school district also extended into Gaston County. As the Gaston County Board of Commissioners had not approved or adopted the plan of merger, petitioners argued that

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the merger was unlawful. Petitioners therefore contended the 13 September 2000 decision by the State Board approving the merger plan was erroneous as a matter of law, arbitrary and capricious, and in excess of the State Board's authority. Petitioners moreover asserted that the decision was procedurally flawed. Petitioners' case came before the trial court on 23 July 2001. After reviewing the evidence and arguments by the parties, the trial court rejected petitioners' claims and entered an order and judgment affirming the decision of the State Board. From this order and judgment, petitioners appeal.

The fundamental question on appeal is whether the legal boundaries of the Kings Mountain School District extend into Gaston County. Petitioners assert that they do, arguing that (1) the Kings Mountain School District is authorized to automatically expand under legislation establishing the school district; (2) the Kings Mountain School District enjoys *de facto* legal existence in Gaston County; and (3) the Kings Mountain School District exists within Gaston County under principles of estoppel. Petitioners further contend that the decision of the trial court is procedurally flawed. For the reasons stated hereafter, we conclude that the Kings Mountain School District is located wholly within Cleveland County, and we affirm the order and judgment of the trial court.

In reviewing a final agency decision pursuant to section 150B-51 of the North Carolina General Statutes, a trial court may reverse or modify the agency's decision if it is: (1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious. *See* N.C. Gen. Stat. § 150B-51(b) (2001). Both parties agree that the trial court conducted a *de novo* review of petitioners' claims that the State Board's decision was made upon unlawful procedure, erroneous as a matter of law, arbitrary and capricious, and in excess of the State Board's authority, and that this was the appropriate standard of review. We must therefore determine whether the trial court correctly applied the *de novo* scope of review to the facts of the instant case. *See Smith v. Richmond Cty. Bd. of Educ.*, 150 N.C. App. 291, 295-96, 563 S.E.2d 258, 263-64 (2002), *disc. review denied*, 356 N.C. 678, 577 S.E.2d 296 (2003).

Under statutory law, "[t]he board of commissioners of a county in which two or more local school administrative units are located, but

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all are *located wholly within* the county, may adopt a plan for the consolidation and merger of the units into a single countywide unit.” N.C. Gen. Stat. § 115C-68.1(a) (2001) (emphasis added). The State Board of Education must approve the plan of merger. *See* N.C. Gen. Stat. §§ 115C-67 *et. seq.* (2001). However, where “one local school administrative unit is located in [two] counties,” the boards of commissioners of both counties must jointly adopt any plan of merger. N.C. Gen. Stat. § 115-68.1(b) (2001). Petitioners contend that the Kings Mountain School District is not “located wholly within” Cleveland County based on several grounds. We address these arguments in turn.

1905 Act

[1] Petitioners argue that, under Chapter 381 of the 1905 Private Laws of North Carolina (“the 1905 Act”), the boundaries of the Kings Mountain School District are coterminous with the boundaries of the town of Kings Mountain. Petitioners thus assert that, when the town of Kings Mountain annexed territory in Gaston County during the 1960’s, the annexation likewise expanded the boundaries of the school district. The relevant language of the 1905 Act establishing the Kings Mountain School District is as follows:

SECTION 1. That all the territory embraced in the incorporate limits of the town of Kings Mountain shall be and is hereby constituted the “Kings Mountain Graded School District” for white and colored children.

.....

SEC. 8. *Provided*, that the trustees of the said graded school of Kings Mountain shall have the right to admit students from outside of the incorporate limits of Kings Mountain and make a reasonable charge for tuition for the same.

1905 N.C. Private Sess. Laws ch. 381, §§ 1,8. Petitioners argue that the words “shall be” in Section One of the 1905 Act are prospective and indicate that the General Assembly intended for the Kings Mountain School District to expand with any future expansions of the town. Section Eight indicates that any child residing within the town limits of Kings Mountain may attend school without paying tuition. As further support for their argument, petitioners note that the General Assembly ratified legislation creating the school district for the town of Asheboro, North Carolina, on the same day as the 1905 Act. The Asheboro charter recites as follows:

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SECTION 1. That all the territory lying within the corporate limits of the town of Ashboro, as the boundaries of said town are on the first day of April, one thousand nine hundred and five, shall constitute a public school district for the white and colored children and shall be known and designated as "Ashboro Graded School District."

1905 N.C. Private Sess. Laws ch. 413, § 1. Petitioners contend that, unlike the 1905 Act establishing the Kings Mountain School District, the legislation establishing the Asheboro School District specifically limits the boundaries of the school district to the town boundaries as they existed on 1 April 1905. Petitioners argue the difference between the two acts indicates the General Assembly intended for the boundaries of the Kings Mountain School District to automatically expand if and when the boundaries of the town were extended. We disagree.

"A municipality has only such powers as the legislature confers upon it." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 520, 186 S.E.2d 897, 902 (1972); *Homebuilders Assn. of Charlotte v. City of Charlotte*, 336 N.C. 37, 41-42, 442 S.E.2d 45, 49 (1994). Such power may be granted through express language, or it may be implied as incidental to the powers expressly granted. *See Homebuilders Assn. of Charlotte*, 336 N.C. at 42, 442 S.E.2d at 49. Further, a municipality may exercise such powers as are essential to the purposes of the corporation. *See id.* Here, petitioners contend that the town of Kings Mountain has the authority to unilaterally expand the boundaries of the school district upon expansion of the town. The ability to create the boundaries of a school district is vested solely within the power of the legislature, however. *See Moore v. Board of Education*, 212 N.C. 499, 502, 193 S.E. 732, 733-34 (1937); *McCormac v. Commissioners*, 90 N.C. 441, 444-45 (1884). Thus, a municipality may not expand its school district boundaries without an express or implied delegation of legislative authority. *See School District Committee v. Board of Education*, 236 N.C. 216, 218, 72 S.E.2d 429, 430 (1952) (noting "the law may confer upon school authorities the discretionary authority to create or consolidate school districts"); *Moore*, 212 N.C. at 502, 193 S.E. at 733-34; *McCormac*, 90 N.C. at 445.

The language of the 1905 Act contains no express delegation of legislative authority to the town of Kings Mountain allowing it to unilaterally expand the legal boundaries of the Kings Mountain School District. Nor may such a power be fairly implied from the language. Notably, at the time of the 1905 Act, the town of Kings Mountain was

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without authority to annex territory. See *Abbott v. Town of Highlands*, 52 N.C. App. 69, 73, 277 S.E.2d 820, 823 (noting that, before 1947, town annexation could only occur pursuant to special legislative act), *disc. review denied*, 303 N.C. 710, 283 S.E.2d 136 (1981). As the town of Kings Mountain had no authority to expand its own boundaries until forty-two years after the 1905 Act was enacted, the General Assembly could not have intended the words “shall be” to grant the town authority to unilaterally expand the school district.

Comparison to similar legislation establishing and modifying the boundaries of various school districts provides examples of the express language necessary to confer legislative authority and lends further support to our interpretation of the 1905 Act. For example, in 1897 the General Assembly established the school district for the town of Monroe, North Carolina, utilizing language virtually identical to the 1905 Act:

SECTION 1. That all territory embraced within the corporate limits of the town of Monroe, Union county, shall be and is hereby constituted the Monroe Graded School District for the white and colored children.

1897 N.C. Public Sess. Laws ch. 147, § 1. In 1920, the General Assembly declared that the school district was “coterminous with the city of Monroe.” 1920 N.C. Private Extra Sess. Laws ch. 94, § 1. Yet in 1971, the General Assembly expressly rewrote section 1 of Chapter 147 of the Public Laws of 1897 to “provide for an automatic extension of [the school district] boundaries upon extension of the corporate limits of the city of Monroe.” 1971 N.C. Sess. Laws ch. 735. The General Assembly again defined the school district’s boundaries as “all of the territory within the corporate limits of the City of Monroe” and set forth a metes and bounds description of such boundaries. The General Assembly then declared that

All annexations to the corporate boundaries of the City of Monroe after July 1, 1971, automatically extend the boundaries of the Monroe City School Administrative Unit to include the territory newly annexed by the City of Monroe.

Id. at § 1. The General Assembly thereby expressly granted the City of Monroe the power it formerly lacked to “automatically extend” the school district boundaries.

The General Assembly enacted similar legislation in 1899 when it established the school district in Kinston, North Carolina:

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That for the purpose and benefits of this act the city of Kinston shall be a graded school district for both white and colored children and is hereby named and designated as the "Kinston graded school district."

1899 N.C. Public Sess. Laws ch. 96, § 3. In 1967, the General Assembly enacted legislation allowing for expansion of the Kinston school district as follows:

The boundary lines of the Kinston City Administrative School Unit are hereby extended so as to embrace all territory annexed, and to be annexed, by the City of Kinston outside of and beyond the present Kinston City Administrative School Unit.

1967 N.C. Sess. Laws ch. 499, § 1. The 1967 legislation serves as further example of the express language necessary for the power to expand school district boundaries.

Petitioners argue, however, that the Kinston school district legislation supports their interpretation of the 1905 Act. According to petitioners, the State Board overlooked legislation enacted in 1919 regarding the Kinston school district. The 1919 legislation provided that "the geographic boundaries of the [Kinston Graded School District] shall remain as constituted under [chapter 96 of the 1899 Public Laws and chapter 225 of the 1915 Private Laws] until further amended by legislative enactment." 1919 N.C. Private Sess. Laws ch. 92, § 2. Petitioners assert that the legislature thereby "froze" the school district boundaries in 1919, and that by implication, the city of Kinston had the power to expand the boundaries prior to 1919 under the original language of chapter 96 of the 1899 Public Laws. We do not agree with petitioners' interpretation. The language of the 1919 legislation did not recognize or imply any delegation of power to the town of Kinston to expand its school district boundaries. Rather, section two merely indicated that the 1919 amendment did not alter the existing boundaries, and that, *until further amended by legislative enactment*, the boundaries remained as established under the 1899 act and as specifically enlarged by legislation enacted in 1915. *See id.* at §§ 1, 2. The General Assembly thus reaffirmed that school district expansion could not occur without express authority by the legislature.

As evident from the General Assembly's enactment of specific legislation authorizing expansion of the Monroe and Kinston school districts, the mere words "shall be" as contained in the 1905 Act are wholly inadequate to confer power to a municipality to unilaterally

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expand its school district boundaries. We conclude that the 1905 Act does not authorize automatic expansion of the Kings Mountain School District pursuant to annexation of territory by the town of Kings Mountain. The State Board's determination that "the 1905 language in the Kings Mountain Graded School District charter does not allow for the automatic expansion of the school district by virtue of the city's annexation power" is therefore correct, and the trial court properly affirmed the decision of the State Board. We overrule this assignment of error.

De Facto Existence

[2] Petitioners contend that, even if the Kings Mountain School District does not legally exist in Gaston County under the 1905 Act, it nevertheless enjoys *de facto* existence in Gaston County. Petitioners therefore assert that the Kings Mountain School District's status in Gaston County may only be attacked through a *quo warranto* proceeding brought by the Attorney General. We disagree.

De facto status arises where a person assumes office "under color of authority" or where one "exercises the duties of the office so long or under such circumstances as to raise a presumption of his right; in which cases his necessary official acts are valid as to the public and third persons; but he may be ousted by a direct proceeding." *Norfleet v. Staton*, 73 N.C. 546, 550 (1875); *In re Pittman*, 151 N.C. App. 112, 115, 564 S.E.2d 899, 901 (2002). "The acts of a *de facto* officer are valid in law in respect to the public whom he represents and to third persons with whom he deals officially." *State v. Porter*, 272 N.C. 463, 465-66, 158 S.E.2d 626, 628 (1967). The validity of the title or an act of a *de facto* officer may be challenged only through an action of *quo warranto*. See *Rogers v. Powell*, 174 N.C. 388, 389, 93 S.E. 917, 917 (1917); *Black's Law Dictionary* 1256 (6th ed. 1990) (defining *quo warranto* as "[a] common law writ designed to test whether a person exercising power is legally entitled to do so"). For example, in *Rogers*, two rival boards of trustees for the school district of Ahoskie, North Carolina, claimed *de jure* status. The plaintiffs sought an injunction against the defendants, who actually occupied and exercised control over the school board, to require the defendants to turn over control and management of the school building. Our Supreme Court affirmed the lower court's dissolution of the preliminary injunction on the grounds that resolution of the issue first required a *quo warranto* action to determine the rightful occupiers of the office. *Id.* at 390, 93 S.E. at 918.

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The trial court concluded, and we agree, that the *de facto* doctrine is simply inapplicable to the present case. In contrast to *Rogers*, the present action does not involve a collateral challenge to the right of the Kings Mountain Board members to their office or their authority over students from Gaston County who attend Kings Mountain schools. *Cf. Crabtree v. Board of Education*, 199 N.C. 645, 650, 155 S.E. 550, 552 (1930) (concluding that, where there was no *quo warranto* proceeding to determine the validity of the school board members' right to hold office, the plaintiffs could not challenge the legality of official acts undertaken by the school board members). There is no challenge to any particular act by the Kings Mountain School District, or the title or authority of its officers. Notably, the Kings Mountain School District does not own, administer or operate any schools in Gaston County. Residents of Kings Mountain who live in Gaston County do not pay the Kings Mountain supplemental school tax. Although the State Board's approval of the plan of merger may collaterally nullify the Kings Mountain School District's asserted annexation of territory in Gaston County, such annexation did not take place pursuant to an ordinance or other legislative act, the validity of which could be determined by a *quo warranto* action. *See, e.g., Taylor v. City of Raleigh*, 290 N.C. 608, 617-18, 227 S.E.2d 576, 581-82 (1976) (concluding that the plaintiffs were without standing to indirectly challenge the validity of an annexation ordinance); *Gaskill v. Costlow*, 270 N.C. 686, 689, 155 S.E.2d 148, 150 (1967) (noting that unless an ordinance is void, private individuals may not attack, collaterally or directly, the validity of an ordinance extending the corporate limits of a municipality). In short, a *quo warranto* action has no application to the instant case and would not resolve the primary dispute, which remains a determination of the legal boundaries of the Kings Mountain School District. The State Board and the trial court both determined that the *de facto* doctrine was inapplicable, and we affirm such decision.

Estoppel

[3] Finally, petitioners argue that the State Board has implicitly recognized the existence of the Kings Mountain School District in Gaston County in the past, and that the State Board is therefore estopped from approving the plan of merger. Petitioners base their argument of estoppel on the fact that, pursuant to section 115C-430 of the North Carolina General Statutes, the State Board has annually certified the number of Gaston County students within the Kings Mountain School District. Such certification determines funding allocation among the school districts. Certification under

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section 115C-430 occurs “[i]f there is more than one local school administrative unit in a county[.]” N.C. Gen. Stat. § 115C-430 (2001). Petitioners assert that the Kings Mountain Board relied upon the State Board’s annual certifications to indicate that the Kings Mountain School District extended into Gaston County, and that the State Board is now estopped to deny what it has implicitly recognized over the years. Again, we must disagree with petitioners.

Equitable estoppel is

“the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy.”

Washington v. McLawhorn, 237 N.C. 449, 454, 75 S.E.2d 402, 405 (1953) (quoting *Bank v. Winder*, 198 N.C. 18, 20, 150 S.E. 489, 491 (1929)). Thus, “[t]he essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts.” *State ex rel. Easley v. Rich Food Servs., Inc.*, 139 N.C. App. 691, 703, 535 S.E.2d 84, 92 (2000).

A governmental agency is not subject to an estoppel claim to the same extent as an individual or a private corporation. See *Washington*, 237 N.C. at 454, 75 S.E.2d at 405-06. A governmental entity may be estopped in a particular instance only if it is necessary to prevent a loss to another and the estoppel will not impair the exercise of governmental powers. See *Land-of-Sky Regional Council v. Co. of Henderson*, 78 N.C. App. 85, 91, 336 S.E.2d 653, 657 (1985), *disc. review denied*, 316 N.C. 553, 344 S.E.2d 7 (1986). Even when there is only the possibility that a county’s exercise of governmental powers might be impeded by an estoppel claim, the estoppel doctrine will not apply. See *Burrow v. Board of Education*, 61 N.C. App. 619, 627, 301 S.E.2d 704, 708 (1983).

Here, there is no evidence to suggest that, by means of its annual certification, the State Board intentionally represented to the Kings Mountain School District that its boundaries extended into Gaston County, all the while knowing that they did not. First, the certifica-

tions were made to the Gaston County Board of Commissioners, and not to petitioners. Further, the certifications were not made pursuant to any independent determination of boundary lines by the State Board. Finally, application of the estoppel doctrine would impede the State Board from exercising its legislative power to approve or deny school mergers under section 115C-68.1(a) of the North Carolina General Statutes. The trial court therefore properly determined that the estoppel doctrine may not be utilized to prevent the State Board from approving the merger plan, and we overrule this assignment of error.

Unlawful Procedure

[4] By their final assignment of error, petitioners argue the State Board's decision was made upon unlawful procedure, and that the trial court erred in concluding otherwise. Petitioners assert that their due process rights were violated when the administrative law judge hearing the instant case admitted and considered five post-hearing affidavits submitted by the respondent-appellant Cleveland County Board of Commissioners. According to petitioners, they understood the parties to be limited to submission of a single post-hearing affidavit. Petitioners now assert that the State Board improperly considered the four additional affidavits submitted by the Cleveland County Board of Commissioners, and that the decision was therefore made upon unlawful procedure. We do not agree.

The transcript of the hearing before the administrative law judge contains multiple references to the parties submitting "affidavits." Based on this evidence, the State Board, and later the trial court, concluded that petitioners consented to the admission of additional affidavits rather than a single affidavit. Not only is this conclusion supported by evidence of record, petitioners fail to demonstrate how the submission of the four additional affidavits substantively prejudiced their case. We overrule this assignment of error.

In conclusion, we hold that the trial court properly affirmed the decision of the State Board approving the merger plan submitted by the Cleveland County Board of Commissioners. The judgment of the trial court is therefore

Affirmed.

Judges WYNN and LEVINSON concur.

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[159 N.C. App. 579 (2003)]

WALTER CLARK ERWIN, PLAINTIFF v. LENA LOWDERMILK TWEED, DEFENDANT

No. COA02-1243

(Filed 5 August 2003)

Insurance— underinsured motorist—non-fleet passenger truck—gross weight specified by manufacturer

The evidence was insufficient to show a truck's "gross vehicle weight as specified by the manufacturer" and summary judgment should not have been granted for defendant in an underinsured motorist stacking case where there was an issue as to whether the truck was a private passenger vehicle. The evidence consisted of the maximum gross weight listed on the truck's identification plate and a weight obtained from a weigh station, but the relevant weight is that specified by the manufacturer without passengers, load capacity or options. This may be obtained from dealership literature or a statement in the owner's manual; the actual weight may be used if manufacturer's specifications cannot be obtained. N.C.G.S. § 58-40-10(b)(1).

Judge TYSON dissenting.

Appeal by plaintiff from judgment entered 5 June 2002 by Judge James L. Baker, Jr. in Burke County Superior Court. Heard in the Court of Appeals 5 June 2003.

Bryce Thomas & Associates, by Bryce O. Thomas, Jr., for plaintiff-appellant.

Willardson Lipscomb & Miller, L.L.P., by William F. Lipscomb, for unnamed defendant-appellee.

CALABRIA, Judge.

This case is before us for a second time on appeal. The full facts are set out in *Erwin v. Tweed*, 142 N.C. App. 643, 544 S.E.2d 803, *disc. rev. denied*, 353 N.C. 724, 551 S.E.2d 437 (2001) ("*Erwin I*"). The essential issue here, as in *Erwin I*, is if there is a genuine issue of material fact as to whether the truck in question's "gross vehicle weight as specified by the manufacturer" under N.C. Gen. Stat. § 58-40-10(1)(b)(1) (2001) is less than 10,000 pounds. Because the critical question of the weight of the truck remains unanswered by the record evidence, we again reverse and remand.

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In *Erwin I*, this Court affirmed the entry of summary judgment by the trial court finding Walter Erwin (“plaintiff”) entitled to underinsured motorist (“UIM”) coverage but reversed entry of summary judgment on the issue of interpolicy stacking. *Erwin I*, 142 N.C. App. at 650, 544 S.E.2d at 807. In remanding the case to the trial court, we held “the manufacturer’s weight of this truck determines whether it is considered a private passenger vehicle or a fleet vehicle . . .” *Id.*, 142 N.C. App. at 649, 544 S.E.2d at 806. This determination constituted a genuine issue of material fact because “[a]n insured party is only permitted to stack interpolicy underinsured motorist coverages for non-fleet private passenger type vehicles.” *Id.*, 142 N.C. App. at 648-49, 544 S.E.2d at 806 (citing *N.C. Farm Bureau Mut. Ins. Co. v. Stamper*, 122 N.C. App. 254, 258, 468 S.E.2d 584, 586 (1996); N.C. Gen. Stat. § 20-279.21(b)(4) (1999)).

To determine whether the truck in question constituted a private passenger motor vehicle, we instructed the trial court to examine whether it had “a gross vehicle weight as specified by the manufacturer of less than 10,000 pounds . . .” N.C. Gen. Stat. § 58-40-10(1)(b)(1). Because there was “no information of record which determine[d] conclusively the manufacturer’s weight of th[e] truck[,]” we remanded the case for further proceedings. *Erwin I*, 142 N.C. App. at 649, 544 S.E.2d at 806.

Following the remand of the case, Farm Bureau, an unnamed defendant, moved for summary judgment arguing “the truck in question is not a private passenger motor vehicle because it is a dump truck and its gross vehicle weight as specified by the manufacturer is more than 10,000 pounds.”¹ Farm Bureau proffered evidence of the manufacturer’s identification plate, which stated the truck’s “maximum gross vehicle weight” was 21,700 pounds. Farm Bureau argued this weight was greater than 10,000 pounds as contemplated by N.C. Gen. Stat. § 58-40-10(1)(b)(1); therefore, the court should grant Farm Bureau’s summary judgment motion.

1. As the trial court correctly noted, our previous opinion considered the nature of the truck, concluded the truck in question was a dump truck, and, notwithstanding that conclusion, remanded the case for determination of the manufacturer’s weight of the truck. This determination, in turn, would “determine[] whether [the truck in question] is considered a private passenger [motor] vehicle or a fleet vehicle . . .” *Erwin I*, 142 N.C. App. at 649, 544 S.E.2d at 806. Accordingly, the critical question was not whether this dump truck was a pickup truck as contemplated by N.C. Gen. Stat. § 58-40-10(1)(b)(1), for that question had already been answered by this Court. The critical question was, and continues to be, the manufacturer’s weight of the truck.

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Plaintiff also moved for summary judgment on the basis that the truck had been taken to a weigh station and found to weigh 9,715 pounds. Plaintiff argued this weight was less than 10,000 pounds as contemplated by N.C. Gen. Stat. § 58-40-10(1)(b)(1); therefore, the court should grant plaintiff's summary judgment motion.

The trial court granted defendant's motion for summary judgment, concluding interpolicy stacking was not allowed in light of the fact that

there [was] no genuine issue of material fact regarding the gross vehicle weight as specified by the manufacturer of the 1973 International truck covered by the business auto policy in question, that said weight [was] not less than 10,000 pounds and that the truck in question [was], therefore, not a private passenger motor vehicle within the meaning of G.S. § 20-279.21(b)(4) and G.S. § 58-40-10(1).

In light of the evident confusion as to the proper definition of "gross vehicle weight as specified by the manufacturer" as used in N.C. Gen. Stat. § 58-40-10(1)(b)(1), we re-visit this issue to provide further clarification.

I. Standard of Review

Summary judgment is appropriate when, in light of the pleadings, depositions, admissions on file, and affidavits, 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 (2001).

"The determination of what constitutes a 'genuine issue as to any material fact' is often difficult. It has been said that an issue is material if the facts alleged . . . are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. A question of fact which is immaterial does not preclude summary judgment."

Kessing v. Mortgage Corp., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) (quoting 3 Barron and Holtzoff, Federal Practice and Procedure § 1234 (Wright Ed. 1958)). "[T]he record is to be viewed in the light most favorable to the non-movant, giving it the benefit of all inferences which reasonably arise therefrom." *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 8, 472 S.E.2d 358, 362 (1996). Therefore, Farm Bureau, as the party moving for summary

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judgment, must establish there is no genuine issue of material fact that the “gross vehicle weight as specified by the manufacturer” of the truck in question is less than 10,000 pounds.

II. Statutory Language and Legislative Intent

Prior to 1989, N.C. Gen. Stat. § 58-131.35A (now N.C. Gen. Stat. § 58-40-10) provided as follows:

As used in this Article and in Articles 12B and 25A of this Chapter:

(1) “Private passenger motor vehicle” means:

...

b. A motor vehicle with a pick-up body, a delivery sedan or a panel truck that is owned by an individual or by husband and wife or individuals who are residents of the same household and that is not customarily used in the occupation, profession, or business of the insured other than farming or ranching. Such vehicles owned by a family farm copartnership or corporation shall be considered owned by an individual for purposes of this Article

N.C. Gen. Stat. § 58-131.35A (Cum. Supp. 1988). In 1989, the General Assembly amended the definition of “private passenger motor vehicle” for insurance rating purposes and changed the statutory definition to the following:

As used in this Article and in Articles 36 and 37 of this Chapter:

(1) “Private passenger motor vehicle” means:

...

b. A motor vehicle that is a pickup truck or van that is owned by an individual or by husband and wife or individuals who are residents of the same household if it:

1. Has a gross vehicle weight as specified by the manufacturer of less than 10,000 pounds; and

2. Is not used for the delivery or transportation of goods or materials unless such use is (i) incidental to the insured’s business of installing, maintaining, or repairing furnishings or equipment, or (ii) for farming or ranching.

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Such vehicles owned by a family farm copartnership or a family farm corporation shall be considered owned by an individual for the purposes of this section

N.C. Gen. Stat. § 58-40-10 (1989).

In modifying the language of the statutes, the legislature rectified certain inequalities between vehicle classifications for insurance purposes. Under the prior law, rates for vehicles used for business purposes differed based upon the vehicle classification: higher commercial rates applied to certain vehicle classifications while lower personal auto policy rates applied to other vehicle classifications. The amendment rectified this inequality by harmonizing the treatment of pickup trucks, vans, and sedans where they fell in the same weight range of 10,000 pounds or less. Accordingly, under the amendment and current statute, individuals pay equal amounts for insurance and are not penalized for preferring certain types of vehicles, such as pickup trucks or minivans, over other vehicles, such as sedans, as long as: (1.) they use the vehicle for similar purposes; and (2.) the weight of the vehicle is less than 10,000 pounds as per the manufacturer's specifications.

The focus of the statute, therefore, is limited solely to the vehicle's innate characteristics and not its capabilities. Moreover, the manufacturer's specification regarding weight as the standard obviates individual disparities between otherwise identical individual vehicles.

We now turn to the language employed in the statute to provide guidance as to the proper definition of "gross vehicle weight as specified by the manufacturer." N.C. Gen. Stat. § 58-40-10(1)(b)(1). "The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002). "The legislative purpose of a statute is first ascertained by examining the statute's plain language." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968)).

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Gross weight is “[t]he total weight of a thing, including its contents and any packaging.” Black’s Law Dictionary 1588 (7th ed. 1999). In this context, the gross weight would consist of the total weight of the truck in question including those things contained in and a part of the truck.²

With these familiar principles in mind, we construe “gross vehicle weight as specified by the manufacturer” to require evidence of the manufacturer’s specified weight of the vehicle alone. This weight does not include passenger weight or the weight of any load the vehicle is carrying or capable of carrying at any given time. Only the weight of the vehicle itself is relevant to the determination of the manufacturer’s “gross vehicle weight.” This value may be obtained by examining dealership literature provided by the manufacturer giving the actual weight of model vehicles adjusted to reflect additional options on the vehicle in question. Alternatively, a statement of the weight of the vehicle contained in the vehicle’s owner’s manual could be used to show its “gross vehicle weight.” We now examine the evidence submitted by plaintiff and defendant in support of their respective summary judgment motions in order to determine whether either party has presented evidence of the relevant weight of the truck in question.

III. Defendant’s interpretation

Farm Bureau asserts the manufacturer’s “gross vehicle weight” is 21,700 pounds because that is the weight appearing on the identification plate on the truck under “maximum gross vehicle weight.” In essence, Farm Bureau equates the term “gross vehicle weight” as used in the insurance provisions of N.C. Gen. Stat. § 58-40-10(1)(b)(1) with the combined weight of the truck and the maximum load with which it can be safely burdened. Besides plain meaning and the legislative intent considerations already addressed, Farm Bureau’s assertion is unavailing for other reasons.

Farm Bureau’s interpretation ignores the General Assembly’s choice of the term “gross vehicle weight” as opposed to the

2. The dissent argues that, if the load is excluded, the weight becomes the “net weight.” To the contrary, if the load is included, the appropriate term becomes “gross vehicle weight rating,” which the legislature chose not to use. The focus of the statute is the weight of the truck measured by the *weight of its constituent parts*. Unless the load is considered a constituent part of the truck, it is irrelevant to the determination of the *truck’s* gross weight. In sum, the weight of the truck is a characteristic of the truck; the load the truck can safely carry is a capability of the truck. The statute is concerned solely with the truck’s characteristics.

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term “gross vehicle weight rating,” which was defined in N.C. Gen. Stat. § 20-4.01(12a) (1993)³ as the “value specified by the manufacturer as the maximum loaded weight of a vehicle.” Had the General Assembly intended to consider the weight of the vehicle in light of the maximum loaded weight it could safely bear, the General Assembly would have utilized the term “gross vehicle weight rating” as it did in N.C. Gen. Stat. § 20-4.01(12a). We find the General Assembly’s choice instructive.

Moreover, in the context of UIM coverage, North Carolina cases consistently hold that “[t]he avowed purpose of the Financial Responsibility Act [(“FRA”)] . . . is to compensate the innocent victims of financially irresponsible motorists.” *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989). “The Act is remedial in nature and is ‘to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished.’” *Pennington*, 356 N.C. at 573-74, 573 S.E.2d at 120 (quoting *Id.*). Its purpose “is best served when [every provision of the Act] is interpreted to provide the innocent victim with the fullest possible protection.” *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989). Though N.C. Gen. Stat. § 58-40-10 is not part of the FRA, it would be incongruous to construe provisions of the FRA dealing with UIM coverage liberally, yet interpret “private passenger motor vehicle” narrowly, when that interpretation controls whether UIM policies may be stacked.

Finally, Farm Bureau’s interpretation would produce unintended results in two important ways. First, motorists may find themselves unable to stack UIM policies on vehicles that are otherwise identical because manufacturers differ in how they determine the towing or carrying capacity. By way of example, if company A and company B contracted to allow company B to sell company A’s models with company B’s badge, yet the companies differed in designating the load their respective models could carry or haul for marketing or other reasons, the two otherwise identical models would be classified differently under N.C. Gen. Stat. § 58-40-10(1)(b)(1). Second, Farm Bureau’s interpretation would frustrate the intent of the legislature by precluding a majority of vans and pickup trucks from falling within the statutory amendment designed to allow these vehicles to be included. If the manufacturer’s “gross vehicle weight” combined the weight of the vehicle with the weight it is capable of carrying or

³ The statutory definition of “gross vehicle weight rating” is now found in N.C. Gen. Stat. § 20-4.01(12b) (2001).

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hauling, most vans and pickup trucks would exceed 10,000 pounds and not meet the statutory definition of “private passenger motor vehicle.” We reject this interpretation.

IV. Plaintiff’s interpretation

In support of plaintiff’s summary judgment motion, plaintiff had the truck in question independently weighed at a weigh station. The truck was found to weigh 9,715 pounds. While this figure is more closely related to the weight relevant to the statute, it fails to show the weight of the truck “as specified by the manufacturer.” The provided weight merely gives the actual weight of the truck without reference to manufacturer’s specifications. Because this figure produces minor inherent weight inconsistencies between identically designed vehicles, it fails to provide one, set standard to be used for that particular vehicle model and is not preferred. We note if manufacturer’s specifications could not be obtained, the actual weight of the truck would be the most appropriate substitute because it would most closely comply with the information required by the statute.⁴ Nonetheless, without a showing that the manufacturer’s specifications concerning the weight of the truck are unattainable, plaintiff must provide evidence of the gross vehicle weight of the truck as contemplated by the statute. In the instant case, plaintiff has failed to do so.

For these reasons, we conclude the critical question presented in *Erwin I* remains unanswered by the record evidence presented by the parties to the trial court. Accordingly, a genuine issue of material fact exists, and the trial court erred in granting summary judgment. We again remand this case to the trial court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judge MCGEE concurs.

Judge TYSON dissents with a separate opinion.

⁴ The dissent contends that the actual weight is immaterial even if the manufacturer’s specifications could not be obtained, through due diligence or otherwise. The practical result of this would be to bar any claim, no matter how meritorious, where the manufacturer’s specifications are simply irretrievable. Because the focus of the statute is the weight of the vehicle in question, the actual weight of the vehicle in question can be used in lieu of the manufacturer’s specified weight for the vehicle model where such information is unattainable. It would be inequitable to bar a claim due to lack of information which cannot be obtained when an acceptable substitute could be procured.

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TYSON, Judge, dissenting.

The majority's opinion reverses summary judgment and remands to the trial court for a second time to determine the same facts required by this Court upon remand of the first appeal. No genuine issue of material fact exists. Plaintiff failed to offer any evidence of an essential element of his claim: that his truck's "gross vehicle weight as specified by the manufacturer" is less than 10,000 pounds. I respectfully dissent. I would affirm the trial court's decision.

Plaintiff bears the burden of making a claim under the policy and the statute. Plaintiff was required by the statute and the prior opinion of this Court in *Erwin I* to show the manufacturer's gross vehicle weight of the truck to be less than 10,000 pounds in order for coverage to apply. *Erwin v. Tweed*, 142 N.C. App. 643, 544 S.E.2d 803, *disc. review denied*, 353 N.C. 724, 551 S.E.2d 437 (2001). Plaintiff put forth evidence of the actual or net weight of the truck without a load, contrary to that required by statute. When Defendant Farm Bureau moved for summary judgment, it had the burden to show no genuine issue of material fact existed as to whether the manufacturer's gross vehicle weight of the truck was less than 10,000 pounds. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). Defendant offered evidence to show that the gross vehicle weight of the vehicle, as determined by the manufacturer, exceeded 21,000 pounds, more than twice the amount allowed by the statute. Plaintiff offered no evidence in support of its contention that the "gross vehicle weight as specified by the manufacturer" was under 10,000 pounds. Plaintiff attempted to contest or rebut defendant's evidence of "gross vehicle weight as specified by the manufacturer" by presenting evidence of the truck's net weight from a weigh station receipt. An essential element of plaintiff's claim failed. No question of material fact exists. *See Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (holding "[t]he [summary judgment] movant may meet [his] 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.")

The majority's opinion correctly quotes Black's Law Dictionary's definition of "*gross weight*" as the "total weight of a thing, including its contents and any packaging." *Black's Law Dictionary* 1588 (7th ed. 1999) (emphasis in original). The opinion substitutes "actual

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weight” for the statutory requirement of “gross vehicle weight as specified by the manufacturer.” The majority’s opinion specifically holds that the plain words and meaning of the statute can be satisfied by plaintiff presenting evidence of the “actual weight” or “net weight” of the vehicle as determined by means other than the manufacturer’s specification.

This interpretation is problematic for two reasons. First, it substitutes a new and different definition for “gross vehicle weight as specified by the manufacturer”, that is contrary to the plain meaning of the statute and dictionary definition of “gross weight.” In doing so, the majority also omits the statutorily required manufacturer’s determination of weight. Secondly, the opinion allows the insured protection under a narrow exception to the statute that is not expressly provided for in the statute.

We cannot circumvent the plain language and meaning of the statute nor expand the coverage of the statute, where plaintiff has failed and cannot show that his truck complies with the exception within in the statute. I would affirm the trial court’s grant of summary judgment in favor of defendant. I respectfully dissent.

STATE OF NORTH CAROLINA v. BUDDY LEE LOCKLEAR

No. COA02-1409

(Filed 5 August 2003)

1. Homicide— second-degree murder—sufficiency of evidence—malice—driving while impaired

The evidence of malice was sufficient in a second-degree murder prosecution where defendant was driving with an alcohol concentration of .08 when he collided with another vehicle; a seven-year-old boy in the other vehicle suffocated when the shoulder belt tore his windpipe; and a prior conviction put defendant on notice of the consequences of driving while impaired.

2. Homicide— second-degree murder—malice—instructions

The trial court’s instruction on malice in a second-degree murder prosecution was correct, taken as a whole, where defendant argued the court should have instructed the jury that it was

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required to find at least one of the examples of attitude given in the instruction.

3. Appeal and Error— preservation of issues—no offer of proof—appeal not considered

Defendant's failure to make an offer of proof resulted in the dismissal of an assignment of error that evidence was wrongly excluded. N.C.G.S. § 8C-1, Rule 103.

4. Evidence— prior offense—similar—probative value

The admission of the circumstances around a prior arrest of defendant for driving while impaired was admissible in his current second-degree murder conviction, which also resulted from drunken driving. The prior circumstances were similar enough to have probative value and were admissible to establish malice.

5. Evidence— prior offense—not prejudicial—other evidence of guilt

Admission of the circumstances of a prior conviction for driving while impaired did not tilt the scales against defendant in his current second-degree murder prosecution and was not more prejudicial than probative. The State presented sufficient evidence of guilt absent this evidence.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 9 May 2002 by Judge Jay Hockenbury in Onslow County Superior Court. Heard in the Court of Appeals 11 June 2003.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Duncan B. McCormick for defendant appellant.

TIMMONS-GOODSON, Judge.

Buddy Lee Locklear (“defendant”) appeals his convictions of second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, and unsafe movement of his motor vehicle. For the reasons stated herein, we find no error by the trial court.

The State presented evidence at trial tending to show the following: On 2 August 2001, at approximately 10:30 p.m., defendant was

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operating a motor vehicle on Piney Green Road when he collided with a vehicle operated by Joseph Matthews, III (“Matthews”). Joseph Matthews, IV (“Joseph”), Matthews’s seven-year-old son, died as a result of injuries sustained in the collision. An autopsy examination of Joseph’s body revealed that he suffered contusions to the chest, throat and neck areas. Testimony from Dr. Charles L. Garrett, a forensic pathologist, revealed that Joseph’s death resulted from him suffocating when the shoulder belt of the motor vehicle restraint system tore his windpipe and prevented air from entering his lungs. Matthews also sustained numerous injuries to his body as a result of the collision.

Officer Kenneth Smith (“Officer Smith”) testified that he observed the front end of defendant’s vehicle on the top of the automobile operated by Matthews. Upon questioning defendant about the collision, Officer Smith “noticed a strong odor of alcohol coming from [defendant’s person].” Officer Smith then examined defendant’s physical appearance and further noticed that defendant’s “eyes were red, glassy and watery, his speech was slurred, and defendant was unsteady on his feet.” Therefore, Officer Smith arrested defendant for driving while impaired.

Upon his arrival at the police station, defendant was administered an Intoxilyzer test which recorded a breath alcohol concentration of 0.08. Additionally, Officer Smith administered several field sobriety tests at the police station. Officer Smith testified that defendant “swayed the entire thirty (30) seconds” and failed to maintain balance on one leg during the test.

On 9 May 2002, defendant was convicted of second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, and unsafe turning of a vehicle. Defendant was sentenced to the following: Two (2) years for driving while impaired and active terms of imprisonment of a minimum term of 125 months to a maximum term of 159 months and ordered to pay \$36,000.00 in restitution. Defendant appeals.

Defendant presents four issues for review, contending that the trial court erred in (1) denying defendant’s motion to dismiss the charge of second-degree murder; (2) instructing the jury on the definition of malice; (3) excluding evidence regarding the seat belt restraint worn by Joseph; and (4) allowing testimony regarding defendant’s prior arrest and conviction for driving while impaired.

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[1] We first address the assignment of error in which defendant argues that the trial court erred by denying his motion to dismiss the charge of second-degree murder. Specifically, defendant asserts that there was insufficient evidence to show malice. We disagree.

In considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that may be drawn from the evidence. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The standard of review for a “motion to dismiss based on insufficiency of the evidence is the substantial evidence test.” *State v. Jones*, 110 N.C. App. 169, 177, 429 S.E.2d 597, 602 (1993), *cert. denied*, 336 N.C. 612, 447 S.E.2d 407 (1994). “The substantial evidence test requires a determination that there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense.” *Id.* Substantial evidence is defined as the amount of “relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

“Second-degree murder is defined as the unlawful killing of a human being with malice but without premeditation and deliberation.” *State v. Rick*, 342 N.C. 91, 98, 463 S.E.2d 182, 186 (1995) (quoting *State v. Phipps*, 331 N.C. 427, 457-58, 418 S.E.2d 178, 194 (1992)). See also *State v. McDonald*, 151 N.C. App. 236, 243, 565 S.E.2d 273, 277, *disc. review denied*, 356 N.C. 310, 570 S.E.2d 892 (2002). Whether the State has carried its burden of proof of malice depends on the factual circumstances of each case. *State v. McBride*, 109 N.C. App. 64, 67, 425 S.E.2d 731, 733 (1993). In *State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000), our Supreme Court addressed the precise issue of malice as raised by defendant. Our Supreme Court adopted the position that, “. . . wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief . . .” are examples, any one of which may provide the malice necessary to convict a defendant of second-degree murder. *Id.* at 391, 527 S.E.2d at 302.

Our Supreme Court has approved the following definition of “deliberately bent on mischief,” one of the attitudinal indices of legal malice.

[The term deliberately bent on mischief] connotes conduct as exhibits conscious indifference to consequences wherein probability of harm to another within the circumference of such con-

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duct is reasonably apparent, though no harm to such other is intended. [It] connotes an entire absence of care for the safety of others which exhibits indifference to consequences. It connotes conduct where the actor, having reason to believe his act may injure another, does it, being indifferent to whether it injures or not. It indicates a realization of the imminence of danger, and reckless disregard, complete indifference and unconcern for probable consequences. It connotes conduct where the actor is conscious of his conduct, and conscious of his knowledge of the existing conditions that injury would probably result, and that, with reckless indifference to consequences, the actor consciously and intentionally did some wrongful act to produce injurious result.

Rich, 351 N.C. at 394, 527 S.E.2d at 303. Further, our Supreme Court announced that any one of the descriptive phrases provided in the malice instruction helps define malice and does not constitute “elements” of malice. Thus, the jury may infer malice from any one of those attitudinal examples. *Id.* at 393, 527 S.E.2d at 303. It is necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.

In the instant case, the State’s evidence on the issue of malice tended to show that defendant was driving while impaired with an alcohol concentration of 0.08, which is above the legal limit, and that defendant was on notice as to the serious consequences of driving while impaired as a result of his prior driving while impaired conviction which occurred four years earlier. Examining the evidence in the light most favorable to the State, there was substantial evidence presented from which the jury could find malice and each of the other essential elements of second-degree murder. Thus, the trial court did not err in denying defendant’s motion to dismiss the charge of second-degree murder.

[2] In the next assignment of error, defendant challenges the trial court’s instructions to the jury on the definition of malice. Specifically, defendant argues that the trial court erred in failing to instruct the jury that the jury was required to find at least one of the attitudinal examples to infer the element of malice. We disagree.

“The charge of the court must be read as a whole . . . , in the same connected way that the judge is supposed to have intended it and the

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jury to have considered it" *Rich*, 351 N.C. at 393, 527 S.E.2d at 303 (quoting *State v. Wilson*, 176 N.C. 751, 754-55, 97 S.E. 496, 497 (1918)). A charge to the jury is viewed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. *Id.* at 394, 527 S.E.2d at 303. "If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970).

After initially charging the jury, the jury deliberated for one hour and returned with a question for the trial court regarding the definition of malice. After a discussion with counsel, the trial court gave the following instruction to the jury:

Malice comprehends not only particular animosity, but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty and deliberately bent on mischief. While there may be no intention to injure a particular person it does not mean an actual intent to take human life. It may be inferred or implied instead of positive as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

After deliberating for fifty-five minutes, the jury sent the following written question to the trial court: "we are still stuck on malice, specifically, the words 'and deliberately bent on mischief.' Where did that come from?" The judge then instructed the jury as follows:

My answer to these questions is this, what I have read to you in my written instructions, and also, I have given additional instructions on circumstances of malice in my clarification, which I gave orally to you. These attitudinal circumstances given in the jury instructions for malice serve as descriptive phrases. These words or phrases are each descriptive of the type or types of thought, attitude, or condition of mind sufficient to constitute malice. The descriptive phrases listed in the instructions for malice serve to help define malice for the jury. They do not constitute elements of malice, which is, itself, an element of second-degree murder. And thus, the State need not prove each and every one of these attitudinal examples of malice in order for the jury to infer the element of malice.

The jury instructions made clear that the State need not prove each and every one of the attitudinal examples of malice. Taken as a

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whole, the trial court's instruction on "malice" was a correct statement of the law.

[3] In the third assignment of error, defendant contends that the trial court erred in excluding evidence that the deceased victim was improperly restrained by a seat belt. This argument is dismissed. "In order to preserve an argument on appeal which relates to the exclusion of evidence . . . the defendant must make an offer of proof so that the substance and significance of the excluded evidence is in the record." *State v. Ginyard*, 122 N.C. App. 25, 33, 468 S.E.2d 525, 531 (1996). According to North Carolina General Statutes section 8C-1, Rule 103, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." N.C. Gen. Stat. § 8C-1, Rule 103 (2001).

In the instant case, the record reveals that defendant failed to produce any witnesses or submit affidavits regarding the seat belt restraint. Defendant failed to make an offer of proof by a competent witness that Joseph would not have suffered a fatal injury if he had been restrained in a different manner. Accordingly, this assignment of error is overruled.

[4] In the last assignment of error, defendant argues that the trial court erred in allowing testimony regarding the facts and circumstances surrounding his prior arrest and conviction for driving while impaired. Specifically, defendant contends that testimony from the arresting officer, Paul Ehrler, ("Officer Ehrler") regarding the events of defendant's 1996 arrest and subsequent conviction, were not probative as to the issue of malice and should have been excluded. We disagree.

Defendant concedes in his brief that the State in its case-in-chief may properly present evidence of a prior conviction for driving while impaired for the purpose of showing malice. Defendant also recognizes that the events and circumstances of a prior driving while impaired arrest may also be admitted if the events are sufficiently similar to the circumstances at issue. The point on which defendant disagrees is whether the facts and circumstances of his prior driving while impaired arrest are sufficiently similar to the present case so as to be admissible.

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Evidence of prior convictions may have probative value as long as the incidents are relevant to any fact or issue other than to show character of the accused. Rule 404(b) of the North Carolina Rules of Evidence does not require that these prior incidents be exactly the same in order to have probative value. *See State v. Sneed*, 108 N.C. App. 506, 509-10, 424 S.E.2d 449, 451 (1993), *affirmed*, 336 N.C. 482, 444 S.E.2d 218 (1994). Further, the similarities between the circumstances need not rise to the level of the unique and bizarre but simply “must tend to support a reasonable inference that the same person committed both the earlier and later acts.” *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). The evidence reveals several significant similarities between the prior driving while impaired charge and the case at issue. Officer Ehrler’s testimony regarding defendant’s 1996 arrest revealed that defendant was operating a motor vehicle; had a blood alcohol level above the legal limit; and while operating his vehicle under the influence of alcohol, defendant made an unsafe traffic turn that resulted in a collision. Officer Ehrler testified that defendant performed poorly on sobriety tests and that he resisted arrest by twisting the officer’s wrist and cursing the officer. In the present case, the evidence tended to show that while driving with a blood alcohol content of .08, defendant caused a traffic accident by making an improper turn into the path of Mathews’s car. We conclude that the circumstances of the 1996 driving while impaired arrest were sufficiently similar so as to have probative value.

[5] Defendant next argues that even if the details surrounding his 1996 driving while impaired arrest have “some limited probative value,” the probative value of the evidence is outweighed by the danger of prejudice. Defendant urges this Court to vacate the second-degree murder conviction because of the prejudicial nature of the evidence of defendant’s combativeness with the arresting officer during his 1996 arrest. “A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial” N.C. Gen. Stat. §15A-1443(a) (2001). Assuming *arguendo*, that it was error to admit testimony that defendant resisted arrest at his prior driving while impaired charge, we conclude that the admission of this evidence was not such that the jury would have reached a different result. *See State v. Bruton*, 344 N.C. 381, 387, 474 S.E.2d 336, 341 (1996) (concluding that in light of evidence of defendant’s guilt, there was no basis for determining that a different result would have been reached). The testimony of defendant’s actions in resisting his 1996 arrest did not rise to the level of altering the balance of the scales

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against defendant in light of all the evidence. Absent the evidence of resisting arrest, the State presented as a whole sufficient evidence that defendant was guilty of second-degree murder. Joseph died as a result of defendant's unsafe operation of his vehicle while driving with a blood alcohol concentration in excess of the legal limit. The second-degree murder charge arose five years after defendant's arrest and conviction for another driving while impaired charge. The prior driving while impaired arrest and conviction should have alerted him to the hazards of driving while impaired.

Therefore, evidence of the events surrounding defendant's 1996 driving while impaired arrest and conviction was admissible to establish malice. We therefore hold that the trial court did not err in admitting the evidence of the events surrounding defendant's prior arrest and conviction for driving while impaired.

For the reasons stated herein, we conclude that the trial court committed no error.

No error.

Judge HUNTER concurs.

Judge ELMORE dissents.

ELMORE, Judge, dissenting.

I disagree with the majority on the last assignment of error concerning the testimony of Officer Ehrler of the circumstances of defendant's prior arrest. The admission of the Officer's testimony was in error, and that error was prejudicial.

At trial, Officer Ehrler testified that in May of 1996 he observed the defendant run a red light and weave in the lane, and pulled the defendant over. Officer Ehrler went on to testify in detail of the defendant's demeanor and actions throughout the course of the traffic stop, field sobriety tests, and subsequent arrest. Officer Ehrler testified in part:

Q: So at that point [after field sobriety tests] did you place him under arrest?

A: Yes, I did.

Q: Did you have any difficulty placing him under arrest?

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A: I put one handcuff on him, yes, I did, and he turned around and said “what are you doing?” and grabbed my wrist and started twisting it. He started cussing. Luckily, another officer arrived and we had to wrestle him a little bit, not too much, but a little bit to get him into cuffs.

In transport to the police department, according to Officer Ehrler’s testimony, defendant was “[c]ussing. Screaming. One minute he begged me to let him go, next thing he’d be cussing me, told me how horrible a police officer I am.” In response to questioning by the trial court, the officer noted that defendant had not been speeding, had not left his lane of travel and gone into another lane, and had no trouble producing his license and registration.

Defendant assigns error to the admission of this testimony concerning the details surrounding the 1996 arrest as lacking probative value, and also any probative value would be substantially outweighed by danger of unfair prejudice to the defendant.

State v. Jones, 347 N.C. 193, 213, 491 S.E.2d 641, 653 (1997), provides that an evidentiary ruling by a lower court should only be overturned if the decision was so arbitrary as to be irrational. If there was any rational basis for admitting this evidence, the ruling must stand. Although evidence of prior crimes, wrongs or acts by a defendant is allowed into evidence for purposes of proving malice under Rule 404(b), the admissibility is guided by the constraints of similarity and temporal proximity. *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 110 S. Ct. 1466, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). “When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking[.]” *Id.* For example, the evidence is properly admitted when the prior offense and the offense charged are identical. *See e.g. State v. McAllister*, 138 N.C. App. 252, 530 S.E.2d 859 (2000). Details of the arrest are admissible for the purpose of proving malice only when they have a tendency to demonstrate the defendant knew his conduct was “reckless and inherently dangerous to human life.” *State v. Jones*, 353 N.C. 159, 173, 538 S.E.2d 917, 928 (2000). I disagree with the majority that this officer’s testimony had any tendency to prove malice. That defendant had been stopped before in a traffic stop with no other cars involved does not tend to

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prove that he knew in the incident before us that his actions were inherently dangerous.

Although defendant was intoxicated in both cases, neither the details of how the 1996 accident occurred, the facts surrounding his field sobriety tests nor the fact that he resisted arrest are similar or relevant to the case at bar. None of these details have any tendency to demonstrate that defendant was aware that his conduct leading up to the collision at issue was reckless and inherently dangerous to human life. The testimony only tended to make the defendant look uncooperative and belligerent with officials, which had not been the case in the incident at issue here. This evidence was more prejudicial than it was probative. Given all the circumstances of the case, this evidence is of a nature likely to prejudice the jury's consideration. I would vacate the judgment and remand for a new trial.



MORRIS COMMUNICATIONS CORPORATION D/B/A FAIRWAY OUTDOOR ADVERTISING, PETITIONER V. THE BOARD OF ADJUSTMENT FOR THE CITY OF GASTONIA, RESPONDENT

No. COA02-1233

(Filed 5 August 2003)

1. Zoning— signs—frame replaced—prohibited by local ordinance

The Gastonia sign ordinance could be construed reasonably to prohibit changing a sign frame as well as the advertisement, and a trial court holding that the City erred in its interpretation of the ordinance was reversed.

2. Zoning— state act—local regulation not preempted

The North Carolina Outdoor Advertising Control Act is not a complete and integrated regulatory scheme and does not preempt local regulation.

3. Zoning— signs—preemption by DOT regulation

The portion of the Gastonia sign ordinance interpreted by the City to prohibit replacement of the frame as well as the advertisement was preempted by a DOT regulation which allowed replacement of a structural member of the billboard.

Judge TYSON concurring in part and dissenting in part.

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Appeal by respondent from judgment entered 10 May 2002 by Judge C. Preston Cornelius in Gaston County Superior Court. Heard in the Court of Appeals 5 June 2003.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for petitioner-appellee.

L. Ashley Smith and Melissa A. Magee, for respondent-appellant.

CALABRIA, Judge.

The Board of Adjustment for the City of Gastonia (“respondent”) appeals a judgment entered 10 May 2002 reversing the determination of respondent prohibiting Morris Communications Corporation (“petitioner”) from replacing a frame and advertisement, on one of their billboards. For the reasons stated herein, we hold respondent’s interpretation of the city code permissible but that the code is preempted by State law to the extent it conflicts, accordingly, we affirm in part and reverse in part the judgment of the Superior Court.

Petitioner has a valid, unexpired permit for the erection and maintenance of the billboard. In January 2001, petitioner began changing the advertising sign on the billboard. After taking down the former sign-face-panel, but before replacing it with the new sign-face-panel, a zoning enforcement officer interrupted petitioner and explained that such work required a city zoning permit. Petitioner immediately applied for the permit, which was denied. Petitioner appealed, claiming changing both the frame and the advertisement were expressly permitted by North Carolina Department of Transportation (“DOT”) regulations. After a public hearing in March 2001, respondent upheld the denial of the permit finding petitioner’s actions constituted a replacement of a portion of the sign structure in violation of § 17-181(c) of the local zoning ordinance.

Petitioner filed a writ of certiorari to the Superior Court pursuant to N.C. Gen. Stat. § 160A-388(e). The Superior Court reversed on the following bases: (1) state law preempts the city ordinance; (2) respondent committed an error of law in its interpretation of the ordinance; and (3) respondent’s decision was not supported by substantial evidence and was arbitrary and capricious. Respondent appeals.

Respondent asserts the Superior Court erred, *inter alia*, in: (I) its interpretation of the city zoning ordinance § 17-181(c); (II) holding state law preempts the city ordinance. Since we find the Superior

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Court correctly determined respondent committed an error of law, we need not reach respondent's remaining assignments of error regarding the factual determinations.

“When the Superior Court grants certiorari to review a decision of the Board, it functions as an appellate court rather than a trier of fact.” *Hopkins v. Nash Cty*, 149 N.C. App. 446, 447, 560 S.E.2d 592, 593-94 (2002). In reviewing a decision from a Board of Adjustment, the Superior Court must:

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

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). “When reviewing the trial court’s decision, this Court must determine: 1) whether the trial court used the correct standard of review; and, if so, 2) whether it properly applied this standard.” *Hopkins*, 149 N.C. App. at 447, 560 S.E.2d at 593.

The standard of review depends on the nature of the error of which the petitioner complains. If the petitioner complains that the Board’s decision was based on an error of law, the superior court should conduct a de novo review. If the petitioner complains that the decision was not supported by the evidence or was arbitrary and capricious, the superior court should apply the whole record test. The whole record test requires that the trial court examine all competent evidence to determine whether the decision was supported by substantial evidence.

Id., 149 N.C. App. at 448, 560 S.E.2d at 594 (internal citations omitted).

I. Ordinance Interpretation

[1] The first issue raised on appeal is whether, as the Superior Court found, respondent committed an error of law in its interpretation of the city zoning ordinance. Since we find no error of law, we reverse the judgment of the Superior Court.

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“Questions involving interpretation of zoning ordinances are questions of law[,]” which we review *de novo*. *Hayes v. Fowler*, 123 N.C. App. 400, 404, 473 S.E.2d 442, 444 (1996). However, “[t]he Board [of Adjustment] is vested with reasonable discretion in interpreting the meaning of a zoning ordinance, and a court may not substitute its judgment for the board in the absence of error of law. . . .” *Rauseo v. New Hanover County*, 118 N.C. App. 286, 289, 454 S.E.2d 698, 700 (1995).

Accordingly, we must review the Board’s interpretation of the ordinance to determine whether it is reasonable or whether an error of law exists. “The canons of statutory construction apply to the interpretation of an ordinance. . . .” *Moore v. Bd. of Adjustment of City of Kinston*, 113 N.C. App. 181, 182, 437 S.E.2d 536, 537 (1993) (internal citation omitted). “Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning.” *Ayers v. Bd. of Adjust. for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994).

Section 17-55 of the Gastonia City Code provides the following definitions:

Sign. Any object, display, or structure, or part thereof, situated outdoors, which is used to advertise, identify, display, direct, or attract attention to an object, person, institution, organization, business, product, service, event or location by any means, including words, letters, figures, design, symbols, fixtures, colors, illumination, or projected images. The term “sign” does not include the flag or emblem of any nation, organization of nations, state, political subdivision thereof, or any fraternal, religious or civic organization; works of art which in no way identify a product or business; scoreboards located on athletic fields; or religious symbols.

Sign, advertising (off-premise). A sign, other than a directional sign, which directs attention to or communicates information about a business, commodity, service, or event that exists or is conducted, sold, offered, maintained or provided at a location other than the premises where the sign is located. Any off-premise advertising sign allowed under this chapter may display either commercial or noncommercial copy. An off-premise advertising sign shall also be known as a ‘billboard.’

Structure. A combination of materials to form a construction for use, occupancy, or ornamentation whether installed on, above, or below the surface of land or water.

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Section 17-181 of the Gastonia City Code provides, *inter alia*:

(c) A nonconforming sign may not be moved or sign structure replaced except to bring the sign into complete conformity with this chapter. Once a nonconforming sign is removed (i.e., the removal of the structural appurtenances above the base or footing) from the premises or otherwise taken down or moved, said sign only may be replaced or placed back into use with a sign which is in conformance with the terms of this chapter.

(d) Minor repairs and maintenance of nonconforming signs necessary to keep a nonconforming sign in sound condition are permitted.

...

(f) Notwithstanding other provisions contained in this section, the message of a nonconforming sign may be changed so long as this does not create any new nonconformities.

At the public hearing, the zoning administrator asserted petitioner's actions were more than minor repairs and changing of the message, as permitted by subsections (d) and (f). The zoning administrator contended petitioner's actions constituted a replacement of a portion of the sign structure in violation of § 17-181(c). Respondent affirmed the zoning administrator's interpretation.¹ The Superior Court held respondent committed an error of law in its interpretation of the code, finding the term "sign" means the totality of the parts of a sign, "sign structure" means the elements necessary for the structure including the footings, poles, sign frame and sign-face-panels, and a "poster face panel"² is not in-and-of-itself a sign or sign structure. Accordingly, the Superior Court held respondent committed an error of law in its interpretation of the statute.

1. As discussed by the dissent, some members of the Board appeared confused as to their role interpreting the ordinance. Two members indicated they didn't believe they were qualified to interpret the ordinance, but rather the Superior Court would give "a more fair ruling." A third member stated "we have to go along with the ordinance as written and the way that the City has interpreted it." Finally, a fourth member explained he believed the intent of the ordinance was followed by the zoning administrator. All members voted to affirm the interpretation of the City zoning administrator. The three-page written order of the Board includes findings of fact and conclusions of law and determines that petitioner's actions violated the ordinance and "[t]he zoning official properly interpreted and acted upon the requirements of the zoning ordinance." Since our review accords deference to the interpretation of the ordinance by the Board, where there is no error of law we do not examine each member's rationale, but rather we defer to their reasonable interpretation.

2. The Superior Court referred to the entire sign frame and advertisement as a poster face panel.

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Upon review, we do not agree respondent committed an error of law in its interpretation of the zoning ordinance. The essential term “sign structure” is not defined in the ordinance, but each individual word is broadly defined. Although the ordinance does not expressly include a list of all the parts of the “sign structure,” the broad language of the statute could reasonably be interpreted to include all those materials which form the constructed sign, including the sign frame. Moreover, section (f), which permits changing the message, could reasonably be interpreted to include only the message and not the frame. Since respondent’s interpretation is reasonable and is not the result of an error of law, we defer to their interpretation and reverse the Superior Court’s judgment.

II. Preemption

[2] Upon finding respondent’s interpretation of the statute is reasonable, we now address whether it impermissibly conflicts with, and is preempted by, State law. Accordingly, the second issue raised on appeal is whether the Superior Court correctly held that respondent committed an error of law finding the city zoning ordinance was not preempted by State law. We review this determination *de novo* and find the Superior Court correctly determined the city ordinance is preempted by conflicting State regulations.

Generally, a city ordinance must be consistent with State and federal law. N.C. Gen. Stat. § 160A-174(b) (2001).

An ordinance is not consistent with State or federal law when:

...

(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;

...

(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation. . . .

N.C. Gen. Stat. § 160A-174(b) (2001).

Petitioner asserts the North Carolina’s Outdoor Advertising Control Act (“OACA”), N.C. Gen. Stat. § 136-126 to -140.1, and OACA is a “complete and integrated regulatory scheme.” Petitioner contends since the ordinance conflicts with State law, the ordinance is

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preempted pursuant to N.C. Gen. Stat. § 160A-174(b)(5). However, this Court recently determined the OACA is not a complete and integrated regulatory scheme and “conclude[d] that the OACA does not preempt local regulation of outdoor advertising.” *Lamar Outdoor Advertising v. City of Hendersonville Zoning Bd.*, 155 N.C. App. 516, 521, 573 S.E.2d 637, 642 (2002). Although petitioner urges this Court to reject the holding in *Lamar*, we decline to do so because “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *State v. Roach*, 145 N.C. App. 159, 161, 548 S.E.2d 841, 844 (2001) (quoting *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)). Accordingly, we are bound by this Court’s decision in *Lamar* and hold petitioner’s assertion is without merit.

[3] Petitioner also asserts the ordinance is preempted by State law because it conflicts with an act which has been expressly permitted by State law, in violation of N.C. Gen. Stat. § 160A-174(b)(2). Petitioner argues the DOT Regulations for Outdoor Advertising, expressly permit petitioner’s actions, and accordingly, the city ordinance prohibiting such actions are preempted.³

DOT regulation § 2E.0225 provides:

(c) Alteration to a nonconforming sign . . . is prohibited. Reasonable repair and maintenance are permitted including changing the advertising message or copy. The following activities are considered to be reasonable repair and maintenance:

- (1) Change of advertising message or copy on the sign face.
- (2) Replacement of border and trim.
- (3) Repair and replacement of a structural member, including a pole, stringer, or panel, with like material.
- (4) Alterations of the dimensions of painted bulletins incidental to copy change.

19A N.C.A.C. 2E.0225(c) (2003). Both the ordinance and regulation permit changing of the advertisement message. However, the ordi-

3. We note that N.C. Gen. Stat. § 160A-174(b)(2) prohibits ordinances which conflict with state law, which includes DOT regulations, as the OACA provided by defining “state law” to include “[a] regulation enacted or adopted by a State agency. . . .” N.C. Gen. Stat. § 136-128(6) (2001).

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nance prohibits replacement of any portion of the “sign structure” which respondent interprets broadly to include all structural parts of the sign. The regulation expressly permits the repair or replacement of a structural member. Accordingly, under North Carolina law, petitioner may repair or replace any structural member of the billboard, and the ordinance is preempted to the extent it conflicts. Therefore, we affirm the Superior Court’s judgment that respondent committed an error of law in failing to conclude this portion of the ordinance is preempted to the extent of the conflict.

We note the OACA requires the payment of just compensation when a “municipality, county, local or regional zoning authority, or other political subdivision . . . remove[s] or cause[s] to be removed any outdoor advertising . . . for which there is in effect a valid permit issued by [DOT] . . .” N.C. Gen. Stat. § 136-131.1 (2001). However, in the present case, the City did not “remove or cause to be removed” the sign, and accordingly this provision is inapposite.

Respondent also asserts on appeal the Superior Court erred in finding respondent’s findings of fact were not supported by substantial evidence and were arbitrary and capricious. However, we need not reach this assertion because, assuming *arguendo* respondent is correct, respondent found petitioner replaced a portion of the sign structure and this action is expressly permitted by DOT regulations.

In conclusion, although we find respondent’s interpretation of the city ordinance was not an error of law, we find the ordinance impermissibly conflicts with State regulations.

Affirmed in part, reversed in part.

Judge McGEE concurs.

Judge TYSON concurs in part and dissents in part in a separate opinion.

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

I concur with part II of the majority’s opinion holding that the ordinance is preempted by State DOT regulations. Affirming for petitioner on preemption is sufficient without further addressing the trial court’s interpretation of the ordinance. Since the majority reaches and reverses the trial court’s interpretation of the ordinance, I address that issue as it affects other signs in the city which fall out-

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side of DOT preemption. I respectfully dissent from the majority's holding that defers to the Board's interpretation of the ordinance and reverses that portion of the superior court's judgment. I would affirm the entire trial court's order.

I. Standard of Review

The majority grounds its decision on deference given to the Board's interpretation of the ordinance. The majority's opinion correctly states that reasonable discretion is allowed, but only "in the absence of error of law . . ." *Rauseo v. New Hanover County*, 118 N.C. App. 286, 289, 454 S.E.2d 698, 700 (1995). The majority's opinion also correctly states, "[q]uestions involving interpretation of zoning ordinances are questions of law," which we review de novo. *Hayes v. Fowler*, 123 N.C. App. 400, 404, 473 S.E.2d 442, 444 (1996). The record reflects that the Board stated that the superior court is the proper forum to determine the interpretation of the ordinance. Donna McPhail, a board member, moved to adopt the zoning officer's interpretation of the ordinance, stating:

I think that I'm going to make a motion to uphold Mr. Pearson's recommendation on the grounds that the big thing we had facing us today was interpretation, your interpretation of a message or a sign face, and the young lady that spoke for the DOT, and then everyone else. We are not that in tune with all the legal aspects of it. We're citizens of the City of Gastonia. We serve on this board and we do the very best we can and we really take everything into consideration, but you know, we're not attorneys. I don't feel like it's something that we can properly address, so I think by your appealing it on up to Superior Court, they are more—that's more who you need to be in front of, . . . As far as the interpretation of the zoning ordinance, I think Superior Court would just really be your audience.

Board member John McDonald seconded the motion made by Ms. McPhail and stated, "I would like to ditto what Ms. McPhail said."

On review of a Board decision, the trial court "sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993). The whole record test applies to findings of fact and compels a determination of whether the findings of fact of the Board are supported by competent evidence in the record. *Id.* Questions of law are reviewed de novo. *Id.* at 137, 431 S.E.2d at

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187. Petitioner's petition to the superior court asserted the Board's action was an error of law. The zoning officer's interpretation of the application of the zoning ordinance to petitioner is a question of law. *Tucker v. Mecklenburg Cty Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001), *aff'd in part, rev. improv. allowed*, 356 N.C. 658, 576 S.E.2d 324 (2003).

Zoning ordinances derogate common law property rights and must be strictly construed in favor of the free use of property. See *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 569, 303 S.E.2d 228, 230 (1983). "When statutory language is clear and unambiguous, 'words in a statute must be construed in accordance with their plain meaning unless the statute provides an alternative meaning.'" *Procter v. City of Raleigh Bd. of Adjust.*, 140 N.C. App. 784, 785-86, 538 S.E.2d 621, 622 (2000) (quoting *Kirkpatrick v. Village Council*, 138 N.C. App. 79, 86, 530 S.E.2d 338, 343 (2000)).

Lambeth v. Town of Kure Beach, — N.C. App. —, —, 578 S.E.2d 688, 691-92 (2003).

The majority reverses the trial court's *de novo* interpretation and holds that the "broad language of the statute could reasonably be interpreted to include all those materials which form the constructed sign, including the sign frame." Zoning ordinances are strictly construed in favor of free use of property and are not broadly construed. *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966); *Lambeth*, — N.C. App. at —, 578 S.E.2d at 691.

The trial court interpreted section 17-181(c) of the Gastonia City Code to only prohibit the moving of the sign in its entirety or replacement of the sign structure. The trial court determined that changing a poster face panel, standing alone, was not moving a sign or replacing a sign structure, which requires a permit under the ordinance, and that replacement of the poster face panel does not violate section 17-181(c). Further, subsection (f) allows the message to be changed as long as there are no new nonconformities.

Although the trial court's interpretation of the ordinance need not be reviewed because the case is decided on preemption, I would also affirm that portion of the trial court order holding the Board committed an error of law in its interpretation of the ordinance. I respectfully dissent.

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STATE OF NORTH CAROLINA v. ROBERT MILLER, DEFENDANT

No. COA02-589

(Filed 5 August 2003)

1. Sexual Offenses— first-degree sexual offense—indictment—confused with statutory sexual offense

Indictments for first-degree sexual offense were fatally defective because they confused first-degree sexual offense with statutory sexual offense. The indictments alleged a combination of the elements of the two offenses without alleging each element of either offense, and they erroneously cite a different statute than the one under which defendant was tried, convicted, and sentenced. The “short-form” language of N.C.G.S. § 15-144.2(b) was not sufficient to cure the defects under these narrow circumstances. N.C.G.S. § 14-27.7A; N.C.G.S. § 14-27.4(a)(1).

2. Sentencing— prior record level—proof—worksheet not sufficient

The State failed to prove defendant’s prior record level by a preponderance of the evidence during sentencing for indecent liberties where the State submitted a prior record worksheet but never tendered the criminal information printouts upon which the worksheet was based, and defendant did not stipulate to the worksheet.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgments entered 6 December 2001 by Judge B. Craig Ellis in Scotland County Superior Court. Heard in the Court of Appeals 18 February 2003.

Attorney General Roy Cooper, by Assistant Attorney General David Gordon, for the State.

Daniel Shatz for defendant appellant.

ELMORE, Judge.

Robert Miller (“defendant”) appeals judgments dated 6 December 2001 entered consistent with jury verdicts finding him guilty of two counts of first-degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1) (98 CRS 0005 and 0006) (collectively, the “sexual offense convictions”) and one count of taking indecent liberties with

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a child (98 CRS 0007) (the “indecent liberties conviction”). Because we conclude that the indictments in 98 CRS 0005 and 98 CRS 0006 are fatally defective, we vacate the judgments entered on the sexual offense convictions. While defendant’s indecent liberties conviction (98 CRS 0007) is undisturbed, we remand for resentencing in that matter because the State failed to prove defendant’s prior record level by a preponderance of the evidence.

The indictments upon which the sexual offense convictions were obtained were based on improper sex acts allegedly committed by defendant upon two minor children, “M.T.” and “B.M.” Defendant’s indictment for taking indecent liberties with a child was based on his improper touching of his twelve-year-old stepdaughter, “C.C.” At trial, the State’s evidence tended to show that on the morning of 16 October 1997 defendant, who was then forty-eight years old, approached C.C. while she was sleeping on the couch in their home and touched her on her vagina outside her nightgown and shorts. After C.C. told defendant to stop, defendant apologized, gave C.C. fifteen dollars, and asked her not to tell anyone. C.C. testified that from the time she was “about seven,” defendant had come into her bedroom “almost every night” and touched her on her vagina while she was sleeping. C.C. never told anyone because she was afraid of defendant. After the incident on 16 October 1997, however, C.C. told her brother, then went on to school. C.C.’s mother picked her up from school later that day and took her to talk to Stephanie Monroe, a Child Protective Services Investigator with the Scotland County Department of Social Services, and Bill Edge, a detective with the Scotland County Sheriff’s Department. C.C.’s testimony was substantially corroborated at trial by Monroe, Detective Edge, and C.C.’s mother. C.C. also testified that M.T. and B.M. were friends of hers who frequently spent the night with C.C.

M.T. testified that during an overnight visit to C.C.’s house one night in July or August 1997 shortly before her ninth birthday, she awoke to find defendant inserting his finger into her vagina. When M.T. tried to sit up, defendant “pulled his hand from under the cover and ran . . . to his bedroom.” M.T. did not tell anyone about this incident until several weeks later, when she confided in C.C. after defendant had moved out following C.C.’s allegations against him. M.T. and C.C. then told C.C.’s mother, who in turn informed M.T.’s mother. M.T. subsequently gave a statement to Detective Edge consistent with this account.

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B.M. testified that in August 1997, when she was eleven years old, she was spending the night at C.C.'s house when she awoke to find defendant "over [her] . . . touch[ing her] on [her] butt." Defendant left the room but returned a few minutes later and inserted his finger into B.M.'s vagina while she was sleeping. B.M. "kicked him off of [her] . . . pulled [her] pants up and [defendant] gave [her] \$12.00." Defendant "told [B.M.] not to tell no one and if [she] did, he'd get [her]." Defendant then left the house. The next day, B.M. "just told [her mother] about him rubbing [her] on [her] butt." B.M. testified that she did not immediately tell her mother about the digital penetration because she was scared of defendant, but that she eventually told her mother about it several weeks later, after C.C. and M.T. had made their allegations against defendant. B.M. also gave a statement to Detective Edge. Portions of M.T.'s and B.M.'s testimony were corroborated at trial by Detective Edge, by C.C.'s mother, and by each girl's own mother.

In separate interviews with Monroe and with Detective Edge, defendant admitted that he "touch[ed]" C.C. and "ran [his] hand up her shorts" on 16 October 1997. Defendant also gave a statement to Detective Edge in which he said he "would get up during the night and . . . would go to wherever [C.C.] was sleeping and would touch her in places in between her legs through her clothes" and that "[t]his ha[d] been going on about four or five months off and on." In his statement to Detective Edge, defendant denied ever touching M.T. or B.M. Defendant offered no evidence at trial.

At sentencing, the State tendered a prior record worksheet listing five misdemeanor convictions for defendant, for a total of five prior record points, placing defendant at prior record level III. Defendant did not stipulate to this prior record and subsequently "move[d] to set aside the sentences in level III." While the prior record worksheet was admitted into evidence, the State did not introduce any documents in support of the worksheet, such as computer printouts from the Administrative Office of the Courts or the Division of Criminal Information, despite asserting that the worksheet was based on these sources. The trial court subsequently entered judgments applying prior record level III and imposing consecutive active sentences of 420 to 513 months imprisonment for each of the two first-degree sexual offense convictions and twenty-six to thirty-three months imprisonment for the indecent liberties conviction.

Defendant brings forth five assignments of error in his brief, asserting (1) that the judgments entered against him on the two first-

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degree sexual offense convictions should be vacated, and (2) that the sentences imposed following defendant's convictions on these counts, as well as on the indecent liberties conviction, should be vacated and the case remanded for resentencing.

[1] The first issue before this Court is whether the indictments upon which defendant's sexual offense convictions (98 CRS 0005 and 0006) were obtained are invalid. At trial, defendant moved to dismiss the first-degree sexual offense charges on the grounds that the indictments failed to properly charge that offense. The trial court denied defendant's motion. Defendant contends that the trial court erred in denying his motion to dismiss the first-degree sexual offense charges. We agree.

Our Supreme Court has stated that “[j]urisdiction to try an accused for a felony depends upon a valid bill of indictment guaranteed by Article I, Section 22 of the North Carolina Constitution.” *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). Our Legislature has required that an indictment or other criminal pleading must contain:

A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting *every element* of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2001) (emphasis added); *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985).

In the case *sub judice*, a review of the record indicates judgment and commitment was entered upon defendant's convictions on two counts of first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4, which provides in pertinent part as follows:

§ 14-27.4. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.] . . .

N.C. Gen. Stat. § 14-27.4(a)(1) (2001).

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The indictments in the instant case, which were identical except for the name of the alleged victim, were each entitled "INDICTMENT STATUTORY SEXUAL OFFENSE" and read as follows:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about and between the 1st day of May, 1997 and the 30th day of August, in the county named above the defendant named above unlawfully, willfully and feloniously did engage in a sex act with [M.T. and B.M., respectively], a child under the age of (13) thirteen. At the time of the offense the defendant was more than (6) years older than the victim and not lawfully married to the victim. *This act was in violation of North Carolina General Statutes Section 14-27.7A.* (Emphasis added)

Thus, the indictments in 98 CRS 0005 and 0006 allege that defendant's alleged conduct with M.T. and B.M. violated N.C. Gen. Stat. § 14-27.7A, while judgment and commitment was actually entered upon defendant's conviction for violation of N.C. Gen. Stat. § 14-27.4(a)(1). N.C. Gen. Stat. § 14-27.7A sets forth the elements for a similar, but not identical, offense as follows:

§ 14-27.7A. rape or sexual offense of person who is 13, 14, or 15 years old.

(a) 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.

N.C. Gen. Stat. § 14-27.7A(a) (2001).

In the instant case, a careful reading of the indictments upon which defendant's first-degree sexual offense convictions were obtained reveals that not only do they erroneously cite a different statute than the one under which defendant was tried, convicted, and sentenced, the indictments also allege violation of a *combination* of the elements of the two separate and distinct offenses set forth in N.C. Gen. Stat. § 14-27.4(a)(1) and N.C. Gen. Stat. § 14-27.7A(a), without alleging each element of either offense.

The indictments allege that defendant "unlawfully, willfully and feloniously did engage in a sex act with [M.T. and B.M., respectively], a child *under the age of (13) thirteen.*" (Emphasis added). This allegation comports with the language of N.C. Gen. Stat. § 14-27.4(a)(1),

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which requires that the victim be “a child *under* the age of 13 years[.]” but it contradicts N.C. Gen. Stat. § 14-27.7A(a), under which the victim must be a “person who *is* 13, 14, or 15 years old. . . .” (Emphases added). The indictments go on to allege that “[a]t the time of the offense the defendant was more than (6) years older than the victim and not lawfully married to the victim.” These statutory requirements are elements of statutory sexual offense under N.C. Gen. Stat. § 14-27.7A(a), but they are not elements of first-degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(1), the statute upon which defendant was tried, convicted, and sentenced. Finally, N.C. Gen. Stat. § 14-27.4(a)(1) provides that to be guilty of first-degree sexual offense, the defendant must be “at least 12 years old” and “at least four years older than the victim.” The indictments here do not contain any such allegations, instead alleging only that defendant was more than six years older than each victim.

We are mindful that while the established rule is that an indictment is not valid and will not support a conviction unless each element of the crime is accurately and clearly alleged therein, our Legislature has authorized the use of “short form” indictments for certain crimes. *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E.2d 339, 350 (1983). Short-form indictments are “sufficient to allege an offense even though not all of the elements of a particular crime are required to be alleged” therein. *Id.* Our Legislature has authorized the use of a short-form indictment as a charging instrument for statutory sex offense. N.C. Gen. Stat. § 15-144.2(b) (2001); *State v. Wallace*, 351 N.C. 481, 505, 528 S.E.2d 326, 342, *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).

N.C. Gen. Stat. § 15-144.2(b) provides the approved “short-form” essentials for an indictment charging sex offense:

(b) If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses.

N.C. Gen. Stat. § 15-144.2(b) (2001).

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While the indictments in 98 CRS 0005 and 0006 (1) allege that each victim is a child under age thirteen, (2) name each child, and (3) aver that defendant “did engage in a sex act” with each, we conclude that, under the very narrow circumstances presented by this case, the use of “short-form” language authorized under N.C. Gen. Stat. § 15-144.2(b) in the indictments is not sufficient to cure the fatal defects found therein. Here, the indictments cite one statute, and defendant was tried, convicted, and sentenced under another statute. Moreover, the indictments allege facts sufficient to satisfy *some* elements contained in each of these statutes to the exclusion of the other, but these averments are *insufficient to satisfy all* of the elements contained in either statute. Based on these circumstances, we conclude that these indictments frustrate the very purposes of requiring an indictment in a criminal prosecution, which our Supreme Court has stated “include giving a defendant notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense.” *Freeman*, 314 N.C. at 435, 333 S.E.2d at 745. We therefore hold that the indictments in 98 CRS 0005 and 0006 are fatally defective, requiring that the judgments entered in those cases be vacated. Because this issue is dispositive, we need not address defendant’s remaining assignments of error concerning the sexual offense convictions.

[2] While defendant’s indecent liberties conviction (98 CRS 0007) is undisturbed by the foregoing, defendant next contends that the trial court erred by finding him to be at prior record level III for sentencing purposes. We agree.

In *State v. Goodman*, 149 N.C. App. 57, 71, 560 S.E.2d 196, 205 (2002), *rev’d on other grounds*, 357 N.C. 43, 577 S.E.2d 619 (2003), a case in which the State submitted a prior record level worksheet which it claimed was based on a criminal information printout but submitted neither the printout nor any other supporting documentation, this Court held that “the State failed to prove by a preponderance of the evidence that defendant was the same person convicted of the prior crimes listed on his prior record level worksheet.” In remanding that case for resentencing, this Court stated “we believe the law requires more than the State’s unverified assertion that a defendant was convicted of the prior crimes listed on a prior record level worksheet.” *Id.* at 72, 560 S.E.2d at 205; *see also State v. Smith*, 155 N.C. App. 500, 515, 573 S.E.2d 618, 628 (2002), *disc. review denied*, 357 N.C. App. 255, — S.E.2d — (2003).

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In the present case, as in *Goodman*, the State submitted the prior record worksheet but never tendered to the trial court or offered into evidence the criminal information printouts upon which it asserted the worksheet was based. Defendant did not stipulate to the prior record level as calculated on the worksheet. We hold that the State failed to prove defendant's prior record level by a preponderance of the evidence, and remand for resentencing.

In summary, we hold that the judgments on defendant's two first-degree statutory sex offense convictions (98 CRS 0005 and 98 CRS 0006) are vacated, and we remand for a resentencing hearing on defendant's conviction for taking indecent liberties with a child (98 CRS 0007).

Vacated in part; remanded in part.

Judge HUNTER concurs in part and dissents in part.

Judge BRYANT concurs.

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

I disagree with the majority's holding "that the indictments in 98 CRS 0005 and 0006 are fatally defective, requiring that the judgments entered in those cases be vacated." Therefore, I respectfully dissent.

"Both our legislature and our courts have endorsed the use of short-form indictments for . . . sex offenses, even though such indictments do not specifically allege each and every element." *State v. Harris*, 140 N.C. App. 208, 215, 535 S.E.2d 614, 619 (2000) (citations omitted). Pursuant to N.C. Gen. Stat. § 15-144.2(b) (2001), "[i]f the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child . . ." An indictment including these averments and allegations "shall be good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years and all lesser included offenses." *Id.* The indictments at issue in this case (1) allege that each victim is under the age of thirteen; (2) name each victim; and (3) aver that defendant "unlawfully, willfully and feloniously did engage in a sex act . . ." Contrary to the majority, I believe these indictments are sufficient since they contain all the information

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required under N.C. Gen. Stat. § 15-144.2(b). While the indictments contain additional factual allegations, these unnecessary allegations should be treated as surplusage. *See State v. Moore*, 311 N.C. 442, 460, 319 S.E.2d 150, 156 (1984) (Meyer, J., concurring) (citing *State v. Moore*, 284 N.C. 485, 202 S.E.2d 169 (1974); *State v. Lewis*, 58 N.C. App. 348, 293 S.E.2d 638 (1982)).

This case can be compared to *State v. Dillard*, 90 N.C. App. 318, 320, 368 S.E.2d 442, 444 (1988), in which this Court concluded the indictment at issue was sufficient to charge the defendant with either first or second degree sexual offense. In *Dillard*, the indictment charged a violation of N.C. Gen. Stat. § 14-27.5 and was captioned “‘SECOND DEGREE SEXUAL OFFENSE.’” *Id.* The indictment stated “‘defendant . . . unlawfully, willfully and feloniously did engage in a sex offense with [victim’s name] age 8, by force and against that victim’s will. At the time of this offense the defendant was at least 12 years old and at least 4 years older than the victim.’” *Id.* This Court concluded “[t]he statements regarding the victim’s and defendant’s ages d[id] not render the indictment insufficient to charge a violation of G.S. 14-27.5 [second degree sexual offense,]” which offense did not include any age requirements of the victim or perpetrator. *Id.* at 320-21, 368 S.E.2d at 444. Although the indictment in *Dillard* included information in addition to that required in a short-form indictment for a sexual offense, this Court concluded the indictment was sufficient to charge the defendant with either first or second degree sexual offense. *Id.* at 320, 368 S.E.2d at 444.

The indictments in the instant case, as the indictment in *Dillard*, include elements from two different statutes. In this case, the indictments include elements from N.C. Gen. Stat. § 14-27.4 (first degree sexual offense) and elements from N.C. Gen. Stat. § 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old). In following *Dillard*, the indictments are sufficient to charge defendant with first degree sexual offense and all lesser included offenses. Therefore, I would hold that the indictments in 98 CRS 0005 and 0006 are not fatally defective.

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JAY T. PINTACUDA AND WIFE LUCRETIA PINTACUDA, PLAINTIFFS v.
JACK ZUCKEBERG, DEFENDANT

No. COA02-905

(Filed 5 August 2003)

1. Negligence— intervening cause—traffic accident—last second swerve

Summary judgment should not have been granted for defendant in a negligence action arising from a traffic accident where defendant stopped his car abruptly on an interstate highway, plaintiff attempted to avoid the accident by changing lanes, and he was injured when his motorcycle skidded. Defendant contended that the skid constituted an intervening cause, but defendant's alleged negligence set in motion a continuous succession of events, and plaintiff's skid was foreseeable.

2. Negligence— contributory—traffic accident—split-second judgment—hindsight irrelevant

Summary judgment should not have been granted for defendant on contributory negligence in a traffic accident case where defendant stopped abruptly on an interstate and plaintiff was injured when his motorcycle skidded as he tried to change lanes. Plaintiff testified in his deposition that he might have been able to stop without changing lanes, based on where his motorcycle came to rest, but hindsight is irrelevant. The proper question is whether a reasonable person, making a split-second decision in this situation, would have believed it necessary to swerve. Furthermore, where the motorcycle came to rest was in dispute.

3. Evidence— official accident reports—admissible

Official accident reports are admissible as records of regularly conducted activity and as public records and reports.

Judge TIMMONS-GOODSON dissenting.

Appeal by plaintiffs from order entered 17 May 2002 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 26 March 2003.

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Roberts & Stevens, P.A., by Anthony Alan Coxie and Jacqueline D. Grant, for plaintiffs-appellants.

Van Winkle Buck Wall Starnes & Davis, P.A., by W. Kevin Mclaughlin, for defendant-appellee.

GEER, Judge.

Plaintiffs Jay T. Pintacuda and his wife Lucretia Pintacuda appeal from the superior court's order granting defendant's motion for summary judgment. Mr. Pintacuda was severely injured when defendant abruptly stopped his car on an interstate highway and Mr. Pintacuda's motorcycle skidded as he attempted to avoid colliding with defendant's car. Defendant contends that no genuine issue of material fact exists as to the issues of proximate cause and contributory negligence and that the trial court therefore properly granted summary judgment. After reviewing the record, we conclude that the evidence raises issues of fact as to whether Mr. Pintacuda's skid constituted an independent intervening cause superseding defendant's negligence and as to whether Mr. Pintacuda was contributorily negligent. We, therefore, reverse.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The party moving for summary judgment must "clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 324 (1999). In reviewing a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing the motion. *Id.* Where the pleadings and proof disclose that no cause of action exists, summary judgment is properly granted. *See Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534-35, 180 S.E.2d 823, 830 (1971).

Plaintiff—a 55-year old SBI forensic scientist with more than 35 years of experience on motorcycles—was riding his motorcycle under the speed limit and at least three car lengths behind defendant's car in the left-hand lane of I-240 in Asheville. According to plaintiff's evidence, as he came over a rise in the road, he saw defendant stop his car "instantaneously," heard a noise, and saw the hood of defendant's car fly up. He immediately applied both his front and rear

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brakes, but feared he would crash into defendant's car and either be thrown over that car or be impaled on the back of the car.

Plaintiff made a split-second decision to avoid the impact by moving over into the right-hand lane, which he knew was clear. Unfortunately, as he swerved to avoid the car in front of him, his motorcycle began to skid for unknown reasons and came down in the right-hand lane. Plaintiff testified in his deposition that he "skidded on something or hit the reflector marker" and his motorcycle "came down." Although plaintiff was wearing protective clothing, he was seriously injured.

On 20 September 2000, plaintiffs filed a complaint alleging that defendant was negligent in failing to keep his vehicle under control, failing to bring his vehicle to a stop, and driving in a careless and heedless manner in wanton disregard of the rights and safety of others. Defendant filed a motion for summary judgment, which was heard by the trial court on 22 April 2002. Finding no genuine issue as to any material fact, the trial court concluded that defendant was entitled to judgment as a matter of law and therefore granted summary judgment in favor of defendant. From this order, plaintiffs appeal.

[1] The primary issue on appeal is whether plaintiff offered sufficient evidence to raise an issue of fact regarding whether defendant's negligence proximately caused plaintiff's injuries. As our Supreme Court has noted, "it is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979). We do not believe that this case falls into the exceptional category.

Although the critical issue with respect to proximate cause is the foreseeability of the plaintiff's injury, the law does not require that the precise injury be foreseeable to the defendant. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233-34, 311 S.E.2d 559, 565 (1984). Instead, "[t]he test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Williams*, 296 N.C. at 403, 250 S.E.2d at 258. Phrased differently, a plaintiff is only required to prove that the defendant, in the exercise of reasonable care, "might have foreseen that *some* injury would result from his act or omission, or that consequences of a *generally*

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injurious nature might have been expected.” *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (internal quotation marks omitted; emphasis added).

In considering whether the harm to a plaintiff was reasonably foreseeable to a defendant, the law “fix[es] [defendant] with notice of the exigencies of traffic” *Id.* Based on common driving experience, if a driver comes to an abrupt and unexpected halt on a highway, he should reasonably foresee (1) that a vehicle behind him will have the choice of either swerving to avoid his car or attempting to stop before rear-ending him; and (2) that his action creates a risk of injury to the driver of the following vehicle. Thus, in this case, a jury could reasonably conclude that Mr. Pintacuda’s swerve to avoid crashing into Mr. Zuckeberg was foreseeable and that Mr. Zuckeberg could have foreseen that his coming to an abrupt standstill on I-240 would likely result in some injury to Mr. Pintacuda. We cannot conclude as a matter of law that the possibility of Mr. Pintacuda’s motorcycle skidding was an unforeseeable result of Mr. Zuckeberg’s stopping his car unexpectedly on I-240.

Our Supreme Court has reached the same conclusion when considering analogous circumstances. In *Hall v. Coble Dairies, Inc.*, 234 N.C. 206, 67 S.E.2d 63 (1951), the defendant had parked a tractor-trailer on a paved portion of the highway. The plaintiff, after coming over a rise in the highway, saw the truck and was forced to swerve sharply in an unsuccessful attempt to avoid crashing into the truck. After colliding with the truck, the plaintiff, dazed but uninjured, got out of the car to assist his injured wife and was struck by another car.

The Supreme Court reversed the trial court’s dismissal of the case, holding that these facts were sufficient to support a finding that the truck company’s negligence was the proximate cause of plaintiff’s injuries:

[I]t is manifest that the defendants are chargeable with having foreseen that consequences of a generally injurious nature would likely result from their conduct in leaving the tractor-trailer on the paved portion of the highway, without lights, flares, and signals as alleged. Upon this record, we cannot say it was beyond the pale of natural consequences that the plaintiff in the ensuing collision was severely shocked, to the extent that he was “dazed and addled” and in that condition walked out on the highway and was hit by a passing motorist.

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Id. at 211, 67 S.E.2d at 66. If it is sufficiently foreseeable that a person could be struck by a second vehicle while walking in a daze after an accident, then it is sufficiently foreseeable that a motorcycle would skid while attempting to avoid a collision with a stopped car ahead. *See also Hairston*, 310 N.C. at 235, 311 S.E.2d at 566 (“Under the circumstances here disclosed, we believe a jury could find that a reasonably prudent person should have foreseen that [the dealership’s] negligence in failing to tighten the lugs on the wheel of the new automobile could cause the car to be disabled on the highway and struck by another vehicle, causing harm to the driver. Absent [the dealership’s] original negligence, the tragic series of events on I-85 would not have occurred; the danger was foreseeable.”).

Defendant points to Mr. Pintacuda’s deposition testimony in which he acknowledged that he did not know what precisely caused his motorcycle to skid as he changed lanes and argues that the existence of another, unknown cause of the skid precludes a jury from finding that Mr. Zuckeberg’s unexpected stop was the proximate cause of Mr. Pintacuda’s injuries. It is, however, well-established that “[t]here may be more than one proximate cause of an injury.” *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565. When two or more proximate causes join together to produce an injury, the first cause is insulated from liability *only if* it constitutes an independent, intervening cause that supersedes the original negligence. *Hall*, 234 N.C. at 211, 67 S.E.2d at 66-67.

It is not enough merely to show, as defendant has here, that some other factor came into play to cause a plaintiff’s injuries. That second cause, in order to be a superseding intervening cause, must:

interven[e] between the original negligent act or omission and the injury ultimately suffered, which turns aside the natural sequence of events and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated The causal connection must be actually broken and the sequence interrupted in order to relieve the defendant from responsibility. The mere fact that another person or agency concurs or co-operates in producing the injury or contributes thereto in some degree, whether large or small, is not of controlling importance.

Id. at 211-12, 67 S.E.2d at 67.

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In applying this test, the courts have again focused on foreseeability. The causal connection is not broken “if the intervening event is one which might in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant’s negligence is an essential link in the chain of causation.” *Id.* at 212, 67 S.E.2d at 67 (internal quotation marks omitted). Or, as stated in *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984), “in order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.” If the subsequent cause “is the very risk created” by the original negligence, then the original negligent actor is still liable. *Id.* at 195, 322 S.E.2d at 173.

Defendant relies on *McNair v. Boyette*, 15 N.C. App. 69, 189 S.E.2d 590, *aff’d*, 282 N.C. 230, 192 S.E.2d 457 (1972). In *McNair*, the defendant had negligently collided with another car. The plaintiff arrived after that collision and determined that no one was injured. After the plaintiff then crossed over the road to get a flashlight from another car to use in directing traffic, he was struck by yet another car. The court held that the last car’s negligence was “independent” because “it resulted in injury to plaintiff after the alleged negligence of [the defendant] had ceased to operate,” because plaintiff was not engaged in rescuing or helping defendant, and because defendant could not foresee that the last car would strike plaintiff when he was starting to direct traffic. *Id.* at 73, 189 S.E.2d at 593. The critical fact in *McNair* is that the events set in motion by the defendant’s negligence had essentially concluded before plaintiff was injured.

In contrast, the Supreme Court in *Hall*, when considering facts more in line with those of this case, held that the question whether a second vehicle’s negligence in striking the plaintiff was a superseding cause was not one that could be decided as a matter of law. 234 N.C. at 213, 67 S.E.2d at 68. The Court reasoned:

[I]t appears that the alleged negligence of the defendants caused the initial collision; that in the collision the plaintiff was “dazed and addled,” and in that condition walked out on the highway and was hit by the passing motorist and thereby suffered the injuries sued on. *The force set in motion by the defendants appears to have continued in active operation through the force it stimulated into activity down to the final injury. Thus, it would seem*

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the plaintiff has alleged a continuous succession of events, so linked together as to make a natural whole.

Id. (emphasis added).

Similarly, in this case, Mr. Zuckeberg's alleged negligence in coming to an unanticipated and immediate stop on I-240 set in motion a "continuous succession of events"—Mr. Pintacuda's swerve to avoid a collision, skidding, and resulting injury—that is "linked together" and "a natural whole." *Id.* at 212, 67 S.E.2d at 68. Mr. Zuckeberg's negligence had not ended and, as discussed above, Mr. Pintacuda's skid, while reacting to that negligence, was foreseeable.

A jury could reasonably find that the risk that Mr. Pintacuda might skid on his motorcycle while attempting to prevent a crash was precisely one of the risks created by Mr. Zuckeberg's negligence. Further, a jury could find that but for Mr. Zuckeberg's stopping, Mr. Pintacuda would not have swerved abruptly into the right lane; that if he had not swerved, he would not have skidded and been injured; and that Mr. Zuckeberg could reasonably have expected these events to occur as a result of his actions. *See also Riggs v. Akers Motor Lines, Inc.*, 233 N.C. 160, 165, 63 S.E.2d 197, 201 (1951) ("If the intervening cause is in reality only a condition on or through which the negligence of the defendant operates to produce an injurious result, it does not break the line of causation . . .").

[2] Defendant argues alternatively that plaintiff's swerve into the right-hand lane and resulting skid constituted contributory negligence. Defendant contends that plaintiff had sufficient time to apply his breaks and safely merge into a different lane, but negligently failed to maintain control of his motorcycle. For evidence supporting this conclusion, defendant points to plaintiff's deposition testimony that, based on where he recalls his motorcycle coming to rest, he might have been able to stop in time had he not changed lanes.

This reasoning misapplies traditional negligence analysis. We do not judge people's actions based on "20-20 hindsight." Rather, we ask whether a person's actions were reasonable in light of the circumstances at the time of the actions.

In other words, it is irrelevant that Mr. Pintacuda may believe now, after completion of all the events and while reflecting in a deposition, that he could have come to a stop safely without changing lanes. The proper question is whether a reasonable person, required to make a split-second decision while traveling 35 to 40 miles an hour

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and when only three car lengths from the car in front, would have believed it necessary to swerve to avoid a collision with that car. Further, Mr. Pintacuda's after-the-fact assessment is based on a fact in dispute. He recalls that his motorcycle came to rest just short of defendant's car, yet the official accident report placed the motorcycle alongside defendant's car.¹

Because the evidence, when viewed in the light most favorable to the plaintiff, presents issues of fact as to both proximate cause and contributory negligence, we reverse the superior court's order granting summary judgment.

Reversed.

Judge BRYANT concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

After a careful review of the record, I respectfully dissent. The majority concludes that summary judgment was inappropriate because of the proximate cause issue. This Court has previously stated that when a plaintiff has become aware that potential dangers have been created by the negligence of another, and then " 'by an independent act of negligence, brings about an accident,' " the defendant is relieved of liability, " 'because the condition created by [the defendant] was merely a circumstance of the accident and not its proximate cause.' " *McNair v. Boyette*, 15 N.C. App. 69, 73, 189 S.E.2d 590, 593, *affirmed*, 282 N.C. 230, 192 S.E.2d 457 (1972) (quoting *Powers v. Sternberg*, 213 N.C. 41, 44, 195 S.E. 88, 90 (1938)). I believe that defendant's act of stopping his vehicle was merely a circumstance of the accident and not the proximate cause of plaintiff's injuries.

In order to state a claim for negligence, "plaintiff must show (1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the

[3] 1. Defendant argues that the accident report is inadmissible hearsay, citing a 1979 case, *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 258 S.E.2d 864 (1979). This case, of course, predates this State's adoption of the Rules of Evidence in 1983. Official accident reports are admissible under both Rule 803(6) (records of regularly conducted activity) and Rule 803(8) (public records and reports). See *Keith v. Polier*, 109 N.C. App. 94, 98, 425 S.E.2d 723, 726 (1993).

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circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury.” *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984). Therefore, upon a showing that the defendant was negligent, there must also be a “showing or determination of proximate cause.” *King v. Allred*, 309 N.C. 113, 117, 305 S.E.2d 554, 557 (1983), *disc. review denied*, 315 N.C. 184, 337 S.E.2d 857 (1985). Proximate cause is defined as

a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston, 310 N.C. at 233, 311 S.E.2d at 565.

Here, the evidence fails to show that defendant was the proximate cause of plaintiff’s injuries. During his deposition, plaintiff gave the following testimony:

Q: Tell me what happen[?]

A: . . . I just know I applied my brakes and then made my move to go into that next-hand lane, which I did maneuver that. I don’t know whether I skidded on something or hit the reflector marker[.]

Q: —you did not intentionally lay your bike down in an attempt to slide. That wasn’t an intentional act.

A: I recall that it went down. I recall that . . . I could make my maneuver because I had been scanning, and I believed that right lane to be open, . . . I had sufficient time to make my move into that right-hand lane, apply my brakes, and make my swerve into that right-hand lane.

Q: How slow or how fast do you believe you were going when you hit that object which caused your bike to begin to skid?

A: . . . I know I slowed down with the application of both the front and rear brakes. . . . I just know that I slowed down. . . . I slowed down to the point where I was able to make my swerve into the right-hand lane.

The majority contends that plaintiff made a “split-second” decision to avoid an impact with defendant’s vehicle and “began to skid

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for unknown reasons.” A review of plaintiff’s testimony clearly places responsibility for the accident on him either “skidding on something” or hitting a lane reflector. Moreover, plaintiff’s testimony reveals that he was aware of the potential danger created by defendant’s accident, had sufficient time to apply his breaks, safely merge into a different lane, and in an independent act, failed to maintain control of his motorcycle. Therefore, it is clear that there was an independent cause, apart from defendant’s collision, which resulted in plaintiff sustaining injuries. Accordingly, I would affirm the order of the trial court.



EVA M. STERNER, PLAINTIFF v. DELMAR S. PENN, REGINA GUNN PENN, AMERITRADE, INC., ADVANCED CLEARING, INC., DEUTSCHE BANC ALEX. BROWN, INC. AND WALL STREET ACCESS, DEFENDANTS

No. COA02-827

(Filed 5 August 2003)

1. Securities— brokerage and clearing—negligence—no duty to third party

Negligence claims against brokerage firms and clearing companies did not state claims, and 12(b)(6) dismissals were properly granted, where the action arose from a third party’s (Penn’s) investment activities for plaintiff and there were no allegations that defendants acted as investment advisors to Penn or to plaintiff. Defendants had no duty to supervise and monitor Penn to protect plaintiff.

2. Securities— brokerage and clearing—constructive fraud

Constructive fraud claims against brokerage firms and clearing companies did not state claims, and 12(b)(6) dismissals were properly granted, where the action arose from a third party’s (Penn’s) investment activities for plaintiff and the complaint alleged that defendants benefitted by earnings commissions on the sales transactions ordered by Penn. Plaintiff did not allege that defendants sought to benefit themselves by taking unfair advantage of plaintiff.

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3. Securities— brokerage and clearing—unfair and deceptive practices statute—not applicable

North Carolina's unfair and deceptive trade practices statute did not apply, and 12(b)(6) dismissals were properly granted, where the action arose from a third party's (Penn's) investment activities for plaintiff. Application of N.C.G.S. § 75-1.1 would create overlapping supervision, enforcement, and liability in an area of law pervasively regulated by state and federal statutes and agencies.

Appeal by plaintiff from order entered 5 February 2002 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 20 February 2003.

S. Mark Rabil, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Ronald R. Davis and Allison R. Bost, for defendant-appellees Ameritrade, Inc. and Advanced Clearing, Inc.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Maria C. Papoulias, for defendant-appellees Deutsche Banc Alex. Brown, Inc. and Wall Street Access.

HUDSON, Judge.

Plaintiff Eva M. Sterner lost more than \$160,000 that she had entrusted to defendant Delmar Penn, believing that he would invest the money for her. Penn used the services of defendants Ameritrade, Inc. ("Ameritrade"); Advance Clearing, Inc. ("Advanced Clearing"); Deutsche Banc Alex. Brown, Inc. ("Deutsche Banc"); and Wallstreet Access ("Wallstreet Access"), brokerage firms and securities clearing companies. Sterner sued the defendants, asserting claims for negligence, constructive fraud, and unfair and deceptive trade practices. Defendants moved to dismiss the suit, and the trial court granted the motion. For the reasons set forth below, we affirm the decision of the trial court.

BACKGROUND

According to the complaint, in the fall of 1998, plaintiff, a widow, met Penn, who told her that he was a highly successful investor. Penn and his wife promised to invest plaintiff's money and guaranteed plaintiff that they would double or even triple her investment.

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Plaintiff agreed and, in September 1998, transferred a total of \$170,700.00 to Penn for him to invest.

Penn placed plaintiff's money into accounts that he had opened with defendants Ameritrade and Deutsche Banc, both brokerage firms. The accounts were in the names of Delmar Penn and an entity known as BTL Worldwide Unlimited, Inc., which was not a valid corporation. Penn executed trades on plaintiff's behalf through Ameritrade and Deutsche Banc and through their respective securities clearing companies, Advanced Clearing and Wall Street Access. Penn traded through these accounts and lost all of plaintiff's money except for \$2000, which he returned to her.

On 30 July 1999, plaintiff sued Penn and his wife for breach of contract, negligence, constructive fraud, and unfair trade practices. Because of criminal charges pending against Penn, the trial court stayed plaintiff's case. In September 2001, plaintiff moved to amend the complaint to add Ameritrade, Advanced Clearing, Deutsche Bank, and Wallstreet Access. The trial court allowed the motion, and plaintiff filed her amended complaint on 6 November 2001, adding claims of negligence, constructive fraud, and unfair and deceptive trade practices against these additional defendants.

On 11 January 2002, Ameritrade and Advanced Clearing moved to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6). Shortly thereafter, Deutsche Banc and Wallstreet Access likewise filed a Rule 12(b)(6) motion. The trial court granted both motions, and plaintiff appealed to this Court. Plaintiff moved to voluntarily dismiss Penn and his wife without prejudice pending the outcome of this appeal, and the trial court granted the motion.

ANALYSIS

Plaintiff assigns error to the trial court's grant of defendants' motions to dismiss. A Rule 12(b)(6) motion tests the legal sufficiency of the pleading. N.C.G.S. § 1A-1, Rule 12(b)(6) (2001); *Shaut v. Cannon*, 136 N.C. App. 834, 834-35, 526 S.E.2d 214, 215, *disc. rev. denied*, 352 N.C. 150, 543 S.E.2d 892 (2000). A Rule 12(b)(6) motion will be granted “(1) when the face of the complaint reveals that no law supports plaintiff's claim; (2) when the face of the complaint reveals that some fact essential to plaintiff's claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiff's claim.” *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000)

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(quoting *Peterkin v. Columbus County Bd. of Educ.*, 126 N.C. App. 826, 828, 426 S.E.2d 733, 735 (1997)). We treat all factual allegations of the pleading as true but not conclusions of law. *Id.* In sum, a Rule 12(b)(6) motion asks the court to “determine whether the complaint alleges the substantive elements of a legally recognized claim.” *Embree Const. Group v. Rafcor, Inc.*, 330 N.C. 487, 490, 411 S.E.2d 916, 920 (1992).

A.

[1] Plaintiff argues first that the complaint sufficiently alleges a negligence claim against the four corporate defendants because it asserts that they negligently allowed Penn, an unlicensed broker, to transfer plaintiff’s money from her account to the brokerage accounts and also because defendants failed to supervise the manner in which Penn invested plaintiff’s funds. Because we can find no authority in North Carolina law for imposing a duty upon defendants to oversee Penn in these respects, we conclude that the trial court properly dismissed the claims for negligence.

To withstand a motion to dismiss, plaintiff’s negligence complaint must allege “the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff.” *Peace River Elec. Coop., Inc. v. Ward Transformer Co.*, 116 N.C. App. 493, 511, 449 S.E.2d 202, 214 (1994), *disc. rev. denied*, 339 N.C. 454 S.E.2d 655 (1995). The sine qua non of a negligence claim is a legal duty owed by defendant to the plaintiff. *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 224 (4th Cir. 2002).

In North Carolina, securities broker/dealers like defendants have long been subject to liability for negligence to customers. *Folger v. Clark*, 198 N.C. 44, 150 S.E. 618 (1929). This case, however, presents a different question—whether a securities broker/dealer has a legal duty to “supervise” and “monitor” the investments ordered by its customer on behalf of that customer’s client. Because our courts have not yet answered this question, we begin our analysis with authority from other jurisdictions.

Plaintiff’s brief cites no persuasive authority indicating that securities broker/dealers are charged with such a broad duty, and we have found none. To the contrary, other courts have declined to impose the broad duty that plaintiff asks us to recognize and impose today.

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In *Cumis Insurance Society, Inc. v. E. F. Hutton & Co.*, 457 F. Supp. 1380 (1978), for example, a federal district court in New York faced a similar situation. There, the plaintiff was an assignee of two credit unions who were the victims of a fraud perpetrated by an investment advisor named George Oppenheimer. The complaint named E. F. Hutton & Co., (“Hutton”) a broker with which Oppenheimer did business, and several other parties as defendants, in part because Oppenheimer used Hutton’s broker/dealer services to execute trades on behalf of his clients. *Cumis*, 457 F. Supp. at 1382-83. Specifically, the plaintiff alleged that Hutton knew or should have known about inappropriate investment orders that Oppenheimer had placed. *Id.* at 1387. The plaintiff premised the alleged constructive knowledge on Hutton’s alleged duty to investigate all the clients of all its customers to ascertain the appropriateness of their customers’ orders. *Id.*

The New York court held that no such duty existed for two persuasive reasons. First, the plaintiff itself had “no reason or right to expect [Hutton] to supervise the use of [its money], for they dealt with Oppenheimer, not Hutton.” *Id.* Second, the plaintiff could find no precedent to support its argument that such a duty should be imposed on broker/dealers. *Id.*

Similarly, other courts have refused to impose a duty on broker/dealers to supervise and monitor the investment orders of their customers. The policy justifications for these decisions range from ethical considerations to simple economics. *See Unity House v. North Pacific Investments*, 918 F. Supp. 1384, 1393 (D. Hawaii 1996) (holding it would be unethical to require a broker/dealer to inquire into all the agreements between its customer and his or her clients); *Chee v. Marine Midland Bank, N.A.*, 1991 WL 15301 *4 (E.D.N.Y. 1991) (stating that “[t]here is even greater reason to reject monitoring liability in the case of discount brokers whose admitted function is not to give advice so investors can save money on commissions”).

In *Eisenberg*, 301 F.3d 220, the Fourth Circuit, applying North Carolina law, held that a bank does not owe a duty to a noncustomer with no relationship to the bank who is defrauded by the bank’s customer through use of its services. *Eisenberg*, 301 F.3d at 225. The court found that the plaintiff fell “into the undefined and unlimited category of strangers who might interact with [defendant’s] customer.” *Id.* at 226. To extend defendant’s duty to include strangers like plaintiff, the court reasoned, “would expose banks to unlimited liability for unforeseeable frauds.” *Id.*

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Although the facts in *Eisenberg* are distinguishable from those before us, we find the logic of the decision and its public policy considerations analogous and persuasive. Plaintiff alleges that defendants “owed a duty to exercise reasonable care and diligence in their relationship with the Plaintiff” and that they breached this duty when they failed to properly supervise Penn, their customer, or to “monitor the funds or investments of the Plaintiff,” which were ordered by Penn. We cannot agree that this could state a claim under North Carolina law, as we see no basis to impose such a “wide-ranging duty on brokers.” *Cumin*, 457 F. Supp. at 1387. Plaintiff alleges that defendants executed Penn’s investment orders. There are neither allegations that defendants acted as investment advisors to Penn, nor to plaintiff. Because defendants had no duty to supervise and monitor Penn’s actions to protect plaintiff, we hold that plaintiff’s negligence claim fails. *Meyer v. McCarley & Co.*, 288 N.C. 62, 68, 215 S.E.2d 583, 587 (1975) (holding that the “existence of a legal duty” constitutes the threshold requirement for a negligence action).

Thus, we hold that plaintiff’s claim for negligence against defendants is legally insufficient and, therefore, that the trial court properly granted defendants’ motion to dismiss on this basis.

B.

[2] Plaintiff also argues that her complaint sufficiently alleges a constructive fraud claim against defendants. Again, we disagree.

In *State Ex Rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 499 S.E.2d 790 (1998), *cert. dismissed*, 350 N.C. 57, 510 S.E.2d 374 (1999), we described the essential elements of a claim based on constructive fraud. To survive a motion to dismiss, such a claim must:

allege facts and circumstances (1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Further, an essential element of constructive fraud is that defendants sought to benefit themselves in the transaction.

Petree Stockton, L.L.P., 129 N.C. at 445, 499 S.E.2d at 798 (citation and quotation marks omitted); *see also Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666-67, 488 S.E.2d 215, 224 (1997). The benefit sought by the defendant must be more than a continued relationship with the plaintiff. *Barger*, 346 N.C. at 667, 488 S.E.2d at 224.

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Moreover, “payment of a fee to a defendant for work done by that defendant does not by itself constitute sufficient evidence that the defendant sought his own advantage.” *Nationsbank of N.C. v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000) (holding that where plaintiff alleged that the defendant “took advantage of his position of trust and benefitted from his actions in that he was paid for his services,” such an allegation by itself was insufficient to show that the defendant sought his own advantage).

Here, plaintiff alleges in her complaint that defendants, acting as broker/dealers, accepted her money, thereby creating a relationship of trust and confidence between them. Without deciding whether those allegations are sufficient, we affirm the dismissal of plaintiff’s constructive fraud claim based on her failure to allege that defendants sought a benefit through that relationship. The closest allegation is that plaintiff contends that her money was traded through defendants and that defendants financially benefitted via “commissions” on “sales transactions.”

We conclude, therefore, that the complaint, taken in the light most favorable to plaintiff, alleges simply that defendants benefitted by earning commissions on the sales transactions ordered by Penn. This allegation, by itself, is not enough; it fails to show that defendants sought to benefit themselves by taking unfair advantage of plaintiff, as our law requires. Thus, we affirm the trial court’s dismissal of plaintiff’s constructive fraud claim.

C.

[3] Plaintiff also contends that our unfair and deceptive trade practices statute, G.S. § 75-1.1 et seq., is applicable to securities transactions such as those executed by defendants. Specifically, she alleges that defendants facilitated Penn’s wrongful actions by accepting money transferred directly from plaintiff’s bank accounts to those opened by Penn; by allowing plaintiff’s money to be invested through an unlicensed broker and failing to verify whether Penn was a licensed broker; by failing to verify whether BTL Worldwide Unlimited, Inc. was a valid corporation; and by failing to monitor the “appropriateness of the ridiculous investments” that Penn made. We agree with the trial court, and with defendants, that North Carolina’s Unfair and Deceptive Trade Practices Act does not apply to the present situation.

The Unfair and Deceptive Trade Practice Act (“UDTPA” or “the Act”) prohibits unfair trade practices affecting commerce. N.C. Gen.

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Stat. § 75-1.1 (2001). The UDTPA does not govern “all wrongs;” accordingly, plaintiffs must “first establish that defendants’ conduct was in or affecting commerce before the question of unfairness or deception arises.” *HAJMM v. House of Raeford Farms*, 328 N.C. 578, 592-93, 403 S.E.2d 483, 492 (1991) (citation and quotation marks omitted). Commerce is defined as “all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.” N.C. Gen. Stat. § 75-1.1(b) (2001).

In addition to the explicit exception for members of a learned profession, common law exceptions to the Act have evolved since the statute was created. Relevant here, our Supreme Court has explicitly held that “securities transactions are beyond the scope” of the UDTPA. *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 275, 333 S.E.2d 236, 241 (1985). According to the Court in *Skinner*, the UDTPA does not apply to securities transactions because such application would create overlapping supervision, enforcement, and liability in an area of law that is already pervasively regulated by state and federal statutes and agencies. *Id.*; see also *Dalton v. Camp*, 353 N.C. 647, 657, 548 S.E.2d 704, 711 (2001); *HAJMM*, 328 N.C. at 593, 403 S.E.2d at 493 (1991).

We have found one decision that closely parallels the situation here. In *Harrah v. J.C. Bradford & Co.*, 37 F.3d 1493, 1994 WL 543528 (4th Cir. Oct. 6, 1994), an individual convinced several investors to allow him to invest their money in stock options, guaranteeing them “large returns with no risk of loss.” *Id.* at *1. The individual invested the plaintiffs’ money through trading accounts with the defendant, a brokerage firm. *Id.* There was no indication that the defendant knew the sources of the funds. When the plaintiffs demanded that the individual return their money, he returned small amounts but never fully repaid them. *Id.* at *2. Plaintiffs then sued, alleging, inter alia, that the defendant had violated the UDTPA. *Id.* The district court granted summary judgment for the defendant.

The Fourth Circuit then affirmed the trial court, holding that the plaintiffs could not bring an UDTPA claim against the defendant brokerage firm. *Id.* at *3. As the court explained, the individual’s transactions with the defendant were “plainly securities-related activities.” *Id.* at *4. The UDTPA does not govern securities transactions because there is “pervasive and intricate” securities regulation under both the North Carolina Securities Act as well as the Securities Exchange Act of 1934.” *Id.* at *3 (citing *Skinner*, 314 N.C. at 274, 333 S.E.2d at 241).

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Penn here, like the individual in *Harrah*, convinced plaintiff to permit him to invest her money and also guaranteed large returns. Using plaintiff's money, Penn, again like the individual in *Harrah*, invested funds with Ameritrade and Deutsche Banc and conducted the trading activity through Advanced Clearing and Wallstreet Access. We are persuaded that the Fourth Circuit's reasoning in *Harrah* is sound and, therefore, we hold that North Carolina's UDTPA has no application here.

Plaintiff relies on *HAJMM*, 328 N.C. 578, 403 S.E.2d 483, for her contention that the sale of securities can be classified as a commercial transaction, so that the UDTPA comes into play. In *HAJMM*, the defendant, whose main business involved processing turkey and other poultry, issued revolving fund certificates. *Id.* at 580-81, 403 S.E.2d at 485. The Supreme Court held that the UDTPA did not apply, extending its decision in *Skinner* (that the Act does not apply to corporate securities) to the revolving fund certificates at issue in *HAJMM*. This holding had two grounds. First, securities transactions are already subjected to pervasive regulation by other sources. *Id.* at 593, 403 S.E.2d at 493. Second, the Court explained, the "legislature simply did not intend for the trade, issuance and redemption of corporate securities or similar financial instruments" to constitute business activities as that term is used in the Act:

"Business activities" is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized.

Issuance and redemption of securities are not in this sense business activities. The issuance of securities is an extraordinary event done for the purpose of raising capital in order that the enterprise can either be organized for the purpose of conducting its business activities or, if already a going concern, to enable it to continue its business activities. Subsequent transfer of securities merely works a change in ownership of the security itself.

Id. at 594, 403 S.E.2d at 493. Accordingly, the transactions at issue were not "in or affecting commerce," even under a reasonably broad interpretation of the legislative intent underlying these terms." *Id.*

Plaintiff takes heart in the second explanation and contends that the UDTPA applies here because defendants' central business activ-

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ity actually *is* securities transactions. In light of the Supreme Court's clear pronouncement in *Skinner* that the Act does not apply to securities transactions, however, we must affirm the trial court's dismissal of this count.

CONCLUSION

For the reasons set forth above, we affirm the decision of the trial court to dismiss plaintiff's complaint.

Affirmed.

Judges McGEE and STEELMAN concur.

THOMAS E. HODGIN, III, EMPLOYEE, PLAINTIFF v. THOMAS E. HODGIN, III, D/B/A,
HODGIN CARPET, EMPLOYER, AND N.C. FARM BUREAU MUTUAL INSURANCE
COMPANY, CARRIER, DEFENDANTS

No. COA02-1007

(Filed 5 August 2003)

Workers' Compensation— hernia—medical testimony as to cause—speculative

Speculative medical testimony was insufficient to support the Industrial Commission's findings and conclusion in a workers' compensation case that plaintiff's hernia was caused by work related activity. Plaintiff, a carpet layer, suffered a rare paraesophageal hernia which he contended was caused by lifting an unusually heavy chest of drawers, but the entirety of the medical testimony was that the cause of plaintiff's hernia remains unclear.

Appeal by defendants from opinion and award entered 28 May 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 May 2003.

Kathleen G. Sumner, for plaintiff-appellee.

Young Moore and Henderson P.A., by Dawn Dillon Raynor, for defendants-appellants.

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[159 N.C. App. 635 (2003)]

LEVINSON, Judge.

This case arises from an award and opinion of the North Carolina Industrial Commission, finding plaintiff suffered a compensable hernia injury when he lifted a chest of drawers 9 February 1999. We reverse.

On 2 February 1999, plaintiff saw Dr. David Patterson for complaints of epigastric abdominal pain. He described to Dr. Patterson that “[o]ver the last month he has had a feeling of ‘gas being trapped’ in his subxiphoid area, especially after eating rapidly.” Dr. Patterson noted that plaintiff’s symptoms were possibly caused by a hiatal hernia, gastroesophageal reflux disease, and/or colon malignancy but concluded that further tests should be conducted to properly diagnose plaintiff. Those tests were scheduled for 22 February 1999.

On the morning of 9 February 1999, plaintiff saw Dr. Philip Carter for complaints of “back and thigh pain.” Dr. Carter noted that plaintiff had a “recent history of either ulcer or hiatal hernia.” Later that day, plaintiff felt a “bad pain” in his chest area under his ribs when he attempted to lift a particularly heavy chest of drawers. Although plaintiff initially sought medical attention that same day, he abandoned treatment after his pain subsided.

On 22 February 1999, plaintiff underwent an esophagogastroduodenoscopy as part of the tests scheduled by Dr. Patterson on 9 February 1999. That test revealed a “large para-esophageal hernia.” On 17 March 1999, complaining of chest pain, plaintiff saw Dr. Anita Lindsey who also diagnosed plaintiff with a paraesophageal hernia. Dr. Lindsey performed surgery to repair the hernia on 26 March 1999, and plaintiff subsequently returned to work on 19 May 1999.

On 31 August 2000, the Industrial Commission filed an opinion and award finding plaintiff suffered a paraesophageal hernia on 9 February 1999 as a direct result of lifting an “unusually heavy chest of drawers,” “which constituted an interruption in [his] normal work routine.” The Industrial Commission awarded plaintiff temporary total disability compensation and medical expenses incurred as a result of his injury. Both parties appealed to the Full Commission (Commission). On 28 May 2002, the Commission modified the opinion and award. Defendant now appeals, contending (1) the “Commission erred by finding and concluding that plaintiff sustained a hernia as a direct result of” his work related activity on 9 February

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1999, and (2) the Commission erred in calculating plaintiff's average weekly wage.

Initially we review the Commission's conclusions to determine whether they are supported by its findings.

The Commission found, in pertinent part:

3. On February 9, 1999, . . . [a]s the plaintiff-employee and his assistant lifted the unusually heavy chest of drawers, the plaintiff-employee felt a sudden onset of severe pain in his chest that did not exist before. The plaintiff-employee experienced difficult breathing and took many breaks during the remainder of his shift. The plaintiff-employee completed his shift.

4. Upon completion of his shift, the plaintiff-employee drove himself to the emergency room. After waiting approximately 45 minutes, the plaintiff-employee's chest pain subsided and the plaintiff-employee left without seeing a physician.

5. On February 2, 1999, the plaintiff-employee presented to Dr. David R. Patterson, an internist and specialist in gastroenterology, for evaluation of epigastric abdominal pain. Dr. Patterson reviewed the plaintiff-employee's December 4, 1997 x-rays and examined the plaintiff-employee.

6. The plaintiff-employee presented to Dr. Michael E. Norins, an internist, for an annual physical on February 7, 1999. The plaintiff had no complaints and felt well. The plaintiff-employee also presented to Dr. Philip J. Carter, an orthopedic, on February 9, 1999 complaining of low back pain, but no chest pains.

7. Dr. Patterson eventually diagnosed the plaintiff-employee with a p[ar]a[es]ophageal hernia. Dr. Patterson opined that symptoms of a p[ar]a[es]ophageal hernia include chest pains and he stated that a p[ar]a[es]ophageal hernia might be asymptomatic for extended periods of time. Dr. Patterson further stated that on February 9, 1999, when the plaintiff-employee was at work and experienced acute chest pain which eventually subsided, this episode could have been related to the plaintiff-employee's p[ar]a[es]ophageal hernia.

. . . .

9. The plaintiff-employee presented to the emergency room on March 17, 1999 complaining of chest pain. Dr. Anita K. Lindsey, surgeon, diagnosed the plaintiff-employee with a left

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p[ara]esophageal hernia. Dr. Lindsey recommended surgery to repair the plaintiff-employee's p[ara]esophageal hernia that she performed on March 26, 1999.

10. Dr. Lindsey opined that a p[ara]esophageal hernia can be asymptomatic for some time and that there is no way to know exactly when the plaintiff-employee's p[ara]esophageal hernia appeared, although severe chest pain, heartburn and gas pressure felt in the chest are symptoms. Dr. Lindsey also stated that p[ara]esophageal hernias are rare.

11. Dr. Lindsey further opined that there are three causes of p[ara]esophageal hernia: 1) congenital; 2) acquired; and 3) sudden trauma. Dr. Lindsey stated that the plaintiff-employee, a carpet layer, who constantly lifts carpet and moves some furniture is at an increased risk of developing a hernia of any type, but that it is rare for a person with several different types of hernias to be more likely to have a congenital predisposition to hernias.

12. Dr. Lindsey opined that without x-rays of the plaintiff-employee between December 1997 and March 1999, there is no way to establish as a medical fact when the plaintiff-employee's p[ara]esophageal hernia occurred or presented. Dr. Lindsey further stated that no one could palpate the plaintiff-employee's p[ara]esophageal hernia because it was behind the plaintiff-employee's rib cage and that only the esophagogastroduodenoscopy could reveal whether the plaintiff-employee had a p[ara]esophageal hernia prior to February 9, 1999. The plaintiff-employee's esophagogastroduodenoscopy was performed after February 9, 1999.

The Commission concluded, in pertinent part:

1. The plaintiff[-employee] lifted the unusually heavy chest of drawers of February 9, 1999 that constituted an interruption in the plaintiff's normal work routine, as it was not a part of his usual routine for the chest of drawers to be so heavy. N.C. Gen. Stat. § 97-2(6).

2. The plaintiff[-employee] sustained a hernia that appeared suddenly and did not exist before arising out of the course of his employment with the defendant-employer and as a direct result of a specific traumatic incident of the work assigned on February 9, 1999[,] when he lifted the unusually heavy chest of drawers. N.C. Gen. Stat. § 97-2(18).

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Our review of the Commission's opinion and award "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by [any] competent evidence, even when there is evidence to support contrary findings." *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709, *disc. review denied*, 350 N.C. 310, 534 S.E.2d 596, *aff'd*, 351 N.C. 42, 519 S.E.2d 524 (1999); *see also Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998).

In order to recover for a hernia an employee has the burden of showing:

- a. That there was an injury resulting in hernia or rupture[;]
- b. That the hernia or rupture appeared suddenly[;]
-
- d. That the hernia or rupture immediately followed an accident [or arose] out of . . . a specific traumatic incident[; and]
- e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

N.C.G.S. § 97-2(18) (2001).

For an injury to be compensable under the terms of the Workmen's Compensation Act . . . [t]here must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question. The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself. There will be "many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of."

Click v. Freight Carriers, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965)). However, in cases presenting "complicated medical questions far removed from the ordinary experience and knowledge

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of laymen, only an expert can give competent opinion evidence as to the cause of the injury.” *Id.* at 167, 265 S.E.2d at 391. “Reliance on Commission expertise is not justified where the subject matter involves a complicated medical question.” *Id.* at 168, 265 S.E.2d at 391.

In a case decided since the Commission’s own decision in this case, our Supreme Court has held that in such cases, “expert medical testimony is necessary to provide a proper foundation for the Commission’s findings.” *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). But “when such expert opinion testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence on issues of medical causation.” *Id.* at 232, 581 S.E.2d at 753 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000)). “The evidence must . . . take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation.” *Id.* (quoting *Gilmore v. Board of Education*, 222 N.C. 358, 365, 23 S.E.2d 292, 296 (1942)).

We find the instant case functionally indistinguishable from *Holley*. In *Holley*, an employee twisted her leg while at work and felt a sudden pain in her left calf. She was subsequently diagnosed with a pulled calf muscle. *Holley*, 357 N.C. at 230, 581 S.E.2d at 751. Approximately six weeks later, the employee developed a painful, swollen leg. She was diagnosed with deep vein thrombosis (“DVT”), a condition caused by a blood clot in a deep vein that obstructed blood flow and caused inflammation. *Id.* at 230, 581 S.E.2d at 751-52. The issue presented to the Court was the sufficiency of the evidence regarding the cause of the employee’s DVT. *Id.* at 231, 581 S.E.2d at 752. Although two physicians testified that it was possible that her DVT was caused by her earlier accident, both “were unable to express an opinion to any degree of medical certainty as to the cause of plaintiff’s DVT.” *Id.* at 234, 581 S.E.2d at 753-54. The Court found the expert testimony revealed that neither of plaintiff’s physicians could establish the required causal connection between plaintiff’s accident and her deep vein thrombosis.” *Id.* at 234, 581 S.E.2d at 754.

Our Supreme Court has recognized that although physicians “are trained not to rule out medical possibilities no matter how remote[,] . . . mere possibility has never been legally competent to prove causation.” *Id.*; *Young*, 353 N.C. at 233, 538 S.E.2d at 916.

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Although our courts do not require medical certainty, a physician's "speculation" is insufficient to establish causation." *Holley*, 357 N.C. at 234, 581 S.E.2d at 754; *Young*, 353 N.C. at 233, 538 S.E.2d at 916. Thus, the Court has held testimony that an event "could" or "might" be the cause of an injury to be insufficient to support a causal connection where there is further evidence tending to show that the expert's opinion is mere guess or speculation. *Young*, 353 N.C. at 233, 538 S.E.2d at 916.

As the case *sub judice* involves a complicated medical question, namely the genesis of plaintiff's paraesophageal hernia, we look to the findings associated with the physicians' testimonies. *Click*, 300 N.C. at 167, 265 S.E.2d at 391. We conclude the Commission's findings do not support its second conclusion of law.

The only findings by the Commission arguably relating to causation involve the testimonies of Drs. Patterson and Lindsey, experts called to testify by defendants. Although we note a third physician, Dr. Michael Norins, testified for plaintiff, he was neither asked his opinion regarding the likely cause or source of plaintiff's hernia nor did he offer such an opinion. Moreover, the Commission made no findings regarding Dr. Norins other than to state that plaintiff "presented to [Dr. Norins] for an annual physical on February 7, 1999" and that he "had no complaints and felt well."

The Commission found that Dr. Patterson testified "when the plaintiff-employee was at work and experienced acute chest pain which eventually subsided, this episode *could have been related to* the plaintiff-employee's p[ara]esophageal hernia." (emphasis added). As the Commission also found Dr. Patterson testified that paraesophageal hernias can be asymptomatic for extended periods and chest pains are only symptomatic of the condition, an opinion by Dr. Patterson that plaintiff's chest pain on 9 February 1999 "could have been *related to*" plaintiff's work related activity tends to show no more than plaintiff felt symptoms of his hernia on 9 February 1999, not causation. (emphasis added). In light of Dr. Patterson's other statements, which were noted by the Commission, this statement is not sufficient to establish a causal connection between the work related activity of lifting the chest of drawers on 9 February 1999 and the genesis of his hernia.

Furthermore, even assuming *arguendo*, Dr. Patterson's statement was probative of causation, due to its speculative nature it would be insufficient to support the conclusion drawn by the Commission. Dr. Patterson merely stated that plaintiff's pain on 9 February 1999

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“*could have been related*” to his hernia. (emphasis added). Without some indicia of greater confidence or reliability, evidence that plaintiff’s pain was merely possibly related to his hernia is insufficient expert evidence upon which to base a conclusion of causation. See *Holley*, 357 N.C. at 233-34, 581 S.E.2d at 753-54; *Young*, 353 N.C. at 233, 538 S.E.2d at 916. We conclude Dr. Patterson’s testimony is within that realm of speculation or guesswork prohibited in forming the basis for a finding that plaintiff’s injury was caused by his work related activity. See *Holley*, 367 N.C. at 233-34, 581 S.E.2d at 753-54.

The Commission’s only other findings relating to an expert’s theory of causation state that “Dr. Lindsey opined that a p[ar]aesophageal hernia can be asymptomatic for some time and that there is no way to know exactly when the plaintiff-employee’s p[ar]aesophageal hernia appeared.” The Commission also found that Dr. Lindsey testified, upon being asked whether plaintiff developed the hernia in 1998 or that portion of 1999 prior to February 22, 1999, that “without x-rays of the plaintiff-employee between December 1997 and March 1999, there is no way to establish as a medical fact when the plaintiff-employee’s p[ar]aesophageal hernia occurred or presented.” Rather than supporting the Commission’s conclusion, these findings, together with plaintiff’s prior complaints of epigastric pain, serve to undermine it.

At most, the Commission’s findings support a conclusion that plaintiff, as a carpet layer, was at an increased risk of developing a hernia, that he developed a hernia sometime between 1997 and 22 February 1999, and that his 9 February 1999 pain may have been symptomatic of his hernia. The Commission’s findings are completely devoid of any indication that any medical expert concluded there was anything more than the mere possibility that plaintiff’s work related activity may have been related to, much less the cause of, his hernia.

Moreover, our review of the record reveals the absence of any record evidence to support findings that would support the Commission’s second conclusion of law. The physicians did not render an opinion within a reasonable degree of medical certainty or within *any* discernible likelihood or probability the genesis of plaintiff’s hernia. Rather, the entirety of the physicians’ testimonies tends to show the cause of plaintiff’s hernia remains unclear and the subject of mere speculation.

In addition to the testimony noted by the Commission in its findings, Dr. Patterson also testified, “I don’t think anybody really knows

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for sure what causes these hernias. . . .” When asked if paraesophageal hernias can be caused by heavy lifting, he responded, “I’ve really looked a lot in the textbooks for what the cause of these is, and I can’t find any definite studies that say. I would certainly think that it’s possible, but I can’t give you any medical data to support that.” Furthermore, Dr. Patterson testified, when asked if he thought plaintiff had his hernia when he examined him on 2 February 1999, “[t]his would just be conjecture. There’s no way I can prove this, but I would say yes, most likely it probably was.” And Dr. Patterson concluded, “[t]here’s certainly no way I could tell you when in time this hernia occurred.”

The record does not support a finding that plaintiff’s 9 February 1999 work related activity caused the hernia. The findings are insufficient to support a conclusion that plaintiff’s injury was caused by his work related activity on 9 February 1999. Plaintiff has failed to carry his burden of proving that his claim is compensable. *See Henry v. A.C. Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950). As we find this issue dispositive, we need not address defendant’s remaining assignment of error. The Commission’s opinion and award is reversed.

Reversed.

Chief Judge EAGLES and Judge BRYANT concur.

ALICE Y. McGRADY, EMPLOYEE, PLAINTIFF v. OLSTEN CORP., EMPLOYER, AND
HARTFORD SPECIALTY RISK, CARRIER, DEFENDANTS, DEFENDANT-APPELLANTS

No. COA02-1035

(Filed 5 August 2003)

**Workers’ Compensation— course of employment—fall from
pear tree**

A workers’ compensation plaintiff suffered a compensable injury when she fell from a pear tree while working as a certified nursing assistant providing in-home care. The Industrial Commission’s findings were binding on appeal because defendants did not assign error to those findings, and those finding specifically state that plaintiff was required to make meals and snacks,

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that she regularly served fruit to her patient as a part of her job, that plaintiff decided to pick a pear for herself and her patient, and that her activities were in the course and scope of her employment. Those findings sufficiently support the conclusion that plaintiff's injury arose out of her employment. Generally, a plaintiff's negligence or foolish activity does not defeat entitlement to workers' compensation.

Appeal by defendants from opinion and award entered 18 April 2002 by the Industrial Commission. Heard in the Court of Appeals 19 May 2003.

Doran, Shelby, Pethel and Hudson, P.A., by David A. Shelby, for plaintiff-appellee.

Morris York Williams Surles & Barringer, L.L.P., by Susan H. Briggs and Keith B. Nichols, for defendant-appellants.

LEVINSON, Judge.

Defendants (Olsten Corporation and ITT Specialty Risk Services, Inc.) appeal from a divided opinion of the Industrial Commission, awarding plaintiff (Alice McGrady) medical benefits and temporary total disability. We affirm.

The factual background of this appeal is summarized as follows: Plaintiff was fifty years old at the time of the hearing and had an eighth grade education. In 1994, she completed the course required for certification as a certified nursing assistant (CNA), and was employed by defendant as a CNA. As a CNA, plaintiff provided in-home care for patients requiring assistance with daily living. In July, 1999, plaintiff's only client was Ms. Withers, an elderly woman with limited physical abilities. Plaintiff assisted Ms. Withers with bathing, dressing, personal care, housekeeping, and meal preparation. In addition, plaintiff drove Ms. Withers to various places in the community and did her grocery shopping. Ms. Withers enjoyed fresh fruit, which plaintiff obtained for her from the local farmers market or at a grocery store.

Plaintiff's regular hours were from 6:00 a.m. until 3:30 p.m. On 26 July 1999 plaintiff arrived at her usual time and assisted Ms. Withers with breakfast. During breakfast, Ms. Withers asked plaintiff to take her dog "Footsie" out to the yard. Plaintiff testified she "usually took

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her out . . . sometimes twice a day.” While plaintiff was outside with Footsie, she noticed that Ms. Withers’ pear tree had borne a pear. She had previously obtained fruit from Ms. Withers’ peach tree without incident and decided to retrieve the pear for her and Ms. Withers to share. Plaintiff began to climb the tree; however, she soon realized that the pear was too high up for her to shake it out of the tree, so she started back down. As plaintiff was climbing back to the ground, she fell. Plaintiff was taken by ambulance to a hospital, where physicians determined that she had broken her back, suffering “50 percent compression fracture” of her spine, and resulting in “quite a bit of damage to the vertebral body.” She was initially treated with pain medication and bed rest, until further examination revealed that plaintiff had both an “acute compression fracture” and a “burst fracture” of the spine. Accordingly, plaintiff’s treating physician performed surgery on her vertebrae and implanted steel rods in her back. Despite the surgery, plaintiff continued to experience pain, and her physician testified at the hearing that it was unlikely that plaintiff could ever return to work, “even light duty.” He also testified that plaintiff’s injuries were caused by the fall from Ms. Withers’ pear tree.

On 9 September 1999, plaintiff filed a claim for workers’ compensation, which was denied by defendants on the basis that her injuries were not causally connected to her employment. A hearing was conducted before Deputy Commissioner Wanda Taylor on 17 April 2000, and on 5 October 2000 the deputy commissioner issued an opinion denying plaintiff’s claim for workers’ compensation. The opinion concluded that, although plaintiff’s accident had proximately caused her injuries, the fall itself “was not an activity which a person so employed might reasonably do in employment such as plaintiff’s.” Plaintiff appealed to the Full Commission, which conducted a review of the record on 7 January 2002. On 18 April 2002, the Industrial Commission issued an opinion reversing the deputy commissioner and awarding plaintiff medical compensation and temporary total disability. The opinion concluded that plaintiff’s attempt to get a pear from Ms. Withers’ pear tree either was “within plaintiff’s work duties” or was not a serious deviation from her job duties, and thus that plaintiff’s injuries were compensable. One commissioner dissented on the basis that “[c]limbing a pear tree was not a contemplated action of plaintiff’s employment” and thus that there was “no causal relationship between plaintiff’s injuries and . . . her employment as an in-home caregiver.” From this opinion and award, defendants appealed.

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Standard of Review

“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) (citation omitted). Further, the Industrial Commission’s findings of fact “are conclusive on appeal if supported by any competent evidence.” *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). “Thus, on appeal, this Court ‘does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.’” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). “Even where there is competent evidence to the contrary, we must defer to the findings of the Commission where supported by any competent evidence. The Commission’s findings of fact may only be set aside when ‘there is a complete lack of competent evidence to support them.’” *Griggs v. E. Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003) (quoting *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390 (1980)). The Commission’s conclusions of law, however, are reviewed *de novo*. *Id.*

Defendants argue on appeal that the Industrial Commission erred by finding that plaintiff suffered a compensable injury. Under N.C.G.S. § 97-2(6) (2001) a compensable injury “mean[s] only injury by accident arising out of and in the course of the employment[.]” In the present case, there is no dispute that plaintiff’s injuries were caused by an accident. However, defendants contend that plaintiff’s injury did not arise “out of and in the course of” her employment.

“Whether an injury arises out of and in the course of a claimant’s employment is a mixed question of fact and law, and our review is thus limited to whether the findings and conclusions are supported by the evidence.” *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997) (citing *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982)). “The phrase ‘arising out of’ refers to the requirement that there be some causal connection between the injury and claimant’s employment. ‘In the course of’

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refers to the time and place constraints on the injury; the injury must occur during the period of employment at a place where an employee's duties are calculated to take him[.]” *Creel, id.* (citing *Clark v. Burton Lines*, 272 N.C. 433, 437, 158 S.E.2d 569, 571 (1968)). Thus, “[w]here the evidence shows that the injury occurred during the hours of employment, at the place of employment, and while the claimant was actually in the performance of the duties of the employment, the injury is in the course of the employment.” *Choate v. Sara Lee Products*, 133 N.C. App. 14, 17, 514 S.E.2d 529, 532-33 (citing *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E.2d 47 (1968)), *aff'd*, 351 N.C. 46, 519 S.E.2d 523 (1999). “In other words, to be compensable, the injury must spring from the employment or have its origin therein.” *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E.2d 350, 354 (1972) (citations omitted). The burden of proof is upon the claimant who “must establish both the ‘arising out of’ and ‘in the course of’ requirements to be entitled to compensation.” *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247-48, 377 S.E.2d 777, 780-81, *aff'd*, 325 N.C. 702, 386 S.E.2d 174 (1989) (citing *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 354, 364 S.E.2d 417, 420 (1988)). Moreover:

while the ‘arising out of’ and ‘in the course of’ elements are distinct tests, they are interrelated and cannot be applied entirely independently. Both are part of a single test of work-connection. Because ‘the terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other.’ ”

Id. (citing *Watkins v. City of Wilmington*, 290 N.C. 276, 281, 225 S.E.2d 577, 581 (1976), and quoting *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 252, 293 S.E.2d 196, 199 (1982)) (emphasis added).

In the instant case, the Industrial Commission’s findings of fact included, in relevant part, the following:

2. In August 1994, plaintiff became employed with defendant-employer as an in-home caregiver[.] . . . As a caregiver, plaintiff had a variety of job duties relating to the care of clients[.] . . . Plaintiff also was required to make meals for clients for breakfast, lunch and dinner as well as snacks, perform household chores such as cleaning and laundering, as well as transporting the client and grocery shopping if requested.

....

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4. While working for defendant-employer plaintiff was assigned as a caregiver in the home of Ms. Nancy Withers.

5. On July 26, 1999, after assisting Ms. Withers out of bed and preparing her breakfast, plaintiff took Ms. Withers' dog outside and, while outside in the yard, plaintiff decided to pick a pear from the pear tree for herself and Ms. Withers. Plaintiff climbed into the tree to retrieve a pear and, as she was coming down, she fell from the tree.

....

7. Plaintiff regularly served fruit to Ms. Withers as a part of her job.

8. As an employee for defendant-employer, plaintiff was to provide services pursuant to . . . [a] plan of care which . . . authorized plaintiff to fix meals for Ms. Withers and to go grocery shopping.

9. . . . Plaintiff's activities in obtaining and preparing food for Ms. Withers [were] in the course and scope of her employment with defendant-employer. . . . The taking of the pear was thereby consistent with plaintiff's duties to acquire and prepare food for Ms. Withers. . . .

Under N.C.G.S. § 97-86 (2001), an appeal from an opinion and award of the Industrial Commission is taken "under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions[, and the] procedure for the appeal shall be as provided by the rules of appellate procedure." N.C.R. App. P. 10(a) provides that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal." Because defendants do not assign as error any of the Industrial Commission's findings of fact, they are "conclusively established on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003) (citing *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000)).

We next determine whether the Industrial Commission correctly applied the law to these facts when it reached the following conclusion: "On July 26, 1999, plaintiff sustained a compensable injury by accident arising out of and in the course of her employment with defendant-employer when she fell from a pear tree while picking a pear for the consumption of her employer's patient."

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Defendants argue that plaintiff's injury is not compensable. They contend that, because plaintiff was not authorized to climb a tree in order to obtain a pear for Ms. Withers, plaintiff's injury did not result from "a risk which might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment." *Bartlett v. Duke University*, 284 N.C. 230, 233, 200 S.E.2d 193, 195 (1973) (denying compensation to claimant who aspirated food while dining out during a business trip). Defendants frame the issue of compensability primarily in terms of whether plaintiff was authorized to obtain a pear by climbing a tree, which defendants term "the critical issue[] in this case[.]"

However, a review of relevant appellate law indicates that a plaintiff's entitlement to workers' compensation generally is not defeated by his negligence, or by evidence that at the time of injury the plaintiff was engaged in a foolish, even forbidden, activity:

The Workers' Compensation Act is a compromise. . . . Nothing in it supports the notion that it was enacted just for the protection of careful, prudent employees, or that employees that do not stick strictly to their business are beyond its protection. . . . [I]t is not required that the employment be the sole proximate cause of the injury, it being enough that 'any reasonable relationship to the employment exists, or employment is a contributory cause.'

Bare v. Wayne Poultry Co., 70 N.C. App. 88, 92, 318 S.E.2d 534, 538 (1984) (plaintiff suffers compensable injury "participating in horse-play" with deboning knife) (quoting *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960)), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). *See also, e.g.*, the following cases allowing compensation: *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 259, 293 S.E.2d 196, 202 (1982) (compensation not barred by actions that violate employer's rules unless undertaken in "disobedience of a direct and specific order by a then present superior"); *Watkins v. City of Wilmington*, 290 N.C. 276, 283, 225 S.E.2d 577, 582 (1976) (injury compensable if "competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury was incidental to his employment") (citation omitted); *Stubblefield v. Construction Co.*, 277 N.C. 444, 445, 177 S.E.2d 882, 183 (1970) (plaintiff suffered fatal accident while idly knocking dust and debris from conveyor rollers, actions which "had no relation to his duties"); *Choate v. Sara Lee Products*, 133 N.C. App. 14, 514 S.E.2d 529, (1999) (plaintiff injured in parking lot after she left production line in violation of company rules); *Spratt v. Duke*

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Power Co., 65 N.C. App. 457, 310 S.E.2d 38 (1983) (claimant injured while running to vending machine in violation of company rules); *Patterson v. Gaston Co.*, 62 N.C. App. 544, 547, 303 S.E.2d 182, 184 (“[N]egligence [does] not necessarily bar the award of compensation[.]”), *disc. review denied*, 309 N.C. 822, 310 S.E.2d 351 (1983). As explained by this Court:

An appellate court is . . . justified in upholding a compensation award if the accident is ‘fairly traceable to the employment as a contributing cause’ or if ‘any reasonable relationship to employment exists.’ . . . [C]ompensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer ‘to any appreciable extent’ when the accident occurred . . . *in close cases, the benefit of the doubt concerning this issue should be given to the employee* in accordance with the established policy of liberal construction and application of the Workers’ Compensation Act.

McBride v. Peony Corp., 84 N.C. App. 221, 226-27, 352 S.E.2d 236, 240 (1987) (emphasis added) (quoting *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963), and *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E.2d 596, 600 (1955)).

We conclude that the Industrial Commission’s findings of fact easily establish that plaintiff’s accident arose “in the course of” her employment. We further conclude that these findings of fact sufficiently support its conclusion that plaintiff’s injury arose “out of” her employment. We note that the Commission’s findings specifically state that plaintiff (1) “was required to make meals . . . as well as snacks”; (2) “regularly served fruit to Ms. Withers as a part of her job”; (3) “took Ms. Withers’ dog outside and . . . decided to pick a pear . . . for herself *and Ms. Withers*”; and (4) that plaintiff’s “activities in obtaining . . . food for Ms. Withers [were] in the course and scope of her employment with defendant-employer.”

Defendants’ arguments are not without force. However, bearing in mind that we are bound by the Industrial Commission’s findings of fact, we are constrained to conclude that plaintiff suffered a compensable injury. Accordingly, the opinion and award of the Industrial Commission is

Affirmed.

Chief Judge EAGLES and Judge BRYANT concur.

IN RE WILL OF SMITH

[159 N.C. App. 651 (2003)]

IN THE MATTER OF THE WILL OF LOUELLA OVERTON SMITH

No. COA02-607

(Filed 5 August 2003)

Wills— caveat proceeding—directed verdict—premature

A directed verdict for caveators on the issue of undue influence was premature in a caveat proceeding because it was granted prior to the close of all the evidence.

Appeal by propounders from judgment dated 22 October 2001 and orders filed 2 October 2001 and 15 October 2001 by Judge Narley L. Cashwell in Superior Court, Durham County. Heard in the Court of Appeals 13 February 2003.

Newsom, Graham, Hedrick & Kennon, P.A., by Josiah S. Murray, III and John C. Rogers, III, for caveators-appellees.

Glenn, Mills & Fisher, P.A., by Robert B. Glenn, Jr. and Carlos E. Mahoney, for propounders-appellants.

McGEE, Judge.

This case arises out of a will caveat to the last will and testament of Louella Overton Smith (testatrix). Testatrix's husband died in 1978 and testatrix suffered a heart attack in February 1997.

Ronald Coulter (Coulter), an attorney, prepared several instruments dated 11 September 1998, which testatrix executed. Testatrix executed: (1) a will (September 1998 will); (2) a power of attorney appointing her daughter, Betty Poole, as attorney-in-fact for testatrix; and (3) a health care power of attorney appointing Betty Poole and testatrix's son, Wallace Smith, as joint health care agents for testatrix. The 1998 will provided for an approximately equal division of testatrix's estate among her children, Betty Poole, Wallace Smith, and Peggy Scarborough. The 1998 will nominated Wallace Smith and Betty Poole's husband, Kenneth Poole, as co-executors.

In March 1999, Wallace Smith took testatrix to Coulter and asked him to prepare a new power of attorney for testatrix. Coulter refused. Wallace Smith telephoned another lawyer, Ruth Hammer (Hammer), about preparing a new power of attorney for testatrix. Wallace Smith took testatrix to see Hammer on 16 March 1999. Hammer prepared a new power of attorney, which testatrix executed, naming Garland

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Weathers (Weathers), testatrix's brother-in-law, as testatrix's attorney-in-fact. Weathers was an accountant and had prepared Wallace Smith's tax returns for twenty years. Testatrix signed a new health care power of attorney on 4 June 1999 which was drafted by Hammer, naming Wallace Smith as her sole health care agent and Weathers as her alternate health care agent. Hammer consulted with testatrix alone during the drafting and creation of each of testatrix's estate documents.

At trial of the will caveat, Hammer testified that although she did not know about all of testatrix's medical records, she did receive and review a report by Dr. Marvin P. Rozear (Dr. Rozear) from 27 January 1999, prior to drafting a new will for testatrix (the June 1999 will). In Dr. Rozear's report, Dr. Rozear concluded that testatrix was "overtly demented" and the report detailed numerous and severe cognitive deficiencies of testatrix.

Wallace Smith took testatrix to Hammer's office on 10 June 1999 where testatrix executed the will. The June 1999 will disinherited testatrix's daughters, Betty Poole and Peggy Scarboro, except for a bequest of \$100.00 to each, leaving virtually testatrix's entire estate to her son, Wallace Smith. The will named Weathers as executor and also as a contingent beneficiary.

Weathers filed a special proceeding dated 30 June 2000 seeking payment from testatrix of \$14,690 for services rendered as testatrix's attorney-in-fact during the period of 1 June 1999 to 31 March 2000. Hammer represented Weathers in that special proceeding until replaced by propounders' counsel in this action.

Wallace Smith and Weathers placed testatrix in the Carver Living Center in Durham, North Carolina on 1 February 2000, where testatrix resided until her death on 3 November 2000.

Testatrix's June 1999 will was admitted to probate in common form on 4 December 2000. Weathers filed an application for probate and letters testamentary, as executor of testatrix's will. Betty Poole and Peggy Scarboro (caveators) filed a caveat to the June 1999 will on 19 December 2000 alleging, *inter alia*, that testatrix lacked testamentary capacity and was subjected to undue influence in the execution of the June 1999 will. Attached to the caveat was an affidavit of Dr. Rozear in which he stated that at all times from and after 3 February 1999 testatrix was "highly susceptible to influence from others."

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A hearing was held and an order entered on 12 February 2001 concerning the alignment of all persons interested in testatrix's estate and listing Weathers and Wallace Smith as the propounders in the caveat proceeding. Propounders filed a motion to dismiss in part the caveat proceeding, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), which was denied in an order filed 25 May 2001. Caveators filed two sets of requests for admissions to which Wallace Smith filed responses.

Caveators filed on 6 September 2001 a motion to compel the disclosure of privileged communications between testatrix and her treating physicians, pursuant to N.C. Gen. Stat. § 8-53. Propounders filed a verified response to caveators' motion to compel on 13 September 2001, asking the trial court: to prohibit counsel for the caveators from having *ex parte* contact with the treating physician of testatrix without the express consent of the executor; to compel counsel for caveators to fully disclose the substance of all *ex parte* conversations he had with testatrix's treating physician, and that all information and opinions obtained as a result of *ex parte* communications between testatrix's treating physician and counsel for caveators be excluded from evidence at trial. The trial court entered an order on 2 October 2001 granting caveators' motion to compel disclosure and denying propounders' motions.

Propounders filed a motion *in limine* seeking to prohibit caveators from offering the testimony of Dr. Rozear because of unauthorized *ex parte* contacts between Dr. Rozear and counsel for caveators. The trial court denied propounders' motion *in limine* without prejudice.

The trial of the caveat proceeding began on 17 October 2001. Propounders called four witnesses to testify: (1) Ruby Gardner, the assistant clerk of superior court in Durham County; (2) Hammer, the attorney who drafted the June 1999 will; (3) Bonnie Lou Picard, a witness to the execution of the June 1999 will; and (4) Tim Moore, another witness to the execution of the June 1999 will. Among the documents propounders offered into evidence was the June 1999 will. Propounders then rested.

After propounders rested, caveators filed a motion for directed verdict on the issue of undue influence. Before the trial court ruled on caveators' motion for directed verdict, propounders verbally moved for leave to reopen their case.

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The trial court entered a final judgment as to the caveat on 22 October 2001 denying propounders' motion for leave to reopen, granting caveators' motion for directed verdict, and ordering that the probate of the common form of the June 1999 will be set aside.

Propounders filed notice of appeal of: the trial court's final judgment in the caveat proceeding, the denial of propounders' motion *in limine*, and the 2 October 2001 order denying propounders' motion with respect to the *ex parte* contacts between Dr. Rozear and counsel for caveators. Pursuant to an order entered by the trial court on 26 February 2002, Weathers was permitted to resign as executor of testatrix's estate. This Court entered an order 13 June 2002 allowing Weathers to withdraw as a party to this appeal, leaving only Wallace Smith as a propounder on this appeal.

Propounder Wallace Smith argues that the trial court erred in granting caveators' motion for a directed verdict. Motions for directed verdict have generally been deemed improper in caveat proceedings. *In re Will of Ellis*, 235 N.C. 27, 32, 69 S.E.2d 25, 28 (1952) (caveat proceeding "must proceed to judgment, and a motion for judgment as of nonsuit, or for directed verdict will not be allowed"); *Burney v. Holloway*, 225 N.C. 633, 636, 36 S.E.2d 5, 7 (1945) ("Since a proceeding to probate a will in common form is *in rem*, it has been held—as far as we know without exception in this jurisdiction—that when the issue of *devisavit vel non* has been raised, the proceeding is not subject to nonsuit at the instance of the propounders or other parties concerned."); and *In re Will of Jarvis*, 107 N.C. App. 34, 37, 418 S.E.2d 520, 522 (1992), *aff'd in part, reversed in part*, 334 N.C. 140, 430 S.E.2d 922 (1993) (citing cases supporting this traditional view).

However, in *In re Will of Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975), our Supreme Court held that the caveators in that case could move for directed verdict on the issue of whether the propounders offered sufficient evidence of testamentary disposition. The Court in *Mucci* stated:

Where, as here, propounder fails to come forward with evidence from which a jury might find that there has been a testamentary disposition it is proper for the trial court under Rule 50 of the Rules of Civil Procedure to enter a directed verdict in favor of the caveators and adjudge, as a matter of law, that there can be no probate.

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Id. at 36, 213 S.E.2d at 214. The Court reasoned that “[r]ather than direct or peremptorily instruct the jury to do what is essentially a mechanical act the better practice is for the trial court to enter a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure.” *Id.* at 37, 213 S.E.2d at 214. Our Supreme Court thereby held that where a propounder fails to present evidence from which a jury might find that there has been a testamentary disposition, the court may enter a directed verdict in favor of the caveators on that issue. *Id.*

Our Court considered in *In re Will of Jarvis*, the issue of whether a trial court may direct a verdict for the propounders “(i) on the issue of due execution where there is no factual dispute as to the manner in which the paper writing was executed and (ii) on the remaining issues when the caveators’ evidence is insufficient as a matter of law to support a jury verdict.” *Jarvis*, 107 N.C. App. at 38, 418 S.E.2d at 523. This Court held that “the trial court may direct a verdict for [the] propounders in a caveat proceeding *at the close of all evidence*, where appropriate.” *Id.* at 36-37, 418 S.E.2d at 522 (emphasis added). The Supreme Court, while reversing the case in part on the issue of sufficiency of the evidence, affirmed the central holding of this Court’s opinion as to the appropriateness of allowing motions for directed verdict by the propounders at the close of all evidence. *In re Jarvis*, 334 N.C. 140, 430 S.E.2d 922 (1993). *See also In re Will of Sechrest*, 140 N.C. App. 464, 468, 537 S.E.2d 511, 514 (2000), *disc. review denied*, 353 N.C. 375, 547 S.E.2d 16 (2001) (allowing the propounders to move for directed verdict at the close of all evidence on the issues of undue influence and testamentary capacity); *In re Will of Jones*, 114 N.C. App. 782, 443 S.E.2d 363, *disc. review denied*, 337 N.C. 693, 448 S.E.2d 526 (1994) (allowing the propounders to move for directed verdict at the close of all evidence on the issues of undue influence and testamentary capacity); *In re Will of Penley*, 95 N.C. App. 655, 383 S.E.2d 385, *disc. review denied*, 326 N.C. 48, 389 S.E.2d 93 (1990) (acknowledging the propriety of the propounders moving for directed verdict at the close of all evidence in a caveat proceeding but denying that motion based on the evidence).

In summary, although motions for directed verdict have not generally been granted in caveat proceedings, our Courts have carved out exceptions to this traditional rule, including: (1) the propounders may move for directed verdict on the issue of undue influence and testamentary capacity at the close of all the evidence; (2) the propounders may move for directed verdict on the issue of whether a

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validly executed will exists at the close of all evidence; and (3) the caveators may move for directed verdict at the close of the propounders' case on the issue of whether a will is validly executed.

Caveat proceedings are unique in nature, as explained by our Supreme Court in *In re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948):

It is not a civil action, as classified in the Code of Civil Procedure, but a special proceeding *in rem* leading to the establishment of the will as a testamentary act under the issue *devisavit vel non*. . . . Often this issue is subdivided, according to the angle or nature of the attack, into ancillary issues, the most common of which are those relating to undue influence and testamentary capacity; but every caveat to a will leads to the simple inquiry we have mentioned, *devisavit vel non*, and the rules of procedure are framed with reference to that feature.

Id. at 487, 50 S.E.2d at 558 (citations omitted). *See generally In re Will of Barnes*, 157 N.C. App. 144, 579 S.E.2d 585 (2003) (when the propounders presented evidence of the validity of the probated will in the first stage of the trial, followed by the caveators' evidence of undue influence and lack of testamentary capacity, the propounders were allowed to present evidence in response to these challenges by the caveators).

Our Courts have continued to treat caveat proceedings differently under the North Carolina Rules of Civil Procedure. *See, e.g., In re Will of Dunn*, 129 N.C. App. 321, 327, 500 S.E.2d 99, 103, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 645 (1998) (declining to apply the implied waiver provisions of N.C. Gen. Stat. § 1A-1, Rule 49(c) to will caveat proceedings); *In re Will of Krantz*, 135 N.C. App. 354, 358 n.2, 520 S.E.2d 96, 99 n.2 (1999), *disc. review denied*, 351 N.C. 356, 542 S.E.2d 212 (2000) (recognizing, without deciding, the possibility that summary judgment under N.C. Gen. Stat. § 1A-1, Rule 56 may not be appropriate in caveat proceedings).

In addition, when the party with the burden of proof moves for a directed verdict, a specialized rule applies, dictating that such a directed verdict "would only be appropriate if the credibility of movant's evidence is 'manifest as a matter of law.'" *Jarvis*, 107 N.C. App. at 38-39, 418 S.E.2d at 523 (quoting *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979)). We note that the caveators in a will caveat proceeding continue to bear the burden of proof on the issue of undue influence despite any presumptions that may arise in

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their favor. *In re Will of Atkinson*, 225 N.C. 526, 530-31, 35 S.E.2d 638, 640 (1945).

In consideration of the above discussion, a motion on the issue of undue influence is inappropriate by caveators at this early stage in the proceedings. Therefore, the trial court erred in directing a verdict for caveators on the issue of undue influence prior to the close of all the evidence in the caveat proceeding. We remand this matter to the trial court for further proceedings.

We need not address propounder's remaining assignments of error in view of our decision above. We specifically note that we do not address at this time propounder's challenge to the trial court's denial of propounder's motion *in limine*, on the issue of whether Dr. Rozear's testimony was admissible, because the trial court denied the motion without prejudice, and at the time caveators moved for directed verdict, caveators had not attempted to introduce the challenged evidence. The trial court did not rule on this issue and it would be premature for us to presently consider propounder's assignments of error relating to that evidence.

Reversed and remanded.

Judges HUDSON and STEELMAN concur.

MATTHEW H. COOK, PLAINTIFF V. MARIA ELIANNE COOK, DEFENDANT

No. COA02-1188

(Filed 5 August 2003)

1. Child Support, Custody, and Visitation— support—changing jobs—earning capacity rule—bad faith required

The trial court abused its discretion by using the earning capacity rule to calculate child support where there was no showing that plaintiff had reduced his income in bad faith. The law requires both voluntary underemployment or unemployment and bad faith. The court found in this case that the reduction in income which came from leaving one job (YMCA aquatics director) while looking for another (full time teaching) was not in bad faith.

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2. Child Support, Custody, and Visitation— support—changing investment strategy—earning capacity rule—bad faith required

The trial court abused its discretion when calculating child support by imputing income from investments where the court found that plaintiff had changed his investment strategy from income to growth, but made no findings as to motive.

Appeal by plaintiff from order entered 29 April 2002 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 13 May 2003.

Law Office of Heather A. Shade, by Heather A. Shade; and Gum & Hillier, P.A., by Howard L. Gum, for plaintiff appellant.

Robert E. Riddle, P.A., by Diane K. McDonald, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff Matthew H. Cook and defendant Maria Elianne Cook were married on 11 January 1999. Soon after, their child, John Aaron Cook, was born on 9 May 1999. Plaintiff and defendant separated on 27 October 1999 and were subsequently divorced. Defendant was granted primary custody of the child.

On 1 February 2001, a child support order was entered mandating that plaintiff pay child support to defendant in the amount of \$516.00 per month. In addition, plaintiff was maintaining health insurance for the child, costing an additional \$232.00 a month.

The February 2001 order noted that plaintiff was employed and earned \$24,500.00 per year at his position at the local YMCA. He also earned \$11,400.00 per year from interest and dividend income from money he had inherited from his father and subsequently invested. The trial court included this amount in calculating plaintiff's child support obligation in accordance with the North Carolina Child Support Guidelines, rather than deviating from them as requested by defendant. Defendant was not employed at the time, as she was a student at the University of North Carolina at Asheville. There were no day-care expenses for the child at that time.

On 9 August 2001, defendant filed a motion in the cause seeking modification of the previous child support order pursuant to N.C. Gen. Stat. § 50-13.4 (2001). According to her motion, she had pro-

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cured employment as a realtor, anticipating approximately \$20,000.00 in earnings her first year, and she now had day-care expenses. Also in her motion, it was noted that plaintiff had ceased paying for health insurance.

The matter was heard on 14 December 2001. The parties stipulated that a substantial change in circumstances had occurred based upon the facts of defendant's employment and day-care costs. Defendant had become a realtor for Coldwell Banker, and she had secured a place for the child at a day-care facility beginning on 2 January 2002 at a cost of \$441.00 per month. Thus, all that remained was recalculation of plaintiff's child support obligation.

While circumstances for defendant had changed, so had those surrounding plaintiff. Since the first order for child support, his income had decreased. In May of 2001, he became certified as a teacher. As a result of this, coupled with other problems at the YMCA, plaintiff resigned his position with the YMCA. Plaintiff did not have employment secured and searched for full-time teaching employment. What he found was part-time and substitute teaching positions. His testimony at the hearing revealed that he had earned the following in those capacities during the months before the hearing: \$57.00 in September; \$1,054.50 in October; and \$1,665.00 in November.

Further, plaintiff's interest and dividend income had also changed. First, plaintiff's investment portfolio had declined in overall value since the previous hearing by 11.5%. Second, his portfolio had been restructured by him to achieve long-term growth. As a result, his interest and dividend income was now, according to the trial court, \$7,200.00 (\$600.00 a month).

In his order of 29 April 2002, the Honorable Gary S. Cash found that plaintiff had voluntarily reduced his income by resigning his position at the YMCA, yet this was not done in bad faith. Nevertheless, Judge Cash imputed to plaintiff income in the amount of \$24,500.00 (former YMCA wage), as "he has the ability to earn said amount as wages."

Judge Cash also found that plaintiff's income from interest and dividends had been reduced due, at least in part, to intentional actions on his part. As a result, his income had dropped from \$11,400.00 to \$7,200.00 annually. The order did not make a finding as to whether these actions were done in bad faith. Rather than use the present income figure, \$7,200.00, Judge Cash fashioned a formula of his own to determine what value he would impute. As mentioned

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above, the value of the account had dropped by 11.5% since the previous hearing. This was due to market conditions and not to any action by plaintiff. Yet the restructuring was because of plaintiff's action, according to Judge Cash. Thus, he imputed the interest and dividend income figure from the previous hearing minus 11.5% (11.5% of \$11,400.00 equals \$1,311.00), arriving at the new figure of \$10,089.00 (\$11,400.00 minus \$1,311.00).

Accordingly, Judge Cash added the two income amounts (\$24,500.00 + \$10,089.00) to arrive at plaintiff's gross income, \$34,589.00, "for the purpose of establishing child support" Plaintiff was ordered to pay \$637.14 on child support per month. Plaintiff appeals.

On appeal, plaintiff contends that the trial court erred in calculating child support by (I) imputing employment income to plaintiff when he did not reduce his income in bad faith or to avoid or minimize child support; and (II) imputing investment income to plaintiff rather than using the actual investment income at the time of the hearing.

I.

[1] In his first assignment of error, plaintiff contends that the trial court abused its discretion by employing the "earning capacity rule" for the purposes of calculating guideline child support absent a showing that plaintiff voluntarily reduced his income in bad faith.

When modifying the amount of a child support obligation, the trial court must generally consider the party's actual income at the time of trial in accordance with the North Carolina Child Support Guidelines. *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997). However, those guidelines provide that:

If either parent is voluntarily unemployed or underemployed to the extent that the parent cannot provide a minimum level of support for himself or herself and his or her children when he or she is physically and mentally capable of doing so, *and the court finds that the parent's voluntary unemployment or underemployment is the result of a parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation*, child support may be calculated based on the parent's potential, rather than actual, income.

N.C. Child Support Guidelines, 2003 Ann. R. (N.C.) 33, 35 (2003) (emphasis added).

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Our Court has established that in this type of case:

The primary issue is “whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent.” *Wolf*, 151 N.C. App. at 527, 566 S.E.2d at 519. The earnings capacity rule can be applied if the evidence presented shows that a party has disregarded its parental obligations by:

(1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family’s financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.

Wolf, 151 N.C. App. at 526-27, 566 S.E.2d at 518-19 (citing *Bowes v. Bowes*, 287 N.C. 163, 214 S.E.2d 40 (1975)). The situations enumerated in *Wolf* are specific types of bad faith that justify the trial court’s use of imputed income or the “earnings capacity” rule.

Mason v. Erwin, 157 N.C. App. 284, 289, 579 S.E.2d 120, 123 (2003).

The trial court made the following finding of fact as to plaintiff’s employment income:

6. That at the time of the previous Order, the Plaintiff was employed at the YMCA as an aquatics director; that his salary was \$24,500.00 per year; that on May 3, 2001, the Plaintiff wrote a letter to his superior at the YMCA in which he voluntarily terminated his employment, effective June 1, 2001; that the Plaintiff had no other anticipated employment, but hoped to obtain full-time employment as a teacher, for which he is certified. *That the Plaintiff knew by terminating his employment his income would be substantially reduced and that his child would no longer have health insurance coverage; that this decision by Plaintiff to voluntarily reduce his employment was not made in bad faith, but was a deliberate deduction of and depression of Plaintiff’s wage income; that this Court therefore should impute to Plaintiff income*

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from wages of \$24,500.00; that he has the ability to earn said amount as wages.

(Emphasis added.)

The trial court has not made sufficient findings to justify applying the earning capacity rule in this case. It made the finding that plaintiff deliberately reduced his income, but did not do so in bad faith, and then applied the earning capacity rule. It appears that the trial court believed that it could impute earnings to plaintiff merely because he voluntarily reduced his income. This is not the law, as it requires both.

This Court has visited this issue several times in the past, and has always required bad faith with voluntary depression of income:

It is clear . . . that “[b]efore the earnings capacity rule is imposed, it must be shown that [the party’s] actions which reduced his income were not taken in good faith.” *Askew [v. Askew]*, 119 N.C. App. [242] at 245, 458 S.E.2d [217] at 219 [(1995)]. *See also Schroader v. Schroader*, 120 N.C. App. 790, 794, 463 S.E.2d 790, 792-93 (1995); *Kennedy v. Kennedy*, 107 N.C. App. 695, 701, 421 S.E.2d 795, 798 (1992); *Fischell [v. Fischell]*, 90 N.C. App. [254] at 256, 368 S.E.2d [11] at 13 [(1988)]; *O’Neal v. Wynn*, 64 N.C. App. 149, 153, 306 S.E.2d 822, 824 (1983), *aff’d*, 310 N.C. 621, 313 S.E.2d 159 (1984).

Ellis, 126 N.C. App. at 364, 485 S.E.2d at 83.

Plaintiff’s voluntary depression of income must have been made with an intent to avoid his child support obligation. The only finding by the trial court on this point was that it was not made in bad faith. This should have ended the discussion and the earning capacity rule should not have been applied.

Defendant contends that the recent case of *King v. King*, 153 N.C. App. 181, 568 S.E.2d 864 (2002) has somehow changed the law in this area, and is controlling. We disagree for a myriad of reasons. In that case, the movant asked for a reduction in her child support obligation due to a change in circumstances, namely that her income had substantially decreased. The evidence showed that this was because she had essentially stopped working and did not give the trial court a satisfactory explanation for her actions. *Id.* at 185-86, 568 S.E.2d at 866. Defendant stresses the following quote from *King*: “A party’s capacity to earn income may become the basis of a child support

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award if it is found that the party voluntarily depressed her income.” *Id.* at 185, 568 S.E.2d at 866. Yet, defendant ignores the following qualification: “Before the earning capacity rule may be applied, there must, however, also be a showing, reflected by the trial court’s findings, ‘that the actions which reduced a party’s income were not taken in good faith.’” *Id.* (quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997)). The Court in *King* made special note that, “as Defendant did not carry her burden of showing good faith . . . the trial court, in the absence of any evidence regarding intent, properly found that ‘[D]efendant’s actions which reduced her income were not taken in good faith.’” *Id.* at 186, 568 S.E.2d at 866-67. *King* is clearly controlling. Unfortunately for defendant, it is a mere restatement of the existing law which requires that voluntary reductions be made in bad faith.

Bad faith is a general term given to situations which trigger the earning capacity rule. An intentional reduction in income is not punishable by the earning capacity rule unless it is proven to have been made to avoid a child support obligation. Therefore, plaintiff’s assignment of error is sustained.

II.

[2] Defendant’s second assignment of error contends that the trial court similarly abused its discretion by imputing income from plaintiff’s investment account.

The trial court made the following findings with regard to plaintiff’s interest and dividend income:

9. In the summer of 1999, the Plaintiff received an inheritance in excess of \$300,000.00; that at the time of the previous child support hearing, the Plaintiff had invested the inheritance at Bank of America; that the account at that time had a value of approximately \$260,000.00; that following September 11, 2001, the account dropped in value to \$230,000.00; that since the previous hearing, the investment account had a decrease in value of 11.5%; that this drop in value is due to passive events beyond the control of the Plaintiff.
10. That the Plaintiff’s banker testified that the other decrease in income from dividends and interest income was due to the Plaintiff’s decision to restructure his portfolio from holdings that produced more income to holdings that would favor long term growth; *that this decision was intentional on the part*

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of the Plaintiff that the Court would find that this change in income was active, but there is insufficient evidence to determine the exact impact of this decision on Plaintiff's gross income from this source.

11. That the Plaintiff has monthly distributions from the investment account of \$600.00 or \$7,200.00 annually; that at the time of the previous hearing, the investment account produced on an annual basis dividends and interest income in the amount of \$11,400.00; that the Court will reduce the Plaintiff's income from this source by 11.5% of the investment income due to passive events happening in the economy; that the Plaintiff's investment income is \$10,089.00.

(Emphasis added.)

Here again, the trial court found that plaintiff intentionally decreased his income and then applied the earning capacity rule. The trial court failed here to even make a finding as to potential motive of plaintiff behind such an investment strategy. Thus, we sustain plaintiff's assignment of error.

This Court has handled many similar cases to the present case, so it bears repeating:

In modifying the amount of a child support obligation, the trial court must generally consider a party's *actual* income. The trial court may only consider a party's *earning capacity* if it finds that the party was "acting in bad faith by deliberately depressing her income or otherwise disregarding the obligation to pay child support."

In this case, the trial court erred in considering Defendant's earning capacity without finding that Defendant had deliberately depressed her income in bad faith or had otherwise disregarded her child support obligation. We therefore remand for entry of findings on this issue, and for recalculation of the amount of Defendant's child support obligation if necessary.

Kowalick v. Kowalick, 129 N.C. App. 781, 787-88, 501 S.E.2d 671, 675-76 (1998) (citations omitted).

Vacated and remanded.

Judges WYNN and ELMORE concur.

GREENE v. ROGERS REALTY & AUCTION CO.

[159 N.C. App. 665 (2003)]

JIMMY LEFF GREENE, JOE BILL GREENE, RONNIE GLENN GREENE, AND DANNY L. SIDDEN, PLAINTIFFS V. ROGERS REALTY AND AUCTION CO., INC., A NORTH CAROLINA CORPORATION, AND BRACKY ROGERS, DEFENDANTS

No. COA02-882

(Filed 5 August 2003)

Fraud; Unfair Trade Practices— real estate purchased at auction—lots deeded as one tract

Summary judgment was properly granted for defendant-auctioneers on fraud and unfair trade practice claims where plaintiffs bought real property which they thought was in individual lots, but which was ultimately deeded as one tract. Defendants represented only the sellers and there was no evidence of an intent to deceive or that defendants owed plaintiffs a fiduciary duty. Plaintiffs and defendants appear to have had a communications problem on which plaintiffs should have focused at closing.

Judge LEVINSON concurs in the result.

Appeal by plaintiffs from judgment entered 7 September 2001 by Judge Russell G. Walker, Jr., in Surry County Superior Court. Heard in the Court of Appeals 27 March 2003.

James L. Dellinger, Jr., for plaintiff appellants.

Sharpless & Stavola, P.A., by Eugene E. Lester, III, for defendant appellees.

McCULLOUGH, Judge.

On 4 December 1999, defendant Rogers Realty and Auction Co., Inc., owned and operated by defendant Bracky Rogers, a licensed auctioneer, conducted an auction in Mt. Airy, North Carolina, located in Surry County. Up for bid at this auction was property owned by the Strickland family, known as the Strickland farm. According to plaintiffs, "advertisement and information" documents were given out prior to and during the auction. These included the subdivision plat which showed the property divided into separate lots. The property was sold off in lots according to how they were separated on that plat. Each lot was given a number on the plat.

In attendance at the auction was plaintiff Danny Sidden. Mr. Sidden had an oral agreement with plaintiffs Jimmy Leff Greene, Joe Bill Greene and Ronnie Glenn Greene to jointly own property pur-

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chased at the auction. Each of these individuals possessed experience in buying and selling property, notably plaintiff Ronnie Greene. Ronnie Greene held a real estate license for several years and had developed several properties.

Prior to the auction, Mr. Sidden had inquired about the property for sale with the Surry County Planning Board. He had been informed that the Board had given preliminary, not final, approval under the existing zoning ordinance to a proposed subdivision of the property. In addition, the Planning Board informed Mr. Sidden that the ordinance was going to change in a few weeks. The new ordinance was more restrictive than the existing, as, among other things, it would require an asphalt road to service the subdivision rather than the gravel road allowed under the existing ordinance.

As it turned out, Mr. Sidden was the highest bidder on lots 19 through 23, including an existing house, of the Strickland property. Accordingly, Mr. Sidden and the Stricklands entered into an offer to purchase and contract for the property, described as "Tract 19 thru 23." Defendants were noted on the contract as agent for the *seller*. Further, Sidden was given a "Disclosure to Buyer" form from defendants which informed him that defendants represented the seller *only*. Testimony from Sidden and others revealed that Sidden had purchased the lots and they were sold to him as a block.

The parties closed on the property on 4 January 2000. Prior to closing, neither Sidden nor any other of the plaintiffs contacted the Planning Board, seller, defendants or anyone else in connection with the purchase of the lots. Plaintiffs claim they never received any information that would lead them to expect that the description on the deeds would be anything different than the description in the offer to purchase or the plat. Apparently, Sidden "figured" and "assumed" that is the way it would be. However, when Sidden got the deed after closing, it contained a metes and bounds description conveying the property not in tracts or separate lots, but as one big block. The deed was filed on 6 January 2000. Apparently, Sidden called the attorney who prepared the deed about the description to try to resolve the discrepancy. Defendants claim that this is the first time that Sidden had informed them that he and the others wanted the lots recorded in separate deeds. Sidden apparently requested a deed for each lot, to which the attorney agreed to try and fix.

The problem is that once the deed was filed with the metes and bounds description of one large block instead of the five separate lots

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that had been on the plat that had received preliminary approval, the Planning Board informed the parties that the property would be subject to the new regulations. Further, the plat, while preliminarily approved, never received final approval. Permission to re-subdivide the property under the old ordinance was denied by the Board. However, the Planning Board eventually granted plaintiffs a variance allowing them to use a gravel road instead of an asphalt road (the main difference between the new and old ordinance). Plaintiffs considered the stipulations that came along with the variance as cost-prohibitive. They filed suit instead.

In their complaint filed 9 January 2001, plaintiffs alleged fraud, unfair and deceptive trade practices and breach of contract arising out of the purchase of the Strickland property. Among other things, the theory was that defendant Rogers owed them a fiduciary duty and it was breached. Defendants answered on 8 March 2001. Defendants also made a motion for summary judgment on 2 August 2001. In their motion for summary judgment, defendants stated that they did not have a duty to discover and/or disclose to plaintiffs any rules or conditions that might have applied to the Strickland property; they did not make any misrepresentations to plaintiffs about said property; any reliance by plaintiffs on them was unreasonable; there was no contract between defendants and plaintiffs; and any representations and warranties concerning the property were disclaimed or excluded by defendants and did not survive the closing.

After a hearing during the 20 August 2001 Session of Surry County Superior Court, defendants' motion for summary judgment was granted. Plaintiffs' appeal of this order was dismissed by the trial court in an order filed 28 December 2001. This Court granted *writ of certiorari* on 19 April 2002.

Plaintiff makes the following assignment of error: That the trial court erred in granting summary judgment for defendants on the grounds that defendant Rogers made no misrepresentation to plaintiffs about the property and did not have a duty to make certain representations to them about the property.

I.

Plaintiffs contend that the trial court erred in granting defendants' motion for summary judgment as there are sufficient facts "alleged" under their fraud and unfair and deceptive trade practices claims. As plaintiffs do not address their third claim of breach

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of contract, we consider it abandoned and do not address it. See N.C.R. App. P. 28(a) (2003).

“On a motion for summary judgment, defendants as movants would have had the burden to show that plaintiff could not adduce evidence of an essential element of his claim and that no genuine issue of material fact existed, thereby entitling defendants to judgment as a matter of law.” *Dockery v. Hocutt*, 357 N.C. 210, 216, 581 S.E.2d 431, 435 (2003). Regardless of the fact that plaintiffs have mistakenly confused the standard of summary judgment with that of a motion to dismiss under Rule 12(b)(6), we review the appeal in light of the correct standard of review quoted above.

Plaintiffs correctly list the elements of a constructive fraud claim:

The elements of a constructive fraud claim are proof of circumstances “(1) which created the relation of trust and confidence [the “fiduciary” relationship], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.’” Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty.

Keener Lumber Co. v. Perry, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823 (2002) (citation omitted). We conclude that plaintiffs have failed to present any evidence that defendants owed them a fiduciary duty, or that there is any reason why plaintiffs should otherwise recover from defendants.

Plaintiffs argue that defendants owed them a fiduciary duty as real estate agents have been held to owe a fiduciary duty to buyers. Plaintiffs rely on this Court’s case of *Brown v. Roth*, 133 N.C. App. 52, 514 S.E.2d 294 (1999). According to *Brown*, real estate agents have “the fiduciary duty ‘to exercise reasonable care, skill, and diligence in the transaction of business [e]ntrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so.’” *Id.* at 54, 514 S.E.2d at 296 (quoting 12 C.J.S. *Brokers* § 53, at 160 (1980)). “This duty requires the agent to ‘make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reasonable diligence’ and likely to affect the principal. The principal has ‘the right to rely on his [agent’s] statements.’” *Id.* at 54-55, 514 S.E.2d at 296 (citations omitted).

Plaintiffs point out that the parties used the North Carolina real estate form entitled “Offer to Purchase and Contract.” They also high-

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light the facts that defendants chose the closing attorney, and that the original plat map that was given to Sidden at the auction was prepared by defendants. Plaintiffs contend these matters create a question of fact.

However, plaintiffs' reliance on *Brown* is misplaced. It is made clear in the opinion that the agent in *Brown* represented both the buyer *and* the seller as he had a contract with both of them. *Id.* at 55, 514 S.E.2d at 296-97. An agent can represent both the seller and buyer as long as both parties have full knowledge and have given their consent. In the present case, there is no such arrangement. In fact, there are two documents in the record that make it clear that defendants represented the seller only: the Offer to Purchase and Contract form that plaintiffs referred to earlier, and a form entitled "Disclosure to Buyer from Seller's Agent or Subagent." This document makes it clear whom defendants represent:

When showing you property and assisting you in the purchase of a property, the above-referenced agent [Rogers Realty] and firm will be representing the interests of the SELLER.

This document was signed by Danny Sidden. He was not the seller. There was no contract between plaintiffs and defendants for any representation. Defendants only represented the Stricklands. Thus, defendants owed no fiduciary duty to plaintiffs under *Brown*. As such, plaintiffs have not forecast sufficient evidence on this element of their fraud claim. Thus, the trial court was correct in granting summary judgment for defendants.

Further, there is no evidence of any fraud in general. The record and transcripts only reveal that the deeds were filed with a metes and bounds description, instead of what plaintiffs wanted, which were separate deeds. Had there been separate deeds for each lot, presumably there would have been no problem. This is significant because this alleged fraud, the changing of the description, had nothing to do with inducing plaintiffs to make the purchase. True, it was important that the plat had received preliminary approval as plaintiffs wanted to be under the old ordinance. They very well may have been if separate deeds were filed. Yet, the fact that the description was not as desired had nothing to do with them being in the transaction in the first place. This was a simple ministerial problem that should have been the focal point of plaintiffs at closing. It was not. As such, there is no evidence of an intent to deceive on the part of defendants.

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Plaintiffs' inaction, namely Sidden's, is analogous to that of buyers that fail to inspect the property before purchasing it. *See Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E.2d 565 (1983) ("Where . . . the purchaser has full opportunity to make pertinent inquiries but fails to do so, through no artifice or inducement of the seller, an action in fraud will not lie."). *Id.* at 698, 303 S.E.2d at 568, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983). Defendants and plaintiffs appeared to have had a miscommunication as to how the deed or deeds were supposed to be drawn. While Sidden just "figured" the way it was going to be done, he "figured" wrong. Further, it was unreasonable on his part to fail to make sure the way he "figured" the deed or deeds would be drawn was in fact the way it was going to be. As much as plaintiffs would like to hold defendants responsible for what happened, they only have themselves to blame.

Further, based on our review of the record, we hold plaintiffs' claim for unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 (2001) is also without merit.

We therefore affirm the trial court's order granting summary judgment to defendants on all counts.

Affirmed.

Judge McGEE concurs.

Judge LEVINSON concurs in the result.

CARRIE HUDSON CHILLARI, PLAINTIFF v. ANTHONY CHILLARI, DEFENDANT

No. COA02-1032

(Filed 5 August 2003)

1. Venue— waiver—objection in answer filed late

An objection to venue was waived because it was contained in an answer which was late. N.C.G.S. § 1-83; N.C.G.S. § 1A-1, Rule 12(a)(1).

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2. Child Support, Custody, and Visitation— custody—decided before mediation

The trial court erred by deciding the issue of permanent custody prior to the parties' participation in mediation as required in N.C.G.S. § 50-13.1(b). The parties did not move or stipulate to waive mediation, and there was no indication that the court waived mediation on its own motion. Neither the record, the transcript, nor the order addresses the issue.

Judge HUDSON dissenting.

Appeal by defendant from order entered 25 February 2002 by Judge Albert Corbett in Harnett County District Court. Heard in the Court of Appeals 10 June 2003.

R. Allen Lytch, P.A., by Marshall Miller, for plaintiff-appellee.

Williams & McNeer, P.C., by T. Miles Williams & Alice L. McNeer, for defendant-appellant.

CALABRIA, Judge.

Anthony Chillari ("defendant") appeals from an order granting Carrie Chillari ("plaintiff") full custody of their minor child and requiring him to pay child support but failing to grant him visitation. We vacate the order of the trial court and remand for further proceedings.

Plaintiff and defendant were married on 6 April 2000, and their only child, Michael Paul Chillari ("the minor child") was born on 4 December 2000. On 19 November 2001, defendant took the minor child to his parents' residence in Connecticut. Although plaintiff was aware defendant planned to take the minor child out of town that day, she was unaware defendant planned on separating, moving the child to Connecticut, or seeking an order for custody of the child.

On 20 November 2001 in the Superior Court of Connecticut, defendant was granted an *ex parte* restraining order prohibiting contact between plaintiff and the minor child. In the same court, on 30 November 2001, defendant filed a complaint for child custody, child support, and divorce. On 4 December 2001, plaintiff filed an action for custody and support of the parties' minor child in the Harnett County District Court of North Carolina and was awarded temporary custody by an *ex parte* order. A temporary custody hearing was scheduled for 18 December 2001, then rescheduled to allow the pre-

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siding judges in North Carolina and Connecticut an opportunity to confer on the issue of conflicting jurisdiction. The judges agreed Connecticut lacked jurisdiction and North Carolina had jurisdiction, and defendant was ordered to return the minor child to North Carolina. Defendant complied after the Connecticut suit was dismissed.

On 12 February 2002, Chief District Court Judge Edward McCormick ordered the parties to mediate child custody and visitation pursuant to N.C. Gen. Stat. § 50-13.1. Although the parties were notified to appear on 4 March 2002, they also understood that a temporary custody hearing had been rescheduled for 14 February 2002.

The parties and their attorneys appeared in Harnett County District Court before the Honorable Albert Corbett. Defendant served his answer on plaintiff and her attorney. In his answer and at the beginning of the hearing, defendant moved for change of venue on the basis that neither party was a resident of Harnett County. The trial court held the motion to change venue in abeyance, choosing to rule on the merits of the case before considering the venue issue.

Rather than determining temporary custody until the parties attended mediation, the trial court granted plaintiff sole custody of the child and ordered defendant to pay child support. The court continued to hold the motion to change venue in abeyance and declined to rule on the issue of visitation. The court found plaintiff to be a fit and proper parent for the care and custody of the minor child. The court further found defendant was not a fit and proper parent because he had not attempted to foster a relationship between plaintiff and the minor child and had sought to exclude plaintiff from the minor child's life in contravention of the best interests of the child.

On appeal, defendant asserts the trial court erred by (I) determining permanent custody before ruling on the motion to change venue; (II) determining permanent custody despite the fact that the parties had not participated in nor waived custody mediation; and (III) determining defendant was not a fit and proper person for the care and custody of the minor child.

I. Venue

[1] Defendant asserts the trial court erred in determining permanent custody of the minor child before addressing his motion to change venue because neither party was a resident of Harnett County as required for venue and because his motion to change venue was

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timely and proper. Defendant contends the motion was timely because it was contained in the answer, and N.C. Gen. Stat. § 1A-1, Rule 12(b) (2001) requires only that a motion to change venue be made at or before the time of filing the answer.

Venue is not jurisdictional and may be waived by any party. *Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 744, 71 S.E.2d 54, 56 (1952).

If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, *before the time of answering expires*, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

N.C. Gen. Stat. § 1-83 (2001) (emphasis added). The time in which a defendant has to answer a complaint is “30 days after service of the summons and complaint upon him.” N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2001).

Defendant was served on 11 December 2001 and answered on 14 February 2002. Defendant’s answer contained his motion to change venue; therefore the motion came almost two months after service of the complaint and summons, well outside the 30-day “time of answering” period. Accordingly, any objection concerning venue has been waived, and this assignment of error is overruled.

II. Mediation

[2] Defendant asserts the trial court erred in deciding the issue of permanent custody prior to the parties’ participation in mediation as required in N.C. Gen. Stat. § 50-13.1(b) (2001). On 12 February 2002, the parties were ordered by Chief District Court Judge Edward McCormick to mediate child custody and visitation issues. Two days later, before the parties could comply with the mediation order, a hearing was held, and the trial court determined the issue of permanent custody.¹ Plaintiff contends defendant waived mediation by not raising it or, alternatively, the trial court impliedly

1. The dissent notes the record does not reflect whether the parties were aware of this order before the custody hearing; however, no party has alleged in their brief to this Court that they were unaware or had not received notice of the mediation order addressed to the parties and their counsel. Assuming *arguendo* that plaintiff had not received notice of the mediation order and also failed to raise lack of notice in her arguments to this Court, plaintiff is nevertheless bound by the statutory language and the local rules for Harnett County District Court, both of which require mediation absent waiver.

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waived the mediation on its own motion by hearing the custody matter. We disagree.

North Carolina General Statute § 50-13.1(b) provides, in part, as follows:

Whenever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to the custody or visitation of a minor child, the matter . . . shall be set for mediation of the unresolved issues as to custody and visitation before or concurrent with the setting of the matter for hearing unless the court waives mediation pursuant to subsection (c).

Subsection (c) provides:

For good cause, on the motion of either party or on the court's own motion, the court may waive the mandatory setting under Article 39A of Chapter 7A of the General Statutes of a contested custody or visitation matter for mediation. Good cause may include, but is not limited to, the following: a showing of undue hardship to a party; an agreement between the parties for voluntary mediation, subject to court approval; allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse, or spouse abuse; or allegations of severe psychological, psychiatric, or emotional problems.

N.C. Gen. Stat. § 50-13.1(c). The stated goals for preferring mediation over litigation on these issues is to reduce acrimony, promote the best interests of the children, inform the parties as to the available choices and first allow them the responsibility of deciding visitation and custody issues, minimize stress and anxiety, and reduce litigation. N.C. Gen. Stat. § 50-13.1(b). In addition to this statutory language the uniform rules regulating mediation of custody and visitation disputes for judicial district 11, of which Harnett County is a part, state in all capital letters “requests for waivers of mediation will be made to and approved by the court.” The local rules go on to require that “[c]ounsel or parties desiring a waiver shall complete, file and serve on the opposing party a Motion and Notice of Hearing for Exemption from Mediation.” Until this is done, the rules provide that the “case will not be released from the mediation process”

The import of N.C. Gen. Stat. § 50-13.1 is clear: the court is to look first to the parties, through the process of mediation, to resolve issues of child custody and visitation. Where the parties or the record

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indicate there is “good cause” justifying waiver, the court may bypass mediation. However, absent such “good cause,” mediation is mandatory as indicated by the use of the directive “shall,” the pre-requisite of “good cause” to waiver, and the characterization of setting an action for mediation as “mandatory.”² Our statutory interpretation is further bolstered by examining the extreme nature of the non-exclusive examples of conduct which justify a finding of “good cause” permitting waiver.³

In the instant case, neither the record, the transcript, nor the order addresses the issue of mediation. The parties did not move or stipulate to waive mediation, and there was no indication in the record that the court, on its own motion, waived mediation. No statutory examples of good cause for waiver of mediation were cited in the transcript or order as a justification for waiver, nor did the court raise other factors which might justify waiving mediation. There was no discussion reflecting consideration of the stated purposes of mediation or whether mediation was an appropriate alternative to litigation. In short, nothing in the record indicates contemplation of or compliance with N.C. Gen. Stat. § 50-13.1.⁴ Moreover, the record is devoid of the materials and motions expressly required for compliance with the local rules established pursuant to N.C. Gen. Stat. § 50-13.1 for the regulation of mediation of custody and visitation.

For the foregoing reasons, the trial court erred in failing to honor the order requiring the parties to mediate child custody and visitation issues and in prematurely deciding these issues without allowing the parties to attempt an amicable compromise beneficial to them and the minor child. Accordingly, we vacate the order of the trial court and remand for further proceedings not inconsistent with this opin-

2. N.C. Gen. Stat. § 50-13.1(b) allows the court to waive mediation upon motion of a party or by its own motion, but it does not allow waiver to occur by default when neither the parties nor the court addresses whether good cause exists for waiver. Accordingly, defendant could not, as the dissent asserts, waive mediation merely by failing to raise it during the hearing.

3. While the trial court heard testimony of and found as fact that there had been isolated acts of domestic violence by both plaintiff and defendant, the trial court considered these facts solely for the purpose of determining what was in the best interests of the minor child and not for the purpose of determining the propriety of mediation.

4. We note from the record that plaintiff and defendant previously separated, sought mediation, and were able to work out and enter a parenting agreement granting each equal time with the minor child.

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ion. Because the order of the trial court has been vacated, we need not reach defendant's third argument.

Vacated and remanded.

Judge WYNN concurs.

Judge HUDSON dissents with a separate opinion.

HUDSON, Judge, dissenting.

I do not agree that the court erred by deciding the issue of permanent custody prior to the parties having participated in mediation. Although there is an order in the record directing the parties to mediation, the order was signed and mailed to plaintiff's attorney by the judge on 12 February 2002. The record does not reflect whether the parties were aware of this order before the custody hearing, which was held on 14 February 2002. Further, by proceeding with the hearing without raising the issue of mediation, the defendant has waived this issue. Thus, I would affirm the district court, and respectfully dissent.

STATE OF NORTH CAROLINA v. JERRY MARTIN ADAMS

No. COA02-1023

(Filed 5 August 2003)

**Search and Seizure— videotapes seized during drug raid—
identity of people controlling premises**

Defendant's motion to suppress videotapes seized during a narcotics search of his home was properly suppressed. The tapes portrayed defendant having sex in the bedroom where marijuana and drug paraphernalia were found and the warrant under which the mobile home was searched included articles of personal property tending to establish the identity of those in control of the premises. N.C.G.S. § 15A-242(4).

Appeal by defendant from judgments entered 14 June 2002 by Judge D. Jack Hooks, Jr. and an order entered 24 June 2002 *nunc pro tunc* to 14 June 2002 by Judge William C. Gore in Brunswick County Superior Court. Heard in the Court of Appeals 21 May 2003.

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Attorney General Roy A. Cooper, III, by Assistant Attorney General John F. Oates, Jr., for the State.

Ramos and Lewis, L.L.P., by Michael R. Ramos; Stiller and Disbrow, by Bonner Stiller, for defendant-appellant.

HUNTER, Judge.

Jerry Martin Adams (“defendant”) appeals from the trial court’s denial of his motion to suppress videotapes seized from his bedroom closet during a search of his residence. We affirm the trial court’s denial of defendant’s motion for the reasons stated herein.

Evidence presented at the hearing on defendant’s motion to suppress is briefly summarized as follows. On 8 March 2002, Steve Lanier (“Agent Lanier”), a narcotics agent with the Brunswick County Sheriff’s Department, obtained and executed a search warrant for defendant’s residence. Information from a confidential source about defendant selling narcotics from his residence and controlled buys from that residence led to the issuance of the warrant. The following language was included in the search warrant with respect to the items to be seized: “[A]rticles of personal property tending to establish and document sales of marijuana . . . plus articles of personal property tending to establish the identity of persons in control of the premises”

When the law enforcement officers arrived at defendant’s residence, there were at least twenty people gathered around a bonfire outside. Four other persons besides defendant lived in defendant’s mobile home. During the execution of the search warrant, the officers seized marijuana, drug paraphernalia, a box of videotapes, and a stolen firearm.

Matthew Strangman (“Agent Strangman”) and Shelton Caison (“Agent Caison”) searched defendant’s bedroom, in which they found a small amount of marijuana, drug paraphernalia, a concealed video camera located on a table at the foot of the bed positioned at an angle to videotape the bed area, and a box of homemade videotapes which were located in the closet. There were no markings or labels on the videotapes denoting the images they contained. Agent Strangman briefly viewed two of the videotapes while in defendant’s bedroom and observed what appeared to be sexual activity between a male and a female.

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Agent Lanier, who was responsible for seizing evidence during the execution of the search warrant, later entered defendant's bedroom. He was told by other officers that a box of videotapes had been found in the room but he was not informed that Agent Strangman had viewed the videotapes nor was he advised of the images observed on the videotapes. While in defendant's bedroom, Agent Lanier discovered the video camera that was facing the view of the bed. After advising defendant of his *Miranda* rights, Agent Lanier asked defendant what was on the videotapes. Defendant responded, "that it was a video of him having sex with other women." Agent Lanier testified that he seized the videotapes "[i]n order to establish who was in control of the property" Further, Lieutenant John Ingram, the officer in charge of the narcotics unit, indicated that it was common practice to seize videotapes to establish the identity of the person controlling the premises. Agent Lanier later viewed the videotapes in his office. After observing that the videotapes showed defendant engaged in sexual acts with women, he turned the tapes over to Detective Dawn Francisco because he suspected that one of the women shown having sex with defendant was underage.

Defendant was charged with seven counts of participating in the prostitution of a minor, three counts of first degree sexual exploitation of a minor, seven counts of statutory rape, one count of maintaining a dwelling for the purpose of keeping and selling controlled substances, and one count of possession with intent to sell or deliver marijuana. On 10 May 2002, defendant filed a motion to suppress the videotapes seized from his bedroom closet during the search of his residence. Following a hearing, the trial court denied defendant's motion in an order dated 24 June 2002, *nunc pro tunc* to 14 June 2002. Defendant then entered a plea of no contest to three counts of first degree sexual exploitation of a minor and one count of participating in the prostitution of a minor, while reserving his right to appeal the court's denial of his motion to suppress. The trial court sentenced defendant to 166 months to 229 months imprisonment. Pursuant to the plea agreement, the remaining charges were dismissed.

The sole issue on appeal is whether the trial court erred in denying defendant's motion to suppress the videotapes seized during the search of defendant's residence. We conclude the trial court did not err and therefore affirm the court's denial of defendant's motion to suppress.

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At the outset, defendant has only one broad assignment of error, which states:

The trial court committed reversible error by denying defendant's motion to suppress certain video tapes searched and seized by law enforcement during a search of the defendant's home pursuant to a search warrant in that the video tapes were not within the scope of those items authorized to be searched for and seized by the warrant.

Thus, defendant has failed to assign error to any of the trial court's findings of fact. When no assignment of error is made to particular findings, "they are presumed to be supported by competent evidence and are binding on appeal." *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). Accordingly, this Court is bound by the trial court's findings and our review is limited to determining whether these findings support the trial court's conclusions. *State v. Phillips*, 151 N.C. App. 185, 565 S.E.2d 697 (2002). The trial court's conclusions of law will be upheld if supported by its findings of fact. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982).

The trial court made the following conclusions of law:

1. The issuance of the search warrant was based on probable cause and adequately stated the premises to be searched and the items to be seized.
2. North Carolina General Statute 15A-242(4) states that an item is subject to a seizure under a search warrant if there is probable cause to believe that it constitutes of [sic] the identity of a person participating in an offense. Where the defendant knowingly states to an officer that he is on the videotape, and that videotape depicts the defendant within the room where narcotics and paraphernalia were found, the seizure of the videotape is within the scope of said statute.
3. The viewing of the tape is allowed by the "plain view" exception to the 4th Amendment in that the defendant identified himself as the individual on the video tape thereby providing the agent with first hand information to establish the probable cause to seize an item to show identity as required by General Statute 15A-242(4).
4. The seizure was reasonable and the Court determines that it violates no provision of the general statutes nor any right

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granted by the United States or North Carolina Constitution, and the Defendant's Motion to Suppress is denied.

It is undisputed that the search warrant issued in this case was based on probable cause. Defendant argues, however, that the trial court erred in concluding the videotapes were among those items subject to seizure pursuant to N.C. Gen. Stat. § 15A-242 (2001). This Section states: "An item is subject to seizure pursuant to a search warrant if there is probable cause to believe that it: . . . (4) Constitutes evidence of an offense or the identity of a person participating in an offense." N.C. Gen. Stat. § 15A-242. Moreover, the search warrant in this case included in its description of property to be seized, "articles of personal property tending to establish the identity of persons in control of the premises"

Defendant asserts that the videotapes were initially seized and searched by Agents Strangman and Caison. Defendant additionally points out that the tapes contained no labels disclosing their contents. Thus, defendant reasons that there was nothing from which the officers could have concluded that the videotapes were subject to search and seizure under the warrant or any provision of N.C. Gen. Stat. § 15A-242. However, the trial court's findings of fact, to which we are bound, established that the narcotics agents discovered "a small amount of marijuana and drug paraphernalia in [defendant's] room, as well as a concealed video camera and a box of homemade videotapes." The court acknowledged in its findings that Officer Strangman viewed two of the videotapes while in defendant's bedroom. However, the court found that Officer Strangman did not tell Agent Lanier that he had viewed the tapes prior to Agent Lanier seizing them. When Agent Lanier asked defendant what was on the tapes, defendant replied, "me having sex with women." The court additionally found that:

Due to the proximity of the camera to the tapes and their location in the locked room, agent Lanier then seized the tapes along with other items to establish the defendant's control of the room, and the contraband found in the room, to the exclusion of the other four residents.

Further, the court found that three other occupants of the premises were charged with weapons and narcotics offenses and thirteen citations were issued to non-residents on the premises for drug offenses. Finally, the court found that "[t]he images on [the] videotapes did

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establish the defendant's control of that particular room and his intent to possess with the intent to sell and/or deliver marijuana from the residence."

We conclude that these findings support the court's conclusion that the videotapes were properly seized pursuant to N.C. Gen. Stat. § 15A-242(4). The findings show that there was probable cause to believe that the tapes constituted evidence of the identity of the person participating in the offense of possessing marijuana with the intent to sell and/or deliver marijuana from the residence. When defendant was asked by Agent Lanier what was on the tapes, defendant replied, "me having sex with women." In addition, there was a concealed video camera facing defendant's bed. Based on these facts, the officers had probable cause to believe that the videotapes would provide evidence of the person in control of the bedroom where marijuana and drug paraphernalia were discovered. In addition, the videotapes were among the items listed in the search warrant to be seized under the language, "articles of personal property tending to establish the identity of persons in control of the premises" Therefore, the trial court properly denied defendant's motion to suppress the videotapes found during the search of defendant's residence. Accordingly, we affirm.

Affirmed.

Judges MARTIN and GEER concur.

MARY M. HOOKS, PLAINTIFF V. THOMAS ECKMAN AND WIFE, MARY ALICE ECKMAN;
MARY ELIZABETH BOENING AND HUSBAND, ROBERT BOENING, DEFENDANTS

No. COA02-1036

(Filed 5 August 2003)

Judgments— prior—false testimony—attempt to set aside

Summary judgment was properly granted for defendant in an action which alleged fraud through false testimony about assets in a prior alienation of affections action. The issue was raised and fully litigated in the prior action; plaintiff is attempting in this action to set aside a prior judgment on the ground of false testimony. Her sole remedy was through a motion in the cause pur-

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suant to Rule 60, which she filed. That motion was denied and she withdrew her appeal of that decision.

Appeal by plaintiff from judgment entered 17 May 2002 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 23 April 2003.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler, Esq., for plaintiff appellant.

Glenn, Mills and Fisher, P.A., by William S. Mills, for defendant appellees Thomas Eckman and Mary Alice Eckman.

Northern Blue, L.L.P., by J. William Blue, Jr., for defendant appellees Mary Elizabeth Boening and Robert Boening.

TIMMONS-GOODSON, Judge.

Mary M. Hooks (“Hooks”) appeals from a judgment of the trial court entered in favor of Thomas Eckman, Mary Alice Eckman, Mary Elizabeth Boening (“Boening”) and Robert Boening (“Robert”) (referred to collectively as “defendants”). For the reasons stated herein, we affirm the trial court’s decision.

An examination of the pleadings, exhibits, and depositions filed in response to defendants’ summary judgment motion, considered in the light most favorable to Hooks, tends to show the following: On 7 October 1998, Hooks filed an action seeking compensatory and punitive damages against Boening for alienation of affection and criminal conversation (“the 1998 Action”) of her husband, Robert. In the 1998 Action, Hooks served Boening with interrogatories inquiring about the extent of her assets. In response to the interrogatories, Boening submitted an equitable distribution affidavit, from her then pending divorce from Michael Dulude (“Dulude”). The affidavit showed that Boening claimed the home she owned with Dulude was separate property valued at \$279,000.00. In September 1999, Boening sold the home and directed that the \$143,000.00 sale proceeds be paid directly to Thomas and Mary Alice Eckman (referred to collectively as “the Eckmans”), Boening’s parents. Boening did not supplement her discovery response after the sale and payment to the Eckmans.

In October 2000, the 1998 Action was tried without a jury in Durham County. During the trial, Hooks questioned Boening about the fact that approximately \$143,000.00 had been paid at her direction to the Eckmans. Boening testified that she directed her share of the

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proceeds in the sale of real property be paid to the Eckmans in satisfaction of a promissory note she owed them for the land and construction of the residence. Dulude testified that the Eckmans forgave the promissory note in 1993.

At trial, Hooks argued that the payment from Boening to the Eckmans should be treated as a fraudulent conveyance and the sum of approximately \$143,000.00 should be considered by the court as an asset of Boening in determining punitive damages. On 16 November 2000, a judgment was entered in the 1998 Action awarding Hooks \$42,500.00 in compensatory damages and \$15,500.00 as punitive damages. The judgment was tendered in full by Boening and accepted by Hooks.

On 13 September 2001, Hooks filed the matter presently before this Court. In her complaint, Hooks alleged that Boening gave false testimony in the 1998 Action regarding the value of her assets resulting in a less favorable award than she would have received but for Boening's false testimony. The complaint further alleged that the Eckmans assisted and aided the acts of Boening and that defendants were liable to Hooks. After filing the initial complaint, Hooks then filed a "Motion For Relief From A Final Judgment" pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. After hearing arguments from counsel for both parties, the trial court then made the following findings of fact:

3. That the Defendant paid the amount awarded to the Plaintiff in the judgment, including accrued interest and costs as allowed by the Court, and that the judgment was marked "satisfied."

....

5. . . . the matters complained of by the Plaintiff were presented to the court during the underlying hearing.

Based on the above-stated findings of fact, the court then made the following conclusions of law:

3. That the Plaintiff, having accepted the benefits of the judgment entered by the Court in the trial of this matter, cannot subsequently attack the validity of that judgment[.]

4. That the Plaintiff is not entitled to relief pursuant to Rule 60 based upon the evidence previously presented to the Court during the underlying trial.

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After the “Motion For Relief From A Final Judgment” was dismissed, defendants filed a motion for summary judgment in this case on 30 April 2002. The trial court then granted summary judgment in favor of defendants. From this judgment, Hooks appeals.

The sole issue before this Court is whether the trial court erred in granting summary judgment in favor of defendants in an independent action based on allegations of false testimony in a prior action. For the reasons stated herein, we affirm the judgment of the trial court.

Summary judgment is appropriate when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The party moving for summary judgment must “clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law.” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 324 (1999). In reviewing a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing the motion. *Id.* Generally, summary judgment is inappropriate in an action for fraud. *Lewis v. Blackman*, 116 N.C. App. 414, 419, 448 S.E.2d 133, 136 (1994). However, the ability of a party to maintain an independent action based upon a judgment in a prior judicial proceeding that allegedly was tainted by fraud, depends upon whether the fraud at issue is extrinsic or intrinsic. *See Stokley v. Stokley and Stokley v. Hughes*, 30 N.C. App. 351, 354, 227 S.E.2d 131, 134 (1976); *see also Fabricators, Inc. v. Industries, Inc.*, 43 N.C. App. 530, 532, 259 S.E.2d 570, 572 (1979).

In *Stokely*, this Court asserted that fraud should be considered extrinsic “when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time.” *Stokely*, 30 N.C. App. at 354-55, 227 S.E.2d at 134. The *Stokely* Court determined that intrinsic fraud occurs when a party (1) has proper notice of an action, (2) has not been prevented from full participation in the action, and (3) has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. *Id.* Specifically, intrinsic fraud describes matters that are involved in the determination of a cause on its merits. In contrast,

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extrinsic fraud prevents a court from making a judgment on the merits of a case. *See id.*

When the alleged fraud complained of is intrinsic then it can only be the subject of a motion under Rule 60(b)(3). N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (2001). It is well established in North Carolina “that where a judgment has been entered relief from that judgment is not available in an independent action upon facts which amount to intrinsic fraud.” *Fabricators, Inc.*, 43 N.C. App. at 531-32, 259 S.E.2d at 571 (citations omitted). Moreover, we note that “false testimony is intrinsic fraud.” *Id.* at 532, 259 S.E.2d at 571.

Applying the above-stated principles, it is clear that the factual allegations alleged by plaintiff involve intrinsic fraud. The record is devoid of any evidence that Hooks was prevented from fully participating in the alienation of affection action. To the contrary, the matter was fully litigated, and counsel for Hooks made the following statements during closing arguments:

In this case, the evidence is that she doesn't have any assets. She's got \$39,000 worth of income. She doesn't have any assets. So, I mean, what do you do with that? I submit that what the evidence shows, Your Honor, is that she does have the assets, \$143,000 and \$23,000. And that the transfer of that money was a fraud, a fraud on this court, a fraud against [Hooks], not only by her but by [the Eckmans]. *And the fraud has been proven.*

Therefore, the precise issue of fraud was raised in the matter before the trial court in the 1998 Action, and the court was afforded the opportunity to consider fraud before awarding punitive damages to Hooks.

We further recognize that all the facts alleged by Hooks are within the classification of intrinsic fraud. In fact, Hooks' complaint in paragraph eighteen specifically alleges that the damage which she has suffered was that the trial court was misled in “. . . weighing the reprehensibility of the conduct of the Defendant Mary Elizabeth Boening against her revenues or net worth . . .” and that the punitive damages awarded against her “. . . would have reasonably been greater had Defendants not engaged in [fraud].” Therefore, Hooks is attempting to set aside a prior judgment on the grounds that Boening offered false testimony. A final judgment cannot be reversed merely upon a showing of perjured testimony, because it would prevent judicial finality. *See McCoy v. Justice*, 199 N.C. 602, 607, 155 S.E. 452, 457 (1930) (concluding “that a final judgment cannot be annulled merely

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because it can be shown to have been based on perjured testimony; for, if this could be done once, it could be done again and again, *ad infinitum*"). Accordingly, this Court will not set aside a judgment on the grounds of perjured testimony or for any other matter that was presented and considered in the judgment, which Hooks now attacks. *See Thrasher v. Thrasher*, 4 N.C. App. 534, 545, 167 S.E.2d 549, 557 (1969).

As stated *supra*, intrinsic fraud can only be the subject of a Rule 60(b) motion. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b)(3). Therefore, the sole remedy for Hooks was to modify or set aside the consent judgment in the 1998 Action through a motion in the cause pursuant to Rule 60. Here, Hooks filed a Rule 60(b) motion, which was denied on 21 February 2002. Because Hooks withdrew her appeal of the trial court's denial of her Rule 60(b) motion, she is now bound by the findings and conclusions reached by the trial court in the denial of that motion. *See Lang v. Lang*, 108 N.C. App. 440, 453, 424 S.E.2d 190, 196-97 (determining that erroneous judgments may be corrected only by appeal and failure to appeal bars any discussion of the merits in the judgment), *disc. review denied*, 333 N.C. 575, 429 S.E.2d 570 (1993); *see also Young v. Insurance Co.*, 267 N.C. 339, 343, 148 S.E.2d 226, 229 (1966).

For the reasons contained herein, we affirm the judgment of the trial court granting summary judgment for defendants.

Affirmed.

Judges BRYANT and GEER concur.

CARMEN ESPINO, PLAINTIFF V. ALLSTATE INDEMNITY COMPANY, DEFENDANT

No. COA02-1169

(Filed 5 August 2003)

Insurance— automobile—UM and medical expenses payments—collateral source rule—policy controls

An insurance company which issued an automobile policy with medical and uninsured motorist (UM) coverage was entitled to a credit against the amount due under the UM coverage for the

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amount it had paid for medical expenses. The Financial Responsibility Act does not contain language controlling duplicate compensation under UM and medical payments coverage, so that the policy controls. This policy expressly provides that defendant's liability under UM coverage is excess to its medical payments coverage and shall not duplicate medical expense payments.

Appeal by defendant from judgment entered 13 June 2002 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 14 May 2003.

Bryce Thomas & Associates, by Bryce O. Thomas, Jr., for plaintiff-appellee.

Wallace, Morris & Barwick, P.A., by P.C. Barwick, Jr., for defendant-appellant.

STEELMAN, Judge.

On 19 October 1999, plaintiff was injured in an automobile accident involving a vehicle driven by an uninsured motorist. At the time of the accident, plaintiff and her husband were insured under a policy issued by Allstate Indemnity Company ("defendant" or "Allstate").

In its policy with plaintiff, defendant agreed to "pay reasonable expenses incurred for necessary medical and funeral services because of bodily injury: 1. Caused by accident; and 2. Sustained by an insured." The uninsured motorist ("UM") coverage in plaintiff's Allstate policy provided that "[t]his coverage is excess over and shall not duplicate any amount paid or payable under Part B [the medical payments coverage]." The medical payments coverage contained a "non-duplication" provision stating that "[n]o person for whom medical expenses are payable under this coverage shall be paid more than once for the same medical expense under this or similar vehicle insurance. . . ."

Pursuant to the policy, defendant paid \$1,000.00 under the medical payments coverage toward plaintiff's total medical expenses incurred as a result of the accident. Plaintiff then demanded arbitration, as permitted by the terms of her policy, to determine the amount of her expenses for which defendant was liable. The arbitrator awarded plaintiff total damages, including reimbursement for medical expenses, in the amount of \$9,000.00.

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Defendant paid an additional \$8,000.00 pursuant to plaintiff's UM coverage, contending it was entitled to a credit against the total amount awarded by the arbitrator for the \$1,000.00 it had previously paid to plaintiff for medical expenses. Plaintiff then filed a complaint seeking a determination of defendant's right to a credit under the medical payments coverage of her policy.

Plaintiff filed motions for judgment on the pleadings and summary judgment, and defendant moved for summary judgment. The trial court entered a judgment in plaintiff's favor, concluding that the provisions of plaintiff's Allstate policy violated the collateral source rule and N.C. Gen. Stat. § 20-279.21 (2001).

In its sole assignment of error, defendant argues the trial court erred in finding that it was not entitled to a credit against sums due under the UM provisions for the amount it had previously paid pursuant to plaintiff's medical payments coverage.

Medical payments coverage is not statutorily mandated, nor is it discussed in the Financial Responsibility Act ("Act"), N.C. Gen. Stat. Chapter 20, Article 9A (2001). In the absence of an applicable provision in the Act, an insurer's liability is measured in terms of the policy as written. *Younts v. State Farm Mut. Auto. Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972). N.C. Gen. Stat. § 20-279.21 of the Act does not contain any language controlling the issue presented in the instant case as to duplication of compensation under UM coverage and medical payments coverage. Therefore, we examine plaintiff's policy to determine whether defendant is entitled to a credit against its total liability as claimed in this appeal.

Plaintiff's policy expressly provides that defendant's liability under UM coverage is excess over its liability under medical payments coverage and shall not duplicate payments for medical expenses. Pursuant to the policy provisions, defendant would be entitled to a credit for the \$1,000.00 it had previously paid plaintiff for her medical expenses.

Plaintiff argues that this Court's decision in *Muscatell v. Muscatell*, 145 N.C. App. 198, 550 S.E.2d 836, *disc. review denied*, 354 N.C. 364, 556 S.E.2d 574 (2001), precludes a credit for defendant. In *Muscatell*, the plaintiff was a passenger in her husband's vehicle and was injured in an accident with another vehicle driven by defendant Ystebroe. *Muscatell*, 145 N.C. App. at 199, 550 S.E.2d at 837. Plaintiff was reimbursed for her medical expenses under the medical payments coverage of the insurance policy issued to her and her hus-

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band, defendant Muscatell. *Id.* The trial court found plaintiff was injured by both defendants' negligence and ordered both defendants jointly and severally liable for the amount of the judgment. *Id.* at 199-200, 550 S.E.2d at 837. The trial court also granted defendant Muscatell a credit in the amount of plaintiff's medical expenses reimbursed by the carrier on their joint insurance policy. *Id.* at 200, 550 S.E.2d at 837. Defendant Ysteboe appealed the ruling that he was not entitled to a credit for the amount plaintiff received under her medical payments coverage. *Id.*

The *Muscatell* Court first concluded that since plaintiff's medical expenses were paid pursuant to her insurer's contractual obligation under the medical payments coverage of her own policy, rather than under defendant Ysteboe's liability coverage, the payment did not raise an issue of double compensation. *Id.* However, this Court determined that the case did raise an issue under the collateral source rule. *Id.* at 201, 550 S.E.2d at 837. This rule seeks to prevent a tortfeasor from "reduc[ing] his own liability for damages by the amount of compensation the injured party receives from an independent source." *Id.* at 201, 550 S.E.2d at 837-38 (quoting *Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981)). Based on the collateral source rule, *Muscatell* held that neither defendant was entitled to a credit for the medical coverage payments. *Id.* at 201, 550 S.E.2d at 838.

In the instant case, defendant is not trying to reduce the amount of its liability, since it has paid a total of \$9,000.00 to plaintiff, the full amount awarded by the arbitrator. Nor is the source in this case "independent" because both the medical expenses payment and the UM payment come from defendant. Further, *Muscatell* concerned payments under liability and medical payments coverages, rather than UM and medical payments coverages at issue here. The *Muscatell* Court did not discuss the policy language or whether the policy included express language barring double compensation under the applicable coverages.

The issue of double compensation under the same insurance policy has been addressed by our Supreme Court in two cases: *Tart v. Register*, 257 N.C. 161, 125 S.E.2d 754 (1962), and *Baxley v. Nationwide Mut. Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993), appeal after remand, 115 N.C. App. 718, 446 S.E.2d 597 (1994). In *Tart*, plaintiffs Tart and Flowers were injured in an automobile collision while passengers in a vehicle driven by defendant. *Tart*, 257 N.C. at 164, 125 S.E.2d at 756. Following a jury verdict awarding

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damages to each plaintiff, defendant asserted that she was entitled to a credit against the verdict in favor of Flowers for payments previously made to Flowers under the medical payments provisions of defendant's insurance policy. *Id.* at 172, 125 S.E.2d at 763. The *Tart* Court concluded:

If double recovery can be had when [the defendant] is insured, it is not by reason of one claim sounding in tort and the other in contract, as suggested, but *solely by reason of the provisions of the insurance contract*. In our opinion it was not within the contemplation of the contracting parties that there should be a double recovery of medical expenses. . . . It is manifestly inequitable for plaintiff to recover twice against the same defendant, even though payment was in part voluntary.

Id. at 174, 125 S.E.2d at 764 (emphasis added).

In *Baxley*, the plaintiff was awarded damages under both the underinsured motorist ("UIM") coverage and medical payments provisions of her policy, and her insurer sought a credit for the medical expenses it had paid to the plaintiff. *Baxley*, 334 N.C. at 11-12, 430 S.E.2d at 902. The policy expressly permitted recovery under both of these sections and did not contain a provision for a credit under medical payments coverage. *Id.* at 13, 430 S.E.2d at 902. The *Baxley* Court held that the express provisions of the insurance policy controlled the question of whether the insurer was entitled to a credit for sums paid under the medical payments coverage against the UIM claim, and, therefore, the insurer was not entitled to a credit. *Id.* at 14, 430 S.E.2d at 903; *see also*, *Aills v. Nationwide Mut. Ins. Co.*, 88 N.C. App. 595, 363 S.E.2d 880 (1988) (holding that the language of the insurance policy determines the rights of the parties).

We find that this case is controlled by *Baxley* and that *Muscatell* is distinguishable from the instant case. Thus, based on the reasoning in *Baxley*, the express language in plaintiff's Allstate policy that its UM coverage was in excess of and shall not duplicate payments made under the medical payments coverage entitles defendant to a credit for the \$1,000.00 it previously paid plaintiff in medical expenses. We remand this matter for entry of judgment in accordance with this decision.

REVERSED AND REMANDED.

Judges TIMMONS-GOODSON and HUDSON concur.

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STATE OF NORTH CAROLINA v. CHRISTOPHER O'BRIAN MASON

No. COA02-1115

(Filed 5 August 2003)

1. Constitutional Law— effective assistance of counsel—misstatement during closing argument

Defendant was not denied effective assistance of counsel where his attorney misspoke during his closing argument and urged the jury to find defendant guilty of all charges. Contextually, counsel did not admit guilt, and the additional argument allowed by the court emphasized defendant's innocence and cured any prejudice.

2. Criminal Law— mistrial—lapsus linguae during closing argument—no prejudice

The trial court did not abuse its discretion by denying defendant a mistrial after defense counsel misspoke during his closing argument. Although defendant contended that the court acted under a misapprehension of the law in stating that double jeopardy would prevent a mistrial, there was no prejudice because counsel's error was in form, not substance.

3. Evidence— hearsay—door opened on cross-examination

The trial court did not err by admitting hearsay from detectives in a trial for murder, burglary, and robbery where defendant opened the door through questions on cross-examination.

Appeal by defendant from judgment entered 1 March 2001 by Judge Gregory A. Weeks in Superior Court, Columbus County. Heard in the Court of Appeals 10 June 2003.

Edwin L. West, III, PLLC, by Heather Wells, for defendant-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for State-appellee.

WYNN, Judge.

From a sentence of life imprisonment without parole for first degree murder, first degree burglary, and robbery with a firearm, defendant, Christopher O'Brian Mason, argues on appeal that (1) he was deprived of his Sixth Amendment right to effective assistance of

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counsel because during oral argument, his attorney committed a *lapsus linguae*—a slip of the tongue—by asking the jury to find him guilty, (2) the trial erroneously denied his motion for a mistrial, and (3) the trial court erroneously admitted prejudicial hearsay. We find no error for the reasons stated herein.

At the conclusion of his closing argument, counsel for the defendant stated: “We ask you to find Chris Mason *guilty* of all charges based upon the failure of the State to prove him guilty beyond a reasonable doubt.” After some confusion, wherein defense counsel apparently was uncertain whether he committed the error, the trial court responded, “I didn’t hear not guilty. I heard you [say to the jury that they] should find the defendant guilty.” At the trial court’s request, the court reporter played back a tape recording of the closing argument. After listening to the tape, the trial court indicated: “what I thought I heard was a statement to find him guilty.”

Thereafter, the trial court stated: “[This] is as close to what is meant or intended by the phrase, ‘you cannot un-ring a bell.’” Defense counsel moved for a mistrial. After listening to the tape again, the trial court determined defense counsel had committed a *lapsus linguae*. Defense counsel renewed his motion for mistrial based on the “apparent misstatement.” Defendant consented to this motion. The trial court expressed concern about:

[T]he issue of whether or not jeopardy has attached in this case and if so whether the allowance of a motion for mistrial made by counsel [with] the defendant’s concurrence might mean that the defendant may not be subject to be retried . . .

The trial court allowed defense counsel to make an additional closing argument. Defense counsel stated to the jury:

The question has arisen as to what last thing I said to you was. I hope you understand that it is my purpose and intent to ask you to find Chris Mason not guilty. . . . I [have] retaken this opportunity to, under the law, argue again. Obviously, the stresses and strains of these trials can take there [sic] tolls at times and if any of you misunderstood or if you believe I misstated what I intended to say, I am asking you, based on the evidence before you, to find that the State has failed to meet its burden of proving Chris Mason guilty beyond a reasonable doubt . . . and I ask you to find Christopher Mason not guilty and I hope you all understand that if I have made what in legal latin is a *lapsus linguae*

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before lunch . . . I certainly apologize but our request is that you find Chris not guilty. Thank you very much.

After defense counsel's second closing argument, the trial court excused the jury; heard arguments from the State and defendant; and denied defendant's motion for a mistrial. The jury returned a guilty verdict on all counts.

[1] By his first argument, defendant contends that under the Sixth Amendment and *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), the admission of guilt by defendant's counsel, without defendant's consent, constituted ineffective assistance of counsel *per se*. We hold that defendant's reliance on *Harbison* is misplaced.

In *Harbison*, defense counsel stated during closing argument:

Ladies and Gentlemen of the Jury I don't feel that [defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.

Harbison at 177-78, 337 S.E.2d at 506. In granting defendant a new trial, the Supreme Court of North Carolina held that:

When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury. For the foregoing reasons, we conclude that ineffective assistance of counsel, *per se* in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent.

Harbison, at 180, 337 S.E.2d at 507-08 (citations omitted).

However, unlike the defense counsel in *Harbison*, the defense counsel in this case made a misstatement, not a strategic decision to admit guilt without the client's consent. Contextually, the defense counsel did not admit defendant's guilt by making the statement that the jury should find defendant "guilty . . . based upon the failure of the state to prove him guilty beyond a reasonable doubt." *See, e.g., State v. Hinson*, 341 N.C. 66, 78, 459 S.E.2d 261, 268 (1995) (finding no *Harbison* violation where defendant took challenged statements out

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of context); *State v. Wiley*, 355 N.C. 592, 620, 565 S.E.2d 22, 42 (2002), *cert. denied*, — U.S. —, 154 L. Ed. 2d 795 (2003) (taken in context, evidence linking defendant to victim's car was not a *Harbison* violation). Furthermore, any prejudice to defendant was cured by additional argument made by defense counsel emphasizing defendant's innocence.

[2] By his second argument, defendant contends the trial court erred by denying his motion for a mistrial under N.C. Gen. Stat. § 15A-1061 (2002) which states that the trial court “must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.” However, “[t]he decision of whether to grant a mistrial is within the sound discretion of the trial judge.” *State v. Norwood*, 344 N.C. 511, 537, 476 S.E.2d 349, 361 (1995) (citation omitted). “[A] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law.” *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982); *State v. Ward*, 338 N.C. 64, 92-93, 449 S.E.2d 709, 724 (1994); *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985).

Defendant contends the trial court abused its discretion in denying his motion for a mistrial because it acted under a misapprehension of the law when it stated that Double Jeopardy might prevent the State from placing defendant on trial again. Assuming this solitary statement was error, *see e.g.*, *State v. Major*, 84 N.C. App. 421, 424-25, 352 S.E.2d 862, 864-65 (1987), we are not persuaded that “had the error in question not been committed, a different result would have been reached.” *See* N.C. Gen. Stat. § 15A-1443(a); *State v. Reeb*, 331 N.C. 159, 179, 415 S.E.2d 362, 373-74 (1992). As discussed *supra*, the trial court had no basis on which to grant defendant a mistrial because defense counsel's error was in form, not substance; furthermore, defense counsel's formal error was cured. Finally, in ruling on defendant's motion for a mistrial, the trial judge correctly based his ruling on the “totality of the circumstances.”

[3] By his final argument, defendant contends the trial court erred in allowing the State to introduce prejudicial hearsay. The State claims, that defendant “opened the door” to incompetent evidence by eliciting information requiring rebuttal. We agree with the State and, therefore, find no error.

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Under the North Carolina Rules of Evidence: “Hearsay is not admissible except as provided by statute or by these rules.” N.C. Gen. Stat. § 8C-1, Rule 802 (2002). Despite the hearsay rule, “[t]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself.” *State v. McNeil*, 350 N.C. 657, 682, 518 S.E.2d 486, 501 (1999) (citing *State v. Warren*, 347 N.C. 309, 317, 492 S.E.2d 609, 613 (1997)) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). “Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially.” *Albert*, 303 N.C. at 177, 277 S.E.2d at 441.

In the present case, defendant challenges certain testimony offered by Deputy Darrell Rogers and Detective Michael Glenn. Defendant contends the trial court erred in permitting Deputy Rogers to testify about a domestic violence call which involved defendant on the night of the shooting. On cross-examination, however, defendant asked the deputy specific questions concerning a report he had written about the incident and his failure to record certain data. To rehabilitate Deputy Rogers, the trial court permitted the State to re-direct Deputy Rogers about the contents of the report. By raising the issue of why Deputy Rogers was called to the scene and his subsequent report on the domestic violence allegation, defendant “opened the door” to allow the State to ask similar or related questions. The trial court warned defendant on a number of occasions to be careful in his questioning. The trial court even explained to defendant how he could have obtained the same evidence without opening the door. Furthermore, the trial court properly limited the use of that evidence to identity and opportunity. *See* N.C. Gen. Stat. § 8C-1, Rule 404(b). Accordingly, under our long-standing exception in *State v. McNeil*, this evidence was properly admitted. *McNeil*, 350 N.C. at 682, 518 S.E.2d at 501.

Additionally, defendant claims the trial court erred in permitting Detective Glenn to testify about statements identifying defendant as being outside the victim’s home on the night of the shooting. However, an examination of the record clearly reveals defendant opened the door to Detective Glenn’s testimony. On cross examination, defendant asked Detective Glenn why the police did not follow any other leads. In an effort to rehabilitate the witness, the trial court permitted the State to re-direct Detective Glenn. The State asked

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Detective Glenn why other potential suspects were not pursued and, furthermore, why the investigation focused on defendant. Detective Glenn testified that two people identified defendant as being at the crime scene at the time of the shooting. Under our long-standing exception in *State v. McNeil*, this evidence was properly admitted. *McNeil*, 350 N.C. at 682, 518 S.E.2d at 501 (1999).

No Error.

Judges HUDSON and CALABRIA concur.

LAURA J. SMITH, PLAINTIFF v. DONNIE LYNN HAMRICK, DEFENDANT

No. COA02-1004

(Filed 5 August 2003)

1. Trials— opening and closing arguments—characterization of opponent’s case

The trial court did not abuse its discretion by denying plaintiff a mistrial in an automobile accident case where the defense attorneys argued that plaintiff’s case was “nonsense” in their opening and closing arguments. The court sustained plaintiff’s objections, but plaintiff did not request a curative instruction and the impropriety of the statements was not so extreme as to require an instruction *ex mero motu*.

2. Trials— use of Pattern Jury Instruction—not prejudicial

The trial court did not err in an automobile negligence case when it denied plaintiff’s motion to strike the use of the North Carolina Pattern Jury Instruction on nominal damages. Plaintiff did not argue that submission of nominal damages was improper, and there is no case law in which an appellate court questioned the use of these instructions or deemed their use prejudicial.

Appeal by plaintiff from judgment entered 14 March 2002 by Judge Charles A. Horne, Sr. in Cleveland County District Court. Heard in the Court of Appeals 14 May 2003.

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Law Offices of Michael J. Bednarik P.A., by Michael J. Bednarik and Brian R. Hochman, for plaintiff-appellant.

Colombo & Gondek, P.A., by Steven J. Colombo, John P. Schifano and David M. Harmon, for defendant-appellee.

HUNTER, Judge.

Laura J. Smith (“plaintiff”) appeals a judgment whereby a jury awarded her one dollar in nominal damages due to personal injuries she incurred in an automobile accident. For the reasons stated herein, we find no error.

On 25 May 1998, Donnie Lynn Hamrick (“defendant”) was towing a trailer behind his truck on Interstate I-85 in Rowan County when the trailer’s rear wheel assembly suddenly detached. The assembly struck and shattered plaintiff’s windshield. Plaintiff sustained injuries.

Plaintiff instituted a negligence action against defendant on 26 January 2001, which was subsequently tried on 25 February 2002. During the trial, plaintiff testified that she could not have prevented the accident because the assembly came towards her suddenly and without warning. She further testified that the broken glass from the windshield primarily injured her foot, causing severe pain and discomfort to her leg and hip. With respect to that injury, plaintiff testified on cross-examination that her shoe apparently came off during the accident and, since the shoe was covered in broken glass fragments, she left it off and walked barefoot on the broken glass around the accident scene. Plaintiff ultimately sought treatment for the cuts on her foot and other injuries from a chiropractic physician, Dr. Richard Berkowitz, who testified that he diagnosed plaintiff with “cervical somatic dysfunction, lumber somatic dysfunction, sprain/strain of the neck, a sprain/strain of the lower back and cephalalgia.” Defendant neither testified nor offered any evidence.

Following the closing arguments and the jury instructions, the jury unanimously determined that plaintiff was entitled to only one dollar in nominal damages from defendant, and judgment was entered accordingly. Plaintiff requested a new trial and was denied. Plaintiff appeals the judgment. Additional facts regarding this appeal will be discussed as relevant to plaintiff’s arguments.

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I.

[1] First, plaintiff argues the court committed reversible error by denying her motion for a mistrial due to the defense attorneys making intentionally prejudicial opening and closing arguments.

The facts relevant to this argument are as follows: Defense attorney Steven Colombo (“Attorney Colombo”) began his opening argument by stating, “Ladies and Gentleman, this is nonsense; it’s absolute nonsense, and we’ll prove it to you.” Plaintiff objected to Attorney Colombo’s characterization of her case, and the objection was sustained with no curative instruction requested by plaintiff or given to the jury. Attorney Colombo subsequently became ill and another attorney from his firm, Charles Collins (“Attorney Collins”), replaced him as defense attorney for the remainder of the trial. Thereafter, when the time came for closing arguments, Attorney Collins began his closing argument by stating: “Ladies and Gentlemen, this case is—it’s nonsense, and we’ve showed [sic] you that.” Plaintiff objected again. That objection was sustained once again without a curative instruction being requested by plaintiff or given to the jury. Thereafter, Attorney Collins continued his closing argument by stating that plaintiff’s case was “not about pain; it’s about profit. And it’s not about injury; it’s about money.” Plaintiff did not object to the additional argument. On appeal, plaintiff contends that each of these statements was made solely to prejudice the jury and represented the personal opinions of the defense attorneys.

As a general rule, attorneys “‘are granted wide latitude in the scope of their argument[s].’” *State v. Walls*, 342 N.C. 1, 48, 463 S.E.2d 738, 762 (1995) (quoting *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, cert. denied, 484 U.S. 959, 98 L. Ed. 2d 384 (1987)). Specifically, an attorney has latitude to argue “all the evidence to the jury, with such inferences as may be drawn therefrom; but he may not ‘travel outside the record’ and inject into his argument facts of his own knowledge or other facts not included in the evidence.” *Crutcher v. Noel*, 284 N.C. 568, 572, 201 S.E.2d 855, 857 (1974) (citations omitted). Ensuring that counsel’s arguments adhere to this rule is left largely to the discretion of the trial court. See *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979). “When counsel makes an improper argument, it is the duty of the trial judge, upon objection, or *ex mero motu*, to correct the transgression by clear instructions. If timely done, such action will often remove the prejudicial effect of improper argument.” *Crutcher*, 284 N.C. at 572, 201 S.E.2d at 857 (citation omitted). An appellate court will not review the exercise of

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the trial court's discretion unless the impropriety of the argument made is extreme and clearly calculated to prejudice the jury in its deliberations. See *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761.

In the instant case, defendant contends that her attorneys' "nonsense" statements merely asserted that plaintiff's decision to walk barefoot on broken glass was contrary to good sense, i.e., nonsense. However, the transcript indicates that defendant's attorneys stated in opening and closing arguments that plaintiff's case was nonsense. Rule 3.4(e) of the Revised Rules of Professional Conduct of the North Carolina State Bar provides that an attorney, in trial, shall not "state a personal opinion as to the justness of a cause [or] culpability of a civil litigant[.]" Rev. R. Prof. Conduct N.C. St. B. 3.4(e), 2003 Ann. R. (N.C.) 593, 664. Such statements, especially when they are not further tied into any aspect of the evidence, exceed the scope of what is permissible under Rule 3.4(e). Moreover, assuming that characterization was permissible in the closing argument, it was wholly inappropriate in the context of the opening argument. This Court recognizes that the purpose of an opening argument is not to act as "an argument on the case or an instruction as to the law of the case[.]" but to "allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it." *State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E.2d 632, 636 (1984). Describing plaintiff's case as "nonsense" unquestionably constituted argument.

Nevertheless, we do not believe the "nonsense" statements were so prejudicial as to entitle plaintiff to a new trial. In front of the jury, the trial court sustained plaintiff's objections to defense counsels' improper statements and commented on why those statements were improper. On appeal, plaintiff contends the trial court should have intervened beyond sustaining the objections and admonishing defendant's attorneys. Yet, this Court has held that when an objection is made to an improper argument of counsel and the court sustains the objection, that court does not err by failing to give a curative instruction if one is not requested. See *State v. Barber*, 93 N.C. App. 42, 48-49, 376 S.E.2d 497, 501 (1989). Plaintiff clearly did not request a curative instruction after the court sustained either of the objections to the defense attorneys' characterization of her case as "nonsense" and, given the nature of the statements, it was unnecessary for the court to give such an instruction *ex mero motu* because the impropriety of the statements was not extreme. See *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 515 S.E.2d 30 (1999). Finally, with respect to the additional disputed statements, those

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statements were proper in the context of Attorney Collins' closing argument as an attempt to draw what he deemed were reasonable inferences from the law and facts offered into evidence. *See generally Crutcher*, 284 N.C. at 572, 201 S.E.2d at 857. Thus, the trial court did not abuse its discretion in denying plaintiff a mistrial based on statements made by the defense attorneys in their opening and closing arguments.

II.

[2] Plaintiff also argues the trial court committed reversible error when it denied plaintiff's motion to strike the use of North Carolina Pattern Jury Instructions regarding nominal damages. Specifically, Instruction 106.00 states, *inter alia*, that "[n]ominal damages consist of some trivial amount such as one dollar in recognition of a technical injury to the plaintiff." N.C.P.I.—Civ. 106.00 (motor veh. vol. 2000). Further, Instruction 106.20 states, *inter alia*, that if the jury fails to find, by the greater weight of the evidence, the amount of damages proximately caused by the negligence of the defendant, "it would be [the jury's] duty to write a nominal sum such as 'One Dollar' in the blank space provided." N.C.P.I.—Civ. 106.20 (motor veh. vol. 2000). Defendant contends these two instructions on their face prevented an impartial determination by a jury because they required the instructing judge to suggest that plaintiff's nominal damages were only worth one dollar. We disagree.

Nominal damages are awarded based upon a finding that there has been an invasion of a party's rights. *Hutton v. Cook*, 173 N.C. 496, 92 S.E. 355 (1917). Such an award is recoverable in actions based on negligence. *Porter v. Leneave*, 119 N.C. App. 343, 458 S.E.2d 513 (1995). Here, the nominal damages instructions with which plaintiff takes issue were created and approved by a committee of the North Carolina Conference of Superior Court Judges over twenty-five years ago. During that time these instructions have served as a way of explaining nominal damages, and it was the duty of the trial court to instruct the jury upon the law with respect to the awarding of nominal damages due to the possibility of them being awarded in this case. *See Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 361 S.E.2d 608 (1987). Plaintiff does not cite, nor has this Court found, any North Carolina case law where giving these instructions to a jury was ever questioned by an appellate court much less deemed prejudicial to the parties. Further, plaintiff has not argued that submission of the nominal damages instructions were improper in light of the evidence. Therefore, the court committed no reversible error in denying

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[159 N.C. App. 701 (2003)]

plaintiff's motion to strike the use of the pattern jury instructions on nominal damages.

No error.

Judges MARTIN and GEER concur.

LINDA C. EAGLE, PLAINTIFF V. GARY JOHNSON, DEFENDANT

No. COA02-848

(Filed 5 August 2003)

1. Appeal and Error— mootness—expired order—collateral consequences

An appeal from a domestic violence protective order was not moot even though the order had expired because the order could have collateral legal and non-legal consequences.

2. Collateral Estoppel and Res Judicata— domestic violence protective order—denied in another county—res judicata

A contention that a request for a domestic violence protective order in one county was barred by a previous denial in another county raised the defense of res judicata. Collateral estoppel precludes re-litigation of issues previously adjudicated; res judicata precludes an action between the parties or those in privity based on the same claim.

3. Evidence— res judicata defense—evidence of prior claim—admissible

A new trial was ordered on a domestic violence protective order where the court did not allow evidence that a judge in another county had previously denied the request. The prior case involved precisely the same claim and the parties are identical; the court should have admitted the evidence and considered whether the current case was barred by res judicata.

Appeal by defendant from order entered 21 February 2002 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 14 May 2003.

EAGLE v. JOHNSON

[159 N.C. App. 701 (2003)]

Bruce A. Lee for plaintiff-appellee.

Douglas R. Hux for defendant-appellant.

GEER, Judge.

This action arises out of a domestic violence protective order entered against defendant Gary Johnson on 21 February 2002 in Guilford County District Court. We hold that the trial court erred in refusing to allow defendant to introduce evidence in support of his defense of *res judicata* and remand for a new trial.

On 4 February 2002, plaintiff Linda C. Eagle filed a complaint and motion for a domestic violence protective order in Rockingham County District Court. The complaint and motion alleged that on 1 February 2002, defendant grabbed plaintiff, threw her to the ground, kned her chest, choked her, and bruised her neck, causing her neck and back pain. At the hearing on the complaint and motion on 14 February 2002, Judge Fred Wilkins of the Rockingham County District Court denied plaintiff's motion for the domestic violence protective order and ordered the action dismissed, concluding that plaintiff had failed to prove that defendant committed acts of domestic violence against plaintiff.

On the next day, 15 February 2002, plaintiff filed a second complaint and motion for a domestic violence protective order, but this time filed her action in Guilford County District Court. This complaint alleged again that on 1 February 2002, defendant grabbed her, threw her to the ground, choked her, and put his knee to her chest so that she could not breathe, causing her neck and back pain. Plaintiff did not disclose that she had previously sought a protective order in Rockingham County.

On 15 February 2002, the Guilford County District Court entered an *ex parte* domestic violence protective order and scheduled a hearing on the complaint and motion for 21 February 2002. In an order filed 21 February 2002, the Guilford County District Court entered a domestic violence protective order finding that defendant had assaulted plaintiff on 1 February 2002. The order was to remain in effect for one year. Defendant has appealed from the 21 February 2002 order.

In defendant's narration of the evidence, pursuant to N.C.R. App. P. 9(c)(1), defendant states that he "tried to introduce the Rockingham County court ruling during cross-examination of the

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[p]laintiff, and again as evidence during his presentation, but the Guilford County District Court Judge refused to allow evidence of the earlier hearing into evidence.” On appeal, defendant contends that the trial court erred in refusing to consider evidence of the Rockingham County proceedings in connection with his defenses of *res judicata* and collateral estoppel. We agree.

[1] As a preliminary matter, we note that the protective order has now, under its terms, expired. Because, however, this protective order could have collateral legal and non-legal consequences—including the stigma of a judicial determination of domestic violence—this appeal is not moot. *Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (holding that an appeal of an expired domestic violence order is not moot).

[2] As one of his defenses below, defendant contended that this case was barred either by *res judicata* or collateral estoppel. *Res judicata* precludes a subsequent action between the same parties (or those in privity) based on the same claim, while collateral estoppel precludes re-litigation of issues that have already been previously adjudicated, even if the prior action involved a different claim. *Hales v. North Carolina Ins. Guar. Ass’n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). Because in this case defendant contends that plaintiff’s complaint in Guilford County involves the same claim—a request for a domestic violence protective order based on 1 February 2002 conduct—as the prior action in Rockingham County, the proper defense is *res judicata*.

[3] As this Court has previously held, “[i]n order to successfully assert the doctrine of *res judicata*, a defendant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits.” *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998). A defendant may meet this burden by offering into evidence the final judgment from the prior litigation and documentation from that litigation sufficient to demonstrate that the causes of action and parties in the two lawsuits are the same. *See, e.g., Lombroia v. Peek*, 107 N.C. App. 745, 748, 421 S.E.2d 784, 486 (1992) (a judgment or finding of another court is admissible to establish *res judicata*).

Here, defendant unsuccessfully attempted to offer precisely such evidence, including the complaint and motion filed in Rockingham

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[159 N.C. App. 704 (2003)]

County District Court and the Rockingham County court's order dismissing that action on the merits. A review of those documents suggests that plaintiff's Rockingham County case involved precisely the same claim as asserted in this case and that the parties are identical. The trial court should, therefore, have admitted this evidence of the prior proceeding and considered whether plaintiff's Guilford County case was barred by the doctrine of *res judicata*.

Based on the fact that defendant has only assigned as error the trial court's failure to allow him to present evidence of the prior proceeding and has not assigned error to the district court's failure to apply the doctrine of *res judicata*, we remand this case for a new trial. At that trial, the court must determine whether the Rockingham County action involved the same claim and parties as in this case and whether plaintiff's action is, therefore, barred by the doctrine of *res judicata*.

New trial.

Judges MARTIN and HUNTER concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF v. J. RICHARDSON RUDISILL, JR.,
ATTORNEY, DEFENDANT

No. COA02-1159

(Filed 5 August 2003)

Appeal and Error— jurisdiction—appeal from State Bar

An appeal from a grant of summary judgment for defendant by the State Bar's Disciplinary Hearing Commission was dismissed for lack of jurisdiction. The Court of Appeals' jurisdiction is limited to that provided by the General Assembly, and N.C.G.S. § 84-28(h) provides no appeal from a final order of the State Bar that does not impose discipline. The case does not present appropriate circumstances for the grant of certiorari, and Rule 2 of the Appellate Rules may not be construed to limit or extend jurisdiction.

Appeal by plaintiff from order by the Disciplinary Hearing Commission of the North Carolina State Bar entered 5 July 2002. Heard in the Court of Appeals 22 May 2003.

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[159 N.C. App. 704 (2003)]

The North Carolina State Bar, by Deputy Counsel A. Root Edmonson, for plaintiff-appellant.

Tharrington Smith, L.L.P., by Douglas E. Kingsbery, for defendant-appellee.

CALABRIA, Judge.

The North Carolina State Bar (“the State Bar”) appeals the order of a panel of the Disciplinary Hearing Commission (“DHC”) granting summary judgment to J. Richardson Rudisill, Jr., (“defendant”). For the reasons stated herein, we hold we do not have jurisdiction, and accordingly cannot reach the merits of the case.

On 3 April 2000, Grace Kathleen Urso (“the client”) signed a fee contract for defendant’s services with regard to a domestic divorce. The fee contract provided, *inter alia*, the client pay “an INITIAL NON-REFUNDABLE MINIMUM FEE of \$25,000.00. . . to reserve the Firm’s services.” This fee would be the final fee unless the billable time exceeded \$25,000.00, in which case the client would be billed for the additional time. In accordance with this contract, the client paid defendant \$25,000.00. Three days later, the client reconciled with her spouse and informed defendant to cease representation on her behalf. The client requested a refund of any unearned portion of the fee. Defendant refused to refund more than \$15,000.00, and client declined to accept this compromise. Although resolution of the fee dispute was sought through the State Bar’s fee dispute program, the State Bar filed a complaint with the DHC on 15 August 2001.

The State Bar alleged defendant’s conduct violated the Revised Rules of Professional Conduct, specifically, Rule 1.5(a), which prohibits “clearly excessive” fees, and 1.16(d), which requires refunds of unearned portions of advanced payments. Defendant answered, and on 17 June 2002, defendant moved for summary judgment asserting the fee was a “true retainer” which he was not obligated to refund, and the fee was not “clearly excessive.” The DHC granted defendant’s motion for summary judgment, and the State Bar appeals.

This Court’s jurisdiction is limited to that which “the General Assembly may prescribe.” N.C. Const. Art. IV, § 12 (2). Our statutes provide: “[f]rom any final order or decision of . . . the North Carolina State Bar under 84-28 . . . an appeal of right lies directly to the Court of Appeals.” N.C. Gen. Stat. § 7A-29(a) (2001). However, the appeal of right is limited as follows:

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[159 N.C. App. 704 (2003)]

There shall be an appeal of right from any final order imposing admonition, reprimand, censure, suspension, stayed suspension, or disbarment upon an attorney, or involuntarily transferring a member of the North Carolina State Bar to disability inactive status to the North Carolina Court of Appeals. Review by the appellate division shall be upon matters of law or legal inference.

N.C. Gen. Stat. § 84-28(h) (2001). Since the statute provides no appeal from a final order which does not impose discipline, the State Bar has no statutory right to appeal the case at bar.

The State Bar asks this Court to consider its appeal as a petition for writ of certiorari. Our statutory law provides this Court with the jurisdiction to grant writs of certiorari as follows:

The Court of Appeals has jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and super-sedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission.

N.C. Gen. Stat. § 7A-32(c) (2001). Our appellate rules explain:

The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when [(1)] the right to prosecute an appeal has been lost by failure to take timely action, or [(2)] when no right of appeal from an interlocutory order exists, or [(3)] for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C.R. App. P. 21(a)(1) (2003). Therefore, where, as here, the case does not fall within Rule 21, none of the “appropriate circumstances” are present to “permit the Court to issue a writ of certiorari. . . .” *State v. Wilson*, 151 N.C. App. 219, 225, 565 S.E.2d 223, 227 (2002).

The State Bar has asked this Court to suspend the requirements of Rule 21 pursuant to Rule 2, which provides:

[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend

STATE v. MARCOPLOS

[159 N.C. App. 707 (2003)]

or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2 (2003). However, our appellate rules “shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.” N.C.R. App. P. 1 (2003). Moreover, our Supreme Court, in addressing a request to utilize Rule 2 to consider a petition for writ of certiorari “outside the formal parameters of Rule 21” commented, “even if we were so inclined, suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns.” *Bailey v. State*, 353 N.C. 142, 157, 540 S.E.2d 313, 322-23 (2000). Accordingly, where we have no independent basis for jurisdiction, we may not utilize Rule 2 to exercise jurisdiction in the case at bar. The appeal is

Dismissed.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA v. MARK W. MARCOPLOS, NANCY KATHERINE WOODS, PASCAL L. PITTS, LAURA WINBUSH VANDERBECK, JAMES EDWIN WARREN, AND RUTH C. ZALPH

No. COA01-1518-2

(Filed 5 August 2003)

Trespass— second-degree—constitutional

North Carolina’s second-degree trespass statute is constitutional as applied to defendants.

Appeal by defendants from judgments dated 9 August 2001 by Judge J.B. Allen, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 17 September 2002. *Affirmed by State v. Marcoplos*, 154 N.C. App. 581, 572 S.E.2d 820 (2002). *Affirmed and remanded, State v. Marcoplos*, 357 N.C. 245, — S.E.2d — (June 13, 2003). Panel reconvened to consider constitutional issues by Order of Chief Judge, North Carolina Court of Appeals, dated 10 July 2003.

STATE v. MARCOPLOS

[159 N.C. App. 707 (2003)]

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

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher and George Hausen, for defendant-appellants.

Per Curiam.

Following this Court's affirmance of defendants' convictions of second degree trespass in *State v. Marcoplos*, 154 N.C. App. 581, 572 S.E.2d 820 (2002), defendants appealed by right to the Supreme Court of North Carolina based upon Judge Greene's dissent. See N.C. Gen. Stat. § 7A-30(2) (2002). That Court affirmed our decision without opinion (Per Curiam). However, upon noting that "[d]efendants . . . sought review . . . of a constitutional issue originally presented to but not addressed by the Court of Appeals," our Supreme Court, "decline[d] to consider this constitutional issue in the first instance" and "remanded to [this Court] so that this [constitutional] issue may be addressed." In essence, defendants contended before our Supreme Court that the second degree trespassing statute, as applied to defendants, violated the First Amendment of the United States Constitution and Article 1 § 14 of the North Carolina Constitution.

On remand, we can say it no better than the Supreme Court did in an analogous case over 20 years ago, *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981). Like defendants in this case, defendant in *Felmet* contended that North Carolina's trespass statute was unconstitutional. Justice Huskins held that "[d]efendant's conduct was not protected under the First Amendment to the United States Constitution [n]or were defendant's actions protected under Article I, section 14 of the North Carolina Constitution" *Felmet*, at 178, 273 S.E.2d at 712.

Accordingly, for the reasons stated in *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981), we hold that these assignments of error are without merit in law or fact.

Affirmed.

Panel consisting of: WYNN, MARTIN, MCGEE

APPENDIXES

**ORDER ADOPTING AMENDMENT
TO RULES OF CONTINUING
JUDICIAL EDUCATION**

**ORDER ADOPTING AMENDMENT
TO NORTH CAROLINA
SUPREME COURT LIBRARY RULES**

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendment to Rules of
Continuing Judicial Education**

Rule II(C), Requirements is hereby amended by adding a new paragraph at the end of the section to read as follows:

“For District Court Judges designated as Family Court Judges, at least twenty-four (24) of the thirty (30) hours shall be continuing judicial education courses designed especially for Family Court.”

This amendment to the Rules of Continuing Judicial Education shall be effective upon adoption by the Supreme Court.

Adopted by the Court in Conference this the 5th day of February 2004. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

s/Brady, J.
For the Court

**ORDER ADOPTING AMENDMENT TO NORTH CAROLINA
SUPREME COURT LIBRARY RULES**

As directed by the Supreme Court, and by authority of N.C. Gen. Stat. § 7A-13(d)(2003), the North Carolina Supreme Court Library Rules, as promulgated December 20, 1967 (275 N.C. 729), and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), July 24, 1980 (299 N.C. 745), July 19, 1982 (*eff.* September 1, 1982) (305 N.C. 784), November 8, 1983 (*eff.* January 1, 1984) (309 N.C. 829), June 21, 1984 (311 N.C. 773), March 18, 1986 (313 N.C. 755), and September 12, 1988 (322 N.C. 870), are hereby amended:

Rule 3 is hereby amended to read as follows:

“Rule 3. Hours.

Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from eight-thirty o'clock in the morning until four-thirty o'clock in the afternoon.”

This amendment to the North Carolina Supreme Court Library Rules shall become effective on the 1st day of March, 2004.

Adopted by the Court in Conference this the 5th day of February 2004. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

s/Brady, J.
For the Court

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ADMINISTRATIVE LAW

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Deadline for final agency decision—extension—showing of good cause by agency—required—An administrative agency did not extend the deadline for issuing a final decision for good cause, and the decision of the administrative law judge became the final decision, where the agency simply issued a letter stating that the time frame for the final decision was being extended. Grounds demonstrating good cause for extending the deadline under N.C.G.S. § 150B-44 must be stated. **Albemarle Mental Health Ctr. v. N.C. Dep't of Health & Human Servs.**, 66.

APPEAL AND ERROR

Appealability—mootness—Respondent father's appeal from a 31 January 2002 order adjudicating his children to be neglected and dependent was rendered moot by a 10 June 2003 order terminating respondent's parental rights. **In re Stratton**, 461.

Appealability—motion to stay action—failure to petition for writ of certiorari—Although defendants contend the trial court erred in an action seeking to release certain funds to plaintiffs that were being held pursuant to an escrow agreement by failing to grant defendants' motions to stay the action under N.C.G.S. § 1-75.12(a), defendants failed to properly petition the Court of Appeals for a writ of certiorari. **Jaeger v. Applied Analytical Indus. Deutschland GMBH**, 167.

Appealability—order denying arbitration—An order denying arbitration is immediately appealable because it involves a substantial right which might be lost if the appeal is delayed. **Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.**, 120.

Appealability—sufficiency of notice of appeal—The Court of Appeals did not have jurisdiction to hear plaintiff insured's cross-appeal assigning as error the trial court's failure to use his requested special instructions and the trial court's failure to give a peremptory instruction in a declaratory judgment action seeking motor vehicle liability insurance coverage because it does not appear on the face of the notice of appeal that plaintiff intended to appeal from anything other than the judgment notwithstanding the verdict. **Monin v. Peerless Ins. Co.**, 334.

Failure to include record page references—issue not considered—No error was found in an equitable distribution action where plaintiff asserted that the court failed to consider certain distributional factors, but did not include page references to the transcript or exhibits. **Rice v. Rice**, 487.

Inconsistent verdict—FELA action—waiver of error—Plaintiff railroad employee waived any claim of error based upon the inconsistency of the jury's verdict in an action under the Federal Employers' Liability Act when plaintiff's counsel declined the court's offer to resubmit the issues to the jury with further

APPEAL AND ERROR—Continued

instructions and insisted that a mistrial was the only available remedy. **Warnock v. CSX Transp., Inc.**, 215.

Instruction—no objection—not fatal—A failure to formally object to an instruction on the jury's determination of the amount of contribution was not fatal because the verdict was not allowed under applicable law. **Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc.**, 43.

Jurisdiction—appeal from State Bar—An appeal from a grant of summary judgment for defendant by the State Bar's Disciplinary Hearing Commission was dismissed for lack of jurisdiction. The Court of Appeals' jurisdiction is limited to that provided by the General Assembly, and N.C.G.S. § 84-28(h) provides no appeal from a final order of the State Bar that does not impose discipline. The case does not present appropriate circumstances for the grant of certiorari, and Rule 2 of the Appellate Rules may not be construed to limit or extend jurisdiction. **N.C. State Bar v. Rudisill**, 704.

Mootness—expired order—collateral consequences—An appeal from a domestic violence protective order was not moot even though the order had expired because the order could have collateral legal and non-legal consequences. **Eagle v. Johnson**, 701.

Mootness—likelihood of repeated action—The issue of whether DMV could disregard a limited driving privilege granted by a court was not moot even though the original revocation and the limited privilege had expired by the time of the Court of Appeals decision. It is reasonably likely that DMV could repeat its action in considering future cases. **State v. Bowes**, 18.

Motion to strike brief—improper appellate brief—The Department of Social Services' motion to strike a brief filed by the mother in a child neglect and dependency adjudication hearing is granted on the ground that the brief was not a proper appellee brief. **In re Stratton**, 461.

Plain error—asserted in brief—combined errors—Defendant's plain error contentions were reviewed, but separately, where he specifically alleged plain error, but attempted to combine assignments of error concerning unrelated evidence. **State v. Riley**, 546.

Preservation of issues—constitutional issue—raised below but not in exact words—Double jeopardy was raised in the trial court, even though the exact words were not used, where the substance of the argument was sufficiently presented and was addressed by the court. **State v. Ezell**, 103.

Preservation of issues—failure to assign error—failure to argue in brief—Although respondent parents contend the trial court erred in a child sexual abuse and neglect case by admitting, over respondents' objection, the hearsay statements of one of their children, this issue was not preserved for appellate review because: (1) respondents did not assign error to the testimony of two social workers regarding statements by the child even though respondents now argue these statements were inadmissible hearsay; and (2) respondents failed to brief the issue of the testimony of a doctor being error, and the portion of the transcript referenced in the assignment of error is not addressed in the brief. **In re Morales**, 429.

APPEAL AND ERROR—Continued

Preservation of issues—failure to include transcript—Although defendant contends the trial court abused its discretion in a robbery with a dangerous weapon case by failing to grant defendant's motion for a mistrial based on a juror's allegedly inflammatory statement during jury selection, this assignment of error is dismissed because defendant failed to include the actual transcript of the voir dire during which the comment was made. **State v. Bellamy, 143.**

Preservation of issues—failure to object—An issue was not preserved for appellate review where there was no objection. **Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 43.**

Preservation of issues—failure to object and argue in brief—Although defendant contends the trial court committed plain error in a second-degree rape case by refusing to provide the jury with a written copy of the jury instructions after the jury requested it, defendant waived appellate review of this issue because he failed to object or to argue plain error in his brief. **State v. Scercy, 344.**

Preservation of issues—failure to object to later admission of same evidence—Although defendant contends the trial court erred in an involuntary manslaughter and practicing medicine without a license case by admitting into evidence a note from defendant naturopath's employee to the child victim's mother, this assignment of error is overruled because defendant failed to preserve this issue for appeal by failing to object to the later admission of the same evidence. **State v. Perry, 30.**

Preservation of issues—failure to preserve issue on grounds asserted—Although defendant contends the trial court erred in an involuntary manslaughter and practicing medicine without a license case by refusing to admit character evidence of defendant naturopath's habit and character for being a law-abiding citizen and not holding himself out as a physician, this assignment of error is overruled because defendant failed to properly preserve the issue for appellate review on the grounds asserted. **State v. Perry, 30.**

Preservation of issues—failure to raise at trial court—Although defendant contends the trial court erred by granting summary judgment in favor of plaintiff bank as to claims against defendant resulting from the breach of a lease agreement because plaintiff failed to prove damages as a matter of law, this issue is overruled because defendant did not raise this issue in the trial court. **Centura Bank v. Winters, 456.**

Preservation of issues—no offer of proof—appeal not considered—Defendant's failure to make an offer of proof resulted in the dismissal of an assignment of error that evidence was wrongly excluded. **State v. Locklear, 588.**

Preservation of issues—peremptory excusal of black female jurors—insufficient record—Although defendant contends the trial court erred in a trafficking in methamphetamine by possession and by transportation case by failing to find that defendant presented prima facie evidence of prosecutorial discrimination in jury selection and by failing to require the prosecutor to articulate a race-neutral reason for his peremptory excusal of three black female jurors, the record is insufficient to permit proper appellate review of this issue because jury selection was not recorded or reconstructed. **State v. Shelman, 300.**

APPEAL AND ERROR—Continued

Refusing to allow rebuttal of affidavits—incomplete record on appeal—The trial court did not err in an action seeking a declaratory judgment that the city lacked authority to condemn plaintiffs' property by refusing to allow plaintiff husband to testify orally to rebut the city's affidavits supporting the trial court's decision because plaintiffs failed to include in the record the evidence or other documentation necessary for an understanding of the issue on appeal. **Tucker v. City of Kannapolis, 174.**

Substantial compliance for annexation—issue already resolved—Although petitioners contend the trial court erred by concluding that respondent city substantially complied with its annexation statute in combining the three pertinent lots into one tract and then counting that tract as a tract in commercial use, the merits of this argument need not be reached because the associated assignments of error are resolved by the appellate court's reversal of the trial court's classification of lots under development as commercial. **Ridgefield Props., L.L.C. v. City of Asheville, 376.**

ARBITRATION AND MEDIATION

Agreement to arbitrate—scope of agreement—analysis—The trial court's denial of a motion to compel arbitration was not reversed based on a failure to follow the Federal Arbitration Act in an investment fraud case involving multiple organizational layers, with a question as to whether the arbitration agreement applied to more than one partnership. North Carolina's stance on arbitration is very close, if not identical to the federal stance; under either analysis, a party is first found to have contractually agreed to arbitration, and then the determination is whether the dispute falls within the realm of the arbitration clause. The presumption in favor of arbitration is applied in the second step. **Sloan Fin. Grp., Inc. v. Beckett, 470.**

Multilayered investment fraud—relationship of allegations to agreement—The trial court did not err by finding that all but one claim arising from investment fraud fell outside an arbitration clause. **Sloan Fin. Grp., Inc. v. Beckett, 470.**

Retroactive application of SEC rules—signed agreements—The trial court erred by applying SEC rules retroactively to determine whether there was a valid arbitration agreement in IRAs and a cash management account. **Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 120.**

Stay of claims not arbitrated—denied—no abuse of discretion—The trial court did not abuse its discretion by not staying claims not ordered to arbitration. The interest of efficiency would not be served by holding the main portion of a lawsuit while a side item is arbitrated. **Sloan Fin. Grp., Inc. v. Beckett, 470.**

ASSAULT

Failure to instruct on lesser included offense—not plain error—The failure to instruct on misdemeanor assault with a deadly weapon as a lesser included offense of felonious assault with a deadly weapon with intent to kill was not plain error. All the evidence showed an intent to kill where it tended to show that defendant wore the colors of a rival gang and fired ten shots from a nine-

ASSAULT—Continued

millimeter handgun into a crowd which included members of that gang, killing one of the victims. **State v. Riley, 546.**

Multiple shots—single assault—The trial court erred by not dismissing four of five assault charges as part of a single assault where the shots were fired in a single place in rapid succession and were not separate events requiring defendant to employ his thought processes each time he fired the gun. **State v. Maddox, 127.**

With a deadly weapon with intent to kill—sufficiency of evidence—There was sufficient evidence of assault with a deadly weapon with intent to kill where defendant shot at the victim five times with a nine-millimeter handgun as the victim attempted to flee, and the victim was spared serious injury or death only by jumping behind a tree. **State v. Maddox, 127.**

ATTORNEYS

Legal malpractice—proximate cause—The trial court did not err in a negligence action alleging legal malpractice arising in the context of a criminal proceeding by granting summary judgment in favor of defendant law firm and one of its partners because plaintiff failed to show that his injury was proximately caused by defendants' alleged negligence. **Belk v. Cheshire, 325.**

BAIL AND PRETRIAL RELEASE

Failure to appear—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of failure to appear. **State v. Dammons, 284.**

CHILD ABUSE AND NEGLECT

Opinion testimony sexual abuse occurred—failure to object—waiver—failure to show prejudice—The trial court did not commit prejudicial error in a child sexual abuse and neglect case by admitting the opinions of a social worker and a doctor that sexual abuse had in fact occurred. **In re Morales, 429.**

Sexual abuse—motion to dismiss—sufficiency of evidence—The trial court did not err in a child sexual abuse and neglect case by denying respondent parents' motions to dismiss at the close of petitioners' evidence and at the close of all evidence where the trial court had ample evidence before it that respondents' older child had been sexually abused and that their younger child was living in an injurious environment. **In re Morales, 429.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—decided before mediation—The trial court erred by deciding the issue of permanent custody prior to the parties' participation in mediation as required in N.C.G.S. § 50-13.1(b). **Chillari v. Chillari, 670.**

Support—changing investment strategy—earning capacity rule—bad faith required—The trial court abused its discretion when calculating child support by imputing income from investments where the court found that plaintiff had changed his investment strategy from income to growth, but made no findings as to motive. **Cook v. Cook, 657.**

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Support—changing jobs—earning capacity rule—bad faith required—The trial court abused its discretion by using the earning capacity rule to calculate child support where there was no showing that plaintiff had reduced his income in bad faith. **Cook v. Cook, 657.**

Visitation—burden of proof—The trial court in a parental visitation case did not improperly shift the burden of proof from plaintiff father to defendant mother because no party has the burden of proof when the trial court is applying the best interests standard. **Lamond v. Mahoney, 400.**

Visitation—sufficiency of findings of fact—The trial court's findings of fact in a parental visitation case were insufficient to support the conclusions of law or the decretal portion of the order amending visitation. **Lamond v. Mahoney, 400.**

Visitation—temporary order—The trial court did not err in a parental visitation case by ruling that a 25 July 2001 order was a temporary order with respect to visitation and by applying a best interests of the child standard rather than requiring that plaintiff father demonstrate a change of circumstances. **Lamond v. Mahoney, 400.**

CITIES AND TOWNS

Annexation—amendments to record in superior court—classification of property—Amendments to the record in superior court in an annexation case did not prejudice residents' rights and were properly allowed. The change concerned the classification of a parcel as urban or non-urban, but the parcel was not included in any calculations to determine the percentage of urban development. **Briggs v. City of Asheville, 558.**

Annexation—amendments to record in superior court—inclusion of enlarged map—available to public at time ordinance passed—The amendment of an annexation record in the superior court to include an enlarged color map of proposed sewer extensions was not erroneous where the map was available for public inspection before the adoption of the ordinance. **Briggs v. City of Asheville, 558.**

Annexation—condominium common areas—residential—Condominium common areas should have been classified as residential in an annexation action. Each unit owner has an undivided interest in the common areas and facilities that cannot be separated from the unit. **Briggs v. City of Asheville, 558.**

Annexation—condominiums—residential rather than commercial—Condominium units should not have been classified as commercial (thereby excluding those areas from the subdivision test) in an annexation proceeding. Condominium owners hold exclusive ownership and possession of the unit, unlike an apartment unit, and condos are typically used as an owner's residence. **Briggs v. City of Asheville, 558.**

Annexation—services plan—septic system maintenance and repair—Asheville failed to create an annexation services plan that complied with statutory requirements where it proposed provision of septic system maintenance and repair services in lieu of sewer service in a portion of an annexation area. **Briggs v. City of Asheville, 558.**

CITIES AND TOWNS—Continued

Annexation—use test—ordinance invalid—The trial court erred by concluding that respondent city's annexation ordinance substantially complied with the "use test" of N.C.G.S. § 160A-48(c)(3) and therefore respondent's annexation ordinance is null and void because future plans for use are irrelevant. **Ridgefield Props., L.L.C. v. City of Asheville, 376.**

Condemnation—injunctive relief—The trial court did not err by granting defendant town's motion to dismiss plaintiff property owners' actions seeking injunctive relief to prevent defendant from proceeding with the condemnation of plaintiffs' property because plaintiffs had the opportunity to present their affirmative defenses during the condemnation proceeding and thus had an adequate remedy at law. **Nelson v. Town of Highlands, 393.**

Condemnation—public purpose—The trial court did not err in an action seeking a declaratory judgment that the city lacked authority to condemn plaintiffs' property by concluding that the proposed taking was for a permissible public purpose to extend sewer service. **Tucker v. City of Kannapolis, 174.**

Health and dental benefits—for former deputy sheriff—disability retirement—authority of board of county commissioners and county manager—A de novo review revealed that the trial court erred by entering judgment in favor of plaintiff former deputy sheriff who is on disability retirement on his claim against defendant county for continuation of health and dental benefits and by denying defendant county's motion for judgment notwithstanding the verdict because plaintiff failed to show that he had a valid contract for the claimed insurance benefits that was formally entered by the board of county commissioners or that the county manager had the authority to enter such a contract. **Denson v. Richmond Cty., 408.**

CIVIL PROCEDURE

Two dismissal provision of Rule 41(a)(1)—different transactions—Plaintiff bank's claims against defendant resulting from breach of an automobile lease agreement were not barred by the two dismissal provision of N.C.G.S. § 1A-1, Rule 41(a)(1) although plaintiff's prior lawsuits arose from breaches of the same lease agreement where each of the present claims was based on a default with respect to a separate set of payments and thus involved different transactions. **Centura Bank v. Winters, 456.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Domestic violence protective order—denied in another county—res judicata—A contention that a request for a domestic violence protective order in one county was barred by a previous denial in another county raised the defense of res judicata. **Eagle v. Johnson, 701.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Trafficking in methamphetamine by possession and by transportation—instruction on confession—The trial court did not err in a trafficking in methamphetamine by possession and by transportation case by instructing the jury that there was evidence tending to show defendant had confessed to trafficking in methamphetamine. **State v. Shelman, 300.**

CONSTITUTIONAL LAW

Double jeopardy—analysis—The double jeopardy analysis in *Blockburger v. United States*, 284 U.S. 299, (proof of a fact not present in each offense) is an aid to determining legislative intent in that it creates a presumption that may be rebutted by a clear indication of legislative intent. **State v. Ezell, 103.**

Double jeopardy—assault—A defendant's conviction for both assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32 and assault inflicting serious bodily injury under N.C.G.S. § 14-32.4 violated double jeopardy. N.C.G.S. § 14-32.4 punishes an assault inflicting serious bodily injury as a Class F felony "unless the conduct is covered under some other provision of law providing greater punishment." N.C.G.S. § 14-32 is a Class E felony, which carries a more severe punishment. **State v. Ezell, 103.**

Due process—school merger plan—post-hearing affidavits—The admission of post-hearing affidavits by an administrative law judge considering a school merger plan was not a due process violation where the petitioners contended that they had understood that the parties were limited to a submission of a single post-hearing affidavit, but the transcript of the hearing indicates that they consented to "affidavits." Moreover, petitioners did not show how the submission of additional affidavits substantively prejudiced their case. **Kings Mountain Bd. of Educ. v. N.C. State Bd. of Educ., 568.**

Effective assistance of counsel—further factual development necessary—A claim of ineffective assistance of counsel was not addressed where further factual development was necessary for a proper review. **State v. Clark, 520.**

Effective assistance of counsel—misstatement during closing argument—Defendant was not denied effective assistance of counsel where his attorney mis-spoke during his closing argument and urged the jury to find defendant guilty of all charges. Contextually, counsel did not admit guilt, and the additional argument allowed by the court emphasized defendant's innocence and cured any prejudice. **State v. Mason, 691.**

Effective assistance of counsel—record not sufficiently developed for some claims—others overruled—Some of an armed robbery defendant's claims for ineffective assistance of counsel were dismissed without prejudice so that he could file a motion for appropriate relief in the trial court. Other claims involved issues decided elsewhere in the opinion and were overruled. **State v. Lawson, 534.**

Right of confrontation—admission of school disciplinary record into evidence—The trial court did not violate a juvenile's right to confrontation in a juvenile delinquency hearing by refusing to admit a minor child witness's disciplinary record into evidence. **In re Oliver, 451.**

Right of confrontation—right to cross-examine child witness about school disciplinary record—The trial court did not violate a juvenile's right to confrontation in a juvenile delinquency hearing by allegedly denying defendant's right to cross-examine a minor child witness about her school disciplinary record in an attempt to ascertain her credibility and whether she had any possible biases or motives. **In re Oliver, 451.**

Right of confrontation—right to cross-examine principal about child's school disciplinary record—The trial court did not violate a juvenile's right to

CONSTITUTIONAL LAW—Continued

confrontation in a juvenile delinquency hearing by failing to allow the juvenile to cross-examine a principal about a minor child witness's behavior or the contents of her disciplinary record. **In re Oliver, 451.**

Separation of powers—due process—limited driving privilege—granted by court—invalidated by DMV—DMV violated both due process and separation of powers by unilaterally invalidating a limited driving privilege which had been granted as a judgment by a district court. The court was not notified and took no action to vacate its order. **State v. Bowes, 18.**

CONTEMPT

Attorney fees—pursuit of contempt order—The trial court did not err by awarding attorney fees to plaintiff in an action seeking to enforce a consent judgment through contempt. The contempt power of the district court includes the authority to award attorney fees as a condition of purging contempt for failure to comply with an order; plaintiff's counsel submitted an affidavit to support the request for attorney's fees; defendant did not take exception to the finding that attorney fees were incurred; and the trial court's award was \$500 less than requested. **Middleton v. Middleton, 224.**

Compliance with consent provisions—violation of spirit —The trial court did not err by finding defendant in contempt of an equitable distribution consent order requiring the sale of the home. Although defendant contended that he complied with all of the provisions of the order, he violated its spirit and intent by taking willful and deliberate action to make the house unattractive and undesirable to prospective purchasers. **Middleton v. Middleton, 224.**

CONTRIBUTION

Agency—lack of direct negligence—claims extinguished—A determination of agency was properly submitted to the jury to establish a contribution claim by an insurance broker (Marsh) against the company issuing a fidelity bond (Hartford). **Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 43.**

Amount of contribution mandated—verdict outside applicable law—The trial court erred in a contribution case by entering judgment upon a jury's determination of the amount of contribution when that amount was mandated by the Uniform Contribution Among Tort-Feasors Act (UCATA). **Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 43.**

Prima facie showing—agency—There was a prima facie showing of a contribution claim between an insurance broker (Marsh) and the company issuing a fidelity bond (Hartford). Marsh's receipt of commissions from Hartford and issuance of title binders and other documents on Hartford's behalf create an apparent authority for Marsh to act as Hartford's agent and are sufficient to withstand Hartford's motion for summary judgment or directed verdict on the issue of agency. **Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 43.**

COSTS

Attorney fees—common fund—reduction of recovery—The trial court did not abuse its discretion by finding that plaintiff UIM insurer's subrogation

COSTS—Continued

recovery should be reduced by its proportionate share of attorney fees incurred by defendants in the prosecution of the dram shop actions. **Farm Bureau Ins. Co. of N.C., Inc. v. Blong, 365.**

CRIMINAL LAW

Instruction—acting in concert—The trial court did not commit plain error in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by instructing the jury on acting in concert. **State v. Poag, 312.**

Instruction—confession—Pattern Jury Instruction—There was no plain error in a first-degree murder prosecution in the court's instruction that there was evidence tending to show that defendant had confessed to the crime charged. Although the defense argument was that defendant had confessed to killing the victim rather than to premeditating the killing, a detective testified that defendant had admitted choking the victim with her apron string because he was angry with her and tired of her "junk." The Pattern Jury Instruction "tending to show" language does not constitute an impermissible expression of opinion. **State v. Fowler, 504.**

Instruction—differences between requested and given instruction—harmless—Any error in a first-degree murder prosecution in the court's instructions on peacefulness was harmless. Defendant requested that the jury be instructed on nonviolence and peacefulness, but the court instructed only on peacefulness; peacefulness and nonviolence are almost synonymous. Furthermore, there is no significant difference in the given instruction on the likelihood of a peaceful person committing first-degree murder and the requested instruction on the likelihood of a peaceful person committing the alleged offense. **State v. Fowler, 504.**

Instruction—false, contradictory, or conflicting statements—guilty conscience—The trial court did not err in a second-degree rape case by instructing the jury that if it found defendant made false, contradictory, or conflicting statements, the same could be considered as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience. **State v. Scery, 344.**

Instruction—reputation—evidence of general good reputation—not sufficient—There was no error in a first-degree murder prosecution in the court's instruction on reputation evidence. Although defendant argued that evidence of his general good reputation should be considered, under our current rules of evidence the accused may only introduce evidence of pertinent character traits. **State v. Fowler, 504.**

Instruction—requested—given—There was no error in a first-degree murder prosecution where defendant contended that the court did not give an instruction on how to consider demonstrative evidence, but the court gave the instruction. **State v. Fowler, 504.**

Joinder—two offenses—The trial court did not err in an obtaining property by false pretenses case by granting the State's motion to join his two offenses. **State v. Simpson, 435.**

CRIMINAL LAW—Continued

Mistrial—lapsus linguae during closing argument—no prejudice—The trial court did not abuse its discretion by denying defendant a mistrial after defense counsel misspoke during his closing argument. Although defendant contended that the court acted under a misapprehension of the law in stating that double jeopardy would prevent a mistrial, there was no prejudice because counsel's error was in form, not substance. **State v. Mason, 691.**

Motion for mistrial—failure to move to strike or request curative instruction—The trial court did not err in an involuntary manslaughter and practicing medicine without a license case by denying defendant naturopath's motion for a mistrial based on a detective's testimony regarding his familiarity with a signature based on a law enforcement investigation where an objection to the testimony was sustained and defendant failed to move to strike or to request a curative instruction. **State v. Perry, 30.**

No contest plea—factual basis—consequences—The trial court did not commit plain error in an obtaining property by false pretense case by accepting defendant's no contest plea to both the false pretense charge involving tire rims and the accompanying habitual felon charge because factual bases existed for both pleas. **State v. May, 159.**

Preliminary instructions—expression of opinion—The trial court did not express an opinion on defendant's guilt in a second-degree rape case when it stated, during preliminary instructions to the jury pool on the presumption of innocence and burden of proof, "and that's what we'll do—what will go on in this case," because although it is the better practice for a court to avoid even ambiguous comments that may imply that it and the prosecutor are on the same team, the court was merely commenting on the roles of the court and the attorneys in the trial which is not a question of fact to be decided by the jury. **State v. Scercy, 344.**

Prosecutor's argument—medical records—note—The trial court did not abuse its discretion in an involuntary manslaughter and practicing medicine without a license case by overruling defendant naturopath's objections to the State's closing argument regarding the reading from the child victim's medical records from another doctor and the notes from an officer because the contents of the medical records and everything the State referenced regarding the notes were in evidence. **State v. Perry, 30.**

Prosecutor's argument—questioning of witness—misstatement of law on acting in concert—The trial court did not err in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by failing to correct the prosecutor's closing argument that misstated the law on acting in concert and the State's question to a witness misstating the law by representing that mere presence at the scene of the crime and knowledge thereof was sufficient to find defendant guilty of acting in concert because the court's instructions cured the improper statements, and defendant failed to show that the jury would have reached a different verdict had the trial court intervened. **State v. Poag, 312.**

Re-instruction—verdict reached but not returned—The court's re-instruction of the jury on the age element of statutory rape was not erroneous where the court realized the error in the original instruction, correctly instructed the jury,

CRIMINAL LAW—Continued

and returned the jurors to the jury room after they had announced that they had a verdict but before the verdict was delivered. Defendant was not subjected to double jeopardy because there had been no final judgment before the re-instruction, and the court did not attempt to coerce a verdict. **State v. Bell, 151.**

Requested instruction—defendant as law abiding—lack of criminal record—instruction not given—A first-degree murder defendant was not entitled to an instruction on being law abiding where the record suggests that defendant's lack of a criminal record resulted from not being caught. **State v. Fowler, 504.**

Requested instruction—motive—Pattern Jury Instruction given—The trial court did not err in a first-degree murder prosecution by denying defendant's request for special instructions on lack of motive. The court gave the Pattern Jury Instruction on motive, but defendant argued that the instruction suggested that the absence of motive was relevant only to consideration of innocence of all charges, not to whether he was guilty of second-degree murder. **State v. Fowler, 504.**

Trial court's expression of opinion on witness credibility—disparaging comments about defense counsel—The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury case by expressing its opinions as to a witness's credibility and by repeatedly making disparaging comments concerning the ability and character of defense counsel, and defendant is entitled to a new trial. **State v. Brinkley, 446.**

Venue—concurrent—joinable offenses—The trial court did not err in an involuntary manslaughter and practicing medicine without a license case by denying defendant's motion to dismiss based on improper venue because each county had concurrent venue. **State v. Perry, 30.**

DIVORCE

Alimony—fault—dependency—The trial court did not abuse its discretion in a divorce action in its treatment of fault from defendant's adultery for purposes of alimony. **Rice v. Rice, 487.**

Alimony—findings—standard of living—potential rental income—The trial court's findings on remand were insufficient in a divorce action with alimony issues where the action had been remanded for findings on the parties' accustomed standard of living (among other things) and the court made findings regarding the separate "estates" of the parties during the marriage. Additionally, it was improper for the court to consider plaintiff's potential rental income of her North Carolina residence because her new, out-of-state job involved a probationary period and uncertainty as to her continued employment and residence. **Rice v. Rice, 487.**

Equitable distribution—classification—sale of house and lot—The trial court erred in an equitable distribution action by classifying the proceeds of the sale of the pertinent house and lot as entirely marital property, because: (1) defendant acquired the house before the parties' marriage and it was his separate property; and (2) the act of physically transferring the location of the house onto the lot owned by the parties as tenants by the entireties, unaccompanied by any

DIVORCE—Continued

other evidence of donative intent by defendant, was insufficient to rebut the statutory mandate that separate property remain separate unless a contrary intention is expressly stated in the conveyance. **Goldston v. Goldston, 180.**

Equitable distribution—distributional factor—assistance in bringing up spouse's child—The trial court did not err in an equitable distribution action by finding the distributional factor that defendant assisted with bringing up plaintiff's daughter by helping to pay for trips, private school tuition, and college expenses. Although support of the parties' children may not be considered, defendant was not the father of plaintiff's daughter and had no legal obligation to care for her. The distributional factor found by the court recognized defendant's voluntary assumption of responsibilities and was properly considered. **Rice v. Rice, 487.**

Equitable distribution—distributional factor—health—The trial court did not err in an equitable distribution action by finding the distributional factor that plaintiff was in good health. Plaintiff's assertion that the trial court ignored a previous judicial recognition that plaintiff suffered from arthritis and hypertension simply attacked an isolated phrase. Plaintiff made no assertion that her arthritis and hypertension affected her work ability. **Rice v. Rice, 487.**

Equitable distribution—distributional factors—findings insufficient—The trial court's findings about distributional factors in an equitable distribution award were not detailed enough for appellate review and the order was remanded. **Embler v. Embler, 186.**

Equitable distribution—distributive award—findings—An equitable distribution order contained insufficient findings of the source from which defendant was to pay a distributive award and was remanded. If defendant is to pay the award from a non-liquid asset or by obtaining a loan, the award must be recalculated to take into account the financial ramifications. **Embler v. Embler, 186.**

Equitable distribution—marital property—fees received by plaintiff's firm—The trial court erred (under then applicable law) in an equitable distribution action by classifying as separate property fees that were received by defendant's law firm before the separation but distributed to defendant after the separation. **Rice v. Rice, 487.**

Equitable distribution—pension—distribution to one party—The trial court did not err in an equitable distribution action by distributing to defendant his entire pension even though a portion of it was marital property. Under the statute applicable to the case, N.C.G.S. § 50-20(b)(3)(1995), the court had a variety of distributive choices that did not restrict it to a proportionally equal division of the pension. **Rice v. Rice, 487.**

Equitable distribution—pension plan—marital property—The classification of a pension plan as marital property for an equitable distribution award was upheld. Defendant stipulated that the plan was marital property with a note that the marital portion was to be appraised, but never introduced evidence of the premarital value of the pension. Defendant had the burden of showing the portion of the plan that was separate property and cannot now complain. **Embler v. Embler, 186.**

DIVORCE—Continued

Equitable distribution—potential income and liabilities—Although it is proper in an equitable distribution action to consider the potential income and liabilities of the parties, it was improper for the trial court to consider plaintiff's potential rental income in this case due to findings about alimony issues. **Rice v. Rice, 487.**

Equitable distribution—unequal division of marital assets—The trial court did not abuse its discretion in an equitable distribution action by determining that an unequal division of the marital assets in favor of plaintiff wife was equitable. **Goldston v. Goldston, 180.**

Equitable distribution—valuation of law practice—undistributed fees—The trial court erred in an equitable distribution action in its valuation of defendant's law practice by classifying fees received by the defendant's law firm before the separation and distributed to defendant after the separation as separate property and not including them in the value of the practice. **Rice v. Rice, 487.**

Equitable distribution—value of real property—reduction of mortgage—improvements—The trial court properly applied the source of funds rule in an equitable distribution action when distributing to the marital estate a portion of passive appreciation in real property based on reductions in the mortgage principal and improvements paid for with marital funds. There is no difference between financial contributions to reduce the mortgage and those to improve the property. **Rice v. Rice, 487.**

DRUGS

Conspiracy to traffic in cocaine by possession—failure of indictment to include weight of cocaine—Defendant was improperly convicted for conspiracy to traffic in cocaine by possession where the indictment failed to include the weight of the cocaine possessed. **State v. Outlaw, 423.**

Trafficking in cocaine—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motions to dismiss the charge of trafficking in cocaine by possession even though defendant contends there was insufficient evidence to support a finding that defendant possessed 28 grams or more of cocaine because the evidence was sufficient to permit the jury to find that defendant had the intent and capability to maintain control over 63.5 grams of crack cocaine found in a tupperware container that came from defendant's apartment. **State v. Outlaw, 423.**

Trafficking in methamphetamine by possession and by transportation—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of trafficking in methamphetamine by possession and by transportation even if defendant had no knowledge of the weight or amount of methamphetamine which he knowingly possessed. **State v. Shelman, 300.**

EVIDENCE

Accident reports—admissible—Official accident reports are admissible as records of regularly conducted activity and as public records and reports. **Pintacuda v. Zuckeberg, 617.**

EVIDENCE—Continued

Arrest for unrelated crimes—overwhelming evidence of guilt—not plain error—The admission of testimony that defendant was also arrested for crimes for which he was not on trial was not plain error, given the overwhelming evidence that defendant committed the crimes charged. **State v. Riley, 546.**

Cross-examination—officer testimony—defendant under the influence—The trial court did not commit plain error in a robbery with a dangerous weapon case by allowing an officer to testify on cross-examination that based on his knowledge of defendant's past, it was possible that defendant was under the influence. **State v. Bellamy, 143.**

Demonstration by detective—strangling—admissible—A demonstration by a detective as to how an apron string used to strangle a murder victim was wrapped and tied around the victim's neck was admissible where the demonstration was relevant to premeditation and deliberation and the State provided a proper foundation in that the detective testified to his familiarity with the autopsy photos and the apron string used for the strangling. The demonstration was not required to be excluded as prejudicial because it was brief and unemotional, not speculative, and the court sustained questions to the detective that were more properly within the jury's sphere. **State v. Fowler, 504.**

Exclusion of victim's uncommunicated threats—substantially same evidence presented—The trial court did not err in a first-degree murder case by excluding the victim's uncommunicated threats to defendant from the jury where defendant had not testified and had not offered evidence of self-defense at the time evidence of the threats was proffered. **State v. Messick, 232.**

Hearsay—defendant's drug deal/revenge theory of case—The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by excluding evidence of and failing to instruct on defendant's theory of the case that his two alleged coconspirators were seeking revenge on defendant based on the fact that they were angry with defendant for refusing to finance a drug deal because the statements were self-serving and the theory was not supported by substantive evidence. **State v. Wiggins, 252.**

Hearsay—door opened—There was no error in the admission of testimony from a convenience store employee present during an armed robbery about hearsay statements from another employee. Defendant opened the door by asking the first employee what he had observed and what his investigation had uncovered about the number of robbers. **State v. Clark, 520.**

Hearsay—door opened on cross-examination—The trial court did not err by admitting hearsay from detectives in a trial for murder, burglary, and robbery where defendant opened the door through questions on cross-examination. **State v. Mason, 691.**

Hearsay—statement to police—admission not prejudicial—other evidence—The admission of a hostile witness's statement to police in an assault prosecution was harmless, even if defendant's general objection was sufficient, because other evidence revealed that defendant shot at the witness a number of times with a handgun as the witness ran behind a tree. There is no possibility that the jury would have reached a different result. **State v. Maddox, 127.**

EVIDENCE—Continued

Hearsay—victim's handwritten statements—present sense impressions—harmless error—A shooting victim's handwritten statements about events leading up to and during the shooting made seven hours after the shooting and after the victim had undergone general anesthesia and surgery were not admissible under the present sense impression hearsay exception; however, the admission of these written statements was harmless error beyond a reasonable doubt where the same information contained in the statements was properly introduced into evidence through the victim's 911 call and the testimony of other witnesses. **State v. Wiggins, 252.**

Medical records—failure to object—The trial court did not err in an involuntary manslaughter and practicing medicine without a license case by allowing a detective to testify that there were numerous phone consultations in defendant naturopath's progress notes that were included in the child victim's medical records because the medical records were admitted into evidence and published to the jury without objection. **State v. Perry, 30.**

Officer's testimony—defendant as liar—There was no plain error in an armed robbery prosecution in the admission of portions of an officer's testimony about defendant giving false information about his identity. The officer's testimony dealt with the reasons for the officer's suspicion and his initial arrest of defendant for providing fictitious information. **State v. Lawson, 534.**

Other offenses—child support arrears—A question about defendant's child support arrears in an armed robbery prosecution was not so prejudicial as to require polling the jury or granting a mistrial. **State v. Clark, 520.**

Package of methamphetamine—authenticity—chain of custody—The trial court did not err in a trafficking in methamphetamine by possession and by transportation case by admitting into evidence a package of methamphetamine found in defendant's possession where the State presented adequate evidence of authenticity and chain of custody. **State v. Shelman, 300.**

Photos—gang brands and tattoos—Miranda—There was no plain error in the admission of an officer's testimony about the meaning of photos of defendant's tattoos and brands, which allegedly depict gang membership, where defendant contended that the information was obtained after he had indicated that he did not want to be questioned without an attorney. Defendant did not object to testimony that the markings indicated membership in a gang, and there was other evidence in the record about the meaning of the marks and that the officer knew the meaning of the marks from other sources. **State v. Riley, 546.**

Physical location of universities—relevancy—The trial court did not abuse its discretion in an involuntary manslaughter and practicing medicine without a license case by admitting evidence regarding the physical locations of the addresses of the universities listed on defendant's diplomas and resume. **State v. Perry, 30.**

Present sense impressions and excited utterances—statements directing officer to robbery—Statements to an officer from unidentified witnesses to an armed robbery who flagged down an officer and later directed him to defendant's car were admissible as present sense impressions and excited utterances. **State v. Clark, 520.**

EVIDENCE—Continued

Prior acts—treatment of another patient—The trial court did not err in an involuntary manslaughter and practicing medicine without a license case by admitting evidence regarding defendant naturopath's treatment of another patient. **State v. Perry, 30.**

Prior offense—not prejudicial—other evidence of guilt—Admission of the circumstances of a prior conviction for driving while impaired did not tilt the scales against defendant in his current second-degree murder prosecution and was not more prejudicial than probative. The State presented sufficient evidence of guilt absent this evidence. **State v. Locklear, 588.**

Prior offense—similar—probative value—The admission of the circumstances around a prior arrest of defendant for driving while impaired was admissible in his current second-degree murder conviction, which also resulted from drunken driving. The prior circumstances were similar enough to have probative value and were admissible to establish malice. **State v. Locklear, 588.**

Questions about irrelevant evidence—not prejudicial—The allowance of questions of questionable relevancy did not rise to the level of prejudicial error in an action to determine the liability of an insurer through the actions of a broker. **Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 43.**

Rape victim's statement—corroborative—A detective's testimony about a statutory rape victim's statement was properly admitted as corroborative evidence. The trial court is in the best position to determine whether the testimony of the detective corroborated that of the witness. **State v. Bell, 151.**

Refusal of questioning concerning business license—failure to prove prejudice—Even if it is presumed that the trial court erred in an involuntary manslaughter and practicing medicine without a license case by refusing to allow defendant naturopath to question a police lieutenant about whether the State would issue a license to an illegal business, this assignment of error is overruled because defendant failed to prove prejudice. **State v. Perry, 30.**

Refusing to admit portion of defendant's statement to police—no prejudicial error—The trial court did not commit prejudicial error in an attempted first-degree rape and breaking or entering case by refusing to permit a portion of defendant's statement to the police to be considered by the jury because the statement was relevant only to the attempted rape charge and there was ample evidence of defendant's intention. **State v. Owen, 204.**

Res judicata defense—evidence of prior claim—admissible—A new trial was ordered on a domestic violence protective order where the court did not allow evidence that a judge in another county had previously denied the request. **Eagle v. Johnson, 701.**

Videotape—convenience store robbery—foundation—no plain error—The admission of a videotape in an armed robbery prosecution was not plain error where the clerk present at the convenience store during the robbery testified that the store was equipped with cameras, that the manager had properly loaded the recorder, and that the tape accurately depicted the robbery. Moreover, defendant could not show that the tape had a probable impact on the verdict given the overwhelming evidence of guilt; in fact, defendant used the tape at trial and it may have helped his case. **State v. Lawson, 534.**

FALSE PRETENSE

Obtaining property by false pretenses—deception of victim—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of obtaining property by false pretenses under N.C.G.S. § 14-100 even though defendant contends the victim pawn shop owner was not actually deceived by defendant's false representations, because although the victim had a suspicion that the cameras were stolen, his testimony when viewed in the light most favorable to the State reasonably permits a jury to make an inference that he called a detective in order to confirm that the items were not stolen property and that the victim was in fact deceived. **State v. Simpson, 435.**

FIREARMS AND OTHER WEAPONS

Weapon in vehicle—constructive possession—sufficiency of evidence—There was sufficient evidence to submit possession of a firearm by a felon to the jury where a gun was found under the driver's seat of a Jeep driven by defendant after an armed robbery. **State v. Clark, 520.**

FRAUD

Real estate purchased at auction—lots deeded as one tract—Summary judgment was properly granted for defendant-auctioneers on fraud and unfair trade practice claims where plaintiffs bought real property which they thought was in individual lots, but which was ultimately deed as one tract. Defendants represented only the sellers and there was no evidence of an intent to deceive or that defendants owed plaintiffs a fiduciary duty. **Greene v. Rogers Realty & Auction Co., 665.**

HIGHWAYS AND STREETS

Outdoor advertising—billboard height regulation—arguments not raised below—authority of DOT—Arguments concerning a DOT regulation limiting the height of billboards not raised below were precluded in the Court of Appeals. In any event, petitioners did not forecast evidence to support their contention that the regulation exceeded the authority of the DOT because of purported difficulties in measuring the signs without violating various statutes and other regulations. **Capital Outdoor, Inc. v. Tolson, 55.**

Outdoor advertising—billboard height regulation—substantive due process—no violation—A DOT regulation limiting the height of billboards did not violate petitioners' substantive due process rights. The regulation addresses safety as well as aesthetics concerns, and the means are rational and not overly burdensome. Although petitioners pointed to the difficulty of measuring the signs without violating other statutes and regulations, they submitted no evidence. **Capital Outdoor, Inc. v. Tolson, 55.**

Outdoor advertising—interpretation of DOT regulation—The words "height" and "sign structure" in a Department of Transportation regulation providing that the height of any portion of a sign structure as measured vertically from the adjacent edge of pavement of the main traveled way shall not exceed 50 feet were properly construed by the trial court by their ordinary meanings to refer to the top of the sign face. **Capital Outdoor, Inc. v. Tolson, 55.**

HOMICIDE

Attempted first-degree murder—motion to dismiss—sufficiency of evidence—specific intent—The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree murder where the evidence was sufficient to permit the jury to find that defendant had the specific intent to kill the victim during the robbery at a convenience store. **State v. Poag, 312.**

Failure to instruct on lesser included offense—not plain error—The failure to submit second-degree murder to the jury in a first-degree murder prosecution was not error where defendant approached a group that included members of a rival gang wearing that gang's colors, fired into the group ten times, continued to fire as the victims fled, and there was no evidence of provocation or excuse. **State v. Riley, 546.**

First-degree murder—instruction—proximate cause—reasonable foreseeability—The trial court did not err by giving an expanded instruction on proximate cause in a first-degree murder prosecution that "defendant's act need not have been the last cause or the nearest cause. It is sufficient if concurred where some other cause acting at the same time which in combination with it proximately caused the death of the victim" where the State's evidence showed that defendant shot the victim in the head and shoulder from a range of two feet; defendant shot the victim a second time after the victim fell to the ground; defendant threw the gun down and fled; a friend of defendant retrieved the gun and shot the victim again; the friend then drove the victim's body from the scene and burned it; and the cause of death was two gunshot wounds to the victim's neck and face area. The issue of the omission of an additional instruction on reasonable foreseeability was not before the appellate court where defendant failed request such an instruction or to assign its omission as plain error. **State v. Messick, 232.**

First-degree murder—motion to dismiss—failure to renew motion at close of all evidence—waiver—Although defendant contends the trial court erred by denying his motion to dismiss the charge of first-degree murder made at the close of the State's evidence, defendant waived this assignment of error because defendant failed to renew his motion at the close of all the evidence. **State v. Messick, 232.**

First-degree murder—short-form indictment—constitutionality—A short-form indictment is constitutionally sufficient to allege first-degree murder based on premeditation and deliberation. **State v. Messick, 232.**

Involuntary manslaughter—practicing medicine without a license—sufficiency of evidence—The trial court did not err by denying defendant naturopath's motion to dismiss the charges of involuntary manslaughter and practicing medicine without a license. **State v. Perry, 30.**

Second-degree murder—malice—instructions—The trial court's instruction on malice in a second-degree murder prosecution was correct, taken as a whole, where defendant argued the court should have instructed the jury that it was required to find at least one of the examples of attitude given in the instruction. **State v. Locklear, 588.**

Second-degree murder—sufficiency of evidence—malice—driving while impaired—The evidence of malice was sufficient in a second-degree murder

HOMICIDE—Continued

prosecution where defendant was driving with an alcohol concentration of .08 when he collided with another vehicle; a seven-year-old boy in the other vehicle suffocated when the shoulder belt tore his windpipe; and a prior conviction put defendant on notice of the consequences of driving while impaired. **State v. Locklear, 588.**

Short-form indictment—murder—Use of the short form murder indictment was not error. **State v. Fowler, 504.**

IDENTIFICATION OF DEFENDANTS

Personal knowledge—discrepancies weighed by jury—The trial court did not commit plain error in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by allowing a victim to identify defendant as the shooter where the victim had sufficient personal knowledge to allow her to make such an identification based upon her perception of him gained during the robbery. **State v. Poag, 312.**

Show-up—no plain error—The admission of identification testimony at an armed robbery prosecution was not plain error where a clerk at the store identified defendant in a show-up, which is disfavored, but there was no substantial likelihood of irreparable misidentification under the totality of the circumstances. Since the out-of-court identification was admissible, there is no danger that it impermissibly tainted the in-court identification. **State v. Lawson, 534.**

IDENTITY FRAUD

Financial identity fraud—instruction—consent—The trial court sufficiently instructed the jury concerning consent in a financial identity fraud case. **State v. Dammons, 284.**

Financial identity fraud—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of financial identity fraud under N.C.G.S. § 14-113.20(a), because: (1) the indictment alleged that defendant misrepresented his identity for the purpose of avoiding legal consequences, and the State presented substantial evidence at trial tending to show that defendant assumed another person's identity without consent in order to avoid the trial of felony charges against him; and (2) the language of the indictment alleging that defendant also misrepresented his identity for the purposes of making a financial transaction was unnecessary and may properly be regarded as surplusage. **State v. Dammons, 284.**

Financial identity fraud—obstructing or delaying a law enforcement officer—The trial court did not err in a financial identity fraud case by failing to instruct the jury on obstructing and delaying an officer because such crime is not a lesser-included offense of financial identity fraud. **State v. Dammons, 284.**

IMMUNITY

Sovereign—limited driving privilege—action to enforce against State—The State's enactment of N.C.G.S. § 20-179.3 waived sovereign immunity for enforcement of a limited driving privilege granted by a court and invalidated by DMV. **State v. Bowes, 18.**

INDICTMENT AND INFORMATION

Motion to amend—date of charged offense—The trial court did not err in an obtaining property by false pretenses case by granting the State's motion to amend the indictment to change the date of the charged offense. **State v. Simpson, 435.**

Obtaining property by false pretense—amendment to date of offense—The trial court did not commit plain error in an obtaining property by false pretense case by permitting the State to amend the date of offense on the indictment to accurately reflect the date of the offense rather than the date of arrest. **State v. May, 159.**

INSURANCE

Automobile—residence—father's policy—A de novo review revealed that the trial court erred by granting judgment notwithstanding the verdict for plaintiff insured in a declaratory judgment action seeking motor vehicle liability insurance coverage, because testimony at trial established by more than a scintilla of evidence that plaintiff did not reside at his father's residence and was therefore not entitled to coverage under his father's policy. **Monin v. Peerless Ins. Co., 334.**

Automobile—UIM coverage—subrogation—The trial court did not err by finding that plaintiff UIM insurer was entitled to be subrogated to the rights of the original plaintiffs in their independent dram shop settlement arising out of a drunk driving accident even though defendants allege the UIM policy at issue and the Financial Responsibility Act are silent on the issue and the stated public policy of North Carolina endeavors to make plaintiff whole in an underinsured motorist case. **Farm Bureau Ins. Co. of N.C., Inc. v. Blong, 365.**

Automobile—UIM coverage—credit for workers' compensation payments—The trial court erred in a wrongful death action seeking the recovery of UIM benefits by denying defendant insurance company a credit for workers' compensation payments received by plaintiff, and defendant is only required to pay its share of the loss without exhausting payment of its UIM coverage before another insurance company would be required to pay on its coverage. **Austin v. Midgett, 416.**

Automobile—UIM coverage—prejudgment interest—Although the trial court erred in a wrongful death action seeking the recovery of UIM benefits by failing to award prejudgment interest on the judgment against defendant insurance company when the pertinent policy did not expressly exclude prejudgment interest from compensatory damages as it did with costs in the supplementary payments provision, defendant's liability limit is \$75,000, the \$100,000 UIM policy limit less a credit for \$25,000 paid by the tortfeasor's liability carrier to plaintiff, and it cannot be required to pay prejudgment interest that would raise the amount it paid above its \$75,000 liability limit. **Austin v. Midgett, 416.**

Automobile—UIM coverage—non-fleet passenger truck—gross weight specified by manufacturer—The evidence was insufficient to show a truck's "gross vehicle weight as specified by the manufacturer" and summary judgment should not have been granted for defendant in an underinsured motorist stacking case where there was an issue as to whether the truck was a private passenger vehicle. **Erwin v. Tweed, 579.**

INSURANCE—Continued

Automobile—UM and medical expenses payments—collateral source rule—policy controls—An insurance company which issued an automobile policy with medical and uninsured motorist (UM) coverage was entitled to a credit against the amount due under the UM coverage for the amount it had paid for medical expenses. The Financial Responsibility Act does not contain language controlling duplicate compensation under UM and medical payments coverage, so that the policy controls. This policy expressly provides that defendant's liability under UM coverage is excess to its medical payments coverage and shall not duplicate medical expense payments. **Espino v. Allstate Indemnity Co.**, 686.

Duty of insurer to monitor insured—instruction on general negligence—An assignment of error to the trial court's failure to instruct a jury on the duty of an insurer to monitor the business of the insured was not addressed where the trial court submitted the issue of the insurer's negligence without an instruction on any specific duty and the jury found the insurer liable as the principal of a broker. **Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc.**, 43.

Fidelity bond—extension of coverage by company expansion—notice and consent required—The trial court did not err by granting summary judgment for an insurer on contract and declaratory judgment claims arising from the fidelity bonds issued to cover insurance agents at a company which expanded the number of agents. **Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc.**, 43.

JUDGMENTS

Entry of default—motion to set aside—good cause—not shown—The trial court did not err by denying a defendant's motion to set aside an entry of default arising from the repossession of an automobile where defendant did not present grounds constituting good cause. **Old Salem Foreign Car Serv., Inc. v. Webb**, 93.

Prior—false testimony—attempt to set aside—Summary judgment was properly granted for defendant in an action which alleged fraud through false testimony about assets in a prior alienation of affections action. The issue was raised and fully litigated in the prior action; plaintiff is attempting in this action to set aside a prior judgment on the ground of false testimony. Her sole remedy was through a motion in the cause pursuant to Rule 60, which she filed. That motion was denied and she withdrew her appeal of that decision. **Hooks v. Eckman**, 681.

JURISDICTION

Personal—alienation of affections—The trial court did not err by dismissing plaintiff's alienation of affections action against defendant based on lack of personal jurisdiction. **Eluhu v. Rosenhaus**, 355.

Personal—minimum contacts—The trial court did not err in an action seeking to release certain funds to plaintiffs that were being held pursuant to an escrow agreement by denying defendant German company's motion to dismiss based on lack of personal jurisdiction. **Jaeger v. Applied Analytical Indus. Deutschland GMBH**, 167.

JURISDICTION—Continued

Subject matter—limited driving privilege issued by court—invalidated by DMV—personal—The trial court had subject matter jurisdiction to consider the DMV's invalidation of a limited driving privilege because the court that issues a judgment (the limited privilege) is the appropriate court in which to seek enforcement of the judgment, and because the General Assembly specifically designated the district court to determine both civil and criminal remedies in N.C.G.S. § 20-179.3. **State v. Bowes, 18.**

JURY

Recordation of numerical division—order to deliberate further—The trial court did not commit plain error in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by asking the jury to record its numerical division and to deliberate further. **State v. Wiggins, 252.**

Selection—peremptory challenges—black jurors—racial discrimination—The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by allowing the peremptory strikes of black jurors. **State v. Wiggins, 252.**

Selection—peremptory challenges—gender discrimination—The trial court in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case did not improperly fail to assess gender discrimination against black males in the juror selection, because: (1) after reviewing the totality of circumstances the trial court concluded as a matter of law that the reasons proffered by the State for its excusal of each juror are acceptable, non-pretextual, race-neutral, and gender neutral; and (2) the trial court's order indicated that in light of the State's rebuttal testimony, it accepted those justifications and concluded the State had acted in a gender neutral fashion. **State v. Wiggins, 252.**

LACHES

DOT billboard height regulation—signs built after effective date—regulation not initially enforced—The doctrine of laches did not apply to DOT's enforcement of a billboard height regulation where petitioners built their signs after the effective date of the regulation, DOT did not give them assurances that their signs were in compliance, petitioners's conclusory statements of expenses were not sufficiently detailed, and petitioners' generalized statements about their ongoing sign business do not establish an issue of fact as to whether they were disadvantaged by DOT's initial non-enforcement of the regulation. **Capital Outdoor, Inc. v. Tolson, 55.**

LIENS

Auto removed from mechanic's lot—no direct remedy from fellow lienholder—The trial court erred by awarding actual damages to an automobile repair business for the removal from its premises of a car on which it had a lien. Plaintiff is entitled to recover its costs if and when the automobile is sold, but has no basis upon which to recover the amount of lien directly from defendant, a fellow lienholder. **Old Salem Foreign Car Serv., Inc. v. Webb, 93.**

MEDICAL MALPRACTICE

Standard of care—expert's knowledge not sufficient—The testimony of a medical malpractice expert witness was properly excluded where the witness stated that he was familiar with a uniform or national standard of care, but provided no meaningful evidence that his community was similar to the community in which the alleged malpractice took place; offered no testimony regarding defendants' training, experience, or resources; and there was no evidence that a national standard of care is the same standard practiced in defendants' community. Summary judgment was properly granted for defendants because this witness was plaintiff's only expert. **Smith v. Whitmer, 192.**

MOTOR VEHICLES

Invalidation of limited driving privilege—DMV—personal jurisdiction—The district court had personal jurisdiction over the DMV in an action concerning DMV's invalidation of a court-issued limited driving privilege. The district attorney is in privity with DMV because this involves a single criminal proceeding and because N.C.G.S. § 20-179.3 implicitly places the district attorney in privity with DMV for purposes of limited driving proceedings. **State v. Bowes, 18.**

Obtaining property by false pretense—driver's license—The trial court did not commit plain error in an obtaining property by false pretense case by entering judgment on the false pretense charge involving a driver's license, because an officer's testimony directly supported the indictment's allegation that defendant misrepresented both his identity and his name to an officer in order to procure a driver's license issued to defendant's alias. **State v. May, 159.**

Obtaining property by false pretense—driver's license—sufficiency of evidence—The trial court did not commit plain error in an obtaining property by false pretense case by allowing the false pretense claim involving the driver's license to go to the jury even though defendant contends an officer admitted he did not recall defendant or having any conversation with him, and that it was feasible the license found on defendant came from some other source, because: (1) the transcript revealed that the officer remembered all the essential facts; and (2) defense counsel's characterization of the officer's testimony did not comport with the transcript. **State v. May, 159.**

Separation of powers—due process—limited driving privilege—granted by court—invalidated by DMV—DMV violated both due process and separation of powers by unilaterally invalidating a limited driving privilege which had been granted as a judgment by a district court. The court was not notified and took no action to vacate its order. **State v. Bowes, 18.**

NEGLIGENCE

Contributory—traffic accident—split-second judgment—hindsight irrelevant—Summary judgment should not have been granted for defendant on contributory negligence in a traffic accident case where defendant stopped abruptly on an interstate and plaintiff was injured when his motorcycle skidded as he tried to change lanes. The proper question is whether a reasonable person, making a split-second decision in this situation, would have believed it necessary to swerve. Furthermore, where the motorcycle came to rest was in dispute. **Pintacuda v. Zuckeberg, 617.**

NEGLIGENCE—Continued

Intervening cause—traffic accident—last second swerve—Summary judgment should not have been granted for defendant in a negligence action arising from a traffic accident where defendant stopped his car abruptly on an interstate highway, plaintiff attempted to avoid the accident by changing lanes, and he was injured when his motorcycle skidded. Defendant contended that the skid constituted an intervening cause, but defendant's alleged negligence set in motion a continuous succession of events, and plaintiff's skid was foreseeable. **Pintacuda v. Zuckeberg, 617.**

PARTNERSHIPS

Dissolution—payment of interest—The trial court did not err in an action arising out of a partnership dissolution by calculating interest from 1 May 1996 even on amounts plaintiff did not pay to retire partnership debt until 1998. **Lewis v. Edwards, 384.**

Dissolution—reimbursement—partnership debt—The trial court did not err in an action arising out of a partnership dissolution by determining that plaintiff was entitled to reimbursement of the \$72,085.09 plaintiff paid after 1 May 1996 to retire partnership debt. **Lewis v. Edwards, 384.**

Dissolution—reimbursement—storage fee—law of case—The trial court erred in an action arising out of a partnership dissolution by awarding plaintiff \$862.00 as reimbursement for the storage fee plaintiff incurred to house partnership files and this amount must be subtracted from plaintiff's one-half interest in the partnership. **Lewis v. Edwards, 384.**

Dissolution—valuation—The trial court in an action arising out of a partnership dissolution properly considered all the pertinent evidence regarding the parties' adjustments to the 1 May 1996 valuation of the parties' partnership. **Lewis v. Edwards, 384.**

PHYSICIANS AND SURGEONS

Involuntary manslaughter—practicing medicine without a license—sufficiency of evidence—The trial court did not err by denying defendant naturopath's motion to dismiss the charges of involuntary manslaughter and practicing medicine without a license. **State v. Perry, 30.**

PREMISES LIABILITY

Slip and fall—contributory negligence—summary judgment—directed verdict—Whether plaintiff was contributorily negligent in looking ahead to navigate debris in a hall rather than looking down at the floor was a question of fact for the jury. **Nelson v. Novant Health Triad Region, 440.**

Slip and fall—duty of care—summary judgment—directed verdict—The trial court did not err in a personal injury slip and fall case by denying defendants' motions for summary judgment and directed verdict even though defendant contends plaintiff has failed to offer evidence to refute allegations of contributory negligence, because the decision as to whether looking ahead to navigate the debris in a hall was more or less reasonable than looking down at the floor is a question of fact to be determined by the jury. **Nelson v. Novant Health Triad Region, 440.**

PREMISES LIABILITY—Continued

Slip and fall—open and obvious dangerous condition—summary judgment—directed verdict—The trial court did not err in a personal injury slip and fall case by denying defendants' motions for summary judgment and directed verdict on the ground that defendant had no duty to alert plaintiff to a dangerous condition that was open and obvious because the dangerous condition was not open and obvious as a matter of law. **Nelson v. Novant Health Triad Region, 440.**

PRODUCTS LIABILITY

Breach of implied warranty—instruction—The trial court did not err in a products liability case based on an implied breach of warranty under N.C.G.S. § 25-2-314 by refusing to give defendants' requested jury instruction that the jury had to find defendants' product was defective when it left defendants' control because the proposed instruction misstates the law and evidence, and whether the product met governmental standards was not at issue in the case. **Red Hill Hosiery Mill, Inc. v. MagneTek, Inc., 135.**

Breach of warranty—directed verdict—judgment notwithstanding the verdict—The trial court did not err by failing to grant a directed verdict or judgment notwithstanding the verdict in a products liability case based on a breach of warranty arising out of a fire at plaintiff's hosiery mill allegedly caused by a lighting fixture supplied by defendants. **Red Hill Hosiery Mill, Inc. v. MagneTek, Inc., 135.**

RAPE

Attempted first-degree—motion to dismiss—sufficiency of evidence—short-form indictment—The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree rape even though defendant never removed any of his clothing or said anything to the victim about sexually assaulting her, and defendant contends the short-form indictment was fatally defective, because: (1) defendant's actions and words constitute sufficient evidence of defendant's intent to gratify his passion upon the victim, including defendant's repeated insistence that the victim remove her clothes and come toward him and his attempt to stab her with his knife; (2) the only evidence supporting an alternative motivation was defendant's statement to the police that he went in the house to commit a breaking and entering, and the surrounding circumstances do not corroborate defendant's assertion; and (3) North Carolina has consistently upheld the constitutionality of the use of the short-form indictment in rape cases. **State v. Owen, 204.**

Penetration—sufficiency of evidence—There was sufficient evidence of penetration in a rape case. Complete penetration need not occur. **State v. Bell, 151.**

Second-degree—constructive force—sufficiency of evidence—There was sufficient evidence of constructive force to support defendant's conviction of second-degree rape where the victim testified that defendant took her to an empty ballpark, threatened her by referring to a "9mm" that could be used to "persuade" her, and stated that he would get it the "easy way or the hard way." **State v. Scercy, 344.**

RAPE—Continued

Sufficiency of evidence—identification of defendant—There was sufficient evidence that defendant was the perpetrator of a rape where the victim testified that defendant raped her, and had said this to her aunt, her mother, the police, the paramedics, and the doctors at the emergency room. The existence of contrary evidence is not controlling. **State v. Bell, 151.**

ROBBERY

Dangerous weapon—failure to instruct on lesser-included offense of misdemeanor larceny—The trial court did not err in a robbery with a dangerous weapon case by failing to submit the lesser-included offense of misdemeanor larceny given the overwhelming evidence of defendant's guilt of armed robbery. **State v. Bellamy, 143.**

Dangerous weapon—motion to dismiss—sufficiency of evidence—pocketknife—The trial court did not err by failing to grant defendant's motion to dismiss the charge of robbery with a dangerous weapon at the close of the evidence, because: (1) there was substantial evidence that defendant threatened to use a pocketknife in a manner making it a dangerous weapon and that the victim perceived the knife as a dangerous weapon; (2) the evidence was sufficient for the jury to determine whether defendant's brandishing of the pocketknife constituted a threat to the victim's life; and (3) the taking and threatened use of force was so joined by time and circumstances as to constitute a single transaction. **State v. Bellamy, 143.**

Sufficiency of evidence—robbery by another—defendant's knowledge—The evidence was sufficient to submit robbery with a dangerous weapon to the jury where another person (Terry) got into defendant's Jeep immediately after the robbery; Terry had a ski cap and gloves, although it was a hot day in May, as well as a loaded gun and a paper bag with the stolen money; defendant drove off with a loaded gun under his seat; and defendant took the back way home with Terry lying down in the back seat of the car. These facts permit a reasonable inference of defendant's knowledge. **State v. Clark, 520.**

SCHOOLS AND EDUCATION

Merger—boundaries of school district—de facto doctrine—not applicable—The de facto doctrine was not applicable to determining the boundaries of the Kings Mountain School District after the town of Kings Mountain expanded into a neighboring county. **Kings Mountain Bd. of Educ. v. N.C. State Bd. of Educ., 568.**

Merger—district extending across county lines—certification of number of students in district—estoppel not applicable—The State Board of Education's annual certification of the number of Gaston County students in the Kings Mountain School District was not an implicit recognition by the Board that the Kings Mountain School District extended into Gaston County and did not estop the Board from approving a school merger plan for Cleveland County that included the Kings Mountain District. A governmental agency is not subject to an estoppel claim to the same extent as an individual or a private corporation; the estoppel doctrine will not apply when there is even the possibility that the exercise of governmental powers might be impeded by an estoppel claim. **Kings Mountain Bd. of Educ. v. N.C. State Bd. of Educ., 568.**

SCHOOLS AND EDUCATION—Continued

Merger plan—district over two counties—expansion not automatic with municipal annexation—A 1905 act establishing the Kings Mountain School district did not allow the automatic expansion of a school district by virtue of a city's annexation power. A municipality may not expand its school district boundaries without delegation of legislative authority, and the 1905 Act contained no such delegation. **Kings Mountain Bd. of Educ. v. N.C. State Bd. of Educ.**, 568.

SEARCH AND SEIZURE

Investigatory stop of vehicle—anonymous tip—motion to suppress cocaine—The trial court erred in a possession of cocaine case by denying defendant's motion to suppress cocaine discovered following a stop of his vehicle based on an anonymous tip received by police that the vehicle was involved in illegal drug sales because the tip did not possess the indicia of reliability necessary to provide reasonable suspicion of criminal activity. **State v. McArn**, 209.

Videotapes seized during drug raid—identity of people controlling premises—Defendant's motion to suppress videotapes seized during a narcotics search of his home was properly suppressed. The tapes portrayed defendant having sex in the bedroom where marijuana and drug paraphernalia were found and the warrant under which the mobile home was searched included articles of personal property tending to establish the identity of those in control of the premises. **State v. Adams**, 676.

SECURITIES

Brokerage and clearing—constructive fraud—Constructive fraud claims against brokerage firms and clearing companies did not state claims, and 12(b)(6) dismissals were properly granted, where the action arose from a third party's (Penn's) investment activities for plaintiff and the complaint alleged that defendants benefitted by earnings commissions on the sales transactions ordered by Penn. Plaintiff did not allege that defendants sought to benefit themselves by taking unfair advantage of plaintiff. **Sterner v. Penn**, 626.

Brokerage and clearing—negligence—no duty to third party—Negligence claims against brokerage firms and clearing companies did not state claims, and 12(b)(6) dismissals were properly granted, where the action arose from a third party's (Penn's) investment activities for plaintiff and there were no allegations that defendants acted as investment advisors to Penn or to plaintiff. Defendants had no duty to supervise and monitor Penn to protect plaintiff. **Sterner v. Penn**, 626.

Brokerage and clearing—unfair and deceptive practices statute—not applicable—North Carolina's unfair and deceptive trade practices statute did not apply, and 12(b)(6) dismissals were properly granted, where the action arose from a third party's (Penn's) investment activities for plaintiff. Application of N.C.G.S. § 75-1.1 would create overlapping supervision, enforcement, and liability in an area of law pervasively regulated by state and federal statutes and agencies. **Sterner v. Penn**, 626.

SENTENCING

Aggravating factor—took advantage of a position of trust or confidence—The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by finding the aggravating factor that defendant took advantage of a position of trust or confidence. **State v. Wiggins, 252.**

Consecutive sentence—rejection of plea agreement—The trial court did not err in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by imposing a consecutive sentence for defendant's robbery conviction instead of a concurrent sentence even though defendant contends it was punishment based on his exercise of his right to a jury trial. **State v. Poag, 312.**

Habitual felon—Class C felon—The trial court did not err in a financial identity fraud and a failure to appear case by sentencing defendant as a Class C felon based on his status as an habitual felon. **State v. Dammons, 284.**

Habitual felon—indictment—motion to dismiss—The trial court did not err in a financial identity fraud and a failure to appear case by denying defendant's motion to dismiss the habitual felon indictment on the ground that other similarly situated defendants are not so prosecuted. **State v. Dammons, 284.**

Habitual felon—request to inform jury about potential punishment—The trial court did not err in a financial identity fraud and a failure to appear case by denying defendant's request to inform the jury about potential punishment based on defendant's status as an habitual felon if found guilty of the principal offenses. **State v. Dammons, 284.**

Miscalculation of prior conviction level—second-degree rape—The trial court erred in a second-degree rape case by miscalculating defendant's prior conviction level as level II under N.C.G.S. § 15A-1340.14 and the case is remanded for resentencing. **State v. Scercy, 344.**

Mitigating factors—aid in apprehension of felon—support of family—extensive support system in the community—The trial court did not err in a conspiracy to commit murder, firing a gun into occupied property, and using an instrument with intent to destroy an unborn child case by failing to find the mitigating factors of aid in apprehension of another felon, defendant's support of his family, and presence of an extensive support system in the community. **State v. Wiggins, 252.**

Offense committed during probation—evidence—The trial court did not err in sentencing defendant for assault with a deadly weapon with intent to kill by finding that the offense was committed while he was on probation and adding a point to his prior record level. Although the State did not move to admit the record check, it was handed up to the trial court and was sufficient to support the finding. **State v. Maddox, 127.**

Presumptive range—failure to make findings for aggravating or mitigating factors—The trial court did not err in a financial identity fraud and a failure to appear case by failing to make findings with regard to aggravating or mitigating factors when it sentenced defendant within the presumptive range. **State v. Dammons, 284.**

SENTENCING—Continued

Prior record level—proof—worksheet not sufficient—The State failed to prove defendant's prior record level by a preponderance of the evidence during sentencing for indecent liberties where the State submitted a prior record worksheet but never tendered the criminal information printouts upon which the worksheet was based, and defendant did not stipulate to the worksheet. **State v. Miller, 608.**

Prior record level—proof—worksheet not sufficient—The trial court erred by setting defendant's prior record level based only upon a worksheet prepared and submitted by the prosecutor. There were no records of conviction, no records from agencies, and no evidence of a stipulation. **State v. Riley, 546.**

Trafficking in methamphetamine by possession and by transportation—same punishment not required for different defendants—The trial court did not err in a trafficking in methamphetamine by possession and by transportation case by its sentencing of defendant because, even if defendant received a greater sentence than his codefendant received pursuant to a plea bargain, there is no requirement of law that defendants charged with similar offenses be given the same punishment. **State v. Shelman, 300.**

SEXUAL OFFENSES

First-degree sexual offense—indictment—confused with statutory sexual offense—Indictments for first-degree sexual offense were fatally defective because they confused first-degree sexual offense with statutory sexual offense. The indictments alleged a combination of the elements of the two offenses without alleging each element of either offense, and they erroneously cite a different statute than the one under which defendant was tried, convicted, and sentenced. The "short-form" language of N.C.G.S. § 15-144.2(b) was not sufficient to cure the defects under these narrow circumstances. **State v. Miller, 608.**

STATUTES OF LIMITATION AND REPOSE

Medical malpractice—wrongful death—The trial court did not err in a medical malpractice and wrongful death case by dismissing plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) based on both claims being time-barred. **Udzinski v. Lovin, 272.**

TAXATION

Ad valorem—nonprofit corporation—restaurant operation—educational exemption—The Property Tax Commission did not err by concluding that taxpayer nonprofit corporation's operation of a restaurant was not a use that qualified as an educational purpose and therefore was not exempt from ad valorem taxation. **In re Univ. for the Study of Human Goodness & Creative Grp. Work, 85.**

Gift—contingent transfers—The trial court erred by granting summary judgment for plaintiffs on a claim for a gift tax refund arising from contingent transfers of property to trusts. N.C.G.S. § 105-195 is unambiguous in giving the Secretary of Revenue the discretion to assess a tax on a contingent transfer based on the potential happening of any of the possible contingencies. There is no evi-

TAXATION—Continued

dence in the record that the Secretary abused this discretion. **Downs v. State, 220.**

TERMINATION OF PARENTAL RIGHTS

Jurisdiction—DSS failure to file affidavit contemporaneous with juvenile petition—The trial court did not err in a termination of parental rights case by concluding that it had jurisdiction even though the Department of Social Services failed to file an affidavit under N.C.G.S. § 50A-209 contemporaneously with the juvenile petition. **In re Clark, 75.**

Willfully leaving child in foster care for more than twelve months—The trial court did not abuse its discretion in a termination of parental rights case by finding under N.C.G.S. § 7B-1111(a)(2) that respondent mother willfully left her child in foster care for more than twelve months without showing to the trial court reasonable progress under the circumstances. **In re Clark, 75.**

TRESPASS

Second-degree—constitutional—North Carolina's second-degree trespass statute is constitutional as applied to defendants. **State v. Marcoplos, 707.**

TRIALS

Inadequate recording of proceedings—Respondent mother in a termination of parental rights case was not prejudiced by the failure to record the entire proceeding over six different dates. **In re Clark, 75.**

Opening and closing arguments—characterization of opponent's case—The trial court did not abuse its discretion by denying plaintiff a mistrial in an automobile accident case where the defense attorneys argued that plaintiff's case was "nonsense" in their opening and closing arguments. The court sustained plaintiff's objections, but plaintiff did not request a curative instruction and the impropriety of the statements was not so extreme as to require an instruction ex mero motu. **Smith v. Hamrick, 696.**

Use of Pattern Jury Instruction—not prejudicial—The trial court did not err in an automobile negligence case when it denied plaintiff's motion to strike the use of the North Carolina Pattern Jury Instruction on nominal damages. Plaintiff did not argue that submission of nominal damages was improper, and there is no case law in which an appellate court questioned the use of these instructions or deemed their use prejudicial. **Smith v. Hamrick, 696.**

UNFAIR TRADE PRACTICES

Mechanic's lien—removal of auto from mechanic's lot—not unfair trade practice—Plaintiff auto repair business was not entitled to recover treble damages from defendant credit union for an unfair trade practice based upon its allegations that defendant removed an auto from plaintiff's premises without permission or notice to plaintiff after defendant had notice of plaintiff's mechanic's lien on the automobile. Defendant's removal of the auto did not affect plaintiff's lien thereon, and plaintiff suffered no actual injury as a result of any deceptive or unfair act by defendant. **Old Salem Foreign Car Serv., Inc. v. Webb, 93.**

UNFAIR TRADE PRACTICES—Continued

Real estate purchased at auction—lots deeded as one tract—Summary judgment was properly granted for defendant-auctioneers on fraud and unfair trade practice claims where plaintiffs bought real property which they thought was in individual lots, but which was ultimately deeded as one tract. Defendants represented only the sellers and there was no evidence of an intent to deceive or that defendants owed plaintiffs a fiduciary duty. **Greene v. Rogers Realty & Auction Co.**, 665.

VENUE

Waiver—objection in answer filed late—An objection to venue was waived because it was contained in an answer which was late. **Chillari v. Chillari**, 670.

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Caveat proceeding—directed verdict—premature—A directed verdict for caveators on the issue of undue influence was premature in a caveat proceeding because it was granted prior to the close of all the evidence. **In re Will of Smith**, 651.

WITNESSES

Expert—qualifications—The trial court did not err in a products liability case based on a breach of warranty by allowing over objection plaintiff's witness to testify as an expert in the fields of electrical engineering and fire cause and origin investigations. **Red Hill Hosiery Mill, Inc. v. MagneTek, Inc.**, 135.

Hostile—refusal to respond—The trial court did not abuse its discretion by allowing the State to treat an assault victim as a hostile witness and ask leading questions where the record showed that the witness refused to answer questions and was evasive when he did respond. **State v. Maddox**, 127.

WORKERS' COMPENSATION

Course of employment—fall from pear tree—A workers' compensation plaintiff suffered a compensable injury when she fell from a pear tree while working as a certified nursing assistant providing in-home care. The Industrial Commission's findings specifically state that plaintiff was required to make meals and snacks, that she regularly served fruit to her patient as a part of her job, that plaintiff decided to pick a pear for herself and her patient, and that her activities were in the course and scope of her employment. Generally, a plaintiff's negligence or foolish activity does not defeat entitlement to workers' compensation. **McGrady v. Olsten Corp.**, 643.

Hernia—medical testimony as to cause—speculative—Speculative medical testimony was insufficient to support The Industrial Commission's findings and conclusion in a workers' compensation case that plaintiff's hernia was caused by work related activity. Plaintiff, a carpet layer, suffered a rare paraesophageal hernia which he contended was caused by lifting an unusually heavy chest of drawers, but the entirety of the medical testimony was that the cause of plaintiff's hernia remains unclear. **Hodgin v. Hodgin**, 635.

WORKERS' COMPENSATION—Continued

Injury and death arising out of employment—workplace assault—The Industrial Commission did not err in a workers' compensation case by concluding that the evidence in the record supports the Commission's findings 11, 12, and 14, which in turn support its conclusions of law, that decedent truck driver's injury and death were rooted in the pertinent traffic merging incident involving a dispute over decedent's driving and that it arose out of decedent's employment. **Dodson v. Dubose Steel, Inc., 1.**

Injury by accident—psychological disorder—investigation of claim—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's psychological disorder was not the result of an injury caused by an accident arising out of and in the course of her employment with defendant. **Smith v. Housing Auth. of Asheville, 198.**

Permanent and total disability—failure to meet burden of proof—The Industrial Commission did err in a workers' compensation case by concluding that plaintiff employee failed to prove permanent and total disability. **Hunt v. N.C. State Univ., 111.**

Psychological disorder—investigation of claim not an accident—The Industrial Commission did not err in a workers' compensation case by concluding as a matter of law that plaintiff employee's psychological disorder was not compensable. **Smith v. Housing Auth. of Asheville, 198.**

Refusing to allow presentation of additional evidence—change of condition—The Industrial Commission did not err or abuse its discretion in a workers' compensation case by refusing to allow plaintiff employee to present additional evidence regarding the issue of change of condition under N.C.G.S. § 97-47. **Hunt v. N.C. State Univ., 111.**

Sanctions—attorney fees—The Industrial Commission did not abuse its discretion in a workers' compensation case by failing to award to plaintiff employee sanctions and/or attorney fees. **Hunt v. N.C. State Univ., 111.**

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Signs—frame replaced—prohibited by local ordinance—The Gastonia sign ordinance could be construed reasonably to prohibit changing a sign frame as well as the advertisement, and a trial court holding that the City erred in its interpretation of the ordinance was reversed. **Morris Communications Corp. v. Board of Adjust. of Gastonia, 598.**

Signs—preemption by DOT regulation—The portion of the Gastonia sign ordinance interpreted by the City to prohibit replacement of the frame as well as the advertisement was preempted by a DOT regulation which allowed replacement of a structural member of the billboard. **Morris Communications Corp. v. Board of Adjust. of Gastonia, 598.**

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