NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

SIDNEY S. EAGLES, JR.

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GERALD ARNOLD

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5	Ernest B. Fullwood	Wilmington
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	JACK A. THOMPSON	Fayetteville
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13	WILLIAM C. GORE, JR.	Whiteville
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16A	B. CRAIG ELLIS	Laurinburg
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	GARY L. LOCKLEAR	Pembroke
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28	DENNIS JAY WINNER	Asheville
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29	ZORO J. GUICE, JR.	Rutherfordton
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	JAMES D. LLEWELLYN	Kinston
	JERRY CASH MARTIN	King
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JOHN B. LEWIS, JR.	Farmville
DONALD L. SMITH	Raleigh

1. Appointed and sworn in 18 May 2005.
2. Elected and sworn in 1 January 2005 to replace Stafford C. Bullock who retired 31 December 2004.
3. Appointed and sworn in 23 March 2005.
4. Appointed and sworn in 20 April 2005 to replace Russell G. Walker, Jr., who retired 31 December 2004.
5. Elected and sworn in 1 January 2005 to replace Marcus L. Johnson who retired 31 December 2004.
6. Elected and sworn in 3 January 2005.
7. Appointed and sworn in 28 January 2005.
8. Appointed and sworn in 27 April 2005.
9. Retired 31 December 2004.
10. Appointed and sworn in 20 January 2005 to replace Clarence E. Horton, Jr. who retired 31 December 2004.
11. Appointed and sworn in 28 January 2005.
12. Appointed and sworn in as Emergency Judge 2 January 2005.
13. Appointed and sworn in as Emergency Judge 1 January 2005.
14. Appointed and sworn in as Emergency Judge 3 January 2005.

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	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS	Sylva
	MONICA HAYES LESLIE	Waynesville

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ROLAND H. HAYES	Winston-Salem
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ROBERT W. JOHNSON	Statesville

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	C. JEROME LEONARD, JR.	Charlotte
	EDMUND LOWE	High Point
	JAMES E. MARTIN	Ayden
	EDWARD H. MCCORMICK[27]	Lillington
	J. BRUCE MORTON	Greensboro
	DONALD W. OVERBY	Raleigh
	L. W. PAYNE, JR.	Raleigh
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	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia
	J. KENT WASHBURN[28]	Graham

RETIRED/RECALLED JUDGES

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

1. Elected and sworn in 6 December 2004.
2. Appointed and sworn in 2 March 2005.
3. Appointed and sworn in 7 March 2005 to replace John W. Smith who was appointed as Superior Court Special Judge.
4. Elected and sworn in 2 December 2004.
5. Elected and sworn in 2 December 2004 to replace William C. Lawton who retired 20 November 2004.
6. Elected and sworn in 6 December 2004.
7. Elected and sworn in 6 December 2004.
8. Elected and sworn in 6 December 2004 to replace Edward H. McCormick who retired 5 December 2004.
9. Appointed Chief Judge 17 December 2004 to replace J. Kent Washburn who retired 30 November 2004.
10. Elected and sworn in 6 December 2004.
11. Elected and sworn in 6 December 2004.
12. Elected and sworn in 6 December 2004 to replace Thomas G. Foster who retired 30 November 2004.
13. Elected and sworn in 6 December 2004 to replace William Daisy who resigned 31 August 2004.
14. Appointed and sworn in 28 February 2005.
15. Appointed Chief Judge and sworn in 1 February 2005 to replace Samuel Cathey who retired 1 February 2005.
16. Appointed and sworn in 15 April 2005.
17. Elected and sworn in 6 December 2004.
18. Elected and sworn in 6 December 2004.
19. Elected and sworn in 6 December 2004.
20. Appointed and sworn in 31 March 2005 to replace Laura J. Bridges who was elected to Superior Court.
21. Appointed and sworn in as Emergency Judge 3 January 2005.
22. Appointed and sworn in as Emergency Judge 1 February 2005.
23. Appointed and sworn in as Emergency Judge 16 December 2004.
24. Appointed and sworn in 17 May 2004.
25. Deceased 7 June 2001.
26. Appointed and sworn in as Emergency Judge 6 December 2004.
27. Appointed and sworn in 3 January 2005.
28. Appointed and sworn in as Emergency Judge 1 December 2004.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JEFFREY R. KENNEDY, D.D.S., P.A. v. K. CARROLL KENNEDY AND JERRE KENNEDY

No. COA02-1198

(Filed 19 August 2003)

1. Appeal and Error— appealability—denial of preliminary injunction—substantial rights affected

The denial of a preliminary injunction to enforce a covenant not to compete was interlocutory but reviewable on appeal because substantial rights were affected.

2. Parties— dental practice—enforcement of covenant not to compete—standing of corporate entity

The trial court correctly refused to find that plaintiff professional corporation was not the proper party in interest and lacked standing to enforce a purchase agreement for a dental practice which included a covenant not to compete. The evidence of an assignment of rights and obligations to plaintiff-corporation was sufficient, and nothing in the record contradicts evidence that plaintiff-corporation had rights and obligations under the agreement. Moreover, plaintiff has shown a likelihood of success in establishing that defendants are estopped from denying the validity of the assignment because employment benefits were accepted from plaintiff.

3. Injunctions— grounds—de novo appellate review

A preliminary injunction will be issued only if plaintiff is able to show the likelihood of success on the merits and if plaintiff is likely to sustain irreparable loss without the injunction or if the injunction is necessary for the protection of plaintiff's rights during the course of litigation. Appellate review is de novo and the appellate court is not bound by the trial court's findings of fact but may weigh the evidence anew and enter its own findings and conclusions.

4. Employer and Employee— covenants not to compete—elements

Covenants not to compete restrain trade and are scrutinized strictly. To be enforceable, they must be in writing, based upon valuable consideration, reasonably necessary for the protection of legitimate business interests, reasonable as to time and territory, and not otherwise against public policy. At the time the contracts containing the covenants are entered, both parties must apparently regard the restrictions as reasonable and desirable.

5. Employer and Employee— covenant not to compete—dentistry—time and place—reasonable

A covenant not to compete restricting the practice of dentistry was reasonable as to time and place where it covered only a 15 mile radius and applied for only three years flowing the dentist's departure from the practice.

6. Employer and Employee— covenant not to compete—dentistry—no solicitation of patients or employees—reasonable

A covenant not to compete restricting a dentist leaving a practice from employing plaintiff's employees and from soliciting patients was reasonable. The restriction does not cause substantial harm to the public health; at most, it merely inconveniences dental patients. Prohibiting the solicitation and hiring of plaintiff's employees for a three-year period does not violate public policy in that protection of customer relationships and goodwill is well recognized as a legitimate protectable interest of the employer.

7. Contracts— novation—purchase agreement for dental practice—no clear intent to substitute new agreement

There was no evidence of a clear intent that a new agreement be substituted for a purchase agreement for a dental practice. The parties simply agreed that they would no longer work together, an option specifically contemplated by the agreement.

8. Dentists— purchase agreement for practice—not breached or repudiated

The trial court erred by finding that a professional corporation for practicing dentistry breached a purchase agreement by failing to pay defendants what they were due, unilaterally changing the method of compensation, and terminating one of the defendants. The trial court also erred by finding that plaintiff repudiated the agreement.

9. Injunctions— preliminary—de novo review by Court of Appeals—evidence for issuance not sufficient

The evidence on a motion for a preliminary injunction to enforce a covenant not to compete among dentists was not sufficient for issuance of the injunction. The issue was not reached by the trial court and was reviewed de novo by the Court of Appeals.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 6 June 2002 by Judge Wade Barber in Orange County Superior Court. Heard in the Court of Appeals 11 June 2003.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., Denis E. Jacobson and Amanda L. Fields, for plaintiff-appellant.

Law Offices of Thomas H. Stark, by Thomas H. Stark, for defendant-appellees.

MARTIN, Judge.

Jeffrey R. Kennedy, D.D.S., P.A. ("plaintiff") appeals from an order denying its motion for preliminary injunction. We reverse and remand for entry of an order granting the preliminary injunction.

Plaintiff is a dental practice located in Chapel Hill, North Carolina and owned by Jeffrey R. Kennedy, D.D.S. ("Jeff"). Defendant K. Carroll Kennedy, D.D.S. ("Carroll") formed the practice in 1967. In 1984, Carroll hired Jeff, his nephew. In 1992, Carroll sold Jeff

a one-half interest in the practice for $250,000. Carroll and Jeff thereafter worked together as partners for five years. During that time, the practice hired an associate dentist, defendant Jerre Kennedy, D.D.S. ("Jerre"), Carroll's niece and Jeff's first cousin. On 31 July 1996, Carroll sold his remaining interest in the practice to Jeff for $250,000 through an Asset Purchase Agreement. The Asset Purchase Agreement incorporated several exhibits into the agreement, including a restrictive covenant agreement, which included a covenant not to compete, and a provider agreement, which governed Carroll's provision of dental services within the practice (collectively, "the Purchase Agreement"). The Purchase Agreement provided for an initial five-year non-termination period wherein Carroll's employment could be terminated only for cause. After the five-year period, Carroll could be terminated for any reason with 90 days prior written notice. The restrictive covenant agreement would continue in full force and effect in the event the provider agreement were terminated without cause following the initial five-year non-termination period.

As part of the restrictive covenant agreement, Carroll agreed not to open a dentistry practice within a fifteen mile radius of the practice located at 123 W. Franklin Street, Chapel Hill for a period commencing with the sale of the practice on 31 July 1996 and ending three years after Carroll ceased employment with plaintiff. The Purchase Agreement allowed Jeff to assign the agreement to a professional corporation or partnership, provided the assignee executed a guaranty to the effect that it would be jointly and severally liable with Jeff under the Purchase Agreement.

In August 2001, shortly after expiration of the five-year non-termination period, Jeff approached Carroll and informed him that he wanted Carroll to work a more regimented schedule as an employee of the practice. Carroll did not desire to do so, and the two mutually agreed to disassociate. In October 2001, plaintiff provided Carroll written confirmation of the parties' intent that Carroll leave the practice. In his affidavit, Carroll stated that he and Jeff orally agreed that Carroll could open a new practice in Hillsborough despite its being located within a fifteen mile radius of plaintiff's practice, in contravention to the terms of the restrictive covenant agreement.

Plaintiff contends that from August 2001 through February 2002, Carroll actively solicited its patients and employees to follow him to his new Hillsborough practice. In early February, Jeff learned of Jerre's plans to join Carroll in Hillsborough. On 8 February 2002, plaintiff provided Carroll two weeks notice to vacate its office.

Carroll and Jerre moved out of plaintiff's office on 22 February 2002 and opened a dental practice in Hillsborough in March 2002.

On 15 April 2002, plaintiff filed a complaint against Carroll and Jerre alleging breach of contract, misappropriation of confidential information, and tortious interference with prospective advantage. Defendants answered and asserted counterclaims against plaintiff for anticipatory repudiation of the Purchase Agreement, breach of that agreement, fraud, breach of fiduciary duty, and unfair and deceptive practices. Defendants also asserted equitable defenses of estoppel and the doctrine of unclean hands.

On 7 May 2002, plaintiff moved for a preliminary injunction to enforce the covenant not to compete alleging immediate and irreparable harm. In denying plaintiff's motion on 6 June 2002, the trial court found: (1) plaintiff had breached and repudiated the contract documents and could not enforce them under legal and equitable principles; (2) enforcement of the covenant not to compete would infringe on the rights of patients to choose their own dentists; (3) the covenant not to compete was overbroad as to time and place; (4) identity of dental patients and contact information was not a trade secret; and, (5) plaintiff had not demonstrated a likelihood of success on the merits or the existence of irreparable harm. The trial court preserved for trial the parties' claims to money damages. Plaintiff appeals.

The issues are: (1) whether the interlocutory order affects a substantial right that is properly reviewable by this Court; (2) whether plaintiff has standing to enforce the terms of the Purchase Agreement; (3) whether the restrictive covenant agreement is enforceable; (4) whether there was a novation of the Purchase Agreement; (5) whether plaintiff repudiated or breached the Purchase Agreement; (6) whether defendants misappropriated trade secrets; and (7) whether plaintiff is entitled to equitable relief.

I. Interlocutory Appeal

[1] Plaintiff asserts this interlocutory appeal affects a substantial right and is reviewable even though other issues remain for disposition. We agree. "In cases involving an alleged breach of a non-competition agreement and an agreement prohibiting disclosure of confidential information, North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions, holding that substantial rights have been

affected." *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002) (citing *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983); *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 373 S.E.2d 449 (1988), *affirmed*, 324 N.C. 327, 377 S.E.2d 750 (1989); *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 501 S.E.2d 353 (1998); *Masterclean of North Carolina, Inc. v. Guy*, 82 N.C. App. 45, 345 S.E.2d 692 (1986)). Plaintiff's appeal is properly before this Court and is reviewable.

II. Standing

[2] Defendants cross-assign as error the trial court's failure to find that plaintiff is not the proper party in interest and lacks standing to enforce the Purchase Agreement, including the restrictive covenant agreement, as an alternative basis for denying the injunction. Defendants argue the Purchase Agreement was executed between Jeff and Carroll, and that even if Jeff attempted to assign his rights and obligations under the agreement to plaintiff, any such assignment was invalid because the agreement required that an assignment be accompanied by a guaranty executed by the assignee providing that it would be jointly and severally liable under the agreement, and plaintiff never executed any such guaranty. We disagree.

First, we believe the evidence of record is sufficient to show plaintiff's likelihood of success in showing that Jeff assigned his rights and obligations under the agreement to plaintiff. Plaintiff alleges in its complaint that the assignment occurred; Jeff testified that he reviewed the allegations of the complaint, including that he assigned the Purchase Agreement to plaintiff, and that all statements were accurate; Jeff further testified that plaintiff became owner of the asset acquired in the Purchase Agreement, and it was plaintiff who made payments on the loan obtained for the purchase price under the agreement; defendants' answer asserts counterclaims for anticipatory repudiation and breach of contract against plaintiff based upon the terms of the Purchase Agreement, effectively conceding that an assignment occurred; defendants concede in their brief that after Jeff established plaintiff as a corporate entity, both Jeff and Carroll became "employed by that corporate entity . . . and all parties went forward doing business as employ[ees] or contractors of [plaintiff]," rather than Jeff individually; and the evidence shows plaintiff performed the obligations owed Carroll under the Purchase Agreement for several years. Nothing in the record contradicts this evidence tending to show that plaintiff had rights and obligations under the agreement.

Moreover, even if plaintiff failed to execute any required guaranty concurrently with the assignment, plaintiff has shown a likelihood of success in establishing that defendants are estopped from denying the validity of the terms of the Purchase Agreement as between Carroll and plaintiff. As our Supreme Court has noted, the courts of this State recognize the doctrine of quasi-estoppel, also termed "estoppel by acceptance of benefits." *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991). The court stated:

> "The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result." *Thompson v. Soles*, 299 N.C. 484, 486, 263 S.E.2d 599, 602 (1980). Equity serves to moderate the unjust results that would follow from the unbending application of common law rules and statutes. It is well settled that "a party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement." *Advertising, Inc. v. Harper*, 7 N.C. App. 501, 505, 172 S.E.2d 793, 795 (1970) (lessee estopped to deny the validity of a lease because of insufficient description of the premises where he had paid the rent for seven months of a nine-year lease).

Id. at 173, 404 S.E.2d at 859; *see also, e.g., Godley v. County of Pitt*, 306 N.C. 357, 361, 293 S.E.2d 167, 170 (1982) (" 'quasi' estoppel, which does not require detrimental reliance per se by anyone, . . . is directly grounded instead upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts."); *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 226, 517 S.E.2d 406, 413 (1999) (quasi-estoppel based upon principle that " ' "where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it." ' " (citations omitted)).

Applying those principles, the *Brooks* court determined that although the agreement between the parties was technically invalid for want of definiteness, the plaintiff was estopped from denying its validity, and the contract was enforceable. In so holding, the court observed that for several years the parties fulfilled the obligations of the agreement, including the making of required payments, and that the defendants had reasonably relied on the validity of the agreement through the parties' fulfillment of its terms. *Id.*

Likewise, the evidence forecast in the present case shows that Carroll received and accepted benefits from plaintiff pursuant to the Purchase Agreement in the years following plaintiff's formation and prior to his disassociation from plaintiff. Defendants concede in their brief that once Jeff formed plaintiff as a corporate entity, Carroll became "employed by that corporate entity;" thus, it follows that plaintiff was the party who performed the terms of the agreement as to Carroll's compensation for his services and other terms of his employment under the provider agreement. Jeff testified that patients who received treatment were patients of the practice, not of any individual dentist, and that patients paid plaintiff, not the dentist. Carroll enjoyed the benefit of being employed through plaintiff in the manner set forth in the agreement, and accepted plaintiff's performance of the agreement, such as the receipt of compensation. Defendants cannot now assert that any technical deficiency in the assignment bars plaintiff's right to enforce the terms of the Purchase Agreement, and particularly since defendants concurrently assert that plaintiff repudiated and breached the terms of that very agreement. This argument is overruled.

III. Standard of Review

[3] "A preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 423, 571 S.E.2d 8, 11 (2002) (emphasis in original). In reviewing the denial of a preliminary injunction, an appellate court is not bound by the trial court's findings of fact, but may weigh the evidence anew and enter its own findings of fact and conclusions of law; our review is *de novo*. *Id.* "*De novo* review requires us to consider the question anew, as if not previously considered or decided," *In re Soc'y for the Pres. of Historic Oakwood v. Bd. of Adjustment of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002), and such a review of the denial of a preliminary injunction is "based upon the facts and circumstances of the particular case." *Kinsey Contracting Co. v. Fayetteville*, 106 N.C. App. 383, 385, 416 S.E.2d 607, 609, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 149 (1992).

IV. Enforceability of Restrictive Covenants

[4] The trial court concluded that the covenant not to compete was overly broad, unreasonable as to place and time, and unenforceable. The covenants restricted Carroll from practicing dentistry in any location within a fifteen mile radius of plaintiff's office for a period of time starting with the closing date of the sale to Jeff and ending three years from the date Carroll discontinued work with plaintiff. The covenants also restricted Carroll from soliciting professional referral services, patients, and employees of plaintiff.

Covenants not to compete restrain trade and are scrutinized strictly. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988). To be enforceable, covenants must be (1) in writing, (2) based upon valuable consideration, (3) reasonably necessary for the protection of legitimate business interests, (4) reasonable as to time and territory, and (5) not otherwise against public policy. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983). "[A] further consideration by this Court, in recognizing the validity of these covenants, is that at the time of entering these contracts containing covenants not to compete both parties apparently regarded the restrictions as reasonable and desirable." *United Laboratories*, 322 N.C. at 649, 370 S.E.2d at 380. It is undisputed that the covenants at issue meet the first three factors. The remaining issues are whether (1) they are reasonable as to time and place and, (2) not otherwise against public policy.

A. Time and Place

[5] Our Supreme Court has upheld the validity of a covenant restricting competition for seven years within Durham and Orange Counties, finding the covenant reasonable as a matter of law. *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 226, 333 S.E.2d 299, 303-04 (1985) (citing *Jewel Box Stores v. Morrow*, 272 N.C. 659- 662-63, 158 S.E.2d 840, 843 (1968) (upheld agreement not to compete with jewelry business for ten years within ten miles); *Sineath v. Katzis*, 218 N.C. 740, 12 S.E.2d 671 (1940) (upheld agreement not to compete with dry cleaning plant for fifteen years within county); *Sea Food Co. v. Way*, 169 N.C. 679, 86 S.E. 603 (1915) (agreement not to compete with fish dealership within one hundred miles of city for ten years)). Moreover, " '[a] longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*." *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 637-38, 568 S.E.2d 267, —

(2002) (citation omitted) (upholding restrictive covenant covering two states, but lasting only one year).

The restrictive covenant at issue covers only a fifteen mile radius and restricts Carroll only from opening a competing practice within that radius for three years following his departure from plaintiff's practice. This covenant is significantly less restrictive than that upheld by *Bicycle Transit* and case law cited therein. Moreover, even though Carroll continued to be employed by plaintiff for five years after the date of the agreement, such that the covenant remained effective for a total of some eight years, the covenant restricted only a very small geographic area; thus, the balance of the time and place restrictions was wholly reasonable, and plaintiff has accordingly shown a likelihood of success on the merits of the covenant's enforceability.

B. Public Policy

[6] The covenant not to compete also prohibited Carroll from soliciting referrals and prior patients, and from soliciting for employment or employing plaintiff's employees at his new practice. The trial court concluded this restrictive covenant violated public policy by restricting the public's right to choose a particular dentist; that patient records are subject to the patient's control and any contractual agreement to limit the patient's control of such records is void; and that any contract purporting to limit Carroll's ability to hire former employees of plaintiff who had been terminated was unenforceable. We reach a different conclusion.

In *Iredell Digestive Disease Clinic, P.A. v. Petrozza*, 92 N.C. App. 21, 373 S.E.2d 449 (1988), *affirmed*, 324 N.C. 327, 377 S.E.2d 750 (1989), this Court summarized the applicable principles:

> A covenant not to compete between physicians is not contrary to public policy if it is intended to protect a legitimate interest of the covenantee and is not so broad as to be oppressive to the covenantor or the public. *Beam* at 673, 9 S.E.2d at 478. Defendant argues on appeal, as he did before the trial court, that the covenant is void on public policy grounds because enforcing the covenant would deprive Statesville residents of necessary medical care. We find no North Carolina decision which has addressed this particular issue. Other jurisdictions considering the question have found relevant the availability of other physicians in the community affected by the covenant. *See, e.g., Cogley*

> *Clinic v. Martini*, 253 Iowa 541, 112 N.W. 2d 678 (1962); *Middlesex Neurological Associates, Inc. v. Cohen*, 3 Mass. App. 126, 324 N.E. 2d 911 (1975); *Odess v. Taylor*, 282 Ala. 389, 211 So. 2d 805 (1968). If ordering the covenantor to honor his contractual obligation would create a substantial question of potential harm to the public health, then the public interests outweighs the contract interests of the covenantee, and the court will refuse to enforce the covenant. *See, e.g., Dick v. Geist*, 107 Idaho Ct. App. 931, 693 P. 2d 1133 (1985); and *Lowe v. Reynolds*, 75 A.D. 2d 967, 428 N.Y.S.2d 358 (1980). But if ordering the covenantor to honor his agreement will merely inconvenience the public without causing substantial harm, then the covenantee is entitled to have his contract enforced. *See, e.g., Marshall v. Covington*, 81 Idaho 199, 339 P. 2d 504 (1959).

Id. at 27-28, 373 S.E.2d at 453.

Applying this rationale, we conclude plaintiff has shown a likelihood of success on the merits in that the covenant at issue does not cause substantial harm to the public health and, at most, merely inconveniences dental patients. Evidence of record at this stage of the case does not support a finding that enforcement of the agreement would harm the public health. Prior cases concluding that such restrictions harm the public health involve circumstances wherein the health care provider is the sole such provider in the area, or is one of few specialists in a particular area. In this case, the practice is located in the same town as North Carolina's only dental school, and there is no allegation that Carroll was a specialist in a particular field of dental practice, or that if he were, he was only one of few such specialists located within fifteen miles of Chapel Hill. The restrictive covenants do not prohibit patients from choosing their own dentist, but simply bar Carroll from actively soliciting those patients. The covenants likewise do not prohibit patients from accessing and controlling their own dental records; whether plaintiff violated patients' rights by not providing their dental records and other information is irrelevant to the issue of whether the covenant violates public policy.

Likewise, we conclude, based upon the record at this stage, that the covenant prohibiting Carroll from soliciting and hiring plaintiff's former employees for the three-year period does not violate public policy. This Court has recognized that "protection of customer relationships and goodwill against misappropriation by departing employees is well recognized as a legitimate protectable interest of

the employer. The greater the employee's opportunity to engage in personal contact with the employer's customer, the greater the need for the employer to protect these customer relationships." *United Laboratories*, 322 N.C. at 651, 370 S.E.2d at 381 (citations omitted). The evidence demonstrates that plaintiff's employees, many of whom had been employed in plaintiff's practice for several years, were a valuable part of the asset owned by plaintiff, that the employees had developed personal relationships with plaintiff's patients, that the employees were an integral part of a patient's experience with plaintiff, and that Carroll's solicitation of those employees to join his new practice resulted in plaintiff losing patients to Carroll's practice. Under these circumstances, plaintiff has demonstrated the likelihood of its success in showing it was entitled to contract with Carroll to protect its interest in maintaining the goodwill and relationships that its staff had fostered with the practice's patients over time. *See Precision Walls, Inc.*, 152 N.C. App. at 638-39, 568 S.E.2d at —— (upholding as reasonable scope of activity prohibited by covenant not to compete which included provision prohibiting former employee from employing company's employees, soliciting company's employees for employment, or inducing company's employees to leave employment with company).

V. Novation

[7] Defendants cross-assign as error the trial court's failure to find as an alternative basis for denying relief that the parties had agreed to a novation of the Purchase Agreement such that they were relieved of all obligations under the agreement. Defendants base this contention upon statements in Jeff's October 2001 letter to Carroll to the extent that "there is no alternative to ending our association," as well as Carroll's testimony that all parties agreed he would leave the practice.

For a novation to occur, the contracting parties must demonstrate a clear and definite intent to substitute a new agreement for the existing agreement. *Kirby Building Systems, Inc. v. McNiel*, 327 N.C. 234, 393 S.E.2d 827 (1990), *reh'g denied*, 328 N.C. 275, 400 S.E.2d 453 (1991). Novation may never be presumed. *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964). Although it is undisputed that the parties agreed Carroll would leave the practice, there is no evidence of a clear intent among the parties that a new agreement be substituted for the Purchase Agreement. The parties simply agreed that they would no longer work together, an option specifically contem-

plated by the provider agreement. The record does not support defendants' argument.

VI. Breach of Agreement by Plaintiff

[8] The trial court found plaintiff breached the Purchase Agreement by failing to "pay the Defendants what they were due, unilaterally chang[ing] the method of compensation which had been in effect for several years, and terminat[ing] [Carroll] with less than ninety (90) days notice." The trial court also found plaintiff repudiated the agreement when Jeff communicated to Carroll in August 2001 his desire that Carroll continue as an employee of plaintiff rather than an independent contractor.

In order to prevent plaintiff from obtaining injunctive relief on grounds of repudiation or breach of the agreement, defendants must show the alleged breach was "substantial and material and goes to the heart of the agreement. Where the breach by the party seeking enforcement of a contract by injunctive relief is not material, however, it will not prevent him from obtaining such equitable relief." *Combined Ins. Co. v. McDonald*, 36 N.C. App. 179, 183, 243 S.E.2d 817, 819 (1978).

Defendants have failed to direct this Court to evidence which would support a finding that plaintiff failed to pay defendants money owed them under the Purchase Agreement. While Carroll's affidavit indicates that his bookkeeper discovered a shortage in his account, absent substantive evidence that Carroll did not receive the compensation to which he was entitled under the agreement, this bare assertion is insufficient to prove plaintiff breached the agreement.

The sole basis of defendants' argument that plaintiff breached the agreement by changing the method of compensation is Jeff's testimony that at certain times plaintiff paid defendants more than that to which they were entitled under the agreement. This evidence simply indicates that defendants in fact received what they were entitled to under the agreement, and the record at this stage does not support a finding that their receipt of additional compensation from plaintiff amounted to a breach of a material term of the agreement.

The provider agreement also established that Carroll could be terminated without cause after the expiration of the first five years of the agreement with 90 days prior written notice of the termination date. In February 2002, plaintiff informed Carroll he had two weeks to leave the practice. However, Carroll received written notice as

early as October 2001 in a letter from Jeff that his employment with plaintiff would cease in the near future. While the October letter did not employ the phrase "termination notice," the letter put Carroll on notice of the impending disassociation. Plaintiff has demonstrated a likelihood of success in showing that its failure to give an additional 90 days written express termination notice was not a material breach or repudiation of the Purchase Agreement. *See id.* at 184, 243 S.E.2d at 820 ("mere failure of an employer to give the notice of termination of employment provided for in its contract of employment with its employee, nothing else appearing, does not as a matter of law constitute a material breach which will prevent the employer's seeking equitable remedies to prevent a breach of a covenant prohibiting the employee from competing with the employer within a reasonable area and time.").

Finally, we disagree with the trial court's finding that Jeff's August 2001 communication that he desired Carroll to continue providing services to plaintiff as an employee rather than a contractor amounted to a repudiation of the Purchase Agreement. The Purchase Agreement did not specifically require that Carroll provide services to plaintiff as an independent contractor; thus, the suggestion that Carroll alter his status to something other than independent contractor does not amount to a repudiation or breach of the terms of the agreement. Defendants further suggest that Jeff's statements amounted to plaintiff's termination of the provider agreement, and because that agreement was a non-severable part of the Purchase Agreement, plaintiff evinced an intent to repudiate the entire agreement between the parties. However, even if Jeff's statements evinced an intent to terminate the provider agreement, that agreement specifically stated that in the event the provider agreement were terminated without cause following the initial five-year non-termination period, the restrictive covenant agreement would continue in full force and effect. These arguments are overruled.

VII. Trade Secrets

Plaintiff contends the trial court erred in concluding that patient identity and contact information did not constitute a trade secret and that defendants did not misappropriate trade secrets. However, we need not reach the merits of this argument, as the issue does not bear on the trial court's decision to deny equitable relief, and because the court's conclusions on this issue will not be determinative of the issue at any trial on damages.

VIII. Equitable Relief

[9] "Our courts have long recognized that a party seeking equitable relief, such as injunctive relief, must come before the court with 'clean hands.' Those who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule." *Combined Ins. Co.*, 36 N.C. App. at 182, 243 S.E.2d 819. Defendants raised various equitable defenses in their answer, including the doctrine of unclean hands, estoppel, and fraud. The trial court, having determined the restrictive covenants were unenforceable, did not address defendants' equitable defenses in its order. Defendants have neither cross-assigned as error the trial court's failure to address its equitable defenses as an alternative basis for denying the injunction, nor have they presented these arguments to this Court such that any objections to the entry of an injunction on the basis of their defenses are not preserved. *See* N.C. R. App. P. 10(b)(1) (2002).

Moreover, under the wide latitude of *de novo* review, this Court is entitled to review the evidence of record anew and make its own findings of fact and conclusions necessary to a resolution of all pertinent issues. *See, e.g., In re Soc'y for the Pres. of Historic Oakwood, supra.* We are entitled to weigh the evidence and arrive at our own determinations as though, as in this case, the issue had not been previously addressed by the trial court. *Id.* Upon such a review, we conclude the record at this stage fails to set forth evidence supporting any equitable reason why the injunction should not issue. Given our findings that the restrictive covenants were reasonable and enforceable, that they did not violate public policy, that plaintiff did not waive the covenants, that plaintiff did not materially breach or repudiate the Purchase Agreement, and that there was no novation, we find no basis for a determination that plaintiff acted fraudulently, with unclean hands, or that it should otherwise be estopped from receiving an injunction.

In summary, plaintiff has shown a likelihood of success on the merits of its case, based upon the record evidence at this stage in the proceedings, through a showing that the restrictive covenants are reasonable and enforceable against Carroll, and that Carroll's establishment of a practice in Hillsborough violates the covenants. Plaintiff also established irreparable harm through a showing that a substantial portion of its patients have followed Carroll and Jerre to the new practice. We decline to address plaintiff's claim for misappropriation of trade secrets. The evidence at this stage does not support a conclusion that plaintiff breached or repudiated the agreement, or that a

novation occurred. Defendants have failed to preserve any arguments against issuance of the injunction premised upon their equitable defenses asserted below, and our *de novo* review of the record reveals no equitable reason why the injunction should not issue. The trial court's denial of plaintiff's motion for a preliminary injunction is hereby reversed and the matter remanded with instructions that the trial court enter an order in compliance with G.S. 1A-1, Rule 65, granting plaintiff a preliminary injunction enforcing the non-competition agreement. *See, e.g., QSP, Inc.*, 152 N.C. App. at 179, 566 S.E.2d at 854.

Reversed and remanded with instructions.

Judge LEVINSON concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge, concurring in part, dissenting in part.

I concur with the majority's opinion except for section VIII, Equitable Relief. I would remand this case to the trial court for hearing and findings of fact regarding whether plaintiff is entitled to equitable relief. I respectfully dissent from section VIII.

This Court's standard to review the denial of a preliminary injunction is *de novo*. The decision to grant or deny injunctive relief remains discretionary, and its terms must comply with Rule 65(d). The limited record before us does not provide a basis to grant or deny equitable relief.

As a general rule, a preliminary injunction

> is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (citations omitted). Plaintiff met the first prong for issuance of a preliminary injunction by showing likelihood of prevailing at trial. The covenants are legally enforceable, and Carroll's establish-

ment of a practice in Hillsborough violates the time and place restrictions in the covenants. Jeff did not breach, repudiate, or novate the agreement.

The second prong requires a showing of irreparable harm. "In every case where the covenant not to compete is found to be reasonable and valid, however, the plaintiff is entitled to a remedy; either the agreement must be enforced or the court must find that plaintiff has an adequate remedy at law for money damages." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 404, 302 S.E.2d 754, 761 (1983).

> The focus in cases such as the one now under consideration, however, is not only whether plaintiff has sustained irreparable injury, but, more important, whether the issuance of the injunction is necessary for the protection of plaintiff's rights during the course of litigation; that is, whether plaintiff has an adequate remedy at law.

Id. at 406, 302 S.E.2d at 762.

It is well established in North Carolina that injunctive relief will be granted only when irreparable injury is both real and immediate. *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 214 S.E.2d 49 (1975); *Membership Corp. v. Light Co.*, 256 N.C. 56, 122 S.E.2d 761 (1961). "It is a basic principle of contract law that one factor used in determining the adequacy of a remedy at law for money damages is the difficulty and uncertainty in determining the amount of damages to be awarded for defendant's breach." *A.E.P. Industries*, 308 N.C. at 406-07, 302 S.E.2d at 762. "Specifically, the court must decide whether the remedy sought by the plaintiff is the most appropriate for preserving and protecting its rights or whether there is an adequate remedy at law." *Id.* at 406, 302 S.E.2d at 762.

A preliminary injunction may not issue unless the movant carries the burden of persuasion as to each of the prerequisites. *E.g.*, *Pruitt v. Williams*, 288 N.C. 368, 218 S.E.2d 348 (1975). Once this burden is carried, it still remains in the court's discretion whether to grant the motion for a preliminary injunction. *Id.* As Justice Ervin stated in *Huskins v. Hospital*, 238 N.C. 357, 360, 78 S.E.2d 116, 119-20 (1953):

> The hearing judge does not issue an interlocutory injunction as a matter of course merely because the plaintiff avowedly bases his application for the writ on a recognized equitable ground. While equity does not permit the judge who hears the application to

decide the cause on the merits, it does require him to exercise a sound discretion in determining whether an interlocutory injunction should be granted or refused.

"One who seeks equity must do equity." *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998). Plaintiff has alleged and must show entitlement to equitable relief. Defendants have alleged and it is their burden to prove their equitable defenses. Defendants' allegations of fraud and unclean hands against plaintiff raise a genuine issue of plaintiff's entitlement to equitable relief. These allegations were never addressed by the trial court. The majority's opinion does not address them here.

The trial court held the contract to be invalid, against public policy, and unenforceable and denied injunctive relief on those grounds. The trial court never reached the issue of plaintiff's eligibility for an injunction under a valid contract nor defendant's equitable defenses. There is insufficient evidence in the record before us to determine whether equity warrants the issuance of an injunction. "[T]he trial judge is in the best position to exercise this discretion. He hears the evidence, observes the witnesses, considers the arguments of counsel, and weighs and balances the equities." *A.E.P. Industries*, 308 N.C. at 419, 302 S.E.2d at 769 (Justice Martin dissenting, joined by Justices Copeland and Exum). As the record on this issue is silent and the trial court has not been given the opportunity to exercise this discretion, I would remand for the trial court to hold a hearing on the issuance of an injunction. The granting of an injunction by the majority's opinion requires the parties to return to the trial court to determine the nature and extent of the injunction granted. The parties must return to the trial court, in any event, since the issue of damages was specifically reserved.

Judicial restraint and judicial economy require that the appropriate remedy be fashioned in accordance with both Rule 65(d) and all other equitable considerations. I would remand this case to the trial court to hold a hearing, review the evidence in light of the alleged defenses, and determine whether injunctive relief is warranted. I respectfully dissent.

STATE OF NORTH CAROLINA v. DERRICK ANTONIO McCREE, DEFENDANT

No. COA02-796

(Filed 19 August 2003)

1. Identification of Defendants— photographic lineup—in-court identification—motion to suppress

The trial court did not err in a robbery with a dangerous weapon, second-degree kidnapping, and attempted robbery with a dangerous weapon case by denying defendant's motion to suppress his identification by four prosecuting witnesses from a photographic lineup and also their subsequent in-court identification, because: (1) although defendant's face appeared fuller and more round than four of the five men depicted in the lineup, it did not render the lineup impermissibly suggestive; (2) there was no impermissibly suggestive intent or effect from a detective's decision to use an older photo of defendant rather than his more recent photo from his arrest based on the fact that the more recent photo was too dark to show sufficient facial detail; (3) the photo lineup was assembled fairly and presented to each of the witnesses separately in a fair and unbiased manner with instructions not to talk to each other until each had seen the lineup and that they were under no obligation to pick anyone; and (4) the prosecuting witnesses' in-court identification of defendant was not tainted by the photo lineup.

2. Evidence— prior crimes or bad acts—defendant driving vehicle reported stolen

The trial court did not abuse its discretion in a robbery with a dangerous weapon, second-degree kidnapping, and attempted robbery with a dangerous weapon case by admitting an officer's testimony that defendant was driving a vehicle which had been reported stolen at the time he was arrested, because: (1) N.C.G.S. § 8C-1, Rule 404(b) did not require exclusion of testimony that the vehicle had been reported stolen, and the officer did not testify that defendant stole the vehicle; (2) the evidence was offered to explain defendant's presence in the photographic lineup compiled following his arrest while driving a vehicle similar to the one that prosecuting witnesses described as being driven by the robbers; (3) the evidence was not offered for the improper purpose of proving that defendant was a person of bad character with the propensity to commit armed robbery; and

(4) the probative value of the evidence outweighed any danger of unfair prejudice.

3. Kidnapping— second-degree—motion to dismiss—sufficiency of evidence—restraint and removal

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree kidnapping that was based on the restraint and removal of one of the victims from one room to another inside an apartment to facilitate the robberies committed therein, because a jury could reasonably find that defendant's restraint and removal of the victim for the purpose of assisting in the robberies of the apartments' other occupants exposed the victim to a greater danger than that inherent in the armed robbery itself.

4. Robbery— dangerous weapon—personal property taken—no fatal variance

There was no fatal variance between an indictment alleging that defendant took "personal property, wallet and its contents, one video cassette recorder, one television" from the person and presence of the victim by use of a firearm and evidence that defendant took $50.00 in cash from the victim at gunpoint and that defendant's accomplice took the victim's VCR and television from downstairs while defendant was robbing the apartment's upstairs occupants.

Appeal by defendant from judgment entered 3 July 2001 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 25 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for the State.

Everett & Hite, L.L.P., by Kimberly A. Swank, for defendant appellant.

ELMORE, Judge.

Derrick Antonio McCree (defendant) appeals from judgments entered 3 July 2001 consistent with jury verdicts finding him guilty of two counts of robbery with a dangerous weapon, one count of second degree kidnapping, and one count of attempted robbery with a dangerous weapon. The charges against defendant arose out of an armed incursion into an apartment shared by several men and various fam-

ily members. For the reasons stated herein, we conclude defendant received a fair trial free of prejudicial error, and we therefore uphold the judgments entered upon his convictions.

Evidence presented at a pretrial suppression hearing and at trial tended to show that in August 1998, Anselmo Martinez Mendez (Anselmo), Roberto Martinez Esquivez (Roberto), Mario Rivas Rivera (Mario), Jose Garcia (Jose), Anselmo Martinez Lopez (Omar), and Ensel Martinez Mendez (Ensel), along with several of their respective family members, shared a two-bedroom apartment in Charlotte, North Carolina. On the evening of 22 August 1998, Anselmo, Mario, Jose, and Omar were drinking beer on the patio outside the apartment following a cookout. Roberto was out and Ensel was asleep with his family in an upstairs bedroom. Between 10:30 and 11:30 p.m., Mario went inside and went to sleep in the other bedroom. Roberto returned home at approximately 2:00 a.m. and joined Anselmo, Jose and Omar on the patio. Shortly thereafter, Jose went inside.

At approximately 2:30 a.m., Roberto, Anselmo, and Omar observed a dark-colored sport utility vehicle drive past the apartment twice, then stop. Two black males approached, one holding a gun, and shouted "[T]his is [the] Police Department. Nobody move." Anselmo and Omar ran inside the apartment, inadvertently knocking Roberto to the ground. Anselmo continued upstairs into the bedroom where Mario was sleeping. The man with the gun, later identified as defendant, pointed the gun at Roberto, told him to get up, and asked if he spoke English. When Roberto answered "yes," defendant said "You gonna [sic] help me because you speak good English." Defendant then took $50.00 from Roberto's pocket, put the gun to Roberto's head, and forced him into the apartment.

Once inside the apartment, defendant and Roberto encountered Jose in the kitchen. Defendant shoved Roberto aside and demanded money from Jose. When Jose replied that he had none, defendant pointed the gun at him and pulled the trigger twice but the gun did not fire. Defendant then put the gun to Roberto's back and forced him into the living room, then upstairs. Roberto first told defendant not to go into the bedroom where Ensel and his family were sleeping because there were children inside, then shouted to Ensel in Spanish not to open the door and to call 911. Defendant then forced open the door to the other bedroom, where he encountered Mario, who was talking to the 911 operator on a cordless telephone, and Anselmo. Defendant took the telephone and placed it in his pocket, then took approximately $40.00 from Anselmo's shirt pocket. Defendant

demanded money from Mario and pulled Mario's pants down looking for money, but he did not take any money from Mario. While these events were transpiring upstairs, the second black male was downstairs taking from the living room a television, stereo, and VCR that belonged to Roberto.

Defendant then forced Roberto at gunpoint back across the hall to Ensel's room and ordered Roberto to tell Ensel in English to open the door. Roberto again shouted to Ensel in Spanish not to open the door and to call 911. Defendant forced open the door, but upon observing children in the room exclaimed "I don't want nothing to do with kids" and ran downstairs. Defendant and the second black male then ran out the back door and departed in the dark-colored sport utility vehicle, which according to the victims' testimony appeared to be either a Ford Expedition or Explorer or a Lincoln Navigator.

Shortly thereafter, Officer Steven Blackwell and other officers from the Charlotte-Mecklenburg Police Department arrived at the apartment. Since none of the officers spoke Spanish, they only interviewed Roberto, the lone English speaker among the apartment's occupants. According to Officer Blackwell's report, Roberto described the armed intruder as a black male in his mid-twenties, approximately 6'2" and 280 pounds, with gold caps on his front teeth. Roberto described the second man as a black male, shorter and skinnier than the man with the gun. Roberto described their vehicle as a burgundy sport utility vehicle, possibly a 1997 or 1998 Expedition or Explorer.

On 8 September 1998, approximately two weeks after the robbery, Officer Luke Sell of the Charlotte-Mecklenburg Police Department stopped a black 1998 Ford Expedition driven by defendant. Officer Sell testified that he ran a computer check on the vehicle which revealed that it had been reported stolen. On cross-examination, defense counsel elicited testimony from Officer Sell that the vehicle was a rental car which had been reported stolen because it was not returned on time. Officer Sell arrested defendant and his two passengers and transported them to the police department's Felony Investigations Bureau, where they were observed by Detective Matthew Thompson. Detective Thompson noted that defendant and one of the passengers matched Roberto's descriptions of the men who robbed him. Detective Thompson then prepared a photographic lineup which included defendant's picture. Detective Thompson testified that since the picture taken that day was too dark to accurately depict defendant's facial features, he used another pic-

ture of defendant, taken following a December 1997 arrest, in the photo lineup. Detective Thompson further testified that to complete the photo lineup he sought out photographs of five men with features similar to defendant, and that defendant's picture was randomly placed by computer in one of the lineup's six photo slots. Detective Thompson also prepared a second photo lineup containing a picture of one of defendant's passengers at the time of his arrest.

On 9 October 1998, Detective Thomas Ledford and Officer Gilberto Narvaez showed the photo lineup to Roberto, Anselmo, Jose, and Mario. Detective Ledford testified that he first showed the lineup to Roberto while Anselmo, Jose, and Mario were kept in another room. Detective Ledford instructed Roberto that the person who robbed him may or may not be in the lineup, and that he was not obligated to pick out anyone. Roberto identified defendant's photo as the man with the gun who robbed him. Officer Narvaez instructed the other men not to communicate with each other during the lineup, then proceeded to show the photo lineup to Anselmo, Jose, and Mario individually, repeating to each the instructions Detective Ledford had given to Roberto. Anselmo also identified defendant's photo from the lineup, as did Mario. Jose stated that the photograph of defendant "look[ed] a lot like the guy who robbed us with the gun that night," but that he was not absolutely certain. The officers also showed the second photo lineup to all four men, but none of them recognized anyone from that lineup. After they had been shown the photo lineup, Officer Narvaez took written statements from Anselmo, Mario, and Jose individually. Anselmo described the armed robber as a "tall and heavy-set" black male with a "round face;" Jose and Mario described him as a "fat" black male.

The trial court denied defendant's pretrial motion to suppress the identifications made by Roberto, Anselmo, Mario and Jose of defendant from the photo lineup. Roberto, Anselmo, Mario and Jose each testified at trial, and each made, over defendant's objection, an in-court identification of defendant as the armed robber. Each testified that defendant appeared to have lost weight since the robbery. Defendant did not testify but offered testimony from a Mecklenburg County Sheriff's Department records custodian, who testified that arrest records listed defendant as 6 feet, 190 pounds in December 1997 and 6 feet, 205 pounds in September 1998.

Defendant brings forth four assignments of error, asserting the trial court erred by (1) denying defendant's motion to suppress his identification by the four prosecuting witnesses; (2) admitting Officer

Sell's testimony that defendant was driving a vehicle which had been reported stolen at the time he was arrested; (3) denying defendant's motion to dismiss the second-degree kidnapping charge; and (4) failing to dismiss one of the robbery with a dangerous weapon counts due to a fatal variance between the indictment and the evidence presented at trial.

[1] By his first assignment of error, defendant contends the trial court erred by denying his motion to suppress the pretrial identifications from the photographic lineup, as well as the subsequent in-court identifications, of defendant by Roberto, Anselmo, Mario and Jose. Defendant asserts that the photo lineup was impermissibly suggestive in both its composition and presentation, and that as a result both the pretrial and in-court identifications were tainted. The State maintains that the photo lineup was assembled fairly and presented to each of the witnesses in a fair and unbiased manner. We agree with the State and overrule this assignment of error.

"Whether an identification procedure is unduly suggestive depends on the totality of the circumstances." *State v. Rogers*, 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002). It is well-settled that identification evidence must be excluded as a violation of a defendant's due process rights "where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification." *State v. Powell*, 321 N.C. 364, 368, 364 S.E.2d 332, 335, *cert. denied*, 488 U.S. 830, 102 L. Ed. 2d 60 (1988). This due process analysis requires that we conduct a two-part inquiry. We must first determine whether the identification procedures at issue were impermissibly suggestive. *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002). Only if the procedures were impermissibly suggestive must we then move to the second part of the inquiry and determine whether the procedures created a substantial likelihood of irreparable misidentification. *Id.*

In the instant case, after hearing testimony and argument on defendant's motion to suppress, the trial court made the following oral findings and conclusions:

> With respect to the . . . four witnesses, there are a good number of similarities in what the four witnesses say. . . . [T]hey all say he was a big man and that he had a round face and I believe three out of four of them say that he had a gold tooth or teeth. . . . There was, according to the believable evidence, a

> significant amount of lighting whereby . . . these witnesses had the opportunity to see him in some detail. There is no evidence . . . as to the time that elapsed between the time that the perpetrator came in contact with the first person at the apartment . . . until the time that [defendant] exited the apartment, . . . but it had to be a right appreciable period of time for all those things to have happened. Certainly enough opportunity for these people to have seen what they say they saw and so I don't see from the believable evidence in this case that there was any impermissible suggestion as to the witnesses from the lineup. They were shown separately photographs—six on one sheet of paper and six on the other. Only one sheet of the paper contained a photograph of the defendant. They were questioned about those photographs separately. No suggestion was made as to whether or not the perpetrator was in any of the photographs. . . .
>
> The [c]ourt does not find that this evidence should be suppressed or excluded; further do not find that there were any unconstitutional [sic] rights of the defendant . . . in any way or manner violated and so the COURT DENIES the Motion to SUPPRESS with respect to these four witnesses.

After a careful review of the record, we agree with the trial court that the photo lineup did not create any "impermissible suggestion" in the minds of the prosecuting witnesses regarding defendant's identity as the armed robber. We are bound by the trial court's findings of fact when they are supported by competent evidence. *Fowler*, 353 N.C. at 618, 548 S.E.2d at 698. The record is replete with evidence supporting the trial court's findings. Roberto, Anselmo, Mario, and Jose each testified that he saw the armed robber's face under well-lit conditions during face-to-face exchanges with him during the robbery. Detective Thompson testified that he completed the lineup with photos of five men similar to defendant in age, race, hair color and amount of facial hair, and that the photos were randomly arranged within the lineup by computer. Our review of the photo lineup reveals six black males of approximately the same age, with similar hairlines and similar amounts of facial hair. While it appears to this Court that defendant's face appears fuller and more round than four of the other five men depicted in the lineup, we are not persuaded by defendant's argument that this renders the lineup impermissibly suggestive. "A photographic lineup is not impermissibly suggestive merely because defendant has a distinctive appearance." *State v. Freeman*, 313 N.C. 539, 545, 330 S.E.2d 465, 471 (1985) (affirming that photographic

lineup was lawful despite the defendant's contention that he was the heaviest individual in the array). Detective Thompson further testified that he used a December 1997 photograph of defendant rather than the photo from defendant's 8 September 1998 arrest because the more recent photo was too dark to show sufficient facial detail. We discern no impermissibly suggestive intent or effect from Detective Thompson's decision to use the older photo.

The officers who conducted the photo lineup testified that they showed the lineup to the prosecuting witnesses separately, with instructions not to talk to each other until each had seen the lineup and with the admonition that the armed robber may or may not be present in the lineup and that they were under no obligation to pick anyone out. This evidence is sufficient to support the trial court's findings, which in turn support its ultimate legal conclusion that the prosecuting witnesses' identifications were not the result of an impermissibly suggestive procedure. "[A]ll that is required is that the lineup be a fair one and that the officers conducting it do nothing to induce the witness to select one participant rather than another." *State v. Grimes*, 309 N.C. 606, 610, 308 S.E.2d 293, 295 (1983). We conclude that the photo lineup was neither assembled, nor presented to the prosecuting witnesses, in such a manner as to render it impermissibly suggestive. Because we hold that the photo lineup was not impermissibly suggestive, we need not proceed to the second part of the inquiry and determine whether the procedures created a substantial likelihood of irreparable misidentification. *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698. Consequently, we conclude that the prosecuting witnesses' in-court identification of defendant was not tainted by the photo lineup. *Freeman*, 313 N.C. at 545, 330 S.E.2d at 471.

We hold that the trial court correctly denied defendant's motion to suppress the identification testimony.

[2] By his next assignment of error, defendant contends the trial court erred by allowing Officer Sell to testify that he stopped defendant prior to his arrest two weeks after the robbery for driving a vehicle that had been "reported stolen." Defendant asserts this testimony was irrelevant and unduly prejudicial, and that its admission violated Rule 404(b) of the North Carolina Rules of Evidence. We disagree.

Rule 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

> conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). Our Supreme Court has stated that the Rule 404(b) "list of permissible purposes for admission of 'other crimes' evidence is not exclusive, and such evidence is admissible as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852-53, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

In the instant case, defendant was arrested on 8 September 1998 after Officer Sell determined that the black Ford Expedition defendant was driving had been reported stolen. At trial, following a voir dire, the trial court ruled that "[i]f [Officer Sell] is going to testify that the vehicle had been reported stolen, I'm going to let him testify to that but I am not going to let him testify that it was a stolen vehicle, simply that it had been REPORTED that it was stolen." On direct examination, Officer Sell followed the trial court's ruling, testifying over defendant's objection as follows:

> I observed a black Ford Expedition on Zebulon Avenue. I saw it pulling away from a parked position, I got behind that vehicle and followed it . . . . I stayed behind the vehicle until I did a computer check . . . of the vehicle . . . and when it came back, it came back that [t]he vehicle was reported stolen.

On cross examination, defense counsel elicited testimony that the vehicle was reported stolen because it was an overdue rental. Officer Sell testified on re-direct examination that he had no knowledge as to who rented the vehicle.

On these facts, we conclude that Rule 404(b) does not require exclusion of Officer Sell's testimony that the vehicle defendant was driving when he was stopped had been "reported stolen." Officer Sell did not testify that *defendant* stole the vehicle; to the contrary, Officer Sell testified that he did not know who stole it. We agree with the State's contention that this evidence was offered to explain defendant's presence in the photographic lineup compiled following his arrest while driving a vehicle similar to the one the prosecuting witnesses described as being driven by the robbers. It

was not offered for the purpose, improper under Rule 404(b), of proving that defendant was a person of bad character with a propensity to commit armed robbery.

Defendant contends that even if this evidence was properly admitted under Rule 404(b), it was inadmissible under N.C. Gen. Stat. 8C-1, Rule 401 (2001) because it was not relevant, or alternatively because under N.C. Gen. Stat. § 8C-1, Rule 403 (2001) its probative value was substantially outweighed by the danger of unfair prejudice. First, we conclude this evidence was relevant because it offered an explanation for why defendant was detained and included in the photographic lineup after he was stopped driving a vehicle similar to that described by the prosecuting witnesses as being driven by the armed robber. Furthermore, the trial court's decision to admit this evidence is a matter within its discretion, and "[a] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Brown*, 350 N.C. 193, 209, 513 S.E.2d 57, 67 (1999) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). Likewise, "[w]hether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). While Officer Sell's testimony that defendant was arrested while driving a vehicle that had been reported stolen is arguably prejudicial to defendant, we conclude that its probative value outweighed any danger of unfair prejudice, and we discern no abuse of discretion in the trial court's decision to admit this testimony. This assignment of error is without merit.

[3] By his next assignment of error defendant maintains the trial court erred in failing to dismiss the kidnapping charge, which was based on the restraint and removal of Roberto from one room to another inside the apartment to facilitate the robberies committed therein. Specifically, defendant argues this charge should have been dismissed because there was insufficient evidence to support a conclusion that the restraint and removal of Roberto was separate and apart from the underlying robberies. We disagree.

Section 14-39 of our General Statutes provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of

> kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony.

N.C. Gen. Stat. § 14-39(a) (2001). Our Supreme Court has construed the statute as follows:

> It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy.

State v. Fulcher, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). In determining whether the confinement, restraint, or removal of the victim during commission of an armed robbery will also support a kidnapping conviction, "[t]he key question . . . is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping 'exposed [the victim] to greater danger than that inherent in the armed robbery itself, ...' " *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)).

"In ruling on a motion to dismiss, 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). In the case *sub judice*, the evidence viewed in the light most favorable to the State shows that defendant *first* robbed Roberto of $50.00, *then* forcibly restrained Roberto and moved him about the apartment at gunpoint for use as an interpreter to facilitate the robbery of the apartment's Spanish-speaking occupants. After defendant's robbery of Roberto was complete, defendant put the gun to Roberto's head and forced him into the kitchen, where defendant unsuccessfully attempted to rob Jose. Defendant subsequently forced Roberto at gunpoint into the living room and then upstairs, where he was ordered to assist in defendant's plan to rob the apartment's remaining

occupants. The evidence shows that when defendant and Roberto arrived upstairs, Mario was on the telephone calling 911 and Ensel refused to open his bedroom door for defendant after Roberto shouted to him in Spanish not to do so. We conclude that from this evidence, a reasonable inference arises that defendant could have become dissatisfied with Roberto's assistance and shot or otherwise harmed him. We hold that from this evidence, a jury could reasonably find that defendant's restraint and removal of Roberto for the purpose of assisting in the robberies of the apartments' other occupants exposed Roberto to greater danger than that inherent in the armed robbery itself. Accordingly, this assignment of error is overruled.

[4] By his final assignment of error, defendant asserts the trial court erred in denying his motion to dismiss the armed robbery charge relating to Roberto because there is a fatal variance between the indictment and the evidence presented at trial. Specifically, defendant contends the evidence presented at trial tended to prove that defendant took $50.00 from Roberto, while the indictment alleged that defendant took from Roberto a wallet and its contents, a television, and a VCR. We are not persuaded by defendant's argument.

"It is well settled that the evidence in a criminal case must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in the indictment, there is a fatal variance between the allegations and the proof requiring dismissal." *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981). Not every variance between the allegations of the indictment and the proof presented at trial is a material variance requiring dismissal. *State v. Furr*, 292 N.C. 711, 721, 235 S.E.2d 193, 200, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977).

Here, defendant was charged with robbery with a dangerous weapon of Roberto in violation of N.C. Gen. Stat. § 14-87, the essential elements of which are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998); *see also* N.C. Gen. Stat. § 14-87(a) (2001). This court has previously stated that in an indictment for robbery with a dangerous weapon, the gist of the offense is not the taking of personal property, but rather a taking or attempted taking by force or putting in fear of the victim by the use of a dangerous weapon. *State v. Mahaley*, 122 N.C. App. 490, 492, 470

S.E.2d 549, 551 (1996) (stating that "armed robbery is mainly an offense against the person").

In the instant case, the indictment at issue alleged that defendant took "personal property, wallet and its' [sic] contents, one (1) video cassette recorder, one (1) television, of value, from the person and presence of Roberto Martinez . . . . by means of an assault consisting of having in his possession and threatening the use of a firearm, a handgun, a dangerous weapon, whereby the life of Roberto Martinez was threatened and endangered." The evidence presented at trial tended to show that defendant took $50.00 in cash from Roberto at gunpoint and that defendant's accomplice actually took Roberto's television and VCR from downstairs while defendant was robbing the apartment's upstairs occupants. On these facts, we conclude the indictment properly alleged that defendant took personal property from Roberto "by force or putting in fear by the use of firearms or other dangerous weapon[,]" *State v. Harris*, 8 N.C. App. 653, 656, 175 S.E.2d 334, 336 (1970), such that defendant was advised "of the nature and cause of the accusation sufficiently to allow him to meet it, to prepare for trial and to enable him to plead in bar of further prosecution after judgment," *Furr*, 292 N.C. at 722, 235 S.E.2d at 200. We find this assignment of error to be without merit.

No error.

Judge MARTIN and Judge HUDSON concur.

STATE OF NORTH CAROLINA v. CORNELIUS RENEUD NIXON, DEFENDANT

No. COA02-613

(Filed 19 August 2003)

1. Search and Seizure— warrantless search—standard of review for informant information

The trial court did not err in a possession with intent to sell and distribute marijuana, possession of cocaine, and carrying a concealed weapon case by denying defendant's motion to suppress evidence seized under a warrantless search of defendant's person and vehicle based on an informant's tip, because: (1) the standard for determining whether probable cause existed to con-

duct a warrantless search of defendant's person and vehicle is basically the same for both a confidential informant and an anonymous tip, although some corroboration of the information or greater level of detail is generally necessary for an anonymous tip; and (2) the trial court made careful and thorough findings of fact, and properly scrutinized the situation under the totality of circumstances test to determine basis of knowledge and reliability or veracity of the information as a basis for probable cause.

2. Search and Seizure— warrantless search—informant information passed through several officers

The trial court did not err in a possession with intent to sell and distribute marijuana, possession of cocaine, and carrying a concealed weapon case by concluding that there was probable cause to support the warrantless search of defendant's vehicle and defendant's subsequent arrest based on information from an informant passed from a first officer through several officers, because: (1) the probable cause of the first officer was established through the testimony before the trial court of the officer who received information from the informant; and (2) once the arresting officer corroborated the description of defendant and his presence at the named location, that officer had reasonable grounds to believe a felony was being committed in his presence which in turn created probable cause to stop and search defendant.

Appeal by defendant from order entered 29 January 2002 by Judge Anthony M. Brannon in Onslow County Superior Court. Heard in the Court of Appeals 11 March 2003.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi II, for the State.

Lanier & Fountain, by John W. Ceruzzi, for defendant appellant.

ELMORE, Judge.

Sometime between 7:00 p.m. and 10:00 p.m. on 7 September 2000, Deputy Michael A. Stevens of the Jacksonville Police Department received an electronic page from an individual he described as a "confidential and reliable informant" (CRI). The CRI related information that an individual named "Corn," whom Deputy Stevens understood to be Cornelius Nixon (defendant), was going to meet an individual

named "Feanel" at the Hardee's restaurant in Beulaville in Duplin County in order to purchase marijuana from Feanel. The CRI further stated that after the transaction, "Corn" would possibly return to his home in the Brynn Marr area of Jacksonville, driving a burgundy Ford sport utility vehicle.

Deputy Stevens related this information to Sergeant Devon Bryan and told him that it had come from a CRI. Sergeant Bryan then passed the information to Sergeant Favious Howard. Sergeant Howard had recently stopped defendant for a traffic violation and remembered his address, and proceeded to set up surveillance of defendant's residence. Approximately fifteen minutes later, defendant pulled up to the curb in front of his residence. Defendant and his vehicle were subsequently searched, and marijuana was found in the pocket of defendant's shorts, a quantity of cocaine and marijuana was found in the vehicle, as well as a forty caliber semi-automatic pistol. Nothing in the record indicates that the arresting officer was acting pursuant to a warrant.

Defendant was charged with possession with intent to sell and deliver marijuana; manufacturing a controlled substance (marijuana); maintaining a place to keep a controlled substance; possession with intent to sell and deliver cocaine; manufacturing a controlled substance (cocaine); and carrying a concealed weapon.

Defendant tendered an Alford plea of guilty of possession with intent to sell and distribute marijuana, possession of cocaine, and carrying a concealed weapon. The State dismissed the remaining charges. Defendant brings this appeal of the trial court's denial of his motion to suppress evidence.

It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's conclusions of law, however, are fully reviewable. *State v. Earwood*, 155 N.C. App. 698, 574 S.E.2d 707 (2003).

The question raised by this appeal is whether the evidence seized was legally obtained based on two assignments of error: 1) defendant assigns error to the findings of fact as being unsupported by the evidence, and not supporting the conclusions of law; and 2) defendant also assigns error to the use of the confidential reliable informant (CRI) standard instead of the anonymous tip standard in evaluating the evidence.

I. Standard

[1] We first address the defendant's second assignment of error, regarding the proper standard for evaluating the evidence. The standard for determining whether probable cause existed to conduct a warrantless search of defendant's person and vehicle is basically the same for information received from either an anonymous tip or a confidential informant. Both situations must be scrutinized under a "totality of the circumstances" test to determine "basis of knowledge" and "reliability" or "veracity" of the information as a basis for probable cause. *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983); *State v. Hughes*, 353 N.C. 200, 203, 539 S.E.2d 625, 628 (2000). The difference in evaluating an anonymous tip is that the overall reliability is more difficult to establish, and thus some corroboration of the information or greater level of detail is generally necessary. *Compare State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984) (applying the *Gates* totality of the circumstances test to an affidavit for a search warrant based on information given by two confidential informants), *with Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983) (establishing the standard in a case involving a tip sent to the police in an anonymous letter), *and State v. Davis*, 66 N.C. App. 98, 311 S.E.2d 19 (1984) (applying the *Gates* totality of the circumstances test to a tip sent to the police in an anonymous letter).

The standard for finding probable cause based on information supplied by a reliable informant before *Gates* was established in *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723 (1964) and later refined in *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637 (1969). Those cases required that first, an affidavit for a search warrant must contain sufficient information as to how the informant obtained the information ("basis of knowledge"), and second, that the affidavit must establish the "reliability" of the informant. *Id.*

We note here that although the standard is the same, more evidence may be required when the officer is acting without a warrant. In the *State v. Harvey*, 281 N.C. 1, 7, 187 S.E.2d 706, 710 (1972), our Supreme Court noted, quoting the *Aguilar* case:

> In *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L. Ed 2d 723, the Supreme Court of the United States dealt with questions concerning the Fourth Amendment requirements for obtaining a valid state search warrant. It said:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing court will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that [the articles searched for] were probably present." * * *

Harvey at 7, 187 S.E.2d at 710.

Under the *Aguilar-Spinelli* standard, this Court established the rule that to support the reliability prong of the test, a confidential informant must satisfy certain standards:

> This court has already established the "irreducible minimum" circumstances that must be set forth in support of an informant's reliability to sustain a warrant. *State v. Altman*, 15 N.C. App. 257 (filed 12 July 1972). In *Altman*, the affiant's statement that the confidential informant "has proven reliable and credible in the past" was held to meet the minimum standards to sustain a warrant. In the present case, the affiant's statement that the confidential informant had given "this agent good and reliable information in the past . . . that had been checked by the affiant and found to be true" also meets this minimum standard.

State v. McCoy, 16 N.C. App. 349, 351-52, 191 S.E.2d 897, 899 (1972), *cert. denied*, 282 N.C. 584, 193 S.E.2d 744 (1973).

After the *Gates* case, our Supreme Court adopted the reasoning of *Gates* in *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), replacing the *Aguilar-Spinelli* standard but noting its relevance. Applying the *Gates* totality of the circumstances test in *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000), our Supreme Court further explained the effect of *Gates* by discussing the case of *Alabama v. White*, 496 U.S. 325, 110 L. Ed. 2d 301 (1990). In *White*, the United State Supreme Court concluded that in a "close" case, an anonymous tip could constitute probable cause if it could satisfy a "totality of the circumstances" analysis. *White*, 496 U.S. 325, 328, 110 L. Ed. 2d 301, 308 (1990). Our Supreme Court noted in reference to *White*:

> The Court in *White* emphasized . . . that the *Aguilar* and *Spinelli* standards for determining an informant's veracity, reliability, and basis of knowledge were important factors to consider in the context of an anonymous informant, as they were when involving a

> confidential, reliable informant. The Court stated that although an anonymous tip by itself rarely demonstrated the needed reliability, the tip combined with corroboration by the police could show indicia of reliability that would be sufficient to meet this burden. . . . [*White*, 496 U.S. 325, 329, 110 L. Ed. 2d 301, 308 (1990).]

Hughes, 353 N.C. 200, 205, 539 S.E.2d 625, 629 (2000) (holding that under whatever scrutiny is applied, whether the informant was treated as reliable or anonymous, there was insufficient evidence to support probable cause when the officer who received the tip did not give any testimony establishing the informant's reliability, and there was insufficient detail and corroboration of the tip). So our appellate courts have applied the *Gates* standard, acknowledging the importance of the *Aguilar-Spinelli* factors and the heightened need for corroboration when evaluating an anonymous tip.

The trial court in the case *sub judice* made careful and thorough findings of fact and considered the totality of the circumstances. The trial court made findings that "Deputy Stevens personally knew the informant for the past two years and information provided by this informant had proven in the past to be reliable and had led to numerous narcotics arrests and convictions." Deputy Stevens had testified at the suppression hearing before the trial court:

> Q [Mr. Askins:] And the informant that you mentioned, is that someone that you are familiar with, that you have worked with before?
>
> A [Deputy Stevens:] Yes, sir, several times.
>
> Q Has this informant proven to be reliable to you?
>
> A Every time.
>
> Q And given you information that led to arrests before?
>
> A Yes, sir, numerous.
>
> Q On any occasion has the informant given you information that was proven not to be reliable and was false?
>
> A No, sir.
>
> Q How—how long have you known this informant?
>
> A Approximately two years.

Q Have you used this informant on a number of occasions?

A Yes, I have.

The trial court's findings are thus supported by the competent evidence of the officer's testimony. Because the standard is basically the same for both a confidential informant and an anonymous tip, and because the trial court applied the correct standard, we dismiss this assignment of error.

II. Probable Cause

[2] Defendant also assigns error to the finding that there was probable cause to support the search and arrest.

A search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the Fourth Amendment if it is based on probable cause, even though a warrant has not been obtained. *State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576 (1987). Information from a CRI can form the probable cause to justify a search. *State v. Holmes*, 142 N.C. App. 614, 544 S.E.2d 18, *cert. denied*, 353 N.C. 731, 551 S.E.2d 116 (2001). "In utilizing an informant's tip, probable cause is determined using a 'totality-of-the circumstances' analysis which 'permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.' " *Holmes*, 142 N.C. App. 614, 621, 544 S.E.2d 18, 22 (2001) (*quoting State v. Earhart*, 134 N.C. App. 130, 133, 516 S.E.2d 883, 886 (1999)). This standard was established in *Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983).

When information from an informant is passed from the first officer to another officer or through several officers, it is still necessary that the arresting officer at the time of the stop and search have probable cause. Probable cause may not be established by the testimony of only the arresting officer that he or she was told by another officer that the information was reliable. *Hughes*, 353 N.C. 200, 204, 539 S.E.2d 625, 628 (2000).

In the *Hughes* case, the first officer claimed to have received a tip from a CRI which he passed on to a detective, who passed the information on to the arresting officer. The first officer did not testify at the suppression hearing or give any other information to the detective about the informant. The tip was that the suspect would arrive on the 5:30 p.m. bus coming from New York City. The tip gave a personal description of the suspect and said that he would have marijuana and

cocaine in his possession, and that he "sometimes" took a taxi from the bus station and "sometimes" carried an overnight bag, and that he would be headed to North Topsail Beach. The arresting officer and his partner waited at the bus station, and observed a man fitting the suspect's description step from behind a bus carrying an overnight bag and get into a taxi. The taxi traveled south on a highway that would eventually split into two directions, one of which was toward Topsail Beach. The officers apprehended the suspect in the taxi, and a subsequent search revealed cocaine and marijuana in the suspect's shoes. The trial court in *Hughes* granted the defendant's motion to suppress the evidence, and this Court reversed. Our Supreme Court reversed the Court of Appeals, and upheld the trial court's order allowing the motion to suppress, stating as follows:

> In applying the test used in *Gates*, this Court also found the principles underlying *Aguilar* and *Spinelli*, mainly that evidence is needed to show indicia of reliability, to be important components in determining the totality of the circumstances.
>
> Turning to the case before us, the evidence shows that [the detective] had never spoken with the informant and knew nothing about the informant other than [the first officer's] claim that he was a confidential and reliable informant. There was no indication that the informant had been previously used and had given accurate information or that his statement was against his penal interest nor, as will be discussed later, was there any other indication of reliability. Some objective proof as to why this informant was reliable and credible, other than just [the first officer's] assertion passed to [the detective], and by him to [the arresting officers], must support [the arresting officers'] decision to conduct a search. To hold otherwise would be to ignore the protections contained in the Fourth Amendment.

Hughes, 353 N.C. 200, 204, 539 S.E.2d 625, 628-29 (2000).

The present case is distinguished from *Hughes* in at least one significant aspect. The "first officer" in the present case, who received the tip from the informant, testified at the suppression hearing that this informant had given him information several times over the previous two years, that the information given had been correct every time and never been false or unreliable and had led to several arrests.

This distinction is brought out in federal case law, notably *United States v. Hensley*, 469 U.S. 221, 83 L. Ed. 2d 604 (1985). In *Hensley*,

the U.S. Supreme Court reversed the Court of Appeals for the Sixth Circuit, holding that police officers who had relied on a "wanted flyer" issued from another law enforcement department based on information from an informant, were justified to stop the defendant while attempting to obtain further information. While the appellant argues that the *Hughes* case requires the arresting officer to have sufficient probable cause to stop and search a suspect where the probable cause relied on by the first officer is never established, the case before us is different in that the original officer's probable cause was established. In *Hensley*, the Court addressed the extent to which police officers may rely on one another for grounds to stop and search suspects. The *Hensley* Court discussed *Whiteley v. Warden*, 401 U.S. 560 (1971) in its analysis. The officers in *Whiteley* relied on a radio bulletin to justify a stop and search of the suspect. The *Hensley* Court noted, quoting *Whiteley*:

> "We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. **Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.** Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." [*Whiteley*], at 568. . . .
>
> This language in *Whiteley* suggests that, had the sheriff who issued the radio bulletin possessed probable cause for arrest, then the Laramie police could have properly arrested the defendant even though they were unaware of the specific facts that established probable cause. See *United States v. Maryland*, 479 F2d 566, 569 (CA5 1973). Thus *Whiteley* supports the proposition that, when evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, **its admissibility turns on whether the officers who issued the flyer possessed probable cause to make the arrest.** It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance. In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense: it minimizes the volume of information concerning suspects that must be transmitted to

> other jurisdictions and enables police in one jurisdiction to act promptly in reliance on information from another jurisdiction.

United States v. Hensley, 469 U.S. 221, 230-31, 83 L. Ed. 2d 604, 613-14 (1985) (emphasis added).

Although the present case involves direct officer-to-officer communication instead of a printed flyer, it is analogous to the *Hensley* facts where the probable cause of the first officer was established, in both cases through the testimony before the trial court of the officer who received information from the informant. That testimony was lacking in the *Hughes* case, and both *Hensley* and *Hughes* stand for the proposition that when the first officer's probable cause is not established, the arresting officer's reliance on his fellow officer cannot insulate the otherwise illegal search. However, when the first officer does have probable cause, that reliance is justified and often necessary in the execution of a police officer's duty. *See also State v. Zuniga*, 312 N.C. 251, 260, 322 S.E.2d 140, 145 (1984) ("it is well established that one law enforcement officer may rely upon bulletins from other officers as the basis for an arrest, but only so long as the originating officer himself had probable cause."); *State v. Battle*, 109 N.C. App. 367, 427 S.E.2d 156 (1993) (reasonable suspicion was established from the collective knowledge of the first officer and the arresting officer); *State v. Tilley*, 44 N.C. App. 313, 317, 260 S.E.2d 794, 797 (1979) (". . . probable cause for an arrest can be imputed from one officer to others acting at his request. The officers receiving the request are entitled to assume that the officer requesting aid had probable cause to believe that a crime had been committed. If the transmitting officer did not have probable cause, the arrest would be illegal.").

Once the officer corroborated the description of the defendant and his presence at the named location, he had reasonable grounds to believe a felony was being committed in his presence which in turn created probable cause to stop and search defendant. *See State v. Wooten*, 34 N.C. App. 85, 88, 237 S.E.2d 301, 304 (1977).

In the case at bar, the learned trial judge, who observed the witnesses at the suppression hearing, made findings that Deputy Stevens received information from a confidential, reliable informant whom Deputy Stevens knew personally for two years and whose information had proven reliable in the past and led to numerous arrests. The trial judge found that the informant told Deputy Stevens that an individual named "Corn" was purchasing or had purchased controlled

substances from a person by the name of Feanel at the Hardee's restaurant in Belulaville and that "Corn" was en route to the Brynn Marr Village area of Jacksonville driving a burgundy colored sport utility vehicle, and in possession of the controlled substances. The trial judge found that Deputy Stevens, based on previous information given by the informant, believed "Corn" to be the defendant, Cornelius Nixon, and relayed the information to Detective Bryan of the Jacksonville Police Department, who relayed the information to Sergeant Howard. Sergeant Howard, the trial judge found, knew that the defendant went by the name "Corn" and remembered his address from a prior investigation, and proceeded to Brynn Marr Village to intercept defendant's vehicle. The trial judge found that the defendant's vehicle matched the description given and arrived at a time that would be consistent with normal travel time from Beulaville to the defendant's home. The trial judge found that the officer did have probable cause to stop and search the defendant's vehicle for controlled substances.

After examining the transcript and the record, we agree with the trial court that based on the testimony of the officers, the arresting officer had probable cause because the first officer's probable cause was established, and the evidence was therefore legally obtained.

No error.

Judges HUNTER and BRYANT concur.

MARLENE RADFORD, PLAINTIFF v. DONALD W. KEITH, DONALD W. KEITH & ASSOC. INC., DEFENDANTS

No. COA02-1340

(Filed 19 August 2003)

Contracts— duress—evidence sufficient

The evidence was sufficient to submit to the jury the issue of duress in the execution of a second promissory note and deed of trust for the construction of a house, and the trial court did not err in denying defendants' motions for directed verdict and judgment n.o.v.

Judge Hunter dissenting.

Appeal by defendant from judgment entered 8 May 2002 by Judge John R. Jolly, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 11 June 2003.

The Del Re' Law Firm, by Benedict J. Del Re' Jr., for plaintiff appellee.

Michael E. Mauney, for defendants appellants.

TIMMONS-GOODSON, Judge.

Donald W. Keith ("Keith") and Donald W. Keith & Associates, Inc. (collectively "defendants") appeal from a judgment entered by the trial court upon a jury verdict finding that they induced Marlene Radford ("plaintiff") by duress, to execute a second promissory note and Deed of Trust. For the reasons herein, we conclude that the trial court committed no error.

The facts pertinent to the instant appeal are as follows: On 25 May 1999, defendants and plaintiff entered into a written contract for the construction of a residence for plaintiff. The total amount of the contract amounted to $165,000.00; however, the contract was subject to additions and deletions pursuant to change orders and allowances. The construction was financed by a joint construction loan issued to both defendants and plaintiff. Several subsequent handwritten addendums to this contract were made by both parties. Upon the completion of plaintiff's residence, a closing was scheduled for 24 March 2000. Approximately one week prior to closing, Keith telephoned plaintiff and demanded that she meet with him in his office. Upon arriving at defendants' office, Keith informed plaintiff that there were "big problems" which may prevent her from closing on her loan. During this meeting, Keith accused plaintiff of fraud and informed her that he would not sign a lien waiver for additional expenses that were added to the contract. Plaintiff testified that Keith then gave her the following three options: (1) the matter could be settled in court; (2) plaintiff could sign a "Note and Deed of Trust"; (3) in lieu of a lawsuit, defendants would discount the difference in the contract price and a lower total price of another contractor, provided plaintiff could locate one. Testimony from both Keith and plaintiff established that Keith confined plaintiff in his office for two (2) hours while an associate of defendants guarded the door.

Plaintiff further testified that prior to the meeting with Keith, she made arrangements for her personal belongings to be delivered to the new residence and she executed a notice to vacate her rental unit. As

a result, plaintiff feared that she would be displaced if defendants' actions prevented her from closing on the loan. According to plaintiff, Keith threatened to sue her and she perceived that her only option was to sign the Note in order to close on 24 March 2000. Upon a full trial of the case, a jury found sufficient evidence of duress and returned a verdict in favor of plaintiff which required defendant to rescind and void the promissory note and cancel the Deed of Trust at issue. Defendants then moved for a directed verdict and a judgment notwithstanding the verdict at the close of trial. Both motions were denied. Defendants appeal.

In defendants' sole assignment of error, defendants contend that the trial court erred in failing to grant their motions for directed verdict and judgment notwithstanding the verdict at the close of trial. Specifically, defendants argue that plaintiff failed to establish a case of duress sufficient for submission to the jury as a matter of law. For the reasons set forth herein, we conclude that the trial court committed no error.

In ruling on a motion for directed verdict, a defendant is not entitled to a directed verdict or a judgment notwithstanding the verdict unless the evidence, taken as true and viewed in the light most favorable to the plaintiff, establishes an affirmative defense as a matter of law. *See Goodwin v. Investors Life Insurance Co. of North America*, 332 N.C. 326, 329, 419 S.E.2d 766, 767 (1992). "All conflicts must be resolved in plaintiff's favor, and [s]he must be given the benefit of every reasonable inference." *Shields v. Nationwide Mut. Fire Ins. Co.*, 61 N.C. App. 365, 374, 301 S.E.2d 439, 445, *disc. review denied*, 308 N.C. 678, 304 S.E.2d 759 (1983). "The question presented by a motion for a directed verdict is whether the evidence is sufficient to entitle the non-movant to have a jury decide the issue in question." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). "[I]f there is conflicting testimony that permits different inferences, one of which is favorable to the non-moving party, a directed verdict in favor of the party with the burden of proof is improper." *Id.* at 662, 370 S.E.2d at 387. The same standard of review "is to be applied by the courts in ruling on a motion for [judgment notwithstanding the verdict] as is applied in ruling on a motion for a directed verdict." *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986).

"Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under cir-

cumstances which deprive him of the exercise of free will." *Smithwick v. Whitley*, 152 N.C. 366, 371, 67 S.E. 913, 914 (1910). A wrongful act or threat is an important element of duress. The act threatened is wrongful "if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 705 (1971). Therefore, where a transaction is induced by the use of threats to take lawful action, the presence or absence of duress depends upon the totality of the circumstances. In proving a case of duress, plaintiff must satisfy the three required elements.

In the case at bar, viewing the evidence in the light most favorable to plaintiff, there was sufficient evidence to submit the issue of duress to a jury. Specifically, there was evidence that (1) Keith's actions were unlawful or wrong; (2) plaintiff was induced to sign the Note; (3) Keith prevented plaintiff from exercising her free will to leave defendants' office. Defendants recognize that Keith and plaintiff entered into an agreement for the construction of a home totaling $165,000.00 subject to additions and deletions. Defendants also concede that after calculating the total expenses for the construction of the residence, Keith required plaintiff to sign an additional Note and Deed of Trust in the amount of $25,715.00.

In support of the first element of duress, plaintiff testified that approximately one week prior to the scheduled closing, defendant telephoned her and told her to come to his office. During this meeting, defendant threatened to execute a lien waiver and to sue plaintiff for fraud for the "additions" to her home. In *Link*, our Supreme Court addressed the question of when a threat of legal proceedings may constitute a wrongful act. The Supreme Court explained that,

> the act done or threatened may be wrongful even though not unlawful, per se; and that the threat to institute legal proceedings, criminal or civil, which might be justifiable, per se, become wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings.

Link, 278 N.C. at 194, 179 S.E.2d at 705. While we recognize that Keith's threat to initiate legal proceedings may have been lawful and justifiable, his methods were such that a jury could determine that his actions were grossly unfair to plaintiff so as to rise to the level of a wrongful act. There was evidence to support a finding that defendants' threat was wrongful within the meaning of the *Link* rule

because defendants' intent was to coerce plaintiff into agreeing to the additional Note. In lieu of the lawsuit, defendant gave plaintiff the option to either agree to sign the Note or locate another contractor who would construct the home at a lower total price and defendants would discount the difference between the two. Evidence at trial revealed that several of the "additions" in dispute were not honored by defendants or were included in the original contract price. A jury could reasonably conclude that defendants' options were not related to the issue of breach of contract, were grossly unfair to plaintiff, and were methods used to coerce plaintiff.

The jury could also determine that defendant coerced plaintiff to execute the Note. An inducement that causes performance of some act serves as the second element of duress. Plaintiff testified that she was detained in Keith's office for two hours, and then agreed to sign the Note. Plaintiff further testified that Keith told her that she could not close on the residence unless she signed certain papers. Plaintiff gave the following testimony:

> Q: "Okay. The day that you went into Mr. Keith's office, please tell the court, first of all, the first contact you had with him . . . on that day?"
>
> A: " . . . this man kept berating me and going after me. And finally, I just said to him, 'What do you want Donald? . . .' And he says, 'More money . . . I've looked at all my bills and this house is costing me more money.' And I said, 'Fine.' "

Based on this evidence, the jury could find that plaintiff was coerced into signing the additional Note and Deed of Trust during the two hour meeting with defendant.

We further note that there was evidence from which the jury could find that plaintiff was not free to leave Keith's office. Plaintiff and Keith testified that defendants' associate guarded the office door to ensure that no one entered to interrupt the meeting. "By duress, in its more extended sense, is meant that degree of severity, either threatened and impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness." *Edwards v. Bowden*, 107 N.C. 58, 60, 12 S.E. 58, 58 (1890).

In the instant case, a jury could determine that plaintiff was detained in Keith's office for several hours, that plaintiff was emotionally upset by the tone of the meeting, and that plaintiff did not

have counsel present to advise her. Plaintiff stated that at this time, she was crying and her "mind went crazy thinking[,] 'where am I going to go' " and that she had done something wrong that would lead to incarceration. At trial, Keith testified that he was angry and upset and asked his associate to ". . . go outside and be sure that we're not interrupted" while he and plaintiff met in his office. The jury could find that Keith's directive that his associate stand guard at the office door prevented plaintiff from exercising her will to leave defendants' office. Therefore, a jury could find that defendants' actions were so severe as to overcome plaintiff's will to leave Keith's office.

We conclude that plaintiff presented sufficient evidence of duress to submit to a jury. We hold that the trial court did not err in denying defendants' motions for directed verdict and judgment notwithstanding the verdict.

No Error.

Judge ELMORE concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority's conclusion that the trial court properly denied defendants' motions for directed verdict and judgment notwithstanding the verdict.

As stated by the majority, a movant is entitled to have either motion granted if the evidence, when viewed in the light most favorable to the non-movant, is insufficient for a jury to decide the issue in question. *See United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). When that issue involves duress, sufficient evidence must be offered establishing that " 'one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will.' " *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 704-05 (1971) (citation omitted) (emphasis in original). Having reviewed the record and transcript, I believe the evidence offered was insufficient to prove essential elements of duress, i.e., that the Note and Deed of Trust signed by plaintiff was (1) induced by a wrongful act of defendants, and (2) executed under circumstances that deprived plaintiff of free will.

"Unquestionably, an essential element of duress is a *wrongful* act or threat." *Id.* at 194, 179 S.E.2d at 705 (emphasis in original). As to the "wrongful act" element, this Court held in *Link* that "the threat to institute legal proceedings, criminal or civil, which might be justifiable, *per se*, becomes wrongful . . . if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings." *Id. Link* also recognized that settlements often arise from threatened lawsuits and that potential litigants frequently choose to settle disputes to avoid the consequences of those lawsuits. Thus, this holding provided a difficult burden for potential litigants to overcome if they claim settlements were reached under duress. The absence of such a burden could possibly result in every settlement being collaterally attacked and set aside for duress.

In the case *sub judice*, I conclude plaintiff did not sign the Note and Deed of Trust under duress because defendants' actions were not wrongful. First, there was no evidence offered that the option selected by plaintiff was grossly unfair. Plaintiff did not testify, or offer the testimony of any qualified witness, that either the terms or amount of the Note and Deed of Trust were unreasonable. Second, defendants' threat to file a lien and then institute legal proceedings against plaintiff for fraud was related to the subject of such proceedings. During their meeting, Keith alleged that plaintiff had unilaterally altered the contract between them to get her home built with several additions at a lower price. This fact clearly establishes that defendants' attempt to collect a fair price for the home they built was related to the contract between the parties. *See generally Chemical Co. v. Rivenbark*, 45 N.C. App. 517, 263 S.E.2d 305 (1980). Therefore, defendants giving plaintiff the option to sign the Note and Deed of Trust in lieu of them instituting legal proceedings against her was not a wrongful act.

Nevertheless, assuming there was sufficient evidence that defendants engaged in a wrongful act, there was still insufficient evidence that plaintiff was deprived of "free will" when she executed the Note and Deed of Trust. For a wrongful act to constitute duress, it must occur under circumstances which deprive one of the exercise of free will. *See Link*, 278 N.C. at 194, 179 S.E.2d at 704-05. In the case *sub judice*, the majority concludes that the jury could have found that plaintiff was prevented "from exercising her [free] will to leave defendants' office[]" because Keith directed his associate to " 'go outside and be sure that [Keith and plaintiff were] not interrupted.' "

However, plaintiff never testified that she felt she was not free to leave the meeting at any time. On the contrary, plaintiff's testimony emphasized her concerns that a legal proceeding would delay the closing thereby resulting in significant inconvenience and economic difficulties because plaintiff had already made plans to vacate her rental property and have her furniture moved. Plaintiff further testified that she was actually "embarrassed" when Keith accused her of fraud because she had worked hard to establish an amicable working relationship with him. Thus, when the evidence is viewed in the light most favorable to plaintiff, it most clearly indicates that she voluntarily chose to remain in the meeting to remedy the situation and not because she believed defendants would not let her leave.

Finally, with respect to plaintiff's "free will" (or lack thereof), I note that: (1) plaintiff signed the Note and Deed of Trust a week after the meeting with Keith; and (2) plaintiff had been a licensed real estate agent for approximately four years prior to the incident in question, which strongly suggest that she was not naive to the possibility of last minute issues arising that may require the postponement of a closing. Yet, prior to signing the Note and Deed of Trust, plaintiff chose not to use that time, use her professional experience, or consult with someone else to effectively evaluate defendants' proposed options to her, as well as, consider her own options as to coordinating the move into the new house. This evidence further indicates no deprivation of plaintiff's free will, simply her desire to elect whichever option that would prevent postponing the scheduled closing date.

In conclusion, I conclude that the evidence, when viewed in the light most favorable to plaintiff, was insufficient to prove essential elements of duress. Therefore, the trial court should have granted either defendants' motion for directed verdict or motion for judgment notwithstanding the verdict.

TOWN OF WALLACE, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY, RESPONDENT

No. COA02-1119

(Filed 19 August 2003)

1. **Administrative Law; Environmental Law— review of agency final decision—whole record test**

There was substantial evidence in the record to support the Environmental Management Commission's findings and conclusions that a town permitted or caused a break to occur in its sewer line by not inspecting or maintaining the line properly. The trial court improperly applied the whole record test by weighing the evidence and substituting its own evaluation for the agency's.

2. **Administrative Law— superior court review of agency decision—burden of proof**

The trial court did not erroneously place the burden of proof on the agency in reviewing an agency decision in a sewer discharge case by finding that there was an absence of competent evidence that petitioner caused or permitted the discharge and by concluding that respondent failed to present substantial credible evidence that petitioner caused or permitted the break in the sewer line. The court's judgment does not relieve petitioner of its burden of pleading sufficient facts to demonstrate respondent's actions violated State law under N.C.G.S. § 150B-23(a).

3. **Injunction; Environmental Law— remedy at law—sufficient**

The trial court erred by permanently restraining and enjoining respondent from imposing a civil penalty upon or investigating petitioner for water quality violations. There was a complete and adequate remedy at law under N.C.G.S. Ch. 150B, Article 4.

Appeal by respondent from judgment entered 11 March 2002 by Judge Gary E. Trawick in Duplin County Superior Court. Heard in the Court of Appeals 14 May 2003.

Burrows & Hall, by Richard L. Burrows, for petitioner-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley and Assistant Attorney General Anita LeVeaux, for respondent-appellant.

STEELMAN, Judge.

The Town of Wallace ("petitioner" or "Wallace") operates a wastewater treatment plant under a national pollutant discharge elimination system ("NPDES") permit issued by the North Carolina Department of Environment and Natural Resources ("DENR") and the Division of Water Quality ("DWQ"). One of the main trunk lines into the plant runs along Little Rockfish Creek in Wallace.

On 16 June 1999, plant operator Doug Mears ("Mears") arrived at 7:00 a.m. to discover that little or no sewage was flowing into the treatment plant. Mears informed Paul Parker ("Parker"), Director of Public Works in Wallace, of the problem around 7:30 a.m. He also telephoned the DWQ office in Wilmington, North Carolina, where he left a message that the treatment plant was not receiving flow and that petitioner was investigating the problem to determine the cause.

About 8:30 a.m. on 16 June 1999, DWQ environmental chemist George Colby ("Colby") received Mears' message and telephoned Mears, who again stated that the plant was not receiving any flow of sewage. At 12:30 p.m., Colby telephoned Parker who informed him that a broken pipe had been discovered on the main trunk line running along Little Rockfish Creek. This pipe was 18 inches in diameter, was one and one-half to two inches thick and was constructed of reinforced concrete.

Colby arrived at the site of the break at approximately 1:15 p.m. and observed that Wallace employees had removed the section of the pipe where the break had occurred. He estimated the break caused one million gallons of untreated sewage to spill into Little Rockfish Creek. Colby sampled the waters of the creek near the sewage entry point, upstream and downstream on 16 June 1999 and for several subsequent days.

During a discussion about the break and subsequent spill, Parker told Colby that the trees and bushes surrounding the section of broken pipe had been cut for right-of-way maintenance three to four years prior to June 1999. However, petitioner had not inspected the interior of the pipes in that section by "TV"ing them with a special camera or any other method before the break occurred.

On 17 June 1999, Parker filed an initial written report in which he stated the break and sewage spill were caused by "[d]ecayed tree stump roots [that] grew into pipe joints and . . . high rainfall . . . ." This report also stated that tree stumps were removed from the area

surrounding the broken pipe and that a temporary, sleeved channel was constructed with steel and plywood until a new section of pipe could be installed.

Parker later testified that during the excavation of the broken pipe, he observed a small, decayed tree stump on the ground above the break. He further testified that none of the roots had intruded any section of the pipe and that an inspection of the adjacent pipe sections revealed no roots growing into the pipe or other defects.

Petitioner had been under a Special Order of Consent ("SOC") with DENR to investigate and repair sections of its sewage collection system identified by engineers as needing repairs. However, the section of pipe which broke and caused the spill was not part of the SOC.

A laboratory analysis of the water samples collected by Colby showed violations of the State water quality standards for dissolved oxygen levels and fecal coliform bacteria. DWQ Director Kerr T. Stevens ("Stevens") investigated the incident and issued a decision assessing petitioner a $4,000.00 civil penalty for its violations of N.C. Gen. Stat. § 143-215.1(a)(6) (2001) plus investigation costs of $530.82.

On 13 March 2000, Wallace filed a contested case petition pursuant to N.C. Gen. Stat. § 150B-23 (2001) to challenge DWQ's assessment. After an administrative hearing, the administrative law judge ("ALJ") issued a recommended decision finding that the civil penalties had been assessed improperly. On 26 April 2001, the Environmental Management Commission ("EMC") issued the final agency decision in which it rejected the ALJ's recommendation but reduced the civil penalty to $2,000.00 plus investigation costs of $530.82.

Wallace petitioned for judicial review on 10 May 2001, seeking to have the EMC's final agency decision declared null and void. On 11 March 2002, the trial court filed its judgment reversing the EMC's final agency decision and permanently restraining and enjoining DENR from imposing any civil penalty or costs on petitioner. Respondent appeals the trial court's reversal of the EMC decision.

I.

[1] Respondent contends the trial court erred in reversing the EMC's final agency decision. Specifically, it argues the trial court erred in concluding there was insufficient credible evidence that petitioner

caused or permitted the break in the sewer line to occur by failing to maintain or inspect it properly.

Our review of the trial court's reversal of a final agency decision involves two inquiries: (1) whether the trial court exercised the appropriate standard of review; and (2) whether the trial court properly applied the standard of review. *Kea v. Dep't of Health and Human Servs.*, 153 N.C. App. 595, 570 S.E.2d 919 (2002), *appeal dismissed*, 356 N.C. 673, 577 S.E.2d 120 (2003). This Court's scope of review is the same as that employed by the trial court. *Wallace v. Bd. of Trs.*, 145 N.C. App. 264, 550 S.E.2d 552, *disc. review denied*, 354 N.C. 580, 559 S.E.2d 553 (2001).

The trial court may reverse or modify an agency's final decision or adopt the ALJ's decision

> if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b). Alleged errors of law, including questions of statutory interpretation by the agency, are reviewed *de novo* by the trial court. *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation v. Coastal Resources Comm'n*, 117 N.C. App. 556, 452 S.E.2d 337 (1995). Where an allegation is made that a final agency decision is not supported by competent evidence or is arbitrary and capricious, the trial court must review the decision under the whole record test. *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), *cert. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

In this case, the petition for judicial review of the EMC's final agency decision alleged that its findings and conclusions were unsup-

ported by substantial competent evidence. The EMC's decision contained the following pertinent findings of fact:

> 6. . . . Upon uncovering the section of sewer collection line in question, the Town [of Wallace] discovered that the bell (joint) portion of one section of pipe had broken off at the bottom. An old tree stump with roots was removed by the Town in uncovering the section of broken pipe. According to the Town, the pipeline break was the result of "decayed tree stump roots which grew into pipe joints and along with the high rainfall (5 in.) creek water caused a break in the pipe."
>
> . . .
>
> 14. The Town of Wallace had never inspected or performed maintenance to the *interior* of the main collection line where the break occurred[,] but it had recently performed inspections and maintenance of other sewer collection lines in the Town's collection system as mandated by DWQ in a Special Order of Consent, ("SOC").
>
> 15. The Town of Wallace did not possess a valid permit for the discharge of waste water to the creek that resulted from the broken pipe.

(emphasis added). The EMC then concluded:

> 8. The Town of Wallace permitted the discharge, spillage and leakage of approximately 1.0 million gallons of municipal sewage into Little Rockfish Creek on 16 June 1999 as a result of its failure to perform any inspection or maintenance of the pipes in the affected portion of the sewer collection line where the rupture or break occurred.

When reviewing the agency's decision to determine whether there was substantial evidence to support the findings and conclusions, the trial court must employ the whole record test and examine all evidence presented to the agency. N.C. Gen. Stat. § 150B-51(b)(5). The trial court's order recites that it "conducted both a *de novo* review as well as a whole record test" of the final decision. Thus, we conclude the trial court exercised the proper standard of review on the question of substantial competent evidence to support the EMC's findings and conclusions. *See Kea, supra*, 153 N.C. App. at 603, 570 S.E.2d at 924. We now must determine whether it properly applied the whole record test.

The whole record test requires the trial court to examine all evidence before the agency and to determine whether the decision has a rational basis in the evidence. *In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979). If the trial court concludes that there is substantial competent evidence in the record to support the findings, the agency decision must stand. *Little v. North Carolina State Bd. of Dental Examiners*, 64 N.C. App. 67, 306 S.E.2d 534 (1983). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' It is more than a scintilla or a permissible inference." *Lackey v. North Carolina Dep't of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citations omitted). The trial court may not weigh the evidence presented to the agency or substitute its own judgment for that of the agency. *King v. North Carolina Envtl. Management Comm'n*, 112 N.C. App. 813, 436 S.E.2d 865 (1993).[1]

The trial court found that there was no competent evidence of record to support the EMC's conclusion that the break occurred because petitioner failed to maintain or inspect the sewer lines properly. It then concluded that "[t]he Respondent has failed to present substantial credible evidence that the Petitioner either caused or permitted the break in the sewer line to occur, by either failing to properly or reasonably maintain or inspect the sewer line in question."

We first note that the trial court made independent findings of fact in its order. However, findings contained in the final agency decision which are not objected to by the petitioner are binding on the trial court. *Walker*, *supra*. Since petitioner objected only to finding of fact 14, all of the EMC's other findings were binding, and the trial court did not have the discretion to make its own findings of fact.

Further, after reviewing the record before us, we conclude there was substantial competent evidence to support the agency's findings and conclusions that petitioner permitted the break to occur by failing to properly inspect or maintain the pipe. The initial report submitted by Parker identified the cause of the break in the pipe as decayed tree stump roots. Testimony from Colby indicated petitioner had not inspected the pipe's interior and that it had performed main-

1. Subsection (c) of N.C. Gen. Stat. § 150B-51 requires the reviewing court to engage in a *de novo* review of a final agency decision where the agency did not adopt the ALJ recommendation. This subsection was enacted in 2000 and is applicable to contested cases commenced on or after 1 January 2001. Because the contested case petition in the instant case was filed on 13 March 2000, the standard of review articulated in subsection (c) does not apply.

tenance right-of-way around the pipe to clear away trees and bushes three to four years prior to the break. The assessment by DWQ Director Kerr T. Stevens stated that "[t]he violations are not considered willful or intentional" but were due to "inadequate maintenance." Field samples taken by Colby established violations of water quality standards in Little Rockfish Creek following the spill. The foregoing provided the EMC with substantial competent evidence upon which it based its final agency decision.

Petitioner presented contrary evidence regarding the cause of the break and the necessity of inspecting the interior of the pipes primarily through Parker's testimony. This testimony conflicted with the initial information provided in Parker's report to respondent. Conflicts in testimony and witness credibility are issues to be determined by the agency, not the reviewing court. *Yates Constr. Co. v. Commissioner of Labor*, 126 N.C. App. 147, 484 S.E.2d 430 (1997). " 'The "whole record" test does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*[.]' " *Wilkie v. North Carolina Wildlife Resources Comm'n*, 118 N.C. App. 475, 483, 455 S.E.2d 871, 876 (1995) (citation omitted). Thus, the trial court improperly weighed the evidence and substituted its own evaluation for the EMC's.

We hold the trial court incorrectly applied the standard of review required under N.C. Gen. Stat. § 150B-51(b) and erred in concluding that the EMC's findings and conclusions were not supported by substantial competent evidence of record.

II.

[2] Respondent next argues the trial court erred in placing the burden of proof on DENR to show that petitioner caused the sewage discharge. Respondent particularly assigns as error (1) the trial court's finding that there was an "absence of any competent evidence that the Petitioner either caused or permitted the waste to go into the stream;" and (2) its conclusion that respondent "failed to present substantial credible evidence that the Petitioner either caused or permitted the break in the sewer line to occur, by either failing to properly or reasonably maintain or inspect the sewer line in question." As a result, respondent contends the trial court erroneously placed the burden of proof upon it, rather than petitioner.

In a contested case filed pursuant to N.C. Gen. Stat. Chapter 150B, the petitioner must "state facts tending to establish that the agency named as the respondent has . . . substantially prejudiced the petitioner's rights and that the agency: . . . (2) Acted erroneously; . . . (4) Acted arbitrarily or capriciously; or (5) Failed to act as required by law or rule." N.C. Gen. Stat. § 150B-23(a). The party having the burden of proof must establish the required facts by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a). Chapter 150B, Article 3 is otherwise silent as to the burden of proof in demonstrating error by the agency. Similarly, N.C. Gen. Stat. § 143-215.1 does not specify which party bears the burden of proving an alleged violation of subsection (a)(6) for causing or permitting waste to be discharged into State waters without a permit.

The trial court's judgment does not relieve petitioner of its burden of pleading sufficient facts to demonstrate respondent's actions violated State law under N.C. Gen. Stat. § 150B-23(a). Thus, we disagree with respondent's argument that the trial court's finding of fact and conclusion of law at issue in this assignment of error erroneously placed the burden of proof on respondent. The conclusion that respondent failed to present substantial credible evidence that petitioner caused or permitted the discharge by improper maintenance or inspection has been addressed in Part I of this opinion.

III.

[3] Finally, respondent contends the trial court erred in permanently restraining and enjoining respondent from imposing any civil penalty or investigative costs on petitioner.

Generally, the trial court may not impose an equitable remedy when there is an adequate and complete remedy at law. *Embree Constr. Group, Inc. v. Rafcor, Inc.*, 330 N.C. 487, 411 S.E.2d 916 (1992). A party to a contested case may appeal a final agency decision through the procedures set forth in N.C. Gen. Stat. Chapter 150B, Article 4. This section governs the scope of the trial court's review and the actions it may take. None of the statues in this section authorize a trial court to enjoin an agency from executing its statutory duties.

We conclude that N.C. Gen. Stat. Chapter 150B, Article 4 provides petitioner a complete and adequate remedy at law and, therefore, hold the trial court erred in permanently restraining and enjoining respondent from imposing a civil penalty upon or investigating petitioner for water quality violations.

Because we reverse the trial court's decision on the grounds that it improperly applied the standard of review in determining whether substantial competent evidence supported the EMC's findings and conclusions that petitioner permitted the break by failing to properly inspect or maintain the sewer line, we do not address respondent's remaining assignments of error. We remand this matter to the trial court for entry of judgment consistent with this decision.

Reversed and remanded.

Judges TIMMONS-GOODSON and HUDSON concur.

NILES D. SLAVIN AND WIFE, CAROL J. SLAVIN; BENNET L. HUSSEY AND WIFE, LILLIE E. HUSSEY; ROBERT LEE MANN; SANDRA H. WILSON AND HUSBAND, THOMAS A. WILSON; RALPH W. PETERS, JR. AND WIFE, JOYCE PETERS; DAVID A. MILLER AND WIFE, LORI H. MILLER; JUDY C. MARTIN AND HUSBAND, WILCO A. MARTIN; JOSEPH BEAM, JR. AND WIFE, JUDITH ANN BEAM; W.H. ODELL; MICHAEL J. GOODMAN AND WIFE, MARIAN GOODMAN; DONALD PROTO AND WIFE, ELIZABETH W. PROTO; DOZIER PROPERTIES, INC., A NORTH CAROLINA CORPORATION; PETER R. DEMAO; LARRY V. HOGAN AND WIFE, MARGARET F. HOGAN; F. EUGENE LILLEY AND WIFE, MARJORIE E. LILLEY; GEORGE P. WHITE, A SINGLE PERSON; WOODROW W. BLACKBURN AND WIFE, BETTY N. BLACKBURN; BRANTLEY E. CLIFTON AND WIFE, MEREDITH B. CLIFTON; DOROTHY O. FLOYD, A WIDOW; JOHN HAIRSTON, JR. AND WIFE, DELANEY G. HAIRSTON; ERVIN L. MCCRAY AND WIFE, LINDA L. MCCRAY; AND JOHN C. WILKS, A SINGLE PERSON, PLAINTIFFS V. TOWN OF OAK ISLAND, A NORTH CAROLINA MUNICIPAL CORPORATION AND BODY POLITIC, DEFENDANT

No. COA02-671

(Filed 19 August 2003)

1. Cities and Towns; Waters and Adjoining Lands— taking— beach access

The trial court did not err in a takings case by granting summary judgment in favor of defendant town even though plaintiff oceanfront property owners contend defendant lacked authority to enact the pertinent access plan or to construct a fence upon the renourished beach in order to protect the sand dune and the turtle habitat which effectively limited each plaintiff's direct access to the ocean from his property, because nothing in the State Lands Act limits the authority of a town or city to enact reg-

ulations in order to protect a public beach located within its municipal limits.

2. Cities and Towns; Waters and Adjoining Lands— taking— beach access—vested appurtenant littoral right of direct access—compensation

The trial court did not err by granting summary judgment in favor of defendant town even though plaintiff oceanfront property owners contend plaintiffs had a vested appurtenant littoral right of direct access to the ocean which defendant cannot lawfully limit without compensating plaintiffs, because a littoral property owner's right of access to the ocean is a qualified one that is subject to reasonable regulation.

Appeal by plaintiffs from judgment entered 13 February 2002 by Judge D. Jack Hooks, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 3 June 2003.

Hedrick, Blackwell & Criner, L.L.P., by G. Grady Richardson, Jr., for plaintiffs appellants.

Roger Lee Edwards, P.A., by Roger Lee Edwards, and Crossley, McIntosh, Prior & Collier, by Clay A. Collier, for defendant appellee.

ELMORE, Judge.

Plaintiffs are owners of oceanfront property located within the municipal boundaries of the Town of Oak Island ("defendant" or "Town"). In May 2001, the United States Army Corps of Engineers ("Corps") completed a beach renourishment project, the Turtle Habitat Restoration Project, within the limits of the Town. The project was conducted with the consent of defendant and was designed to restore a sea turtle nesting habitat that had been damaged by erosion. A second beach renourishment project, the Wilmington Harbor Project, was undertaken in the Town by the Corps but not yet completed by the time this action commenced. Both projects entailed the placement of new sand on the seaward side of the former mean high water mark, which represents the seaward boundary of plaintiffs' properties. The placement of new sand in this manner pushed the mean high water mark seaward, creating a new dry sand beach and dune between plaintiffs' property and the ocean.

In order to protect the new sand dune and the turtle habitat, defendant adopted the Beach Access Plan ("Access Plan") at issue.

The Access Plan provides for the construction of fencing on and along the length of the renourished beach. Pursuant to the Access Plan, plaintiffs may only access the ocean via designated public access points. Prior to implementation of the Access Plan and construction of the fencing, each plaintiff enjoyed direct access to the ocean from his or her property.

Plaintiffs filed suit against defendant alleging that plaintiffs had a right of direct access to the ocean and that defendant's Access Plan constituted a taking of that right in violation of the federal and state constitutions. On 13 February 2002, after careful consideration of the pleadings and supporting materials, the trial court ordered that summary judgment be entered in favor of defendant. On 19 February 2002, plaintiffs gave notice of appeal to this Court.

On appeal, plaintiffs contend summary judgment in defendant's favor was improper as a matter of law on the following issues: 1) plaintiffs' assertion that defendant lacked standing and authority to adopt the Access Plan; and 2) plaintiffs' assertion that they each possess a vested appurtenant littoral right of direct access to the ocean, which defendant cannot lawfully limit without compensation. We disagree with plaintiff's contentions and affirm the trial court's order.

Summary judgment is appropriate if there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Weeks v. N.C. Dept. of Nat. Resources and Comm. Development*, 97 N.C. App. 215, 224, 388 S.E.2d 228, 233, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 890 (1990). The purpose of summary judgment "is to foreclose the need for a trial when, based upon the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are to be decided." *Robertson v. Hartman*, 90 N.C. App. 250, 252, 368 S.E.2d 199, 200 (1988). Plaintiffs concede that there are no disputed issues of fact in the present case.

[1] We first consider plaintiffs' contention that defendant was not entitled to summary judgment as a matter of law because defendant lacked the authority to enact the Access Plan or to construct a fence upon the renourished beach. Plaintiffs argue that, pursuant to the provisions of the State Lands Act, codified at N.C. Gen. Stat. § 146-1 *et seq.*, the State of North Carolina and its Department of Administration have exclusive authority to regulate the renourished beach. Plaintiffs further contend that, because the Department of

Administration has not delegated that authority to defendant, defendant's Access Plan was unlawfully implemented. After careful consideration of the State Lands Act, we conclude that the Act does not support plaintiffs' contention, and that the Town does as a matter of law have authority to enact the Access Plan.

N.C. Gen. Stat. § 146-6(f) provides that ". . . the title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the State." N.C. Gen. Stat. § 146-6(f) (2001). Because the renourishment projects undertaken by the Town were publicly financed sand placement projects, title to the newly-created beach is vested in the State. However, we believe that nothing in the Act should be read as limiting the authority of a town or city to enact regulations in order to protect a public beach located within its municipal limits. Plaintiffs' reading of the Act is inconsistent with our Legislature's grant of authority to municipalities to exercise police power within their boundaries. *See* N.C. Gen. Stat. § 160A-174(a) (2001) ("A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."). Accordingly, we reject plaintiffs' contention that defendant as a matter of law lacked authority to adopt and implement its Access Plan or to construct a fence upon the renourished beach.

[2] Plaintiffs also contend that summary judgment for defendant was improper because plaintiffs have a vested appurtenant littoral right of direct access to the ocean, which defendant cannot lawfully limit without compensating plaintiffs. Plaintiffs insist that they are entitled to compensation because defendant's Access Plan unlawfully limits plaintiffs' right of access by requiring plaintiffs to access the ocean via designated access points, rather than directly from their respective properties.

While we agree that North Carolina law recognizes a littoral property owner's right of access to adjacent water, plaintiffs misinterpret the nature of that right. *See Capune v. Robbins*, 273 N.C. 581, 588, 160 S.E.2d 881, 886 (1968); *Bond v. Wool*, 107 N.C. 139, 148, 12 S.E. 281, 284 (1890). A littoral property owner's right of access to the ocean is a qualified one, *Capune*, 273 N.C. at 588, 160 S.E.2d at 886, and is subject to reasonable regulation, *Weeks*, 97 N.C. App. at 225-26, 388 S.E.2d at 234. Plaintiffs, however, do not argue that the Access Plan is an unreasonable regulation of their littoral property

rights. Rather, plaintiffs insist that defendant may not limit their right of access to the ocean at all without compensating plaintiffs.

In *Capune*, our Supreme Court stated that a littoral property owner's right of access to adjacent water is " 'subject to such general rules and regulations as the Legislature, in the exercise of its powers, may prescribe for the protection of the public rights in rivers or navigable waters.' " *Capune*, 273 N.C. at 588, 160 S.E.2d at 886 (quoting *Bond*, 107 N.C. at 148, 12 S.E. at 284). In *Weeks*, this Court held that appurtenant littoral rights are "subordinate to public trust protections." *Weeks*, 97 N.C. App. at 226, 388 S.E.2d at 234. Thus, it is well-established that the littoral right of access to ad-jacent water is a qualified right.

Plaintiffs' contention that the Town may not, without compensation, in any way limit their right of access to the ocean is inconsistent with the qualified nature of that right. Accordingly, we conclude that defendant is entitled to judgment as a matter of law, and the trial court's order granting summary judgment in favor of defendant was proper.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. RONALD WEAVER, DEFENDANT

No. COA02-931

(Filed 19 August 2003)

1. Evidence— hearsay—codefendant's out-of-court statements—bribery of public officer—verbal acts—adoptive admissions

The trial court did not err in a bribery of a public officer case by admitting testimony of the out-of-court statements of a codefendant offering the alleged bribe even though defendant contends the statements were hearsay, because: (1) to prove that a person has offered a bribe, the State must necessarily offer evidence that words amounting to a bribe were spoken; (2) the State offered the codefendant's statements to prove that he spoke

words that amounted to an offer of a bribe rather than for the truth of the matter asserted in those statements; (3) the codefendant's statements fall into the category of operative facts or verbal acts; and (4) as an alternative basis, the evidence was admissible as adoptive admissions since the State offered evidence that defendant participated in the conversation and affirmatively endorsed his codefendant's statements. N.C.G.S. § 8C-1, Rule 801.

2. Evidence— prior crimes or bad acts—possession of drug paraphernalia—pendency of appeal

The trial court did not err in a bribery of a public officer case by allowing the State to cross-examine defendant with respect to his district court conviction of possession of drug paraphernalia even though the conviction had been appealed to superior court, because N.C.G.S. § 8C-1, Rule 609 specifically states that pendency of an appeal from a conviction does not render evidence of the conviction inadmissible.

3. Bribery— public officer—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charge of bribery of a public officer, because: (1) the evidence was sufficient to allow the jury to find that defendant and a codefendant together offered to share a portion of defendant's claimed settlement with a police officer if the officer would ignore the drugs that he had found when he searched the codefendant; and (2) the State offered evidence that defendant stated he was willing to pay whatever it takes and whatever the officer wants.

Appeal by defendant from judgment entered 13 February 2002 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 14 May 2003.

Attorney General Roy Cooper, by Assistant Attorney General Melissa L. Trippe, for the State.

J. Stephen Gray, for defendant-appellant.

GEER, Judge.

This appeal arises out of defendant Ronald Weaver's conviction for bribery of a public officer. Defendant contends primarily that the

trial court erred (1) in admitting the out-of-court statements of his co-defendant offering the alleged bribe; and (2) in admitting into evidence a district court conviction for possession of drug paraphernalia that had been appealed to superior court. Because we find that the co-defendant's statements were not hearsay but rather verbal acts and because Rule 609 permits admission of the conviction, we find no error in defendant's trial.

Facts

The State's evidence tended to show the following. On 26 July 2000, the Salisbury Police Department obtained a search warrant for Apartment 2 at 203 Pearl Street, Salisbury, North Carolina, the residence of James Edward Blakeney, who was suspected of selling drugs at that location. The search warrant also authorized the police to search Blakeney's vehicle and any people in the area surrounding Apartment 2.

The police "staked out" the area until Blakeney returned to his apartment. At 5:00 p.m., Blakeney's car pulled up with defendant Weaver driving and Blakeney in the front passenger seat. Pursuant to the search warrant, Detective Mike Dummett of the Salisbury Police Department searched Blakeney and found 65 "rocks of crack cocaine" and $600.00 in cash on his person.

Dummett escorted Blakeney inside and the officers began to search his apartment. At that point, Blakeney asked Dummett if they could speak in private. They stepped outside onto the apartment's porch. According to Dummett, defendant Weaver was standing only three to five feet away.

Dummett testified that Blakeney asked him "if there was anything that [Dummett] could do to just forget about the drugs that [he] had found." Dummett asked Blakeney what he meant by that. Blakeney responded "that his friend, Ronald Weaver was coming into four hundred thousand dollars from a military type of settlement and he would give [Dummett] some money, just for free, to drop the charges." Blakeney then turned to defendant and asked, "How much money are you willing to give him to make this go away?" Defendant replied: "It doesn't matter to me, whatever it takes."

Blakeney told Dummett that defendant loved him, would not let anything happen to him, and would use his settlement money to get Blakeney out of trouble. Blakeney then turned again to defendant and said, "Isn't that right?" Defendant replied, "That's right." Defendant

showed Dummett a power of attorney that he had just signed giving Blakeney control over defendant's assets.

Blakeney asked Dummett, "Don't you need a vacation or something?" Dummett responded that he was not interested in a bribe. Blakeney claimed that he was not offering a bribe, but instead it was "just a gift from one black man to another black man." He urged, "Come on brother, help me out." Blakeney again mentioned money, turned to defendant, and said, "We can do that, can't we?" Defendant responded: "Whatever he wants, we can do it." Dummett turned and returned to the apartment.

At trial, Blakeney did not testify. Defendant testified that on 26 July 2000, he was driving Blakeney's car because Blakeney had been drinking. He stated that they had gone to sign the power of attorney that he showed to Dummett so that Blakeney could help him obtain additional Veterans Administration benefits. Defendant denied bribing Dummett and denied hearing Blakeney say anything about money, trips, or a vacation.

On 13 February 2002, a jury found defendant guilty and he was sentenced to a minimum of 13 months and a maximum of 16 months. The sentence was suspended and defendant was placed on supervised probation for 24 months.

I

[1] In his first assignment of error, defendant argues that the trial court erred in admitting testimony of Blakeney's out-of-court statements. Defendant contends that these statements were inadmissible hearsay and that their admission therefore violated his constitutional rights to confrontation and effective assistance of counsel under Article 1, § 19 and § 23 of the Constitution of North Carolina and under the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

Defendant was convicted under N.C. Gen. Stat. § 14-218 (2001), which provides: "If any person shall offer a bribe, whether it be accepted or not, he shall be punished as a Class F felon." To prove that a person has offered a bribe, the State must necessarily offer evidence that words amounting to a bribe were spoken. The State offered Blakeney's statements not for the truth of the matter asserted in those statements, but rather to prove that Blakeney spoke words that amounted to an offer of a bribe. When offered for that purpose, the statements do not amount to hearsay. *See State v. Kirkman*, 293

N.C. 447, 455, 238 S.E.2d 456, 461 (1977) ("The Hearsay Rule does not preclude a witness from testifying as to a statement made by another person when the purpose of the evidence is not to show the truth of such statement but merely to show that the statement was, in fact, made."); *State v. Grier*, 51 N.C. App. 209, 214, 275 S.E.2d 560, 563 (1981) ("Notable examples of admissible non-hearsay include statements which are offered to prove only that the statement was actually made . . . ."); *State v. Cleveland*, 51 N.C. App. 159, 160, 275 S.E.2d 284, 285 (1981) (testimony by victim that, during a robbery, a robber stated that defendant, one of the other robbers, would hurt him if he did not turn over money was not hearsay).

Blakeney's statements fall into the category of "operative facts" or "verbal acts." N.C. Gen. Stat. § 8C-1, Rule 801 Commentary (2001) ("The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights."). As 2 *Brandis & Broun on North Carolina Evidence* § 195 (5th ed.) notes, "[a] person's utterances may be admissible because they are operative facts in the case, as where they are words of . . . attempted bribery . . . ." *See also United States v. Moss*, 9 F.3d 543, 550 (6th Cir. 1993) (testimony that witness was solicited to offer a bribe was offered to prove that solicitation was made and, therefore, was not hearsay); *United States v. Gonsiewski*, 277 F. Supp. 300, 303 (E.D. Pa. 1967) ("[T]he verbal offer of a bribe by [declarant] does not constitute hearsay evidence. Rather, it is in the nature of a 'verbal act' . . . .").

Alternatively, these statements were admissible under Rule 801(d)(B), which provides that a statement is admissible if offered against a party and it is "a statement of which he has manifested his adoption or belief in its truth." N.C. Gen. Stat. § 8C-1, Rule 801(d)(B) (2001). Adoptive admissions generally fall into one of two categories: (1) those adopted through an affirmative act of a party; and (2) those inferred from silence or a failure to respond in circumstances that call for a response. *State v. Sibley*, 140 N.C. App. 584, 588-89, 537 S.E.2d 835, 839 (2000). This case does not present a scenario in which defendant simply remained silent while Blakeney spoke. Instead, the State offered evidence that defendant participated in the conversation and affirmatively endorsed Blakeney's statements.

When Blakeney asked defendant what he would be willing to pay to help Blakeney with the drug charges, he responded, "[W]hatever it

takes." After Blakeney assured Dummett that defendant would do whatever necessary to get Blakeney out of trouble, defendant confirmed, "That's right." Finally, after Blakeney again mentioned money and asked defendant, "We can do that, can't we?" he responded, "Whatever he wants, we can do it." In short, after each of Blakeney's statements, defendant asserted his agreement.

Blakeney's statements were admissible as either non-hearsay verbal acts or as adoptive admissions. Because the statements either were not hearsay or fell within a well-recognized exception to the rule barring hearsay evidence, the admission of the statements did not violate defendant's constitutional rights. *State v. Workman*, 344 N.C. 482, 503, 476 S.E.2d 301, 312 (1996). This assignment of error is overruled.

II

[2] In his second assignment of error, defendant argues that the trial court erred in allowing the State to cross-examine defendant with respect to his district court conviction of possession of drug paraphernalia. Defendant argues only that the conviction was inadmissible because it had been appealed to superior court. The plain language of Rule 609 of the North Carolina Rules of Evidence, N.C. Gen. Stat. § 8C-1, Rule 609 (2001), provides otherwise.

Rule 609(e) specifically states that "[t]he pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible." Defendant cites no authority suggesting that Rule 609(e)'s reference to "an appeal" excludes appeals from district court to superior court and we have found none. This assignment of error is overruled.

III

[3] In his final assignment of error, defendant argues that the trial court erred by denying the appellant's motion to dismiss at the close of all the evidence. "In reviewing a 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. Stancil*, 146 N.C. App. 234, 244, 552 S.E.2d 212, 218 (2001) (quoting *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982)), *aff'd as modified*, 355 N.C. 266, 559 S.E.2d 788 (2002). " 'Substantial evidence is such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion.' " *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). When reviewing a defendant's challenge to the sufficiency of the evidence, the evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of all reasonable inferences to be drawn from the evidence. *State v. Compton*, 90 N.C. App. 101, 103-04, 367 S.E.2d 353, 355 (1988).

The elements of bribery of a public officer include (1) the offer of something of value, (2) to a person known to be a public official, and (3) with the corrupt intent to influence the official's actions in the performance of a legal duty. *See* N.C. Gen. Stat. § 14-218; *State v. Hair*, 114 N.C. App. 464, 467, 442 S.E.2d 163, 164 (1994) (quoting *State v. Greer*, 238 N.C. 325, 328, 77 S.E.2d 917, 920 (1953)) (emphasis original) (defining bribery as " 'the voluntary offering [or] giving . . . of any sum of money, present, or thing of value with the corrupt intent to influence the recipient's action as a public officer . . . in the performance of any *official duty* required of him.' ").

Here, the State's evidence was sufficient to allow the jury to find that Blakeney and defendant together offered to share a portion of defendant's claimed $400,000.00 settlement with Dummett if Dummett would ignore the drugs that he had found when he searched Blakeney. Defendant's argument on appeal that there was no evidence that defendant offered money to Dummett overlooks the State's evidence that defendant said he was willing to pay "whatever it takes" and "[w]hatever he wants, we can do it." This evidence was sufficient to allow the jury to convict defendant of bribery of a public officer.

No error.

Judges MARTIN and HUNTER concur.

TIMMY R. BUTLER AND FRANCIS D. BUTLER, PETITIONERS v. CITY COUNCIL OF THE CITY OF CLINTON AND THE CITY OF CLINTON, RESPONDENTS

No. COA02-1268

(Filed 19 August 2003)

Cities and Towns— crematory—conditional use permit denied

A city's decision to deny a conditional use permit for a crematory was supported by competent, material, and substantial evidence, and the trial court correctly affirmed the city's decision, where the applicable ordinance required that the proposed use "will not" be detrimental to the safety or general welfare, while petitioners' evidence was that the crematory would "likely" not be a danger.

Appeal by petitioners from order entered 19 June 2002 by Judge Russell J. Lanier, Jr., in Sampson County Superior Court. Heard in the Court of Appeals 4 June 2003.

The Banks Law Firm, P.A., by John Roseboro, and The Charleston Group, by Jonathan Charleston, for petitioner appellants.

Johnson, Parsons, and Hobson, P.A., by Dale Johnson, for respondent appellees.

TIMMONS-GOODSON, Judge.

Tim and Francis Butler ("petitioners") appeal from an order of the trial court affirming a denial by the City Council of the City of Clinton ("respondents") of petitioners' application for a conditional use permit ("CUP") to operate a crematory in Clinton, North Carolina.

The facts pertinent to the instant appeal are as follows: On 8 January 2002, the City Council conducted a hearing on petitioners' application. After reviewing the evidence, respondents determined that petitioners failed to present uncontroverted evidence that the proposed crematory would comply with all of the standards of the applicable zoning ordinance ("the ordinance"), and unanimously voted to deny the CUP.

Petitioners thereafter filed an ex parte petition for writ of certiorari to the Sampson County Superior Court seeking judicial review of respondents' denial of the CUP application. On 19 June 2002, the trial

court entered an order containing the following pertinent findings of fact:

> 1. THIS MATTER arises out of a conditional use permit request by the Petitioners to operate a crematorium on the corner of North Boulevard and Lloyd Street in an office and institutional district in Clinton, North Carolina. This matter was heard by the City of Clinton Planning and Zoning Board on December 17, 2001. The City of Clinton Planning and Zoning Board unanimously denied the conditional use request upon the grounds that the Petitioners failed to prove Standards 1, 2 and 4 of the Standards of the Clinton Zoning Ordinance, Section 10.7, as set out in the record.
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> 2. That all eight standards must be approved in order to justify a conditional use permit. That Section 10.1.8 of the Clinton Zoning Ordinance indicates that the City must consider each case and its impact on those uses upon neighboring land and of the public need for the particular use and particular location.
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> . . . .
>
> 6. That the City Council of the City of Clinton found and submitted the following certified findings of fact:
>
> (a) That the proposed site was within one mile radius of two residential neighborhoods, six medical facilities, one elementary school, three day cares, one restaurant and grocery stores.
>
> (b) That the crematorium site has residences, across the street in front of the site, and to the side of the site, all within one hundred yards. There are eight houses directly facing the property.
>
> (c) That there are scientific, environmental and health concerns about the identification and qualification of emissions from crematoriums, as to heavy metals, such as mercury and dioxins. The crematoriums are listed as the third biggest source of dioxins. That children are of particular risk to dioxins. That Sampson Regional Medical Center in Clinton, NC, closed its human tissue incinerator because of scientific and environmental concerns. (Dr. Paul Viser, Board Certified in Internal Medicine)
>
> (d) That by the nature of the crematorium, which incinerates human bodies, there are legitimate concerns about the psychological impact of such, in an area with residences nearby, on children and residents of that area.

(e) That a crematorium would substantially decrease and impair the value of residences and properties, in the area, due to the adverse psychological impact in the unresolved, unanswered health and safety issues.

(f) That a thirty-six-inch diameter, seventeen foot, eight inches high emissions stack would be inconsistent with architectural appeal of the existing office and institutional adjacent property, and the character of the applicable district.

(g) That there is a lack of necessity of a crematorium at this site, with residences close by, when there are other alternative sites available.

(h) That the new regulations for solid waste incinerators, which include crematoriums, will not be issued by the Environmental Protection Agency until November 15, 2005.

(i) That there is currently litigation concerning issues involving the current regulations on crematorium incinerators.

Based on these findings, the trial court concluded that respondents had acted lawfully and that its decision was supported by competent, material, and substantial evidence. The trial court therefore affirmed respondents' denial of the CUP. From this order of the trial court, petitioners appeal.

Petitioners argue that the trial court erred in affirming respondents' decision to deny the issuance of a CUP because the decision was unsupported by competent, material, and substantial evidence, based on the whole record. For the reasons herein, we affirm the order of the trial court.

"A legislative body such as [a city council], when granting or denying a conditional use permit, sits as a quasi-judicial body . . ." *Sun Suites Holdings, LLC v. Board of Alderman of Town of Garner*, 139 N.C. App. 269, 271, 533 S.E.2d 525, 527 (2000). As such, denial of a CUP is subject to review in the nature of certiorari by the superior court. *See* N.C. Gen. Stat. § 160A-381(c) (2001). The trial court's review is limited to determining whether the conduct of the city council was in accordance with the law and whether the decision was supported by competent, material, and substantial evidence based on the "whole record." *See Pisgah Oil Co. v. Western N.C. Reg'l Air Pollution Control Agency*, 139 N.C. App 402, 405, 533 S.E.2d 290, 293 (2000); *Baker v. Town of Rose Hill*, 126 N.C. App. 338, 341, 485 S.E.2d

78, 80 (1997). Our task on review of the trial court's order is " 'twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *Pisgah* at 405, 533 S.E.2d at 293 (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)). In the case at bar, petitioners do not contend that the trial court applied an improper standard of review. Thus, this Court must determine whether the trial court properly applied the "whole record" test to the instant facts.

Section 10.7 of the ordinance sets out eight standards that must be satisfied before a CUP may be issued. Failure to meet any one standard is grounds for denial of the entire application. Respondents determined that petitioners failed to present substantial evidence to support CUP standards one, two, and four under the applicable ordinance.[1] Standards one, two, and four of the ordinance, read as follows:

> (1) That the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, or general welfare.
>
> (2) That the conditional use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already.
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> . . . .
>
> (4) That the exterior architectural appeal and functional plan of any proposed structures will not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or the character of the applicable district, as

1. We note that the language of the ordinance does not specifically permit crematories as a conditional use, but merely "funeral homes." The North Carolina General Statutes define a "funeral establishment" as "every place or premises devoted to or used in the care, arrangement and preparation for the funeral and final disposition of dead bodies and maintained for the convenience of the public in connection with dead bodies or as the place for carrying on the profession of funeral service." N.C. Gen. Stat. § 90-210.20(h) (2001). "Crematory" is defined as "the building or portion of a building that houses the cremation center and that may house the holding facility, business office or other part of the crematory business." N.C. Gen. Stat. § 90-210.41(9) (2001). Further, funeral establishments and crematories have separate licensing boards. *See* N.C. Gen. Stat. §§ 90-210.18, 90-210.42 (2001). As the question of whether the ordinance permits crematories in the town of Clinton is not directly before us, we decline to address this issue.

> to cause a substantial depreciation in the property values within the neighborhood.

Petitioners contend that they presented competent, material, and substantial evidence in compliance with these standards.

In support of the first standard, petitioners produced evidence of emission testing and equipment documentation to demonstrate that the proposed crematory "*likely* would not" jeopardize or endanger the public health, safety, morals, or general welfare. The language of standard one of the ordinance, however, specifically requires evidence that the proposed use " . . . *will not* be detrimental to or endanger the . . . general welfare." Further, respondents heard evidence presented in support of the denial that tended to show that the proposed crematory could endanger general welfare. Residents testified about concerns with potential learning disabilities and cancer caused by emissions from the burning of human bodies, as well as the potentially adverse psychological effect on children living in the neighborhood. Dr. Paul Viser, a general internist, testified concerning mercury emissions from crematories that adversely affect the kidneys and the central nervous system, as well as dioxins that harm both reproductive and immune systems.

In a case similar to the instant case, *Mann Media v. Randolph County Planning Bd.*, 356 N.C. 1, 565 S.E.2d 9 (2002), the petitioner appealed from the denial of an application for a special use permit to build a broadcast tower zoned for residential and agricultural use. After an application hearing, the Randolph County planning board denied the request for the permit based on findings indicating that the potential of ice forming and falling from support wires of the proposed towers was a public safety risk. Upon petition, the superior court reversed the denial of the special use permit. On appeal, the North Carolina Court of Appeals affirmed the trial court. Respondents sought further review. The North Carolina Supreme Court reversed the decision of this Court, holding that

> Under the whole record test, in light of petitioners' inability satisfactorily to prove that the proposed use would not materially endanger public safety, we are not permitted to substitute our judgment for that of respondent. Accordingly, we hold that petitioners failed to meet their burden of proving this first requirement and did not establish a *prima facie* case.

Id. at 17, 565 S.E.2d at 19.

Similarly, the present petitioners failed to produce *uncontroverted* evidence to ensure that the proposed use *will not* be detrimental to the safety or general welfare of the residents. They also failed to overcome evidence of the adverse psychological impact on the ability of the residents to use and enjoy their property. We conclude that the trial court did not err in affirming respondents' denial of the permit based on petitioners' failure to show that the proposed crematory would comply with standard one of the ordinance. Because petitioners failed to prove one of the eight standards, it is unnecessary for this Court to address the remaining two standards in order to reach our decision.

In conclusion, we uphold the trial court's order affirming the decision by the City of Clinton and City Council to deny the CUP. The trial court appropriately applied the proper standard of review, and its decision is supported by competent, material, and substantial evidence. We therefore affirm the order of the trial court.

Affirmed.

Judges HUDSON and STEELMAN concur.

ANTHONY C. LAMBERT, PLAINTIFF v. KATHERINE C. CARTWRIGHT, INDIVIDUALLY, DEFENDANT

No. COA02-961

(Filed 19 August 2003)

1. Pleadings— motion for judgment on—motion not converted into summary judgment

The trial court considered only the pleadings and attached exhibits in ruling on a motion for judgment on the pleadings. The court did not convert the motion into one for summary judgment without giving plaintiff an opportunity to present materials.

2. Public Officers and Employees— probation officer—public official

Defendant's motion for a judgment on the pleadings was correctly granted in a tort action against a probation officer arising from her report of a probation violation. A probation officer is a

public official who cannot be held liable for negligence in her individual capacity.

Appeal by plaintiff from judgment entered 4 March 2002 by Judge Quentin T. Sumner in Pasquotank County Superior Court. Heard in the Court of Appeals 16 April 2003.

Attorney General Roy Cooper, by Assistant Attorney General Mary S. Mercer, for defendant-appellee.

Anthony Lambert, plaintiff-appellant, pro se.

HUDSON, Judge.

Plaintiff Anthony C. Lambert sued defendant Katherine S. Cartwright, his probation officer, in her individual capacity after she filed what he contends to be an untrue probation violation report. He brought claims of civil conspiracy, intentional infliction of emotional distress, abuse of process, and malicious prosecution, all premised on his beliefs that defendant acted outside the scope of her authority when she reported him for violating probation, that the violations set forth in the probation violation report were not true, and that the purpose of filing the report was to injure, oppress, and intimidate him. Defendant filed a motion for judgment on the pleadings, claiming that as a public official she was immune from suit. The trial court granted defendant's motion, and plaintiff appealed. For the reasons set forth below, we affirm.

BACKGROUND

In March 1998, a jury convicted plaintiff of the unauthorized practice of law. He received a sentence of 45 days in jail, suspended for 36 months, with regular and special conditions of probation. Plaintiff appealed. The Court of Appeals found no error in plaintiff's trial but remanded for resentencing. At the resentencing hearing on 22 May 2000, plaintiff received an intermediate punishment consisting of 45 days in jail, suspended for 36 months, with regular and special conditions of probation. Plaintiff appealed the resentencing judgment.

The trial court dismissed plaintiff's appeal on 4 February 2001. On 28 February 2001, while supervising plaintiff's probation, defendant determined that plaintiff had violated the terms and conditions of his probation and completed a probation violation report to this effect. The trial court signed an order for plaintiff's arrest.

By order entered 14 May 2001, this Court determined that the trial court had erred by dismissing plaintiff's appeal of his criminal action and that the appeal had been docketed and was still pending for decision. Shortly thereafter, plaintiff filed a civil complaint against defendant, alleging that she had violated North Carolina law and his rights under the North Carolina Constitution by virtue of filing the probation violation report. Specifically, he brought claims of civil conspiracy, intentional infliction of emotional distress, abuse of process, and malicious prosecution, all based on his contentions that defendant acted outside the scope of her authority when she reported him for violating probation, that the violations set forth in the probation violation report were not true, and that the purpose of filing the report was to injure, oppress, and intimidate him. Plaintiff sought compensatory damages in the amount of $100,000 and punitive damages in the amount of $200,000.

In February 2002, defendant moved for judgment on the pleadings. The trial court granted the motion on 4 March 2002. Plaintiff appeals.

ANALYSIS

[1] Plaintiff first argues that the trial court erred by converting a motion for judgment on the pleadings into a summary judgment motion without giving him reasonable opportunity to present relevant materials. We disagree.

In ruling on a motion for judgment on the pleadings, the trial court is to consider only the pleadings and any attached exhibits, which become part of the pleadings. *Powell v. Bulluck*, 155 N.C. App. 613, 573 S.E.2d 699, 701 (2002) (citation and quotation marks omitted); N.C. Gen. Stat. § 1A-1, Rule 12(c) (2001). "No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings." *Id.* (citation omitted). The trial court must accept all material allegations in the complaint as true and accurate and consider them in the light most favorable to the non-moving party. *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002).

Here, contrary to plaintiff's contentions, defendant's memorandum filed in support of her motion for judgment on the pleadings contained no factual matters outside the pleadings. Rather, the factual allegations in the memorandum are taken from the pleadings. No affi-

davits were submitted to the trial court, and no evidence was taken. We conclude that the trial court considered only the pleadings and the attached exhibits in ruling on defendant's motion.

[2] Plaintiff next contends that the trial court erred by granting defendant's motion for judgment on the pleadings. Again we disagree.

A motion for judgment on the pleadings should be granted when all material questions of fact are resolved in the pleadings and only issues of law remain. *Mabrey v. Smith*, 144 N.C. App. 119, 124, 548 S.E.2d 183, 187, *disc. review denied*, 354 N.C. 219, 554 S.E.2d 340 (2001). A motion for judgment on the pleadings is not favored by the law and requires the trial court to view all facts and permissible inferences in the light most favorable to the nonmoving party. *Governors Club, Inc. v. Governors Club Ltd. Partnership*, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2002), *affirmed*, 357 N.C. 46, 577 S.E.2d 620 (2003). All factual allegations in the nonmovant's pleadings are deemed admitted except those that are legally impossible or not admissible in evidence. *Id.*

Here, plaintiff has sued defendant, a state probation officer, in her individual capacity. We must determine whether defendant is a public employee or a public official. It is "settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997) (quoting *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952)). In such a case, an "official may not be held liable unless it be alleged and proved that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties." *Id.* "Public employees, as opposed to public officials, do not enjoy the same protection, and may be held liable for mere negligence in the performance of their duties." *Andrews v. Crump*, 144 N.C. App. 68, 76, 547 S.E.2d 117, 123, *disc. review denied*, 354 N.C. 215, 553 S.E.2d 907 (2001).

A public official is someone whose position is created by the constitution or statutes of the sovereign. *Meyer*, 347 N.C. at 113, 489 S.E.2d at 889 (citation omitted). Public officials are usually required to take an oath of office. *Messick v. Catawba County, N.C.*, 110 N.C. App. 707, 717, 431 S.E.2d 489, 496, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). An "essential difference between a public office and mere employment is the fact that the duties of the incum-

bent of an office shall involve the exercise of some portion of sovereign power." *Meyer*, 347 N.C. at 113, 489 S.E.2d at 889 (citation omitted). Officials exercise a certain amount of discretion, while employees perform ministerial duties. *Id.* (citation omitted). Discretionary acts are those requiring "personal deliberation, decision and judgment; duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Id.* (citation omitted).

Here, we conclude that, as a probation officer, defendant is a public official who cannot be held liable for negligence in her individual capacity. Probation officers are appointed pursuant to Chapter 15 of the General Statutes and are required to take an oath of office. N.C. Gen. Stat. § 15-204 ("Each person appointed as a probation officer shall take an oath of office before the judge of the court or courts in which he is to serve . . . "). Probation officers, moreover, are accorded by statute the same rights to "execute process as is now given, or that may hereafter be given by law, to the sheriffs of this State." N.C. Gen. Stat. § 15-205. Our courts have recognized that sheriffs are public officials. *Summey v. Barker*, 142 N.C. App. 688, 691, 544 S.E.2d 262, 265 (2001). Since North Carolina law permits probation officers and sheriffs to provide some of the same services, we see no reason to classify them differently for purposes of immunity. Finally, we do not think that probation officers perform merely ministerial duties but instead they must bring "personal deliberation, decision and judgment" to each situation. *Meyer*, 347 N.C. at 113, 489 S.E.2d at 889. Accordingly, defendant, as a public official, cannot be held liable for negligence, and the trial court properly granted defendant's motion for judgment on the pleadings.

CONCLUSION

Affirmed.

Judges MARTIN and ELMORE concur.

STATE OF NORTH CAROLINA v. SCOTT LYLE HARLESS

No. COA02-1147

(Filed 19 August 2003)

Probation and Parole— probation revocation—appeal from district court

A defendant's appeal from a judgment of the trial court revoking his probation and activating his sentence in a misdemeanor and felonious possession of marijuana, possession of drug paraphernalia, and possession of non-tax paid alcohol case is dismissed, because N.C.G.S. § 15A-1347 provides that a defendant must first appeal the revocation of probation by the district court to the superior court, and therefore, defendant did not have the right to appeal the revocation of his probation by the district court directly to the Court of Appeals.

Judge STEELMAN dissenting.

Appeal by defendant from judgment entered 27 February 2002 by Judge Mitchell L. McLean in Wilkes County District Court. Heard in the Court of Appeals 21 May 2003.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Jarvis John Edgerton, IV, for defendant appellant.

TIMMONS-GOODSON, Judge.

Scott Lyle Harless ("defendant") appeals from judgment of the trial court revoking his probation and activating his sentence of four to five months' imprisonment. For the reasons stated herein, we dismiss the appeal.

On 7 February 2001, defendant pled guilty to misdemeanor and felonious possession of marijuana, possession of drug paraphernalia, and possession of non-tax paid alcohol. The trial court suspended his sentence and placed him on probation for twenty-four months. On 19 October 2001, defendant's probation officer filed a probation violation report, alleging multiple violations of the terms and conditions of probation. Defendant admitted to all violations on 27 February 2002 in the Wilkes County District Court.

The trial court revoked his probation and activated his sentence. Defendant appeals.

The dispositive issue on appeal is whether this Court has subject matter jurisdiction over defendant's appeal. Because we conclude that defendant cannot appeal the revocation of his probation directly from the district court, we dismiss this appeal.

Both the State and defendant agree that this Court lacks statutory authority to hear an appeal from probation revocation directly from the district court level. Section 15A-1347 authorizes an appeal by a defendant from revocation by the trial court of probation:

> When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing. At the hearing the probationer has all rights and the court has all authority they have in a revocation hearing held before the superior court in the first instance. Appeals from lower courts to the superior courts from judgments revoking probation may be heard in term or out of term, in the county or out of the county by the resident superior court judge of the district or the superior court judge assigned to hold the courts of the district, or a judge of the superior court commissioned to hold court in the district, or a special superior court judge residing in the district. When the defendant appeals to the superior court because a district court has found he violated probation and has activated his sentence or imposed special probation, and the superior court, after a de novo revocation hearing, orders that the defendant continue on probation under the same or modified conditions, the superior court is considered the court that originally imposed probation with regard to future revocation proceedings and other purposes of this Article. When a superior court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, either in the first instance or upon a de novo hearing after appeal from a district court, the defendant may appeal under G.S. 7A-27.

N.C. Gen. Stat. § 15A-1347 (2001). Thus, under section 15A-1347, a defendant must first appeal the revocation of probation by the district court to the superior court. *See id*; N.C. Gen. Stat. § 7A-271(b) (2001) (providing that "[a]ppeals by the State or the defendant from the district court are to the superior court"). If, after a *de novo* review by the

superior court, the defendant's suspended probationary sentence is activated, the defendant may appeal under section 7A-27 of the General Statutes.

We acknowledge that a recent decision filed by this Court on 1 July 2003 concluded that a defendant may properly appeal probation revocation judgments entered by the district court directly to this Court under sections 7A-272 and 15A-1029.1 of the General Statutes. *See State v. Hooper*, 158 N.C. App. 654, 582 S.E.2d 331 (2003). The decision in *Hooper*, however, was a divided one. The dissent in *Hooper* concluded that "[t]he indisputable purport of [sections 15A-1347 and 7A-271(b)] is that appeal to this Court . . . would be proper only *after* activation of a suspended probationary sentence by the superior court upon *de novo* review following appeal of the revocation of said probationary sentence by the district court." *Id.* at 660-61, 582 S.E.2d at 335 (Wynn, J., dissenting). Given the probability of review by our Supreme Court pursuant to section 7A-30(b) of the General Statutes, the issue of whether a defendant may properly appeal revocation of probation directly from the district court remains undecided.

We conclude that defendant did not have the right to appeal the revocation of his probation by the district court directly to this Court. If an appealing party has no right to appeal, dismissal of the appeal by the appellate court is proper. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). We therefore dismiss this appeal.

Dismissed.

Judge HUDSON concurs.

Judge STEELMAN dissents.

Judge STEELMAN, dissenting.

This is a case in which a felony guilty plea was taken in the District Court of Wilkes County pursuant to the provisions of N.C. Gen. Stat. § 7A-272. The appeal involves a handwritten probation revocation judgment that raises the question of whether the record on appeal was complete and in proper form. However, the sentence imposed of 4 to 5 months clearly shows that it was a felony judgment.

I respectfully dissent from the majority's holding that this court lacks jurisdiction to hear an appeal of a felony probation revocation from the district court division.

The majority acknowledges *State v. Hooper*, 158 N.C. App. 654, — S.E.2d — (2003), which holds that an appeal from a felony probation revocation in the district court lies to this Court rather than to the superior court. One of our most important principles of appellate law in North Carolina is that: "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, *unless it has been overturned by a higher court.*" *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) (Emphasis added).

The majority states: "Given the probability of review by our Supreme Court, pursuant to section 7A-30(b) of the General Statutes, the issue of whether a defendant may properly appeal revocation of probation directly from the district court remains undecided." This holding would change the law of this State so that when a panel on this Court decides an issue by a 2 to 1 vote, the decision does not become precedent binding upon this Court, pending an appeal to the Supreme Court.

The effect of the majority opinion is to sow the seeds of chaos and confusion in our trial court divisions, in that they now have two directly conflicting decisions of this Court on the identical issue which they are required to follow.

JIMMY LEWIS WATTS, EMPLOYEE, PLAINTIFF v. HEMLOCK HOMES OF THE HIGHLANDS, INC., EMPLOYER, BUILDERS MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA02-1229

(Filed 19 August 2003)

Appeal and Error— appealability—interlocutory order—workers' compensation award

Defendants' appeal in a workers' compensation case is dismissed as an appeal from an interlocutory order and there is no immediate right of appeal, because: (1) an opinion and award that on its face contemplates further proceedings or which does not

fully dispose of the pending stage of the litigation is interlocutory, and the opinion in this case specifically reserved the issue of the amount of plaintiff's compensation award pending a hearing to determine plaintiff's average weekly wage at the time of his compensable injury; and (2) defendants' brief contains no statements of the grounds for appellate review and no discussion of any basis for review of this interlocutory order as required by N.C. R. App. P. 28(b)(4).

Appeal by defendants from opinion and award entered 7 May 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 May 2003.

No brief filed for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by John H. Ruocchio and Timothy S. Riordan, for defendant-appellants.

HUDSON, Judge.

Plaintiff, Jimmy Lewis Watts, was injured in his employment with defendant Hemlock Homes of the Highlands, Inc. ("Hemlock Homes") on 26 September 1995. On 6 October 1995, defendants executed an IC Form 60, recognizing plaintiff's right to compensation and noting an average weekly wage of $480.00, yielding a compensation rate of $320.01 per week. Defendant began making payments to plaintiff at that rate.

On 4 November 1995, plaintiff returned to work for Hemlock Homes and continued to work through 21 February 1996, at which time plaintiff underwent surgery on his shoulder. On 26 February 1996, defendants sent plaintiff a letter informing plaintiff that his average weekly wage was $244.73, not $480.00, and which generated a compensation rate of $161.16 per week. Subsequently, defendants began paying plaintiff compensation at the rate of $161.16 per week.

On 30 October 1998, plaintiff filed a motion along with the IC Form 60 in the Superior Court in Jackson County seeking an order to enforce the IC Form 60, which stated that plaintiff's average weekly wage was $480.00. On 19 July 1999, after hearing arguments, Judge J. Marlene Hyatt entered judgment ordering payment to plaintiff in the amount of $29,517.88, which represented the past compensation plaintiff would have received if paid at a compensation rate of

$320.01 per week, and ordered defendants to continue paying plaintiff ongoing compensation, consistent with IC Form 60, at the rate of $320.01 per week.

Defendant appealed this order to this Court, which vacated the order, holding that the superior court exceeded its jurisdiction by entering judgment and forcing payment of an amount of compensation when such an amount was in dispute. *Watts v. Hemlock Homes of the Highlands, Inc.*, 141 N.C. App. 725, 544 S.E.2d 1, *disc. review denied*, 353 N.C. 398, 547 S.E.2d 431 (2001).

On 17 February 1999, defendants filed an IC Form 24 seeking to terminate plaintiff's compensation, contending that plaintiff had been working and building houses since 26 January 1996. On 18 March 1999, a Form 24 hearing was held before Special Deputy Commissioner Gina Cammarano. On 25 March 1999, Special Deputy Cammarano entered an order stating that the Commission was unable to reach a decision. Subsequently, on 4 May 1999, Special Deputy Cammarano ordered defendants to immediately reinstate plaintiff's temporary total disability compensation. On 12 May 1999, defendants filed an IC Form 33 to request a hearing on both the 25 March 1999 and 4 May 1999 orders.

The matter was thereafter set for hearing before Deputy Commissioner George T. Glenn, II. Following several hearings, on 31 October 2000, Deputy Glenn ordered that the compensation rate should be paid pursuant to the IC Form 60 in the amount of $320.02 [sic] per week.

Defendants appealed to the Full Commission alleging that plaintiff has worked, and continues to work, as a carpenter, general contractor, and boom truck operator. The Full Commission affirmed and modified Deputy Commissioner Glenn's order, finding that plaintiff returned to work as of 31 March 2000. The Full Commission, however, remanded the case for a hearing before a Deputy Commissioner on the issues of "plaintiff's average weekly wage at the time of plaintiff's compensable injury by accident and plaintiff's resultant weekly compensation rate."

Defendants now appeal to this Court arguing (1) that the Commission erred in determining that plaintiff was temporarily totally disabled from 21 February 1996 through 31 March 2000; (2) that the Commission applied an incorrect standard for determining plaintiff's period of disability; (3) that the Commission failed to make material findings of fact; and (4) the Commission's findings of fact

and conclusions of law are insufficient for this Court to determine the rights of the parties to this controversy. However, for the following reasons, we dismiss this appeal as interlocutory.

An appeal from an opinion and award of the Industrial Commission is subject to the "same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." G.S. § 97-86 (2001). Parties have a right to appeal any final judgment of a superior court. G.S. § 7A-27 (2001). Therefore, an appeal as of right can arise only from a final order of the Industrial Commission. *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002).

"A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court." *Id.* We have said that "[a]n opinion and award of the Industrial Commission is interlocutory if it determines one but not all of the issues in a workers' compensation case." *Id*; *see also Fisher v. E.I. DuPont De Nemours*, 54 N.C. App. 176, 177-78, 282 S.E.2d 543, 544 (1981) (holding that an order is not final where the amount of compensation is not determined). Moreover, while we recognize that a workers' compensation claim may continue under an open award for many weeks or even years, an opinion and award that on its face contemplates further proceedings or which does not fully dispose of the pending stage of the litigation is interlocutory. *See Riggins v. Elkay Southern Corp.*, 132 N.C. App. 232, 233, 510 S.E.2d 674 (1999) ("An opinion and award that settles preliminary questions of compensability but leaves unresolved the amount of compensation to which the plaintiff is entitled and expressly reserves final disposition of the matter pending receipt of further evidence is interlocutory").

Here, the Commission's opinion and award specifically reserved the issue of the amount of plaintiff's compensation award pending a hearing to determine plaintiff's average weekly wage at the time of his compensable injury. Although the opinion determined that plaintiff suffered a compensable injury by accident, the total amount of compensation has yet to be determined, and the average weekly wage is in dispute. There being nothing in the record to indicate that the parties have resolved this issue independently after the Commission entered its opinion, this appeal is clearly interlocutory.

We note that Rule of Appellate Procedure 28(b)(4) requires the appellant to include in its brief to this Court a "statement of grounds for appellate review. . . . When an appeal is interlocutory, the state-

ment must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." Further, it is well established that the appellant bears the burden of making such a showing to the court, and that it is not up to the court to construct the grounds for the parties. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). The appellant's brief here contains no statement of the grounds for appellate review, and no discussion of any basis for review of this interlocutory order.

Appeal dismissed.

Judges TIMMONS-GOODSON and STEELMAN concur.

IN THE MATTER OF: THE ESTATE OF ROBERT L. MOORE, JR., INCOMPETENT

No. COA02-1248

(Filed 19 August 2003)

Guardian and Ward— commissions—proceeds actually applied in payment of debts or legacies

The trial court erred in a case concerning an award of commissions to decedent's guardian and the case is remanded for computation of the guardian's commissions consistent with this opinion because the clerk awarded the guardian a commission of five percent of the full amount of the proceeds received from the sales of three tracts of land, and the commission should have been limited to the amount used to pay administrative costs and decedent's debts as provided under N.C.G.S. § 28A-23-3(B).

Appeal by Executor of the Estate of Robert L. Moore, Jr. from judgment entered 7 June 2002 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 4 June 2003.

Law Office of Michael W. Patrick, by Michael W. Patrick, for executor-appellant.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Jennifer D. Maldonado, for respondent-appellee.

HUDSON, Judge.

Benjamin S. Moore ("executor"), executor of the estate of Robert L. Moore, Jr., deceased ("decedent"), appeals an award of commissions to Decedent's guardian. Executor argues (1) that the order violates the statute governing commissions for guardians; and (2) even if the order did not violate the governing statutes, the court should not have allowed the entire commission in the year of sale. We agree that the order is contrary to the statute and reverse.

BACKGROUND

Mr. Robert L. Moore, Jr. accumulated substantial real estate holdings during his lifetime. In his later years, he suffered from Alzheimer's disease and required extensive, long-term medical care. During Decedent's illness, his wife sold or otherwise transferred all of his real estate holdings, by power of attorney, for her own benefit or for the benefit of Decedent's oldest son, Robert L. Moore III. Mrs. Moore died in 1996, having appointed her son as executor of her estate.

In early 1997, Decedent's daughter asked the clerk of superior court to appoint an interim guardian for Decedent. Robert Monroe ("guardian") was appointed interim, and then permanent, guardian of Decedent's estate. Soon after his appointment, the guardian filed a lawsuit against Mrs. Moore's estate and against Decedent's son. Under the terms of the settlement of the lawsuit, Mrs. Moore's estate and trust transferred several parcels of real estate back to Decedent. Also as part of the settlement, the guardian received a fund of $272,000 to be used only to pay for Decedent's medical care and that was projected to cover the cost of the care for two years. In addition, the guardian received an unrestricted fund containing another $262,800 that could be used for any purpose, including the payment of attorney's fees.

On 17 August 1998, the guardian petitioned the clerk of superior court to sell three tracts of real estate to pay the legal fees associated with the litigation and to cover the increasing costs of Decedent's care. The clerk approved the petitions on the grounds that they were "necessary to create assets to pay the costs of administration and debts necessarily incurred in maintaining the said ward." The guardian sold the real estate, thereby garnering more than three million dollars for Decedent's estate.

After the real estate sales, the clerk approved commissions of five percent of the full amount of the proceeds received by the sales. Specifically, "[t]he commissions were not limited to the amount of the proceeds used to pay debts of the ward or the costs of administration of the Estate."

Mr. Moore died on 1 October 2000. The following month, Benjamin S. Moore was appointed to be Decedent's executor and personal representative. Executor filed a Motion to Vacate Orders Fixing Commissions & To Set a Reasonable Commission and a Motion to Reopen the Guardianship for the purpose of determining whether the approved commissions were valid as a matter of law. The clerk denied both motions, and Executor appealed to the superior court. The superior court entered a judgment affirming the clerk's order, and Executor appeals.

ANALYSIS

"The Clerk of Superior Court has original jurisdiction over matters involving the management by a guardian of her ward's estate." *Caddell v. Johnson*, 140 N.C. App. 767, 769, 538 S.E.2d 626, 627-28 (2000). An appeal to the superior court from an order of the clerk " 'present[s] for review only errors of law committed by the clerk.' " *In re Flowers*, 140 N.C. App. 225, 227, 536 S.E.2d 324, 325 (2000) (quoting *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966)). The reviewing judge conducts a hearing "on the record rather than *de novo*," with the objective of correcting any error of law. *Id.* In guardianship matters, this Court's standard of review is the same as the superior court's. *Caddell*, 140 N.C. App. at 769, 538 S.E.2d at 628.

Executor contends that the clerk erred by awarding the guardian a commission of five percent of the full amount of the proceeds received from the sales of the three tracts of land. Executor argues that the commission should have been limited to the amount used to pay administrative costs and Decedent's debts. We agree and conclude that the clerk and the court erred as a matter of law.

We find no common law in our jurisdiction that directly addresses this issue. However, we conclude that the statute governing the payment of commissions to guardians does. G.S. § 35A-1269 provides that "[t]he clerk shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to

executors, administrators and collectors under the provisions of G.S. 28A-23-3 and G.S. 28A-23-4." Section 28A-23-3, in turn, governs commissions allowed to personal representatives and provides that "[w]here real property is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually applied in the payment of debts or legacies." N.C. Gen. Stat. § 28A-23-3(b) (emphasis added).

Here, the guardian's petitions to sell Decedent's real estate were premised on the guardian's need to pay the debts and administrative costs of Decedent's estate. Similarly, the clerk's orders that allowed the sale of the real estate were granted for the purpose of paying the debts and administrative costs of the estate. Because the real estate was sold to pay the debts of Decedent, we conclude that the statutory limitation of § 28A-23-3(b) applied. Therefore, the clerk erred by computing the guardian's commission on the full proceeds of the real estate sale rather than limiting his computation to those proceeds actually applied to Decedent's debts.

Respondent Robert E. Monroe argues that, as a policy matter, the commissions allowed to guardians should be treated differently than those allowed to other personal representatives such as executors. If a statute is clear and unambiguous, and no constitutional challenge is made, we are bound to apply the plain language of the statute. *Orange County ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 822, 501 S.E.2d 109, 112 (1998). We find no ambiguity in the statutes governing commissions for guardians and personal representatives and thus apply the statute as written. Respondent's policy argument is more appropriately addressed to the General Assembly.

CONCLUSION

For the reasons discussed above, we reverse the superior court and remand for computation of the guardian's commissions consistent with this opinion.

Reversed and Remanded.

Judges TIMMONS-GOODSON and STEELMAN concur.

ROBERT ANTHONY DAVID, PLAINTIFF v. SHARON ALICIA FERGUSON, DEFENDANT

No. COA02-84-2

(Filed 19 August 2003)

Child Support, Custody, and Visitation— custody—illegitimate child—best interest standard

On remand from the Supreme Court, the Court of Appeals reconsidered *David v. Ferguson*, 153 N.C. App. 482, and held that the trial court had correctly applied the best interest of the child standard rather than the common law presumption in favor of the mother in awarding joint custody of the parties' illegitimate children.

On remand by order of the Supreme Court in *David v. Ferguson*, 357 N.C. 452, —— S.E.2d ——, remanding the unanimous decision of the Court of Appeals in *David v. Ferguson*, 153 N.C. App. 482, 571 S.E.2d 230 (2002) for reconsideration in light of the Supreme Court's opinion in *Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003). Case originally appealed by defendant from order entered 21 June 2001 by Judge Christopher W. Bragg in Richmond County District Court.

Deane, Williams & Deane, by Jason T. Deane, for plaintiff-appellee.

Henry T. Drake for defendant-appellant.

BRYANT, Judge.

This case comes before us on remand from the North Carolina Supreme Court for reconsideration of our decision in light of its holding in *Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003) that the common law presumption in favor of awarding custody to the mother of an illegitimate child has been abrogated by statutory and case law. *Id.* at 199, 581 S.E.2d at 45; *see* N.C.G.S. § 50-13.2(a) (2001).

In the case *sub judice*, defendant-mother contended the trial court had erred by applying the best interest of the child standard in awarding joint custody of the parties' illegitimate children instead of using the common law presumption. This Court agreed with defendant and reversed and remanded the case based on what was then binding precedent established by the Court of Appeals in *Rosero*, which recognized the existence of the presumption in favor of the

mother. *David v. Ferguson*, 153 N.C. App. 482, 571 S.E.2d 230 (2002); *Rosero v. Blake*, 150 N.C. App. 250, 563 S.E.2d 248 (2002). The Supreme Court's recent decision in *Rosero*, however, reversed the Court of Appeals decision and held that:

> the father's right to custody of his illegitimate child is legally equal to that of the child's mother, and, as dictated by section 50-13.2, if the best interest of the child is served by placing the child in the father's custody, he is to be awarded custody of that child.

Rosero, 357 N.C. at 208, 581 S.E.2d at 50.

Having reconsidered *David v. Ferguson* in light of the above holding, we now conclude that the trial court applied the correct standard as between the parents of an illegitimate child. Accordingly, we reverse our initial holding and affirm the trial court's custody order.

Affirmed.

Judges McCULLOUGH and TYSON concur.

KINDRED OF NORTH CAROLINA, INC., AND VICKIE L. KINDRED, PLAINTIFFS v. PAULINE S. BOND AND BOND CARPET & FLOOR COVERING, INC., DEFENDANTS

No. COA02-898

(Filed 2 September 2003)

1. Fraud; Unfair Trade Practices—negligent misrepresentation—sale of business

The trial court did not err in a fraud, unfair and deceptive trade practices, and negligent misrepresentation case arising out of the sale of a carpet business by entering judgment upon the jury's verdict even though defendants contend it was inconsistent on its face based on the fact that the jury had answered the question of whether defendant had made any misrepresentations in the negative when it was contained in the unfair and deceptive trade practices questions and in the affirmative in the negligent misrepresentation questions, because: (1) the trial court properly instructed the jury before their deliberations began, and the jury followed those along with the later

instructions; and (2) there was no abuse of discretion in the manner the trial court handled the situation, especially in light of the acquiescence of defense counsel.

2. Fraud—negligent misrepresentation—motion for directed verdict

The trial court did not err by denying defendants' motion for directed verdict on plaintiffs' claims for negligent misrepresentation during the sale of a carpet business arising from the failure of defendant business owner's profit and loss statements to properly account for an employee's salary, because: (1) plaintiff purchaser did not fail to undertake an effort to investigate the financial statements so as to destroy her reasonable reliance; (2) there was enough evidence for the jury to believe that plaintiff was justified in relying on the financial statement as she was not at arm's length with the information, but had to rely on what was provided her; and (3) defendant owed a duty to provide accurate financial information to plaintiff when they were involved in a business transaction in which defendant was the only party who had or controlled the information at issue, and defendant had a pecuniary interest in inducing plaintiff to purchase the business.

3. Costs—attorney fees—default on promissory note

The trial court erred in an action arising out of a default on a promissory note by denying defendants' motion for attorney fees, because: (1) N.C.G.S. § 6-21.2 allows for an award of attorney fees in actions to enforce obligations owed under an evidence of indebtedness that itself provides for the payment of attorney fees; and (2) the parties' promissory note stated that defendants were entitled to attorney fees equal to fifteen percent of the outstanding balance owed on the note.

4. Negotiable Instruments—security agreement—possession of collateral—money owed on promissory note

The trial court did not err by entering judgment both for possession of property and for money owed on a promissory note in an action arising out of the sale of a carpet business, because: (1) although plaintiffs contend defendants failed to prove any right to possession of the collateral under the security agreement, the issues of perfection and priority are irrelevant in disputes between the debtor and the secured party; (2) a valid security interest was created and had attached to the collateral when

evidence showed that the security agreement was signed and proper, value was given through the transaction, and the debtor took possession of the collateral; (3) the fact that the trial court gave plaintiffs forty-five days to satisfy the money judgment without having to give up collateral seemingly gave plaintiffs a redemption period; and (4) fears of double recovery are unfounded when defendants are only entitled to the amount of the judgment.

Appeals by plaintiffs and defendants from judgment entered 24 September 2001 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 April 2003.

John E. Hodge, Jr., for plaintiff appellants/appellees.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant appellees/appellants.

McCULLOUGH, Judge.

Defendant Pauline Bond started defendant Bond Carpet & Floor Covering, Inc., in 1994. She used her own money to start the business. She was the president, treasurer, sole shareholder and director. Her duties were mostly bookkeeping and administrative. In 1998, she employed her sons, Rick and Tommy, and one other employee full-time. Her grandson, Ricky, worked part-time. Rick was the general manager and principal employee, as he had been in the carpet business for over 20 years.

In 1998, Ms. Bond decided to sell the business. She hired Clontz Commercial Investments, Inc., as her sales agent to assist in the selling process.

Plaintiff Vickie Kindred was the operations manager of Cowper Construction Company in 1998. She wanted to own her own business again. In early 1999, she saw an advertisement for defendant's business. She contacted Clontz and signed a Disclosure to Buyer from Seller's Agent form. On 21 January 1999, Ms. Kindred met with Clontz and received a packet which included information on Bond Carpet, sale terms, an executive summary, and unaudited financial statements for 1995-97. Ms. Kindred was not interested at first. Clontz arranged a meeting between all parties.

On 27 January 1999, Ms. Kindred, Clontz, Ms. Bond and Rick Bond met at Bond Carpet. Ms. Kindred asked for current financial

information from Ms. Bond. Ms. Bond printed a profit and loss statement off Quick Books, the software that she used to keep the business's books. Ms. Bond had been trained on Quick Books, but also stated that she was not the best bookkeeper. The profit and loss statement showed payroll expenses of $56,747.48 and a net income of $23,760.74. Rick's salary was discussed, where it was revealed that he was paid $605.00 per week, or approximately $31,000.00 per year.

On 1 February 1999, Ms. Kindred took the financial information on Bond Carpet to her accountant. Her accountant urged her to get the 1998 tax returns. Ms. Kindred told him that she had asked for them, however, Ms. Bond informed her that she had not given her accountant the information yet. Thus the tax returns were not completed. In fact, Ms. Bond had indeed sent this information to her accountant the day before the parties met on 26 January 1999. With her accountant, Ms. Kindred formulated an offer after developing a comprehensive business plan. Notably, this business plan did not envision the business retaining its retail business, or most of the current employees. After requesting and receiving additional information from Clontz, Ms. Kindred had Clontz explain to her the method that was used in arriving at the asking price of $190,000.00. It was similar to the method used by her accountant to develop the offer price.

On 15 February 1999, Ms. Kindred made an offer of $150,000.00. This was declined. Clontz suggested something with a non-compete clause for Ms. Bond, Rick and "Lonnie." Ms. Kindred, not hearing of Lonnie before, became concerned. She was concerned about how he was paid. Ms. Bond explained that Lonnie was called Tommy, and he was paid through the payroll system. Rick, on the other hand, was paid as subcontract labor. Rick was also the company's highest paid employee.

Finally, an agreement for $165,000.00 was reached. An Asset Sale and Purchase Agreement was signed by all parties by 6 March 1999. On 25 March 1999, Kindred of North Carolina was incorporated. The parties closed on 30 March 1999. Ms. Kindred paid Ms. Bond $55,000.00 in cash, while Ms. Bond financed the remaining $110,000.00 by a promissory note. Ms. Bond was granted a security interest in various business property conveyed.

According to plaintiff, problems surfaced immediately. Rick did not show up for work, while Ms. Bond had gone through and removed

numerous files dealing with the customers, vendors and ongoing projects. She claimed they belonged to her. She also changed the password on the Quick Books software so that Ms. Kindred could not access them. She refused to divulge the password. In April 1999, Ms. Kindred had an accountant come in and update the Quick Books. This required backing up the old program, and Ms. Bond relinquished the password for this purpose.

Once this information was obtained, Ms. Kindred investigated Rick Bond's salary. There was no entry under subcontract labor or payroll indicating how Rick's salary was handled.

Rick was eventually terminated on 26 May 1999. On this day, Ms. Kindred, Ms. Bond and Rick met, at which time Ms. Bond admitted that Rick was paid as a draw. Ms. Bond said that she would have to get her accountant to explain. The next day, however, Ms. Bond came in and again changed the passwords.

Ms. Kindred then investigated her backup copy on 8 June 1999. She printed out statements and took them to her accountant. As of 23 June 1999, Ms. Bond still would not return phone calls or grant requests to see the now completed 1998 tax return.

On 2 July 1999, the parties met as it was time for the first installment on the promissory note. Ms. Kindred tried again to go over the salary information she and her accountant had prepared. Ms. Bond exclaimed that, "You're just upset because you didn't get what you thought you were getting." Plaintiff agreed, while also tendering the installment check. She filed suit on 27 August 1999, before the second installment was due.

Only after Ms. Bond's deposition did Ms. Kindred first learn that the financial statements she had received from defendants did not include Rick's salary at all. Eventually it was determined, with the help of defendants' accountant, that defendants had characterized the salary of Rick as a distribution of equity to the owner. This is what Ms. Bond had referred to as a draw. She would pay herself, and then pay Rick, tax free.

According to Ms. Bond's accountant, these "draws" showed up in the expense column of the profit and loss statement for 1998 that he was given on 26 January 1999. These draws added up to $33,295.24, and were taken out in checks equal to Rick's salary. The accountant believed that Ms. Bonds was distributing earnings to herself. If it were a salary, it should have been in payroll. The payroll total was

$56,747.48, and was the largest expense on the statement. According to the accountant, the company had a loss of $9,534.50.

Ms. Kindred alleged that Ms. Bond had falsified the books. The profit and loss statement that she received on 27 January 1999 showed that the company was turning a $23,760.74 profit. However, the profit and loss statement the Bond's accountant had, printed out 26 January 1999, showed a $9,534.50 loss. The difference reflected the salary to Rick, totaling $33,295.24 [$23,760.74 (profit) + $9,534.50 (loss) = $33,295.24]. Had the $33,295.24 been reported as a salary with withholdings and social security paid, according to one expert, the company would have shown a loss of $18,916.00.

Ms. Kindred's amended complaint of 30 March 2000 alleged causes of action for fraud, unfair and deceptive acts or practices in commerce, and negligent misrepresentation based upon material misrepresentations and non-disclosures in connection with the sale of the business. Defendants counterclaimed on the promissory note, guaranty (Ms. Kindred had assigned the note to her business and assumed the role of its guaranty), conversion, unfair and deceptive trade practices, possession of property, and breach of contract. The case was tried during the 25 June 2001 Civil Session of Mecklenburg County Superior Court. The jury found that plaintiffs were damaged in the amount of $60,000.00 by the negligent misrepresentations of defendants. Both sides moved for costs, and defendants moved for judgment notwithstanding the verdict. Parties were heard on their respective motions on 31 August 2001. On 24 September 2001, judgment was entered. The trial court granted *nunc pro tunc* defendants' motion for directed verdict on its counterclaims on the note and guaranty in the amount of $45,000.00 (Balance of note [$105,000.00] minus damages [$60,000.00]) against plaintiffs. Both motions for costs were denied, as well as defendants' motion for JNOV. Defendants requested judgment on its possession claim, and the trial court denied the request as long as plaintiffs satisfied the money judgment within 45 days of entry of judgment. Defendants appealed on 24 October 2001, then plaintiffs cross-appealed on 5 November 2001.

Defendants make several assignments of error and present the following questions on appeal: (I) Was it prejudicial error for the trial court to enter judgment based on a jury verdict, as it was inconsistent? (II) Should the trial court have granted its motion for directed verdict on plaintiffs' claims for intentional and negligent misrepresentation? (III) Did the trial court commit prejudicial error by denying defendants' motion for directed verdict on plaintiffs' claim of

unfair and deceptive trade practices? (IV) Did the trial court commit error by denying defendants' motion for attorneys' fees based on the promissory note?

Plaintiffs make several assignments of error and present the following questions on appeal: (V) Did the trial court commit error in entering judgment both for possession of property and for money owed on the promissory note? (VI) Did the trial court commit error in excluding plaintiffs' exhibits 24 and 25?

I.

[1] Defendants first contend that the trial court erred by entering judgment upon the verdict of the jury as it was inconsistent on its face.

Once the trial had concluded, the trial court submitted several issues to the jury. These included fraud, unfair and deceptive trade practices, negligent misrepresentation, and punitive damages. The verdict form given to the jury reflected these claims: Questions 1-3 asked if plaintiffs had been damaged by any fraud by defendants and to what extent; Questions 4-7 were special interrogatories to the jury on the unfair and deceptive trade practices claim; and Questions 8 and 9 asked if plaintiffs had been damaged by any negligent misrepresentation by defendants and to what extent.

The jury answered the fraud questions in the negative. It also answered all the interrogatories pertaining to unfair and deceptive trade practices in the negative, including those which asked if defendants had misrepresented or failed to disclose certain information to plaintiffs. However, the jury responded in the affirmative to the question of plaintiffs being financially damaged by a negligent misrepresentation of defendants in the amount of $60,000.00.

Defendants argue that the jury's verdict was inconsistent and/or irregular as the jury answered the question of whether defendants had made any misrepresentations in the negative when it was contained in the unfair and deceptive trade practices questions and in the affirmative in the negligent misrepresentation questions. According to defendants, the trial court was required by N.C. Gen. Stat. § 1A-1, Rule 49(d) (2001) to enter judgment on the special findings in the questions pertaining to unfair and deceptive trade practices, or in the alternative, had a duty not to enter a judgment on the jury's verdict finding defendants liable for negligent misrepresentation. *See Edwards v. Motor Co.*, 235 N.C. 269, 69 S.E.2d 550 (1952).

However, the context from the transcript tends to put the jury's answers into perspective. After deliberating for a period of time, the jury asked the trial court a question: "Which questions refer to fraud and unfair and deceptive trade practices and which questions refer only to negligent misrepresentation[?]" The trial court brought the jury into the courtroom and told them which questions pertained to which cause of action: "questions 1, 2 and 3 refer to fraud; 4, 5, 6 and 7 refer to unfair and deceptive trade practices; 8, 9, 10 and 11 refer to negligent misrepresentation." Each party agreed that this was proper. Later, the jury asked the trial court another question, and the following took place:

> THE COURT: We have another question. *Can we answer no to all of the questions 4, 5, 6, and 7 and still find the Defendant liable on question 8 for amount of damages*?
>
> Why don't we just let the bailiff tell them yes, or do you want to bring them out.
>
> [PLAINTIFF'S ATTORNEY]: Telling them the answer is okay with me.
>
> [DEFENDANT'S ATTORNEY]: Yes, sir.
>
> THE COURT: Just tell them yes. All right.

It appears that the jury knew exactly what it was doing, and was not confused in the least. The trial court properly instructed the jury before their deliberations began, and the jury followed those along with the later instructions. There does not appear to be an abuse of discretion here in the manner that the trial court handled this situation, especially in light of the acquiescence of defendants' trial counsel.

This assignment of error is overruled.

II.

[2] Defendants next contend that the trial court erred by denying their motion for directed verdict on plaintiffs' claims for negligent misrepresentation.

"Upon motion for directed verdict made by defendants, the question before the Court is whether the evidence offered by plaintiff, when considered in the light most favorable to plaintiff and allowed the benefit of every reasonable inference which may be drawn there-

from, is insufficient as a matter of law for submission to the jury." *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 697, 303 S.E.2d 565, 567-68, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983); *see* N.C. Gen. Stat. § 1A-1, Rule 50(a) (2001).

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988).

According to defendants, plaintiffs' evidence failed to establish that they justifiably relied upon any false statement made by defendants. Plaintiffs' claim arises from the failure of Bond's profit and loss statements to properly account for Rick Bond's salary. However, defendants point out that Ms. Kindred found out that those statements were incorrect during the Tommy/Lonnie confusion. In spite of this, Ms. Kindred made no further investigation into the books. All Ms. Kindred had to do in this respect was request a copy of Bond's Quick Books disk, which would have revealed all checks and deposits for the years involved. Alternatively, she could have sent the disk to her own accountant, as Ms. Kindred does generally the same thing with her Quicken software.

Defendants cite *Libby Hill* as an analogous case. *Libby Hill*, 62 N.C. App. 695, 303 S.E.2d 565. In *Libby Hill*, the plaintiff was suing the seller of realty for misrepresentation. *Id.* at 697, 303 S.E.2d at 567. The agent of the seller made a comment about the integrity of the land, as it was formerly a landfill. *Id.* at 699, 303 S.E.2d at 568. The comment was that the landfill ended "approximately" 20 feet inside the rear property line. *Id.* This turned out to be untrue, and the plaintiff built a restaurant over land that was formerly landfill, and it crumbled. *Id.* at 696, 303 S.E.2d at 567. This Court found that the plaintiff could not justifiably rely on the vague statement by the agent knowing that the agent got his information from an independent report of which plaintiff could have availed himself. The agent was not a professional in these matters, and plaintiff was on equal footing to have hired its own expert to test the ground before investing large sums of money. *Id.* at 699-700, 303 S.E.2d at 568-69. This Court explained: " 'The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encour-

age negligence and inattention to one's own interest.' " *Libby Hill*, 62 N.C. App. at 700, 303 S.E.2d at 569 (quoting *Calloway v. Wyatt*, 246 N.C. 129, 134-35, 97 S.E.2d 881, 886 (1957)).

In the present case, when Ms. Kindred raised her concern about Tommy/Lonnie, the situation was explained to her by the only ones that could have known. Bond Carpet was a small business that was closely held and operated by the Bond family. Ms. Kindred was arguably put on notice that the bookkeeping was suspect by Ms. Bond's own admission, and the fact that defendants had difficulty explaining the salary situation prior to sale. Yet these were the only people who knew. Further investigation was something that Ms. Kindred had been doing all during the negotiation process. The response from defendants was that they did not have the information, such as the case of the tax return. In fact, it was because of Ms. Bond's delay that the return was not available. Certainly, Ms. Kindred could not go to Ms. Bond's accountant and request such information, as he testified that he would not have provided it. The claim by defendants in their brief that all Ms. Kindred had to do was ask for more information is, to some extent, disingenuous. This is especially so considering their actions after the purchase. Thus, Ms. Kindred did not fail to undertake an effort to investigate the financial statements so as to "destroy" her reasonable reliance.

Further on the issue of reliance, defendants point out that Ms. Kindred had a business plan for her purchase. In this plan, Ms. Kindred planned on discontinuing the retail operation of the business and no longer employ Rick and Tommy. Thus, their salaries were not relevant to the business plan. This, supposedly, explains why she did not discuss the missing salaries because she did not care. However, salaries affect the profit loss margin. They are certainly material to the bottom line, regardless of any business plan.

The evidence, taken in the light most favorable to plaintiffs, shows that Ms. Kindred based her offer on the information she had, with a focus on the 1998 financial statement. Before the offer was written and given to Ms. Bond, Ms. Kindred found out that Tommy was an employee. She was concerned about where Tommy's compensation was accounted for and what affect it had on the statement. She was told that Tommy was paid through payroll expenses and that Rick was paid as subcontract labor. It was explained that subcontract labor was "above the line" and that it did not affect the bottom line of the financial statement given to Ms. Kindred. This was a bad accounting practice but was consistent with Ms. Bond's confession that her

bookkeeping was bad and the accountant changed categories. In fact, this would have tended to increase the profit margin.

Given the factual nature of this determination and the standard of viewing the evidence in the light most favorable to plaintiff, the trial court was correct in denying defendants' motion for directed verdict as there was enough evidence for the jury to believe that Ms. Kindred was justified in relying on the financial statement.

Defendants also claim that they are entitled to a directed verdict on plaintiffs' negligent misrepresentation claim because they owed no duty of care to plaintiff Kindred. Defendants argue that this was a commercial transaction between parties of equal footing. They again cite *Libby Hill* for the proposition that the seller of a business does not owe a duty to provide information to the purchaser in a commercial transaction. We fail to find this statement of law in the *Libby Hill* opinion.

The question remains whether or not Ms. Bond owed a duty to Ms. Kindred to produce accurate financial information during the course of their negotiations of the sale of Bond Carpet.

Recent cases shed light on the issue of a duty to supply accurate financial information. An approach was adopted in *Raritan River Steel Co.*, 322 N.C. at 209, 367 S.E.2d at 612 (discussing the liability of accountants when providing negligent information). This approach was recently applied in a potentially instructive case, *Jordan v. Earthgrains Baking Cos.*, 155 N.C. App. 763, 576 S.E.2d 336, 340 (2003). Breach of duty owed in negligent misrepresentation cases has been defined as:

> ". . . One who, in the course of his business, profession or employment, or in any other transaction in which he *has a pecuniary interest*, supplies false information for the guidance of others in *their business transactions*, [and thus] is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Jordan, 155 N.C. App. at 767, 576 S.E.2d at 340 (quoting *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 218, 513 S.E.2d 320, 323-24 (1988)).

The facts in *Jordan* were that a CEO of a corporation visited a plant and spoke to its employees. *Id.* at 764, 576 S.E.2d at 338. The

employees alleged that the CEO told them that the plant was profitable and that their jobs were secure. *Id.* However, approximately five months later the plant was closed and essentially all the employees were laid off. *Id.* The Court in *Jordan* concentrated on several facts that the employees failed to show: "(1) [the CEO] was offering them guidance in a business transaction; (2) that the alleged information was false; (3) that [the CEO] had a pecuniary interest in inducing [employees] to continue employment; or (4) that [employees] were justified in relying on the alleged information." *Id.* at 767, 576 S.E.2d at 340. The CEO and the employees were not in a business transaction, as he was attempting to assuage the effect a recent stock announcement might have on the employees. The decision to close the plant was not made until after the visit. Neither the CEO nor the company had a pecuniary interest in the employees not leaving the company, and in fact it would have been financially better for the company had the employees left under the collective bargaining agreement at the time. Further, there was no justified reliance as the employees did nothing differently, such as decline other job offers.

Using the same factors as *Jordan*, it appears that Ms. Bond owed a duty to provide accurate financial information to Ms. Kindred. Ms. Bond and Ms. Kindred were clearly involved in a business transaction. The profit and loss statement given to Ms. Kindred by Ms. Bond for the year 1998 did not account for Rick Bond's salary. The statement to Ms. Kindred represented over $20,000.00 in profit, while in actuality the business was operating at an almost $10,000.00 loss. It is elementary that Ms. Bond had a pecuniary interest in inducing Ms. Kindred to purchase the business. Further, we have already held that Ms. Kindred was justified in relying on the alleged information as she was not at arm's length with the information, but had to rely on what was provided her.

We hold that, in the present case, Ms. Bond owed a duty to provide accurate, or at least negligence-free financial information to Ms. Kindred. *See also Libby Hill*, 62 N.C. App. at 698, 303 S.E.2d at 568 (while discussing misrepresentations regarding realty, stated that "where material facts are available to the vendor alone, he or she *must* disclose them"). Ms. Bond owed the same duty to respond truthfully to Ms. Kindred's information requests, as she was the only party who had or controlled the information at issue. Ms. Kindred had no ability to perform any independent investigation.

This assignment of error is overruled.

III.

Defendants further contend that the trial court erred by denying their respective motions for directed verdict on fraud/intentional misrepresentation and unfair and deceptive trade practices. In light of the facts that we are declining to remand this matter for a new trial and that the jury found for defendants on these issues, we decline to address these arguments.

IV.

[3] Defendants' final assignment of error contends that the trial court erred by denying their motion for attorneys' fees. The note provided:

> Upon default, the holder of this Note may employ an attorney to enforce the holder's rights and remedies, and the Maker, principal, surety, endorser, and guarantor, of this Note agree to pay to the holder reasonable attorney fees equal to fifteen percent (15%) of the outstanding balance due on the Note, plus all other reasonable expenses incurred by the holder in exercising any of the holder's rights and remedies due to the default.

Plaintiffs made the first payment due under the promissory note around the beginning of July. The next month, however, they filed the present lawsuit and never made another payment. As such, defendants declared plaintiffs to be in default after missing the 30 September 1999 payment. As allowed by the promissory note, defendants accelerated the debt upon default, and the total amount, plus interest, came to $106,812.32. Once plaintiffs filed suit against defendants for the various causes of action discussed above, defendants filed, among other things, a counterclaim to recover the balance owed under the promissory note. Defendants noted in their counterclaim, and plaintiffs admitted such in their reply, that on 11 October 1999, they sent a letter to plaintiffs notifying them that "if the amount claimed to be owed on the note was not paid within five days of the date of the letter [defendants] would seek to recover reasonable attorney's fees allowed by law in addition to seeking the payment of principal and interest under the note."

The parties agreed at the end of the trial that plaintiffs would only seek damages as its remedy, abandoning its alternative remedy of rescission. In doing this, the parties and the trial court agreed that the issue of breach of the promissory note would not be submitted to the jury, and the trial court reserved ruling on defendants' motion for

directed verdict on its counterclaim on the note until after the jury returned its verdict. The parties and the trial court further agreed that any damages awarded by the jury would then offset the amount plaintiffs owed on the note.

As mentioned before, the jury awarded plaintiffs damages in the amount of $60,000.00. In the judgment, the trial court granted defendants' counterclaims on the note, reducing the original amount by the jury award. This amount came to "$45,000.00, plus interest at the legal rate of eight percent (8%) per annum from and after September 30, 1999 until paid."

After the jury returned its verdict, but before it was reduced to judgment, the parties made their respective motions for costs. Defendants made a motion for costs on 6 August 2001 which included a request for "Attorneys' fees in the amount of $6,750.00 pursuant to the promissory note." The trial court denied defendants' motion for costs, in its entirety, in the judgment filed 24 September 2001.

Defendants argue that N.C. Gen. Stat. § 6-21.2 controls in the present case and mandates reversal of the trial court's ruling. This statute allows an award of attorneys' fees in actions to enforce obligations owed under "an evidence of indebtedness" that itself provides for the payment of attorneys' fees. *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 372, 432 S.E.2d 394, 397 (1993). It provides:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> (1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees *in some specific percentage* of the "outstanding balance" as herein defined, such provision and obligation *shall be valid and enforceable up to but not in excess of fifteen percent (15%)* of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attor-

> neys' fees by the debtor, *without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%)* of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C. Gen. Stat. § 6-21.2 (2001) (emphasis added).

The promissory note in this case stated that "[u]pon default . . . the Maker . . . agrees to pay to the holder reasonable attorney fees equal to fifteen percent (15%) of the outstanding balance due on the Note[.]" This clause "provides for attorneys' fees in some specific percentage of the 'outstanding debt,' " and thus subsection (1) applies. *Id.* Subsection (1) states that the provision in the note is "valid and enforceable up to but not in excess of fifteen percent." *Id.* Thus, it appears that defendants were entitled to 15% of the outstanding balance owing on the note by operation of the statute. We recognize that the mandatory notice requirement of N.C. Gen. Stat. § 6-21.2(5) was satisfied by the 11 October 1999 letter.

This Court is unaware of the reasoning behind the trial court denying this motion. Plaintiffs argue that the note did not reach maturity until the trial court announced the amount owed after making the adjustments in the judgment because the amount owed under the note was in dispute. *See Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 545 S.E.2d 745, *aff'd per curiam*, 354 N.C. 565, 556 S.E.2d 293 (2001). According to plaintiffs, the outstanding balance, defined as "the principal and interest owing at the time suit is instituted," was unknown until such time. In fact, plaintiffs admit in their brief that when a final determination in this matter is reached, if defendants were to send a letter to them in the nature of their 11 October 1999 letter, defendants would be entitled to the $6,750.00 amount. But because plaintiffs filed this suit disputing the amount owed and not a suit by defendants after maturity, N.C. Gen. Stat. § 6-21.2 does not yet apply.

We disagree with plaintiffs' tortured application of the law to the present facts. There was no injunction relieving plaintiffs of the duty to pay under the note, and we have found no case or law stating that the filing of a suit for fraudulent acts relieves that obligation. Regardless of the fact that the amount owed under the note was disputed or why it was, on the face of the note, the amount was clear. By plaintiffs' filing their suit to avoid that obligation, defendants employed counsel to enforce the note. Plaintiffs defaulted by missing the 30 September 1999 payment, and the note allowed for accelera-

tion. At that point, the note had indeed matured. The outstanding balance was known at the time defendants filed their counterclaim. Nowhere in subsection (3) does it allow for post-trial adjustments. Thus, the trial court erred by denying defendants' motion.

This assignment of error is overruled.

We now consider the appeal by plaintiffs in this matter.

V.

[4] In plaintiffs' first assignment of error, they contend that the trial court erred in entering judgment both for possession of property and for money owed on the promissory note.

In the judgment, the trial court noted that:

> At the hearing of this matter on August 31, 2001, defendant Bond Carpet & Floor Covering, Inc. requested judgment on its claim against plaintiff Kindred of North Carolina, Inc. for possession of the property described in the exhibit to the Security Agreement between said defendant and said plaintiff. Having heard and considered argument of counsel and the record, and having presided over the jury trial of this action, the court finds that the request should be denied *if* the judgment for money is paid within forty-five (45) days of the entry of this judgment; otherwise, defendant Bond Carpet & Floor Covering, Inc. should recover possession of property in accordance with the Security Agreement between said plaintiff and said defendant.

(Emphasis added.) In the decretal portion of the judgment, the trial court ordered that if the judgment was not satisfied in 45 days, then defendants would have judgment for possession on the property described in the security agreement, which was reproduced in the order. It concluded with "[a]ny property possession of which is obtained pursuant to this paragraph shall be sold as an execution sale in accordance with G.S. §§ 1-339.41-1-339.71."

Plaintiffs first contend that defendants failed to prove any right to possession of the collateral under the security agreement as no evidence was produced of perfection of the security interest by the filing of a financing statement or priority of competing interests, etc. However, issues of perfection and priority are irrelevant in disputes between the debtor and the secured party. *Mazda Motors v. Southwestern Motors*, 36 N.C. App. 1, 16-17, 243 S.E.2d 793, 804 (1978), *aff'd in part, rev'd in part on other grounds*, 296 N.C. 357,

250 S.E.2d 250 (1979). Evidence of perfection is simply irrelevant in the present case.

Plaintiffs continue that other than offering the security agreement into evidence, defendants did nothing else. It notes that according to Ms. Kindred's testimony, most of the property described in the security agreement had been donated to others or discarded, as the business had moved and no longer engaged in the exact same enterprise. Further, defendants did not prove that plaintiffs had any of the property in which they had a secured interest in their possession.

> If a debtor and a creditor enter into a security agreement granting to the creditor a security interest in certain collateral, and if value is given and the debtor has rights in the collateral, then the creditor becomes a secured party with a security interest which is enforceable against the debtor as to that collateral. *See* N.C. Gen. Stat. §§ 25-9-203(1)(a)-(c) (1988). Once the creditor has enforceable rights against the debtor as a secured party, it is said that the secured party's interest "attaches" to the collateral. *See* § 25-9-203(2).

Zorba's Inn, Inc. v. Nationwide Mut. Fire Ins. Co., 93 N.C. App. 332, 334, 377 S.E.2d 797, 799 (1989).

Evidence at trial showed that the security agreement was signed and proper, value was given through the transaction, and debtor took possession of the collateral. Thus, a valid security interest was created and had attached to the collateral. *See current and former* N.C. Gen. Stat. § 25-9-203(1) (2001). The property was sufficiently described, as it only needed to be reasonably identified by the agreement. *See former* N.C. Gen. Stat. § 25-9-110 (1999) *and current* § 25-9-108 (2001).

Upon default of plaintiffs, defendants had several choices of remedies. Former N.C. Gen. Stat. § 25-9-501(1) and current § 25-9-601(a)(1) & (c) provide "that when a debtor is in default 'a secured party . . . may reduce his claim to judgment, foreclose or otherwise enforce the secured interest by any available judicial procedure. . . . The rights and remedies . . . are cumulative.' " *Ken-Mar Finance v. Harvey*, 90 N.C. App. 362, 367, 368 S.E.2d 646, 650, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 545 (1988). Defendants had their choice of remedies and utilized many of those choices in their counterclaims, namely the money judgment and possession of the collateral. Instead of allowing defendants their choice of avenue of

satisfying the judgment, the trial court postponed the possession option by 45 days, and made it dependent upon full payment of the money judgment. Whether or not this was entirely proper on the part of the trial court, we fail to see how this prejudices plaintiffs. Certainly, a party with a security interest in collateral could get possession of such property if it elected to do so. The debtor in such a situation has no real choice in the matter. The trial court in the present case, by giving plaintiffs 45 days to satisfy the money judgment without having to give up collateral, has seemingly given plaintiffs a redemption period.

Further, the fears of a double recovery by awarding defendants the money judgment *and* possession are equally unfounded. Defendants are only entitled to the amount of the judgment. *See Ken-Mar*, 90 N.C. App. at 367, 368 S.E.2d at 650.

As we see no prejudice to plaintiffs, this assignment of error is overruled.

VI.

Our upholding of the trial court's ruling on directed verdict of negligent misrepresentation and the jury verdict make our discussion of plaintiffs' final assignment of error unnecessary.

Affirmed in part; reversed in part as to attorneys' fees.

Judges McGEE and LEVINSON concur.

STATE OF NORTH CAROLINA v. RONALD LEE SMITH

No. COA02-945

(Filed 2 September 2003)

1. Confessions and Incriminating Statements— Miranda warnings—motion to suppress—custodial interrogation

The trial court did not err in a first-degree kidnapping, second-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, common law robbery, felonious breaking or entering, and possession of a firearm by a con-

victed felon case by denying defendant's motion to suppress his 7 May 2001 statement to a detective, because: (1) defendant was not interrogated within the meaning of Miranda and Innis when a detective posed no questions to defendant but instead defendant questioned the detective, and defendant's statement was made after the detective responded to defendant's question; (2) the detective's factually correct answer called for no response on the part of defendant; and (3) there was no evidence that suggested either any prior knowledge on the part of the detective that defendant was unusually susceptible to any particular form of persuasion or that the detective's response was designed to elicit an incriminating response.

2. Criminal Law— admissions—instruction

The trial court did not err in a first-degree kidnapping, second-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, common law robbery, felonious breaking or entering, and possession of a firearm by a convicted felon case by charging the jury on admissions pursuant to N.C.P.I. 104.60, because even if defendant's statement to a detective had not been admitted into evidence, the evidence was sufficient to support the instruction when defendant himself testified that he went to the victims' home on 23 March 2003, attempted to sell them meat, and engaged in a fistfight with the couple when they refused to buy meat from him.

3. Appeal and Error— preservation of issues—failure to object—double jeopardy

Although defendant contends the trial court erred by entering judgment against defendant for both first-degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury based on the fact that his double jeopardy rights were allegedly violated, defendant waived appellate review of this issue because: (1) defendant did not move to dismiss the charge of first-degree kidnapping of the husband victim on double jeopardy grounds; (2) although the State indicated during the charge conference that the serious injury element would apply to both charges, defendant did not object; (3) defendant did not object to the submission of both the first-degree kidnapping and assault of the husband victim to the jury; and (4) even if this issue were properly preserved, double jeopardy does not preclude punishing a defendant for both first-degree kidnapping based on serious injury and assault with a deadly weapon with intent to kill inflict-

ing serious injury when each crime contains elements not required to be proved in the other.

4. Kidnapping— first-degree—instruction—restraint—not expression of opinion

The trial court did not express an opinion on the credibility of testimony on the restraint element of first-degree kidnapping by its instruction that "one who is physically seized and held or whose hands or feet are bound is restrained" within the meaning of the kidnapping statute when both victims had testified to being either handcuffed or tied up by defendant because: (1) the trial court specifically instructed the jurors that they were the sole judges of the credibility of the witnesses and were entitled to believe all, none, or any part of a witness's testimony; (2) as defendant conceded during the charge conference, the language relied on by the trial court in framing its definition of restraint reflected a correct statement of the law; and (3) the trial court properly brought the relation of the evidence adduced at trial into view with the particular issue involved.

5. Appeal and Error— appealability—no right of appeal from guilty plea—attempted felonious escape

The trial court did not err by entering judgment against defendant for attempted felonious escape even though defendant contends the bill of information to which he pled guilty failed to allege a felony in accordance with N.C.G.S. § 148-45, because: (1) by pleading guilty and failing to move to withdraw his plea, defendant is not entitled to an appeal of right from the trial court's ruling; (2) the issue of the sufficiency of the allegations contained in the charging instrument falls outside the scope of either N.C.G.S. § 15A-1444(a1), (a2), or N.C.G.S. § 15A-975; and (3) appeal of this issue may not be had by writ of certiorari.

6. Appeal and Error— appealability—no right of appeal from guilty plea—committing felony after attaining status of habitual felon

The trial court did not err by entering judgment against defendant under the second count of the bill of information for committing a felony after having attained the status of an habitual felon, because: (1) by pleading guilty to being an habitual felon and not having moved in the trial court to withdraw his guilty plea, defendant is not entitled to an appeal of right from the trial court's ruling; and (2) appeal of this issue may not be had by

writ of certiorari when the case does not involve an interlocutory order, the denial of a motion for appropriate relief, or a situation where the right to appeal has been lost by defendant's failure to take timely action.

7. Sentencing— habitual felon status—indictment's failure to identify predicate felonies

The indictment used to charge defendant with habitual felon status was sufficient to meet the requirements of N.C.G.S. § 14-7.3 even though defendant contends it does not identify any predicate felonies but only alleges defendant committed one or more felonious offenses while being an habitual felon, because nothing in the plain wording of the statute requires a specific reference to the predicate substantive felony in the habitual felon indictment.

Appeal by defendant from judgment entered 31 January 2002 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 10 June 2003.

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

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

EAGLES, Chief Judge.

Defendant, Ronald Lee Smith, appeals from multiple convictions arising out of a series of events which included felonious breaking and entering and the kidnapping and robbery of Frank and Teri Little. The State's evidence tended to establish the following: On 23 March 2001, Frank and Teri Little left their home located at 4502 Briargrove Court in Greensboro, North Carolina at approximately 12:00 p.m. Frank Little went to meet a client for lunch. Teri Little went for a walk in an adjacent neighborhood. At approximately 1:10 p.m., Teri returned home alone. Teri parked her car in the driveway, entering the house by walking through the garage and into the kitchen. Once inside the door, Teri immediately noticed defendant, who was standing partially inside the sliding glass door located on the opposite side of the kitchen. When Teri asked defendant what he was doing in the house, defendant, a door-to-door sales representative for Omega Meats, mumbled that he was in the "wrong place." Defendant then said he was "with" someone else and began pointing outside. When Teri looked outside to see who defendant was referring to, defendant grabbed her, "swung [her] around," and handcuffed her hands behind

her back. Defendant then demanded Teri's money and purse. After Teri told defendant that she left her purse under the seat of her car, defendant led Teri into the master bedroom where he blindfolded her with a pair of sweat pants. Defendant then led Teri back into the kitchen, pushed her to the floor and instructed her not to move. Defendant left the house and went outside to retrieve Teri's purse. Defendant returned a few moments later, led Teri back into the master bedroom and removed the blindfold. Defendant emptied the contents of Teri's purse on the bed, removed both cash and credit cards and demanded the personal identification numbers for each credit card.

Frank Little returned at approximately 1:25 p.m. As Frank pulled into the driveway, he noticed a white truck parked with its engine running, in his next-door neighbor's driveway. The truck had a meat freezer in the back and was sitting approximately five yards away from the sliding glass door that led into the Littles' kitchen. As Frank went into the house, he called for Teri, walked toward the bedroom and called for her again. This time, both defendant and Teri appeared in the hallway. Teri's hands were still bound behind her back and defendant was standing behind her. When Teri tried to warn Frank of defendant's presence in the house, defendant punched Teri in the face, causing her eye to bleed. Defendant ordered Frank to his knees and then ordered Frank into the bedroom. When Frank failed to respond, defendant "reached into his left pocket" and said, "I'll shoot you both right here right now." After this, Frank complied with defendant's instructions.

Defendant ordered both Frank and Teri to lie face down on the bedroom floor. Defendant tied Frank's hands behind his back with a piece of nylon cord, took Frank's wallet and again demanded money. After Frank explained that he and Teri did not keep a lot of cash in the house, Frank directed defendant to a jewelry box where he kept a small amount of cash. Defendant took the money from the jewelry box. Defendant then covered Frank's head with a plastic shopping bag and tied it so that Frank was unable to breathe. When Teri saw Frank struggling to breathe, she began screaming: "You're killing him. You're killing him." Defendant turned to Teri and asked: "Do you want to do something about it?" Teri replied: "Yes." Defendant ordered Teri to "[g]et up," "[p]ull [her] pants down" and "bend over." Although Teri complied, once defendant discovered that Teri was menstruating, defendant abandoned any further attempt to have sexual intercourse with her. During this time, however, Frank managed to free himself

from his restraints and tear the bag off his head. Frank also found a knife lying in the bedroom.

Frank picked up the knife, stood up and tried to assist Teri. Defendant attacked Frank and the two men began wrestling for control of the knife. The altercation spilled into the hallway where defendant broke an empty wine bottle over Frank's head. As the struggle continued, defendant hit Frank twice in the head with a brass lamp. Defendant then picked up a heavy "glass vase" and "started pounding Frank in the back of the head." Teri began kicking defendant and begging him to stop, but defendant continued hitting Frank with the vase. Ultimately, Frank instructed Teri to "run." Teri, handcuffed and naked from the waist down, ran to a neighbor's house and called police. Shortly thereafter, defendant fled in the truck that was parked outside the sliding glass door. Frank required thirty-six surgical staples to close the wounds in the back of his head. Teri received stitches over her right eye as well as treatment for a broken finger that she sustained while being handcuffed.

After Frank and Teri identified defendant from a photo array, Greensboro police began surveillance on defendant's home. At approximately 9:00 p.m., defendant drove up to a house located three doors down from defendant's house. Defendant was driving a dark colored Dodge Neon and was followed by a woman who was driving defendant's truck. After stopping in front of the house, defendant got out of the Neon, walked back to the truck and sat in the truck's passenger seat. When police converged on the two vehicles, defendant escaped by fleeing into the woods on foot. Upon searching the Dodge Neon, police discovered a 9 millimeter pistol lying in the front passenger's seat. Defendant was arrested several days later, near his mother's home in White Plains, New York.

On 7 May 2001, while defendant was being held in the Guilford County Jail, Detective Timothy Sizemore of the Greensboro Police Department served defendant with an "order to hold without bond" from the Conover Police Department. While the two men were in the holding area of the magistrates's office, defendant began "questioning" Detective Sizemore about whether defendant's mother would be arrested as an accessory after the fact. When Detective Sizemore answered affirmatively, defendant became "extremely irate" and said: "Look, man, my mom is innocent. Just because I attacked two innocent people in Greensboro doesn't mean you have to charge innocent people." Defendant had not been advised of his *Miranda* warnings prior to making this statement.

On 17 July 2001, defendant's probation, which stemmed from a 16 September 2000 conviction for possession of a firearm by a felon, was revoked. Consequently, the suspended portion of defendant's sentence was activated and defendant began serving a sentence of 16 to 20 months in the North Carolina Department of Correction. On 16 January 2002, the second day of defendant's trial, defendant attempted to escape from the Guilford County Jail.

Defendant testified in his own defense that he went to the home of Frank and Teri Little on 23 March 2001 in an attempt to sell meat. Defendant testified that he knocked on the door and spoke to Teri Little, who told defendant that her husband was not home and that she did not make decisions without her husband. Teri instructed defendant to come back in twenty to thirty minutes. Defendant left and returned as instructed. This time, defendant spoke to Frank Little. When Frank refused to buy any meat, defendant hit Frank with his fist and a physical altercation followed. Defendant admitted hitting both Frank and Teri Little before leaving their residence, but denied all other alleged misconduct.

Defendant was convicted of: (1) first-degree kidnapping of Frank Little; (2) second-degree kidnapping of Teri Little; (3) assaulting Frank Little with a deadly weapon with intent to kill inflicting serious injury; (4) common law robbery of Teri Little; (5) common law robbery of Frank Little; (6) felonious breaking or entering; and (7) possession of a firearm by a convicted felon. After the jury returned its verdict, the State presented a bill of indictment alleging one count of committing a felony after having attained habitual felon status and a bill of information alleging one count of attempted felonious escape and one count of committing a felony after having attained habitual felon status. Defendant pled guilty to all three remaining charges and now appeals.

I.

[1] Defendant first contends that the trial court erred by denying the motion to suppress his 7 May 2001 statement to Detective Sizemore. Defendant argues that because Detective Sizemore should have known that his comments concerning potential charges against defendant's mother were reasonably likely to elicit an incriminating response, defendant was "interrogated" within the meaning of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Defendant further argues that because Detective Sizemore never advised him of

his *Miranda* warnings, his statement was taken in violation of *Miranda* and inadmissible at trial. We disagree.

We first note that "[i]n superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under [G.S. § 15A-975](b) or (c)." G.S. § 15A-975(a). Here, defendant did not move to suppress his statement prior to trial; rather, defendant only objected during trial and he objected only generally to the admission of the testimony. Notwithstanding defendant's apparent failure to comply with G.S. § 15A-975, the trial court conducted an evidentiary hearing following an unrecorded bench conference. Because the record is silent as to the trial court's basis for permitting defendant to make his motion for the first time at trial, we presume the trial court acted correctly. *See State v. Fennell*, 307 N.C. 258, 262, 297 S.E.2d 393, 396 (1982).

"The standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Logner*, 148 N.C. App. 135, 137, 557 S.E.2d 191, 193 (2001) (citations omitted). However, because "[t]he determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law," this question is fully reviewable on appeal. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992). " 'The trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations omitted).

"It is well established that *Miranda* warnings are required only when a [criminal] defendant is subjected to custodial interrogation." *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253, *disc. review denied*, 354 N.C. 578, 559 S.E.2d 549 (2001). Although the issue of whether defendant was in custody has not been raised, we note that "[a]n inmate . . . is not, because of his incarceration, automatically in custody for purposes of *Miranda*[.]" *State v. Briggs*, 137 N.C. App. 125, 129, 526 S.E.2d 678, 680 (2000).

"[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980).

> Factors that are relevant to the determination of whether police "should have known" their conduct was likely to [e]licit an incriminating response include: (1) "the intent of the police"; (2) whether the "practice is designed to elicit an incriminating response from the accused"; and (3) "any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . ."

State v. Fisher, 158 N.C. App. 133, 142-43, 580 S.E.2d 405, 413 (2003) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 302, 64 L. Ed. 2d 297, 308 (1980) (fn. 7, 8)). Our Supreme Court has consistently held that "law enforcement officers can respond to questions posed by a defendant without violating *Innis* . . . ." *State v. Golphin*, 352 N.C. 364, 407, 533 S.E.2d 168, 200 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). *See also, State v. McQueen*, 324 N.C. 118, 132, 377 S.E.2d 38, 46 (1989) (holding that neither an officer's "willingness to respond to defendant's questions," nor the "actual answers" to those questions could be equated with " 'words or actions . . . that [the officer] *should have known* were reasonably likely to elicit an incriminating response' ").

In *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986), a Guilford County Sheriff's detective served a non-testimonial identification order on defendant following defendant's arrest on charges of kidnapping and rape. The following colloquy took place when Detective Odum served the order on the defendant:

Defendant:	What's this about?
Detective Od[u]m:	This is to help you or to help us . . . .
Defendant:	Why did you . . . believe her story instead of [mine]?
Detective Od[u]m:	I believed her because of the evidence and because you lied to me about where you were that night.
Defendant:	I lied because I knew you wouldn't believe the truth about me falling asleep in the car while she met another man in a car.

Id. at 406, 346 S.E.2d at 632. Detective Odum then told defendant that if defendant "wanted to tell the truth, [Detective Odum] would be

willing to listen." *Id.* at 405, 346 S.E.2d at 632. Defendant responded by saying: "I fell asleep in the car. She met another man in a car." *Id.* at 406, 346 S.E.2d at 632.

Defendant argued his statement was the product of custodial interrogation and should have been suppressed because Detective Odum never advised him of his *Miranda* warnings. Our Supreme Court disagreed, concluding that defendant was not "interrogated" according to *Innis*. The Court said:

> An examination of the conversation clearly shows that the statement was not elicited from the defendant as the result of questioning by Detective Odum. Detective Odum posed no questions to the defendant. Moreover, we do not feel that the defendant was subjected to the 'functional equivalent of questioning.' The defendant's statement—'I lied because I knew you wouldn't believe the truth about me falling asleep in the car while she met another man in a car'—was made in response to Detective Odum's comment that he believed Ms. Jenkins because of the evidence and the fact that the defendant had lied to him about his whereabouts on the night in question. Odum's comment did not require or call for a response on the part of the defendant. It simply cannot be said that Detective Odum should have known that this statement was reasonably likely to elicit an incriminating response from the defendant.

Id. at 408, 346 S.E.2d at 633.

Here, the only evidence presented on *voir dire* was Detective Sizemore's testimony that "[t]here had been some mention to [defendant] about his mother being arrested . . . [as an] accessory after the fact." Detective Sizemore further testified that he did not question defendant; rather, once the two were inside the magistrate's office, it was defendant who "began questioning" Detective Sizemore about whether his mother was likely to be charged. When Detective Sizemore answered defendant's question, defendant became "extremely irate" and stated: "Look, man, my mom is innocent. Just because I attacked two innocent people in Greensboro doesn't mean you have to charge innocent people." Following *voir dire*, the trial court entered findings of fact consistent with Detective Sizemore's uncontroverted testimony, concluded that defendant's statement was not obtained in violation of either the North Carolina or United States Constitutions and denied defendant's motion to suppress.

Applying *Young*, we conclude that defendant here was not interrogated within the meaning of *Miranda* and *Innis*. First, Detective Sizemore posed no questions to defendant; instead, it was defendant who questioned Detective Sizemore. Moreover, defendant's statement was made after Detective Sizemore responded to defendant's question. Detective Sizemore's terse, factually correct answer called for no response on the part of defendant. Finally, we cannot say that Detective Sizemore should have known that his answer was likely to elicit an incriminating response from defendant. There is no evidence in the record that suggests either any prior knowledge on the part of Detective Sizemore that defendant was unusually susceptible to any particular form of persuasion or that Detective Sizemore's response was designed to elicit an incriminating response. Because defendant was not subjected to custodial interrogation, we hold the trial court properly denied defendant's motion to suppress. Accordingly, this assignment of error is rejected.

II.

[2] Defendant next contends that the trial court erred in charging the jury on admissions pursuant to N.C.P.I. 104.60.

During the charge conference, the State requested that the trial court instruct the jury "that the defendant admitted a fact charged in th[e] case." Defendant objected to the instruction. The trial court overruled defendant's objection and instructed the jury in pertinent part:

> Ladies and gentlemen, during the course of the trial which has been conducted, evidence has been received which tends to show that the defendant has admitted one or more facts relating to the crimes charged in this case. If you find that the defendant did make such an admission, then you should consider all of the circumstances under which that admission was made in determining whether it was a truthful admission and the weight that you will give to it.

Defendant argues that because the evidence concerning his 7 May 2001 statement to Detective Sizemore was improperly admitted, it was error to instruct the jury on admissions. We disagree.

The trial judge is required to " 'fully instruct the jury as to the law based on the evidence in the case.' " *State v. Moore*, 26 N.C. App. 193, 194, 215 S.E.2d 171, 172 (citation omitted), *cert. denied*, 288 N.C. 249, 217 S.E.2d 673 (1975).

Here, we have already concluded that defendant's statement to Detective Sizemore was properly admitted into evidence. However, even if defendant's statement to Detective Sizemore had not been admitted into evidence, an instruction on admissions was still proper. Defendant himself testified that he went to the Little's home on 23 March 2003, attempted to sell both Teri and Frank Little meat and engaged in a fistfight with the couple when they refused to buy meat from him. Since this evidence was in and of itself sufficient to support the instruction, this assignment of error fails.

III.

[3] Defendant next contends that the trial court erred by entering judgment against him for both first-degree kidnapping (01 CrS 23477) and assault with a deadly weapon with intent to kill inflicting serious injury (01 CrS 23480). Citing *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986), *overruled on other grounds*, *State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), defendant argues that because he was convicted of assault with a deadly weapon with intent to kill inflicting serious injury against the kidnap victim, elevation of the kidnapping to the first degree based on the same injuries, violates the constitutional prohibition against double jeopardy. After careful consideration, we disagree.

In order to preserve a question for appellate review, a party must present the trial court with a timely request, objection or motion, stating the specific grounds for the ruling the party desires, and obtain a ruling from the trial court. N.C.R. App. P. 10(b)(1). A criminal defendant waives appellate review of the issue of whether his conviction of first-degree kidnapping violates double jeopardy by failing to "object at trial to the submission of first-degree kidnapping" on the same grounds. *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997).

Here, a careful review of the transcript reveals that at the close of all the evidence, defendant moved to dismiss the charge of first-degree kidnapping of Teri Little (01 CrS 23478) on double jeopardy grounds. However, despite participating in an extensive discussion with the trial judge concerning all potential bases to support the motion, including the very grounds argued here, defendant did not move to dismiss the charge of first-degree kidnapping of Frank Little on double jeopardy grounds. Furthermore, during the charge conference, the trial judge specifically inquired into which "enhancement elements" the State was proceeding on to support first-degree kid-

napping. Although the State indicated that the "serious injury" element would apply to both charges, defendant did not object. Finally, defendant did not object to the submission of both the first-degree kidnapping and assault of Frank Little to the jury. Accordingly, we hold defendant has waived appellate review of this issue.

Assuming *arguendo* that this issue was properly before us, we would hold that double jeopardy does not preclude punishing a defendant for both first-degree kidnapping based on serious injury and assault with a deadly weapon with intent to kill inflicting serious injury.

In *State v. Fernandez*, 346 N.C. 1, 484 S.E.2d 350 (1997), the defendant was convicted of both first-degree murder and first-degree kidnaping based on failure to release the kidnap victim in a safe place. Our Supreme Court, applying the *Blockburger* test, held that because "each crime charged contain[ed] an element not required to be proved in the other[,]" defendant could be convicted of both without violating double jeopardy. *Id.* at 19, 484 S.E.2d at 362.

Here, defendant was convicted of both first-degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury. The offense of kidnapping is established upon proof of an unlawful, nonconsensual restraint, confinement or removal of a person from one place to another, for the purpose of: (1) holding the person for ransom, as a hostage or using them as a shield; (2) facilitating flight from or the commission of any felony; or (3) terrorizing or doing serious bodily harm to the person. *See* G.S. § 14-39(a). "If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree . . . ." G.S. § 14-39(b). In contrast, the essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are "(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). Because each crime contains elements not required to be proved in the other, applying *Fenandez*, we would hold that defendant's convictions for both offenses are proper.

IV.

[4] Defendant next contends that the trial court erroneously instructed the jury regarding the restraint element of first-degree kidnapping. The trial court instructed the jury in pertinent part:

> Now, for you to find the defendant guilty of first-degree kidnapping, the State must prove five things to you beyond a reasonable doubt:
>
> First, that the defendant unlawfully restrained a person. That is, restricted his freedom of movement. *One who is physically seized and held or whose hands or feet are bound is restrained within the meaning of this statute.*

(Emphasis added.)

Defendant argues that because both victims testified to being either handcuffed or tied up by defendant, the trial court's inclusion of the italicized language in its instructions to the jury constituted an impermissible expression of the trial judge's opinion that (1) the victims' testimony was credible, and (2) the testimony conclusively established the element of restraint. We disagree.

G.S. § 15A-1232 provides in part that "[i]n instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved . . . ." In determining whether the trial judge has expressed an impermissible opinion in its instructions to the jury, " '[t]he 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 jury to have considered it.' " *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970) (citation omitted). "The trial judge has wide discretion in presenting the issues to the jury." *State v. Harris*, 306 N.C. 724, 728, 295 S.E.2d 391, 393 (1982).

> The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved.

State v. Friddle, 223 N.C. 258, 261, 25 S.E.2d 751, 753 (1943). "[W]here a trial court, in charging a jury, undertakes the definition of a term that the law provides no set formula for defining, 'the definition given should be in substantial accord with definitions approved by our Supreme Court.' " *State v. Every*, 157 N.C. App. 200, 214, 578 S.E.2d 642, 652 (2003) (citation omitted). Where the charge, viewed contextually, "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." *Lee*, 277 N.C. at 214, 176 S.E.2d at 770.

In *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), our Supreme Court held:

> As used in G.S. 14-39, the term 'confine' connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement. Thus, *one who is physically seized and held, or whose hands or feet are bound*, or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, *is restrained within the meaning of this statute.* Such restraint, however, is not kidnapping unless it is (1) unlawful (i.e., without legal right), (2) without the consent of the person restrained (or of his parent or guardian if he be under 16 years of age), and (3) for one of the purposes specifically enumerated in the statute. One of those purposes is the facilitation of the commission of a felony.

Id. at 523, 243 S.E.2d at 351 (emphasis added).

After reviewing the entire jury charge, in context, we conclude there was no error. First, the trial judge specifically instructed the members of the jury that they were "the sole judges of the credibility of the witnesses," entitled to believe all, none or any part of a witness's testimony. Next, the language relied on by the trial court in framing its definition of "restraint" reflects a correct statement of the law; a point which defendant conceded during the charge conference. Finally, after defining "restraint" as it applied to the charge of kidnapping, the trial judge proceeded to instruct the jury on the remaining elements of kidnapping. We disagree with defendant's assertion that these instructions had the effect of establishing both the credibility of the victims' testimony and the element of restraint. On the contrary, we hold the trial judge, through his instructions, properly brought the relation of the evidence adduced at trial into view with the particular issue involved. Accordingly, this assignment of error is rejected.

V.

[5] Defendant next contends that the trial court erred by entering judgment against him for attempted felonious escape because the bill of information to which he pled "fail[ed] to allege a felony" in accordance with G.S. § 148-45.

On 16 January 2002, the second day of trial, defendant attempted to escape from the Guilford County Jail. After the jury returned its verdict, the State presented a two-count bill of information (No. 02 CrS 23218) charging defendant with: (1) attempted felonious escape in violation of G.S. § 148-45; and (2) committing a felony after having attained habitual felon status. Defendant pled guilty to both charges and the trial court entered judgment.

Defendant assigns error to the failure of the bill of information to "allege a felony as required by statute[,]" contending that the allegations contained in the bill of information "support[] no more than a misdemeanor" conviction. Defendant supports this contention by arguing that the "recitation of facts by the prosecutor to support the plea" established only that defendant was in the custody of the Guilford County Jail at the time of his escape attempt and not the Department of Correction. Consequently, defendant asserts that he is entitled to appeal as a matter of right pursuant to G.S. § 15A-1444(a1) and (a2). We disagree.

We begin by noting that although G.S. § 15A-1444(a1) permits a defendant to appeal "the issue of whether his . . . sentence is supported by evidence introduced at the trial and sentencing hearing[,]" the scope of appellate review is "confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a). Here, defendant has assigned error only to the sufficiency of the allegations contained in the bill of information. Accordingly, our review is limited.

It is the general rule that "a defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty to a criminal charge in the superior court unless he is appealing sentencing issues or the denial of a motion to suppress." *State v. Nance*, 155 N.C. App. 773, 774, 574 S.E.2d 692, 693 (2003). G.S. § 15A-1444(e) provides in pertinent part that:

> Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the *defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty* or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

(Emphasis added.)

Here, defendant pled guilty to the charges presented in the bill of information. However, defendant did not move to withdraw his plea. By "plead[ing] guilty . . . and not having moved in the trial court to withdraw his guilty plea, defendant is not entitled to an appeal of right from the trial court's ruling." *State v. Young*, 120 N.C. App. 456, 459, 462 S.E.2d 683, 685 (1995). Moreover, the issue from which appeal is taken, *i.e.*, the sufficiency of the allegations contained in the charging instrument, falls outside the scope of either G.S. §§ 15A-1444(a1), (a2) or 15A-975. Therefore, even if defendant had moved to withdraw his plea, defendant would not be entitled to appeal. Accordingly, we conclude that defendant is not entitled to appeal this issue as a matter of right.

Finally, this Court may only issue the *writ of certiorari* to review judgments and orders of trial tribunals in instances where: (1) "the right to prosecute an appeal has been lost by failure to take timely action"; (2) "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). *Accord, State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002). Because none of these circumstances applies to the case here, we conclude that appeal of this issue may not be had by *writ of certiorari*. Accordingly, we hold that defendant is not entitled to appeal from this judgment.

VI.

[6] Defendant next contends that the trial court erred by entering judgment against him under the second count of the bill of information (No. 02 CrS 23218), for committing a felony after having attained the status of a habitual felon. Defendant argues that the single bill of information used here failed to comply with G.S. § 14-7.3, which requires two separate charging instruments.

As we have already noted, by "plead[ing] guilty to being an habitual felon, and not having moved in the trial court to withdraw his guilty plea, defendant is not entitled to an appeal of right from the trial court's ruling." *Young*, 120 N.C. App. at 459, 462 S.E.2d at 685. Similarly, because this case does not involve an interlocutory order, the denial of a motion for appropriate relief, or a situation where the right to appeal has been lost by defendant's failure to take timely action, review may not be had by *writ of certiorari*. Accordingly, we hold defendant is not entitled to appeal from this judgment.

VII.

[7] Defendant next contends that because the indictment charging habitual felon status (01 CrS 23576), "does not identify any predicate felonies, but rather only alleges the defendant 'did commit one or more felonious offenses while being an habitual felon[,]' " it fails to comply with the format and allegation requirements of G.S. § 14-7.3. We disagree.

> Nothing in the plain wording of N.C.G.S. § 14-7.3 requires a specific reference to the predicate substantive felony in the habitual felon indictment. The statute requires that the State give defendant notice of the felonies on which it is relying to support the habitual felon charge; nowhere in the statute does it mention the predicate substantive felony or require it to be included in the indictment.

State v. Cheek, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995). Here, the indictment charging defendant as an habitual felon complies with the requirements of G.S. § 14-7.3 in all respects. Accordingly, this assignment of error is rejected.

VIII.

Defendant's final contention is that since the habitual felon indictment is defective, the trial court erred by enhancing the sentences in defendant's remaining convictions. Because we have already concluded that the indictment charging defendant as an habitual felon was proper in all respects, this assignment of error is rejected.

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

No error.

Judges TYSON and STEELMAN concur.

IN RE: THE ESTATE OF CANDICE LEIGH LUNSFORD, DECEASED

No. COA02-904

(Filed 2 September 2003)

1. Appeal and Error— Supreme Court order—application of statute by implication

The statute which prohibits a parent who has abandoned a child from taking by intestate succession (N.C.G.S. § 31A-2) was implicitly applied to a case in a North Carolina Supreme Court order which remanded for findings of fact on issues raised by the statute.

2. Intestate Succession— parent who abandoned child—findings—not sufficient for willful abandonment

The trial court's conclusion that a father could not inherit by intestate succession from his daughter was not supported by the findings. Those findings at most describe a man with alcoholism who curtailed contact but visited his daughter throughout her life, and who offered to help with her maintenance and support but was refused by his ex-wife. These findings do not rise to the level of willful abandonment.

3. Intestate Succession— parent who abandoned child—compliance with prior court order

An exception to the statute barring intestate succession by parents who abandon their children (N.C.G.S. § 31A-2(2)) applied because respondent complied with the only court order in existence. That order, for reasons not given, awarded custody to the child's mother but did not require the payment of child support; this was apparently acceptable to the mother, who subsequently refused respondent's offers of support.

Judge BRYANT dissenting.

Appeal by respondent from judgment entered 16 April 2002 by Judge L. Todd Burke in Surry County Superior Court. Heard in the Court of Appeals 26 March 2003.

Royster & Royster, by Stephen G. Royster and Michael D. Beal, for petitioner-appellee.

Law Offices of Jonathan S. Dills, P.A., by Jonathan S. Dills and Daniel B. Anthony, for respondent-appellant.

GEER, Judge.

This appeal addresses the proper distribution of the estate of Candice Leigh Lunsford ("Candice"), who died at the age of eighteen in an automobile accident. Petitioner Dawn Collins Bean, the estate's administratrix and Candice's mother, contends that respondent Randy Keith Lunsford, Candice's father, willfully abandoned Candice and is not entitled to share in Candice's estate.

Following a prior appeal, in which our Supreme Court ordered the case remanded to the trial court for additional findings of fact, *In re Estate of Lunsford*, 354 N.C. 571, 556 S.E.2d 292 (2001), the superior court concluded that Mr. Lunsford had willfully abandoned his daughter and was not entitled, under N.C. Gen. Stat. § 31A-2 (2001), to share in Candice's estate. Since neither party has assigned error to the superior court's findings of fact, the sole issue before this Court is whether those findings support the superior court's conclusions of law. We hold that the findings do not support the superior court's conclusion that Mr. Lunsford willfully abandoned his daughter and reverse.

On 30 June 1999, Candice died in a car accident. On 31 August 1999, after the proceeds of a $100,000.00 liability insurance policy had been tendered to Candice's estate, the estate sought a determination by the clerk of court of Mr. Lunsford's right to inherit. In an order entered 20 December 1999, the clerk of superior court for Surry County concluded that Mr. Lunsford was precluded from inheriting by N.C. Gen. Stat. § 31A-2. Mr. Lunsford appealed the clerk's decision to the superior court, which, after conducting an evidentiary hearing on 7 February 2000, reached the same conclusion.

On appeal, this Court affirmed the superior court, with Chief Judge Eagles dissenting on the grounds that N.C. Gen. Stat. § 31A-2 should not apply because Candice was not a minor at the time of her death. *In re Estate of Lunsford*, 143 N.C. App. 646, 547 S.E.2d 483 (2001). Mr. Lunsford appealed to the North Carolina Supreme Court based on the dissenting opinion. On 18 December 2001, the Supreme Court vacated the opinion of this Court and remanded the case to this Court for further remand to the trial court for:

> additional findings of fact as to (1) whether respondent Randy Lunsford abandoned Candice Leigh Lunsford; (2) if so, whether respondent Randy Lunsford resumed care and maintenance of Candice Leigh Lunsford at least one year prior to her death

and continued the same until her death; and (3) whether respondent Randy Lunsford "substantially complied" with all orders of the trial court requiring contribution to the support of the child.

354 N.C. 571, 571, 556 S.E.2d 292, 292 (2001).

On 12 April 2002, the superior court conducted an in-chambers hearing at which the parties agreed that the court would make its additional findings of fact without taking further evidence. Based on the 7 February 2000 hearing transcript and the arguments of counsel, the court, on the same day, entered an order setting forth new findings of fact.

Specifically, the court found that Ms. Bean and Mr. Lunsford married at young ages on 1 November 1980. Candice was born on 21 June 1981. Candice's parents separated on 20 November 1982. Because Mr. Lunsford was an alcoholic and too immature for the responsibilities of family life, Ms. Bean did not want him to remain in the same household as their daughter. Mr. Lunsford agreed and honored Ms. Bean's request that he leave.

On 30 January 1985, Ms. Bean and Mr. Lunsford were divorced. The divorce decree gave sole "care, custody and control" of Candice to Ms. Bean. The decree made no provision for visitation for Mr. Lunsford. The decree mentioned the subject of child support, but did not include any provisions directing either parent to pay child support.

On 30 March 1985, Ms. Bean married Gary Bean. Following that marriage, Mr. Bean assisted Ms. Bean with the support of Candice and they together almost exclusively paid for Candice's expenses. The court found that throughout Candice's minority, Mr. Lunsford occasionally offered to pay Ms. Bean for a part of the care and maintenance of Candice, but that Ms. Bean refused all of his offers. After one of Mr. Lunsford's offers, Ms. Bean suggested that he buy Candice some clothes that she wanted and, according to the trial court, he "readily complied."

The court further found that from the date that Ms. Bean and Mr. Lunsford separated, Mr. Lunsford visited with Candice sporadically on his own initiative. Mr. Lunsford's mother, who had an established relationship with Candice, would pick her up for a visit and Mr. Lunsford would occasionally spend time with his daughter then.

The court found that as Candice grew older, either Candice or Mr. Lunsford would initiate phone calls, visits, or other "relational contact." The court noted that the visits "usually coincided with lulls in [Mr. Lunsford's] alcoholism and/or an increase in the emotional stability of his private life." Just before Candice's unexpected death, Mr. Lunsford attended her high school graduation. According to the trial court, both Candice and Mr. Lunsford "had initiated plans for furthering their father-daughter relationship."

Based on these findings of fact, the trial court again concluded that Mr. Lunsford had willfully abandoned his daughter within the meaning of N.C. Gen. Stat. § 31A-2 and that neither of the exceptions contained within the statute applied. Mr. Lunsford has appealed from that 16 April 2002 order.

Applicability of N.C. Gen. Stat. § 31A-2

[1] Initially, Mr. Lunsford contends that N.C. Gen. Stat. § 31A-2 does not apply because Candice was not a minor at the time of her death. N.C. Gen. Stat. § 31A-2 provides:

> Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except—
>
> (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
>
> (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

We are not free to revisit the question of the applicability of this statute to the facts of this case since that issue was necessarily decided by the Supreme Court in the prior appeal.

Although the Supreme Court's order does not expressly hold that N.C. Gen. Stat. § 31A-2 applies to this case, that conclusion is implicit in the Court's 18 December 2001 order. Because this case was before the Supreme Court pursuant to N.C. Gen. Stat. § 7A- 30(2) (2001), the scope of the appeal was limited to the subject matter of Chief Judge Eagles' dissent, which addressed the question whether N.C. Gen. Stat.

§ 31A-2 "applies only to minor children-decedents." 143 N.C. App. at 656, 547 S.E.2d at 489. In addressing that issue, the Supreme Court ordered a remand for additional findings of fact regarding whether respondent had abandoned Candice; if so, whether he had resumed care and maintenance at least one year before her death; and whether he had substantially complied with all child support orders. 354 N.C. at 571, 556 S.E.2d at 292. Such additional findings tracking the provisions of N.C. Gen. Stat. § 31A-2 would not be necessary had the Court concluded that the statute did not apply. By vacating this Court's prior opinion and directing the trial court to make additional findings regarding each of the factors specified in N.C. Gen. Stat. § 31A-2, the Supreme Court necessarily concluded that the statute did apply in this case and we may not conclude otherwise.[1]

Standard of Review

A trial court's findings of fact following a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000). Appellate review of the trial court's conclusions of law is *de novo*. *Id.* Under N.C.R. App. P. 10(a), however, this Court's review is limited to those findings of fact and conclusions of law properly assigned as error. Thus, "findings of fact to which [appellant] has not assigned error and argued in his brief are conclusively established on appeal." *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002).

Since neither party in this case has assigned error to any of the findings of fact, we take them as conclusive. In addition, appellant has only assigned error to conclusions of law 1 and 3:

> 1. Lunsford and Candi[ce] had some relationship during the lifetime of Candi[ce]. However, Lunsford willfully abandoned his daughter, Candice Leigh Lunsford, as that term is used and understood in N.C. Gen. Stat. § 31A-2 and North Carolina common law.
>
> . . . .
>
> 3. Although Lunsford was deprived of the custody of Candi[ce] under an order of a court of competent jurisdiction, and support was considered[,] Lunsford could not substan-

1. We also dismiss respondent's assignment of error arguing the constitutionality of N.C. Gen. Stat. § 31A-2 since respondent raised that issue for the first time on this appeal.

> tially comply with all orders of a court requiring contribution to the support of Candi[ce] since no order to pay child support was issued.

Our review is thus limited by appellant's assignments of error to a determination whether the trial court's conclusions of law 1 and 3 are supported by its findings of fact.

Willful Abandonment

[2] In considering whether a parent has willfully abandoned a child under N.C. Gen. Stat. § 31A-2, this Court applies the definition of "willful abandonment" set forth in *Pratt v. Bishop*, 257 N.C. 486, 126 S.E.2d 597 (1962). *See Hixson v. Krebs*, 136 N.C. App. 183, 188, 523 S.E.2d 684, 687 (1999), *cert. denied*, 352 N.C. 356, 544 S.E.2d 546 (2000); *Lessard v. Lessard*, 77 N.C. App. 97, 100-01, 334 S.E.2d 475, 477 (1985), *aff'd*, 316 N.C. 546, 342 S.E.2d 522 (1986). In *Pratt*, the Supreme Court set forth two definitions of "willful abandonment":

> The most frequently approved definition is that abandonment imports any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Wilful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence.
>
> . . . .
>
> Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.
>
> . . . .
>
> Abandonment requires a wilful intent to escape parental responsibility and conduct in effectuation of such intent.

Pratt, 257 N.C. at 501-02, 126 S.E.2d at 608 (citations omitted).

In this case, the trial court's findings of fact establish that Mr. Lunsford originally left his daughter at his wife's request because of his alcoholism. In the divorce decree, the court granted sole custody to Ms. Bean and did not specifically address visitation for Mr. Lunsford. Nevertheless, the court found that "Lunsford and Candi[ce]

had some relationship during the lifetime of Candi[ce]." Specifically, from the date that the parties separated, Mr. Lunsford took the initiative to visit Candice, although the trial court found that he did so only "sporadically" or "occasionally." The court further found that "[a]s Candi[ce] grew older, either Candi[ce] or Lunsford would initiate phone calls, visits, or other relational contact." The court specifically found that Mr. Lunsford attended Candice's high school graduation and they "both had initiated plans for furthering their father-daughter relationship."

With respect to Candice's care and maintenance, the court found that no child support order had ever been entered requiring that Mr. Lunsford pay support. The court further found that although Ms. Bean and Candice's stepfather, Gary Bean, had paid "almost exclusively" for Candice's care, Mr. Lunsford had "[t]hroughout Candi[ce]'s minority . . . occasionally offered to pay Bean for some of the care and maintenance of Candi[ce]." Ms. Bean, however, refused those offers. The court did note that when Ms. Bean suggested that Mr. Lunsford buy Candice clothes instead, he "readily complied."

These findings of fact do not rise to the level of willful abandonment as defined in *Pratt*. The findings at most describe a man who had curtailed contact with his daughter, but still visited and contacted her throughout her life. While Mr. Lunsford did not in fact pay child support, the findings do not suggest that he ignored his obligation to assist in his daughter's care and maintenance. To the contrary, the court found that he offered to help, but was refused.

The findings thus do not set forth any intentional conduct by Mr. Lunsford that "evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608. Nor do the findings establish that Mr. Lunsford "[withheld] his presence, his love, his care, the opportunity to display filial affection, and wilfully neglect[ed] to lend support and maintenance . . . ." *Id. See also id.* at 501-02, 126 S.E.2d at 608 ("[A] mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment.").

In *In re Young*, 346 N.C. 244, 251-52, 485 S.E.2d 612, 617 (1997), our Supreme Court concluded that findings of fact setting forth even less substantial contact between a mother and child were insufficient to support the trial court's conclusion that the mother had willfully abandoned her son. Although the mother, during the six-month period

at issue, had made no attempt to visit her son, she had called "at times," she had requested to see her son before she underwent surgery, and subsequently she began visiting him. The Court held that "[t]his conduct does not evidence a willful abandonment of her child on the part of respondent." *Id.* at 252, 485 S.E.2d at 617.

Likewise, while the trial court's findings of fact in this case present an unflattering portrait of Mr. Lunsford as a father, they do not suggest "a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). The description in the findings of fact of Mr. Lunsford's efforts throughout his daughter's life to maintain a "relationship" with her, although limited, and of his rebuffed offers to assist in her maintenance cannot be reconciled with the definitions of "willful abandonment" adopted in this State.

We stress the narrowness of our review. While appellee refers to evidence supporting her position, the trial court chose not to make findings in accordance with that evidence. Appellee has not cross-assigned error as to those findings. It is not the role of this Court to consider what the trial court could have found or to make our own findings based on our review of the record. Instead, our review is limited to determining whether the court's actual findings of fact support the conclusion that it reached. In this case, they do not.

[3] We also hold that the trial court erred in concluding that Mr. Lunsford did not fall within the scope of N.C. Gen. Stat. § 31A-2(2). Under N.C. Gen. Stat. § 31A-2(2), a parent who has willfully abandoned the care and maintenance of his or her child maintains his right to intestate succession from his child's estate "[w]here a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child." The Supreme Court specifically directed the trial court to make findings as to "whether respondent Randy Lunsford 'substantially complied' with all orders of the trial court requiring contribution to the support of the child." *Lunsford*, 354 N.C. at 571, 556 S.E.2d at 292.

On remand, the trial court found that Mr. Lunsford was deprived of the custody of his daughter under an order of a court of competent jurisdiction and, therefore, met the first requirement of the exception in N.C. Gen. Stat. § 31A-2(2). Although appellee argues on appeal that there was no deprivation of custody, she did not cross-assign error to

the trial court's finding otherwise. That finding is, therefore, binding on this Court.

In any event, the finding is fully supported by the evidence. In the divorce judgment, the district court ordered that "the care, custody and control of Candice Leigh Lunsford is hereby awarded to [Teresa Dawn Collins Lunsford]." The decree also did not grant Mr. Lunsford any visitation rights. Appellee contends that this order is insufficient and the exception should not apply absent a termination of parental rights. If, however, a parent's rights have been terminated, then he has no right to inherit from the child. N.C. Gen. Stat. § 7B-1112 (2001). N.C. Gen. Stat. § 31A-2 can only be relevant if a parent still has rights of inheritance. Appellee's proposed construction of the exception would render the exception meaningless. *See* Comment, "In re Estate of Lunsford and Statutory Ambiguity: Trying to Reconcile Child Abandonment and the Intestate Succession Act," 81 N.C.L. Rev. 1149, 1176 (Mar. 2003) ("If the divorce judgment had deprived Mr. Lunsford of his parental rights, there would be no lawsuit, because a parent whose parental rights have been terminated cannot inherit through intestacy; section 31A-2 is therefore inapplicable.").

Although the trial court found that Mr. Lunsford had been deprived of custody, it nonetheless concluded that the exception to N.C. Gen. Stat. § 31A-2 did not apply because "Lunsford could not substantially comply with all orders of a court requiring contribution to the support of Candi[ce] since no order to pay child support was issued." We cannot agree with this construction of the exception.

The policy underlying Chapter 31A, barring property rights, is to ensure "that no person shall be allowed to profit by his own wrong." N.C. Gen. Stat. § 31A-15 (2001). The exception contained in N.C. Gen. Stat. § 31A-2(2) must be construed in accordance with that policy. The exception essentially states that if a court takes away custody of a child and decides the specifics of support, then a parent should not be denied the right to participate in intestate succession if he limits his role in his child's life to the parameters set out by a court. Although, as appellee argues, a parent could do more, the exception provides that a failure to exceed the requirements of a court order does not warrant application of N.C. Gen. Stat. § 31A-2.

Here, the trial court found that the district court entering the divorce decree considered child support, but "made no order whether child support was to be paid by either parent." In fact, the decree specifically found that no court had entered any order "concerning

child custody or child support for the minor child involved in this action." Then, the district court, for reasons not set out in the decree or record, chose to award "care, custody and control" of Candice to her mother and not include any requirement that Mr. Lunsford pay child support. Although the district court's order failing to require Mr. Lunsford to pay any child support may be curious, that determination of the district court was apparently acceptable to appellee since, as the trial court found below, she "refused" all offers of child support.

Because the district court in its divorce judgment considered the issue of child support but elected not to require Mr. Lunsford to pay support, Mr. Lunsford has complied with the only order in existence addressing the question of child support. To conclude, as the trial court did, that exception (2) of N.C. Gen. Stat. § 31A-2, does not apply if a court has decided not to order a parent to pay child support in effect allows a subsequent court to revisit the issue of support and decide, contrary to the earlier decision, that a parent should have done more. Here, although Mr. Lunsford did not pay child support, his actions were consistent with the only pertinent order and in accordance with the mother's wishes. His conduct cannot be deemed "wrong" in the sense of the public policy expressed in N.C. Gen. Stat. § 31A-15. Thus, even if the trial court's determination of willful abandonment was supported by the findings of fact, the court erred in failing to conclude that N.C. Gen. Stat. § 31A-2(2) applied.

Reversed.

Judge TIMMONS-GOODSON concurs.

Judge BRYANT dissents in a separate opinion.

BRYANT, Judge, dissenting.

As I believe Mr. Lunsford's wilful neglect of the natural and legal obligations of parental care and support owed to his daughter Candice constituted wilful abandonment as defined by the law of this State, I respectfully dissent.

Whether a parent has abandoned his child within the meaning of section 31A-2 of the North Carolina General Statutes is a question of fact to be decided by a jury, or judge acting as the finder of fact. *See*

Hixson v. Krebs, 136 N.C. App. 183, 188-89, 523 S.E.2d 684, 687 (1999). In the original appeal of this case, the North Carolina Supreme Court specifically instructed the trial court on remand to make ultimate findings of fact on three issues: (1) whether Mr. Lunsford abandoned Candice; (2) if so, whether Mr. Lunsford resumed care and maintenance of Candice at least one year prior to her death and continued the same until the date of her death; and (3) whether Mr. Lunsford "substantially complied" with any and all child support orders. *In re Lunsford*, 354 N.C. 571, 571, 556 S.E.2d 292, 292 (2001). The trial court, however, on remand labeled its findings of fact on these issues as conclusions of law. Fortunately, the trial court's mislabeling of its ultimate findings is not fatal to the order as these findings of fact are clearly stated and distinguishable from the trial court's conclusion of law, contained in its mandate, that Mr. Lunsford was barred under section 31A-2 from sharing in his daughter's estate based upon his abandonment of his daughter. *See In re Faircloth*, 153 N.C. App. 565, 569, 571 S.E.2d 65, 68 (2002) (findings of fact mislabeled as conclusions of law did not violate N.C. Gen. Stat. § 1A-1, Rule 52 where they were clearly stated and easily distinguishable). Although the trial court could, and indeed should, have made findings that were more comprehensive and reflective of the evidence, I conclude that the evidentiary findings which were made are sufficient to support an ultimate finding of wilful abandonment based upon wilful neglect of parental duties.

Wilful abandonment under section 31A-2 may take the form of "wilful neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). Thus, where a parent "withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* "To constitute an abandonment . . . it is not necessary that a parent absent himself continuously from the child . . . , nor even that he cease to feel any concern for its interest." *Id.* at 503, 126 S.E.2d at 609; *see Hixson*, 136 N.C. App. at 188-89, 523 S.E.2d at 687.

In this case, the trial court found Mr. Lunsford left the marital home in 1982 because he "was an alcoholic and too immature for responsibilities of family life." Between the separation and Candice's death in 1999, Mr. Lunsford visited only sporadically, occasionally spending time with his daughter after his mother had arranged for visitation, and also made an appearance at her high school graduation.

Mr. Lunsford did not contribute financially to Candice's care and maintenance, except to buy her clothes on a single occasion. It is, however, noted that Candice's mother also refused any contributions from Mr. Lunsford. As the majority recognizes, no error is assigned to the trial court's findings and they are binding on appeal. Further, this Court noted more specifically in the previous appeal of this case that Mr. Lunsford visited Candice less than twelve times in almost seventeen years and that he paid less than $100.00 toward her support and maintenance. *In re Lunsford*, 143 N.C. App. 646, 648, 547 S.E.2d 483, 484 (2001), *vacated and remanded*, 354 N.C. 571, 556 S.E.2d 292 (2002).

These findings show that Mr. Lunsford made only extremely limited and sporadic attempts to provide any care and maintenance to Candice, otherwise totally abandoning her for almost seventeen years. The duties of care and maintenance in section 31A-2 are specific obligations of a parent, the neglect of which can possibly result in both civil and criminal proceedings. These separate duties define a parent's overall responsibilities to his minor child, and both requirements must be met. *See Davis v. Trus Joint MacMillan*, 148 N.C. App. 248, 253, 558 S.E.2d 210, 214 (2002) (parent must prove he has resumed both care *and* maintenance of his child to obtain workers' compensation death benefits under N.C. Gen. Stat. § 97-40). The duty of care requires a presence in a child's life: to show love and affection, as well as providing support and maintenance. *See Pratt*, 257 N.C. at 501, 126 S.E.2d at 608. The duty of support and maintenance is a legal duty of the parent to his child. *See* N.C.G.S. § 50-13.4(b) (2001) (absent other circumstances, parents are primarily liable for the support of their minor children); *see also Wells v. Wells*, 227 N.C. 614, 616-18, 44 S.E.2d 31, 33-34 (1947) (discussing the moral and legal duty of a parent to support and maintain a minor child). Maintenance and support require that the parental responsibility to provide food, clothing, and shelter be met, *see In re Adcock*, 69 N.C. App. 222, 225, 316 S.E.2d 347, 349 (1984) (failure to provide stable living environment and proper food and clothing is clearly evidence of neglect that cannot be ignored), and the trial court's findings reflect that in fact these requirements were not met by Mr. Lunsford in this case. Neither logic nor the record in this case supports an assertion that a parent who visits a child less than twelve times in almost seventeen years, provides less than $100.00 toward her maintenance and support, buys her clothes on only one occasion, and attends her high school graduation is providing the parental duty of care and maintenance as contemplated in our statute. Simply stated, Mr. Lunsford's

actions do not meet the standard of care and responsibility to which a parent is obligated.

Thus, the trial court's findings conclusively establish Mr. Lunsford wilfully neglected his parental duties and therefore abandoned his daughter within the meaning of section 31A-2. Accordingly, I would affirm the trial court's order denying Mr. Lunsford from sharing in Candice's estate.

JOHN ROBERTSON, EMPLOYEE, PLAINTIFF v. HAGOOD HOMES, INC., EMPLOYER, VILLANOVA INSURANCE COMPANY, CARRIER, AND/OR ERIC SCHUETTE, D/B/A PRECISION HOME BUILDERS, NON-INSURED, EMPLOYER, AND/OR JIM MCGUIRT, EMPLOYER, DEFENDANTS

No. COA02-1222

(Filed 2 September 2003)

1. **Workers' Compensation— failure to obtain certificate of insurance—general contractor a statutory employer of subcontractor**

The Industrial Commission did not err in a workers' compensation case by holding in effect that defendant general contractor may become the statutory employee of defendant subcontractor and therefore liable for payment of workers' compensation benefits to plaintiff injured employee of a sub-subcontractor under N.C.G.S. § 97-19, because: (1) the general contractor failed to comply with N.C.G.S. § 97-19, which requires obtaining a certificate of insurance from its subcontractor; (2) relieving defendants of liability would relegate plaintiff for compensation protection to small subcontractors who fail to carry workers' compensation insurance; (3) any other result would defy the explicit purpose of N.C.G.S. § 97-19 by permitting general contractors to circumvent the law and to insulate themselves from liability simply by interposing an additional layer of subcontractors; and (4) the chain of liability extends from the immediate employer of the injured employee up the chain to the first responsible contractor who has the ability to pay.

2. Workers' Compensation— notice of insurance cancellation—subletting work through series of contracts

Although defendants contend the Industrial Commission erred in a workers' compensation case by finding that it was more likely than not that defendant general contractor had received notice that defendant subcontractor's workers' compensation insurance was cancelled, the issue of notification is irrelevant on the facts of this case because: (1) defendant failed to comply with N.C.G.S. § 97-19 by failing to obtain a certificate of insurance when it sublet the contract; (2) defendants' act of requiring a certificate for the first contract that they sublet to defendant subcontractor was insufficient to demonstrate compliance with N.C.G.S. § 97-19 with regard to the later contract; and (3) having chosen voluntarily to sublet a series of individual contracts, defendants were required by N.C.G.S. § 97-19 to obtain a certificate for each separate contract.

Judge TYSON concurring in a separate opinion.

Appeal by defendants from opinion and award entered 4 June 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 June 2003.

Jones Martin Parris & Tessener Law Offices PLLC, by Tamara R. Nance, for plaintiff-appellee.

Marshall, Williams & Gorham, L.L.P., by Ronald H. Woodruff and F. Murphy Averitt, III, for defendants-appellants.

Eric Schuette, pro se.

James L. McGuirt, pro se.

LEVINSON, Judge.

Defendants (Hagood Homes Inc. and Villanova Insurance Company) appeal an opinion of the Industrial Commission awarding plaintiff (John Robertson) medical benefits, temporary total disability, and partial disability compensation. For the reasons that follow, we affirm.

The relevant facts as found by the Industrial Commission are summarized as follows: Jim Kenny, president of defendant Hagood, and Eric Schuette, d/b/a Precision Home Builders, began working

together in March 1999. The terms of the first contract they negotiated provided that Hagood, general contractor for a house construction job, would subcontract the framing of the house to Schuette. The property was located at "Lot 15" in the Magnolia Green Subdivision, and when Hagood sublet the Lot 15 framing contract to Schuette, Kenny required Schuette to provide a certificate of workers' compensation insurance. Accordingly, Schuette had his insurance agency fax Hagood a copy of a certificate of insurance stating that Schuette was insured under a policy in effect from 16 March 1999 until 16 March 2000. Following completion of the framing for Lot 15, Hagood and Schuette entered into several additional contracts concerning different properties. In each of these, Hagood was the general contractor for a building construction project, and Schuette subcontracted part of the contract. Hagood did not request or obtain a certificate of workers' compensation insurance when it sublet any of these additional contracts.

The instant case arises from one of the contracts between Hagood and Schuette for which Hagood failed to obtain a certificate of workers' compensation. In fall 1999, Hagood, general contractor for a home construction project, subcontracted the framing to Schuette. In October 1999, Schuette subcontracted the framing to Jim McGuirt. Plaintiff was employed by McGuirt as a framer helper. When Schuette sublet the framing contract to McGuirt, Schuette agreed to provide workers' compensation insurance, and withheld $1,000 from the contract fee for this purpose. However, at the time Schuette negotiated this deal with McGuirt, Schuette knew his workers' compensation insurance had already been canceled for nonpayment of premiums.

On 26 October 1999, while working as a framing helper for McGuirt, plaintiff fell from a ladder and sustained injuries. At the time of this accident, neither McGuirt nor Schuette had workers' compensation insurance. On 1 December 1999, plaintiff filed a claim seeking workers' compensation and medical benefits from defendants. Hagood denied liability, and a hearing was held before a deputy commissioner of the Industrial Commission. The deputy commissioner issued an opinion and award on 31 May 2001, determining that defendants were liable for payment of plaintiff's workers' compensation and medical expenses. Defendants appealed to the Full Commission, which issued its opinion and award on 4 June 2002. The Industrial Commission generally affirmed the deputy commissioner's opinion and awarded plaintiff temporary total disability,

medical benefits, and partial disability compensation. From this order, defendants appeal.

" 'Appellate review of opinions and awards of the Industrial Commission is strictly limited to the discovery and correction of *legal* errors.' " *McAninch v. Buncombe County Schools*, 347 N.C. 126, 131, 489 S.E.2d 375, 378 (1997) (quoting *Godley v. County of Pitt*, 306 N.C. 357, 359-60, 293 S.E.2d 167, 169 (1982)). Thus:

> [j]urisdiction of appellate courts on appeal from an award of the Industrial Commission is limited to the questions (1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions. . . . [F]indings of fact made by the Commission are conclusive on appeal when supported by competent evidence . . . even though there is evidence to support a contrary finding of fact.

McLean v. Roadway Express, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982) (citation omitted). In the present case, the only findings of fact to which defendants assigned error were findings number nine and sixteen, stating that Hagood had likely received notice of the cancellation of Schuette's workers' compensation insurance. Because "defendants failed to assign error to any of the Commission's [other] findings of fact . . . these findings are conclusively established on appeal." *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003) (citation omitted). The Commission's conclusions of law, however, are reviewed *de novo*. *See Shingleton v. Kobacker Grp.*, 148 N.C. App. 667, 670, 559 S.E.2d 277, 280 (2002) (question of law "is subject to *de novo* review") (citation omitted).

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[1] The primary issue raised by this appeal is whether, pursuant to N.C.G.S. § 97-19 (2001), a general contractor may become the statutory employer of a subsubcontractor and therefore liable for payment of workers' compensation benefits to the injured employee of a subsubcontractor. Resolution of this issue requires analysis of G.S. § 97-19, which states in relevant part that:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract . . . without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, . . . stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, . . . to the same extent as such

> subcontractor would be . . . for the payment of compensation and other benefits under this Article. . . . If the principal contractor . . . shall obtain such certificate at the time of subletting such contract . . . he [is not] liable . . . for compensation. . . .

Defendants argue that the Industrial Commission erred by concluding that under G.S. § 97-19 they are liable to plaintiff for workers' compensation benefits. We disagree.

In its opinion and award, the Industrial Commission made the following pertinent conclusions of law:

> 1. Plaintiff sustained a compensable injury by accident . . . arising out of and in the course of his employment with defendant Jim McGirt on October 26, 1999. N.C.G.S. § 97-2(6).
>
> 2. Jim McGirt employed plaintiff . . . and was uninsured. . . . Jim McGirt paid Eirk [sic] Schuette for workers' compensation insurance. N.C.G.S. § 97-2; [§] 97-19.
>
> 3. Eric Schuette . . . the next sub-contractor in the chain of subcontractors, was responsible for plaintiff's workers' compensation insurance. N.C.G.S. § 97-19.
>
> 4. Because Eric Schuette . . . was non-insured . . . liability is assumed by Hagood Homes, Inc., the general contractor in the line of sub-contractors. . . . The chain of liability extends from the immediate employer of the injured employee up the chain to the first responsible contractor who has the ability to pay. . . .
>
> 10. Because Eric Schuette . . . had no valid workers' compensation insurance, Hagood Homes shall be liable for all compensation and medical treatment. N.C.G.S. § 97-19; [§] 97-29; [§] 97-25.

Defendants argue that in order for G.S. § 97-19 to apply "a general contractor must contract directly with a subcontractor or a subcontractor must contract with a lower tier subcontractor." Defendants note that G.S. § 97-19 does not explicitly "address the issue of what should happen in a case where, as here, the subcontractor contracts with a sub-subcontractor to perform work." Defendants contend liability may not be imposed upon a general contractor who did not contract directly with the subsubcontractor, because the general contractor and subsubcontractor are not "in privity." On this basis, defendants assert that they are relieved of liability. We disagree,

and conclude that if the general contractor fails to comply with G.S. § 97-19 by obtaining a certificate of insurance from its subcontractor, then G.S. § 97-19 may be applied to an injured employee of a subsubcontractor of the general contractor.

In *Deese v. Lawn & Tree Expert Co.*, 306 N.C. 275, 277-78, 293 S.E.2d 140, 142-43 (1982), the North Carolina Supreme Court noted that the Court "has interpreted the statutory provisions of North Carolina's workers' compensation law on many occasions[, and has] . . . been wisely guided by several sound rules of statutory construction[.]" Four of the principles articulated in *Deese* may be summarized as follows: (1) the workers' compensation statutes should be liberally construed whenever possible to avoid denying benefits based on "narrow interpretations of its provisions"; (2) appellate courts may not expand upon "the ordinary meaning of the terms used by the legislature"; (3) appellate courts should avoid adding a provision to a statute "that has been omitted, which [it] believes ought to have been embraced"; and (4) the legislative intent may be determined by consideration of the "language, purposes and spirit" of the workers' compensation act. *Id.* (citations omitted). In addition, the *Deese* Court stated another principle of significance in the present case:

> [F]inally, the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Act in the first instance.

Id. We shall endeavor to adhere to these principles in our interpretation of G.S. § 97-19.

We first note that the language of the statute does not prohibit its application to employees of a subsubcontractor. Rather, the statute refers somewhat expansively to "any principal contractor, intermediate contractor, or subcontractor." We also agree with the Industrial Commission that, if the legislature had intended G.S. § 97-19 to apply only to those who with whom the general contractor has contracted directly, "there would be no need of the following provision[] of N.C.G.S. § 97-19":

> Every claim . . . shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

Moreover, our review of the statute and its interpretive case law compels the conclusion that it was enacted to address situations precisely like the one presented herein:

> The manifest purpose of this statute, . . . is to protect employees . . . by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors[.] . . . It is also the obvious aim of the statute to forestall evasion of the [Workers'] Compensation Act by those who might be tempted to subdivide their regular operations with the workers, thus relegating them for compensation protection to small subcontractors, who fail to carry, or if small enough may not even be required to carry, compensation insurance.

Greene v. Spivey, 236 N.C. 435, 443, 73 S.E.2d 488, 494 (1952) (citation omitted). In the present case, to relieve defendants of liability would, as described in *Greene*, "relegate [plaintiff] for compensation protection to small subcontractors who fail to carry" workers' compensation insurance. The statute's purpose was also addressed in *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 310, 392 S.E.2d 758, 759-60 (1990), in which this Court noted that G.S. § 97-19 is "the so-called 'statutory employer' or 'contractor under' statute" and that the statute:

> was enacted by the Legislature to deliberately bring specific categories of conceded nonemployees within the coverage of the Act . . . and to *prevent principal contractors*, intermediate contractors, and sub-contractors *from relieving themselves of liability* under the Act *by doing through sub-contractors what they would otherwise do through the agency of direct employees.'*

(citing Larson, The Law of Workmen's Compensation, vol. 1C § 49.00 *et seq.*) (emphasis added) (citations omitted). We conclude that in the present case, the legislative intent and purpose of G.S. § 97-19 would be served by imposing liability upon defendants. We further conclude that any other result would defy the explicit purpose of G.S. § 97-19, by permitting general contractors to circumvent the law and to insulate themselves from liability simply by interposing an additional "layer" of subcontractors.

Additionally, we observe that when appellate courts in other jurisdictions have interpreted similar statutes, they generally have concluded that the statute may be applied to employees of a subsubcontractor, even if the general contractor did not enter into a contract

with the claimant's employer. In *Brogno v. W & J Associates, Ltd.*, 698 A.2d 191, 195 (R.I. 1997), the Rhode Island Supreme Court summarized rulings from several "sister-states" in which workers' compensation statutes were "construed to make the general contractor the statutory employer for the employees of a sub-subcontractor where the general contractor had failed to require proof of insurance from the subcontractor." This is exactly the situation presented in the case *sub judice*. The *Brogno* Court also observed that:

> the common denominator discernible [among the states adopting this interpretation] . . . is a clearly expressed legislative intention to provide relief to an injured employee when the general contractor . . . failed to obtain written documentation from [subcontractor] assuring that it had workers' compensation insurance[.]

Id. Similar conclusions have been reached in Mississippi and Pennsylvania. *See Crowe v. Brasfield & Gorrie Contractor*, 688 So. 2d 752, 757 (Miss. 1996) (where subsubcontractor does not have workers' compensation insurance, "the injured employee could ascend the hierarchy to get workers' compensation coverage from the subcontractor immediately above his employer or further up until he received coverage"); *see McCarthy v. Dan Lepore & Sons Co., Inc.*, 724 A.2d 938, 941 (Pa. Super. Ct. 1998), *appeal denied*, 560 Pa. 707, 743 A.2d 921 (1999):

> [T]he key element of statutory employer status is the vertical relationship between the general contractor, the subcontractor, and the sub-subcontractor, whose employee was injured. . . . [B]y virtue of the vertical relationship, *all of the contractors up the ladder remain potentially liable under the Act for payment of the injured employee's workers' compensation benefits*. . . .

(emphasis added) (citation omitted). A Utah case held that:

> 'In the increasingly common situation displaying a hierarchy of principal contractors upon subcontractors upon sub-subcontractors, *if an employee of the lowest subcontractor on the totem pole is injured*, there is no practical reason for *reaching up the hierarchy* any further than the *first insured contractor*.'

Jacobsen v. Industrial Comm'n of Utah, 738 P.2d 658, 661 (Utah Ct. App. 1987) (quoting 1C A. Larson, Workmen's Compensation Law, § 49.14 (1986)) (emphasis added). The same conclusion was reached in New York:

> [O]ur concern is *whether [the workers' compensation statute] was intended* to *extend liability to a subcontractor that is twice removed from the uninsured employer.* We are of the opinion *that it was so intended.* The purpose of the statute, in our view, is to protect an injured employee and place liability on the insured contractor or subcontractor *nearest to the uninsured employer in the chain* of subcontractors. A contrary conclusion would frustrate the true intent of the statute[.]

Minnaugh v. Topper & Griggs, Inc., 69 A.D.2d 965, 966, 416 N.Y.S.2d 348, 349 (N.Y. App. Div. 3d Dep't. 1979) (emphasis added). Finally, from Tennessee:

> The injured employee was an employee of a sub-contractor under the sub-contractor . . . . In other words, as between the parties in this case it is a stepping stone. . . . [T]he primary responsibility is on first the employer of the injured employee, then if that employer can't pay him, he must take it a step up. There is no connection between this injured employee and the sub-contractor and the general contractor. They are only connected by reason of the statute.

Tayloe Paper Co. v. Jameson, 211 Tenn. 232, 239, 364 S.W.2d 882, 885-86 (1963).

Thus, appellate courts in other jurisdictions have concluded that "more than one employer in *a contractor subcontractor employer pyramid* may qualify as an injured worker's statutory employer[.]" *Selle v. Boeing Co.*, 17 Kan. App. 2d 543, 543, 840 P.2d 542, 542 (1992). These decisions employ a variety of metaphors to describe relationships among general contractor, subcontractors, and subsubcontractors. However, regardless of whether the parties are characterized as a chain, a ladder, a totem pole, a pyramid, stepping stones, or simply a hierarchy, the stated conclusion is the same as that reached by the Industrial Commission in the instant case: that the "chain of liability extends from the immediate employer of the injured employee up the chain to the first responsible contractor who has the ability to pay." Further, we agree with the Rhode Island Supreme Court:

> To hold otherwise would be to permit general contractors and construction managers to be relieved of responsibility merely by ensuring that the project is sub-subcontracted out. . . . [O]ur holding ensures that both general contractors and [subcontractors] require written proof of workers' compensation insurance which

in turn will ensure that subcontractors require the same from the sub-subcontractors, and so on down the line.

Brogno v. W & J Associates, Ltd., 698 A.2d 191, 194 (R.I. 1997). While clearly not precedent for this Court, these holdings from other jurisdictions are persuasive.

Defendants also argue that imposing workers' compensation liability upon them is improper because, even if they are deemed to be plaintiff's statutory employer, they would still be subject to a tort suit by plaintiff. Defendants misstate the law in this regard. *See, e.g., Rich v. R.L. Casey, Inc.*, 118 N.C. App. 156, 158-59, 454 S.E.2d 666, 667 (where "defendant, as a principal contractor, is plaintiff's statutory employer" defendant is "entitled to benefit" from exclusivity provisions of workers' compensation law, and "workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constitute[] plaintiff's exclusive remedy"), *disc. review denied*, 340 N.C. 360, 458 S.E.2d 190 (1995).

We conclude that the Industrial Commission did not err by concluding that on the facts of this case G.S. § 97-19 may be applied to defendants to impose liability for plaintiff's workers' compensation benefits and compensation.

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[2] Defendants also argue that the Industrial Commission erred by finding that it was "more likely than not" that Hagood had received notice that Schuette's workers' compensation insurance was cancelled. Because we conclude that the issue of notification is irrelevant on the facts of this case, we are not required to resolve this question.

G.S. § 97-19, which addresses certain obligations and responsibilities attendant upon the parties' execution of contracts, is written in terms of individual contracts and subcontracts ("Any principal contractor, intermediate contractor, or subcontractor *who shall sublet any contract* for the performance of any work") (emphasis added). In this vein, the statute provides that a general contractor who obtains a certificate of compliance with workers' compensation "at the time of subletting such contract" is relieved of liability as regards employees injured in the performance of the contract. In that situation, the issue of notification to the general contractor regarding termination of the subcontractor's workers' compensation insurance may be relevant:

> [The general contractor] complied with N.C.G.S. § 97-19 by obtaining a certificate of insurance, *at the time of subletting its contract to [subcontractor]*, . . . and thereafter in good faith relied on its purported validity in the absence of notice of cancellation prior to the expiration of the policy period. . . . [The general contractor] did not have knowledge of the cancellation prior to plaintiff's injury. Accordingly, we conclude that the Commission's findings support the conclusion that [general contractor] was not a statutory employe[r].

Patterson v. Markham & Associates, 123 N.C. App. 448, 453-54, 474 S.E.2d 400, 403, *disc. review denied*, 344 N.C. 474, 478 S.E.2d 5 (1996). Based upon *Patterson* and G.S. § 97-19, it appears that a general contractor who obtains a certificate of workers' compensation insurance is entitled to rely upon its validity until the earlier of (1) the completion of the contract, or (2) notification that the insurance was cancelled. However, in the case *sub judice*, it is undisputed that defendant Hagood failed to comply with G.S. § 97-19 when it subcontracted framing to Schuette for the job on which plaintiff was injured. As Hagood failed to obtain a certificate of insurance when it sublet the contract, notification of the cancellation of Schuette's workers' compensation insurance is irrelevant.

Nor was the defendant's act of requiring a certificate for the first contract that they sublet to Schuette sufficient to demonstrate compliance with G.S. § 97-19 as regards the later contract. In *Southerland v. B.V. Hedrick Gravel & Sand Co.*, 345 N.C. 739, 483 S.E.2d 150 (1997), the North Carolina Supreme Court upheld the Industrial Commission's conclusion that to comply with G.S. § 97-19 a general contractor must actually *obtain* a certificate:

> Defendants' argument that by contracting with plaintiff to the effect that plaintiff *shall* furnish a certificate of insurance, defendants "required" from plaintiff a certificate of insurance and therefore satisfied N.C.G.S. § 97-19, . . . [although] defendants [n]ever actually received a certificate . . . is without merit. The . . . word 'require' in this instance means in fact actually obtain a certificate.

Id. at 741, 483 S.E.2d at 151. In the instant case, it is uncontroverted that defendants neither requested nor obtained a certificate for the contract at issue.

Finally, we observe that defendant Hagood was free to execute a contract with Schuette that sublet several jobs in a single contract.

Or, if defendants wished to secure Schuette's assistance with framing on an "as needed" basis, they might have hired Schuette as an employee. Indeed, after finishing the job at issue herein, Schuette went to work for Hagood as an employee. However, in the present case, defendants chose to structure their business relationship by executing a series of individual contracts for separate construction projects. Having chosen voluntarily to sublet a series of individual contracts, defendants were required by G.S. § 97-19 to obtain a certificate for each separate contract.

For the reasons discussed above, we conclude that the Industrial Commission's findings of fact were supported by competent evidence, and that they support its conclusions of law. We further conclude that the Industrial Commission did not err by concluding that defendants are liable for plaintiff's workers' compensation benefits. Accordingly, the opinion and award of the Industrial Commission is

Affirmed.

Judge MARTIN concurs.

Judge TYSON concurs in the result with separate opinion.

TYSON, Judge concurring.

I concur with the result of the majority's opinion which affirms the opinion and award of the North Carolina Industrial Commission ("Commission"). I agree with the majority's determination that N.C. Gen. Stat. § 97-19 provides liability to the general contractor when an employee of the subcontractor is injured under these facts. The majority's discussion and focus on out of state statutes and case law is not germane to the resolution of this case. The language of North Carolina's statute and case law is sufficient to impose liability on the general contractor unless there is a defense.

N.C. Gen. Stat. § 97-19 provides a defense to the general contractor's liability. "If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate [verifying workers' compensation insurance] *at the time of subletting such contract to subcontractor*, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this Article." N.C. Gen. Stat. § 97-19 (2003). Under the statute, a contrac-

tor is entitled to a defense from liability if, "at the time of subletting" the contract covering the job in which the employee was injured, the contractor had obtained a certificate of insurance. If there is one contract with multiple houses, only one certificate covering the period of work need be obtained. However, if there are separate and distinct contracts, the statute requires a new certificate be issued at the time of subletting each contract.

James Kenny, president of Hagood Homes, testified that when he received the certificate of insurance for Precision Homes he had only "one verbal contract with [Precision Homes] at that time for one house." The certificate of insurance specifically stated that it was provided for Lot 15 Magnolia Greens. Kenny acknowledged that he did not request subsequent certificates of insurance for the later jobs. Eric Schuette, owner of Precision Homes, testified that each house was a separate verbal contract between Precision Homes and Hagood Homes.

The Commission found:

> 6. Schuette and Hagood Home began working together in March of 1999. At that time, Schuette and Jim Kenny, president of Hagood Homes, entered into a verbal contract for Schuette to frame a house on Lot 15 in the Magnolia Green subdivision. That was the only house contracted for at that time. . . . The certificate [of insurance], provided in discovery, had a notation at the bottom that it was for Lot 15 Magnolia Green, and that the policy was to be effective for the period from March 16, 1999 to March 16, 2000.
>
> 7. Schuette completed the house on Lot 15, and then over the next six months entered into separate verbal contracts with Jim Kenny to do four more houses. Each house was a new verbal contract. The evidence is uncontradicted that Jim Kenny did not request a new certificate of insurance at the time each new contract was entered into with Schuette. Had Kenny asked for a certificate of insurance at the time the contract on the house plaintiff was injured at was sublet, Schuette would not have been able to provide one, because his insurance had been canceled. . . .

Neither of these findings of fact are contested and they are binding on appeal. There is competent evidence in the record to support the findings of the Commission that Hagood Homes and Precision Homes entered into separate contracts. Because the contracts were

separate and Hagood did not request nor receive a subsequent certificate of insurance at the time of subcontracting the house where plaintiff was injured, Hagood cannot defend under N.C. Gen. Stat. § 97-19 on the grounds that he (1) received a certificate of insurance for the first house and (2) did not receive notice of the cancellation of the insurance.

Hagood Homes does not have a defense under N.C. Gen. Stat. § 97-19 to the imposition of liability for the injury by accident of plaintiff. I vote to affirm the Commission's order.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS GLASCO

No. COA02-602

(Filed 2 September 2003)

1. Evidence— exhibits—authentication

The trial court did not err in a possession of a firearm by a convicted felon case by admitting several of the State's exhibits including an AK-47 magazine, an AK-47 rifle, a brown bag containing a plastic garbage bag, the plastic garbage bag, and a plastic bag with casings and bullets, even though defendant contends the State failed to lay a proper foundation to authenticate those exhibits, because: (1) defendant neither objected to the admission of the AK-47 magazine at trial nor used it as the basis for an assignment of error in the record on appeal; (2) the State's witnesses properly identified each exhibit at trial and stated that there was no material change in the condition of the exhibits from the seizure to the analysis to the identification during trial; and (3) contrary to defendant's assertion, the testing marks on the garbage bag do not constitute material alterations.

2. Firearms and Other Weapons— possession of a firearm by a convicted felon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon under N.C.G.S. § 14-415.1 based on alleged insufficient evidence that defendant had possession of the firearm because circumstantial evidence tended to show that defendant had discharged a

gun, giving rise to a reasonable inference that he possessed that gun at least long enough to fire it.

3. Criminal Law— prosecutor's argument—defendant's alleged flight

Although the prosecutor made improper remarks concerning defendant's alleged flight in a possession of a firearm by a convicted felon case when in fact defendant was only seen jumping over a nearby fence and the trial court had refused to give a jury instruction on the alleged flight, the trial court did not abuse its discretion by refusing to declare a mistrial because the improper comments did not rise to the level of being prejudicial.

4. Firearms and Other Weapons— possession of a firearm by a convicted felon—motion to set aside verdict—motion for new trial

The trial court did not abuse its discretion in a possession of a firearm by a convicted felon case by failing to grant defendant's motion to set aside the verdict or grant a new trial even though defendant contends there was insufficient evidence to infer that he possessed a firearm and the fact that the jury did not find him guilty of firing into an occupied residence suggested that the jury was confused by the charges, because: (1) the evidence on the bag that tended to show defendant had a weapon supported the possession charged, but the jury may not have been persuaded that defendant fired those particular shots; and (2) the evidence was sufficient to support the jury's verdict.

5. Sentencing— habitual felon—utilizing same felony as basis for underlying conviction

The indictment used to charge defendant for being an habitual felon did not violate defendant's double jeopardy rights by allegedly utilizing the same felony charge as the basis for his underlying conviction for possession of a firearm by a convicted felon and as one of the three underlying felonies used to elevate him to habitual felon status, because our courts have determined that elements used to establish an underlying conviction may also be used to establish a defendant's status as a habitual felon.

Appeal by defendant from judgment entered 7 September 2001 by Judge Stafford G. Bullock in Superior Court in Vance County. Heard in the Court of Appeals 20 February 2003.

Attorney General Roy Cooper, by Fred Lamar, Assistant Attorney General, for the State.

James N. Freeman, Jr. for defendant/appellant.

HUDSON, Judge.

The grand jury indicted defendant William Thomas Glasco on charges of discharging a firearm into occupied property, possession of a firearm by a convicted felon, and for being an habitual felon. On 7 September 2001, a jury found him not guilty of discharging a firearm into occupied property, and guilty of possession of a firearm while a felon. Defendant then entered a plea of guilty to the status of habitual felon, and the court sentenced him to a prison term of 121 to 155 months. Defendant now appeals.

He appeals, contending that the trial court erred (1) by allowing various exhibits to be introduced at trial; (2) by denying his motion to dismiss; (3) by not declaring a mistrial based on the prosecutor's improper comments during closing arguments; (4) by failing to grant defendant's motion to set aside the verdict or grant a new trial. Defendant also contends that the trial court should have dismissed the habitual felon indictment because it violated defendant's right to be free from double jeopardy. For the reasons set forth below, we find no prejudicial error.

BACKGROUND

The State's evidence at trial tended to show the following:

On 29 April 2000, around 9:00 or 9:30 p.m., Kathleen Barnes returned to her home in Henderson, North Carolina. She took a shower and, just as she was finishing, heard shooting that sounded like it was coming into her house. Barnes stayed on the floor for a few minutes until the shooting stopped, and then she and her brother heard a commotion and went outside. Barnes testified that she recognized defendant, who was in a police patrol car by that time. Defendant is the first cousin of Barnes' husband.

On cross-examination, Barnes admitted that, before this shooting incident she had sought police assistance because of domestic abuse problems with her husband. After the incident, Barnes reconciled with her husband, but later left him again after he committed domestic violence against her. She also testified that on the day of the shooting, she saw her husband driving by her house with a "very dark person in the truck with him" pointing toward the house.

Barnes' neighbor Barbara Marshall, testified that on the evening of 29 April 2000, she heard a lot of gunshots. She opened her back door and saw a man wearing a black or brown jacket holding a paper sack or trash bag and jumping over the fence behind the utility shed belonging to her neighbor, Ronald Camp. Marshall testified that she later saw defendant in the police car, and that he appeared to be wearing clothes like the person she had seen near the fence. She then identified defendant positively as the man she had seen jumping over the fence.

Deputy Sheriff Lloyd Watkins testified that he was called to the scene at approximately 10:00 or 11:00 p.m. When he arrived, people sitting outside told him that the house was "shot up." After asking the people outside to describe the shooter, police canvassed the area and found defendant standing near the street four or five houses up from Barnes's home. Watkins and Officer Root-Ferguson patted defendant down and found a bundled trash bag under his jacket. Root-Ferguson said that defendant claimed that the bag was a "sweat bag" and that he had been running.

Ronald Camp, who lived two doors down from Marshall near Barnes, testified that he and his family were out when the shooting occurred. When they returned, they noticed the commotion. Camp then searched for and found an AK-47 rifle hidden in a pile of tires beside his backyard shed, and directed the police to the gun.

Officer Root-Ferguson testified that he talked to a number of witnesses at the scene and that none but Marshall could positively identify defendant as the individual they saw involved in the shooting. Root-Ferguson confirmed that his incident report indicated that one of the witnesses told him that defendant was not the man she had seen. Root-Ferguson did not take the name or address of this witness or any of the others who could not positively identify defendant.

Caroline Bachelor, who worked with Kathleen Barnes, testified that an AK-47 identical to the one admitted into evidence at trial was stolen from her house about the same time as the shooting. She said that someone stole the gun from a closet in her home during a housewarming party, and that she reported the theft either the day of the shooting or the day after.

Ricky Navarro, a latent evidence expert for the State Bureau of Investigation, testified that the latent fingerprint remnants found on the AK-47 were not of sufficient quality to form the basis for an identification.

Detective Jim Cordell of the Vance County Sheriff's Department testified for defendant. Cordell said that he had interviewed Barnes on 2 May 2000 and 9 May 2000 regarding the shootings. Barnes told Cordell that on 9 May 2000, ten days after the shooting, she had spoken with Bachelor at work. Bachelor had asked Barnes whether her husband was trying to kill her and told Barnes that it was her gun that was used in the shooting. Cordell also indicated that his interview summaries were in the investigation file in the case, but that after he completed the interview, Root-Ferguson took over primary investigation of the case.

ANALYSIS

I.

[1] Defendant first argues that the State failed to lay a proper foundation by which to authenticate State's Exhibits 5-9 and that such failure was prejudicial and requires a new trial. We do not agree.

In North Carolina, evidence that is identified and introduced in court as the object that was actually involved in the subject incident is referred to as "real evidence." *State v. Harbison*, 293 N.C. 474, 483, 238 S.E.2d 449, 454 (1977). When real evidence is properly identified, it is freely admissible. *State v. Williamson*, 146 N.C. App. 325, 335, 553 S.E.2d 54, 61 (2001), *disc. review denied*, 355 N.C. 222, 560 S.E.2d 366 (2002) (citation and quotation marks omitted). It must "simply 'be identified as the same object involved in the incident in order to be admissible' and as not having undergone any material change." *Id.* (citation omitted). Authentication of real evidence " 'can be done only by calling a witness, presenting the exhibit to him and asking him if he recognizes it and, if so, what it is.' " *State v. Bryant*, 50 N.C. App. 139, 141, 272 S.E.2d 916, 918 (1980) (quoting 1 *Stansbury's North Carolina Evidence* § 26 (Brandis rev. 1973)). Moreover, "[a]s there are no specific rules for determining whether an object has been sufficiently identified, the trial judge possesses, and must exercise, sound discretion." *Williamson*, 146 N.C. App. at 336, 553 S.E.2d at 61 (citation and quotation marks omitted).

First, defendant challenges the admission of State's Exhibit 6 (the AK-47 magazine). Defendant neither objected to the admission of State's Exhibit 6 at trial nor used it as the basis for an assignment of error in the record on appeal. Accordingly, we conclude that he waived this issue. N.C.R. App. P. 10(b)(1).

The remaining exhibits defendant challenges are the AK-47 rifle (Exhibit 5); a brown bag that contained a plastic garbage bag (Exhibit 7); the plastic garbage bag (Exhibit 8); and a plastic bag with casings and bullets (Exhibit 9). Officer Root-Ferguson identified each exhibit at trial as being in substantially the same condition and appearance as when he first saw them, with the exception of marks on the garbage bag made by technicians. Root-Ferguson clearly identified the rifle as being the same as that shown to him by Mr. Camp, who had found the rifle near his shed where defendant was seen jumping a fence. Likewise, regarding the garbage bag, Root-Ferguson testified that he found the item on defendant's person, bundled under his jacket. That same night he placed the garbage bag inside a paper bag, sealed it, and marked it as evidence.

Detective John Almond, the officer in charge of the evidence room, then took and retained custody of the garbage bag and the casings and bullets. Almond testified that he was responsible for retaining custody over evidence submitted by the officers, for transferring evidence to the State Bureau of Investigation ("SBI"), and for making the evidence available to the officers for court. He testified that he had custody of State's Exhibits 5, 6, 7, 8, and 9 and was familiar with them. He said that he had delivered the exhibits to the SBI and that they were mailed back to him.

Forensic firearm and tool mark examiner Thomas Trochum tested the garbage bag and the casings and bullets after their receipt by the SBI. Ricky Navarro, the SBI latent evidence expert, tested the rifle and then returned it to Trochum. After concluding his examinations, Trochum returned the exhibits to Roosevelt Ryals, an SBI evidence technician, who then sent them to Almond via United Parcel Service.

This evidence reveals that the State's witnesses properly identified each exhibit at trial and that there was no material change in the condition of the exhibits from the seizure to the analysis and to the identification during the trial. Contrary to defendant's assertion in his brief, the testing marks on the garbage bag do not constitute material alterations. Moreover, even though defendant argues that the rifle and magazine could have been altered or changed because they were discarded in a pile of tires, there was no evidence that they were altered. Officer Root-Ferguson testified simply that the exhibits at trial were the same as those found in the tire pile. We conclude that the exhibits were properly admitted. *E.g.*, *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 10-11 (1984) (weapons,

projectile, and casings properly admitted where the State established a chain of custody and established that there were no material changes in the items' conditions).

II.

[2] Next, defendant argues that the trial court erred by denying his motion to dismiss all charges on the grounds of insufficiency of the evidence. Specifically, he contends that the State failed to prove that he possessed the assault rifle. Again, 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 evidence, both direct and circumstantial, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *Id.* The trial court neither weighs the evidence nor considers evidence unfavorable to the State because weighing the evidence and assessing the credibility of witnesses fall within the province of the jury. *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed 2d 162 (2002).

Here, defendant was charged with possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. Pursuant to section 14-415.1(a), 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." N.C. Gen. Stat. § 14-415.1(a) (2001). Defendant does not challenge his status as a convicted felon; thus, his sole contention on appeal is that the evidence was insufficient for the jury to find that he had possession of the firearm.

Possession may either be actual or constructive. *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). When the defendant, " 'while not having actual possession, . . . has the intent and capability to maintain control and dominion over' the [property]," he has constructive possession of the item. *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (citation omitted). This Court has

previously emphasized that " 'constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury.' " *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001), *affirmed*, 356 N.C. 141, 567 S.E.2d 137 (2002) (citation omitted) (emphasis omitted).

Viewed in the light most favorable to the State, we conclude that the circumstantial evidence here was sufficient to withstand a motion to dismiss and allow the jury to resolve the issue. *State v. Clark*, 138 N.C. App. 392, 403, 531 S.E.2d 482, 489 (2000), *cert. denied*, 353 N.C. 730, 551 S.E.2d 108 (2001) ("[a]though the State's case centered around circumstantial evidence, taken in the light most favorable to the State, it was sufficient to withstand the defendant's motions to dismiss"). Barnes' neighbor Barbara Marshall, testified that shortly after the shooting incident she saw defendant jumping over a fence into her back yard, near the shed in Ronald Camp's yard. Camp then found the gun in his back yard, near the shed in a pile of tires. The SBI analyst testified that the garbage bag found on defendant's person had firearm discharge residue in it. The analyst also explained that at least two of the holes in the bag were physically altered through melting and chemicals from lead particulate and vapor, signs consistent with discharging a firearm from inside the bag. Because this evidence tended to show that defendant had discharged a gun, we also conclude that it gave rise to a reasonable inference that he possessed that gun, at least long enough to fire it. Such evidence, when taken in the light most favorable to the State, provides a sufficient link between defendant and a firearm to allow for the jury's consideration. *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991), *affirmed*, 331 N.C. 113, 413 S.E.2d 798 (1992) (issues of constructive possession are properly determined by the jury). We overrule this assignment of error.

III.

[3] Defendant also argues that the trial court erred by not declaring a mistrial after the State argued facts not in evidence during closing arguments to the jury. More precisely, defendant takes issue with the State's references to his alleged flight from the scene of the crime even though the trial court had refused to give a jury instruction concerning defendant's flight. Although we agree that the remarks were inappropriate, we do not believe that in context they warrant a new trial.

In *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), our Supreme Court recognized the need to "strike a balance between giving appropriate latitude to attorneys to argue heated cases and the need to enforce the proper boundaries of closing argument and maintain professionalism." *Id.* at 135, 558 S.E.2d at 108. In assessing those boundaries, the Supreme Court listed four requirements for a closing argument: that it "(1) be devoid of counsel's personal opinion; (2) avoid[s] name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial." *Id.* Such requirements must be viewed in light of the well-established principle that prosecutors are afforded wide latitude in presenting closing arguments to the jury. *See State v. Prevatte*, 356 N.C. 178, 570 S.E.2d 440 (2002), *cert. denied*, — U.S. —, 155 L. Ed. 2d 681 (2003). However, as the *Jones* court noted, " 'wide latitude' has its limits." *Jones*, 355 N.C. at 129, 558 S.E.2d at 105.

Here, defense counsel interposed a timely objection to each reference that the State made to defendant's alleged flight; thus, we review the court's rulings for abuse of discretion. *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. A prosecutor's improper remark during closing arguments does not justify a new trial unless it is so grave that it prejudiced the result of the trial. *State v. Westbrooks*, 345 N.C. 43, 70, 478 S.E.2d 483, 500 (1996). Such prejudice is established only where the defendant can show that the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. Morston*, 336 N.C. 381, 405, 445 S.E.2d 1, 14 (1994) (citations and quotation marks omitted).

Here, the prosecutor twice referred to evidence that defendant was seen fleeing from the scene of the crime, when in fact defendant was only seen jumping over a nearby fence, and the trial court had refused to give a jury instruction on the alleged flight. Although we agree with defendant that the prosecutor should not have mentioned defendant's alleged flight, we cannot agree that the error is so grave that it prejudiced the result of the trial. *Westbrooks*, 345 N.C. at 70, 478 S.E.2d at 500. Defendant argues that he should receive a new trial because "this Court cannot say that there can be no reasonable possibility that a different result would have been reached," in the absence of these comments. The standard of review, however, is abuse of discretion prejudicing the outcome. Defendant has not clarified, nor have we been able to ascertain, how the improper com-

ments rise to the level of those that our courts have found to be prejudicial in other cases. *E.g.*, *State v. Allen*, 353 N.C. 504, 508, 546 S.E.2d 372, 374 (2001) (new trial granted where prosecutor told jury during closing arguments that they had been allowed to hear a certain piece of the State's evidence "because the Court found [the evidence was] trustworthy and reliable . . . . If there had been anything wrong with that evidence, you would not have heard that;" court determined that the statement "traveled outside the record"); *State v. Jordan*, 149 N.C. App. 838, 843, 562 S.E.2d 465, 468 (2002) (mistrial granted where the prosecutor compared defendant's counsel to Joseph McCarthy; the prosecutor "thoroughly undermined [the defendant's] defense by casting unsupported doubt on counsel's credibility and erroneously painting defendant's defense as purely obstructionist"). Here, the jury was able to analyze the evidence in so discerning a manner as to find defendant not guilty of discharging a firearm into occupied property, while finding him guilty of possessing a firearm. In sum, we do not think that the trial court abused its discretion in refusing to declare a mistrial.

IV.

[4] Defendant next argues that there was insufficient evidence to infer that he possessed a firearm, and the fact that the jury did not find him guilty of firing into an occupied residence suggests that the jury was confused by the charges since "no evidence was presented that would show [defendant] in possession of a firearm." As discussed above, the evidence on the bag that tended to show defendant had a weapon supported the possession charge, but the jury may not have been persuaded that he fired those particular shots. We believe that the jury's determination that defendant was not guilty of shooting into Barnes' home could indicate the jury's careful deliberation, rather than any confusion on their part. "The decision to grant or deny a motion to set aside the verdict is within the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion." *State v. Serzan*, 119 N.C. App. 557, 561-62, 459 S.E.2d 297, 301 (1995), *cert. denied*, 343 N.C. 127, 468 S.E.2d 793 (1996). When the evidence at trial is sufficient to support the jury's verdict, there is no abuse of discretion in the trial court's denial of defendant's motion to set aside the verdict. *Id.* Because we have held that the evidence was sufficient to support the jury's verdict, there is no abuse of discretion, and defendant's assignment of error is overruled.

V.

[5] This Court, on its own motion, requested that the parties file any additional arguments that they deemed appropriate regarding issues raised by the indictment for habitual felon (01CRS009113), which was not originally in the record on appeal. In response, defendant argues that the indictment violates his constitutional rights by utilizing the same felony charge as the basis for his underlying conviction for possession of a firearm by a convicted felon and as one of the three underlying felonies used to elevate him to habitual felon status. We do not agree.

More specifically, defendant argues that he was impermissibly subjected to double jeopardy because the court used the offense of possession with intent to sell and deliver cocaine to support both the underlying substantive felony (the "felon" portion of the offense of felon in possession of a firearm) and the habitual felon indictment. Our courts have determined that elements used to establish an underlying conviction may also be used to establish a defendant's status as a habitual felon. *State v. Misenheimer*, 123 N.C. App. 156, 158, 472 S.E.2d 191, 192-93 (1996), *cert. denied*, 344 N.C. 441, 476 S.E.2d 128 (1996). As the relevant statutes do not indicate otherwise, we are bound to follow this ruling and reject defendant's argument. N.C. Gen. Stat. §§ 14-7.1 & 7.6 (2001).

CONCLUSION

For the reasons set forth above, we find no prejudicial error in defendant's conviction.

No Prejudicial Error.

Judges McGEE and STEELMAN concur.

CYNTHIA SMITH-PRICE, PLAINTIFF-EMPLOYEE v. CHARTER PINES BEHAVIORAL CENTER, DEFENDANT-EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANT-CARRIER

No. COA02-1122

(Filed 2 September 2003)

Workers' Compensation— post-traumatic stress disorder— mental health nurse

The Industrial Commission could properly find in a workers' compensation case that a mental health nurse with post-traumatic stress disorder suffered from a compensable occupational disease, even though evidence to the contrary existed. Plaintiff presented evidence that supports the Commission's determination that her mental disorders stem from a job with unique stresses to which the general public is not exposed.

Appeal by defendants from opinion and award filed 30 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2003.

Gray, Newell, Johnson & Blackmon, L.L.P., by Angela Newell Gray, for plaintiff appellee.

Davis and Hamrick, L.L.P., by Shannon Warf Beach, for defendant appellant.

McCULLOUGH, Judge.

Plaintiff, a registered nurse who formerly worked at defendant Charter Pines Behavioral Center (hereinafter "Charter") filed a Workers' Compensation action against defendant claiming that she suffered from post-traumatic stress disorder (PTSD), an occupational disease which arose from her employment. On 25 April 2001, the Deputy Commissioner denied her claim on the basis that plaintiff failed to prove that her condition resulted from an occupational disease characteristic of her employment excluding ordinary diseases of life to which the general public is equally exposed. Plaintiff appealed to the Full Commission, and on 30 April 2002, the Full Commission filed an opinion and award reversing the decision of the Deputy Commissioner and allowing benefits for an occupational disease with Commissioner Mavretic dissenting. Defendants appeal on the basis that the Commission erred in finding plaintiff's occupational disease compensable under the Workers' Compensation Act.

The evidence before the Commission tended to show that this was plaintiff's first job upon graduating from nursing school. According to plaintiff, Charter apparently had administrative and staffing problems. This led to her doing more than what her job originally required. Further, the Mental Health Assistants (MHA's) of whom she was in charge failed to do their jobs, again according to plaintiff, causing her to have to do portions of their jobs as well. This was in addition to the stress that came from working with patients whose problems ranged from being suicidal, homicidal, or otherwise disturbed due to mental disease and/or substance abuse.

One of the MHA's, Jay Laws, gave plaintiff particular problems. On one occasion, plaintiff asked Laws to perform a particular function which Laws apparently believed was not in his job description. Laws became angry, yelling and throwing documents at plaintiff while patients were nearby watching. Further, Law and another MHA, Ann Cutts, were having an extramarital affair, and would indulge themselves while on duty, further neglecting their duties.

On 5 February 1998, plaintiff instructed Laws to perform a function. Again, Laws refused. Plaintiff pressed Laws by warning him that if he did not do as she instructed, she would report him and have him sent home. Laws did not back down, and informed plaintiff he would retaliate by telling the superiors that plaintiff had been sexually involved with other employees.

Plaintiff went to the hospital administration, but was not given any assistance. Laws continued to disobey plaintiff, so plaintiff filed a written complaint and Laws was sent home and lost one day's pay.

Laws came in the next day and made good on his promise, making an explicit and detailed written complaint accusing plaintiff of sexual harassment. Apparently, the investigation into these allegations, which substantiated some of the claim, was also done in such a way as to cause plaintiff further anguish and embarrassment.

"The culmination of these events at Charter resulted in plaintiff's experiencing debilitating migraine headaches[.]" Plaintiff stopped going to work on 10 February 1998 as the migraines became overwhelming. She saw a psychiatrist, Dr. Randy Readling, who noted that her visit was related to the event with Laws. He diagnosed her with PTSD, the onset of which was due to the events at Charter. The Full Commission noted Dr. Readling's testimony:

d) Plaintiff had a previous history of an abusive relationship; however she had functioned very well for years. Plaintiff had gone through nursing school; had supported herself and her children in the interim between her first divorce and second marriage and *was functioning very well at Charter until this incident occurred.*

(Emphasis added.) However, Dr. Readling also noted, as the Full Commission found:

e) Many incidents occurred at Charter that caused stress to plaintiff, including plaintiff's concern about the safety of the children, improper staffing, and being instructed to clock out while still being required to continue working. Plaintiff received no support from supervisors, which caused her a great deal of stress.

f) An incident involving the death of a child patient at Charter in March, 1998, impacted the plaintiff strongly because the plaintiff took it very personally. Plaintiff's best friend was a nurse who had been on the unit at the time of the child's death. Newspapers, numerous television stations/shows, including 60 minutes and the local news, ran stories about the death of the child at Charter, as well as the overall incompetence of Charter Staff members and inadequate care provided to Charter patients. Plaintiff felt that if she had voiced her concerns louder perhaps something would have changed to have prevented the death of the child.

Dr. Readling was of the opinion that plaintiff's job was a stressful position, and that she "was exposed to an increased risk of developing stress or some type of symptom like stress as a result of her job at Charter. . . . Someone working as a nurse in a psychiatric hospital is exposed to a much higher degree of stress than the general public."

Plaintiff also saw Dr. John Rodenbough, a neuropsychologist. Like Dr. Readling, Dr. Rodenbough diagnosed plaintiff with PTSD due to events at Charter. The Full Commission noted that plaintiff was fearful of an individual at her job, namely, Laws.

e) Plaintiff expressed a lack of support that occurred around her employment in relationship to what was happening with ["Jay"] and the things that were happening at work.

f) Plaintiff complained about interactions with Jay Laws regarding aggressive conflicts, including throwing objects at her. A letter that was produced by Laws regarding graphic sexual activity he contends occurred between both himself and the plaintiff; or other male employees and the plaintiff, was given to Jean Hubbard. Hubbard shared the details of those accusations with non-essential personnel. The reaction to the letter by plaintiff's supervisors created a great deal of fear in plaintiff.

g) A critical element essential for the diagnosis of PTSD is the patient's perception of whether their life is in danger of or [sic] either bodily harm or death. One of the variables that played a significant role in the diagnosis of PTSD was the supervisor's response to the situation at work.

h) Plaintiff was transferred because of the sexual allegations of Laws, and the letter became semi-public knowledge with colleagues that plaintiff worked with. Physicians and other staff members were talking about the letter. This was very frightening to the plaintiff. She did not feel supported at work. Plaintiff felt she was being punished because of the letter. Plaintiff felt that the supervisors were treating her offensively, and it interfered with her chosen profession.

Another doctor, Dr. James Carter, testified that she was traumatized by this ordeal. A former supervisor at Charter, Irene Adamson, testified that the staff at Charter was improperly trained, disregarded state standards of patient care, and had numerous conflicts, all while attempting to care for the mentally ill patients. According to Adamson, plaintiff's nursing license could have been in jeopardy due to poor job performance by subordinates, as she would have been responsible. Adamson testified that she left Charter due to the "chaotic atmosphere."

The Full Commission found that:

15. Plaintiff's experiences at the job while employed by Charter Pines caused her occupational diseases. These job experiences placed plaintiff at an increased risk for contracting these occupational diseases. Members of the public generally were not exposed to these job experiences. Testimony to the effect that the *type* of job that plaintiff had did not cause her occupational dis-

> eases is not a defense. *The particular experiences of her particular work* caused her occupational disease, not the mere fact that she was a registered nurse in a psychiatric hospital.

In its conclusions of law, the Full Commission noted that it relied on *Keller v. City of Wilmington Police Dept.*, 65 N.C. App. 675, 309 S.E.2d 543 (1983), *disc. review allowed*, 310 N.C. 625, 315 S.E.2d 690 (1984), adding its own emphasis in the following quote:

> "Peculiar to the occupation" means that the *conditions of the employment* (emphasis added) must result in a hazard which distinguished it in character from the general run of occupations and is in excess of attending employment in general.

Id. The Deputy Commissioner also cited this quote in its opinion and award denying plaintiff benefits, and noted that "no evidence to support plaintiff's theory that this was a common problem with registered nurses at Charter. There is not a recognizable [link] between the nature of the plaintiff's job as a registered nurse and an increased risk of contraction of PTSD or job related stress." The Full Commission disagreed and found that plaintiff indeed had contracted a compensable occupational disease.

Standard of Review

The standard for appellate review of an opinion and award of the Industrial Commission is well settled. Review "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980); *see also Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000); *Shah v. Howard Johnson*, 140 N.C. App. 58, 61, 535 S.E.2d 577, 580 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

In addition, "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.' " *Id.* at 61-62, 535 S.E.2d at 580 (quoting *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)). The *Calloway* Court went further stating that "our task on appeal is not to weigh the respective evidence but to assess the *competency* of the evidence in support of

the Full Commission's conclusions." *Calloway*, 137 N.C. App. at 486, 528 S.E.2d at 401.

In *Woody v. Thomasville Upholstery, Inc.*, 146 N.C. App. 187, 552 S.E.2d 202 (2001), *rev'd*, 355 N.C. 483, 562 S.E.2d 422 (2002), it was explained that

> "[f]or a disability to be compensable under our Workers' Compensation Act, it must be either the result of an accident arising out of and in the course of employment or an 'occupational disease.' " *Hansel v. Sherman Textiles*, 304 N.C. 44, 51, 283 S.E.2d 101, 105 (1981). By the express language of N.C. Gen. Stat. § 97-53 (1999), only the diseases and conditions enumerated therein shall be deemed to be occupational diseases within the meaning of the Act. Because neither fibromyalgia nor depression is specifically mentioned in N.C.G.S. § 97-53, the issue is whether these two diseases fall within subsection (13) of the statute, which defines an "occupational disease" as
>
> > [a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.
>
> N.C.G.S. § 97-53(13). Our Supreme Court has interpreted this language as requiring three elements in order to prove that a disease is an "occupational disease": (1) the disease must be characteristic of and peculiar to the claimant's particular trade, occupation or employment; (2) the disease must not be an ordinary disease of life to which the public is equally exposed outside of the employment; and (3) there must be proof of causation (proof of a causal connection between the disease and the employment). *See Hansel*, 304 N.C. at 52, 283 S.E.2d at 105-06 (citing *Booker v. Medical Center*, 297 N.C. 458, 468, 475, 256 S.E.2d 189, 196, 200 (1979)). Further, in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), our Supreme Court explained what is required to establish the first two elements:
>
> > To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from

> the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. Thus, the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. ["]The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation.["]

Id. at 93-94, 301 S.E.2d at 365 (citations omitted).

Id. at 197-98, 552 S.E.2d at 209.

The resolution of this case requires this Court to reconcile the Commission's opinion and award with two principal cases in determining whether plaintiff has met her burden under our case law. Those cases are *Woody*, 146 N.C. App. 187, 552 S.E.2d 202, and *Pulley v. City of Durham*, 121 N.C. App. 688, 468 S.E.2d 506 (1996). In *Woody*, our Supreme Court reversed this Court which had upheld the Commission's finding of a compensable occupational disease for a sales manager at defendant's furniture company where the disease was brought on by conflict with an abusive supervisor. Our Supreme Court adopted Judge Martin's dissent where he stated:

> I must respectfully dissent from that portion of the majority opinion which holds that the evidence and the Commission's findings support its conclusions that plaintiff's employment exposed her to a greater risk of contracting depression and fibromyalgia than the public generally and that her depression and fibromyalgia are compensable occupational diseases.
>
> Although the majority correctly cites the definition of an occupational disease, as contained in G.S. § 97-53(13), and our Supreme Court's interpretation of the statute, as contained in *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979) and further explained in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), I do not believe the majority or the Commission has correctly applied the law to the facts as found by the Commission. Notwithstanding the fact that plaintiff's job-related stress caused her depression and aggravated her fibromyalgia, such facts cannot support the conclusion that plaintiff's mental and physical conditions were occupational diseases

as defined by the statute. The findings indicate merely that plaintiff suffered from depression and fibromyalgia after being placed in the unfortunate position of working for an abusive supervisor, which can occur with any employee in any industry or profession, or indeed, in similar abusive relationships outside the workplace. Therefore, I do not believe plaintiff's conditions can be construed as "characteristic of and peculiar to" her particular employment; they are ordinary diseases, to which the general public is equally exposed outside the workplace in everyday life. *See Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365 ("Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded.") In my view, to hold these conditions to be occupational diseases compensable under G.S. § 97-53(13), under the facts of this case, stretches beyond the intent of the Workers' Compensation Act. Thus, I would reverse the award of compensation.

Woody, 146 N.C. App. at 201-02, 552 S.E.2d at 211.

In *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 566 S.E.2d 807 (2002), this Court and the Commission followed *Woody* in denying benefits stating:

Under appropriate circumstances, work-related depression or other mental illness may be a compensable occupational disease. *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 476 S.E.2d 410 (1996); *Baker v. City of Sanford*, 120 N.C. App. 783, 463 S.E.2d 559 (1995), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996). However, the claimant must prove that the mental illness or injury was due to stresses or conditions different from those borne by the general public. *Woody v. Thomasville Upholstery Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002) (adopting dissent in 146 N.C. App. 187, 202, 552 S.E.2d 202, 211 (2001)). Thus, the claimant must establish both that her psychological illness is " 'due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment' " and that it is not " 'an ordinary disease of life to which the general public is equally exposed.' " *Booker v. Medical Center*, 297 N.C. 458, 468, 256 S.E.2d 189, 196 (1979) (quoting N.C.G.S. § 97-53(13) (2001)); *see also Norris v. Drexel Heritage Furnishings*, 139 N.C. App. 620, 534 S.E.2d 259 (2000) (upholding denial of claim based on occupational disease: although plaintiff's fibromyalgia was caused or aggravated by employment with defendant, there was no evidence that her employment with

> defendant placed plaintiff at an increased risk of contracting or developing fibromyalgia as compared to the general public not so employed).

Id. at 648, 566 S.E.2d at 813.

In *Pulley*, a police officer suffered from depression. The Full Commission found that

> [t]hroughout [plaintiff's] employment as a Police Officer and Public Safety Officer with defendant-employer, plaintiff was involved in dealing with situations in which people were the victims of or had committed criminal acts. Plaintiff was also involved in dealing with situations involving motor vehicles, including instances of personal injury or death. During her period as an officer with the Youth Division, she was involved in dealing with minors who were either committing criminal acts or against whom criminal acts had been committed.

121 N.C. App. at 694, 468 S.E.2d at 510.

A doctor testified that there was a "recognizable link between the nature of police work and increased risk of contracting depression." *Id.* This Court found competent evidence to support all this. Further,

> [t]he Full Commission found that "when asked the causes of the depression and post-traumatic stress syndrome, Dr. Hostetter testified at extreme length concerning a number of factors, all of which were related to plaintiff's job." The Full Commission also found that "Dr. Zeil [sic] felt plaintiff's employment as a public safety officer for the city of Durham significantly contributed to her development of depression. . . . Dr. Zeil [sic] felt plaintiff's work was causally connected to plaintiff's depression." There is sufficient competent evidence in the record to support these findings of fact by the Full Commission and to satisfy the third element for establishing the existence of an occupational disease. Accordingly, we conclude that the Full Commission did not err in awarding plaintiff workers' compensation benefits.

Id.

Many cases cite *Pulley* for the proposition that emotional injury is compensable. *See Caple v. Bullard Restaurants, Inc.*, 152 N.C. App. 421, 429, 567 S.E.2d 828, 834 (2002); *Beaver v. City of*

Salisbury, 130 N.C. App. 417, 420, 502 S.E.2d 885, 888 (1998); *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 118, 476 S.E.2d 410, 413 (1996), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997).

In *Jordan*, it was stated that:

> Recent cases from this Court have recognized depression, a mental condition, as an occupational disease and compensable under the Act. In *Baker v. City of Sanford*, 120 N.C. App. 783, 463 S.E.2d 559 (1995), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996), the Industrial Commission found that plaintiff suffered from work-related depression which it stated was an occupational disease. However, the Commission concluded the plaintiff's disability was not the result of this occupational disease, but was a consequence of an intervening event. This Court reversed and remanded the case stating, among other things, the Commission erred in denying benefits to plaintiff because it did not employ the proper, three-part analysis in concluding plaintiff's depression was not compensable. (For a disease to be occupational, it must be (1) characteristic of claimant's trade or occupation; (2) the disease must not be an ordinary disease of life to which the general public is equally as exposed; and (3) the disease must be causally connected to the claimant's employment. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983)).
>
> The *Baker* Court pointed to an earlier case, *Harvey v. Raleigh Police Dept.*, 85 N.C. App. 540, 355 S.E.2d 147, *disc. review denied*, 320 N.C. 631, 360 S.E.2d 86 (1987), *appeal after remand*, 96 N.C. App. 28, 384 S.E.2d 549, *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989), as recognizing depression as an occupational disease. *Baker*, 120 N.C. App. at 788, 463 S.E.2d at 563. In *Harvey*, a police officer committed suicide and his wife filed for workers' compensation benefits under N.C. Gen. Stat. § 97-38 alleging Harvey suffered from the occupational disease of depression due to his employment with the Raleigh Police Department. The Full Commission denied plaintiff's claim, but this Court reversed and remanded the case concluding the Industrial Commission made inadequate findings of fact to support its conclusions of law.
>
> More recently, this Court upheld an award for compensation to a plaintiff who was suffering from depression and post-

traumatic stress syndrome caused by her work as a police and public safety officer. *Pulley v. City of Durham*, 121 N.C. App. 688, 694, 468 S.E.2d 506, 510 (1996). In upholding the award, this Court used the three-part test for determining if an occupational disease is compensable under N.C. Gen. Stat. § 97-53(13). The Court then reviewed the Full Commission's findings of fact and conclusions of law and determined plaintiff had presented sufficient evidence to satisfy the test for a compensable occupational disease.

The approach in *Harvey*, *Baker*, and *Pulley* was to apply to each plaintiff the three-part test for occupational disease to determine whether compensation was proper. *See Harvey*, 85 N.C. App. at 543, 355 S.E.2d at 150; *Baker*, 120 N.C. App. at 787, 463 S.E.2d at 562-63; *Pulley*, 121 N.C. App. at 693, 468 S.E.2d at 510 (all three cases applying the test outlined in *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365). These cases do not make a distinction between mental and physical occupational diseases. The question for each Court was simply whether plaintiff's condition met the test for compensable occupational disease.

Id. at 117-18, 476 S.E.2d at 413.

In the present case we find that plaintiff presented evidence which supports the Commission's determination that her mental disorders stem from a job which has unique stresses to which the general public is not exposed. Plaintiff was caring for the mentally ill whose problems ranged from the suicidal to those who were severely anxious or depressed. There had already been one death at Charter which resulted in local and national news coverage of the conditions at Charter under which plaintiff labored. This case presents a situation far more severe than merely an employee's relationship with an abusive supervisor as was the case in *Woody*.

We believe plaintiff worked in an atmosphere permeated with stress and this case is much more analogous to *Pulley* due to the fact that she worked with an aberrant population where treatment errors could (and did at least once) result in death. These are not common workplace stresses.

Thus we hold that the Commission could properly find, on the record before it, that plaintiff suffered from a compensable occupational disease, even though evidence to the contrary existed.

Accordingly, the opinion and award of the Commission is affirmed.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. LARRY WHEELER LEMONDS, DEFENDANT

No. COA02-900

(Filed 2 September 2003)

1. **Drugs— trafficking in marijuana by possession—trafficking in marijuana by manufacture—motion to dismiss—sufficiency of evidence**

The trial court did not by denying defendant's motion to dismiss the charges of trafficking in marijuana by possession and trafficking in marijuana by manufacture based on alleged insufficient evidence of weight, because: (1) thirty bags of marijuana plant material were seized from defendant's residence and weighed on three separate occasions with the weight of the marijuana exceeding ten pounds on each occasion; and (2) the evidence was sufficient to permit a reasonable inference that the weight of the marijuana exceeded ten pounds.

2. **Drugs— trafficking in marijuana by possession—trafficking in marijuana by manufacture—manufacture of marijuana**

The trial court did not commit plain error in a trafficking in marijuana by possession and trafficking in marijuana by manufacture case by instructing the jury with regard to the lesser-included offense of manufacture of marijuana even though defendant contends the trial court should have instructed that the jury could find defendant guilty of manufacture of marijuana if it found that defendant grew less than or equal to ten pounds, because: (1) the amount of marijuana manufactured is not an element of the lesser-included offense of manufacture of marijuana as defined by N.C.G.S. § 90-95(a)(1); and (2) the trial court's instructions accurately reflected the law that the amount of marijuana grown was only a factor in determining whether defendant was guilty of trafficking in marijuana.

3. Constitutional Law— effective assistance of counsel—failure to timely file motion to suppress evidence

A defendant in a trafficking in marijuana by possession and trafficking in marijuana by manufacture case was not denied effective assistance of counsel based on defense counsel's failure to timely file a motion to suppress the evidence of growing marijuana seized from defendant's residence after the police conducted two thermal imaging scans of defendant's residence revealing a heat signature consistent with a marijuana-growing operation, because: (1) even without the results of the thermal imaging tests conducted on defendant's residence, there was sufficient information before the magistrate to support a finding of probable cause to believe defendant was growing marijuana; and (2) the thermal imaging was only a single nonessential component of an extensive investigation into defendant's activities, and therefore, it is unlikely that defendant's motion to suppress would have been granted had it been filed in a timely manner.

Appeal by defendant from judgment entered 13 February 2002 by Judge Steve Balog in Johnston County Superior Court. Heard in the Court of Appeals 13 May 2003.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Sallenger & Brown, L.L.P., by Thomas R. Sallenger, for defendant appellant.

ELMORE, Judge.

Defendant was charged with one count of trafficking in marijuana by possession, one count of trafficking in marijuana by manufacture, and one count of maintaining a dwelling for keeping and selling controlled substances. The charge of maintaining a dwelling for keeping and selling controlled substances was dismissed. The State proceeded on the two trafficking charges.

At trial, the State's evidence tended to show that law enforcement officers from the Johnston County Sheriff's Department, the Raleigh Police Department, and the State Bureau of Investigation ("SBI") executed a search warrant at defendant's residence in Johnston County on 28 August 2000. Inside defendant's residence, the officers discovered an indoor marijuana-growing operation. The officers seized numerous items related to the marijuana-growing operation, includ-

ing grow lights, ballasts, sections of pipe, a carbon dioxide tank, scales, charts and a notebook containing data related to the growing operation, and various magazines related to marijuana and marijuana growing. The officers also seized a large quantity of marijuana plants and marijuana plant material.

On 29 August 2000, the day after the execution of the search warrant, the material seized from defendant was analyzed and determined to be marijuana, weighing 51.8 pounds. The same marijuana plant material was resubmitted to the SBI for another weighing on 15 June 2001, at which time it was determined to weigh 37.7 pounds. Lieutenant Angela Bryan of the Johnston County Sheriff's Department testified that the difference between this weight and the initial, so-called "green weight," was the result of the plant material drying out over time.

At the request of defense counsel, the marijuana plant material was examined by a horticulturist on 15 November 2001. Under the supervision of law enforcement officers, the horticulturist separated out the stalks and other material that he believed did not meet the statutory definition of marijuana under N.C. Gen. Stat. § 90-87(16). The remaining marijuana plant material was weighed on 28 January 2002 at the SBI lab. This time the marijuana weighed 13.9 pounds.

Defendant was found guilty of trafficking in marijuana by possession and trafficking in marijuana by manufacture. The trial court imposed a $10,000.00 fine on defendant and sentenced him to twenty-five to thirty months imprisonment.

On appeal, defendant asserts: 1) that the trial court erred in denying defendant's motion to dismiss the charges of trafficking in marijuana by possession and trafficking in marijuana by manufacture; 2) that the trial court erred in instructing the jury with regards to the lesser included offense of manufacture of marijuana; and 3) that defendant was deprived of the effective assistance of counsel in violation of both the federal and state constitutions. We consider each argument in turn.

[1] By his first two assignments of error, defendant asserts that the trial court erred in denying his motion to dismiss the charges of trafficking in marijuana by possession and trafficking in marijuana by manufacture. Defendant argues that the evidence regarding the element of weight, essential to both charges, was insufficient to support a conviction. We disagree.

When ruling on a motion to dismiss, "the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). To be substantial, the evidence need not be irrefutable or uncontroverted, but only adequate to permit a reasonable inference that the defendant is guilty of the offenses charged. *Id.* "[E]vidence is deemed less than substantial if it raises no more than mere suspicion or conjecture as to the defendant's guilt." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139-40 (2002).

In considering a motion to dismiss, the trial court must examine the evidence in the light most beneficial to the State and must give the State the benefit of all reasonable inferences that can be drawn from the evidence. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 256 (2002), *cert. denied*, 154 L. Ed. 2d 404, 123 S. Ct. 488. "The trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility." *Id.* If the evidence is sufficient "to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

Trafficking in marijuana is defined by the North Carolina General Statutes as follows: "Any person who sells, manufactures, delivers, transports, or possesses in excess of 10 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as 'trafficking in marijuana'. . . ." N.C. Gen. Stat. § 90-95(h)(1) (2001). It is uncontested that defendant both possessed and grew marijuana. The only element of the trafficking charges disputed at trial was the weight of the marijuana seized from defendant's home.

Taken in the light most favorable to the State, the evidence tended to show that law enforcement officers seized thirty bags of marijuana plant material from defendant's residence. The marijuana was analyzed by SBI agents and weighed on three separate occasions. On each occasion, the weight of the marijuana exceeded ten pounds. We hold that this evidence was sufficient to permit a reasonable inference that the weight of the marijuana exceeded ten pounds. Therefore, defendant's motion to dismiss was properly denied.

[2] By his next assignment of error, defendant contends that the trial court erred in instructing the jury with regards to the lesser included offense of manufacture of marijuana by failing to specify the quantity

necessary to satisfy the requisite elements of that charge. Defendant argues that the trial court should have explained to the jury that it could find defendant guilty of manufacture of marijuana, as opposed to trafficking in marijuana by manufacture if it found that the amount of marijuana manufactured was less than ten pounds. We discern no error with respect to the trial judge's instructions to the jury.

Because defendant did not object to the instructions or request any corrections or additional instructions at trial, this Court may only review the trial judge's instructions for plain error. N.C.R. App. P. 10(b)(2); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). The plain error rule applies only in exceptional cases "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' . . . ." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

In charging the jury with respect to the crime of trafficking in marijuana by manufacture, the trial court explained that the State was required to prove beyond a reasonable doubt that the defendant manufactured marijuana and that the amount of marijuana that defendant manufactured was greater than ten pounds and less than or equal to fifty pounds. The trial court also instructed the jury that, if it found defendant not guilty of trafficking in marijuana by manufacture, it must then consider whether defendant was guilty of manufacture of marijuana. The trial court explained that this lesser included offense only required the state to prove beyond a reasonable doubt that defendant manufactured marijuana. Defendant argues that this set of instructions was confusing and that the trial court should have more clearly distinguished the charges of trafficking in marijuana by manufacture and manufacture of marijuana by specifically informing the jury that it could find defendant guilty of manufacture of marijuana if it found that defendant grew less than or equal to ten pounds.

The amount of marijuana manufactured is not, however, an element of the lesser included offense of manufacture of marijuana as defined by N.C. Gen. Stat. § 90-95(a)(1). *State v. Hyatt*, 98 N.C. App. 214, 216, 390 S.E.2d 355, 357 (1990). If the defendant grows any amount of marijuana, he is guilty of manufacture of marijuana. *See Id.* The trial court's instructions regarding the lesser included offense, therefore, accurately reflected the law. The amount of marijuana

grown was only a factor in determining whether defendant was guilty of trafficking in marijuana. Had the jury found defendant not guilty of the trafficking charge, the weight of the marijuana would no longer have been an issue. In addressing the lesser included offense of manufacture of marijuana, the jury would only need to determine whether defendant had in fact grown any marijuana. Thus, the trial court properly instructed the jury on both trafficking in marijuana and the lesser included offense of manufacture of marijuana.

[3] Finally, defendant contends that he was deprived of the effective assistance of counsel in violation of both the federal and state constitutions. During the course of their investigation into defendant's activities, police conducted two thermal imaging scans of defendant's residence, revealing a heat signature consistent with a marijuana-growing operation. This information was included in the affidavit provided to the magistrate that issued the warrant to search defendant's residence. After the issuance and execution of the search warrant but before defendant's trial, the United States Supreme Court decided *Kyllo v. United States*, 533 U.S. 27, 150 L. Ed. 2d 94 (2001). In *Kyllo*, the Court held that the warrantless use of thermal imaging devices to detect heat emanations from private homes constituted an unreasonable search under the Fourth Amendment. *Id.* at 39, 150 L. Ed. 2d at 105.

Based on the holding in *Kyllo*, defendant's trial counsel filed a motion to suppress the evidence of marijuana growing seized from defendant's residence. However, the trial court summarily denied and dismissed the motion to suppress because defendant's counsel failed to file it in a timely manner. On appeal, defendant argues that this failure on the part of defendant's trial counsel constituted ineffective assistance of counsel, depriving defendant of a fair trial. We disagree.

In order to successfully challenge a conviction on the basis of ineffective assistance of counsel, defendant must demonstrate: 1) that his trial counsel's performance "fell below an objective standard of reasonableness[;]" and 2) that this deficiency in performance was prejudicial to his defense. *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698, *reh'g denied*, 467 U.S. 1267, 82 L. Ed. 2d 864 (1984).

Defendant contends that without the information gathered using thermal imaging devices, there was not probable cause to support the search warrant in this case. Defendant insists that, had his motion to suppress been filed on time, that motion would have been granted and the evidence against him suppressed. Even without the results of the thermal imaging tests conducted on defendant's residence, however, there was sufficient information before the magistrate to support a finding of probable cause to believe defendant was growing marijuana.

In determining whether there is probable cause to support a search warrant, we must examine the totality of the circumstances. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). With respect to issuance of a search warrant, the North Carolina Supreme Court has stated as follows:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L. Ed. 2d 527, 548 (1983)).

Included in the application for the warrant to search defendant's residence was the sworn affidavit of Captain W.D. Daughtry of the Johnston County Sheriff's Department. Excluding the information gathered using thermal imaging devices, the affidavit indicated that: 1) Captain Daughtry was contacted by Detective S.M. Deans of the Raleigh Police Department Narcotics Unit in June 2000 and informed that Raleigh police had been investigating a suspected indoor marijuana-growing operation at 4213 Wedgewood Drive in Raleigh; 2) An anonymous concerned citizen told Detective Deans that Larry Lemonds, a white male who drove a small white pickup truck, was growing marijuana at that address; 3) Raleigh police observed defendant coming and going from the 4213 Wedgewood Drive residence, operating a white Nissan pickup truck registered to Larry Wheeler Lemonds; 4) On 1 March 2000, Raleigh police observed defendant leave the 4213 Wedgewood Drive residence in his white pickup and drive to a nearby apartment complex where he discarded three large

garbage bags into the complex's trash bin; 5) Raleigh police recovered and searched the discarded bags finding a number of items that, in Detective Deans' experience, are commonly used to build and maintain indoor marijuana-growing operations; 6) Raleigh police also recovered marijuana residue from the garbage as well as a bag containing marijuana residue; 7) On 2 March 2000, Raleigh police observed defendant leave the 4213 Wedgewood Drive residence with sections of PVC pipe in the back of his truck, which he drove to a nearby storage facility; 8) At the storage facility, Raleigh police observed defendant unloading large lights, trash cans, and the sections of PVC pipe, which had holes cut in them every few inches; 9) Detective Deans obtained electric bills for 4213 Wedgewood Drive, which revealed a dramatic increase in electricity usage during the period of defendant's residency; 10) On 1 April 2000, Detective Deans observed defendant load furniture and other items from 4213 Wedgewood Drive onto a moving truck and drive the truck to 104 Raspberry Court in Johnston County; 11) Detective Deans returned to the storage facility and learned that defendant had removed his property and closed his account; 12) Detective Deans obtained electric bills for 104 Raspberry Court and continued to monitor electricity usage at that address; 13) Electric bills for 104 Raspberry Court indicated a dramatic increase in electricity consumption when compared with the previous occupant's bills for the same time of year; 14) Based on Captain Daughtry's experience, the observations made by police, and the dramatic increases in electricity usage at both 4213 Wedgewood Drive and 104 Raspberry Court, the applicants believed that defendant was maintaining an indoor marijuana-growing operation at 104 Raspberry Court.

While the data gathered using thermal imaging devices certainly supported Captain Daughtry's belief that defendant was maintaining an indoor marijuana-growing operation, that data was not crucial to a finding of probable cause. Rather, the thermal imaging was only a single, nonessential component of an extensive investigation into defendant's activities. During their investigation, police received an anonymous tip that defendant was growing marijuana at his Raleigh residence. Police recovered marijuana residue and equipment commonly used to grow marijuana from defendant's garbage. They observed defendant moving more marijuana-growing equipment into a storage unit and learned that that equipment was removed shortly after defendant's move to 104 Raspberry Court. Finally, police obtained power bills for defendant's residence revealing electricity consumption patterns consistent with indoor marijuana-growing

operations. Based on the totality of the circumstances, we hold that the information before the magistrate, even without the data gathered using thermal imaging devices, provided a "substantial basis" for finding probable cause that defendant was maintaining an indoor marijuana-growing operation.

Because the information related to thermal imaging was not essential to the magistrate's finding of probable cause in this case, it is unlikely that defendant's motion to suppress would have been granted had it been filed in a timely manner. Defendant has not demonstrated a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Therefore, defendant has not met his burden of showing he was deprived of effective assistance of counsel.

Assignments of error number four, six, and seven were not argued in defendant's brief and are therefore deemed waived under the North Carolina Rules of Appellate Procedure, Rule 28(a).

No error.

Judges WYNN and McCULLOUGH concur.

DANA L. DESETH, DECEASED, EMPLOYEE/PLAINTIFF v. LENSCRAFTERS, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER/DEFENDANTS

No. COA02-1306

(Filed 2 September 2003)

1. Workers' Compensation— store manager struck by car in mall parking lot—no control over lot by store

LensCrafters did not maintain control over a mall parking lot, so that an employee killed in the lot while going to work would be entitled to workers' compensation, where the mall required tenants to pay a common area charge and to enforce the policy that employees park in remote areas. Tenants shared the costs, but the mall hired, paid, and directed the maintenance staff, and the enforcement of a parking scheme developed by the landlord by a tenant with only a non-exclusive right to use the parking lot did not give the employer control of the lot.

2. Workers' Compensation— store manager struck by car in parking lot—not traveling—no special errand—not preliminary preparations

The death of a LensCrafter store manager was not compensable under the Workers' Compensation Act where decedent died after being struck by a car as he walked across a mall parking lot to open the store. This case is distinguishable from cases involving traveling employees or situations in which the employee was running a special errand for the employer, and the "preliminary preparations" cases involve employees performing necessary maintenance on a vehicle.

3. Workers' Compensation— struck by car while going to work—risk of injury not increased by employment

The Industrial Commission did not err by not considering as an alternate basis of compensation whether decedent's employment increased his risk of injury where he died after being struck by a car while crossing a parking lot to open a store. Traffic hazards are not generally traceable to employment and the Commission specifically found that the decedent was not exposed to greater danger than the general public.

Appeal by plaintiff from opinion and award entered 7 May 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 June 2003.

Womble Carlyle Sandridge & Rice, PLLC, by Clayton M. Custer, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough, L.L.P., by Paul J. Osowski and John E. Schmidt, III, for defendants-appellees.

LEVINSON, Judge.

Plaintiff appeals from a unanimous opinion of the North Carolina Industrial Commission denying compensation. We affirm.

Dana Lee Deseth (the decedent) was employed as a retail manager for the LensCrafters store located at Hanes Mall in Winston-Salem, North Carolina. On 14 September 1997, after driving to Hanes Mall to open the LensCrafters store, decedent parked his vehicle at a considerable distance from the entrance and began walking towards the mall. While traversing the mall parking lot, decedent was struck

by a vehicle driven by another LensCrafters employee, Rod Pandolfo. Decedent died two days later from resulting injuries.

The findings of fact of the Industrial Commission (Commission) recite the relevant details of the incident leading to decedent's injury and death. The Commission found, in pertinent part, the following:

> 2. Employee-decedent parked his automobile in the mall parking lot farthest away from the store, as it was his custom to do, and was walking across the empty parking lot towards the LensCrafters store. The LensCrafters store at Hanes Mall has an outside entrance that is accessible to the public. Employee-decedent was carrying the store keys along with other work related material in his hand as he was walking across the parking lot.
>
> 3. Employee-decedent had reached the edge of the parking lot and was about to cross the inner loop road into the curtilage of the property in front of the LensCrafters' outside entrance as Rod Pandolfo was driving his automobile along the inner loop of the mall, heading towards the parking lot to park his car. Mr. Pandolfo was running late for work and had been cutting across the empty parking lot to arrive at the parking lot in front of LensCrafters. Mr. Pandolfo was driving his automobile at approximately 30 miles per hour. There was testimony that Mr. Pandolfo intentionally directed his automobile at employee-decedent as if to play the game of chicken with employee-decedent. There was some evidence that employee-decedent had participated in the game of chicken with Mr. Pandolfo and other employees. But on this occasion there was an independent witness who saw the incident and indicated that from her stand point [sic] employee-decedent . . . attempted to get out of the way but could not and the automobile struck him causing him to fly up into the air and coming to rest in front of the automobile.
>
> . . . .
>
> 5. Employee-decedent was struck while he stood in the parking lot at the edge of the marked parking stalls in front of the LensCrafters store and Loading Dock C of Hanes Mall. The time of the accident was 12:02 p.m.
>
> 6. . . . Under the terms of the lease between LensCrafters and Hanes Mall, LensCrafters received a non-exclusive right to use, along with approximately 200 other Mall tenants, all of the com-

mon areas including the parking lot in question. This non-exclusive right was subject to LensCrafters['] acknowledgment and agreement that, "Landlord shall, at all times, have full control, management and direction of the Common Areas. . . ."

7. The mere right of LensCrafters to use the parking lot under the terms of the lease with the mall does not constitute "sufficient control" over the parking lot to allow a finding that the parking lot was within LensCrafters' premises. LensCrafters had no more control over the area of the parking lot where the accident occurred than any other tenant in the mall. LensCrafters did not control nor [sic] maintain the parking lot referenced above and employee-decedent was not exposed to any danger greater than the public in general.

8. Employee-decedent's injuries did not occur on the employer's premises. Employee-decedent's injuries occurred on property that was controlled exclusively by the landlord . . . who owns Hanes Mall.

The Commission reached the following conclusions of law:

1. Employee-decedent did not sustain an injury by accident while in the course and scope of his employment with defendant. N.C. Gen. Stat. § 97-2(6).

2. Employee-decedent's injuries did not occur on the employer's premises. Therefore, employee-decedent's injuries do not fall within the limited exception to the 'coming and going' rule that applies when an employee is injured when going to or coming from work on the employer's premises. *Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996).

3. Employee-decedent did not sustain an injury by accident while in the course and scope of his employment with defendant. Injuries occurring while an employee travels to and from work that do not arise in the course of employment are not compensable. *Barham v. Food World, Inc.*, 300 N.C. 329, 266 S.E.2d 676 (1980).

Plaintiff appeals from the opinion and award of the Commission.

Plaintiff does not challenge the Commission's findings of fact, and they are, therefore, binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118 (2003); *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000).

Rather, plaintiff contends that the Commission erred in concluding that compensation was unwarranted. This Court reviews the Commission's conclusions of law *de novo*. *Griggs v. E. Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Plaintiff advances three separate theories on appeal: (1) the decedent's injury arose out of and in the course of employment because defendant LensCrafters maintained and/or controlled the premises where the accident occurred; (2) the injury arose out of and in the course of employment because, even if the decedent was not on the defendant's premises at the time of the accident, he was, nonetheless, performing the work-related activity of opening his employer's store for business at that time; and (3) the Commission erred by not considering, as an alternative basis for awarding compensation, that the decedent's job placed him at an increased risk of harm. We address each of these arguments in turn.

[1] First, plaintiff contends that the decedent suffered an injury arising out of and in the course of employment because defendant LensCrafters controlled and maintained the parking lot where the injury occurred. This is so, plaintiff argues, because Hanes Mall required defendant to pay "for its share" of parking lot maintenance and was expected to direct and control where its employees parked at Hanes Mall. We disagree.

For an injury to be compensable, it must be an "injury by accident arising out of and in the course of employment[.]" N.C. G.S. § 97-2(6) (2001). "Whether an injury arises out of and in the course of . . . 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' 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[.]'

Id. at 552-53, 486 S.E.2d at 478 (quoting *Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E.2d 473, 475 (1982) (internal citations omitted)).

The "coming and going" rule provides that "injuries occurring while an employee travels to and from work do not arise in the course of employment and thus are not compensable." *Barham v. Food World*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 (1980). A limited exception to the " 'coming and going' rule may arise when an employee is injured when going to or coming from work but is on the employer's premises." *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). "There are numerous cases dealing with parking lot injuries and the vast majority which permit recovery do so on the ground that the employer owned, maintained, provided, controlled, or otherwise exercised dominion over the parking lot, walkway or other area in question." *Barham*, 300 N.C. at 333, 266 S.E.2d at 679; *see also Glassco v. Belk-Tyler*, 69 N.C. App. 237, 316 S.E.2d 334 (1984) (denying compensation to a mall tenant's employee who was injured in the mall parking lot). *Barham* and *Glassco* govern the present analysis.

In *Barham*, the North Carolina Supreme Court held that an injury had not occurred on an employer's premises where an employee slipped and fell on ice while in the parking lot and loading zone in front of her employer's store:

> While the evidence here indicates that defendant Food World instructed its employees not to park in the loading zone, and that occasionally it asked customers to move their cars from the zone, we do not think such evidence rises to that level of control which is necessary to support a determination that this loading zone was a part of defendant Food World's premises. To the contrary, the uncontradicted evidence is to the effect that Food World neither owned nor leased the parking lot or the loading zone. It had no responsibility for the upkeep or maintenance of those areas and had no obligation or authority under its lease with the shopping center to instruct drivers not to park in any particular area. The evidence indicates that the parking lot and loading zone were common areas, and that all of the stores had access to them for the convenience of their customers. We therefore hold that, under the uncontroverted facts of this case, the parking lot and loading zone were not sufficiently under the control of defendant Food World so as to permit the conclusion that those areas constituted a part of the employment premises.

Barham, 300 N.C. at 333-34, 266 S.E.2d at 679-80.

Likewise, in *Glassco*, this Court held that a mall tenant's employee was not entitled to compensation when injured in the mall parking lot; in that case

> [t]he landlord retained control over the common areas, including the right to adopt rules and regulations regarding the use of the parking areas by customers and employees. Pursuant to this power, the landlord formulated and furnished a master parking plan designating certain areas for the employees of mall tenants to park.

Glassco, 69 N.C. App. at 238, 316 S.E.2d at 335. Under such conditions, this Court held that even where the tenant-employer enforced the owner-landlord's parking conditions against the employee, such enforcement did not rise to the level of control because "[the employer] had no responsibility for the maintenance or upkeep of the designated parking area." *Id.*

In this case, the lease between LensCrafters and the owners of Hanes Mall provided that "LANDLORD shall, at all times, have full control, management and direction of the Common Areas. . . ." The lease defines "Common Areas" to include "parking areas, sidewalks, walkways, roadways, driveways . . . and all other areas and facilities within the Shopping Center which are available for use in common by occupants of the Shopping Center and their customers and invitees." Under the lease, the landlord granted to Lenscrafters the "non-exclusive right to use" the common areas, including the parking lot.

Plaintiff urges that LensCrafters exercised control over the parking lot because the "Mall management ceded control over employee parking to the store managers." Plaintiff observes that, at the time of the accident, Hanes Mall had a policy of requiring tenants' employees to park in the more remote areas of the parking lot. Hanes Mall expected store managers to enforce the policy. A "Reference Sheet" provided to tenants stated, "all employees are permitted to park only in the designated YELLOW parking stalls, located on the ends of parking aisles. The store manager is responsible for enforcing this requirement."

Plaintiff's control argument conflicts with *Glassco*. *Glassco* is clear that an employer does not exercise control over a parking lot merely because it enforces a parking scheme developed by its landlord where the employer possesses only a non-exclusive right to use that parking lot. *See Glassco*, 69 N.C. App. at 238, 316 S.E.2d at 335.

With respect to maintenance and upkeep, plaintiff correctly notes that pursuant to the lease between defendant and Hanes Mall defendant was required

> to pay to [Hanes Mall] as its "Common Area Charge," one-half (½) of an amount determined by multiplying the ratio of the square feet of Gross Leasable Area within the PREMISES to the total square feet of Gross Leasable Area within the Mall . . . by the total cost and expense of . . . operating and maintaining the Common Areas on the Developer Parcel. . . .

While mall tenants, such as LensCrafters, paid a "Common Area Charge," the mall hired, paid, and directed the maintenance staff. The mall's maintenance staff did not take instructions from LensCrafters. We are unpersuaded that by sharing in the costs of maintenance with other Hanes Mall tenants, LensCrafters "maintained" the parking lot such that the injury to the decedent occurred on LensCrafters' premises.Plaintiff's first assignment of error is overruled.

[2] Plaintiff next argues that the decedent's injury is compensable, even if not incurred on LensCrafter's premises, because the decedent was performing a work-related activity when the injury occurred. Specifically, plaintiff asserts that the decedent had already begun his "special" managerial job of opening the store because he was holding work-related materials and store keys while walking towards the mall. Plaintiff contends that the present case is analogous to those cases supporting awards of compensation where an employee was injured while on a business trip for an employer, *see Martin v. Georgia Pacific Corp.*, 5 N.C. App. 37, 167 S.E.2d 790 (1969); while running a special errand, *see Powers*, 306 N.C. 728, 295 S.E.2d 473; or while making preparations to begin work, *see Thompson v. Transport Co.*, 32 N.C. App. 693, 236 S.E.2d 312 (1977). We do not agree.

The present case is distinguishable from cases involving traveling employees. Though " 'traveling employees, whether or not on call, usually do receive protection when the injury has its origin in a risk created by the necessity of sleeping and eating away from home,' " *Martin*, 5 N.C. App. at 42, 167 S.E.2d at 793 (quoting 1 Larson, Workmen's Compensation Law, § 25.21, p. 445), the present case does not lend itself to analysis under such a rule.

Nor does the present case present a situation where the decedent was running a special errand for his employer. Though compensation is appropriate where an employee is injured while running a "special

errand" for an employer, in those cases applying the special errand rule, the action undertaken by the employee bestowed some benefit upon the employer other than the employee merely coming to work. *Powers*, 306 N.C. 728, 295 S.E.2d 473 (finding employee to be on a special errand where employee was performing duties incident to performance of late-night, emergency embalming for employer's business); *Felton v. Hospital Guild*, 57 N.C. App. 33, 291 S.E.2d 158 (finding employee to be on a special errand where employee was performing the special task of picking up baked goods for her employer in addition to coming into work), *aff'd*, 307 N.C. 121, 296 S.E.2d 297 (1982).

In this case, the Commission found that the decedent was walking across a parking lot with work-related materials in his possession; upon arrival at his place of employment, decedent was responsible for opening up his employer's store. These facts do not support a conclusion that the decedent was running a special errand. Moreover, no authority exists for the proposition that managers who are responsible for opening or closing a store are *per se* conducting special errands.

The present matter also is distinguishable from a situation where compensation is appropriate because an employee suffered an injury while making "[p]reliminary preparations . . . reasonably essential to the proper performance of some required task or service." *See Thompson*, 32 N.C. App. at 697, 236 S.E.2d at 314. The "preliminary preparations" cases involve an employee performing necessary maintenance upon a vehicle to make it fit for use in commerce by an employer. *See id.* (upholding award where claimant was injured while preparing the truck for inspection by the carrier); *see also Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 293 S.E.2d 807 (1982) (where plaintiff received an injury while repairing a truck he both leased to defendant and drove for defendant, the injury was compensable as arising out of and in the course of his employment since plaintiff was performing a necessary repair after he was "under load" and since the repair was an act preparatory or incidental to the fulfillment of his duty to make a scheduled delivery within an allotted time). Given the vastly different context of the present case, the "preliminary preparations" cases do not support an award. Plaintiff's second assignment of error is overruled.

[3] Plaintiff's third argument is that the Commission erred by not considering, as an alternative basis for awarding compensation, that decedent's employment with LensCrafters increased his risk and

therefore proximately caused his injury. This argument encompasses three sub-parts. First, the empty condition of the Hanes Mall parking lot increased the risk of injury to the decedent. Second, LensCrafters increased the likelihood of injury to the decedent by not instructing or requiring the employee who struck the decedent to park in the proper location. Third, plaintiff alleges that the decedent's employment with LensCrafters proximately caused his injury because the employee who struck the decedent reasonably believed that LensCrafters condoned horseplay in the parking lot.

A contributing proximate cause of an injury must be a risk inherent in or incidental to the employment, and must be one to which the employee would not have been equally exposed apart from the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 404, 233 S.E.2d 529, 533 (1977). Thus, an employee must be at an "increased risk" because of the employment; the " 'causative danger must be peculiar to the work and not common to the neighborhood.' " *Id.* at 404, 233 S.E.2d at 532 (quoting *Harden v. Furniture Co.*, 199 N.C. 733, 735, 155 S.E. 728, 730 (1930)).

As a general rule, traffic hazards are not fairly traceable to employment. *Bryan v. T.A. Loving Co.*, 222 N.C. 724, 729, 24 S.E.2d 751, 754 (1943); *Taylor v. Shirt Co.*, 28 N.C. App. 61, 64-65, 220 S.E.2d 144, 146 (1975), *cert. denied*, 289 N.C. 302, 222 S.E.2d 703 (1976). In *Bryan*, the North Carolina Supreme Court held compensation inappropriate where a station gate guard was struck by a car while coming to work. Although the guard occasionally went into the street to help a patrolman stop traffic, the Court found that the employment was not the proximate cause of the injury where the employee was struck on the same street while coming to work:

> The employee's journey had not been completed. He was still on his way to work. He was master of his own movements. The hazard created by traffic on the highway under the circumstances of this case cannot fairly be traced to the employment. It cannot be said that it was, at the time and place and under the circumstances disclosed, a natural incident of the work. It was not created by the employer. It did not arise out of the exposure occasioned by the nature of the employment. It was neither an ordinary nor an extraordinary risk directly or indirectly connected with the services of the employee. On the contrary, any other person undertaking to cross a public highway under the same or similar circumstances would be subjected to the identical hazard encountered by him.

Bryan, 222 N.C. at 729, 24 S.E.2d at 754-55. Likewise, in *Taylor*, this Court held that an employee's injury did not arise in the course of her employment where the employee was struck by an automobile as she attempted to cross a public street in front of her employer's factory while on her way to a private parking lot. *Taylor*, 28 N.C. App. at 64-65, 220 S.E.2d at 146. It was unimportant that employees of the employer constituted a great majority of persons using the street at the time of the accident and that the driver of the car which struck plaintiff had just picked up one of defendant's employees. *Id.*

In this case, the unchallenged findings of the Commission do not necessarily suggest that the decedent was peculiarly susceptible to being struck in the mall parking lot. Moreover, the record indicates that the Commission did, in fact, address whether the decedent's employment with LensCrafters proximately caused his injury. The Commission specifically found that "employee-decedent was not exposed to any danger greater than the public in general." Plaintiff's third assignment of error is therefore overruled.

The opinion and award of the Industrial Commission is

Affirmed.

Judges MARTIN and TYSON concur.

McCLURE LUMBER COMPANY, A NORTH CAROLINA CORPORATION PLAINTIFF V. HELMSMAN CONSTRUCTION, INC. A NORTH CAROLINA CORPORATION, ROBERT F. HELMS, INDIVIDUALLY AND VERNON E. NASH, JR., DEFENDANTS

McCLURE LUMBER COMPANY, A NORTH CAROLINA CORPORATION PLAINTIFF V. HELMSMAN CONSTRUCTION, INC. ROBERT F. HELMS AND HELMSMAN CONSTRUCTION COMPANY, INC. A/K/A HELMSMAN CONSTRUCTION, INC., DEFENDANTS

No. COA02-1078

(Filed 2 September 2003)

1. Appeal and Error— preservation of issues—failure to present argument

Although plaintiff contends the trial court erred by denying plaintiff's motion to enforce the parties' settlement agreement regarding payment for building materials and release of a mechanic's lien based on the fact that it allegedly undermines the

purpose of alternative dispute resolution and court-ordered mediated settlement conferences, this assignment of error is dismissed because plaintiff's brief simply states general legal principles but fails to present any argument as to how the trial court's order violates them or otherwise undermines our system of court-ordered mediated settlement conferences.

2. Arbitration and Mediation— settlement agreement—material breach

The trial court did not err by concluding that plaintiff's failure to discharge a letter of credit on the pertinent lot materially breached the parties' mediated settlement agreement even though plaintiff contends it was excused from its obligation to release the letter of credit based on the fact that defendants' second and third payments were approximately seventeen days late, because: (1) pursuant to the settlement agreement's terms, defendant's payment of the first $30,000 was a condition precedent, the occurrence of which gave rise to plaintiff's duty to release the letter of credit and discharge the lien for the pertinent lot; and (2) the trial court found that defendant paid plaintiff in accordance with the terms of the mediated settlement agreement, and this finding was supported by a witness's testimony that he timely delivered the three checks on the dates specified in the settlement agreement, as well as by evidence of the cancelled checks.

3. Appeal and Error— preservation of issues—failure to state specific grounds for motion

Although plaintiff contends the trial court's order leaves open numerous unresolved issues in an action to enforce provisions of a mediated settlement agreement, the only issue properly before the Court of Appeals is whether the trial court properly denied plaintiff's motion to enforce the settlement agreement based on the record evidence.

Appeal by plaintiff from judgment entered 20 February 2002 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 May 2003.

Miller & Miller, by J. Jerome Miller, for plaintiff appellant.

Johnston, Allison & Hord, P.A., by Greg C. Ahlum and Alicia Almeida Bowers, for defendants appellees.

ELMORE, Judge.

On or about 26 May 1999, subcontractor McClure Lumber Company ("plaintiff" or "McClure Lumber") entered into four separate construction contracts with a general contractor, defendant Helmsman Construction, Inc. ("Helmsman"), whereby McClure Lumber agreed to provide building materials and services in connection with the construction of four homes on Lots One, Two, Three, and Four in Union County, North Carolina (collectively, the "Projects"). Lots Two and Four were owned by defendant Vernon E. Nash, Jr. ("Nash"), and lots One and Three were owned by defendant Robert F. Helms ("Helms"). The contracts provided that plaintiff would be paid approximately $30,000.00 for the goods and services it provided on each house, for a total amount of $119,769.99 for the four Projects. However, a dispute arose when Helmsman, asserting that plaintiff's work on the Projects was defective and not performed in a workmanlike manner, refused to pay McClure Lumber's invoices. Plaintiff then filed liens on each of the four Projects, and filed four separate lawsuits (00 CVS 5791, 5792, 5794, and 5795, respectively) against Helmsman, Nash, and Helms (collectively, "defendants") to enforce each lien on or about 13 April 2000. Defendants filed motions to dismiss, answers, and counterclaims in each of the four suits. On 6 February 2001, the trial court ordered the four suits consolidated for mediation.

Prior to mediation, individuals contracted to purchase Lot Two from Nash and Lot Three from Helms. However, before it would insure title over plaintiff's liens encumbering each Lot, First American Title Insurance Company required that a $30,000.00 letter of credit be posted for each Lot. Nash posted two letters of credit for $30,000.00 each to the title insurance company, which then insured title of Lots Two and Three over McClure Lumber's liens. Lots Two and Three were subsequently sold.

On 16 March 2001, a mediated settlement conference was held and the parties reached a settlement, which was memorialized in handwritten form and signed by the parties. McClure Lumber's counsel later prepared a more formal typewritten document (the "Settlement Agreement") which was substantively identical to the handwritten version, was also signed by the parties, and provided in pertinent part as follows:

. . .

1. Payment. Defendants shall pay to Plaintiff the sum of Fifty-Five Thousand and No/100 Dollars ($55,000.00) in full and final settlement of [the four lien enforcement suits], with payments to be made as follows:

(1) $10,000 due and payable May 22, 2001[1]

(2) $10,000 due and payable June 16, 2001

(3) $10,000 due and payable July 16, 2001

(4) $10,000 due and payable August 16, 2001

(5) $10,000 due and payable September 16, 2001

(6) $ 5,000 due and payable October 16, 2001

. . . .

3. Release of Mechanic's Liens. Upon execution of this Settlement Agreement and Mutual Release, by both parties, Plaintiff shall discharge from the public record . . . it's [sic] mechanics lien claims asserted on Lots 1 and 4 in case Nos. 00-CVS-5792 and 00-CVS-5795. Upon execution of this Settlement Agreement, by both parties, Plaintiff shall dismiss with prejudice all claims against Defendants in case Nos. 00-CVS-5792 and 00-CVS-5795.

4. Letters of Credit. The letters of credit posted by Vernon E. Nash, Jr., to insure title over the liens filed by Plaintiff against Lots 2 and 3 shall be used to secure this Settlement Agreement. . . .

Upon Defendants['] payment of the first Thirty Thousand Dollars ($30,000.00) to Plaintiff, Plaintiff agrees that the letter of credit pertaining to Lot 2 shall be released and returned and the lien against such lot shall be discharged. (Emphasis added)

. . . .

6. Dismissal of 00-CVS-5791 and 00-CVS-5794. Upon receipt of the final payment due hereunder, Plaintiff shall file a Dismissal

1. The Settlement Agreement originally provided that the first payment was due on 17 May 2001, but the parties, as indicated by a handwritten alteration to the date accompanied by their initials, subsequently agreed to move the initial payment's due date to 22 May 2001.

with Prejudice as to case Nos. 00-CVS-5791 and 00-CVS-5794 [the lien enforcement actions pertaining to Lots 2 and 3] and Defendants shall dismiss their counterclaims with prejudice as to all four (4) cases.

7. Mutual Release. The Mutual Release attached hereto as Exhibit B shall be a complete release as to all claims relating to Lots 1, 2, 3 and 4.

. . .

Pursuant to the Settlement Agreement, defendants made the first settlement payment via hand delivery of a $10,000.00 check to plaintiff's counsel on 22 May 2001. Defendants contend that the second and third payments were also made in accordance with the Settlement Agreement via defendant Nash's hand delivery of $10,000.00 checks to McClure Lumber's office on 15 June 2001 and 16 July 2001. Plaintiff, however, contends on appeal that the first payment was actually due on 1 April 2001, rendering defendants' 22 May 2001 payment untimely. Plaintiff further contends that the second payment was not received until 3 July 2001, and that the third payment was not received until 3 August 2001, rendering them untimely as well.

It is undisputed that upon receipt of the third $10,000.00 payment from defendants, plaintiff refused to authorize release of the letter of credit posted by Nash pertaining to Lot Two, as required by paragraph four of the Settlement Agreement. Plaintiff likewise refused to release its lien filed against Lot Two. Defendants consequently refused to make the three remaining settlement payments, asserting that plaintiff's instructions to First American Title not to release the letter of credit constituted a breach of the Settlement Agreement and released defendants from any obligation to continue making payments. Plaintiff, by contrast, contends that what it characterizes as the untimely nature of defendants' first three payments released plaintiff from any obligation to release the letter of credit on Lot Two, and that defendants' subsequent refusal to make the remaining three payments placed defendants in breach of the Settlement Agreement.

With the parties at this impasse, on 5 December 2001 plaintiff filed a motion seeking to enforce the Settlement Agreement. The trial court heard plaintiff's motion on 25 January 2002, at which time defendant Nash testified that he hand-delivered the first $10,000.00 payment to plaintiff's counsel on 22 May 2001. Nash further testified

that he hand-delivered both the second and third $10,000.00 payments to plaintiff's office on 15 June 2001 and 16 July 2001 respectively, in each instance leaving the checks with Ann Patterson, plaintiff's credit manager. In support of Nash's testimony that defendants' payments were timely, defendants tendered copies of two cancelled checks, made out by Nash to plaintiff for $10,000.00 each and dated 15 June 2001 and 16 July 2001, respectively. Nash also testified that after making the third $10,000.00 payment, he asked plaintiff's credit manager and plaintiff's counsel to have plaintiff authorize release of the letter of credit on Lot Two, and that plaintiff responded by instructing First American Title not to release the letter of credit "due to the continuing default of [defendants]."

By contrast, Robert B. McClure, Jr., plaintiff's chairman, testified at the hearing that although the checks for the second and third $10,000.00 payments were dated 15 June 2001 and 16 July 2001, defendants did not deliver them to plaintiff's credit manager Patterson until 3 July 2001 and 3 August 2001, respectively, rendering these payments untimely. McClure testified that although he did not see or speak to Nash at plaintiff's office on either 3 July 2001 or 3 August 2001, he knew the checks were not delivered until those dates because (1) according to plaintiff's records, the second and third checks from Nash were deposited on those dates, (2) "[w]e deposit on the same day we receive checks unless we have an arrangement to do otherwise," and (3) plaintiff had no such arrangement with defendants. Plaintiff introduced accounting records indicating McClure Lumber deposited a $10,000.00 check from defendants on 3 July 2001, and another on 3 August 2001.

On 20 February 2002, the trial court entered an order denying plaintiff's motion, which stated in pertinent part as follows:

. . . .

> 3. Defendant, Vernon E. Nash, Jr. paid the first $30,000 to the Plaintiff in accordance with the terms of the Mediated Settlement Agreement;
>
> 4. Plaintiff, McClure Lumber Company materially breached the Mediated Settlement Agreement by failing and refusing to release the Irrevocable Letter of Credit [pertaining to Lot Two] posted by Vernon E. Nash, Jr. and drawn off of American Community Bank;

. . . .

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT

1. As a result of Plaintiff's material breach of the Mediated Settlement Agreement, Plaintiff is not entitled to enforce the Mediated Settlement Agreement and Defendants are excused from any further performance under the Mediated Settlement Agreement including any obligations set forth in the Agreement with respect to the Letters of Credit [pertaining to Lots Two and Three] posted by Vernon E. Nash, Jr.[]

From this order, plaintiff appeals.

[1] First, plaintiff contends in its brief that the trial court's denial of plaintiff's motion to enforce the settlement agreement was error because it "undermines the stated purposes of Alternative Dispute Resolution and, specifically, Court Ordered Mediated Settlement Conferences." Plaintiff's brief correctly notes that the purpose of court-ordered mediation is "to make civil litigation more economical, efficient, and satisfactory to litigants and the State," N.C. Gen. Stat. § 7A-38.1(a) (2001), and that mediated settlement as a means to resolve disputes should be encouraged and afforded great deference because settlement of claims is favored under North Carolina law, *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001). However, because plaintiff's brief simply states these general legal principles but fails to present any argument as to how the trial court's order violates them or otherwise undermines our system of court-ordered mediated settlement conferences, plaintiff has abandoned this assignment of error. *See* N.C.R. App. P. 28(b)(5) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned."); *see also State v. Hatcher*, 136 N.C. App. 524, 526-27, 524 S.E.2d 815, 817 (2000) ("Because of defendant's failure to make any supporting argument or citation of authority, this assignment of error is considered abandoned.")

[2] Next, plaintiff contends the trial court erred by concluding that plaintiff's failure to discharge the letter of credit on Lot Two breached the Settlement Agreement, despite evidence that defendants' second and third payments were each approximately seventeen days late. Plaintiff argues that defendants were obligated to pay the entire $55,000.00 settlement amount, in timely monthly installments, despite plaintiff's failure to authorize release of the letter of credit. We disagree.

Our Supreme Court has stated that a mediated settlement agreement constitutes a valid contract between the settling parties which is "governed by general principles of contract law." *Chappell*, 353 N.C. at 692, 548 S.E.2d at 500. "If the contract is clearly expressed, it must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language." *Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 712, 281 S.E.2d 676, 679 (1981). Thus, we conclude that the trial court correctly treated the Settlement Agreement as a binding, bilateral contract, to be interpreted according to general principles of contract law.

It is a well-settled principle of contract law that "[a] condition precedent is an event which must occur before a contractual right arises . . . ." *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 375, 432 S.E.2d 855, 859 (1993). Stated another way, "[a] condition precedent is an act or event, other than a lapse of time, which [unless excused] must exist or occur before a duty to perform a promised performance arises." *First Union Nat. Bank v. Naylor*, 102 N.C. App. 719, 723, 404 S.E.2d 161, 163 (1991) (quoting J. Calamari & J. Perillo, The Law of Contracts § 11-5 (3d ed. 1987)). However, for a contract provision to be construed as a condition precedent, the provision must contain language which plainly requires such construction. *Goforth Properties, Inc.* 334 N.C. at 375-76, 432 S.E.2d at 859. Our appellate courts have held that "the use of such words as 'when,' 'after,' 'as soon as,' and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event." *Jones v. Realty Co.*, 226 N.C. 303, 306, 37 S.E.2d 906, 908 (1946). This Court has stated that "the contractual language '*[u]pon* the said note . . . being paid in full' indicates in plain language a condition precedent." *Naylor*, 102 N.C. App. at 723, 404 S.E.2d at 163 (emphasis added).

In the case *sub judice*, paragraph four of the Settlement Agreement states that "*Upon Defendants['] payment of the first Thirty Thousand Dollars ($30,000.00) to Plaintiff*, Plaintiff agrees that the letter of credit pertaining to Lot 2 shall be released and returned and the lien against such lot shall be discharged" (emphasis added). We conclude that pursuant to the Settlement Agreement's terms, defendants' payment of the first $30,000.00 was a condition precedent, the occurrence of which gave rise to plaintiff's duty to release the letter of credit and discharge the lien pertaining to Lot Two. *Goforth Properties, Inc.*, 334 N.C. at 375, 432 S.E.2d at 859; *Naylor*, 102 N.C. App. at 723, 404 S.E.2d at 163. Thus, we hold that

plaintiff's failure to authorize release of the letter of credit on Lot Two following defendant's third $10,000.00 payment constituted a breach of the Settlement Agreement. *Cargill, Inc. v. Credit Assoc., Inc.*, 26 N.C. App. 720, 722-23, 217 S.E.2d 105, 107 (1975) ("Conditions precedent . . . must exist or occur before there is a right to immediate performance, before there is a breach of contract duty . . . .").

As a general rule, if either party to a bilateral contract commits a material breach of the contract, the non-breaching party is excused from the obligation to perform further. *Lake Mary Ltd. Part. v. Johnston*, 145 N.C. App. 525, 537, 551 S.E.2d 546, 555, *disc. review denied*, 354 N.C. 363, 557 S.E.2d 539 (2001). Whether a breach is material or immaterial is ordinarily a question of fact. *Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 512, 358 S.E.2d 566, 570 (1987). Here, we conclude that the Settlement Agreement's provision requiring plaintiff to release the letter of credit for Lot Two "[u]pon Defendants[']' payment of the first Thirty Thousand Dollars ($30,000.00) to Plaintiff" is a material term of the Settlement Agreement. Both Nash and Helms testified that defendants would not have agreed to the settlement if plaintiff had not promised to release the letter of credit on Lot Two after payment of the first $30,000.00. In addition to being found in paragraph four of the formal Settlement Agreement, this provision was inserted in the margin of the handwritten document the parties compiled at the mediated settlement conference to memorialize their agreement, where it was initialed by the parties. We hold that plaintiff's failure to authorize release of the letter of credit on Lot Two following defendants' payment of the first $30,000.00 constituted a material breach of the Settlement Agreement, which excused defendants from their obligation to make any further settlement payments.

Plaintiff's assertion that each of defendant's three settlement payments were untimely and thus excused its obligation to release the letter of credit is without merit. When reviewing a trial court's determination that a party has materially breached a contract, "the appellate courts are bound by the trial judge's findings of fact if there is some evidence to support them, even though the evidence might sustain findings to the contrary." *Williams, Inc. v. Southeastern Regional Mental Health Center*, 89 N.C. App. 549, 550, 366 S.E.2d 516, 517-18 (1988). Here, the trial court found that "Defendant, Vernon E. Nash, Jr. paid the first $30,000.00 to the Plaintiff in accordance with the terms of the Mediated Settlement Agreement." This finding is supported by Nash's testimony that he delivered the first $10,000.00

check to plaintiff's counsel, and the second and third checks to plaintiff's office, on the dates specified in the Settlement Agreement, as well as by cancelled checks made out by Nash to plaintiff for $10,000.00 and dated 15 June 2001 and 16 July 2001. We are thus bound by the trial court's finding, and plaintiff's second assignment of error is overruled.

[3] Finally, after a thorough examination of the record, we conclude that plaintiff's assertion in its brief that the trial court's order "leaves open numerous unresolved issues" is without merit. In its Motion to Enforce Provisions of Mediated Settlement Agreement filed 5 December 2001, plaintiff requested only that the trial court "enter an Order compelling Defendants, Vernon E. Nash, Jr., and Robert F. Helms, to perform their obligations as set forth in paragraphs 1, 2, 3, 4, 5 and 6 of the Settlement Agreement." In its order denying plaintiff's motion, the trial court concluded that plaintiff materially breached the Settlement Agreement by failing to release the letter of credit on Lot Two upon defendants' third $10,000.00 payment, and that "Defendants are excused from any further performance under the Mediated Settlement Agreement." Therefore, the only issue properly before this Court is whether the trial court properly denied plaintiff's motion to enforce the Settlement Agreement, based on the record evidence. *See* 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 request, objection or motion, stating the specific grounds for the ruling the party desired . . . 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."); *see also Buckingham v. Buckingham*, 134 N.C. App. 82, 91, 516 S.E.2d 869, 875-76, *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999). This assignment of error is overruled.

Affirmed.

Judges WYNN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. TYRONE EDWARD McCREE

No. COA02-1337

(Filed 2 September 2003)

1. Sentencing— habitual offender— not ex post facto

Whether an application of the habitual misdemeanor assault statute was ex post facto because prior offenses occurred before the effective date of the statute was controlled by *State v. Smith*, 139 N.C. App. 209, which rejected this argument.

2. Sentencing— habitual offender—prior convictions

The transcript showed that defendant pled guilty to five previous misdemeanor convictions and waived his right to a jury determination of his status as an habitual offender, even though he contended that he merely stipulated to the convictions.

3. Assault— pointing a gun—sufficiency of evidence

There was sufficient evidence of assault by pointing a gun, even though defendant contended that the intended victim was another, where the victim testified that defendant pointed a gun directly at her and told her not to move, identified defendant both at a photo lineup and in court, and defendant did not contend that he had a legal justification for pointing the gun at the victim.

4. Firearms and Other Weapons— possession by felon—operability of weapon

The operability of a firearm is not an essential element of possession of a firearm by a felon, nor is it an affirmative defense.

5. Assault— handgun—deadly weapon per se

A handgun is a deadly weapon per se and the State need only show possession of a handgun to establish the deadly weapon element of assault with a deadly weapon inflicting serious injury. The State is not required to show that defendant used the gun with deadly force.

6. Assault— circumstantial evidence—sufficient

Defendant's possession of a handgun and the extent of the victim's injuries constituted sufficient circumstantial evidence that an assault was accomplished with a deadly weapon, even though the victim could not remember defendant beating him with a gun.

7. Evidence— prior inconsistent statement—inadmissible

A prior statement by an assault victim that he had been beaten with a gun should have been excluded because he testified at trial that he did not remember defendant striking him with a gun. A witness's prior statements may be admitted to corroborate trial testimony but may not be used as substantive evidence.

8. Evidence— prior inconsistent statement—prejudicial

The admission of an assault victim's prior statement that he had been beaten by defendant with a gun was prejudicial, even though there was sufficient circumstantial evidence to submit the charge to the jury, because this statement was the only direct evidence that the victim was struck by the weapon.

9. Sentencing— consecutive sentence—improperly recorded

A consecutive sentence that was correct but improperly recorded was remanded for correction of the judgment.

Appeal by defendant from judgments entered 24 July 2002 by Judge Claude S. Sitton in Gaston County Superior Court. Heard in the Court of Appeals 11 June 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Carlton, Rhodes & Carlton, by Gary C. Rhodes, for defendant-appellant.

HUNTER, Judge.

Tyrone Edward McCree ("defendant") appeals his convictions and sentencing for two counts of habitual misdemeanor assault, assault with a deadly weapon, and possession of a firearm by a felon. For the reasons stated herein, we grant defendant a new trial with respect to his conviction for assault with a deadly weapon and remand for correction of a clerical error in the judgment form.

The State's evidence tended to show that around noon on 25 August 2001 defendant, along with another man, approached Walter Brown ("Brown") and Linda Young ("Young") (now Linda Brown) while the two were sitting on the steps of their home in Gastonia, North Carolina. At the time, Young was holding the couple's fifteen-month old daughter on her lap. The two men, including defendant, asked Brown if he was "T.J." When Brown stated that he was "T.J.,"

defendant pulled out a handgun, pointed it at Brown, Young, and their child and told them not to move. Despite defendant's threat, Young took the child and went into the house to call 911. While Young was in the house, defendant struck Brown in his face, on his head, and on his jaw. During the attack, Brown went in and out of consciousness. Brown indicated that he only remembered being struck by a fist on the first blow, and that he could not remember any details regarding the subsequent blows. As a result of the incident, he suffered several injuries including a swollen jaw, several chipped and missing teeth, bruises on his face and head, and a dent in his skull.

Officer Mike McKenzie ("Officer McKenzie"), of the Gastonia City Police Department, investigated the incident. In a victim's impact statement dated 15 September 2001, Brown stated that a man had pointed a gun at him and Young, and that he had been beaten with that gun. Officer McKenzie showed Brown a photographic lineup which included a picture of defendant. Although Brown was unable to identify defendant as his assailant from the lineup, Young was able to identify him. Shortly thereafter, defendant was arrested and charged with three counts of habitual misdemeanor assault pursuant to N.C. Gen. Stat. § 14-33.2 (based on the enhancement of charges of assault by pointing a handgun at Brown, Young, and their child pursuant to N.C. Gen. Stat. § 14-34), feloniously assaulting Brown with a deadly weapon inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32(b), and possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1.

At trial, defendant presented evidence tending to show that his brother, Tracy McCree, went to Brown's home upon learning of an altercation between Brown and his father, Buck McCree. When Tracy McCree questioned Brown about the altercation, Brown became hostile. Tracy McCree approached Brown and hit him several times with his fists and then left. Defendant did not accompany his brother on this occasion and was not involved in the beating of Brown.

Based on the evidence presented, the jury found defendant guilty of two counts of habitual misdemeanor assault with respect to his assaults by pointing a gun at both Young and Brown, one count of assault with a deadly weapon on Brown pursuant to N.C. Gen. Stat. § 14.33(c)(1) (a lesser included offense of the original charge of assault with a deadly weapon inflicting serious injury), and possession of a firearm by a felon. Defendant appeals his convictions.

I.

[1] By his first assignment of error, defendant argues the trial court erred in failing to dismiss the habitual misdemeanor assault charges since three of his five prior misdemeanor offenses required to establish the charge occurred before the effective date of the habitual misdemeanor assault statute. Specifically, defendant asserts that three of the prior convictions—two charges of assault with a deadly weapon (92 CRS 28803), and a charge for use of profane language on a highway (90 CRS 22710)—occurred before the enactment of N.C. Gen. Stat. § 14-33.2 and subjects defendant to *ex post facto*. However, this Court expressly rejected this argument in *State v. Smith*, 139 N.C. App. 209, 533 S.E.2d 518 (2000). As we noted in *Smith*,

> the habitual felon statute does not violate the prohibition against *ex post facto* laws because it does not punish defendant for his previous conduct, but rather for his current conduct to a greater degree, due to his previous similar offenses. . . . As the habitual misdemeanor assault statute similarly does not impose punishment for previous crimes, but imposes an enhanced punishment for behavior occurring after the enactment of the statute, because of the repetitive nature of such behavior, we hold the habitual misdemeanor assault statute does not violate the prohibition on *ex post facto* laws.

Id. at 214-15, 533 S.E.2d at 521. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, we are bound by *Smith* and overrule this assignment of error.

II.

[2] Defendant also assigns error to the trial court sentencing him as an habitual misdemeanor offender on the grounds that he neither pled guilty to the offense, nor did the trial court submit the issue to the jury. It is well established that a plea of guilty is equivalent to a conviction and no evidence of guilt is required and no verdict of a jury is required as a prerequisite to the imposition of a lawful sentence. *State v. Shrader*, 290 N.C. 253, 262, 225 S.E.2d 522, 529 (1976). Here, defendant asserts that he merely stipulated to the convictions, and did not plead guilty to the habitual misdemeanor assault charge. Yet, the transcript reveals the trial court entered into the following dialogue with defendant:

THE COURT: With that understanding, do you desire to admit your guilt as to those five previous convictions and to waive your right to a trial by jury in regard thereto?

MR. McCREE: Yes, sir.

THE COURT: Are you, in fact, guilty of those five previous misdemeanors?

MR. McCREE: Yes. Sir.

This portion of the transcript clearly indicates that defendant pled guilty to the five previous misdemeanor convictions and waived his right to a jury determination of his status as an habitual offender. We, therefore, overrule defendant's assignment of error.

III.

By defendant's next assignment of error, he argues the trial court erred in failing to dismiss charges against him due to insufficiency of the evidence. Defendant advances the following contentions: (1) the trial court erred in failing to grant his motion to dismiss the underlying charge of assault by pointing a gun with respect to the alleged assault on Young;[1] (2) the trial court failed to dismiss the charge of possession of a firearm by a felon because the State failed to provide evidence that the gun was operable; (3) the trial court failed to dismiss the charge of assault with a deadly weapon inflicting serious injury on Brown for lack of sufficient evidence that the gun *was* a deadly weapon; and (4) the trial court failed to dismiss the charge of assault with a deadly weapon inflicting serious injury on Brown for lack of sufficient evidence that the injuries were caused by the *use* of a deadly weapon. We address each of defendant's arguments separately.

When determining whether to dismiss a criminal action, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference which may be drawn from the evidence and resolving all inconsistencies in the State's favor. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). A motion to dismiss is properly 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."

1. Defendant also had an underlying charge of assault by pointing a gun on Brown; however, he does not raise this issue on appeal. Therefore, we will not address it.

State v. Lynch, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). The term " 'substantial evidence,' " as interpreted by our Supreme Court in the context of a motion to dismiss, is interchangeable with " 'more than a scintilla of evidence.' " *State v. Faison*, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991) (citation omitted).

[3] Defendant first contends the trial court erred in failing to dismiss the charge of assault by pointing a gun at Young on the grounds that the State failed to prove he *intentionally* pointed the gun at Young. According to defendant, all of the evidence supports the sole inference that Brown was the only intended victim of the alleged assault. We disagree.

The assault by pointing a gun statute, N.C. Gen. Stat. § 14-34 (2001), provides that "[i]f any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor." At trial, Young testified that defendant pointed a gun directly at her and told her not to move. She also identified defendant both in a photo lineup and in court as the person who pointed a gun at her. Furthermore, our Courts have interpreted the provisions of Section 14-34 to include an additional qualification that the intentional pointing of a pistol constitutes a violation only if it is done without legal justification. *Lowe v. Department of Motor Vehicles*, 244 N.C. 353, 360, 93 S.E.2d 448, 453 (1956). Defendant does not contend that he had a legal justification to point the gun at the victim. Thus, when viewing the evidence in the light most favorable to the State, we are compelled to conclude that there was sufficient evidence to withstand defendant's motion to dismiss the charge of assault by pointing a gun at Young.

[4] Defendant also contends that the charge of possession of a firearm by a felon should have been dismissed on the ground that the evidence failed to support that defendant was in possession of a *working* firearm. Yet, despite defendant's contention, operability of a firearm is not an essential element of the charge of possession of a firearm by a felon, nor is it an affirmative defense. *State v. Baldwin*, 34 N.C. App. 307, 309, 237 S.E.2d 881, 882 (1977); *State v. Jackson*, 353 N.C. 495, 503, 546 S.E.2d 570, 575 (2001). Accordingly, the trial court properly denied defendant's motion to dismiss.

Defendant's remaining two contentions involve the felony charge of assault with a deadly weapon inflicting serious injury. The essential elements of the charge of assault with a deadly weapon inflicting

serious injury are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death. N.C. Gen. Stat. § 14-32(b) (2001); *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). Of these elements, defendant only takes exception with respect to the element requiring the use of a deadly weapon.

[5] Defendant initially contends the State produced insufficient evidence that Brown's injuries were caused by a deadly weapon because in order to establish that a gun is a deadly weapon, the State must show that defendant used the gun with deadly force. However, this Court has previously held that a handgun is a deadly weapon *per se*. *State v. Reives*, 29 N.C. App. 11, 12, 222 S.E.2d 727, 728 (1976). Thus, whether or not deadly force was used to inflict Brown's injuries, the State was merely required to show that defendant possessed a handgun in order to establish the "deadly weapon" element.

[6] Next, defendant contends that even assuming he was in possession of a gun, the State failed to present sufficient evidence that he struck Brown with the weapon because Brown testified that he could not remember being struck with defendant's gun. In light of that testimony, defendant further argues that a prior statement of Brown's whereby he stated that he had been beaten with a gun was erroneously admitted into evidence by the trial court because the prior statement was inconsistent with Brown's trial testimony and, had the statement not been admitted, there would have been no evidence that a gun was used to inflict Brown's injuries.

Here, the State offered evidence that as a result of Brown's beating by defendant he suffered "cuts and dents and bruises on [his] head[,]" could not open his mouth due to swelling, and had a tooth knocked out of his mouth as well as several other chipped and cracked teeth. Brown spent approximately a month on pain medication following the incident and still had visible signs of the beating when he testified at trial approximately eleven months later. Although not direct evidence, this Court has recognized that circumstantial evidence may be sufficient to show whether a deadly weapon was used to inflict injuries on a victim. *See State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981). Specifically, in *State v. Rowland*, 263 N.C. 353, 139 S.E.2d 661 (1965), this Court held that although the victim was hit in the head from behind and did not see who or what hit her, the fact that she was rendered unconscious, sustained a serious injury to her head, and was hospitalized provided sufficient circumstantial evidence for a jury to infer that she was hit with a deadly

weapon. Thus, even in the absence of testimony regarding Brown's prior statement that he was hit with a gun, when viewing the evidence in this case in the light most favorable to the State, defendant's possession of the handgun, coupled with the extent of Brown's injuries, was sufficient circumstantial evidence for the jury to infer that an assault had been accomplished with a deadly weapon. The motion to dismiss the charge of assault with a deadly weapon inflicting serious injury was properly denied.

[7] Nevertheless, we conclude that whether defendant's prior statement was inadmissible must also be determined because it may have impacted the jury's ultimate decision to find defendant guilty of the lesser charge of assault with a deadly weapon. At trial, Brown testified that despite defendant being armed with a handgun, he did not remember defendant striking him with that gun. He testified that he did, however, remember initially being struck by a fist. During redirect examination of Brown, the State presented a statement dated 15 September 2001, in which Brown indicated that he had been beaten with a gun. According to defendant, the statement should have been excluded because it did not corroborate Brown's testimony at trial. We agree.

It is well established that a witness's prior statements may be admitted to corroborate the witness's sworn trial testimony but they may not be used as substantive evidence. *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303-04 (1991). "In order to be corroborative and therefore properly admissible, the prior statement of the witness need not merely relate to specific facts brought out in the witness's testimony at trial, so long as the prior statement in fact tends to add weight or credibility to such testimony." *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573 (1986). *See also State v. Mickey*, 347 N.C. 508, 519, 495 S.E.2d 669, 676, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998). However, prior statements that indicate additional or new information that is not referred to in the witness's trial testimony, may never be admitted as corroborative evidence. *Ramey*, 318 N.C. at 469, 349 S.E.2d at 574. Additionally, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony. *Id.* During Brown's testimony at trial, he indicated that he had been struck by a fist, and that he could not remember anything regarding the other times he was hit. At no time during his testimony did he mention that he may have been struck by a handgun. However, in his 15 September 2001 statement he asserted that he was struck with a gun. We hold the prior statement and Brown's trial testimony

were contradictory; and thus, the trial court erred in admitting the prior statement.

[8] Despite sufficient circumstantial evidence being offered by which the jury could have inferred that defendant was hit by a deadly weapon, the erroneous admission of Brown's prior inconsistent statement was the only direct evidence that Brown was struck with the weapon. That direct evidence may have persuaded the jury to find defendant guilty of assault with a deadly weapon instead of either assault inflicting serious injury or simple assault, both of which were other lesser included offenses of assault with a deadly weapon inflicting serious injury that were submitted to the jury. Therefore, since we cannot definitively conclude the inadmissible statement was not a significant factor in the jury's verdict, defendant is entitled to a new trial based on his conviction of assault with a deadly weapon. *See generally State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997).

IV.

[9] By defendant's final assignment of error, he contends the trial court erred in Case No. 01CRS61902 by imposing a consecutive sentence to begin at the end of another sentence with an identical case number. On the judgment form for case number 01CRS61902, the trial court indicated that defendant was sentenced to serve 150 days, and that at the end of this sentence he was to begin serving time for a sentence imposed in case number 01CRS61902—the same case number. The trial court should have listed the second case number as 01CRS61903. The State concedes the trial court erred in placing the incorrect case number on the judgment form, but it contends that the error should not result in our vacating defendant's sentence. In *State v. Lorenzo*, 147 N.C. App. 728, 735, 556 S.E.2d 625, 629 (2001), this Court held that where a sentence was proper, but improperly recorded, the case must be remanded to the trial court to correct the judgment so that it conforms to the sentence. Aside from being improperly recorded on the judgment form, defendant's sentences would have otherwise been correct. Thus we remand defendant's case to the trial court to correct the judgments in the manner stated above.

Partial new trial. Remanded for correction.

Judges TIMMONS-GOODSON and ELMORE concur.

JOHNNIE E. HARPER, PETITIONER v. CITY OF ASHEVILLE, RESPONDENT

No. COA02-1044

(Filed 2 September 2003)

1. **Administrative Law— appeal to superior court—session law—de novo review of jurisdiction**

An appeal of right existed from a decision by the Asheville Civil Service Board that it lacked jurisdiction over an employment grievance. The session law in which the Asheville Civil Service Law appears does not suggest a legislative intent that the superior court defer to the Board's findings and conclusions on subject matter jurisdiction. Moreover, the court has jurisdiction to determine the whole case, including jurisdiction, when a statute provides appeal from an agency decision de novo, as in this case. Finally, even if no right of appeal exists, the standard of review is de novo for questions of subject matter jurisdiction.

2. **Administrative Law— appeal to superior court—de novo determination of jurisdiction**

The right to appeal a civil service board's jurisdictional decision entitled petitioner to a de novo determination by the trial court. The trial court's deferential standard of review was improper; however, after its own de novo review, the Court of Appeals concluded that the Asheville Board lacked subject matter jurisdiction.

Appeal by petitioner from judgment entered 29 April 2002 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 23 April 2003.

Biggers & Hunter, P.L.L.C., by John C. Hunter, for petitioner-appellant.

Office of the City Attorney for the City of Asheville, by Assistant City Attorney II Martha Walker-McGlohon, for respondent-appellee.

GEER, Judge.

This appeal presents the question whether an individual is entitled, under § 8(f) of Chapter 303 of the 1999 N.C. Sess. Laws, to appeal to superior court a determination of the Asheville Civil Service

Board ("the Board") that it lacked subject matter jurisdiction over the individual's grievance. The superior court ruled below that it had no subject matter jurisdiction and could review the Board's decision only pursuant to a *writ of certiorari*. We hold that, under the pertinent session law, petitioner Johnnie Harper was entitled to *de novo* review of the Board's decision by the superior court, but that the question of subject matter jurisdiction is a question for the court and not the jury. Because, however, our review of the record reveals no disputed issue of fact regarding whether Mr. Harper resigned, we affirm the trial court's dismissal of Mr. Harper's petition.

As originally enacted in 1953, the Asheville Civil Service Law provided a system of civil service protection for employees of the City of Asheville, but did not provide a mechanism for judicial review of decisions of the Civil Service Board. *Jacobs v. City of Asheville*, 137 N.C. App. 441, 443-44, 528 S.E.2d 905, 907 (2000). In 1977, the General Assembly amended the Asheville Civil Service Law to allow appeal from a decision of the Board to superior court for a trial *de novo*. *Id.* at 444-45, 528 S.E.2d at 907-08; 1977 N.C. Sess. Laws ch. 415.

The current version of the Asheville Civil Service Law appears at 1999 N.C. Sess. Law ch. 303. The act sets forth an administrative review procedure for certain personnel actions taken with respect to covered city employees. Specifically, under § 8(a) of this session law, "[w]henever any member of the classified service of the City is discharged, suspended, reduced in rank, transferred against his or her will, or is denied any promotion or raise in pay which he or she would be entitled to, that member shall be entitled to a hearing before the Civil Service Board to determine whether or not the action complained of is justified."

Mr. Harper worked for the City of Asheville in its Parks and Recreation Department and was covered by the civil service provisions of 1999 N.C. Sess. Law ch. 303. On 30 June 2000, Mr. Harper submitted a grievance alleging that the City of Asheville had unlawfully dismissed him from employment. After a determination by the Parks and Recreation Director that he had voluntarily resigned his position effective 22 June 2000, Mr. Harper sought a hearing before the Board under 1999 N.C. Sess. Law ch. 303, § 8(a).

Following an evidentiary hearing, the Board dismissed the grievance in an order dated 23 October 2000. The Board found that "[o]n June 8, 2000 Harper voluntarily resigned his position with the City of Asheville by giving notice of his resignation, effective June 22, 2000."

The Board concluded as a matter of law that "having found that Harper voluntarily resigned from his employment, the Civil Service Board has no jurisdiction to grant relief in this matter."

On 2 November 2000, Mr. Harper filed a petition for trial *de novo* in Buncombe County Superior Court. The City filed a motion to dismiss under Rules 12(b)(6), 12(b)(1), and 12(b)(2) on 21 November 2000. On 14 March 2001, the City filed a motion to continue explaining that "upon further review of the Complaint filed by the Petitioner, matters outside of the pleadings will need to be considered by the court in ruling upon Respondent's Motion to Dismiss . . . ." The City filed an answer on 23 April 2001, followed by a motion for summary judgment contending that the superior court lacked subject matter jurisdiction.

On 4 December 2001, the trial court entered an order stating that "in order for the Court to determine its subject matter jurisdiction, the Court must first review, by proceedings in the nature of certiorari, the decision rendered by the Asheville Civil Service Board dismissing Petitioner's Grievance for lack of subject matter jurisdiction . . . ." The court ordered, pursuant to Rule 19 of the General Rules of Practice for the Superior and District Courts and N.C. Gen. Stat. § 1-269, that the complete record of proceedings before the Board be filed with the court. The court further directed that the matter be placed upon the trial calendar "for the sole purpose of determining whether the [Civil] Service Board properly dismissed Petitioner's grievance for lack of subject matter jurisdiction."

On 22 April 2002, Judge Robert D. Lewis heard the continued motion for summary judgment and Mr. Harper's petition for a jury trial *de novo*. With respect to Mr. Harper's petition, Judge Lewis concluded that the Board "considered conscientiously the evidence and determined unanimously that Johnnie Harper had resigned[;]" that without the necessary predicate action of a discharge, the Board had no jurisdiction; and "[a] fortior[i], the petition does not vest subject matter jurisdiction in the Superior Court . . . ." In considering the court's own *writ of certiorari*, the court stressed that "the judge presiding does not substitute his or her own judgment for that of the Board," but decides only whether the Board committed an error of law and whether the decision was supported by competent evidence in the record. Finding no error of law and that competent evidence supported the Board's decision, Judge Lewis concluded that Mr. Harper was not entitled to relief by way of the *writ of certiorari*. Mr. Harper appealed from this order.

I

[1] The first question presented by this appeal is whether Mr. Harper was entitled to *de novo* review before the superior court under 1999 N.C. Sess. Laws ch. 303 or whether the court properly considered his appeal pursuant to a *writ of certiorari*. Review by *certiorari* is appropriate when no right to appeal has been provided by law. *Russ v. Board of Education*, 232 N.C. 128, 130, 59 S.E.2d 589, 591 (1950).

In determining whether the trial court erred in reviewing this case by way of *certiorari*, we must decide whether 1999 N.C. Sess. Laws ch. 303 provided Mr. Harper with a right to appeal from the Board's conclusion that it lacked jurisdiction. The session law provides:

> Within ten days of the receipt of notice of the decision of the Board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial *de novo*. The appeal shall be effected by filing with the Clerk of the Superior Court of Buncombe County a petition for trial in superior court, setting out the facts upon which the petitioner relies for relief. If the petitioner desires a trial by jury, the petition shall so state.

1999 N.C. Sess. Laws ch. 303, § 8(f).

The City argues that Mr. Harper had no right of appeal under this provision because the Board concluded that it lacked jurisdiction. Under the City's view of the Act, any decision by the Board that it lacks jurisdiction is not subject to appeal. We disagree.

No provision of the session law suggests such a limitation. Section 8(f) states that upon receipt of the decision, either party may appeal "for a trial *de novo*." The Board issued a decision under § 8(e), finding that Mr. Harper had not met the requirements of § 8(a). The plain language of § 8(f) of the session law authorized Mr. Harper to appeal that decision.

The language does not suggest that the General Assembly intended to require the superior court to defer to the Board's factual findings and legal conclusions regarding subject matter jurisdiction. To the contrary, our Supreme Court has held that when a statute providing an appeal from an agency decision stipulates that the hearing shall be *de novo*, the statute gives "the court jurisdiction to determine the whole case . . . ." *Able Outdoor, Inc. v. Harrelson*, 341 N.C.

167, 170, 459 S.E.2d 626, 628 (1995). A significant aspect of "the whole case" is whether the agency—or in this case the Board—had jurisdiction.

This Court's prior decisions with respect to the Asheville Civil Service Board are consistent with a *de novo* hearing on the question of subject matter jurisdiction. In *Worley v. City of Asheville*, 100 N.C. App. 596, 598, 397 S.E.2d 370, 370 (1990), *disc. review denied*, 328 N.C. 275, 400 S.E.2d 463 (1991), this Court affirmed the trial court's grant of summary judgment when review of the evidence revealed no issue of fact regarding whether the petitioner was entitled to a pay increase, a prerequisite for review by the Board. Similarly, in *O'Donnell v. City of Asheville*, 113 N.C. App. 178, 180, 438 S.E.2d 422, 423 (1993), the Court affirmed the trial court's dismissal of a petition for lack of jurisdiction based on the allegations of the petition and not on the Board's dismissal: "Plaintiff's failure to allege that he is entitled to a promotion is more than a harmless technical error. Without that allegation, the petition does not vest subject matter jurisdiction in the superior court, and whenever the court does not have subject matter jurisdiction, the judge must dismiss." In neither case did this Court base its decision on the Board's finding of a lack of jurisdiction. *See also Warren v. City of Asheville*, 74 N.C. App. 402, 405-06, 328 S.E.2d 859, 862 (Asheville Civil Service Law's provision for trial *de novo* vests the superior court " 'with full power to determine the issues and rights of all parties . . . as if the suit had been filed originally in the court.' ") (quoting *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)), *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985).

Even if the City were correct and no right to appeal existed, Mr. Harper would still have been entitled to *de novo* review of the Board's decision in this case. For questions of subject matter jurisdiction, the standard of review is *de novo* even when there is no right to appeal. *See, e.g., Raleigh Rescue Mission, Inc. v. Board of Adjustment of City of Raleigh*, 153 N.C. App. 737, 740, 571 S.E.2d 588, 590 (2002) ("Because the issue of whether the Board had jurisdiction is a question of law, the trial court applied the incorrect standard of review. The appropriate review is *de novo*."); *Beauchesne v. University of North Carolina at Chapel Hill*, 125 N.C. App. 457, 468, 481 S.E.2d 685, 692 (1997) (because petitioner contended that the State Personnel Commission erred in deciding that it did not have jurisdiction over a particular personnel action, "our *de novo* review is again required"). Under the *de novo* standard, the trial court is required to consider the question of jurisdiction "anew, as if not previously considered or

decided" by the Board. *Raleigh Rescue Mission*, 153 N.C. App. at 740, 571 S.E.2d at 590.

We hold, therefore, that a right of appeal exists under 1999 N.C. Sess. Laws ch. 303 from a decision of the Board that it lacks jurisdiction under § 8(a) of the session law. The trial court erred (1) in dismissing the petition based on the fact that the Board had found no jurisdiction; and (2) in applying the whole record test to the question of jurisdiction when considering the Board's decision pursuant to the court's *writ of certiorari*. *Raleigh Rescue Mission*, 153 N.C. App. at 740, 571 S.E.2d at 590 (court erred in applying whole record review to question of jurisdiction).

II

[2] Our holding that Mr. Harper was entitled to appeal the Board's jurisdictional decision does not, however, automatically entitle him to a trial by jury on that question. He was instead entitled to a *de novo* determination of subject matter jurisdiction by the court.

Our Supreme Court has held that a trial court may decide the question of subject matter jurisdiction without a jury even if the evidence presents issues of fact:

> "The issue of jurisdiction is basically one of law. It involves the determination by the court of its right to proceed with the litigation. A decision of this question by the court deprives a litigant of no right to a jury trial of the issue of liability because, if the court has no jurisdiction, the litigants have no rights which they may assert in that court. The right to have a jury pass upon the controverted factual issues must of necessity relate to the assertion of the right of the litigant which has been allegedly violated, which presupposes a court having jurisdiction to grant the relief sought. The determination of the jurisdictional question by the court is not a denial of any constitutional right of a litigant to a jury trial, but simply a determination of the forum in which those rights may properly be asserted. The decision of the question of whether the court has jurisdiction is a preliminary one to the determination of the merits of the cause, and is for the court to decide."

Burgess v. Gibbs, 262 N.C. 462, 465-66, 137 S.E.2d 806, 808 (1964) (quoting *Bridges v. Wyandotte Worsted Co.*, 243 S.C. 1, 9, 132 S.E.2d 18, 21-22 (1963), *overruled in part on other grounds*, *Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002)). More recently, the

Supreme Court has held that once the question of subject matter jurisdiction is raised, the superior court must "follow[] the proper procedure and [make] findings of fact and conclusions of law in resolving the issue." *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986).

Generally, a defendant raises the issue of subject matter jurisdiction by filing, as the City did here, a Rule 12(b)(1) motion. As a leading civil procedure commentator has noted,

> A motion under Rule 12(b)(1) may be used to attack two different types of defects. The first is the pleader's failure to comply with Rule 8(a)(1), which means that the allegations in the complaint are insufficient to show that the . . . court has jurisdiction over the subject matter of the case. . . . The other defect that may be challenged under Rule 12(b)(1) is the court's actual lack of jurisdiction over the subject matter, a defect that may exist despite the formal sufficiency of the allegations in the complaint.

5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1350 at 211-12 (2d ed. 1990).

As this Court has previously explained, when considering a Rule 12(b)(1) motion—in contrast to a motion under Rule 12(b)(6)—a trial court is not confined to the face of the pleadings, " 'but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.' " *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (1998) (quoting 2 James W. Moore *et al.*, *Moore's Federal Practice*, § 12.30[3] (3d ed. 1997)). Our review of a trial court's decision denying or allowing a Rule 12(b)(1) motion is *de novo* "except to the extent that the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record." *Id.*

Here, the trial court should have first determined, as required by *O'Donnell*, whether Mr. Harper's petition properly invoked the court's subject matter jurisdiction by alleging a personnel action within the scope of § 8(a) of the session law. *O'Donnell*, 113 N.C. App. at 180, 438 S.E.2d at 423 (without plaintiff's allegation that he was "entitled to" a promotion, "the petition does not vest subject matter jurisdiction in the superior court," and the trial judge must dismiss the petition). Mr. Harper's petition alleges that "[t]he actions of the City herein alleged resulted in the discharge of the Petitioner without just cause and in violation of the Personnel Policy of the City

of Asheville." This allegation sufficiently invokes the superior court's subject matter jurisdiction.

The City was then entitled to challenge, as it did, the factual basis for that allegation. It was the trial court's responsibility to determine *de novo*, upon review of the parties' evidence, whether Mr. Harper resigned or whether he was discharged. *See, e.g., Campbell v. N.C. Dep't of Transp.*, — N.C. App. —, 575 S.E.2d 54, 60 (superior court properly determined that agency's conclusion that petitioner voluntarily resigned was an error of law), *disc. review denied*, 357 N.C. 62, 579 S.E.2d 386 (2003). As this Court indicated in *Privette*, the trial court was free to decide the jurisdictional question based on affidavits or other documentary evidence or, if the court found issues of fact, to hold an evidentiary hearing.

It is apparent from Judge Lewis' order that he conducted a careful review of the whole administrative record, but that he applied the wrong standard of review. As stated by Judge Lewis in his order, "With regard to this case, *sub judice*, the judge presiding does not substitute his or her own judgment for that of the Board but decides only: 1. Did the Board commit an error of law? 2. Is the Board's decision that Harper resigned supported by competent evidence in the record?" Judge Lewis thus applied a deferential standard of review to the Board's decision. Under § 8(f) of the session law, however, Mr. Harper was entitled to *de novo* review, which " 'vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.' " *Warren*, 74 N.C. App. at 405-06, 328 S.E.2d at 862 (quoting *In re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)).

Since the issue of subject matter jurisdiction is a question of law, we may address the dispositive issue without remanding the case to superior court for application of the proper standard of review. *Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment*, 355 N.C. 269, 559 S.E.2d 547 (2002), *adopting per curiam*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting). *See also Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment*, 152 N.C. App. 474, 475, 567 S.E.2d 440, 441 (on appeal from superior court's review of agency decision, appellate court must determine whether agency committed any errors in law), *disc. review denied*, 356 N.C. 611, 574 S.E.2d 676 (2002). After a careful *de novo* review of the record, we find no evidence that could support a finding that Mr. Harper was fired. The Board, therefore, properly concluded it lacked subject matter jurisdiction.

During his testimony before the Board, Mr. Harper admitted, at the beginning of his cross-examination, that he told the receptionist he was quitting at the point when she asked if he wanted to leave a voice mail for the Director of Parks and Recreation. He then repeatedly testified that he could not deny instructing the receptionist to tell the Director that he was quitting effective two weeks later, that the Director should draw up the necessary paperwork, and that Mr. Harper would be going to court. Although given numerous opportunities, Mr. Harper never denied directing the receptionist to tell the Director that he was quitting. Mr. Harper bore the burden of proving that he was discharged as opposed to voluntarily resigning because without a discharge, the superior court lacked subject matter jurisdiction.[1] *Guilford County Planning & Dev. Dep't v. Simmons*, 115 N.C. App. 87, 91, 443 S.E.2d 765, 768 (1994) (plaintiff bears burden of proving subject matter jurisdiction). In light of Mr. Harper's testimony before the Board, he cannot meet his burden.

Although we agree with Mr. Harper's first contention that the trial court erred in reviewing the Board's decision pursuant to a *writ of certiorari*, we conclude that the trial court properly dismissed the petition for lack of subject matter jurisdiction.

Affirmed.

Judges TIMMONS-GOODSON and BRYANT concur.

ERIE INSURANCE EXCHANGE, PLAINTIFF v. ROBBIN D. MILLER, OLLIE K. MILLER, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, DEFENDANTS

No. COA02-699

(Filed 2 September 2003)

Insurance— underinsured motorist—rejection—insurance company form not sufficient

There was not a valid rejection of underinsured motorist coverage where the purported rejection used the words of the form promulgated by the North Carolina Rate Bureau, but included them in a box on petitioner's own form. The plain language of

1. Our review of the record does not indicate that Mr. Harper has argued at any point that his resignation amounted to a constructive discharge.

N.C.G.S. § 20-279.21 requires that the rejection be on a form promulgated by the Rate Bureau; moreover the typeface on petitioner's form did not comply with the Readable Insurance Policies Act.

Appeal by defendants Robbin D. Miller and Ollie K. Miller from judgment entered 21 February 2002 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 17 February 2003.

Bailey & Thomas, P.A., by John R. Fonda, for plaintiff-appellee.

Donaldson & Black, P.A., by Arthur J. Donaldson and Rachel Scott Decker, for defendants-appellants.

GEER, Judge.

Defendants Robbin D. Miller and Ollie K. Miller, who purchased an automobile liability insurance policy from plaintiff Erie Insurance Exchange ("Erie"), have appealed from the trial court's order granting Erie's motion for summary judgment and declaring that Millers' written rejection of underinsured motorist coverage was valid and enforceable. The question presented by this appeal is whether Erie's inclusion in its insurance application form of a section measuring 2 1/2 by 4 inches (in apparently 5.5 point type) allowing for selection and rejection of uninsured motorist ("UM") and underinsured motorist ("UIM") coverage complied with N.C. Gen. Stat. § 20-279.21(b)(4) (2001), requiring all rejections to be "in writing by the named insured on a form promulgated by the [North Carolina Rate] Bureau and approved by the Commissioner of Insurance." Because the North Carolina Rate Bureau's form measures 8 1/2 by 11 inches and is in 12 point type and because the record contains no evidence that either the Rate Bureau or the Commissioner of Insurance has approved Erie's approach, we reverse.

On 12 January 1998, defendant Robbin Miller signed an Erie private passenger automobile application. The application was a two-page form with numbered boxes seeking various information, including personal data about the Millers, the levels of coverage that they wanted, the premiums that would be charged, and their accident history. Box 17, on the second page of the application, was entitled "Selection/Rejection Form Uninsured Motorists Coverage Combined Uninsured/Underinsured Motorists Coverage."

Although Robbin Miller was given the opportunity, he did not review the application and did not fill in any of the blanks in the form. He had previously supplied the information necessary to complete the application to the insurance agent. He relied upon her and simply signed next to three checkmarks that had already been placed on the application. With respect to box 17, he signed that he was choosing to reject combined UM/UIM coverage and selecting UM coverage "at limits of Bodily Injury 100/300 Property Damage 100." At the time, Miller thought that UM benefits and UIM benefits were the same thing.

Erie issued to the Millers a policy of motor vehicle liability insurance with coverage limits in the amount of $100,000.00 per person/$300,000.00 per accident. The policy also indicated that it provided for UM benefits in the same amounts.

On 27 March 1998, the Millers were involved in a motor vehicle accident that the parties stipulated, for purposes of summary judgment, was caused by Brentwood Thomas. Thomas' insurer tendered its policy limits with the result that the Millers each received $33,333.33.

The Millers then made a demand on Erie for UIM benefits. Based on box 17 of the application, Erie denied that the policy provided UIM benefits and brought a declaratory judgment action, seeking a declaration that no UIM coverage existed under its policy for the injuries sustained by the Millers in the 27 March 1998 accident. The Millers filed a counterclaim seeking a declaratory judgment that plaintiff is obligated to provide UIM coverage.

Both plaintiff and defendants subsequently filed motions for summary judgment. Based on the parties' stipulated facts, the superior court concluded as a matter of law that defendant Robbin Miller's rejection of UIM coverage and selection of UM coverage was valid and enforceable. The court, therefore, entered judgment declaring that no UIM coverage existed under the Erie policy for the 27 March 1998 accident.

In North Carolina, a motor vehicle liability insurance policy is required to provide UM and UIM coverage unless the insured has rejected that coverage. N.C. Gen. Stat. § 20-279.21 (2001). Absent a valid rejection, a policy is deemed to include such coverage. *State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 269, 513 S.E.2d 782, 784 (1999).

This appeal requires us to consider what constitutes a valid rejection of UIM coverage. N.C. Gen. Stat. § 20-279.21(b)(4) (emphasis added) is the controlling statute and provides: "Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured *on a form promulgated by the Bureau and approved by the Commissioner of Insurance.*"

The parties do not dispute that Robbin Miller rejected combined UM/UIM coverage in writing. They focus their arguments instead on whether that rejection was "on a form promulgated by the Bureau and approved by the Commissioner of Insurance." We hold that it was not.

In response to N.C. Gen. Stat. § 20-279.21(b), as amended in 1991, the Rate Bureau promulgated and the Commissioner approved two revised forms for selection and rejection of UM or combined UM/UIM coverage: NC 01 85 (Ed. 7-91) for new policies and NC 01 86 (Ed. 7-91) for renewal policies. *Fortin*, 350 N.C. at 269-70, 513 S.E.2d at 785. Since the Millers were entering into a new policy, their rejection of combined UM/UIM coverage was required to be on form NC 01 85 (Ed. 7-91).

Form NC 01 85 (Ed. 7-91) is a one-page, 8 1/2 by 11 inch, form printed in 12 point type with the text measuring 7 by 10 inches. The rejection at issue here has virtually identical language to Form NC 01 85 (Ed. 7-91), substituting only the word "Erie" for "company" and "insured" for "named insured." Erie, however, shrunk the promulgated form and then included it as box 17 in another form, its application. The text of box 17 is 2 1/2 by 4 inches and it appears to be printed in 5.5 point type.

Erie first contends that its rejection complies with N.C. Gen. Stat. § 20-279.21 because it uses the same words as the promulgated form and because the statute does not require that the rejection be in a separate document. This argument disregards the plain language of the statute. The statute requires that the rejection be "on a form promulgated by the Bureau." The Bureau created and the Commissioner of Insurance approved form NC 01 85 (Ed. 7-91). The Millers' rejection is not on the form promulgated by the Bureau, but rather is included in box 17 on an unrelated application form created by Erie. Nothing in the statute or in any administrative ruling authorizes an insurer to merge an unrelated form with the approved Rate Bureau selection/rejection form.

Erie references a leading insurance treatise in arguing that it is appropriate to include a rejection as part of an application form. *See* 9 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 122:57, at 122-108 (1997) ("Form rejections are often included in the application for insurance."). Erie has, however, overlooked the fact that North Carolina's statute, requiring insurers to use a specified form, is unusual. *See* 2 Irvin E. Schermer, *Automobile Liability Insurance 3d* § 36.04, at 36-6 (1995) ("The rejection provisions of the statutes contain numerous dissimilarities of structure and detail relative to . . . the nature and form of rejection . . . ."). Other states requiring that the rejection be in writing either do not specify what form the writing must take or provide that the rejection is to be on a form furnished *by the insurer. See, e.g.*, Ark. Code Ann. § 23-89-403 (Supp. 2003) (UM coverage not required when insured "has rejected the coverage in writing"); Del. Code Ann. tit. 18, § 3902(a)(1) (1999) (coverage must be rejected "on a form furnished by the insurer"). The authors of *Couch on Insurance* point out that "[w]here the use of the statutory form is expressly required, and no provision is made for alteration, addition, or modification, strict adherence with the form is required." 1 Russ & Segalla, *supra*, § 17.13, at 17-21 (1997). Because North Carolina by statute requires the use of a particular form and neither the statute nor any administrative ruling by the Commissioner of Insurance has provided for modification of the format of that form, Erie was required to strictly adhere to the required format.

This requirement of strict adherence has already been adopted by our Supreme Court. In *Fortin*, the insurer used a renewal form that was virtually identical with NC 01 86 (Ed. 7-91); it added only a single line specifying the insured's current UM coverage limits. As Justice Parker stated in her dissent, "[i]n my view, the State Farm form . . . included the exact same language as NC Form 01 86 . . . ." 350 N.C. at 275, 513 S.E.2d at 788. Nevertheless, the majority concluded "that the State Farm version of renewal form NC0186 [sic] that [the insured] executed in January 1992 was not the 'form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.' " *Id.* at 269, 513 S.E.2d at 784. The Court continued: "We note further that the statute specifically provides that rejection 'shall be made in writing' on the approved form." *Id.*

Prior decisions of this Court have reached a similar conclusion. In *Hendrickson v. Lee*, 119 N.C. App. 444, 455, 459 S.E.2d 275, 281 (1995), the insurer argued, as Erie does here, that "use of the precise form promulgated by the Rate Bureau was not required." This Court

disagreed, noting that the statute was "concerned with avoiding confusion and ambiguity through the use of a single standard and approved form." *Id.* at 456, 459 S.E.2d at 282. Likewise, in *Sanders v. American Spirit Ins. Co.*, 135 N.C. App. 178, 186, 519 S.E.2d 323, 328 (1999), because of the need for a single standard form, this Court found a rejection of UIM coverage ineffective when the form, although otherwise identical with the Rate Bureau form, omitted the word "combined." Only when issuing insurance policies outside the jurisdiction of the Rate Bureau may the insurer "permissibly use[] its own form for selection or rejection of underinsured motorist coverage." *Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 325, 524 S.E.2d 386, 389, *aff'd in part on other grounds*, 353 N.C. 240, 539 S.E.2d 274 (2000).

In arguing that its "form" is identical with the Rate Bureau form, Erie points to the fact that the statute does not include any size requirements for the form. There was, however, no need for the General Assembly to do so. It authorized the Rate Bureau to design the form subject to the approval of the Commissioner. It was, therefore, up to the Rate Bureau to determine the proper print size and overall size of the form. When it promulgated its form, it was Erie's responsibility to print rejection/selection forms that matched that form.

In addition, the Readable Insurance Policies Act, enacted in 1979, mandated long ago that "[a]ll insurers are required by this Article to use policy and contract forms and, where applicable, benefit booklets . . . that are printed in a legible format." N.C. Gen. Stat. § 58-38-5 (2001). More specifically, N.C. Gen. Stat. § 58-38-20(a) (2001) requires that all insurance policies and contracts providing private passenger nonfleet motor vehicle insurance "must be printed in a typeface at least as large as 10 point modern type, one point leaded . . . ."

Erie relies primarily on an unpublished 16 March 1999 decision, *Erie Ins. Exchange v. Bordeaux*, COA98-773 (N.C. App. Mar. 1999). Unpublished decisions are not, however, controlling authority. N.C.R. App. P. 30(e). That decision did not have the benefit of *Fortin* or *Sanders*, which were both decided several months later and mandate use of the single, standard form promulgated by the Rate Bureau. Moreover, the unpublished decision assumed that "[o]ur statutes do not require the selection/rejection form to contain specific font sizes . . . ." Apparently, the parties did not direct the Court's attention to N.C. Gen. Stat. § 58-38-20 with its 10-point limitation.

Erie also points to *Blackburn v. State Farm Mut. Auto. Ins. Co.*, 141 N.C. App. 655, 540 S.E.2d 63 (2000), *disc. review denied*, 353 N.C. 369, 547 S.E.2d 409 (2001), as support for its position. In *Blackburn*, however, the insurer had added to the standard Rate Bureau form language further explaining UM and UIM coverage. In concluding that this rejection/selection form was valid despite the additional explanatory language, the court relied upon the fact that "the Rate Bureau and Department of Insurance expressed in 1991 their approval of a selection/rejection form that '[a]dd[s] explanations of [UM] and/or combined [UM/UIM] coverages' which otherwise complies with the form promulgated by the Rate Bureau and approved by the Department of Insurance." *Id.* at 657, 540 S.E.2d at 64. The Court concluded that the additional language "comports with the authorization given by the Rate Bureau and the Department of Insurance. Therefore, we conclude as a matter of law that this additional language does not render invalid the selection/rejection form executed by [the insured.]" *Id.* at 659, 540 S.E.2d at 65.

Erie bore the burden of establishing the validity of the Millers' rejection of coverage. *Hendrickson*, 119 N.C. App. at 450, 459 S.E.2d at 279. Here, Erie offered no evidence that the Rate Bureau or the Commissioner of Insurance has authorized it to include the rejection/selection form in its application or to print it in tiny type. As Erie has failed to show that its modification of the Rate Bureau form was authorized or approved, it has failed to establish that the Millers validly rejected UIM coverage.

Because there was no valid rejection of UIM coverage, UIM coverage was included in the policy in accordance with the provisions of N.C. Gen. Stat. § 20-279.21(b)(4) as amended in 1991. The parties have not addressed the amount of that coverage and we leave that determination for the trial court.

Reversed.

Chief Judge EAGLES and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JAY EFRAM INGRAM, DEFENDANT

No. COA02-826

(Filed 2 September 2003)

1. **Indictment and Information— name of one victim deleted—no error**

The trial court did not err by allowing the State to delete the name of one of the victims in an armed robbery indictment. The alteration did not change the nature of the offense, prejudice defendant's theory of defense, or change the State's burden of proof.

2. **Evidence— prior conduct—pretending to rob**

The admission of testimony that an armed robbery defendant had pretended to rob his coworkers in the past, in a manner similar to the robbery for which he was charged, was admissible to show motive, opportunity, intent, preparation, plan or knowledge. It was more probative than prejudicial.

3. **Sentencing— aggravating circumstances—position of trust or confidence—former employee**

There was insufficient evidence to find the aggravating circumstance that a robbery defendant abused a position of trust or confidence where the defendant was a former employee who had not worked for the victim for six months.

Judge ELMORE dissenting in part and concurring in part.

Appeal by defendant from judgment entered 28 March 2002 by Judge Orlando F. Hudson in Superior Court, Alamance County. Heard in the Court of Appeals 20 May 2003.

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

Duncan B. McCormick for the defendant-appellant.

WYNN, Judge.

From his conviction on the charge of armed robbery, defendant Jay Efram Ingram contends on appeal that the trial court erroneously (I) allowed the state's motion to alter the indictment; (II) overruled his objection to a series of questions regarding prior statements and

behavior; and (III) found as an aggravating sentencing factor that he took advantage of a position of trust or confidence. After review, we find no error.

At about 11:00 p.m. on 23 May 2001, two men stole the day's receipts from a fast-food restaurant in Burlington. The incident occurred after two employees, Sandra Goodman and Stephonia Berger, closed the store. The record shows that one of the robbers (later identified as defendant) approached Ms. Goodman in her car, placed a gun to her head and took two deposit bags containing the day's receipts. The other robber, however, approached Berger in a different car and took a plastic bag containing clothes. Both women identified defendant as a former employee of the restaurant and one of the robbers.

The grand jury returned a true bill of indictment which stated *inter alia*,

> the Defendant named above unlawfully, willfully and feloniously did steal, take and carry away and attempt to steal, take and carry away another's personal property, U.S. CURRENCY of the value of OVER $1,000, from the presence, person, place of business and residence of SANDRA GOODMAN AND STEPHONIA BERGER.

At the close of its trial evidence, the State moved to delete Stephonia Berger's name from the indictment. The trial court granted the motion, and the jury returned a verdict finding sheet finding "THE DEFENDANT JAY EFRAM INGRAM TO BE . . . GUILTY OF ARMED ROBBERY (SANDRA GOODMAN)."

Thereafter, the trial court found aggravating and mitigating factors, determined the aggravating factors outweighed the mitigating factors, and sentenced defendant to a term of 80 months to 105 months imprisonment. Defendant appeals.

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[1] Defendant first contends the indictment's alteration, striking the second victim's name, substantially altered the charge set forth in the indictment in violation of N.C. Gen. Stat. § 15A-923(e) (2001). We disagree.

A bill of indictment is legally sufficient if it charges the substance of the offense and puts the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated. *State v. Rankin*, 55 N.C. App. 478, 480, 286 S.E.2d 119, 120 (1982). N.C. Gen. Stat. § 15A-923(e)

states a bill of indictment may not be amended. However, our Supreme Court has interpreted this provision as prohibiting indictment amendments which substantially alter the charge set forth in the indictment. *See State v. Kamtsiklis*, 94 N.C. App. 250, 255, 380 S.E.2d 400, 402 (1989).

In this case, defendant was indicted for robbery with a dangerous weapon, in violation of N.C. Gen. Stat. § 14-87 (2001) which requires proof of the following elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. *State v. Beaty*, 306 N.C. 491, 293 S.E.2d 760, 760, *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1982). "In respect of armed robbery as defined in G.S. 14-87, force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense. Variance between the allegations of the indictment and the proof in respect of the ownership of the property taken is not material. In an indictment for robbery, the allegations of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property. The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *Id.* at 499, 293 S.E.2d at 766.

In this case, the trial court allowed the indictment to be altered by deleting Ms. Berger's name as a victim, leaving Ms. Goodman's name as the sole alleged victim. This deletion did not change the degree or nature of the offense charged. Indeed, before and after the amendment, the defendant was on notice that he had to defend against a charge of robbery with a dangerous weapon. Moreover, it did not prejudice the defendant's theory of defense. He contended he had an alibi for the time at which the robbery occurred and therefore he could not have been one of the perpetrators. Finally, the deletion did not change the State's burden of proof. Indeed, defendant's guilt of robbery of a dangerous weapon would have been established with proof beyond a reasonable doubt that he robbed either Ms. Goodman or Ms. Berger—the State was not required to prove both individuals had been robbed by defendant. *See State v. Montgomery*, 331 N.C. 559, 569, 417 S.E.2d 742, 747 (1992) (stating "the use of a conjunctive in [a robbery with a dangerous weapon] indictment does not require the State to prove various alternative matters alleged").

[2] Defendant next contends the trial court erroneously allowed testimony regarding whether defendant ever jokingly scared other employees, his former coworkers, by pretending to rob them in a manner similar to that used by the robber on the night of the robbery because such testimony was irrelevant and prejudicial. We disagree.

During direct examination of State's witness Stephonia Berger, the following testimony was admitted after defendant's objection:

> Q: How would the defendant, I'm sorry, how would Mr. Ingram joke around after work some nights?
>
> A: Well, some nights when we would come out, he would run from behind the building and jump out and holler, "Aiee," you know, trying to scare us.
>
> Q: Compare that, the location where he would run out from when he was joking around, the location where these two gentleman came out and robbed you guys that night. Was it the same location?
>
> A: It was the same location.

[t.p.58]

Under North Carolina Rule of Evidence 404(b), testimony tending to show proof of motive, opportunity, intent, preparation, plan, or knowledge is admissible. N.C. Gen. Stat. § 8C-1, Rule 404 (2001). The line of questioning at issue tended to make such a showing, and was more relevant and probative than unduly prejudicial.

[3] In his final argument, defendant contends the trial court erred in finding the aggravating factor that "defendant took advantage of a position of trust or confidence to commit the offense", determining the aggravating factors outweighed any mitigating factors, and sentencing defendant in the aggravated range. We agree.

Initially, we note that there is no case law which supports the contention that there is an abuse of a position of trust by a former employee who had not worked for the victim company for six months. Defendant had worked at the restaurant's location for approximately a year, and had not worked there for five or six months prior to the robbery. (D.brief p.9) Although he was working at another restaurant's location, he was no longer in any relationship of trust or confidence with the restaurant that was robbed in the instant case. Under the facts of this case, we hold that the evidence was insuffi-

cient to establish as an aggravating factor that a relationship of trust existed between defendant and his former employer. The aggravating factor at issue was inappropriate in this case.

For the foregoing reasons, we affirm the judgment below and remand for re-sentencing.

No error in part, remanded for resentencing.

Judge McCULLOUGH concurs.

Judge ELMORE concurs in part and dissents in part.

ELMORE, Judge, dissenting in part, concurring in part.

The majority upholds the defendant's robbery conviction holding that the State could amend the indictment by deleting the name of one of the two named victims. From this conclusion I respectfully dissent.

It is well established that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). Our General Statutes state that "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2001). This has been interpreted by North Carolina case law to mean that "an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (citation omitted).

The issue is whether the amendment which omitted one of the two victims named in the conjunctive substantially altered the charge set forth in the indictment. The majority holds that the burden of proof did not change, and that the amendment was appropriate. I respectfully disagree.

Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal. *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967). In *Bell*, the indictment charged defendant with the robbery of Jean Rogers, whereas the evidence showed the correct name of the victim was Susan Rogers. The Court held that the defendant's motion for nonsuit should have been allowed as to the indictment on the ground that the indictment was in variance with the evidence. *Bell*, 270 N.C. at 29, 153 S.E.2d at 745. In

State v. Overman, 257 N.C. 464, 125 S.E.2d 920 (1962), the indictment charged that Frank E. Nutley, rather than Frank E. Hatley, was victim of a hit-and-run accident. Because the indictment required the State to prove injury to someone other than the true victim, the Court held a fatal variance existed. *Id.* at 468, 125 S.E.2d at 924. *See State v. Harper*, 64 N.C. 100, 102 (1870) ("A variance or omission in the name of the person injured is more serious than a variance in the name of the defendant . . . ."). *But see State v. Bailey*, 97 N.C. App. 472, 389 S.E.2d 131 (1990) (change in indictment which stated victim's name as Pettress Cebron to correctly reflect the victim's name as Cebron Pettress was not a prohibited amendment).

I conclude from this line of cases that the identity of the victim is a substantial element of the indictment, and that a change in the victim's identity is a substantial change, which change is prohibited by section 15A-923(e) of the General Statutes. In the case at bar, the indictment was amended from including two individual victims to including only one. In addition, the amendment was made at the close of the State's evidence, well into the case and after the jury had been initially read the original indictment by the trial court and listened to the evidence with both victims in mind. This constitutes a substantial change which our law does not permit.

The trial transcript indicates that the State and the trial court were trying to bring the indictment into conformity with *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991), which held that disjunctive jury instructions using "and/or" between the victims names were fatally ambiguous and required a new trial when the indictment had used the conjunctive "and" between the names. The *Lyons* case established the rule that when a disjunctive jury instruction is given, which allows the jury to find a defendant guilty of either of two underlying acts each of which is in itself a separate offense, the instruction is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

In the present case, however, the original indictment named two victims using the conjunctive "and", not the disjunctive "and/or." It follows that under the original indictment the State would have to prove that the defendant robbed from *both* of the named victims, Sandra Goodman *and* Stephonia Berger. The indictment was not ambiguous. After the amendment, the State's burden was reduced to proving that the defendant robbed Sandra Goodman only.

The majority relies on *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992), which does say that a conjunctive in the indictment does not require the State to prove both, in that case person and presence of the victim. This case is distinguishable because the conjunctive charges the defendant with a crime against two individuals. While in a well-worded indictment this would usually be two separate charges, when the State decided to charge both in one, I believe they must then carry the burden as to both to satisfy the charge. Lessening the State's burden from two victims to one is a substantial alteration.

Because the amendment was in error and that error necessarily prejudiced the verdict given by the jury, I would vacate the judgment of the trial court. I concur in the other aspects of the majority opinion.

PAMELA PRIEST AND BETTY LOU SKINNER, PLAINTIFFS v. THOMAS SOBECK AND MAKE-UP ARTISTS AND HAIR STYLIST LOCAL 798, OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE OPERATORS OF THE UNITED STATES AND CANADA, DEFENDANTS

No. COA01-1476-2

(Filed 2 September 2003)

Libel and Slander— libel—actual malice standard—qualified privilege—union speech

The trial court erred by denying defendants' summary judgment motion on plaintiff union members' libel claims under the actual malice standard arising out of the publication of a union newsletter and the case is remanded for entry of summary judgment in favor of defendants based on the trial court's determination that defendants were entitled to a qualified privilege for the protection of union speech, because: (1) the language in the pertinent union newsletter sought to have 100% membership by keeping non-union members from working on union films and also sought to strengthen the collective bargaining power of the union by encouraging the membership to only work with their union brothers and sisters; (2) a union's right to persuade others to join must not be stifled by the threat of liability for the overenthusiastic use of rhetoric or the innocent mistake of fact; and (3) even assuming that plaintiffs can show that the statements

were made with actual malice, plaintiffs failed to forecast sufficient evidence of actual damages when plaintiffs admit they worked after the newsletter's publication, turned down work, and cannot specify a particular production for which they were not hired due to allegedly libelous statements.

Appeals by plaintiffs and defendants from order granting partial summary judgment in favor of defendants entered 4 September 2001 by Judge Melzer A. Morgan, Jr., Superior Court, Moore County. Heard in the Court of Appeals 10 September 2002, *dismissed as interlocutory*, *Priest v. Sobeck*, 153 N.C. App. 662, 571 S.E.2d 75 (2002), *reversed and remanded*, 357 N.C. 159, 579 S.E.2d 250 (2003). Panel reconvened to consider appeal on merits by order dated 10 July 2003.

Barringer, Barringer, Stephenson & Schiller by David G. Schiller and Marvin Schiller for plaintiffs.

Smith, James, Rowlett & Cohen by Seth R. Cohen and Stanford, Fagan & Gilito, L.L.C., by Robert S. Giolito and Jeffrey D. Sodko for defendants.

WYNN, Judge.

This appeal returns to us for a determination on the merits following our Supreme Court's reversal of our earlier decision holding that the appeal was interlocutory. *Priest v. Sobeck*, 153 N.C. App. 662, 571 S.E.2d 75 (2002), *reversed and remanded* 357 N.C. 159, 579 S.E.2d 250 (2003). We incorporate by reference to our earlier decision, the facts relevant to this appeal. *See Priest v. Sobeck*, 153 N.C. App. 662, 571 S.E.2d 75 (2002).

Briefly, plaintiffs, members of Make-up Artists and Hairstylist Local 798 of the International Alliance Theatrical Stage Employees and Motion Picture Operators of the United States and Canada (Local 798), allege defendants, Local 798 and its representative Thomas Sobeck, committed libel in a newsletter it published and mailed to the Local 798 membership. Defendants moved for summary judgment which the trial court granted in part, and denied in part. We hold that the trial court should have granted summary judgment in favor of defendants on all of plaintiffs' claims.

In this case, both parties appeal from the trial court's order granting partial summary judgment which stated:

> . . . There are no genuine issues of material fact with respect to any of the claims alleged except as to whether the defendant Sobeck with malice published in the August newsletter and subsequent newsletters that plaintiffs stood by when Henrita Jones, not a member of Local 798, was hired in mid to late June, 1999 when such hiring was actually initially approved by union representative Vincent Callaghan and when defendant Sobeck himself later allegedly approved, explicitly or implicitly, the hiring of Ms. Jones. . . . Except with respect to the hiring of Ms. Jones and defendant Sobeck's assertion that plaintiffs stood by while Ms. Jones was hired, when he allegedly knew that he had himself approved the hire, no malice has been shown on the part of the defendants as to any other factual scenario.

The trial court then ordered:

> (1) partial summary judgment is granted as to any and all claims except any claim based upon the limited assertion that, after union representative Vincent Callaghan initially approved the hiring of Henrita Jones, defendant Sobeck, having himself approved, explicitly or implicitly, the hiring of Henrita Jones in mid to late June, 1999, then maliciously published that it was plaintiffs who stood by when Ms. Jones was hired when he knew he had approved the hire himself . . . .

Preliminarily, we note that because the trial court held plaintiffs to an actual malice standard, it implicitly determined a qualified privilege extended to defendants' statements. *See Bouligny, Inc. v. United Steelworkers of America, AFL-CIO*, 270 N.C. 160, 171, 154 S.E.2d 344, 354 (1967).

On appeal, plaintiffs argue defendants were not entitled to a qualified privilege and therefore the trial court erroneously required them to prove their libel claim under the actual malice standard. On the other hand, defendants argue that the trial court correctly found that they were entitled to a qualified privilege; however, defendants appeal from the trial court's failure to grant summary judgment in their favor on plaintiffs' libel claims under the actual malice standard. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Thus, the issues on appeal are: (1) whether the trial court properly found that defendants were entitled to a qualified privilege, and (2) If so, whether the trial court properly denied summary judgment on plaintiffs' claims under the actual malice standard. After careful review, we conclude the trial court properly extended a qual-

ified privilege to defendants' statements; however, we find the trial court should have granted summary judgment in favor of defendants on all of plaintiff's claims.

In *Bouligny*, our Supreme Court interpreted the United States Supreme Court's holding in *Linn v. Plant Guard Workers*, 383 U.S. 53, 15 L.Ed.2d 582 (1966) to mean that,

> the defense of qualified privilege extends to statements spoken or published in good faith by a labor union in the course of a campaign to solicit members or to establish itself as the authorized representative of the employees in a business enterprise in their collective bargaining with their employer, provided there is a reasonable relation between such objective and the statement made.

Bouligny, 270 N.C. at 172, 154 S.E.2d at 355. Defendants in this case apparently recognize that this language in *Bouligny* does not entitle them to a qualified privilege because their newsletter statements were neither a part of a solicitation campaign nor a part of a negotiation between the union representative and the employer. Instead, defendants allege that the statements in this case fit within the extended definition of a qualified privilege under *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, et al. v. Austin et al.*, 418 U.S. 264, 41 L.Ed. 745 (1974). We agree.

In *Letter Carriers*, the United States Supreme Court stated that while its earlier decision in *Linn* found state libel law was not completely preempted by the Nation Labor Relations Act ("NLRA"), *Linn's* partial preemption "must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." *Letter Carriers*, 418 U.S. at 279, 41 L. Ed. 759. Thus,

> One of the primary reasons for the [NLRA's] protection of union speech is to insure that union organizers are free to try peacefully to persuade other employees to join the union without inhibition or restraint. Accordingly, we think that any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity, is entitled to the protection of *Linn*. We see no reason to limit this protection to statements made during representation election campaigns. . . . Unions have a legitimate and substantial interest in continuing organizational efforts after recognition. Whether the goal is merely to strengthen

> or preserve the union's majority, or is to achieve 100% employee membership . . . these organizing efforts are equally entitled to the protection of § 7 and § 1.

Id.

In this case, the union published a newsletter to its members urging the members to hire their "brothers and sisters" over non-union members and noting that non-union members were hired on "Shake Rattle and Roll." The newsletter alleged that plaintiffs "stood by" as this happened. It further urged the membership to file complaints against these "not-thinking members" [sic] and write their business agent to advise him how the membership wants him to deal with this problem.

We hold that the language in the subject newsletter falls under *Letter Carriers'* expanded definition of the defense of qualified privilege. It seeks to have 100% membership by keeping non-union members from working on union films. It also seeks to strengthen the collective bargaining power of the union by encouraging the membership to only work with their union brothers and sisters. A union's right to "persuade others to join must not be stifled by the threat of liability for the over-enthusiastic use of rhetoric or the innocent mistake of fact." *Id.* at 277, 41 L. Ed. 758. (Citations omitted.) Accordingly, we uphold the trial court's determination that defendants' statements were entitled to a qualified privilege.

Having determined the defendants were entitled to a qualified privilege, we now address defendants' contention that the plaintiffs' forecast of evidence was insufficient to create a genuine issue of material fact as to whether defendants acted with actual malice.

"Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Martin Architectural Products v. Meridian Construction*, 155 N.C. App. 176, 180, 574 S.E.2d 189, 191 (2002). To justify summary judgment, the movant must show one of the following three grounds:

> (1) an essential element of plaintiff's claim is nonexistent . . . (2) plaintiff cannot produce evidence to support an essential element

of his claim, or . . . (3) plaintiff cannot surmount an affirmative defense which would bar the claim.

Clark v. Brown, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37 (1990).

In this case, since defendants' statements were protected by a qualified privilege, the subject "publication is not actionable for libel in the absence of actual malice." *Raymond U. v. Duke Univ.*, 91 N.C. App. 171, 181, 371 S.E.2d 701, 708 (1988). Thus, plaintiffs' evidence must show a genuine issue of material fact as to whether defendants' allegedly defamatory statements were made with knowledge that the statements were false or with a reckless disregard for the truth in order to preclude summary judgment in favor of defendants. Furthermore, judgment for the plaintiffs in such an action may be rendered only if the plaintiffs allege and prove not only the actual malice sufficient to overcome the qualified privilege allowed the union by the law of this State but also some actual damage resulting from the libelous publication. *Bouligny*, 270 N.C. at 176, 154 S.E.2d at 357-58.

In this case, even assuming that plaintiffs can show that the statements were made with actual malice, the record shows that plaintiffs failed to forecast sufficient evidence of actual damages. Indeed, plaintiffs admit they worked after the newsletter's publication, turned down work, and cannot specify a particular production for which they were not hired due to the allegedly libelous statements. Accordingly, we summarily hold that defendants were entitled to summary judgment on all of plaintiffs' claims.

In sum, we reverse the court's denial of summary judgment on this claim and remand for entry of summary judgment in favor of defendants.

Affirmed in part, reversed and remanded in part.

Judges MARTIN and McGEE concur.

IN THE MATTER OF: APPEAL OF THE CHURCH OF YAHSHUA THE CHRIST AT WILMINGTON FROM THE DECISION OF THE PENDER COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING PROPERTY TAX EXEMPTION FOR TAX YEAR 2000

No. COA02-1005

(Filed 2 September 2003)

1. **Taxation— property—religious use exemption—building required**

   A property with no buildings did not qualify for the N.C.G.S. § 105-278.3 tax exemption for property used for religious purposes. The statute is not ambiguous; land is exempted only to the extent necessary for the convenient use of building. However, the building and accompanying land need only be used for religious purposes, which may encompass activities other than worship.

2. **Taxation— property—religious use exemption—building required—constitutionality—not reached**

   A church's beliefs prohibiting worship in a building did not raise the issue of whether it was constitutional to refuse a property tax exemption for buildings used for religious purposes because the church was not barred by its beliefs from using buildings for non-worship religious purposes.

Appeal by The Church of Yahshua the Christ at Wilmington from final decision entered 10 December 2001 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 14 May 2003.

The Church of Yahshua the Christ at Wilmington, pro se, appellant.

Robert H. Corbett, for Pender County, appellee.

GEER, Judge.

This appeal arises under N.C. Gen. Stat. § 105-278.3(a) (2001), which exempts from property tax "[b]uildings, the land they actually occupy, and additional adjacent land reasonably necessary for the convenient use of any such building" to the extent the property is used "for religious purposes . . . ." Appellant, The Church of Yahshua The Christ at Wilmington ("the Church"), challenges a decision of the North Carolina Property Tax Commission. The church contends that real property owned by the Church should be exempt from taxation

under § 105-278.3 even if the land has no buildings on it. The Church argues alternatively that if the tax exemption provided in § 105-278.3 requires that there be buildings on the land, then the statute is unconstitutional as applied to the Church because the Church's religious tenets prohibit members worshiping in buildings.

We hold that the tax exemption set out in § 105-278.3 applies only to buildings and the land necessary for their convenient use. Because the Church admits that no buildings exist on its land, the Commission correctly determined that the property at issue was not entitled to tax exemption under § 105-278.3. We do not reach the constitutional question as set forth by the Church because the Church does not contend that its members are barred from using buildings for "religious purposes" as opposed to worship.

The Church owns approximately 50 acres of land located in Pender County, North Carolina. For tax year 2000, the Church filed a request with the Pender County tax assessor for exemption of this land from property taxes. The tax assessor denied the request and the Pender County Board of Equalization and Review affirmed the decision. The Church appealed to the North Carolina Property Tax Commission. Following an evidentiary hearing, the Commission affirmed the decision of the Board. The Church appeals the Commission's final decision.

The Commission found that the Church is a religious body and that it owns the approximately 50 acres of land at issue. According to the Commission, there is "no formal building of worship" on the land, but the Church has plans to construct buildings "such as an outdoor pavilion, tractor shed, workshop, storage buildings and homes for active ministers." The Commission found that the land is used for camping and recreational outings as well as observing nature, but further found that the Church had failed to demonstrate that regular instruction or courses of study occur on the land.

Based on these findings, the Commission concluded that the Church failed to meet its burden of proving its entitlement to an exemption under N.C. Gen. Stat. § 105-278.4 (2001) (exemption for property used for educational purposes), § 105-278.5 (2001) (exemption for property owned by a religious educational assembly), § 105-278.6 (2001) (exemption for property used for charitable purposes), and § 105-278.3 (exemption of property used for religious purposes). Since the Church has assigned error solely to the conclusion

of law that it failed to meet its burden of proof with respect to N.C. Gen. Stat. § 105-278.3, we review only whether the Commission erred in its decision under that statute. *In re Appeal of the Master's Mission*, 152 N.C. App. 640, 645, 568 S.E.2d 208, 211 (2002) (charitable and religious exemptions not reviewed where taxpayer solely assigned error as to the educational exemption).

With respect to N.C. Gen. Stat. § 105-278.3, the Commission noted that the Church "contends that the subject property should be exempt because the property is used as a natural retreat for outdoor altar services that requires extended buffers to create such an environment." The Commission rejected this argument because the Church "failed to show that the subject land qualifies for the exemption when there were no buildings of worship situated on the property that are used for a religious purpose."

Standard of review

This Court reviews decisions of the North Carolina Property Tax Commission pursuant to N.C. Gen. Stat. § 105-345.2 (2001). "Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test." *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Under *de novo* review, the Court "considers the matter anew and freely substitutes its own judgment for that of the Commission." *Id.*

When the evidence is conflicting, the whole-record test requires the Court to review all the evidence in the record, including evidence contradictory to that upon which the Commission relied, to determine whether the decision has a rational basis in the evidence. *In re Southview Presbyterian Church*, 62 N.C. App. 45, 47, 302 S.E.2d 298, 299, *disc. review denied*, 309 N.C. 820, 310 S.E.2d 354 (1983). We may not substitute our judgment for that of the Commission, but rather must decide whether substantial evidence exists to support the decision. *Id.*

I

[1] The Church first argues that since it uses its land for religious purposes, it should be entitled to a property tax exemption under N.C. Gen. Stat. § 105-278.3 even in the absence of any buildings on the land. We disagree.

N.C. Gen. Stat. § 105-278.3(a) (emphasis added) provides:

> (a) *Buildings, the land they actually occupy, and additional adjacent land reasonably necessary for the convenient use of any such building* shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:
>
> (1) Wholly and exclusively used by its owner for religious purposes as defined in subsection (d)(1), below . . . .

The statute is unambiguous. The focus of the exemption is on "buildings." Land is exempted only to the extent necessary for convenient use of the building.

The Church's construction of the statute would significantly expand the scope of the exemption to cover not only buildings, but land used for religious purposes. It is for the General Assembly to determine what property should be exempt from taxation and when the General Assembly has intended to exempt land, as opposed to buildings, it has done so explicitly. *See* N.C. Gen. Stat. § 105-278.4(b) ("Land (exclusive of improvements); and improvements other than buildings, the land actually occupied by such improvements, and additional land reasonably necessary for the convenient use of any such improvement shall be exempted from taxation" if owned by an educational institution that also owns buildings exempted from taxation). The Church's proposed construction of the statute is particularly unwarranted given the principle that statutes exempting specific property from taxation based on the purpose for which the property is used should be construed strictly against exemption and in favor of taxation. *In re Appeal of Worley*, 93 N.C. App. 191, 195, 377 S.E.2d 270, 273 (1989).

We hold that N.C. Gen. Stat. § 105-278.3 does not provide for a tax exemption in the absence of buildings used by the owner "for religious purposes." The Commission erred, however, in requiring a "building of worship" for property to qualify for the exemption under § 105-278.3. The building and accompanying land need only be used "for religious purposes." N.C. Gen. Stat. § 105-278.3(d)(1) defines "religious purpose" as "one that pertains to practicing, teaching, and setting forth a religion." The statute notes that "[a]lthough worship is the most common religious purpose, the term encompasses other activities that demonstrate and further the beliefs and objectives of a given church or religious body." *Id.*

The Commission should, therefore, have made findings of fact regarding whether there were buildings being used for religious purposes on the property at issue. Under the whole record test, we may review the record to determine whether the evidence is conflicting and whether remand is therefore necessary. *See In re Rogers*, 297 N.C. 48, 60, 253 S.E.2d 912, 920 (1979) (even after determining that an error justifying remand has occurred, an appellate court may "examine the record to see if there would have been sufficient evidence to support necessary findings if they had been properly made"). Here, the record reveals no dispute. When asked at the hearing whether there were any buildings on the property, counsel for the Church replied, "No, sir, there are not . . . ." Additionally, the Church stated in its reply brief filed with this Court: "The fact that no building used for religious purposes existed on the subject property was known to the Commission before the hearing on the merits." Because the property has no buildings at all, it does not qualify for tax exemption under N.C. Gen. Stat. § 105-278.3.

II

[2] The Church next argues that to the extent N.C. Gen. Stat. § 105-278.3 requires a building for the tax exemption to apply, it is unconstitutional as applied to the Church because the Church's religious beliefs prohibit worshiping as a group in a building. We need not address the constitutional issue as posed by the Church because the Church does not suggest that its beliefs preclude using buildings "for religious purposes" other than worship.

In fact, the record reveals that the Church advised the Commission that the Church's "long term plans include the construction of some buildings, principally on the front third of the subject property. These buildings will include an outdoor pavilion, tractor shed, workshop, storage buildings, and homes for active ministers, elderly or infirm ministers, and caretakers." Because the Church is not barred by its beliefs from constructing buildings to be used for non-worship related religious purposes and therefore may, without violating its religious beliefs, still qualify for the tax exemption under N.C. Gen. Stat. § 105-278.3, this case presents no constitutional issue.

Because of our disposition of this appeal, we do not address the Church's remaining assignments of error.

Affirmed.

Judges MARTIN and HUNTER concur.

DAWN SHARP, PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID SHARP, PLAINTIFF v. CSX TRANSPORTATION, INC., CSX CORPORATION, AND R. A. JONES, DEFENDANTS

No. COA02-1094

(Filed 2 September 2003)

Railroads— crossing accident—going around crossing gate—contributory negligence

The trial court erred by granting defendant's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) based upon contributory negligence in an action arising from a railroad crossing accident. A violation of N.C.G.S. § 20-142.1 is not negligence per se, and the complaint left open the question of whether the decedent, a fireman returning a fire truck to the station, exercised due care in deciding to drive around a crossbar given his knowledge of defendant's customary practice of stopping trains in such a way that crossing gates remained down even though no hazard was present, the obstruction of his view, and his need to return to the fire station.

Appeal by plaintiff from order entered 29 May 2002 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 21 May 2003.

Gill & Tobias, L.L.P., by Douglas R. Gill, for plaintiff-appellant.

Millberg, Gordon & Stewart, P.L.L.C., by John C. Millberg and Dena White Waters, for defendants-appellees.

GEER, Judge.

In this appeal, appellant Dawn Sharp asks us to reverse the trial court's order granting defendants' motion to dismiss. Defendants have contended that dismissal is appropriate because the complaint establishes contributory negligence as a matter of law. Applying the standards governing a motion to dismiss under Rule 12(b)(6) of the

North Carolina Rules of Civil Procedure, we hold that the allegations of the complaint, taken as true, do not necessarily dictate a finding of contributory negligence and, therefore, we reverse.

Plaintiff's complaint alleges the following facts. On 17 March 2000, David Sharp was driving a fire truck owned by the City of Fayetteville Fire Department back to his fire station. Under Fire Department policies, Sharp—who was alone in the truck—was required to return the truck to the fire station directly upon conclusion of a call.

As Sharp approached a railroad crossing on Cumberland Street, a locomotive owned by defendant CSX crossed Cumberland Street causing the crossing gate to descend across the roadway. The locomotive came to a stop with the last car sitting just north of the crossing. Because of where the train stopped, the crossing gate remained in a lowered position. In addition, the train obscured Sharp's view of the tracks to the north and the train acted as a barrier against any sound made by a train approaching from the north.

According to the complaint, defendants have a widely known practice in Fayetteville of stopping their trains for extended periods of time in close proximity to crossing gates thereby causing the gates to remain lowered. This problem has occurred frequently and is widely known to residents and travelers in Fayetteville, including Sharp.

The complaint alleges that Sharp waited for an extended period of time to see if the train would move forward and allow the crossing gate to rise. Sharp believed that the crossing gate was remaining lowered only because of the CSX train. As Sharp was alone in the fire truck, he was prohibited by Fire Department policies from operating the truck in reverse. Since he was unable to back up the truck, Sharp decided to cross the tracks in order to return promptly and directly to the fire station. As Sharp began crossing the tracks, an Amtrak train, whose approach had been obscured by the CSX train, struck the fire truck, killing Sharp.

Sharp's wife, Dawn Sharp, filed suit on 15 March 2002 asserting a claim for negligence against defendants. Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, defendants moved to dismiss on the grounds that the complaint established contributory negligence as a matter of law. Plaintiff appeals from the trial court's order granting that motion.

When a party files a motion to dismiss pursuant to Rule 12(b)(6), the question for the court is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. *Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001). The court must construe the complaint liberally and "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000).

Dismissal under Rule 12(b)(6) is appropriate in three situations: (1) when it is apparent from the face of the complaint that no law supports plaintiff's claim; (2) when review of the complaint's allegations reveals the absence of a fact necessary to state a claim for relief; or (3) when the complaint alleges some fact that necessarily defeats plaintiff's claim. *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380 (1987). A complaint is considered sufficient under Rule 12(b)(6) when no "insurmountable bar" to recovery appears on the face of the complaint and when the complaint's allegations give adequate notice of the nature and extent of plaintiff's claim. *Id.*

In this case, defendants argue that Sharp's violation of N.C. Gen. Stat. § 20-142.1 (2001) and the common law duty to yield the right of way to approaching trains constitutes contributory negligence as a matter of law. Because this case is at the motion to dismiss stage, we disagree.

While N.C. Gen. Stat. § 20-142.1 prohibits any person from driving around or under a crossing gate, it also expressly provides that a violation of the statute is not negligence *per se*. Specifically, the statute states:

> (b) No person shall drive any vehicle through, around, or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed, nor shall any pedestrian pass through, around, over, or under any crossing gate or barrier at a railroad crossing while the gate or barrier is closed or is being opened or closed.
>
> . . . .
>
> (d) Any person who violates any provisions of this section shall be guilty of an infraction and punished in accordance with

> G.S. 20-176. *Violation of this section shall not constitute negligence per se.*

N.C. Gen. Stat. § 20-142.1(b), (d) (emphasis added).

Defendants' argument—that allegations in a complaint demonstrating a violation of this statute establish, without more, contributory negligence as a matter of law—is inconsistent with the General Assembly's mandate that the violation "shall not constitute negligence *per se*." *Id.* As our Supreme Court has explained, when a statutory violation "is declared not to be negligence *per se*, the common law rule of ordinary care applies, and a violation is only evidence to be considered with other facts and circumstances in determining whether the violator used due care." *Cowan v. Murrows Transfer, Inc.*, 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964). The Court explained further: "The distinction, between a violation of a statute . . . which is negligence *per se* and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances." *Id.*

As a result, the issue with respect to defendant's claim of contributory negligence, is whether Mr. Sharp exercised "due care under the circumstances." *Id.* The fact that Mr. Sharp bypassed the crossing gate in violation of the statute is evidence that may be considered, together with all of the other facts and circumstances, in deciding whether Mr. Sharp breached his common law duty of exercising ordinary care. *Kinney v. Goley*, 4 N.C. App. 325, 332, 167 S.E.2d 97, 102 (1969).

Similarly, the fact, standing alone, that Mr. Sharp did not yield the right of way to the oncoming Amtrak train does not establish his negligence as a matter of law at the motion to dismiss stage. Whenever a train and a car collide at a crossing, the car has failed to yield the right of way to the train. Yet, the driver is not always held to be contributorily negligent. Instead, the courts look to all of the facts and circumstances: "Our courts have encountered considerable difficulty in enunciating bright-line rules to govern liability in train-automobile grade crossing accidents. Consequently, each case is evaluated on its own facts." *Parchment v. Garner*, 135 N.C. App. 312, 315, 520 S.E.2d 100, 102 (1999), *disc. review denied*, 351 N.C. 359, 542 S.E.2d 216 (2000). Significantly, none of the cases cited by defendants involves the granting of a motion to dismiss a complaint.

A court should dismiss a complaint based on contributory negligence only when the allegations of the complaint taken as true

"show[] negligence on [the plaintiff's] part proximately contributing to his injury, so clearly that no other conclusion can be reasonably drawn therefrom." *Ramey v. Southern Ry. Co.*, 262 N.C. 230, 234, 136 S.E.2d 638, 641 (1964). Given the allegations of the complaint in this case, Mr. Sharp's contributory negligence is not so clear that "no other conclusion can be reasonably drawn therefrom." *Id.*

The complaint alleges that defendant had a practice of stopping trains in such a way that crossing gates remained down even though no hazard was present. Before crossing the tracks, Mr. Sharp stopped and waited "an extended period of time to see if the train would move forward and allow the crossing gates to rise." Further, according to the complaint, defendant's train blocked Mr. Sharp's ability to see and hear any train coming from the north.

Plaintiff also argues that Mr. Sharp, since he was operating a fire truck, was exempt from the statutory requirement concerning railroad crossings. This Court has held:

> Our research reveals that a majority of jurisdictions by statutes or ordinances exempt emergency vehicles (such as police cars, ambulances and fire department apparatus) from strict compliance with traffic regulations. However, the allowance of these special privileges (which include traveling through a red traffic light and exceeding speed limits) has been held generally not to relieve the operator of the emergency vehicle from the exercise of ordinary, reasonable care commensurate with the circumstances.

City of Winston-Salem v. Rice, 16 N.C. App. 294, 298, 192 S.E.2d 9, 11 (reversing trial court's order finding contributory negligence by the driver of a fire truck as a matter of law), *cert. denied*, 282 N.C. 425, 192 S.E.2d 835 (1972). In other words, the fact that Mr. Sharp needed to return a fire truck to the fire station is another factor that may be considered in deciding whether he used due care.

The complaint thus leaves open the question whether Mr. Sharp exercised due care in deciding to drive around the crossbar given his knowledge of defendant's customary practice, the obstruction of his view, and his need to return to the fire station. The allegations in plaintiff's complaint do not present an insurmountable bar to recovery. *See Miller v. Davis*, 71 N.C. App. 200, 203, 321 S.E.2d 470, 471-72 (1984) (refusing to find contributory negligence as a matter of law when plaintiff presented evidence that the driver did not see the train

coming because he was looking the other way while trying to see around an obstruction), *disc. review denied*, 313 N.C. 331, 327 S.E.2d 892 (1985). The trial court therefore erred in granting defendants' motion to dismiss.

Reversed.

Judges MARTIN and HUNTER concur.

THOMAS E. SCRUGGS, PLAINTIFF v. EMMA SLADE CHAVIS AND LOLETA CHAVIS, DEFENDANTS

No. COA02-1112

(Filed 2 September 2003)

Trials— motion to dismiss—calendar—conflicting dates—reliance on calendar

Defendants' motion to dismiss an automobile accident case should not have been granted in plaintiff's absence where defendants served a notice of hearing for one date, but the subsequent final motion calendar distributed by the trial court administrator specified a different date. A party may rely upon the final calendar issued by the court; if the court has authorized a date other than that specified in the final calendar, it is the responsibility of the party who wishes to have the motion heard to clarify the hearing date with opposing counsel.

Appeal by plaintiff from order entered 30 April 2002 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 21 May 2003.

Nancy P. Quinn, for plaintiff-appellant.

Burton & Sue, L.L.P., by William T. Corbett, Jr., for defendants-appellees.

GEER, Judge.

The issue raised by this appeal is whether the trial court erred in granting defendants' motion to dismiss in plaintiff's absence when defendants served a notice of hearing for one date, but the subse-

quent final motion calendar distributed by the Trial Court Administrator specified a different date. Because we hold that plaintiff's counsel reasonably relied upon the Trial Court Administrator's final motion calendar, we reverse and remand.

Plaintiff, who was injured in a December 1997 automobile accident, originally filed a complaint based on that accident in Guilford County Superior Court in 1999. Defendants served discovery requests on 10 June 1999 and subsequently filed a motion to compel on 14 September 1999. On 11 October 1999, the court entered a consent order granting plaintiff until 3 November 1999 to respond to the discovery requests "or otherwise be subject to sanctions, pursuant to Rule 37 of the North Carolina Rules of Civil Procedure." On 7 January 2000, defendants served additional discovery requests. On 13 March 2000, defendants filed a second motion to compel, which resulted in a second consent order, dated 3 April 2000, requiring plaintiff to provide discovery within 30 days of entry of the order. On 20 June 2000, defendants moved to dismiss the action for failure to comply with the discovery order. Defendants served a notice of hearing stating that the motion would be heard on 10 July 2000, followed by a second notice of hearing stating that the motion would be heard on 24 July 2000. On 20 July 2000, plaintiff voluntarily dismissed that initial lawsuit without prejudice.

Plaintiff refiled his lawsuit on 19 July 2001. Defendants answered, denying the allegations, and served plaintiff with Defendants' First Set of Interrogatories and Request for Production of Documents. On 24 January 2002, after plaintiff failed to respond fully to defendants' discovery requests, defendants filed a motion to compel. After a hearing on defendants' motion, during the 4 March 2002 civil motion session, the superior court entered a consent order granting plaintiff an additional 30 days to provide defendants with specified documents and information.

On 12 April 2002, after 30 days had passed without compliance with the consent order, defendants served and filed a motion to dismiss pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. On the same date, they also served and filed a "Calendar Request Form" asking that the motion be heard on 29 April 2002 and a notice of hearing stating that defendants would appear for the hearing of their motion on 29 April 2002.

Subsequent to receiving the notice of hearing, plaintiff received the "Final Calendar" for the 6 May 2002 motion non-jury civil session

over which Judge Ronald E. Spivey would be presiding. Included on that calendar was defendants' motion to dismiss.

Defendants appeared before Judge W. Douglas Albright on 29 April 2002. The court found that the matter was duly noticed for hearing on 29 April 2002 and that counsel for plaintiff had failed to appear. The court granted defendants' motion to dismiss. From this order, plaintiff appeals.

Defendants filed their motion to dismiss pursuant to Rules 26, 33, 34, and 37 of the North Carolina Rules of Civil Procedure for plaintiff's failure to comply with the court's order compelling discovery. We do not express an opinion on the merits of that motion, but rather address only whether the superior court erred in finding that the motion was duly noticed for hearing on 29 April 2002 and in then granting the motion without giving counsel for plaintiff an opportunity to be heard.

This appeal involves a fundamental principle: in civil cases filed in North Carolina, the calendar is set by the court and not by the lawyers. Here, the record includes two dates for the hearing of defendants' motion: one in a notice of hearing prepared by counsel for defendants and one in a later-received final motion calendar prepared by the Trial Court Administrator. Under both the General Rules of Practice and the local rules for the 18th Judicial District, plaintiff's counsel was entitled to rely upon the Trial Court Administrator's final calendar in the absence of any further direction from the court.

Under Rule 6 of the General Rules of Practice, "[m]otions may be heard and determined either at the pre-trial conference *or on motion calendar* as directed by the presiding judge." Gen. R. Pract. Super. and Dist. Ct. 6, 2002 Ann. R. N.C. 5 (emphasis added). Rule 2 of the General Rules of Practice provides that the civil calendar shall be prepared under the supervision of the presiding judge and shall be distributed to each attorney of record. Gen. R. Pract. Super. and Dist. Ct. 2(b), 2002 Ann. R. N.C. 2. In short, motions—other than those heard at a pre-trial conference—are to be heard on a motion calendar prepared by the court.

The 18th Judicial District Superior and District Court local rules in turn provide in Rule 1.2 that "[t]he calendars for the disposition of civil cases in the Superior Courts of the 18th Judicial District shall be set by the Trial Court Administrator in accordance with these rules." *See also* Rule 3.2 ("The tentative and final civil calendars for all civil

sessions in Greensboro and High Point will be prepared by the Trial Court Administrator."). To schedule a motion in a civil matter, counsel is required, under Rule 3.5, to complete a "Calendar Request" form and submit it to the Trial Court Administrator. Rule 7.2(b)(1), specifically addressing motions, provides that non-jury civil sessions for the hearing of motions will be held at least monthly "and at such other times deemed appropriate by the Trial Court Administrator."

Since the notice of hearing was served on the same day as the calendar request form, plaintiff's counsel could reasonably assume that defendants were simply requesting that their motion be heard on 29 April 2002 and that the court had not yet calendared the motion. Counsel for defendants' cover letter does not suggest otherwise. In fact, the record contains no evidence to indicate that the court ever granted defendants' request to be heard on 29 April 2002. The notice of hearing from counsel could not trump the Trial Court Administrator's subsequent "Final Calendar" scheduling the motion for hearing on 6 May 2002. Given the local rules for the 18th Judicial District, plaintiff's counsel was entitled to rely upon that "Final Calendar."

Defendants argue that the conflicting dates placed a duty on counsel to clarify the date of the hearing. Had plaintiff's counsel received the notice of hearing after the final calendar, then such an argument might have merit. When, however, an attorney has received a calendar request form/notice of hearing from counsel followed by a final calendar issued by the court, the attorney may rely upon the final calendar. If the court has in fact authorized a date other than the one specified in the final calendar, it is the responsibility of the party who wishes to have the motion heard to clarify the hearing date with opposing counsel.

Under these circumstances—and in the absence of any record that the court actually directed that the motion be calendared for 29 April 2002—we find that plaintiff's counsel was not duly notified of the 29 April 2002 hearing. We, therefore, reverse and remand for the trial court to hear defendants' motion to dismiss following proper notice to plaintiff.

Reversed and remanded.

Judges MARTIN and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 AUGUST 2003

ASHTON v. CITY OF CONCORD No. 02-1257	Cabarrus (00CVS130)	Affirmed
BENNETT v. PROGRESSIVE FURN. CO. No. 02-1021	Ind. Comm. (I.C. 861644)	Affirmed
BRADY v. AMERIPLUS, INC. No. 02-967	Buncombe (98CVS5491)	Affirmed
CHLEBOROWICZ v. JOHNSON No. 02-1116	Carteret (00CVS507)	Affirmed
GARRETT v. GALLOWAY No. 02-1185	Transylvania (00CVD353)	Dismissed
HUNLEY v. HUNLEY No. 02-758	Mecklenburg (99CVD17711)	Affirmed in part and remanded in part
HUTTON v. GLOSSON FREIGHTWAYS, INC. No. 02-390	Davidson (99CVS1640)	Reversed and remanded
IN RE APPEAL OF WENGER No. 02-1124	Prop. Tax Comm. (01PTC154)	Affirmed
IN RE ESTATE OF BRINSON No. 02-962	Pamlico (01E138)	Affirmed
LEWIS v. DOWD No. 02-1714	Moore (01CVS67)	Affirmed
STATE v. ALLEN No. 02-1686	Watauga (01CRS50666)	No error
STATE v. CLARK No. 02-1699	Forsyth (00CRS56700) (00CRS56767)	No error
STATE v. FULLER No. 02-1176	Swain (01CRS522) (01CRS523) (01CRS524) (01CRS1348) (01CRS1349) (01CRS526) (01CRS527) (01CRS528)	No error
STATE v. GORDON No. 02-1575	Gaston (98CRS3993) (99CRS26788)	No error

STATE v. GREENIDGE No. 02-1209	Guilford (99CRS29338)	No error
STATE v. HUDSON No. 02-1214	Wayne (95CRS18514) (95CRS19042)	No error
STATE v. ISMAIL No. 02-1662	Union (01CRS4062) (01CRS4063) (01CRS4064)	No error
STATE v. MAYE No. 02-1604	Greene (00CRS185) (02CRS389)	No error
STATE v. McGOWAN No. 02-1602	Onslow (00CRS59928)	No error
STATE v. SUTHERLAND No. 03-21	Gaston (95CRS2820) (95CRS2821) (95CRS2822) (95CRS2823)	Affirmed
STATE v. SWANN No. 02-1099	Duplin (01CRS51562)	No error
STATE v. TORRES No. 02-1553	Guilford (99CRS97663)	No error
STATE v. TORRES No. 02-1589	Harnett (01CRS54625) (01CRS54635)	No error
STATE v. WRIGHT No. 02-744	Wake (99CRS96934)	No error
VAUGHT v. CAROLINA NEURO-SURGICAL SERVS., P.C. No. 02-1153	Cumberland (01CVS6667)	Affirmed
YATES v. BRADLEY No. 02-1062	Madison (00CVS190)	Affirmed

FILED 2 SEPTEMBER 2003

BASS v. BASS No. 02-1068	Robeson (97CVD2404)	Affirmed
BEDDINGFIELD v. MORGAN No. 02-997	Ind. Comm. (988156)	Affirmed
CADDELL v. CADDELL No. 02-977	Brunswick (01CVD2101)	Dismissed

GEORGE v. GEORGE No. 02-1047	Durham (88CVD3603)	Dismissed part; reversed and remanded in part
IN RE DERREBERRY No. 02-1238	Buncombe (00J354)	Affirmed
IN RE MERCADO No. 02-1162	Durham (02J6)	Affirmed
STATE v. DONEVAN No. 02-899	Person (00CRS4799) (00CRS4800)	No prejudicial error
STATE v. PETERS No. 02-1060	Northampton (01CRS51313)	No error
STATE v. TRAVIS No. 02-873	Halifax (99CRS2200) (99CRS2202) (99CRS2208) (99CRS2407) (01CRS1136) (01CRS1137)	No prejudicial error

NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; WAKE COUNTY BOARD OF EDUCATION; DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION; JOHNSTON COUNTY BOARD OF EDUCATION; BUNCOMBE COUNTY BOARD OF EDUCATION; EDGECOMBE COUNTY BOARD OF EDUCATION; AND LENOIR COUNTY BOARD OF EDUCATION, PLAINTIFFS V. RICHARD H. MOORE, STATE TREASURER; ROBERT POWELL, STATE CONTROLLER; DAVID MCCOY, STATE BUDGET OFFICER; PHILLIP J. KIRK, JR., CHAIRMAN OF THE STATE BOARD OF EDUCATION; MICHAEL E. WARD, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION; ROY COOPER, ATTORNEY GENERAL OF NORTH CAROLINA; E. NORRIS TOLSON, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE; LYNDO TIPPETT, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; CAROL HOWARD, NORTH CAROLINA COMMISSIONER OF MOTOR VEHICLES; MOLLY CORBETT BROAD, PRESIDENT OF THE UNIVERSITY OF NORTH CAROLINA; JAMES MOESER, CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; MARYE ANNE FOX, CHANCELLOR OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH; WILLIAM G. ROSS, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES; JIM FAIN, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF COMMERCE; CARMEN HOOKER BUELL, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; L. THOMAS LUNSFORD, II, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BAR; RAYMOND W. GOODMAN, JR., CHAIRMAN OF THE NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION; SANDRA O'BRIEN, EXECUTIVE SECRETARY OF THE NORTH CAROLINA BOARD OF EXAMINERS OF PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS; ROBERT L. BROOKS, EXECUTIVE DIRECTOR OF THE NORTH CAROLINA BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS; DOUGLAS H. VAN ESSEN, EXECUTIVE SECRETARY OF THE NORTH CAROLINA BOARD OF COSMETIC ART EXAMINERS; EACH OF WHOM IS SUED IN HIS OR HER OFFICIAL CAPACITY ONLY, DEFENDANTS

No. COA02-507

(Filed 16 September 2003)

1. Penalties, Fines, and Forfeitures— monies from civil penalties and forfeitures—School Technology Fund—constitutional requirement

Statutes which establish a Civil Penalty Fund for the collection of civil penalties and forfeitures and mandate that the Fund's monies be transferred to a School Technology Fund for allocation to local school districts based on student population are constitutional under N.C. Const. art. IX, § 7, and the trial court erred by granting summary judgment for plaintiffs. The General Assembly properly legislated the details necessary to effectuate a general constitutional provision that revenue from civil penalties be used for public schools. N.C.G.S. §§ 115C-457.1, -457.2, -457.3.

2. Penalties, Fines, and Forfeitures— remittance to schools—principles for determining

The North Carolina Supreme Court has articulated principles for determining whether monetary payments to the State are remedial or punitive, in order to determine whether they would fall under the constitutional provision requiring that revenue from civil penalties be used for public schools. These monies must be fines for the breach of criminal laws or the clear proceeds of payments intended to penalize the wrongdoer rather than to compensate a particular party; they must be paid to the State or a department of the State; and the label attached to the payment does not determine its nature.

3. Penalties, Fines, and Forfeitures— overweight vehicle penalties—remittance to schools

Overweight vehicle penalties are penal and belong to the public schools because they are intended to penalize the wrongdoer rather than compensate a particular party. N.C.G.S. § 20-118(e).

4. Penalties, Fines, and Forfeitures— lapse of motor vehicle insurance—remittance to public schools

Penalties collected from the lapse of motor vehicle insurance are in the nature of sanctions intended to penalize the wrongdoer and belong to the public schools. N.C.G.S. § 20-309(e).

5. Taxation— prohibition on lawsuits to prevent—action to determine use of payments for late fees

The statute that prohibits suits against the Secretary of Revenue to prevent the collection of taxes did not apply to a declaratory judgment action to determine whether payments for late filings and other failures to comply with the tax code belong to the public schools. Plaintiffs sought a determination of the proper disposition of the amounts collected, not the prevention of collection.

6. Penalties, Fines, and Forfeitures— additional taxes—failure to comply with revenue code—not remitted to schools

Payments collected by the Department of Revenue for failure to comply with the tax code do not belong to the public schools because they are assessed as an additional tax and are remedial rather than punitive in nature.

7. Penalties, Fines, and Forfeitures— penalties for late unemployment insurance payments—not remitted to public schools

Amounts collected by the Employment Security Commission for late payments to the Unemployment Insurance Fund are in the nature of additional taxes and are thus remedial rather than punitive, so that those payments do not belong to the public schools. N.C.G.S. § 96-10.

8. Penalties, Fines, and Forfeitures— penalties for university traffic and parking violations—not remitted to public schools

Amounts collected by the Consolidated University of North Carolina campuses for traffic and parking violations belong to the public schools when they are characterized as infractions, prosecuted by the local district attorney, and any resulting penalties are imposed and collected by the district court. Other payments do not belong to the schools because they are denominated civil penalties, enforced by civil actions in the nature of debt, intended as compensation for the expense of establishing and maintaining parking and transportation services, and enacted pursuant to an equal constitutional provision. N.C.G.S. § 116-44.4(m); N.C. Const. art. IX, § 8.

9. Penalties, Fines, and Forfeitures— payment for late returns to university libraries—not remitted to public schools

Payments collected by the Consolidated University of North Carolina campuses for loss, damage, or late return of library materials are remedial and do not belong to the public schools. The payments are intended to insure the availability of library materials and to compensate the universities for replacing materials, and were enacted pursuant to a constitutional provision that is separate from the public schools provision. N.C.G.S. § 116-33; N.C. Const. art. IX, § 9.

10. Penalties, Fines, and Forfeitures— unauthorized substance taxes—not remitted to public schools

Unauthorized substance taxes assessed against drug and illicit liquor dealers do not belong to the public schools because prior panels of the Court of Appeals concluded that the tax is intended for a remedial purpose. N.C.G.S. § 105-113.111.

11. Penalties, Fines, and Forfeitures— penalties for environmental violations—remittance to public schools

Penalties collected for environmental violations are punitive in nature and belong to the public schools. Monies paid for supplemental environmental project settlements, including payments not made directly to the State, are paid because of a civil penalty against the violator, are punitive in nature, and still belong to the public schools. N.C.G.S. §§ 143-215.6A, 143-215.114A.

12. Penalties, Fines, and Forfeitures— penalties paid by schools—not remitted to public schools

Payments made by local public school systems to various state agencies as fines or civil penalties may not be used by the public schools. Otherwise, the offending unit would be unjustly enriched by its own wrongdoing.

13. Penalties, Fines, and Forfeitures— penalties for late payment of license fees—not remitted to public schools

Payments collected by certain state agencies for the late payment of occupational license fees did not belong to the public schools because they are intended to compensate the collecting agency for additional operating expenses incurred in collecting money due or compelling performance of a license requirement. The payments are remedial rather than punitive in nature.

14. Statutes of Limitation and Repose— fines and penalties—remittance to schools

The trial court correctly applied the three-year statute of limitations of N.C.G.S. § 1-52 to an action by local school boards to recover payments already collected by the State which the schools claimed were due them under the State constitution. The one-year statute of limitations of N.C.G.S. § 1-54(2) is applicable to actions intended to collect civil penalties or forfeitures.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendants from judgment entered 14 December 2001 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 11 March 2003.

Tharrington Smith, L.L.P., by Michael Crowell and Kara L. Grice; Wallace, Morris & Barwick, P.A., by Edwin M. Braswell, Jr.; and Roberts & Stevens, P.A., by Cynthia Grady, for plaintiffs appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Dale Talbert and Assistant Attorney General Celia Grasty Lata, for defendants appellants Moore, Powell, McCoy, Kirk, Ward, Cooper, Tolson, Tippett, Howard, Broad, Moeser, Fox, Ross, Fain, Buell, Lunsford, Goodman, and Van Essen.

Young Moore and Henderson, P.A., by John N. Fountain and Reed N. Fountain, for defendants appellants O'Brien and Brooks.

Allen and Pinnix, P.A., by Noel L. Allen, for the North Carolina Board of Architecture and the North Carolina State Board of Mortuary Science, amici curiae.

Bailey & Dixon, L.L.P., by Carson Carmichael, III, for the North Carolina Licensing Board for General Contractors and the North Carolina Board of Pharmacy, amici curiae.

ELMORE, Judge.

This appeal arises from the State of North Carolina's attempts to direct the collection and distribution of civil fines and penalties within the constitutional mandate of Article IX, Section 7 of the North Carolina Constitution, which provides in pertinent part as follows:

> [T]he clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7. Plaintiff North Carolina School Boards Association, an incorporated association representing all county and city school boards in the state, is joined in this appeal by the individual Boards of Education for Wake, Durham, Johnston, Buncombe, Edgecombe, and Lenoir counties, which are the governing bodies for the public schools in their respective counties. Defendants[1] are, as of

1. Each defendant is sued in his or her official capacity only. By Judge Jones' Order Substituting Parties entered 14 December 2001 the following defendants were substituted, pursuant to N.C.R. Civ. P. 25(f), as parties for their originally named predecessors who have died, resigned, or otherwise vacated their offices during the pendency of this litigation: defendant Moore for Harlan E. Boyles as State Treasurer; defendant Powell for Edward Renfrow as State Controller; defendant McCoy for Marvin K. Dorman, Jr. as State Budget Officer; defendant Cooper for Mike Easley as Attorney General; defendant Tolson for Muriel K. Offerman as Secretary of the Department of Revenue; defendant Tippett for E. Norris Tolson as Secretary of the

14 December 2001, chief executive officers of various State departments, agencies, institutions, and licensing boards, each of which either (1) assesses and collects monetary payments from individuals or entities for failing to comply with certain statutory or administrative requirements, or (2) administers State funds into which these payments are deposited and distributed.

Plaintiffs brought this declaratory judgment action seeking a determination that various monetary payments collected by defendants are "penalties and forfeitures" or "fines collected . . . for . . . breach of the penal laws of the State" belonging to the public schools "in the several counties" under Article IX, Section 7. Defendants contend that none of the challenged payments fall within the purview of Article IX, Section 7 because they are each remedial, rather than punitive, in nature, and that defendants may therefore retain and use the payments for purposes other than maintaining free public schools.

Plaintiffs also seek a determination that Article 31A of Chapter 115C of the North Carolina General Statutes, which requires (1) that "the clear proceeds of all civil penalties . . . collected by a State agency" be deposited into a central Civil Penalty and Forfeiture Fund (Civil Penalty Fund), and (2) that all funds accruing to the Civil Penalty Fund be transferred to the State School Technology Fund (School Technology Fund) for allocation to local school units based on each unit's student population, is unconstitutional and void because it violates the Article IX, Section 7 mandate that all civil penalties "shall belong to and remain in the several counties" and be "used exclusively for maintaining free public schools." Defendants contend that Article 31A of Chapter 115C is consistent with the general provisions of Article IX, Section 7, and therefore constitutional, because it ultimately provides for the distribution of all civil penalties to local school administrative units and directs their use by the State's public schools, albeit for the limited purpose of implementing local school technology plans.

Department of Transportation; defendant Howard for Janice H. Faulkner as Commissioner of Motor Vehicles; defendant Moeser for Michael Hooker as Chancellor of the University of North Carolina at Chapel Hill; defendant Ross for Wayne McDevitt as Secretary of the Department of Environment and Natural Resources; defendant Fain for Rick Carlisle as Secretary of the Department of Commerce; defendant Buell for H. David Bruton as Secretary of the Department of Health and Human Services; defendant Goodman for J. Parker Chesson, Jr. as Chairman of the Employment Security Commission; and defendant O'Brien for T.L. Phillips as Executive Secretary of the North Carolina State Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors.

Finally, plaintiffs contend that their claims for the clear proceeds of the challenged monetary payments are governed by a three-year statute of limitations, while defendants maintain that, should any of the challenged payments be adjudged civil penalties subject to Article IX, Section 7, a one-year limitations period applies to plaintiffs' claims.

By order entered 14 December 2001, the Honorable Abraham Penn Jones denied defendants' motion for summary judgment and granted summary judgment in plaintiffs' favor on all claims. In ruling for plaintiffs, Judge Jones' order expressly provided that the following monetary payments are each "subject to Article IX, Section 7, of the North Carolina Constitution and belong to and shall be remitted to the public schools[:]"

1. Moneys collected by the Department of Transportation from automobile dealers pursuant to G.S. 20-79(e) for misuse of dealer plates . . . .

2. Moneys collected by the Department of Transportation from the owners and operators of vehicles pursuant to G.S. 20-118(e) for violation of weight limits . . . .

3. Moneys collected by the Department of Transportation from automobile owners pursuant to G.S. 20-309(e) for failure to have financial security in effect and from insurers for failing to give notice of termination . . . .

4. Moneys collected by the Department of Commerce pursuant to G.S. 54-109.15(b) for credit unions' failure to file reports timely . . . .

5. Moneys collected by the Employment Security Commission pursuant to G.S. 96-10 for overdue employer taxes, for the late filing of reports, and for bad checks . . . .

6. Moneys collected by the Department of Revenue pursuant to G.S. 105-113.89, -163.15, -163.41, -164.14, -231 and -236 for late filings and underpayments and failure to comply with statutory or regulatory tax provisions . . . .

7. Moneys collected by the boards of trustees of the campuses of the consolidated University of North Carolina for violation of ordinances adopted by the trustees under the authority of G.S. 116-44.4(h) for the regulation of traffic and parking and the registration of vehicles . . . .

8. Moneys collected by the boards of trustees of the campuses of the consolidated University of North Carolina pursuant to the authority granted by G.S. 116-33 for the late return of materials from the university libraries . . . .

9. Moneys collected by the Department of Health and Human Services pursuant to G.S. 143-116.7 for violations of departmental motor vehicle regulations on the grounds of department institutions . . . .

10. Moneys collected by the Secretary of Revenue pursuant to Article 2D of Chapter 105 of the General Statutes, denominated as the state unauthorized substances excise tax . . . .

11. Monies [sic] paid to support a Supplemental Environmental Project (SEP), in settlement of an assessed civil penalty pursuant to a settlement agreement with the Department of Environment and Natural Resources. . . . Specifically, the $50,125 paid by the City of Kinston to Lenoir Community College on or about 31 March 1998 as a SEP pursuant to a Consent Agreement and Settlement in contested cases 97 EHR1177 and 97 EHR1380 in the Office of Administrative Hearings is subject to Article IX, Section 7 . . . and belongs to and shall be paid by the Department of Environment and Natural Resources to the Lenoir County Board of Education for the public schools of that county.

12. The $80,000 collected by the Department of Environment and Natural Resources from the Department of Transportation as a mitigated penalty in settlement of contested case 98EHR778 in the Office of Administrative Hearings . . . belongs to and shall be paid by the Department of Environment and Natural Resources to the Buncombe County Board of Education and the Asheville City Board of Education, based on the average daily membership of each school system, for the use of public schools.

. . .

16. . . . [M]oneys that clearly constitute civil penalties within the meaning of Article IX, Section 7, . . . [which] have been paid by public school systems themselves. . . . Specifically, the $11,000 paid by the Edgecombe County Board of Education to the Division of Water Quality of the Department of Environment and Natural Resources on or about 24 April 1997 for failure to comply with interim effluent limitations at the Phillips School Wastewater Treatment Facility is subject to Article IX, Section 7,

and belongs to the public schools and shall be paid by the Department of Environment and Natural Resources to the Edgecombe County Board of Education for the use of public schools in the county.

Judge Jones' order also addressed the proper disposition of monetary payments collected by state agencies and licensing boards "for the late renewal of licenses or the late payment of licensing fees" as follows:

> 17. . . . The court finds that the "clear proceeds" of such moneys are subject to Article IX, Section 7 . . . and belong to and shall be remitted to the public schools. The court finds that "clear proceeds" means that the moneys to be paid to the public schools may be reduced by the costs of collecting and processing the late renewal or late payment, not to include general overhead, and that those costs may be retained by the board or agency.

The order further provided that any statutes either (1) authorizing the foregoing payments, or (2) governing the disposition of these payments, violate Article IX, Section 7 "[t]o the extent that [they] . . . provide that the moneys collected are to go to agencies or for purposes other than the public schools." With respect to the constitutionality of Article 31A of Chapter 115C of our General Statutes, Judge Jones' order provided as follows:

> 14. Article IX, Section 7 . . . provides that the clear proceeds of all penalties and fines and forfeitures "shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." Because this provision requires moneys to remain in the counties where the violation which gave rise to the collection occurred, Article 31A of Chapter 115C of the General Statutes, which provides for remission of the proceeds of civil penalties to the central state Civil Penalty and Forfeiture Fund, violates Article IX, Section 7 . . . and is declared unconstitutional and void.
>
> 15. By providing that the proceeds of all penalties and fines and forfeitures are to remain in the counties where collected, Article IX, Section 7 . . . vests with the local board(s) of education for each county the control of such funds and the discretion as to the best use of those moneys for public education in the county. Accordingly, to the extent that Article 31A of Chapter 115C of the General Statutes directs that the monies [sic] remitted to the

> Civil Penalty and Forfeiture Fund are to be transferred to the State School Technology Fund and are to be allocated to local school units exclusively for school technology purposes, that statute violates Article IX, Section 7 . . . and is declared unconstitutional and void.

Judge Jones' order provides that it "shall be applicable to each defendant who currently has control of the moneys to be paid to the public schools, and each defendant shall be responsible for compliance with this Order. . . . [T]he burden of assuring expeditious and complete compliance with this Order shall be with the defendants generally." The order further provides that "[p]laintiffs' claims are subject to a three-year statute of limitations." Operation and enforcement of the order were stayed pending appeal.

All defendants save O'Brien and Brooks filed their notice of appeal to this Court on 11 January 2002. Defendants O'Brien and Brooks filed their notice of appeal on 14 January 2002.

This appeal presents issues of great importance to an array of State departments, agencies, and licensing boards as well as to our State's system of public education. Determination of how the substantial monetary sums at issue here—as much as $75,000,000.00 annually, according to defendants[2]—may be constitutionally collected and distributed will have a significant and lasting impact on agencies and institutions which play a vital role in the lives of all North Carolinians. With this in mind, we turn now to our analysis of the several issues presented by this appeal.

I. The Constitutionality of the Civil Penalty Fund and Technology Fund

[1] By their first assignment of error, defendants contend the trial court erred in concluding that Article 31A of Chapter 115C of our General Statutes (N.C. Gen. Stat. §§ 115C-457.1 to -457.3), which establishes the central Civil Penalty Fund and mandates that the funds accruing to it be transferred to the School Technology Fund for allocation "to local school administrative units on the basis of average daily membership" violates Article IX, Section 7 of our

2. In their brief, defendants state that determination of this appeal also "will control the disposition of as much as $500,000,000.00 in monetary payments collected by State agencies since 1995." At oral argument, however, counsel for plaintiffs stated that plaintiffs are not seeking redistribution of any funds collected and deposited into the Civil Penalty Fund since its inception on 1 September 1997. We therefore treat any claims plaintiffs may have to these sums as abandoned for purposes of this appeal.

Constitution. Defendants contend that the provisions of this statutory scheme are consistent with the constitutional provision's purpose and intent that the clear proceeds of civil penalties be used exclusively to fund local schools and maintain free public schools, and are therefore constitutional. We agree, and therefore reverse those portions of the trial court's order declaring this statutory scheme "unconstitutional and void."

It is well settled that, when reviewing the constitutionality of a legislative act, the North Carolina appellate courts must accord the legislative act a "presumption of constitutionality." *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 690, 249 S.E.2d 402, 406 (1978). Our Supreme Court has articulated the appropriate standard of review as follows:

> [T]he courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

Glenn v. Board of Education, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936). "In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Guilford County Bd. of Education v. Guilford Co. Bd. of Elections*, 110 N.C. App. 506, 511, 430 S.E.2d 681, 684 (1993). Further, "[w]here a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Wayne County Citizens Assn. v. Wayne Co. Bd. of Comrs.*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991). We examine the constitutionality of Article 31A of Chapter 115C in light of these principles.

The Civil Penalty Fund is established by N.C. Gen. Stat. § 115C-457.1 (2001), which provides in pertinent part:

> (a) There is created the Civil Penalty and Forfeiture Fund. The Fund shall consist of the clear proceeds of all civil penalties and civil forfeitures that are collected by a State agency and are payable to the County School Fund pursuant to Article IX, Section 7 of the Constitution.

> (b) . . . . The Fund and all interest accruing to the Fund shall be faithfully used exclusively for maintaining free public schools.

N.C. Gen. Stat. § 115C-457.2 (2001) further mandates that:

> The clear proceeds of . . . all funds which are civil penalties or civil forfeitures within the meaning of Article IX, Section 7 . . . shall be deposited in the Civil Penalty and Forfeiture Fund. The clear proceeds of such funds include the full amount of all such penalties and forfeitures collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected.

The statutory scheme is completed by N.C. Gen. Stat. § 115C-457.3 (2001), which provides that:

> The Office of State Budget and Management shall transfer funds accruing to the Civil Penalty and Forfeiture Fund to the State School Technology Fund. These funds shall be allocated to local school administrative units on the basis of average daily membership.

The use of funds allocated to local school administrative units from the School Technology Fund is limited to implementation of local school technology plans. N.C. Gen. Stat. § 115C-102.6D (2001).

The trial court concluded that "[b]ecause [Article IX, Section 7] requires moneys to remain in the counties where the violation which gave rise to the collection occurred," Article 31A of Chapter 115C of our General Statutes, "which provides for remission of the proceeds of civil penalties to the central state [Civil Penalty Fund], . . . is declared unconstitutional and void." The trial court further concluded that because "Article IX, Section 7 . . . vests with the local board(s) of education for each county the control of . . . and the discretion as to the best use of [the clear proceeds of civil penalties] for public education in the county," the statutory scheme at issue here is unconstitutional and void "to the extent that [it] directs that monies [sic] remitted to the [Civil Penalty Fund] are to be transferred to the [School Technology Fund] and are to be allocated to local school units exclusively for school technology purposes."

We agree with defendants' contention that this statutory scheme does not violate the plain language of Article IX, Section 7. Article IX, Section 7 provides only that the "clear proceeds of all [civil] penalties . . . collected in the several counties . . . shall belong

to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7. The constitutional provision is silent, or at best ambiguous, regarding several critical aspects of its operation and enforcement, including: (1) the definition of "clear proceeds;" (2) the establishment of a method for collecting these funds; (3) the establishment of a method for distributing these funds among and within the "several counties;" and (4) the specific educational purpose(s) for which these funds may be used "for maintaining free public schools."

Our Supreme Court has stated that where a constitutional provision's "language is free from ambiguity . . . and the purpose of the provision would be frustrated unless it is given immediate effect, it will be held self-executing." *Kitchin v. Wood*, 154 N.C. 446, 448, 70 S.E. 995, 996 (1911) (quoting *Tuttle v. Nat. Bank of Republic*, 161 Ill. 497, 502, 44 N.E. 984, 985 (1896)). Because Article IX, Section 7 requires generally that revenue collected from civil penalties be used exclusively to support the State's public schools, but fails to unambiguously specify how this is to be accomplished, we conclude that this constitutional provision is not self-executing and that it consequently requires legislation to give it effect and a means for its enforcement. *Id.*

It is a long-established principle that the General Assembly possesses all legislative authority not expressly or impliedly prohibited to it by the state or federal constitutions. *Gwathmey v. State of North Carolina*, 342 N.C. 287, 303, 464 S.E.2d 674, 683-84 (1995). Constitutional provisions "lay down general propositions, and do not deal in details, leaving these to be worked out by the Legislature." *Trustees University of North Carolina v. McIver*, 72 N.C. 76, 80 (1875). Our Supreme Court has determined the "general proposition" laid down by the funding provision of our Constitution's Education Article, found then in Article IX, Section 5 and now in substantially the same form in Article IX, Section 7, to be as follows:

> It is manifest that Article IX, Section 5 [now Article IX, Section 7], of the Constitution was designed in its entirety to secure two wise ends, namely: (1) To set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes.

Boney v. Kinston Graded Schools, 229 N.C. 136, 140, 48 S.E.2d 56, 59 (1948).

We hold that the General Assembly, by enacting Article 31A of Chapter 115C, has properly legislated the details necessary to effectuate the general proposition laid down by Article IX, Section 7 that the clear proceeds of civil penalties be set aside and used exclusively for the support of our State's public schools. Article 31A of Chapter 115C provides a mechanism whereby these funds may not be appropriated by the legislature or any agency, but instead are remitted to the several counties to be used exclusively by the public schools therein. We conclude that the statutory scheme's creation of the Civil Penalty Fund, its mandate that all funds accruing thereto be transferred to the School Technology Fund for allocation to local school units based on student population, and its requirement that these funds be used to implement local school technology plans are consistent with the intent and purpose of Article IX, Section 7. We therefore reverse those portions of the trial court's order which either (1) declare Article 31A of Chapter 115C of our General Statutes to be "unconstitutional and void," or (2) direct that any payments collected by a State agency or department as an assessed "penalty" or in settlement of same be paid to a specific city and/or county school board, rather than to the Civil Penalty Fund for allocation to local school administrative units pursuant to N.C. Gen. Stat. § 115C-457.3.

II. The Proper Disposition of Monetary Payments Provided for Under Various Statutes and Collected by Defendants: "Punitive" vs. "Remedial" Purpose

[2] By their next assignments of error, defendants contend that the trial court erred in concluding that several statutorily-authorized monetary payments collected by defendants are "penalties and forfeitures" or "fines collected . . . for . . . breach of the penal laws of the State," and thus properly within the purview of Article IX, Section 7. The payments at issue are imposed for violations of various civil or administrative statutes and rules. These payments are denominated by the statutes authorizing them as "excise taxes," tax "penalties" or "additional taxes," traffic, parking, vehicle registration, and library "fines," "late fees," "civil penalties," or simply "penalties." Defendants argue that the clear proceeds of these monetary payments are not governed by Article IX, Section 7 because, regardless of nomenclature, they are actually *remedial* rather than punitive in nature, and that defendants should therefore be allowed to retain and use these payments for purposes other than maintaining free public schools. Consequently, defendants except to the trial court's conclusion that the several statutes authorizing these monetary payments

violate Article IX, Section 7 to the extent they "provide that the moneys collected are to go to agencies or for purposes other than the public schools."

In considering defendants' contentions, we are guided by several principles articulated by our Supreme Court in previous decisions considering the applicability of Article IX, Section 7 to various statutorily-authorized monetary payments. First, our Supreme Court "[has] interpret[ed] the provisions of [Article IX, Section 7] . . . as identifying two distinct funds for the public schools. These are (1) the clear proceeds of all penalties and forfeitures in *all cases, regardless of their nature, so long as they accrue to the state*; and (2) the clear proceeds of all fines collected for any breach of the criminal laws." *Mussallam v. Mussallam*, 321 N.C. 504, 508-09, 364 S.E.2d 364, 366, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 915 (1988) (emphasis added). Since none of the payments at issue in the present case are criminal fines, we are dealing here exclusively with the first *Mussallam* category of "funds for the public schools."

Second, in defining the types of payments encompassed by this first category of funds, the Court in *Mussallam* stated that because "[t]he term 'penal laws,' as used in the context of article IX, section 7, means laws that impose a monetary payment for their violation," only payments which are "*punitive* rather than remedial in nature and [are] intended to *penalize the wrongdoer* rather than compensate a particular party" are subject to Article IX, Section 7. *Id.* at 509, 364 S.E.2d at 367 (emphasis added); *see also* D. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. Rev. 49, 65 (1986) (". . . fines, penalties, and forfeitures as a group are distinguished as payments imposed as *punishment*. If a payment, however labelled, is imposed for some other purpose—usually as compensation to a person or entity who has been harmed because of the violation—then [Article IX, Section 7] does not apply").

Third, the clear proceeds of all penalties and forfeitures which are punitive in nature *and which are required to be paid to the State or to a department of the State* are subject to Article IX, Section 7. *Craven County Bd. of Education v. Boyles*, 343 N.C. 87, 91, 468 S.E.2d 50, 52 (1996); *see also State ex rel. Thornburg v. House and Lot*, 334 N.C. 290, 295, 432 S.E.2d 684, 687 (1993). Finally, our Supreme Court has stated that the *label* attached to the monetary payment does not control the determination of whether such a payment constitutes a penalty, forfeiture, or fine within the meaning of Article

IX, Section 7. *Craven County*, 343 N.C. at 92, 468 S.E.2d at 53; *see also Cauble v. City of Asheville*, 301 N.C. 340, 344, 271 S.E.2d 258, 260 (1980), *aff'd*, 314 N.C. 598, 336 S.E.2d 59 (1985). Indeed, "it is neither 'the label attached to the money' nor 'the [collection] method employed,' but 'the *nature of the offense committed*' that determines whether the payment constitutes a penalty" and is thus subject to Article IX, Section 7, or remedial and outside the constitutional provision's purview. *Craven County*, 343 N.C. at 92, 468 S.E.2d at 53 (quoting *Cauble*, 301 N.C. at 344, 271 S.E.2d at 260) (emphasis added); *see also Donoho v. City of Asheville*, 153 N.C. App. 110, 116, 569 S.E.2d 19, 22 (2002), *disc. review denied*, 356 N.C. 669, 576 S.E.2d 110-11 (2003). With these principles in mind, we examine each of the challenged monetary payments in the sequence in which they are addressed by the trial court's order.

A. Payments Collected by the Department of Transportation from Owners of Vehicles Which Exceed Axle-Weight Limits

[3] Our Legislature has placed certain restrictions on the weight at which different types of vehicles may be lawfully operated on the State's highways. N.C. Gen. Stat. § 20-118 (2001). Subsection (e) of N.C. Gen. Stat. § 20-118, which is entitled "Penalties," provides that "the Department of Transportation shall assess a civil penalty against the owner or registrant" of a vehicle "for each violation of the . . . weight limits" set forth therein. Defendants except to the trial court's ruling that payments collected by the Department of Transportation (DOT) pursuant to N.C. Gen. Stat. § 20-118(e) are subject to Article IX, Section 7 and belong to the public schools. This assignment of error is without merit.

While the statute clearly and repeatedly characterizes the monetary payment authorized thereunder as a "civil penalty" or "penalty," under *Craven County* and *Cauble*, "the label attached to the money does not control[]" the determination of whether it is a penalty or breach of the State's penal laws within the meaning of Article IX, Section 7. *Craven County*, 343 N.C. at 92, 468 S.E.2d at 53 (quoting *Cauble*, 301 N.C. at 344, 271 S.E.2d at 260). Since assessments for violation of the weight limits are to be paid to the DOT, a State agency, the payments provided for in N.C. Gen. Stat. § 20-118(e) clearly "accrue to the state" within the meaning of *Craven County* and *House and Lot*. Our analysis of whether these payments are subject to Article IX, Section 7 therefore comes down to a determination of whether the payments are punitive or remedial in nature. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.

We hold that the payments authorized by N.C. Gen. Stat. § 20-118(e) are punitive in nature and are therefore subject to Article IX, Section 7. The statute authorizes assessment of a "civil penalty" by the DOT against any person who engages in a proscribed course of conduct, i.e., "unlawful[ly]" owning or operating a vehicle above certain weight limits on the State's highways. N.C. Gen. Stat. § 20-118; *see also* N.C. Gen. Stat. § 20-115 (2001) ("It shall be unlawful for any person to drive . . . on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this title . . . ."). We conclude that N.C. Gen. Stat. § 20-118(e) is a "penal law" because it "impose[s] a monetary payment for [its] violation" and "is intended to penalize the wrongdoer rather than compensate a particular party" for violation of a proscribed course of conduct. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367; *see also Craven County*, 343 N.C. 87, 468 S.E.2d 50 (moneys paid to the Department of Environment, Health and Natural Resources pursuant to a settlement agreement for violations of environmental laws held to constitute a penalty, fine, or forfeiture under Article IX, Section 7); *House and Lot*, 334 N.C. 290, 432 S.E.2d 684 (disposition of proceeds from sale of property forfeited by owner for conduct in violation of RICO Act held governed by Article IX, Section 7). As such, we hold that the clear proceeds of payments collected by the DOT under N.C. Gen. Stat. § 20-118(e) belong to the public schools pursuant to the statutory scheme set forth in Article 31A of Chapter 115C of our General Statutes.

We are unpersuaded by defendants' assertion that the weight penalties are remedial, rather than punitive, in nature because they are intended to compensate the State for deterioration of its highways due to operation of overweight vehicles thereon. In *Craven County* and *House and Lot*, our Supreme Court declined to characterize payments made for violations of both the State's environmental laws and its RICO Act as compensation for costs incurred by the State due to its citizens' illegal conduct, and we likewise decline to so characterize the payments at issue in the present case.

B. Payments Collected by the Department of Transportation for Lapses in Insurance Coverage

[4] Under N.C. Gen. Stat. § 20-309(e) (2001), the DOT may collect a "civil penalty" of $50.00 from vehicle owners who allow their motor vehicle insurance to lapse, as well as a "civil penalty" of $200.00 from insurers who fail to give notice of insurance termination to the DOT. Defendants except to the trial court's ruling that these payments

belong to the public schools, contending instead that N.C. Gen. Stat. § 20-309 is remedial in nature and that the payments authorized thereunder are thus not subject to Article IX, Section 7. We disagree with defendants' contention and affirm this portion of the trial court's order.

As with the vehicle weight-limit statute discussed above, N.C. Gen. Stat. § 20-309(e) authorizes the DOT to collect a monetary payment from individuals and entities which engage in certain proscribed conduct, which in this case consists of (1) a car owner allowing his motor vehicle insurance to lapse, or (2) an insurer failing to notify the DOT of termination of a motor vehicle insurance policy. Our Supreme Court has characterized the "civil penalty" authorized under N.C. Gen. Stat. § 20-309(e) as "the exclusive *sanction* for failure to give [the Department of Motor Vehicles] the required notice of termination." *Allstate Ins. Co. v. McCrae*, 325 N.C. 411, 417, 384 S.E.2d 1, 4 (1989) (emphasis added). *Black's Law Dictionary* defines a "sanction" as "[t]hat part of a law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance." *Black's Law Dictionary* 1341 (6th ed. 1990). Because we are bound by our Supreme Court's conclusion in *McCrae* that these payments are in the nature of sanctions, we conclude that they are "intended to penalize the wrongdoer rather than compensate a particular party" and are thus punitive. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367. Accordingly, we hold that the payments authorized by N.C. Gen. Stat. § 20-309(e) are subject to Article IX, Section 7 and belong to the public schools, pursuant to the statutory scheme set forth in Article 31A of Chapter 115C of our General Statutes.

C. Payments Collected by the Department of Revenue For Failure to Comply with Regulatory or Statutory Tax Provisions

[5] Defendants assert the trial court erred in concluding that payments collected by the Department of Revenue (DOR) under N.C. Gen. Stat. §§ 105-113.89, -163.15, -163.41, -164.14, -231 and -236 (2001) for late filings, underpayments, and failure to comply with various provisions of the North Carolina tax code are subject to Article IX, Section 7. We agree, and therefore reverse this portion of the trial court's order.

At the outset we find to be without merit defendants' contention that plaintiffs' claims involving these payments should be dismissed on the grounds that the Secretary of Revenue cannot be sued for

declaratory relief pursuant to N.C. Gen. Stat. § 105-267. N.C. Gen. Stat. § 105-267 (2001) provides in pertinent part that "[n]o court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax . . . ." This provision does not apply to the instant case, however, because plaintiffs neither owe any tax liability to the DOR, nor are they attempting to prevent the collection of a tax. Plaintiffs' claims against the Secretary of Revenue were not "brought for the purpose of preventing the collection of any tax" from plaintiffs; they were instead brought seeking a determination as to the proper disposition of amounts collected by the DOR as statutorily-denominated "penalties" or "additional taxes." We conclude that plaintiffs' declaratory judgment action with respect to the Secretary of Revenue is therefore not precluded by N.C. Gen. Stat. § 105-267.

[6] However, we agree with defendants' assertion that the various payments denominated as "penalties" or "additional taxes" under the challenged portions of Chapter 105 of our General Statutes (the North Carolina Revenue Act) are remedial, rather than punitive, in nature, and we therefore hold the trial court's conclusion that these payments belong to the public schools under Article IX, Section 7 was erroneous. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.

Civil tax penalties and additions to tax for fraud, negligence, and substantial understatement of tax liability under the federal Revenue Act have consistently been determined to be remedial, rather than punitive, in nature. *See Helvering v. Mountain Producers Corp.*, 303 U.S. 391, 401, 82 L. Ed. 917, 923 (1938); *Thomas v. C.I.R.*, 62 F.3d 97, 100 (4th Cir. 1995); *Little v.* C.I.R., 106 F.3d 1445, 1454 (9th Cir. 1997); *U.S. v. Alt*, 83 F.3d 779, 781 (6th Cir. 1996), *cert. denied*, 519 U.S. 872 (1996); *Ames v. Commissioner*, 112 T.C. 304 (1999). In holding that the civil fraud penalty contained within the federal Revenue Act was remedial rather than punitive in nature, the United States Supreme Court stated as follows:

> The remedial character of sanctions imposing *additions to a tax* has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.

Helvering, 303 U.S. at 401, 82 L. Ed. at 923 (emphasis added). In so holding, the Court, noting that the civil fraud penalty was introduced

into the federal Revenue Act under the heading "Interest and Additions to the Tax," stated that "[o]bviously all of these 'Additions to the Tax' were intended by Congress as civil incidents of the assessment and collection of the income tax." *Id.* at 405, 82 L. Ed. at 925.

Significantly, the penalties provision of the North Carolina Revenue Act, which is similar to the penalties provision of the federal Act, provides that "[p]enalties assessed by the Secretary under this Subchapter are assessed as an *additional tax*." N.C. Gen. Stat. § 105-236 (2001) (emphasis added). Moreover, our Legislature has provided that "[u]nless the context clearly requires otherwise, the terms 'tax' and 'additional tax' include *penalties* and interest as well as the principal amount." N.C. Gen. Stat. § 105-228.90(b)(7) (2001) (emphasis added). We conclude that the "[p]enalties assessed . . . as an additional tax" under N.C. Gen. Stat. § 105-236 and other provisions of the North Carolina Revenue Act for failure to comply with the tax code are remedial, not punitive, in nature, and we hold that they are not subject to Article IX, Section 7 and thus do not belong to the public schools. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.

D. Payments Collected by the Employment Security Commission from Employers for Overdue Contributions to the Unemployment Insurance Fund, Late Filing of Wage Reports, and Tendering a Worthless Check

[7] Defendants contend the trial court erred in concluding that payments the Employment Security Commission (ESC) is entitled to collect under Chapter 96 of our General Statutes (the Employment Security Act) from employers for late contributions to the Unemployment Insurance Fund are subject to Article IX, Section 7. These payments are statutorily characterized as "[a]n *additional penalty* in the amount of ten percent (10%) of the *taxes* due" from the employer as its contribution to the Fund. N.C. Gen. Stat. § 96-10(a) (2001) (emphasis added). Defendants also except to the trial court's ruling that amounts the ESC is authorized to collect from employers as (1) a "late filing penalty" for failure to timely file certain reports, and (2) a "penalty" for tendering a worthless check in payment of its contributions, belong to the public schools as well. N.C. Gen. Stat. § 96-10(g), -(h) (2001).

We agree with defendants' assertion that N.C. Gen. Stat. § 96-10 both (1) defines employers' contribution to the Unemployment Insurance Fund as a "tax," and (2) provides that the penalties the statute establishes for various transgressions by employers relating

to payment of these contributions are part of these "taxes." In determining whether these penalties are punitive or remedial in nature, each party applies the same analysis it applied in analyzing the penalties collected by the Department of Revenue under the Revenue Act for failure to comply with various provisions of the North Carolina tax code. As with the payments collected as penalties under the Revenue Act, we agree with defendants' contention that the payments collected as penalties under the Employment Security Act are in the nature of "additional taxes" or "tax penalties." As such, we conclude (1) these payments collected as penalties are part of employers' contributions to the Unemployment Insurance Fund; (2) employers' contributions to the Unemployment Insurance Fund are "taxes;" and (3) these payments collected as penalties under the Employment Security Act are "additional taxes" and thus remedial, rather than punitive, in nature. *Helvering*, 303 U.S. at 401, 82 L. Ed. at 923. We therefore hold that the payments collected by the ESC pursuant to N.C. Gen. Stat. § 96-10 are not subject to Article IX, Section 7 and do not belong to the public schools, and we reverse this portion of the trial court's order. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.

E. Payments Collected by the Boards of Trustees of the Consolidated University of North Carolina Campuses for Violation of Ordinances Regulating Traffic, Parking, and Vehicle Registration

[8] Defendants contend the trial court erred in concluding that payments collected under N.C. Gen. Stat. § 116-44.4(h) by the boards of trustees of the several University of North Carolina (UNC) campuses as "penalties" for the violation of campus traffic and parking ordinances are subject to Article IX, Section 7. We agree and hold that these payments do not belong to the public schools.

Article IX, Section 8 of the North Carolina Constitution provides in pertinent part that "[t]he General Assembly may enact laws necessary and expedient for the maintenance and management of The University of North Carolina and the other public institutions of higher education." N.C. Const. art. IX, § 8. Defendants argue, and we agree, that our Legislature acted within this constitutional grant of power by enacting N.C. Gen. Stat. § 116-44.4 (2001), which gives the trustees of each UNC campus the authority to adopt ordinances regulating traffic and parking on their respective campuses. The trustees may choose to treat violations of these ordinances as either (1) "infraction[s] as defined in G.S. 14-3.1" punishable by a "penalty" of up to $50.00, or (2) "civil penalties" assessed in amounts "graduated

according to the seriousness of the offense or the number of prior offenses by the person charged." N.C. Gen. Stat. § 116-44.4(g), -(h) (2001). Violations characterized by the trustees under N.C. Gen. Stat. § 116-44.4(g) as "infractions" are prosecuted by the local district attorney, and any resulting penalties are imposed and collected by the district court. N.C. Gen. Stat. §§ 15A-1114; 15A-1116 (2001). "The proceeds of penalties for infractions are payable to the county in which the infraction occurred for the use of the public schools." N.C. Gen. Stat. § 14-3.1(a) (2001). There is therefore no doubt that the proceeds of penalties collected for violation of campus traffic and parking ordinances as "infractions" under N.C. Gen. Stat. 116-44.4(g) belong to the public schools.

The payments in dispute here, then, are only those resulting from violations of campus traffic and parking regulations which the trustees have denominated as "civil penalties," rather than "infractions," under N.C. Gen. Stat. § 116-44.4(h). These penalties are collected according to procedures established by the trustees, which "may be enforced by civil action in the nature of debt." N.C. Gen. Stat. § 116-44.4(h). Our Legislature has directed that the penalties collected under this statute must be placed in a trust account on each campus and used only for the following purposes:

> (1) To defray the cost of administering and enforcing [campus parking and traffic] ordinances . . .;
>
> (2) To develop, maintain, and supervise parking areas and facilities;
>
> (3) To provide bus service or other transportation systems or facilities, including payments to any public or private transportation system serving University students, faculty, or employees;
>
> (4) As a pledge to secure revenue bonds for parking facilities issued under Article 21 of this Chapter;
>
> (5) Other purposes related to parking, traffic, and transportation on the campus.

N.C. Gen. Stat. § 116-44.4(m) (2001). Defendants argue, and we agree, that the "civil penalties" imposed by N.C. Gen. Stat. § 116-44.4(h) are intended to compensate each campus for the expense of establishing and maintaining parking- and transportation-related services, rather than to penalize individuals who violate campus parking and traffic ordinances. *Craven County*, 343 N.C. at 92, 468 S.E.2d at

53 (the "*nature* of the *offense* committed" determines whether a payment constitutes a penalty). We therefore hold that N.C. Gen. Stat. § 116-44.4(h) is remedial in nature, and that the payments collected pursuant to the statute are not subject to Article IX, Section 7. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.

Moreover, we note that our Legislature acted pursuant to a constitutional provision separate and apart from Article IX, Section 7 in enacting N.C. Gen. Stat. § 116-44.4. We conclude that because our Legislature enacted N.C. Gen. Stat. § 116-44.4 pursuant to a clear grant of constitutional authority to establish a mechanism for administering the "maintenance and management" of traffic and parking on each UNC campus, this statute is constitutional under Article IX, Section 8 of our Constitution, which is a co-equal provision with Article IX, Section 7. N.C. Const. art. IX, § 8; *see also Stephenson v. Bartlett*, 355 N.C. 354, 409, 562 S.E.2d 377, 413 (2002) (Parker, J., dissenting) (it is a "fundamental principle" that one section of the North Carolina constitution cannot violate another).

We hold that the clear proceeds of payments collected pursuant to N.C. Gen. Stat. § 116-44.4(h) are not subject to Article IX, Section 7, and we reverse this portion of the trial court's order.

F. Payments Collected by the Boards of Trustees of the Consolidated University of North Carolina Campuses for Loss, Damage, or Late Return of Materials Borrowed from University Libraries

[9] Defendants also assert the trial court erred in concluding that payments collected from individuals by the trustees of each UNC campus for loss, damage, or late return of materials borrowed from campus libraries are subject to Article IX, Section 7. The constituent UNC institutions assess and collect these payments pursuant to authority granted to their trustees by N.C. Gen. Stat. § 116-33, which provides in pertinent part as follows:

> Each board of trustees shall promote the sound development of the institution within the functions prescribed for it. . . . Each board shall serve as advisor to the Board of Governors on matters pertaining to the institution and shall also serve as advisor to the chancellor concerning the management and development of the institution. The powers and duties of each board of trustees, not inconsistent with other provisions of this Article, shall be defined and delegated by the Board of Governors.

N.C. Gen. Stat. § 116-33 (2001). Applying similar reasoning as in our holding above that campus parking and traffic penalties do not belong to the public schools, we hold that UNC campus library fines imposed under this statute are not subject to Article IX, Section 7. We agree with defendants' argument that because these fines are intended to (1) ensure the availability of library materials and (2) compensate each UNC campus for costs incurred in replacing lost or damaged materials, they are remedial rather than punitive in nature, and therefore are not subject to Article IX, Section 7. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367; *see also Craven County*, 343 N.C. at 92, 468 S.E.2d at 53.

Moreover, as with the statute authorizing collection of penalties for violation of campus parking and traffic ordinances, we note that our Legislature acted pursuant to a constitutional provision separate and apart from Article IX, Section 7 in enacting N.C. Gen. Stat. § 116-33. Article IX, Section 9 of the North Carolina Constitution provides that "[t]he General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense." N.C. Const. art. IX, § 9. We conclude (1) that the broad authority granted to UNC campus trustees under N.C. Gen. Stat. § 116-33, including the authority to assess fines for the loss, damage, or late return of campus library materials, is intended to promote the remedial purpose of keeping the cost of an education at the several UNC campuses as low as possible; and (2) that because N.C. Gen. Stat. § 116-33 advances this remedial purpose, the statute is constitutional under Article IX, Section 9 of our Constitution, which is a co-equal provision with Article IX, Section 7. *Stephenson*, 355 N.C. at 409, 562 S.E.2d at 413.

We hold that the clear proceeds of payments collected pursuant to N.C. Gen. Stat. § 116-33 are not subject to Article IX, Section 7, and we therefore reverse this portion of the trial court's order.

G. Payments Collected by the Department of Revenue From Persons Dealing in Unauthorized Substances

[10] Defendants except to the trial court's ruling that payments collected pursuant to Article 2D of Chapter 105 of our General Statutes belong to the public schools under Article IX, Section 7. These payments, denominated as "unauthorized substance taxes," are assessed against "dealers" who possess "controlled substances" or "illicit spiritous liquor." N.C. Gen. Stat. §§ 105-113.105 through 105-113.113

(2001). The statutory scheme requires dealers to report their possession of these unauthorized substances to the Secretary of Revenue, and to pay a substantial "excise tax" based on the amount of the substance in their possession. N.C. Gen. Stat. §§ 105-113.107, -113.109. In return, dealers receive "revenue stamps" which they must affix to the unauthorized substance before selling it. N.C. Gen. Stat. § 105-113.108(a). "Penalties" and interest are assessed against any "dealer who possesses an unauthorized substance to which a stamp has not been affixed. . . ." N.C. Gen. Stat. § 105-113.111 (2001).

In enacting this statutory scheme, our Legislature provided that "[t]he purpose of [Article 2D of Chapter 105] is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund." N.C. Gen. Stat. § 105-113.105 (2001). The Department of Revenue must remit seventy-five percent of each unauthorized substance tax collected "to the State or local law enforcement agency that conducted the investigation of a dealer that led to the assessment," and the remainder goes to the General Fund. N.C. Gen. Stat. § 105-113.113(b) (2001). Defendants contend the trial court erred in striking down this portion of the statutory scheme and ruling that the clear proceeds of unauthorized substance taxes instead belong to the public schools under Article IX, Section 7. We agree and reverse the trial court's ruling.

In *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *aff'd per curiam*, 345 N.C. 626, 481 S.E.2d 84, *cert. denied*, 522 U.S. 817, 139 L. Ed. 2d 29 (1997), a panel of this Court considered the constitutionality, for double jeopardy purposes, of the unauthorized substances tax as imposed under a previous statutory scheme and held that the tax "does not have such fundamentally *punitive* characteristics as to render it violative of the prohibition against multiple punishments for the same offense contained in the Double Jeopardy Clause." *Ballenger*, 123 N.C. App. at 184, 472 S.E.2d at 575 (emphasis added). In so holding, we stated that the statutory scheme "is a legitimate and *remedial* effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling or manufacturing large quantities of controlled drugs." *Id.* (emphasis added); *see also State v. Woods*, 136 N.C. App. 386, 389-90, 524 S.E.2d 363, 365, *disc. review denied*, 351 N.C. 370, 543 S.E.2d 147 (2000); *State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589, *disc. review denied*, 350 N.C. 836, 538 S.E.2d 570, *cert. denied*, 528 U.S. 1022, 145 L. Ed. 2d 414 (1999).

Plaintiffs cite *Lynn v. West*, 134 F.3d 582 (4th Cir. 1998), *cert. denied*, 525 U.S. 813, 142 L. Ed. 2d 36 (1998) in support of their contention that the unauthorized substances tax is subject to Article IX, Section 7 under *Mussallam* because the tax is actually *punitive*, rather than remedial, in nature. In *Lynn*, the Fourth Circuit Court of Appeals concluded that a previous version of North Carolina's unauthorized substances tax "has enough punitive features that its nature is that of a criminal penalty, not a civil tax." *Lynn*, 134 F.3d at 589. However, it is well-settled that with the exception of decisions of the United States Supreme Court, federal appellate decisions are binding upon neither the appellate nor trial courts of this State. *State v. Wambach*, 136 N.C. App. 842, 843-44, 526 S.E.2d 212, 213 (2000). Moreover, absent modification by our Supreme Court, a panel of this Court is bound by the prior decision of another Court of Appeals panel addressing the same issue. *State v. Harris*, 157 N.C. App. 647, 656, 580 S.E.2d 63, 69 (2003). Because our Supreme Court has declined to conclude that the unauthorized substances tax is punitive in nature, we are bound by the conclusions of prior panels of this Court that this tax is intended for a remedial purpose. *Harris*, 157 N.C. App. at 656, 580 S.E.2d at 69; *Woods*, 136 N.C. App. at 389-90, 524 S.E.2d at 365; *Adams*, 132 N.C. App. at 820, 513 S.E.2d at 589. We therefore hold that payments collected under Article 2D of Chapter 105 of our General Statutes are not subject to Article IX, Section 7 and do not belong to the public schools. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.

H. Money Paid by an Environmental Violator to Perform or Fund a Third Party's Performance of a "Supplemental Environmental Project" in lieu of Paying a Civil Penalty

[11] Our Legislature has authorized the Department of Environment and Natural Resources (DENR) to assess civil penalties against individuals and entities who violate certain statutory and regulatory requirements designed to protect the environment. N.C. Gen. Stat. § 143-215.6A (2001) (assessing civil penalties for violation of water quality laws); N.C. Gen. Stat. § 143-215.114A (2001) (assessing civil penalties for violation of air quality laws). When a civil penalty is assessed, DENR may also collect from an environmental violator "the reasonable costs of any investigation, inspection, or monitoring survey which revealed the violation . . . ." N.C. Gen. Stat. § 143-215.3(a)(9) (2001). The statutes authorizing these civil penalties expressly provide that "[t]he clear proceeds of civil penalties assessed . . . shall be remitted to the Civil Penalty and Forfeiture

Fund," from which, pursuant to our holding in Part I of this opinion, they are to be transferred to the School Technology Fund for use by the state's public schools. N.C. Gen. Stat. § 143-215.6A(h1); *see also* N.C. Gen. Stat. § 143-215.114A(h).

Since at least 1998, however, DENR's Division of Water Quality has implemented a policy whereby environmental violators are allowed to voluntarily undertake a "supplemental environmental project" (SEP) in lieu of paying some portion of an assessed civil penalty. According to a 1998 DENR memorandum, a SEP is defined as a project that is "beneficial to the environment and/or to public health that a[n environmental violator] agrees to perform as part of a settlement to an enforcement action." According to the same memorandum, DENR's purpose in allowing a SEP is to "provide opportunities for environmental benefit as a result of negotiated settlements where some portion of the settlement agreement may be in the form of a [SEP]."

Defendants contend the trial court erred in ruling that "[m]onies paid to support a [SEP], in settlement of an assessed civil penalty pursuant to a settlement agreement with [DENR], are subject to Article IX, Section 7 . . . and belong to and shall be remitted to the public schools." Defendants also specifically challenge the trial court's conclusion that "the $50,125 paid by the City of Kinston to Lenoir Community College on or about 31 March 1998 as a SEP pursuant to a Consent Agreement and Settlement . . . is subject to Article IX, Section 7 . . . and belongs to and shall be paid by [DENR] to the Lenoir County Board of Education . . . ." We do not agree with defendants' contentions and affirm this portion of the trial court's order, to the extent that it provides that monies paid in support of a SEP are subject to Article IX, Section 7. Pursuant to our holding in Part I of this opinion, however, we reverse that portion of the trial court's order directing DENR to pay to the Lenoir County Board of Education the $50,125.00 DENR received from the City of Kinston on 31 March 1998 in support of a SEP, and hold that DENR must instead remit these moneys to the Civil Penalty Fund.

The DENR memorandum announcing implementation of the SEP option for environmental violators defines a SEP as "part of a *settlement* to an enforcement action" and states that DENR is implementing the policy "to provide opportunities for environmental benefit as a result of negotiated *settlements*." In *Craven County*, our Supreme Court held that payments made by an environmental violator to DENR pursuant to a settlement agreement following assessment of a

civil penalty were subject to Article IX, Section 7, stating that "[t]he fact that the monies were paid pursuant to a settlement agreement does not change the nature of these payments. The monies were still paid because of a civil penalty assessed against [the environmental violator]." *Craven County*, 343 N.C. at 91, 468 S.E.2d at 52. In the present case, we conclude that payments by an environmental violator, including the City of Kinston, to support a SEP as part of a settlement agreement are "still paid because of a civil penalty assessed against the [environmental violator]" and as such are punitive in nature and therefore subject to Article IX, Section 7. *Id.*

With respect to the payment made by the City of Kinston, we are unpersuaded by defendant's argument that because the payment was made to Lenoir Community College in support of a SEP, it did not "accrue to the state" and thus was not subject to Article IX, Section 7. The only reason the City of Kinston paid the $50,125.00 to Lenoir Community College rather than DENR is because DENR, acting without any statutory or regulatory authority to do so, unilaterally implemented its policy of allowing SEPs as an alternative to enforcing the State's environmental laws through the imposition of civil penalties. As our Supreme Court stated in *Boney v. Kinston Graded Schools*, one of the "wise ends" for which Article IX, Section 7 was designed was "to prevent the diversion of public school property and revenue from their intended use to other purposes." *Boney*, 229 N.C. at 140, 48 S.E.2d at 59; *see also Shore v. Edmisten, Atty. General*, 290 N.C. 628, 633, 227 S.E.2d 553, 558 (1976) (holding that statutes and judgments purporting to direct payment of a fine anywhere other than for the use of the public schools violate Article IX, Section 7).

We hold that any monies paid in support of a SEP, including the $50,125.00 paid by the City of Kinston to Lenoir Community College on or about 31 March 1998, are subject to Article IX, Section 7 and must be remitted by DENR to the Civil Penalty Fund for allocation to local school administrative units pursuant to N.C. Gen. Stat. 115C-457.3.

We note that by their brief's twelfth assignment of error, defendants contend "[t]he trial court erred when it concluded 'investigative costs' collected by [DENR, pursuant to N.C. Gen. Stat. § 143-215.3(a)(9)] as part of an enforcement action against a[n environmental] violator belong to the county school funds." However, because defendants concede in their brief that "the trial court did *not specifically find* that 'investigative costs' assessed and collected by [DENR] are civil penalties under [Article IX, Section 7]," asserting

instead that "the general conclusion of law challenged by this assignment of error *could be read* as supporting that position," we decline to address this assignment of error as it is not properly before this Court. *See* N.C.R. App. P. 10(b).

I. Civil Penalties Paid by Local Public School Systems to State Agencies

[12] Defendants except to the trial court's ruling that payments "which clearly constitute civil penalties" made by local public school systems themselves "remain subject to Article IX, Section 7 . . . and belong to the public schools and shall be remitted by the collecting state agencies to the public schools." Defendants also specifically challenge the trial court's ruling that "the $11,000 paid by the Edgecombe County Board of Education to [DENR's Division of Water Quality] on or about 24 April 1997 for failure to comply with interim effluent limitations at the Phillips School Wastewater Treatment Facility is subject to Article IX, Section 7 . . . and shall be paid by [DENR] to the Edgecombe County Board of Education for the use of the public schools in that county." We agree with defendants and reverse this portion of the trial court's order.

While the trial court concluded that payments made by local public schools to various State agencies "clearly constitute civil penalties within the meaning of Article IX, Section 7," we note that in light of our holdings in the several foregoing sections of this opinion, these payments may or may not be subject to Article IX, Section 7. The determinative factor is whether the authority under which each payment is collected is "punitive" or "remedial" in nature. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367; *see also Craven County*, 343 N.C. at 92, 468 S.E.2d at 53. However, a case-by-case analysis of the different payments made by local public schools to various state agencies is unnecessary, because we hold that any money collected by a State agency from a public school or local school administrative unit should not be remitted to the Civil Penalty Fund for ultimate distribution among the State's public schools.

Our Supreme Court has stated that "[p]ublic policy in this jurisdiction, buttressed by the uniform decisions of this Court, will not permit a wrongdoer to enrich himself as a result of his own misconduct." *Davenport v. Patrick*, 227 N.C. 686, 689, 44 S.E.2d 203, 205 (1947). If payments collected as civil penalties from public schools remain subject to Article IX, Section 7 and are utilized by the public schools under the statutory scheme set forth in Article 31A of

Chapter 115C of our General Statutes, the offending unit will receive back from the School Technology Fund a portion of the fine or penalty assessed against the unit. *See* N.C. Gen. Stat. § 115C-457.3. The offending unit will thus be unjustly enriched by its own wrongdoing, in the sense that it will retain the use of money which would otherwise have been paid in its entirety to a State agency as a consequence of the offending units's wrongdoing.

We hold that payments collected by State agencies as fines or civil penalties assessed against a public school or local school administrative unit, including the $11,000.00 paid to DENR by the Edgecombe County Board of Education on or about 24 April 1997, need not be remitted to the Civil Penalty Fund, but may instead remain with the collecting State agency, where they may be used for purposes other than maintaining public schools.

J. Payments Collected by State Agencies and Licensing Boards for Licensees' Failure to Timely Comply with Licensing Requirements

[13] Defendants assert the trial court erred in ruling that payments collected from individuals by "numerous state agencies and licensing boards . . . for the late renewal of licenses or the late payment of license fees" are subject to Article IX, Section 7. Noting that our Legislature has granted various occupational licensing boards the authority to assess and collect "late fees" or "penalties" from their licensees for failure to timely renew their licenses, defendants argue that these payments are remedial, rather than punitive, in nature, and therefore outside the scope of Article IX, Section 7. We agree, and we reverse this portion of the trial court's order.

Under N.C. Gen. Stat. § 87-22 (1997), the version of the statute in effect at this litigation's commencement, the North Carolina Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors (Plumbing and Heating Board) is authorized to assess a "penalty for nonpayment" in the amount of 10% of the annual licensing fee for each month a licensee delays renewal, with the condition that the "penalty for nonpayment shall not exceed the amount of the annual fee." Similarly, pursuant to the version of N.C. Gen. Stat. § 87-44 in effect at this litigation's commencement, the North Carolina Board of Examiners of Electrical Contractors (Electrical Board) may collect $25.00 from each licensee who renews late. Likewise, the North Carolina Board of Cosmetic Art Examiners (Cosmetic Board), pursuant to N.C. Gen. Stat. §§ 88B-6, -21 (2001), collects payments ranging from between $10.00 to $25.00 from license holders for late

renewal of licenses. Finally, the North Carolina State Bar (State Bar) collects a "late fee" of $30.00 for members' late payment of annual dues under N.C. Gen. Stat. § 84-34 (2001).

Only payments which are "*punitive* rather than remedial in nature and [are] intended to *penalize the wrongdoer* rather than compensate a particular party" are subject to Article IX, Section 7. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367 (emphasis added). The *label* attached to the monetary payment does not control the determination of whether such a payment constitutes a penalty, forfeiture, or fine within the meaning of Article IX, Section 7. *Craven County*, 343 N.C. at 92, 468 S.E.2d at 53; *see also Cauble*, 301 N.C. at 344, 271 S.E.2d at 260.

Based on the record before us, we conclude that the payments collected by the Plumbing and Heating Board, the Electrical Board, the Cosmetic Board, and the State Bar are intended not as a means to punish delinquent license holders, but rather to compensate the collecting agency for additional operating expenses incurred in collecting money due or compelling performance of a licensing requirement. Each entity's director maintains that these assessments are used to fund its operations and/or to administer its regulatory program. The assessments themselves are for such small dollar amounts that we discern no punitive intent in the statutes authorizing them. We hold that the payments collected by the Plumbing and Heating Board, the Electrical Board, the Cosmetic Board, and the State Bar for late renewal of occupational licenses or late payment of license fees are remedial in nature and therefore not subject to Article IX, Section 7. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 367.

III. Statute of Limitations

[14] By their final assignment of error, defendants except to the trial court's conclusion that plaintiffs' claims are subject to the three-year statute of limitations found in N.C. Gen. Stat. § 1-52. Defendants contend that N.C. Gen. Stat. § 1-54(2) should apply instead, limiting plaintiff's claims to payments collected within one year preceding the filing of the complaint. We disagree.

N.C. Gen. Stat. § 1-54(2) (2001) provides that a one-year limitations period applies to actions brought "[u]pon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved . . . except where the statute impos-

ing it prescribes a different limitation." Our Supreme Court has construed this statute to "apply to a civil action by the State to collect *unpaid* civil penalty assessments." *Ocean Hill Joint Venture v. N.C. Dept. of E.H.N.R.*, 333 N.C. 318, 323, 426 S.E.2d 274, 278 (1993) (emphasis added). We have held that "G.S. Sec. 1-54(2) applies only to actions based on statutes which *expressly* provide for a penalty or forfeiture, the purpose of which is punitive." *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 368, 355 S.E.2d 189, 193 (1987) (emphasis in original).

Our appellate courts have construed N.C. Gen. Stat. § 1-54(2) as applicable to actions commenced by the State upon a statute to *collect* civil penalties or forfeitures. However, because the case at bar involves claims by the School Boards Association and various local school boards to *recover* payments provided to the public schools by Article IX, Section 7, which payments have already been collected by the State, we hold that N.C. Gen. Stat. § 1-54(2) is not applicable. We conclude that the trial court correctly applied the three-year limitations period provided in N.C. Gen. Stat. § 1-52 (2001) for "an action . . . [u]pon a liability created by statute" or "[a]gainst a public officer, for a trespass, under color of his office." In so holding we are mindful of this Court's previous determination that "a statute of limitations should not be applied to cases not clearly within its provisions, . . . and that where there is doubt as to which statute of limitations should apply, the longer statute should be chosen." *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 240-41, 259 S.E.2d 1, 8, *disc. review denied*, 298 N.C. 806, 261 S.E.2d 919 (1979) (citation omitted).

In summary, we hold that the statutory scheme set forth in Article 31A of Chapter 115C of our General Statutes, which directs that payments determined to constitute penalties, fines, or forfeitures within Article IX, Section 7's meaning be remitted by the collecting agency to the Civil Penalty Fund, transferred to the School Technology Fund, and distributed to local public school administrative units based on student population for the implementation of school technology plans, is constitutional. Of the several payments collected by various State agencies, institutions, and licensing boards which the trial court held to be subject to Article IX, Section 7, we affirm the trial court's order as to some of these payments and reverse the trial court as to others, as discussed fully in Part II of this opinion. Finally, we hold that plaintiffs' claims are subject to a three-year limitations period.

Affirmed in part and reversed in part.

Judge HUNTER concurs in part and dissents in part.

Judge BRYANT concurs.

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

While I agree with most of the majority opinion, I disagree with the majority's conclusions that (I) the clear proceeds of payments collected by the North Carolina Department of Transportation ("DOT") pursuant to N.C. Gen. Stat. § 20-118(e) (2001) fall within the purview of Article IX, Section 7 of the North Carolina Constitution and therefore belong to the public schools, and (II) any penalty collected by a State agency from a public school or local school administrative unit should not be remitted to the Civil Penalty Fund for distribution among the state's public schools. Accordingly, I respectfully dissent from those portions of the majority opinion but concur in the majority's remaining holdings.

I.

As to the payments collected by DOT from owners of vehicles exceeding axle-weight limits: N.C. Gen. Stat. § 20-88 imposes an annual registration fee on property-hauling vehicles based upon their empty weight and heaviest load to be transported as declared by the owner or operator. N.C. Gen. Stat. § 20-88(a) (2001). A vehicle driven which exceeds the declared weight for which the vehicle is registered is subject to the penalties set forth in N.C. Gen. Stat. § 20-118(e). *See* N.C. Gen. Stat. § 20-88(k) (2001). Subsection (e) of N.C. Gen. Stat. § 20-118, which is entitled "Penalties," provides that "the [DOT] shall assess a civil penalty against the owner or registrant of [a] vehicle . . ." for each violation of the weight limits set forth in Section 20-118. N.C. Gen. Stat. § 20-118(e) (2001).

Article IX, Section 7 of the North Carolina Constitution provides the following, in pertinent part:

> [T]he clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7. Our Supreme Court has interpreted this constitutional provision as identifying the following two distinct funds for the public schools: "(1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state; and (2) the clear proceeds of all fines collected for any breach of the criminal laws." *Mussallam v. Mussallam*, 321 N.C. 504, 509, 364 S.E.2d 364, 366 (1988). Further, our Supreme Court has defined " 'penal laws,' " as used in Article IX, Section 7, as "laws that impose a monetary payment for their violation." *Id.* at 509, 364 S.E.2d at 367. The clear proceeds of all penalties and forfeitures which are punitive in nature and which are required to be paid to the state or to a department of the state are subject to Article IX, Section 7. *Id.* Monetary payments are "punitive rather than remedial in nature" if they are "intended to penalize the wrongdoer rather than compensate a particular party." *Id.* The label attached to the monetary payment is not determinative of whether such payment constitutes a penalty, forfeiture, or fine within the meaning of Article IX, Section 7. *Craven County Bd. of Education v. Boyles*, 343 N.C. 87, 92, 468 S.E.2d 50, 53 (1996).

The monies collected under N.C. Gen. Stat. § 20-118(e) are paid to the DOT, a state agency, and therefore "accrue to the state" as is required in order to fall under the purview of Article IX, Section 7. *Mussallam*, 321 N.C. at 509, 364 S.E.2d at 366. Thus, the determinative issue becomes whether the payments collected pursuant to N.C. Gen. Stat. § 20-118(e) are punitive or remedial in nature.

The weight penalties collected pursuant to N.C. Gen. Stat. § 20-118(e) are remedial in nature and therefore, do not belong to the public schools. The term "remedial" is defined in part as "[a]ffording or providing a remedy; providing the means of obtaining redress." Black's Law Dictionary 1296 (7th ed. 1999). The penalties at issue are intended to compensate the state for the deterioration of its highways due to operation of overweight vehicles thereon and are thus remedial in nature. In an affidavit submitted to the trial court, David Allsbrook ("Allsbrook"), Deputy Chief for Operations of the DOT, testified that, "[a]lthough passenger cars have little or no effect on the deterioration of highway surfaces and bases, larger vehicle[s] and heavier loads contribute significantly to road deterioration and failures." Allsbrook additionally stated that "[w]hile legal weight loads cause some deterioration[,] loads in excess of the legal limit cause significantly more deterioration." Although many factors contribute to road deterioration, according to Allsbrook, overweight vehicles

accelerate the deterioration of pavements which causes premature failures of the roadways which the DOT must repair. Moreover, the amount of monetary penalty that a violator must pay is calculated according to the number of pounds over the maximum amount of weight permitted under N.C. Gen. Stat. § 20-118 and the number of pounds over the declared weight for licensing purposes under N.C. Gen. Stat. § 20-88, providing additional support that these monetary payments are remedial in nature.

The collection of the annual registration fee and penalties for overweight vehicles is further analogous to the penalties under the North Carolina tax code for late filings, underpayment or failure to comply with the tax code, which the majority concludes, and in which I concur, are remedial and not subject to Article IX, Section 7 of the North Carolina Constitution. "All taxes levied under [Article 3 of the Motor Vehicle Act of 1937] are compensatory taxes for the use and privileges of the public highways of this State." N.C. Gen. Stat. § 20-97 (2001). Thus, the annual registration fees under N.C. Gen. Stat. § 20-88 are taxes for the use of the roads and highways of this State. As the proceeds from these taxes and the penalties are credited to the Highway Fund in order to finance the maintenance of the roads, it follows that these penalties are indeed remedial and not punitive.

Just as the income tax penalties are "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud," *Helvering v. Mitchell*, 303 U.S. 391, 401, 82 L. Ed. 917, 923 (1938) (footnote omitted), so to are penalties for overweight vehicles directly designed to safeguard the state's highways and reimburse the state for the expense of enforcing the weight restrictions and repairing roads damaged by overweight vehicles. Thus, I would hold that the monetary payments collected under N.C. Gen. Stat. § 20-118(e) are remedial in nature and therefore, do not belong to the public schools.

II.

I also disagree with the majority's holding that payments made by local public school systems to state agencies, including the $11,000.00 civil penalty paid by the Edgecombe County Board of Education to DENR for failure to comply with interim effluent limitations at the Phillip's School Wastewater Treatment Facility, should not be remitted to the Civil Penalty Fund.

As with all civil penalties paid to state agencies, the determining factor in deciding whether the payments collected from public school systems are subject to Article IX, Section 7 and belong to the public schools is whether those penalties are "punitive" or "remedial" in nature. *See Mussallam*, 321 N.C. at 509, 468 S.E.2d at 367. Thus, it is necessary to undertake a case-by-case determination of whether civil penalties paid by local public school systems are remedial or punitive in nature. As to penalties for environmental violations by local school systems, the majority opinion, in which part I concur, has already determined that civil penalties paid by environmental violators are punitive in nature and subject to Article IX, Section 7. Even though the environmental violator may be a school system, this does not change the punitive nature of civil penalties assessed by DENR, and those environmental penalties remain subject to Article IX, Section 7. The majority correctly notes that "[p]ublic policy in this jurisdiction, buttressed by the uniform decisions of [the North Carolina Supreme Court], will not permit a wrongdoer to enrich himself as a result of his own misconduct." *Davenport v. Patrick*, 227 N.C. 686, 689, 44 S.E.2d 203, 205 (1947). This public policy, however, does not mandate that the remaining school systems should be punished for the wrongdoing of another; it simply mandates that the offending school system be removed from the calculation of how to distribute the funds collected from the offending school system among the remaining public school systems.

The majority approach ignores the fact that as we have upheld the constitutionality of the Civil Penalty Fund, the penalty assessed against the Edgecombe County Board of Education would be distributed among all the eligible local school systems and not simply recycled back to Edgecombe County Schools. Therefore, under the majority analysis and using 2001-02 average daily membership figures for North Carolina and Edgecombe County Schools, out of an $11,000.00 civil penalty, Edgecombe County would be denied only $64.35 while the remaining school systems would lose $10,935.65.[3] The better approach is to remit the civil penalty to the Civil Penalty Fund and distribute it among the eligible school systems while simply omitting Edgecombe County from the distribution. This method has the dual benefit of providing the inno-

3. The North Carolina Public Schools Statistical Profile 2003 lists Total Average Daily Membership for North Carolina Public School Systems in 2001-02 as 1,289,523 and Average Daily Membership for Edgecombe County Schools during that year as 7,544. North Carolina Department of Public Instruction, *North Carolina Public Schools Statistical Profile*, 4, 160 (2003).

cent local public school systems with funds from a punitive civil penalty and to receive the benefits of the entire $11,000.00 without allowing the offending school system to be enriched in any way by its own wrongdoing.

Thus, I would hold that the $11,000.00 civil penalty assessed against the Edgecombe County Board of Education for environmental violations is punitive and subject to Article IX, Section 7, however, in determining how to distribute the penalty among the eligible school systems from the Civil Penalty Fund, the average daily attendance of Edgecombe County public schools should not be included in the calculation. Further, none of the proceeds of the penalty should be disbursed to the Edgecombe County Board of Education and this case should be remanded to the trial court to implement that calculation.

DIANA MAE PATAKY, PLAINTIFF v. KENNETH PATAKY, DEFENDANT

No. COA02-616

(Filed 16 September 2003)

1. Child Support, Custody, and Visitation— child support—unincorporated separation agreement—rebuttable presumption amount reasonable

The trial court erred by establishing an order of child support based on the presumptive child support guidelines without sufficient evidence of a change in conditions of need when the parties had executed an unincorporated separation agreement that included allowance for child support, because: (1) in an initial determination of child support where the parties have executed an unincorporated separation agreement that includes a provision for child support, the trial court should first apply a rebuttable presumption that the amount in the agreement is reasonable, and therefore, that application of the guidelines would be inappropriate; (2) the trial court should determine the actual needs of the child at the time of the hearings as compared to the provisions of the separation agreement; and (3) even in the context of these facts where there is no allowance for cash but for medical insurance coverage and after-school costs, the trial court must conduct a hearing and make findings and conclusions

related to the needs of the children at the time of the hearing and whether the presumption of reasonableness has been rebutted.

2. Child Support, Custody, and Visitation— child support— capacity earnings rule

The trial court erred in a child support case by applying the capacity earnings rule with respect to defendant father's income based on its determination that defendant voluntarily resigned from his job to return to graduate school and was therefore unemployed by choice, because: (1) evidence of a voluntary reduction in income is insufficient, without more, to support a finding of deliberate income depression or bad faith; (2) where a defendant foregoes all employment to become a full-time student, there is no bad faith provided defendant continues to adequately provide for his children; (3) defendant in this case decided to return to school only after the execution of the parties' separation agreement and before he was even aware that plaintiff would seek a child support order from the trial court that differed from the allowances provided in the agreement; and (4) defendant made arrangements to meet his financial obligations for the children once his employment ceased and he also cared for the children in excess of the agreement's required custodial duties.

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

Appeal by defendant from judgment entered 30 November 2001 by Judge William L. Daisy in Guilford County District Court. Heard in the Court of Appeals 8 January 2003.

Tate Law Offices, by C. Richard Tate, Jr., for plaintiff appellee.

Joyce L. Terres for defendant appellant.

LEVINSON, Judge.

This appeal arises from an order establishing child support for the parties' minor children. The parties were married in 1988 and separated in 2000; two minor children were born of the marriage. The parties entered into a Separation Agreement and Property Settlement Agreement (the "Agreement") on 25 September 2000. The Agreement, which provided for joint legal and physical custody of the minor children, also stated that defendant:

will pay for the children's health insurance, after-school care, extra-curricular expenses, school supplies and clothing. In addition, Husband will maintain college savings funds for the children. Since both parties will be providing support for the children equally, no child support payments shall be paid by either party.

On 26 June 2001, plaintiff filed a complaint against defendant, alleging in pertinent part that defendant had violated the Agreement by failing to provide equal financial support for the children, or to pay for the children's clothing. She requested that permanent child support be set at a reasonable amount.

Pursuant to the Agreement, the parties share physical custody of the children on an every-other-week basis. Although defendant's formal education and degrees were in the liberal arts and education, during the parties' marriage he worked as a computer programmer, earning approximately $65,000 a year. However, after the parties entered into the Agreement but before the filing of plaintiff's complaint, defendant gave notice of his intention to quit his job to pursue graduate education in a field more closely related to his formal education. Defendant testified that this plan was discussed between the parties prior to execution of the Agreement. He planned to continue working until plaintiff had finished with school, and then return to school and obtain the qualifications for employment as a school counselor. Plaintiff graduated with "a two-year degree at GTCC" in May 2001, and defendant quit his job and returned to school about two months later.

Defendant further testified that he had developed a plan to meet his financial obligations to his children under the Agreement while he was in school. In addition to his scheduled custody of the children every other week, defendant cared for the children when plaintiff attended evening classes and on "dozens of occasions" when plaintiff was not available. During trial, the judge held that "[t]he separation agreement is too vague to be enforced with regard to the purchase of clothing." Accordingly, the court did not allow either party to introduce receipts or other evidence documenting the amount each had spent on clothing. Defendant testified he had paid for the children's clothing and health insurance.

Plaintiff testified that she was a "stay-at-home mom." She also testified that she worked part-time as a nanny, worked in a spa as a massage therapist, and was studying for an "aesthetics" license,

which would qualify her to provide other salon services such as body wraps and facials.

The trial court found, in part, the following:

(4) The parties' separation agreement provided that the parties would alternate physical custody of the children and provided that Defendant would pay for the children's health insurance, after-school care, extra-curricular activities and clothing and that neither party would pay child support.

. . . .

(6) That at the time of the filing of this action on June 26, 2001, the Defendant was employed as a computer systems manager with the United States Federal Courts in Greensboro, earning a salary of approximately $65,000.00 per year. Defendant had notified the Plaintiff prior to the Plaintiff's filing the Complaint, that he intended to leave this position because he had been accepted in a masters' degree program at the University of North Carolina at Greensboro. Plaintiff objected to the Defendant's leaving his employment.

(7) Defendant had applied to graduate school in December 2000 and was notified that he had been accepted in a masters' program for school counselors in the spring of 2001.

(8) Defendant's last day of work was July 12, 2001. Defendant voluntarily resigned in order to become a full-time student. Defendant testified that he is now in school full-time and is redirecting his career towards being a school counselor in which career he would earn a significantly lower wage. Defendant has a master's degree in education and is a highly intelligent individual and had performed satisfactorily at his prior position. Defendant's expected date of graduation is May of 2003.

(9) Plaintiff produced an e-mail sent to her in November 2001, by the defendant in which the Defendant stated that he is "unemployed by choice."

(10) Defendant has deliberately suppressed his income and acted in deliberate disregard of his obligation to provide reasonable support for the minor children, and therefore the Court attributes income of $65,000.00 per year to the Defendant

based upon his earning capacity, or $5416 per monthly gross wages.

(11) The Defendant currently pays for health insurance for the two boys with a monthly cost of approximately $110 per month and the Defendant is given credit for this expense on the Worksheet B calculation.

(12) Plaintiff's maximum gross wage during the past several years is $360.00 per week, which she is presently earning or hopes to earn as a licensed massage therapist. . . . Plaintiff is paid per massage and averages about ten one-hour massages per week. Plaintiff did not work during the majority of the marriage of the parties.

(13) Plaintiff has not sought any other employment since the parties' separation since she is attempting to build her massage business. Plaintiff has recently re-initiated efforts towards a nursing degree in an effort to increase her earnings.

(14) Both parties owe a duty of support to the minor children of the parties, and should be required to pay a reasonable sum for the support of the minor children.

Based on these findings, the trial court concluded that defendant deliberately depressed his income and acted in deliberate disregard of his obligation to provide reasonable support for the minor children. Applying Worksheet B of the North Carolina Child Support Guidelines, the trial court ordered defendant to pay $500 per month in child support payments.

Defendant argues the trial court erred in (1) establishing an order of child support based on the presumptive child support guidelines without sufficient evidence of a "change in conditions or need" since the execution of the parties' Agreement, and (2) applying the capacity earnings rule with respect to his income.

I. RELATIONSHIP BETWEEN SEPARATION AGREEMENT AND CHILD SUPPORT GUIDELINES

[1] The central issue for our determination is the impact, if any, of an unincorporated separation agreement that includes allowance for child support on a subsequent claim for child support. Since the amendment of N.C.G.S. § 50-13.4 in 1989, see 1989 ALS 529 (1989), which created the current child support guideline structure, no appellate decision has squarely addressed this issue. *See, e.g., Rose v. Rose,*

108 N.C. App. 90, 422 S.E.2d 446 (1992); *Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991), *appeal dismissed and disc. review denied*, 331 N.C. 286, 417 S.E.2d 254 (1992). Accordingly, we first review the pertinent statutory and common law.

A. BACKGROUND

1. Statutory Law

Our legislature provided for judicial awards of child support as early as 1943:

> After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders. . . .

N.C.G.S. § 50-13 (1943) (repealed 1967); *see Griffin v. Griffin*, 237 N.C. 404, 411; 75 S.E.2d 133, 138-39 (1953).

In 1967, the General Assembly replaced G.S. § 50-13 with N.C.G.S. § 50-13.4(c), which provided, in pertinent part:

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case.

This first sentence of G.S. § 50-13.4(c) has remained substantially the same since 1967. *Compare* N.C.G.S. § 50-13.4(c) (2001) (adding "child care and homemaker contributions of each party" as considerations).

In 1975, pursuant to Title 42, Chapter 7, Title IV, Part D of the Social Security Act ("Title IV-D"), Congress established the Child Support Enforcement Program ("CSE program"). 93 P.L. 647, 88 Stat. 2337 (1975); *see Kansas v. United States*, 214 F.3d 1196 (10th Cir.), *cert. denied*, 531 U.S. 1035, 148 L. Ed. 2d 533 (2000). The CSE program is a voluntary program "[f]or the purpose of enforcing the support obligations owed by absent parents to their children, locating absent parents, establishing paternity, and obtaining child support" in which states, in exchange for federal monies to operate child support enforcement regimens and provide AFDC (now TANF) dollars for eli-

gible parents, agree to operate the program in accordance with federal law. 42 U.S.C. § 651 (2001); *see Garrison v. Connor*, 122 N.C. App. 702, 471 S.E.2d 644 (1996).

A 1984 amendment to Title IV-D required states participating in the CSE program to enact guidelines for determination of child support award amounts. *See* 98 P.L. 378, 98 Stat. 1305 (1984) (effective 1 October 1986). These guidelines could be "established by law or by a judicial conference or other mechanism as may be appropriate in that state." *Id.* To comply with Title IV-D, North Carolina amended G.S. § 50-13.4 by adding N.C.G.S. § 50-13.4(c1), which directed "[t]he Conference of Chief District Judges [to] prescribe uniform statewide advisory guidelines for the computation of child support obligations[.]" N.C.G.S. § 50-13.4(c1) (1987).

As part of The Family Support Act of 1988, Congress again amended Title IV-D to state in pertinent part:

> There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

100 P.L. 485; 102 Stat. 2343, 42 U.S.C. § 667(b)(2) (2003). Thus, while states that adopted this requirement would establish a rebuttable presumption that the sum determined by application of a State's generalized guidelines was the proper amount of child support, they would retain the authority to establish criteria for deviation from the guidelines. To comply with this mandate, North Carolina amended G.S. § 50-13.4 in 1989. In addition to requiring the Conference of Chief District Court Judges to establish child support guidelines, *see* G.S. § 50-13.4(c1), the following pertinent language was added to G.S. § 50-13.4(c):

> The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after

> considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

Our legislature thus created an avenue for the court to award child support in an amount different from that dictated by the official child support guidelines, provided the court determined that application of the guidelines would be "unjust or inappropriate." Further, in the absence of a request from the parties, the court may enter such an order on its own initiative. *Biggs v. Greer*, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000) ("upon a party's request . . . or the court's decision on its own initiative to deviate from the presumptive amounts . . . the court must hear evidence and find facts related to the reasonable needs of the child for support").

2. Common Law

"A separation agreement is a contract between the parties and the court is without power to modify it except (1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where rights of third parties have not intervened." *McKaughn v. McKaughn*, 29 N.C. App. 702, 705, 225 S.E.2d 616, 618 (1976). However, our Courts have been quick to note:

> [N]o agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court.

Fuchs v. Fuchs, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963); *see also Winborne v. Winborne*, 41 N.C. App. 756, 760, 255 S.E.2d 640, 643, *cert. denied*, 298 N.C. 305, 259 S.E.2d 918 (1979).

North Carolina common law dictates that "where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence

of evidence to the contrary, that the amount mutually agreed upon is just and reasonable[.]" *Fuchs*, 260 N.C. at 639, 133 S.E.2d at 491. The holding of *Fuchs* was reinforced in *Williams v. Williams*, 261 N.C. 48, 59, 134 S.E.2d 227, 235 (1964), filed one month after *Fuchs*, which cited *Fuchs* for the rule that "*in the absence of evidence to the contrary*, there is a presumption that the amount mutually agreed upon in a deed of separation is just and reasonable and that a judge is not warranted in ordering an increase in the absence of any evidence of the need of such increase." In applying the rule of *Fuchs-Williams*, this Court has held that a party seeking an initial judicial determination of child support where the parties have executed an unincorporated separation agreement need not show changed circumstances between the time of the separation agreement and the hearing, but must instead:

> show the amount of support necessary to meet the reasonable needs of the child[ren] *at the time of the hearing*. Should the evidence establish, giving due regard to the factors contained in G.S. 50-13.4(b) and (c) [as they existed prior to their amendment in 1989], that such amount substantially exceeds the amount agreed upon in the separation agreement, such evidence would necessarily rebut the presumption of reasonableness . . . . *Absent such a showing, the agreement of the parties will be deemed to be reasonable.* While evidence of a change in circumstances, involving a comparison of actual expenditures and other circumstances between the time of the separation agreement and the date of the hearing, may be relevant to the issue of reasonableness, such evidence is not an absolute requirement to justify an increase.

Boyd v. Boyd, 81 N.C. App. 71, 76, 343 S.E.2d 581, 585 (1986) (emphasis added).

B. ANALYSIS

We next turn to the question of the impact, if any, an unincorporated separation agreement that includes allowance for child support will have in a later claim for child support. In her brief before this Court, plaintiff agrees with defendant's contention "that there is a presumption that a mutually agreed upon amount [in an unincorporated separation agreement] is just and reasonable." Plaintiff argues, however, that the record contains "overwhelming" evidence that the provision in the separation agreement was not reasonable. On this basis, plaintiff contends that the court did not err in applying the presumptive child support guidelines. Defendant, on the other hand, con-

tends the trial court erred by not applying the presumption dictated by *Fuchs-Williams*, that the separation agreement established a reasonable amount of child support, and by not making findings and conclusions related to these cases. Neither party argues that the principles enunciated in *Fuchs-Williams* are no longer effective; however, this Court will examine for the first time their continued viability in light of the presumptive child support amendments to G.S. § 50-13.4.[1]

Application of relevant statutes and case law might support our adoption of either of two differing approaches to the establishment of child support in the presence of a prior, unincorporated separation agreement. The first interpretation would require the court to apply the presumptive guidelines, and to consider the separation agreement and its child support allowance *only* in its determination (upon motion of either party or by the court *sua sponte*) of whether to deviate from those guidelines. The second approach would require application of the *Fuchs-Williams* principles, and therefore would require the court to examine the children's needs at the time of the hearing compared to the amount provided in the separation agreement. Under this second approach, the court would not apply the presumptive guidelines unless the claimant overcomes the presumption of reasonableness established by *Fuchs-Williams* and applied more definitively in *Boyd*. We address each of these approaches in turn.

1: Interpretation that prior separation agreement is relevant only to possible deviation from presumptive guidelines.

If one views G.S. § 50-13.4(c) as an unambiguous directive that the "court shall [always, without exception] determine the amount of child support payments by applying the presumptive guidelines," then the court would not be required to consider a prior unincorporated agreement or the amount it provides for child support. This interpretation is supported by the legislature's use of the term "presumptive guidelines," whose plain meaning might suggest that an amount properly determined under those guidelines is presumptively reasonable and cannot be disturbed on appeal. Moreover, because the trial court must consider deviation from the guideline amount if requested to do so by either party, the terms of a separation agreement would still have a role to play: the court could properly consider the agreement and the child support allowances it includes in deciding whether "application of the guidelines would not meet or would exceed the

1. Because neither party raises any constitutional arguments on appeal, none are addressed herein.

reasonable needs of the child . . . or would be otherwise unjust or inappropriate . . . ." G.S. § 50-13.4(c).

Furthermore, one also might argue that, because *Fuchs-Williams* conflicts with pertinent statutory language to the contrary, *stare decisis* is inapplicable. *See 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). Clearly, the parties' right to contract and to execute agreements they believe will adequately provide for their children is of elemental importance. However, the legislature's intent in drafting child support statutes was to ensure the amounts determined by the guidelines presumptively meet the reasonable needs of children. In addition, if a court orders child support payments in an amount that is different from what was provided by the separation agreement, the parent who is made to pay more (or receive less) theoretically[2] could recover the difference in contract. *See, e.g., Bottomley v. Bottomley*, 82 N.C. App. 231, 235-36, 346 S.E.2d 317, 320 (1986).

The legal arguments in favor of the first approach are not without substantial force. Further, the ease with which the first approach lends itself to practical application might make the outcomes of child support actions more predictable. However, for the following reasons, we hold that the *Fuchs-Williams* principles are still applicable and require our courts to examine cases such as the one *sub judice* differently from those in which no separation agreement is present.

2: Interpretation that The General Assembly has not abrogated the common law principles in *Fuchs-Williams*.

N.C.G.S. § 4-1 (2001), Common law declared to be in force, provides:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom

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2. However, Professor Sally Sharp, a respected scholar, provides an instructive *caveat*:

> This theoretical preservation of the integrity of the parties' agreement is largely illusory, however, because, much like modifiable specific performance orders for the enforcement of "contract only" alimony rights, surviving contract rights to child support are likely to be of little practical value to the obligee.

Sally Burnett Sharp, *Semantics as Jurisprudence: The Elevation of Form Over Substance in the Treatment of Separation Agreements in North Carolina*, 69 N.C.L. Rev. 319, 354 (1991).

> and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, *not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.*

(emphasis added). As the *Fuchs-Williams* principles have not become "obsolete," *see Forsyth Memorial Hospital v. Chisholm*, 342 N.C. 616, 467 S.E.2d 88 (1996), and have not been "repealed," the dispositive issue is whether the amendments to G.S. § 50-13.4 "abrogated" the same. *Rosero v. Blake*, 357 N.C. 193, 194, 581 S.E.2d 41, 41 (2003) ("common-law rule that custody of an illegitimate child presumptively vests in the mother has been abrogated by statutory and case law").

Over the course of approximately forty years and notwithstanding at least five amendments to what originated as G.S. § 50-13, the General Assembly has never explicitly altered the analysis required by *Fuchs-Williams*. Nor has the North Carolina Supreme Court ruled that the principles enunciated in *Fuchs-Williams* are now inapplicable. "This Court is bound by precedent of the North Carolina Supreme Court." *State v. Gillis*, 158 N.C. App. 48, 53, 580 S.E.2d 32, 36 (2003) (citing *Forsyth Memorial Hospital*, 342 N.C. at 620, 467 S.E.2d at 90, and *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 482, 528 S.E.2d 397, 399 (2000)). Therefore, unless we determine that these principles have been abrogated by statute, the rebuttable presumption that a separation agreement has properly provided for child support must be harmonized with the provisions of N.C.G.S. § 50-13.4(c1).

When the *Fuchs* and *Williams* opinions were issued by the Court, our trial courts routinely entered orders for the support of children. We note that (1) neither the present statutes nor their statutory predecessors refer to unincorporated separation agreements, and (2) the statutory considerations listed in the first sentence of G.S. § 50-13.4(c) remained substantially unchanged by the 1987 and 1989 amendments to G.S. § 50-13.4.[3] From this we may safely infer that the legislature had no explicit intention to overrule or abrogate *Fuchs-Williams*. Within the statutory framework, the North Carolina Supreme Court established a two-step process in claims for child support in the presence of a prior, unincorporated agreement. Our trial

3. The 1987 G.S. § 50-13.4(c) amendment did not include any "rebuttable presumption" language but, instead, broadly addressed the "computation of child support obligations of each parent as provided in Chapter 50 or elsewhere in the General Statutes."

courts were required to *first* determine the current amount necessary to meet the needs of the children and, if this amount "substantially exceeds" the amount provided in the agreement, this would rebut the presumption that the amount in the separation agreement was reasonable. *See Boyd*, 81 N.C. App. 76, 343 S.E.2d 585. In the absence of such a showing, affording "due regard to the factors contained in G.S. § 50-13.4(b) and (c)," the court was not allowed to change the amount of child support from what was set forth in the separation agreement. *Id.* (referring to statutory factors existing in 1986).

We also note that the presumptive guidelines provisions were not adopted to address circumstances like those in the present case, but were enacted in response to efforts by the federal government to cut welfare rolls:

> The primary justification for this increased federal role can be discerned from the relevant legislative history. Congress was concerned about the 'rapid and uncontrolled growth' of expenditures under the Aid to Families with Dependent Children (AFDC) program. In large measure, such growth could be attributed to the failure of the states to ensure that individuals legally obligated to provide child support actually did so. Greater efforts in this regard by both the federal and state governments, it was believed, would reduce overall welfare costs.

State of N.J. v. Department of Health & Human Serv., 670 F.2d 1262, 1265 (3d Cir. 1981).

While the guidelines generally must be employed in actions for child support, G.S. § 50-13.4, *et seq.*, the statute's silence with respect to prior, unincorporated agreements suggests that the legislature had no intention of abrogating the holdings of *Fuchs-Williams*. *See Yates v. New South Pizza, Ltd.*, 330 N.C. 790, 808, 412 S.E.2d 666, 677 (1992) ("Absent clear legislative intent to the contrary, we should presume that the legislature was aware of and intended to retain the longstanding common law rule enunciated in [earlier cases]"); *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977) ("In interpreting statutes, . . . it is always presumed that the Legislature acted with full knowledge of prior and existing law."). Moreover, we assess statutory language, stating the guidelines "shall" be utilized to determine awards of child support, in the context of the entire statute which also authorizes the trial court to vary from those guidelines upon a finding that their application would be "inappropriate" in a given case. We conclude that where the parties

have executed a separation agreement that includes provision for child support, the court must apply a rebuttable presumption that the amount set forth is just and reasonable and therefore application of the guidelines would be inappropriate. Accordingly, before it applies the child support guidelines, the trial court must first consider the child support allowances in a separation agreement between the parties.

It bears repeating that, notwithstanding several amendments to other portions of the statute, the General Assembly has left intact the quantitative and qualitative considerations in the first sentence of G.S. § 50-13.4(c) ("Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to . . . [the] facts of the particular case."). We also note again that the General Assembly amended G.S. § 50-13.4, to include the "rebuttable presumption" language mandated by Congress' amendment to Title IV-D in 1988, in an effort to secure the continued receipt of federal dollars for the administration of its child support enforcement program and AFDC (now TANF).[4] *See* 42 U.S.C. § 667(b)(2). Against this backdrop, it is not surprising that the guidelines employ a "one size fits all" approach to calculation of the proper amount of child support.

We conclude that the guideline amount is not competent evidence of the *actual* amount required to meet the needs of the children at the time of the hearing. Doing so would strip *Fuchs-Williams* of all but illusory meaning, and diminish to little or no consequence the quantitative and qualitative factors enumerated in the first sentence of G.S. § 50-13.4(c). Such an approach would, in many cases, reduce to useless surplusage the considerations enumerated in the first sentence in G.S. 50-13.4(c).[5] *See Stephenson v. Bartlett*, 355 N.C. 354, 408, 562 S.E.2d 377, 413 (2002):

> [North Carolina follows a] long-standing rule of construction that a statute must be "construed, if possible, so that none of its pro-

4. The Aid to Families with Dependent Children (AFDC) program was replaced when Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). AFDC dollars were replaced with Temporary Assistance to Needy Families (TANF). *Kansas v. United States*, 214 F.3d 1196, 1197 (10th Cir. 2000).

5. That the same considerations are repeated verbatim in G.S. § 50-13.4(c1) and therefore instruct the Conference of Chief District Court Judges on what to consider when establishing presumptive child support guidelines does not alter our view of this feature of the statute.

visions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage."

(quoting *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981)). Furthermore, because the trial court is not *required* to deviate from the guidelines no matter how compelling the reasons to do so, the first approach, as discussed in section B1 of this opinion, would allow the *Fuchs-Williams* presumption of reasonableness to be easily cast aside by the presiding judge. *See* G.S. § 50-13.4(c) (court "*may* vary from the guidelines") (emphasis added).

To accord sufficient weight to parties' separation agreements, as our common law directs, the benchmark for comparison must be the amount needed for the children at the time of the hearing, compared with that provided in the agreement. *See Boyd*, 81 N.C. App. 76, 343 S.E.2d 585. Further, "in the absence of evidence to the contrary," the court must respect a presumption that "the amount mutually agreed upon is just and reasonable." *Fuchs*, 260 N.C. at 639, 133 S.E.2d at 491; *see also Williams*, 261 N.C. at 59, 134 S.E.2d at 235.

We recognize that no agreement between a husband and wife can fully deprive the courts of their authority to protect the best interests and welfare of the minor children. *Winborne*, 41 N.C. App. at 760, 255 S.E.2d at 643. Thus, application of *Fuchs-Williams* neither bankrupts the court's ability to protect the needs of children, nor creates an insurmountable burden for parents seeking redress from the court. The court's guiding principle must always be the child's best interests. The unthinking application of the guidelines, without first considering the parents' agreement, short-changes the very standard the trial court is charged with applying—the best interests of the child. The unthinking acceptance of parties' separation agreements would likewise impair a court's determination of the best interests of the child. *Fuchs-Williams* requires consideration of parents' contractual determinations and fashions a logical balance between the proper role of such agreements and the court's obligations regarding children within its jurisdiction.

The notion, that parents who have agreed on how best to meet the needs of their children may expect to have the court ignore their agreement, is an idea too counterintuitive and illogical to be countenanced by this Court.[6] Parents generally are in the best position to

6. That parents can choose to incorporate their separation agreement into a divorce decree, and therefore subject modification efforts to a substantial change of

determine their children's needs. Accordingly, we attach significance to parents' *individualized* efforts to structure their children's development (oftentimes with the benefit of hindsight and years of making financial and economic decisions for them), as compared with the unfitted benchmark so broadly drawn by the statutory guidelines. We hold *Fuchs-Williams* is applicable and therefore encourage judicial review of a vital resource, the parents' agreement, that speaks directly to the court's concern, the welfare of children.

Our law should, when practicable, encourage the resolution of family issues without resort to court interference. N.C.G.S. § 50-41 (North Carolina Family Law Arbitration Act); *see Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995). To do otherwise runs contrary to our long standing jurisprudential doctrines. "Separation or marital settlement agreements are, quite correctly, said to minimize the psychological and economic costs of divorce, to create better prospects for post-divorce cooperation between the parties, to lessen the impact of divorce upon children, and to promote judicial economy." Sharp, *supra*, at 319-20. If separation agreements are accorded no deference, parties who enter into them will have no protection from a party who agrees to a support amount but later seeks redress from the courts simply because he or she is unhappy with the decision to enter into the contract.[7] However, the *Fuchs-Williams* presumption generally affords both parties a logical measure of protection—that although the court is not divested of its ability to protect the needs of children, their child support arrangement will be given appropriate consideration by the court.

With all these observations in mind, we hold the General Assembly has not abrogated the two-step process required by *Fuchs-Williams* and, further, that employment of *Fuchs-Williams* comports

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circumstances standard, cannot be determinative of the issue before the court. Parents should be free to evaluate the relative advantages and disadvantages to incorporation of an agreement. *See* N.C.G.S. § 50-13.7 (change of circumstances).

7. We fail to see the value in encouraging the Family Bar to counsel their clients that, unless they provide for child support allowances in separation agreements that mirror the guideline amount, they can have little confidence the allowance will be given serious consideration by the District Court in a later claim for child support. The continued viability of *Fuchs-Williams* enables family lawyers to advise parents that what they believe meet the needs of their children will enjoy presumptive reasonableness protection in a subsequent claim. This is especially compelling where, as here, one parent seeks an order of child support merely nine (9) months after execution of an agreement.

with applicable North Carolina statutes and relevant federal mandates that helped impact our child support statutes. Thus, in an initial determination of child support where the parties have executed an unincorporated separation agreement that includes provision for child support, the court should first apply a rebuttable presumption that the amount in the agreement is reasonable and, therefore, that application of the guidelines would be "inappropriate." The court should determine the actual needs of the child at the time of the hearing, as compared to the provisions of the separation agreement. If the presumption of reasonableness is not rebutted, the court should enter an order in the separation agreement amount and make a finding that application of the guidelines would be inappropriate.[8] If, however, the court determines by the greater weight of the evidence that the presumption of reasonableness afforded the separation agreement allowance has been rebutted, taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of G.S. § 50-13.4(c), the court then looks to the presumptive guidelines established through operation of G.S. § 50-13.4(c1) and the court may nonetheless deviate if, upon motion of either party or by the court *sua sponte*, it determines application of the guidelines "would not meet or would exceed the needs of the child . . . or would be otherwise unjust or inappropriate."

A brief review of the facts and circumstances of the instant case illustrates the importance of *Fuchs-Williams*. The Agreement provided for a shared custody arrangement, with the children alternating weeks between each parent's home. The parents agreed defendant would provide health insurance and pay the costs of after-school care, extracurricular expenses, school supplies, and clothing. Unlike many other agreements, no payment of cash support was required. Nine months later, plaintiff filed an action for child support contemporaneous with defendant's intention to leave his current employment and return to school. Notwithstanding defendant's satisfactory arrangements to continue to meet his custodial and financial obligations pursuant to the Agreement—and plaintiff's apparent awareness long before execution of the Agreement that defendant intended to return to school—plaintiff sought an order for child support from the court. Even in the context of these facts, where there is no allowance

8. As the issue is not raised on appeal, we do not address whether the court may enter an order of support it would not, *ab initio*, be authorized to enter (*e.g.*, college tuition or for a duration of the child's life in excess of that provided in G.S. § 50-13.4(c)) in the absence of a separation agreement.

for cash but, *inter alia*, medical insurance coverage and after-school care costs instead, the trial court must conduct a hearing and make findings and conclusions consistent with this opinion.[9] Here, the trial court neither made findings related to the needs of the children at the time of the hearing nor concluded whether the presumption of reasonableness had been rebutted. Despite plaintiff's arguments to the contrary that a whole-record review by this Court would support these essential findings, this cannot substitute for such findings by the trial court.

We reverse and remand the trial court's order. We address another assignment of error because the same issue may be relevant upon remand.

II. IMPUTATION OF INCOME

[2] Defendant next contends the trial court erred in imputing to him the income he made as a computer programmer, his last job prior to returning to school. Though plaintiff agrees with defendant that there must be a showing of bad faith for the court to employ the earnings capacity rule, she argues the evidence and findings support the same.

Normally, a party's ability to pay child support "is determined by that [party's] income at the time the award is made." *Atwell v. Atwell*, 74 N.C. App. 231, 235, 328 S.E.2d 47, 50 (1985). *See also Askew v. Askew*, 119 N.C. App. 242, 458 S.E.2d 217 (1995). However, capacity to earn may be the basis for an award where the party "deliberately depressed his income or deliberately acted in disregard of his obligation to provide support." *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997) (citing *Askew, id.*). *See also Schroader v. Schroader*, 120 N.C. App. 790, 463 S.E.2d 790 (1995). Before earning capacity may be used as the basis of an award, there must be a showing that the actions which reduced the party's income were taken in bad faith, to avoid family responsibilities. *Bowers v. Bowers*, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001) (noting rule that absent a finding that defendant deliberately suppressed his income to avoid his support obligation, the trial court could not employ defendant's earning capacity in determining child support); *Sharpe*, 127 N.C. App.

9. Our district court judges may be concerned about the time required in these cases. In practice, however, our holding will ordinarily require no more than that required were the evidence considered only upon a motion to deviate. In other words, the evidence supporting a parent's motion to deviate will oftentimes mirror that required by employing the *Fuchs-Williams* principles.

708, 493 S.E.2d at 290 (holding that father's failure to look for higher paying job after his position was eliminated was not deliberate suppression of income or other bad faith, and thus, his earning capacity could not be used to impute income to him for determining child support); *see also Cook v. Cook*, 159 N.C. App. 657, 583 S.E.2d 696 (2003), and *King v. King*, 153 N.C. App. 181, 185, 568 S.E.2d 864, 866 (2002).

Here, the trial court attributed income to defendant upon concluding that defendant deliberately suppressed his income in disregard of his parental obligations. The trial court apparently based its conclusion on the fact that defendant voluntarily resigned from his job to return to graduate school and was "unemployed by choice." It specifically found that defendant had sent an e-mail to plaintiff in which defendant stated he was "unemployed by choice."

This Court has previously found that evidence of a voluntary reduction in income is insufficient, without more, to support a finding of deliberate income depression or bad faith. *King*, 153 N.C. App. at 185, 568 S.E.2d at 866; *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510; *Sharpe*, 127 N.C. App. at 709, 493 S.E.2d at 290. Furthermore, this Court has suggested that where a defendant foregoes "all employment [to] become a full-time student" there may not be bad faith provided he continues to adequately provide for his children. *See Goodhouse v. DeFravio*, 57 N.C. App. 124, 128, 290 S.E.2d 751, 754 (1982). Rather, "[t]he dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations." *Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002) (holding the trial court did not err in imputing income where defendant voluntarily remained unemployed "in conscious and reckless disregard" of his duty to provide support to his children); *Wachacha v. Wachacha*, 38 N.C. App. 504, 508, 248 S.E.2d 375, 378 (1978) (holding there was insufficient evidence to support the trial court's decision to impute income where, although defendant voluntarily surrendered his job so that he could return to college, he arranged to meet his support and alimony obligations from his income under the GI bill).

A party is not deemed to be acting in bad faith only because he is unemployed by choice. *See King*, 153 N.C. App. at 185, 568 S.E.2d at 864; *Bowers*, 141 N.C. App. at 732, 541 S.E.2d at 510; *Sharpe*, 127 N.C. App. at 709, 493 S.E.2d at 290. We recognize that the determination of bad faith, in conjunction with the suppression of income, is best made on a case by case analysis by the trial court. Here, however, the record wholly lacks evidence of bad faith.

Defendant's e-mail to plaintiff, although it accurately described his status as a voluntary student rather than the victim of employment lay-offs, does not provide any information about his motivation for returning to school. While the attendant intentions and motivations surrounding such a statement are properly within the purview of the trial court, the e-mail, standing alone and wholly unsupported by record evidence probative of bad faith, is insufficient to support a finding of bad faith.

Moreover, defendant financially supported his children consistent with the Agreement. Significantly, he decided to return to school only *after* the execution of the Agreement and *before* he was even aware that plaintiff would seek a child support order from the court that differed from the allowances provided in the Agreement. He also testified that he made arrangements to meet his financial obligations for the children once his employment ceased and that he exercised not only his every-other week custody of the children but also intermittently cared for the children when plaintiff could not, in excess of the Agreement's required custodial duties.

The trial court's order is reversed and remanded with instructions to conduct a hearing and award child support not inconsistent with this opinion.

Reversed and remanded.

Judge TIMMONS-GOODSON concurs in the result in part and dissents in part.

Judge TYSON concurs.

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

I agree that the order of the trial court contains insufficient findings regarding whether the separation agreement adequately protects the children's interests and that the issue should therefore be remanded for entry of appropriate findings.

Having resolved this dispositive issue, the majority purports to hold that "there is not a showing that defendant deliberately depressed his income or otherwise acted in bad faith." This statement is unnecessary, however, for resolution of the case and may therefore be regarded as *obiter dictum. See Debnam v. N.C. Dept. of*

Correction, 334 N.C. 380, 386, 432 S.E.2d 324, 329 (1993) (noting that "statements in the nature of *obiter dictum* are not binding authority"). If this issue were necessary to the resolution of the case, I would hold that there was sufficient evidence in the record to support the trial court's finding that "[d]efendant has deliberately suppressed his income and acted in deliberate disregard of his obligation to provide reasonable support for the minor children." To the extent that the majority opinion purports to hold otherwise, I respectfully dissent.

The standard of review for findings made by a trial court sitting without a jury is whether any competent evidence exists in the record to support said findings. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988), *see also Smith v. Smith*, 103 N.C. App. 488, 490-91, 405 S.E.2d 912, 913 (1991) (stating that "[e]vidence must support findings; findings must support conclusions; conclusions must support the judgment."). The trial court's findings of fact are conclusive if they are supported by competent evidence. *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E.2d 822, 825 (1980). A trial court's findings are based upon a holistic analysis of the evidence presented in light of the applicable laws. This Court should not disturb such findings of fact, even though there may be evidence to the contrary. *Associates, Inc. v. Myerly and Equipment Co. v. Myerly*, 29 N.C. App. 85, 89, 223 S.E.2d 545, 548, *appeal dismissed*, 290 N.C. 94, 225 S.E.2d 323 (1976).

On the issue of reduction of income, the trial court found as fact and concluded as a matter of law that defendant had deliberately suppressed his income and acted in deliberate disregard of his obligation to provide reasonable support for the minor children. This finding and conclusion is supported by evidence that the defendant is, in his own words, "unemployed by choice." The court found that defendant voluntarily resigned his $65,000 salaried position in order to become a full-time student, and that defendant has redirected his career towards being a school counselor in which career he would earn a significantly lower wage.

This Court recently decided a case with similar facts. In *Mason v. Erwin*, the defendant entered into a voluntary child support agreement with the mother of his child. Several years later, the defendant's wife won a prize in the lottery and soon thereafter the defendant entered into early retirement. The defendant's retirement pension amounted to half of the wages that he was earning when he was employed. This Court held that the trial court's findings that (1) the

defendant's testimony was unpersuasive and was sufficiently rebutted by other evidence, and (2) that "the evidence tended to show that defendant was reluctant about his responsibility to provide support for [the child]" was sufficient to support the trial court's "conclusion that the defendant retired and voluntarily reduced his income in bad faith and in deliberate disregard for his obligation to provide reasonable support for [his child]". 157 N.C. App. 284, 289, 579 S.E.2d 120, 123 (2003). This Court viewed "all this evidence in the context of defendant's voluntary decision to retire though he was an able-bodied, 52 year old worker with no physical disabilities who was capable of earning sufficient funds to provide for his daughter," and held that the trial court did not abuse its discretion by imputing income to the defendant. *Id.*, at 124.

The trial court properly entered findings of fact that support the conclusions of law, which in turn support the judgment in favor of plaintiff. Accordingly, I would affirm the trial court on the question of imputation of income.

STATE OF NORTH CAROLINA v. DOUGLAS EARL COLLINS

No. COA02-415

(Filed 16 September 2003)

1. Search and Seizure— warrantless search of vehicle—motion to suppress drugs—informant tip

The trial court did not err in a trafficking in cocaine case by denying defendant's motion to suppress the drugs obtained by the police when they conducted a warrantless search of defendant's vehicle based on an informant's tip, because: (1) the police were able to verify that defendant was the alleged perpetrator and establish probable cause to justify the warrantless stop and search of defendant's vehicle based on the informant's description of the vehicle, description of defendant, and provision of the location and approximate time of the alleged activity; (2) the informant was a reliable informant and his information was reasonably corroborated by other matters within the officer's knowledge; and (3) the informant gave the police sufficient information to establish probable cause for the eventual warrantless arrest of defendant.

2. Criminal Law— motion for continuance—locating police informant

The trial court did not err in a trafficking in cocaine case by denying defendant's motions for a continuance to locate and subpoena the police informant at trial, because: (1) the evidence does not fully establish that defendant made any real effort to identify or locate the informant during the nine months between defendant's arrest and trial; and (2) the evidence shows the informant should have been easily identified or located by defendant considering that defendant knew the informant to be a well-known drug dealer in his father's community, defendant returned several of the informant's pages on the night of defendant's arrest, and defendant went to the informant's house after meeting him at a store.

3. Constituional Law— pretrial motion—identity of confidential informant

The trial court did not err in a trafficking in cocaine case by denying defendant's pretrial motion to reveal the identity of the confidential informant when that motion was made, because: (1) a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure; (2) defendant's guilt was established through other evidence and not by the informant, especially considering that the informant did not testify at trial; and (3) when the informant was identified at the end of the trial, defendant was not surprised since he had essentially stated in his motion to suppress that he believed that the individual was one of two likely candidates to have been an agent of the state.

4. Criminal Law— entrapment—matter of law

The trial court did not err in a trafficking in cocaine case by failing to find that defendant was entrapped as a matter of law because when viewed in its entirety, the evidence does not demonstrate inducement as a matter of law, but rather a predisposition and opportunity to commit the offense in question.

Judge McGEE concurring in part and dissenting in part.

Appeal by defendant from judgment entered 19 July 2001 by Judge L. Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 January 2003.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General R. Marcus Lodge, for the State.

James M. Bell for defendant-appellant.

HUNTER, Judge.

Douglas Earl Collins ("defendant") appeals his conviction for trafficking in cocaine. For the reasons stated herein, we hold there was no error.

The State's evidence at trial tended to show the following: Officer C. A. Kimball ("Officer Kimball"), of the Charlotte-Mecklenburg Police Department, arrested Calvin Cunningham ("Cunningham") for drug offenses on 6 October 2000. While in custody, Cunningham was informed by Officer Kimball that Cunningham could help his case by assisting the police catch other individuals involved in illegal drug activities. Consequently, Cunningham provided Officer Kimball with detailed information regarding seven drug houses and drug markets in Charlotte; information the officer was able to corroborate.

Thereafter, Cunningham proceeded to make various telephone calls from a police cell phone over a one-hour period in an effort to create drug activity. Following these calls, Cunningham informed Officer Kimball that he had scheduled a meeting at the Fast Fare on the corner of Eastway and The Plaza with a black man, in his thirties, named "Doug" who would be driving a late 1980's model, white, four-door Cadillac Brougham with spoke or wire hubcaps. Cunningham also told Officer Kimball that the man would have a large amount of cocaine in the Cadillac and the approximate time the vehicle would arrive at the Fast Fare. Although Officer Kimball had no prior experience with Cunningham as an informant, he was familiar with Cunningham from an arrest several months earlier.

Based on Cunningham's information, the police set up surveillance of the Fast Fare. As Cunningham stood by a phone at the Fast Fare, a black male, later identified as defendant, drove up in a white, four-door Cadillac. Cunningham got in defendant's Cadillac, and defendant drove to a house several blocks away. Cunningham entered the house alone, came back out, and told defendant to drive around the corner. As defendant drove away, he was stopped by the police. Officer Kimball and another officer immediately conducted a search of defendant's vehicle and found two baggies of cocaine under the driver's seat totaling approximately fifty-five grams in weight.

Defendant was arrested and taken to a law enforcement center where, after waiving his *Miranda* rights, he gave a statement to the police.

Defendant told police in his statement and later testified at trial that, although he was employed, he needed extra money. Defendant said he only knew the first names of two known drug dealers in his father's community, "Kevin" (later identified as Calvin Cunningham) and "Otis." Prior to 6 October 2000, defendant said he had asked Cunningham for money and had also given Cunningham his pager number in case Cunningham had some work for him. Defendant testified that he was only interested in doing non-drug-related work such as cutting grass. Shortly thereafter, Cunningham paged defendant and offered to pay him to deliver a "package," but at that time defendant told Cunningham he did not want to be involved in any drug-related activities.

Defendant also testified that on the night of 6 October 2000, Cunningham paged him four or five times. When defendant returned the pages, Cunningham urged him to deliver a package if he wanted to make extra money. Defendant then spoke with Otis who told him that Cunningham had called and expressed defendant's desire to make some money. Otis offered defendant fifty dollars to deliver a Crown Royal bag to Cunningham and collect $2,000.00 from Cunningham. Defendant testified that after Otis assured him that the bag contained "powder" and not "crack," Otis put the bag under a seat of the Cadillac. Defendant then drove to the Fast Fare to meet Cunningham.

After defendant picked up Cunningham, Cunningham put the Crown Royal bag in his pants and asked defendant to drive to Cunningham's house so that he could get the money for defendant. Defendant testified that Cunningham told him to drive around the corner while he was in the house. When defendant drove away, he was stopped and arrested. Defendant testified that he did not know that there were two baggies of cocaine in his Cadillac when the police stopped him. Defendant thought the cocaine was in the Crown Royal bag that Cunningham had put in his pants.

On 27 November 2000, defendant filed a motion to suppress based on a lack of probable cause to stop and search defendant's vehicle. An affidavit in support of the motion was filed on 8 December 2000. Defendant alleged in the motion and affidavit that he believed "Otis or [Cunningham was an] agent of the state that entrapped him

in this criminal enterprise, with the sole purpose of setting him up for arrest." The trial court ultimately denied defendant's motion. In a second motion, defendant sought to compel the identity of the confidential informant. The trial court also denied that motion, concluding that the State only had to provide defendant with anything it knew that would help defendant learn the whereabouts and last names of "Kevin" (Cunningham) and "Otis." Thus, the State told defendant Cunningham's full name and last known address. The State had no information about "Otis."

Prior to trial, defendant twice moved for a continuance in order to subpoena Cunningham for trial. The court denied defendant's motion on both occasions, stating that since defendant's arrest, there had been ample time for him to "find out what the last name of the local dope dealer was[.]" Nevertheless, the State was ordered to pay for a private investigator to serve a subpoena on Cunningham. The investigator's attempts were unsuccessful.

At the close of the evidence, defendant was permitted to recall Officer Kimball to determine the identity of the State's confidential informant. Defendant learned Cunningham was the informant; however, Officer Kimball reiterated that the police were unable to locate "Otis."

The trial court instructed the jury on the defense of entrapment. That defense was rejected, and the jury convicted defendant of trafficking in cocaine. Defendant was sentenced to a term of thirty-five months to forty-two months imprisonment. Defendant appeals.

I.

[1] Defendant first argues the trial court erred in denying his motion to suppress the drugs obtained by the police when they conducted a warrantless search of his vehicle because Cunningham's informative tips were insufficient to establish probable cause. We disagree.

A warrantless search may be conducted incident to a lawful arrest if probable cause to arrest exists prior to the search and the arrest is permitted by law. *State v. Mills*, 104 N.C. App. 724, 728, 411 S.E.2d 193, 195 (1991). " 'Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' " *Id.* (citations omitted). Specifically in the case of an informant's tip, probable cause is deter-

mined by a " ' " 'totality-of-the circumstances' " ' " test, using a " ' " 'balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.[']" ' " *State v. Chadwick*, 149 N.C. App. 200, 203, 560 S.E.2d 207, 209, *disc. review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002) (citations omitted). The indicia of reliability may include (1) whether the informant was known or anonymous, (2) the informant's history of reliability, and (3) whether information provided by the informant could be and was independently corroborated by the police. *Id.*; *State v. Earhart*, 134 N.C. App. 130, 133-34, 516 S.E.2d 883, 886 (1999). An informant's tip is more reliable if it contains " 'a range of details relating not just to easily obtained facts and conditions existing at the time of the tip, but to future actions of third parties ordinarily not easily predicted.' " *Alabama v. White*, 496 U.S. 325, 332, 110 L. Ed. 2d 301, 310 (1990) (citation omitted).

There are several prior cases of this Court that are instructive as to determining the measure of probable cause based on an informant's tip. In one such case, *State v. Martinez*, 150 N.C. App. 364, 562 S.E.2d 914, *appeal dismissed and disc. review denied*, 356 N.C. 172, 568 S.E.2d 859 (2002), Daniel Goff ("Goff") was arrested for possession of drugs and contraband. In an effort to gain a plea bargain, Goff told the arresting officer that he normally purchased marijuana from two Hispanic males. He stated that the two males were en route to his home in a white four-door automobile to deliver marijuana " 'right to [his] door.' " *Id.* at 367, 562 S.E.2d at 916. Goff had not previously served as an informant. Acting on this information, the officers established surveillance in the immediate area. While the officers were waiting, the two men called Goff on his cellular phone and stated that they would be arriving in twenty minutes. Approximately twenty minutes later, a white four-door Neon, occupied by Mario Martinez ("Martinez") and another Hispanic male, parked next to Goff's front door. The officers arrested both men and searched the vehicle.

On appeal, Martinez argued the police did not have probable cause to support the warrantless arrest and search. This Court recognized that " '[o]nce [officers] corroborate[] the description of the defendant and his presence at the named location, [they] ha[ve] reasonable grounds to believe a felony [i]s being committed in [their] presence which in turn create[s] probable cause to arrest and search defendant.' " *Id.* at 369, 562 S.E.2d at 917 (citation omitted). Therefore, we concluded that once the officers corroborated (1) the description of the vehicle, (2) the description of the occupants, (3)

the location of the activity, including the proximity of the automobile's position to the front door, and (4) the arrival time of the automobile, there was probable cause to justify the warrantless search. *Id.*

Martinez is analogous to the present case. Here, Cunningham described the vehicle as a late 1980's model, white, four-door Cadillac Broughham with spoke or wire hubcaps. Cunningham described defendant as a black man, in his thirties, named "Doug." Both of these descriptions were more detailed than the descriptions given by the informant in *Martinez*. Also, like the informant in *Martinez*, Cunningham provided the location and approximate time of the alleged activity. From all this information, the police were able to verify that defendant was the alleged perpetrator and establish probable cause to justify the warrantless stop and search of his vehicle.

Additionally, *Chadwick*, 149 N.C. App. 200, 560 S.E.2d 207, and *Earhart*, 134 N.C. App. 130, 516 S.E.2d 883, are instructive in addressing defendant's first argument. The informant in *Chadwick*, who had a history of reliability, told police that the

> defendant was about to (1) deliver a large amount of cocaine to a specific location, (2) be driven by a black female in an older model four-door black Nissan Sentra, because defendant did not have a driver's license, (3) be taken to a Texaco station at the corner of Highway 17 North and Piney Green Road, (4) be traveling from a certain direction, (5) park next to a telephone booth in the parking lot, (6) act like he was there to use the telephone, and (7) conduct a drug transaction there.

Chadwick, 149 N.C. App. at 203-04, 560 S.E.2d at 210. Our Court noted that the police verified every detail of the informant's tip "with minute particularity." *Id.* at 204, 560 S.E.2d at 210. Furthermore, a police officer testified that he recognized the defendant as soon as the vehicle drove up. *Id.* Thus, the warrantless search was upheld.

In *Earhart*, the sheriff's department received two tips concerning the defendant. The first informant, an anonymous male, called the sheriff's department and stated that

> a white Trans Am would be traveling to a residence on North Spot Road in Powell's Point sometime between 27 April and 28 April and that it might be accompanied by a blue Subaru. The caller stated that the white Trans Am would be transporting approxi-

> mately a pound of marijuana. The caller did not identify himself and Deputy Davidson did not recognize the voice.

Earhart, 134 N.C. App. at 131, 516 S.E.2d at 885. The second tip, given by a police officer based on information he had received from an SBI agent, provided that

> a person whose name sounded like "Airhart" was selling cocaine and marijuana from his home on North Spot Road and that he drove a white Trans Am, a blue Chevrolet Cavalier, and a rust Jeep. [The agent] also told him that the SBI had received this information from an individual who had been inside Earhart's residence.

Id. at 132, 516 S.E.2d at 885. Based upon the tips, law enforcement set up surveillance of the address. A license check revealed that the name of the driver of the Trans Am was Earhart, a man known to carry weapons. While on surveillance, law enforcement observed a blue Subaru pull up to the house. When the sheriff's deputy questioned the driver, she stated that she was visiting her sister and her boyfriend, Earhart, who drove a white Trans Am. Thereafter, Earhart passed by the law enforcement surveillance in a white Trans Am and was pulled over. The officers subsequently searched Earhart's car and found fifty grams of cocaine, marijuana, and a handgun. *Id.* at 132-33, 516 S.E.2d at 885-86. This Court found the informant's tips were sufficient to allow a warrantless stop, stating that

> in addition to the informant's tip . . . , the officers involved were able to use separate information obtained from the SBI and from an independent investigation to corroborate the information received. This included the type of vehicle driven by the defendant, the name of the defendant, and information that the defendant was known to sell drugs including marijuana and cocaine. . . . The officers were able to independently verify all of the anonymous informant's tip except for the presence of drugs in the vehicle prior to the vehicle stop. Based on all this information, the officers had reasonable grounds to believe the tip was accurate and reliable and that drugs were in the vehicle.

Id. at 134, 516 S.E.2d at 886-87.

The present case can also be analogized to *Chadwick* and *Earhart*. Like the informants in those cases, Cunningham was a reliable informant. Prior to giving information about defendant, Cunningham had provided Officer Kimball with specific information

about seven different drug locations in Charlotte, the names of several drug dealers, the names of their suppliers, their methods of operation, and even the location of their drug stashes. Officer Kimball testified that based on his experience and knowledge of particular drug areas, he knew the information Cunningham provided was correct thereby allowing him to rely on the information Cunningham gave him regarding defendant. *See State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (citation omitted), *cert. denied*, 535 U.S. 940, 152 L. Ed. 2d 231 (2002) (holding that an officer may rely upon information received through an informant " 'so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge' ").

Moreover, similar to the informants in *Earhart* and *Chadwick*, Cunningham gave the police sufficient information to establish probable cause for the eventual warrantless arrest of defendant. To establish probable cause, the police need not verify the defendant's identity with someone other than the informant prior to making the arrest as long as the informant provides sufficient details of the defendant's appearance in order for the police to recognize the defendant. *See State v. Trapp*, 110 N.C. App. 584, 430 S.E.2d 484 (1993). In *Earhart*, the only identifying information the officers received about the defendant was that he drove a white Trans Am and his name sounded like " 'Airhart.' " *Earhart*, 134 N.C. App. at 132, 516 S.E.2d at 885. Similarly, in *Chadwick*, the only identifying information the informant provided was that the defendant was known as " 'Breeze.' " *Chadwick*, 149 N.C. App. at 201, 560 S.E.2d at 208. Here, Cunningham described defendant as a black male in his thirties named "Doug." Cunningham further provided details regarding the make and model of defendant's vehicle and the approximate time defendant would arrive at the Fast Fare. Thus, the information Cunningham provided about the physical description of defendant, coupled with additional detailed information, was sufficient to establish probable cause.

Accordingly, under the totality of the circumstances, the evidence was sufficient to justify the warrantless search of defendant's vehicle and his subsequent arrest.

II.

[2] Next, defendant argues the trial court erred in denying his motions for a continuance to locate and subpoena Cunningham for trial. We disagree.

"It is well settled that a motion for continuance is addressed to the discretion of the trial judge and we will not disturb that ruling absent an abuse of that discretion." *State v. Wilfong*, 101 N.C. App. 221, 223, 398 S.E.2d 668, 670 (1990). However, defendant contends that his motions were based on his state and federal Constitutional rights to confront the evidence against him. "When a defendant's motion to continue ' " 'is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable.' " ' " *Id.* (citations omitted). On review, this Court looks for detailed proof that fully establishes the reasons for the delay as well as a showing of whether the party requesting the continuance would be materially prejudiced if the motion was denied. *State v. Cody*, 135 N.C. App. 722, 726, 522 S.E.2d 777, 780 (1999).

The evidence in the case *sub judice* does not fully establish that defendant made any real effort to identify or locate Cunningham during the nine months between his arrest and trial. On the contrary, the evidence shows that Cunningham should have been easily identified or located by defendant considering defendant (1) knew Cunningham to be a well-known drug dealer in his father's community; (2) returned several of Cunningham's pages on the night of his arrest; and (3) went to Cunningham's house after meeting him at the Fast Fare. Therefore, we hold that it was not error for the trial court to deny defendant's motions for a continuance.

III.

[3] Defendant also argues the trial court erred by denying defendant's pretrial motion to reveal the identity of the confidential informant when that motion was made. We disagree.

Generally, the State may withhold the identity of a confidential informant subject to certain exceptions. *See State v. Newkirk*, 73 N.C. App. 83, 85, 325 S.E.2d 518, 520 (1985). "[A] defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981). Here, defendant's guilt was established through other evidence and not by Cunningham, especially considering he did not testify at trial. Morever, when Cunningham was identified as the confidential informant at the end of the trial, defendant was not surprised by this revelation since he had essentially stated in his motion to suppress (filed approximately seven months earlier) that he believed

Cunningham was one of two likely candidates to have been an "agent of the state[.]" Therefore, the trial court did not err in denying defendant's pretrial motion to compel the State to reveal the informant's identity.

IV.

[4] Finally, defendant argues the trial court erred by failing to find that he was entrapped as a matter of law. We disagree.

> Entrapment is a defense to conviction of a crime when
>
> there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the origin of the criminal intent lies with the law enforcement agencies. We note that this is a two step test and a showing of trickery, fraud or deception by law enforcement officers alone will not support a claim of entrapment. The defendant must show that the trickery, fraud or deception was "*practiced upon one who entertained no prior criminal intent.*" Entrapment may occur through action of law enforcement officers *or their agents.*

State v. Hageman, 307 N.C. 1, 28, 296 S.E.2d 433, 449 (1982) (citations omitted) (emphasis in original). "The defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials [or their agents]." *State v. Worthington*, 84 N.C. App. 150, 157, 352 S.E.2d 695, 700 (1987) (citation omitted).

The issue of whether or not a defendant was entrapped is generally a question of fact to be resolved by the jury. *Id.* In the present case, the trial court instructed the jury on the defense of entrapment, which defense the jury rejected. However, defendant argues that the court should have taken the issue from the jury and found defendant was entrapped as a matter of law. Such a decision by a trial court is appropriate "[o]nly when 'the undisputed evidence discloses that an accused was induced to engage in criminal conduct that he was not predisposed to commit[.]' " *Id.* (quoting *Hageman*, 307 N.C. at 30, 296 S.E.2d at 450). Factors indicating a predisposition to engage in the criminal conduct include "the defendant's ready compliance, acquiescence in, or willingness to cooperate in the proposed criminal plan." *Id.*

The evidence in the record indicates that the informant, Cunningham, was working for the police at the time he called defend-

ant on 6 October 2000. While Cunningham's calls could arguably be perceived as acts of persuasion to induce defendant to transport, "[l]aw enforcement 'may rightfully furnish to the players of [the drug] trade *opportunity* to commit the crime in order that they may be apprehended. It is only when a person is *induced* by the officer to commit a crime which he did not contemplate that we must draw the line.' " *State v. Broome*, 136 N.C. App. 82, 89, 523 S.E.2d 448, 454 (1999) (quoting *State v. Stanley*, 288 N.C. 19, 33, 215 S.E.2d 589, 598 (1975)) (emphasis in original).

With that in mind, a further review of the evidence shows defendant initially gave Cunningham, a known drug dealer, his pager number in case he needed defendant to do some work. On one occasion prior to 6 October 2000, defendant refused to deliver a "package" for Cunningham because he did not want to be involved in drug-related activities. Yet, when defendant returned Cunningham's pages on 6 October 2000, the two men once again discussed defendant delivering a package to make money. Later that evening, defendant spoke with another known drug dealer, Otis, and agreed to make a delivery and pick up $2,000.00 from Cunningham, in exchange for fifty dollars. During the trial, defendant testified:

> I knew that I made a bad decision because I asked him, I said, "What's in this bag?" It was [a] Crown Royal bag. He said, "Don't worry about it. It ain't crack. It's powder." And I was like, man—I said, "You can get in trouble doing that." He promised me that I would get in no trouble. He said, "I promise you that." So, when I left, I went to the place and picked up [Cunningham] and we went to [Cunningham's] house, and I said, "[Cunningham], you know, you got the bag . . ."—He put it in his crotch and he got out and went in the house. . . . So, at this time I thought that he had took the drugs and went in the house with it . . . .

This testimony clearly indicates that defendant knew the "powder" he was delivering to Cunningham was an illegal substance. When viewed in its entirety, the evidence does not demonstrate inducement as a matter of law, but rather a predisposition and opportunity to commit the offense in question. *See Hageman*, 307 N.C. at 31, 296 S.E.2d at 450. Therefore, the trial court properly submitted the issue of entrapment to the jury.

In conclusion, the trial court did not err in its judgment against defendant for trafficking in cocaine.

No error.

Judge CALABRIA concurs.

Judge McGEE concurs in part and dissents in part in a separate opinion.

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

I concur in the majority's conclusion that defendant was not entrapped as a matter of law. However, I respectfully dissent from the majority's conclusion that there was probable cause to conduct the warrantless stop and search of defendant's vehicle based on an informant's tip. As correctly stated by the majority, in the case of an informant's tip, probable cause is determined by a " 'totality-of-the circumstances' " test, using a " 'balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip.'" *State v. Chadwick*, 149 N.C. App. 200, 203, 560 S.E.2d 207, 209, *disc. review denied*, 355 N.C. 752, 565 S.E.2d 672 (2002) (citations omitted). A court must review the facts and circumstances of each case to determine whether, under the totality of the circumstances, there was probable cause to make a warrantless stop and search. *Id.* In the present case, under the totality of the circumstances, probable cause did not exist.

In the present case, I take a different view of some of the facts as well as the cases the majority cites in support of its holding. I believe the present case can be distinguished from both *Chadwick* and *State v. Earhart*, 134 N.C. App. 130, 516 S.E.2d 883 (1999). The informant in the present case was certainly known to the police and was, in fact, in their custody. However, the informant was known to the police as a criminal defendant, not as an informant, since he had no track record of providing information to the police, and therefore no history of reliability. The fact that the informant gave Officer Kimball general information about drug houses and markets, that Officer Kimball knew was correct from his experience as a law enforcement officer, does not overcome this significant deficiency. The factor of being an informant on previous occasions serves the purpose of showing that the informant was reliable in the past, establishing a track record of reliability. The statements given by the informant to Officer Kimball concerning drug activity in Charlotte, even if about specific drug markets and the like, were merely statements showing the informant's knowledge of the drug trade in Charlotte; they were

not prior tips the police acted upon, which could establish a track record of reliability as an informant. *See Chadwick*, 149 N.C. App. at 203, 560 S.E.2d at 209 ("[a] known informant's information may establish probable cause based on a reliable track record"). Statements made in a relatively contemporaneous manner with the tip acted upon, which simply show knowledge of the drug trade in the area do not convert an informant who has never provided prior reliable tips in the past, into an informant with a reliable history. *See id.*

Further, the facts that the informant gave the police in this case were not as specific as the facts given by informants in the cases discussed above. Information the informant gave to the police that could be and was independently verified was that a black man in his thirties, driving a 1980's model, white, four-door Cadillac with spoke wheels, would arrive at the Fast Fare at the corner of Eastway and The Plaza at an approximate time. The informant only gave police defendant's first name, "Doug." The police did not check the registration of the vehicle that arrived at the Fast Fare, nor did they ask anyone other than the informant to confirm defendant's identity, as the deputies did in *Earhart*. I agree with the majority that the police need not verify the defendant's identity with someone else in every case, but such verification can strengthen the reliability of the informant's tip in the absence of other corroborating factors. The police in this case failed to independently verify key information given by the informant before stopping the vehicle. In addition, defendant's description of the man in the Cadillac was vague, consisting only of the identifying features that he was a black man in his thirties.

The case before us is further distinguishable from *Earhart* in that there was only one informant's tip, as opposed to the multiple, corroborating tips in *Earhart*. *Earhart*, 134 N.C. App. at 134, 516 S.E.2d at 886-87. Probable cause can be established on the basis of information provided by a single informant, *see Chadwick*, 149 N.C. App. at 203-04, 560 S.E.2d at 210; however, as shown in *Earhart*, when corroborating information is obtained from two different sources, the reliability of the information is strengthened under the totality of the circumstances test. *See Earhart*, 134 N.C. App. at 134, 516 S.E.2d at 886-87.

The present case is also distinguishable from *Chadwick*; the tip given by the informant in the present case did not include any details of what defendant would do once he arrived at the Fast Fare; the police did not verify every detail "with minute particularity," such as the identity of "Doug," nor did the police recognize defendant as the

officer in *Chadwick* did; and the informant in *Chadwick* had a history of proven reliability as an informant, unlike the informant in this case, despite the majority's conclusion to the contrary. *Chadwick*, 149 N.C. App. at 203-04, 560 S.E.2d at 210.

The majority relies on *State v. Martinez*, 150 N.C. App. 364, 562 S.E.2d 914, *appeal dismissed and disc. review denied*, 356 N.C. 172, 568 S.E.2d 859 (2002); however, I find that case distinguishable from the present case as well. In *Martinez*, the informant was a college student in his early twenties who had been apprehended in his residence after police had searched his house and discovered illegal drugs, contraband, and cash. *Id.* at 367, 562 S.E.2d at 916. The informant " 'was crying and . . . scared' " when he told the police that from a conversation the informant had with his normal suppliers, two Hispanic males, approximately an hour before the police arrived at the informant's residence, the suppliers were already "en route" to deliver a shipment of marijuana to his house and would " 'come right to [the informant's] door.' " *Id.* After receiving this information, an officer overheard a conversation between the informant and the two suppliers, when the suppliers called the informant and told him they would arrive in about twenty minutes. *Id.* A car matching the description provided by the informant, containing two Hispanic males, turned into the informant's driveway and pulled right up to the front door of the informant's home. *Id.*

In *Martinez*, although the tip did not describe the two suppliers with particular detail beyond the fact that they were two Hispanic males driving a small, white, four-door automobile, two men matching the description given by the informant pulled into the driveway of the informant's home and right up to the front door of the residence. *Id.* The lack of a particularly detailed description of the defendants in *Martinez* was balanced against the fact that the defendants drove into the driveway of a private home, as opposed to a convenience store, right up to the front door as predicted, and that the investigating police officer overheard the conversation the informant had with the defendants, confirming the transaction that had already been set up even before the police arrived at the informant's home. *See id.* at 369, 562 S.E.2d at 914.

In considering the totality of the circumstances, I believe the single informant's tip in the case before us was insufficient to allow the police to conduct a warrantless stop and arrest of defendant. While no one factor is necessarily conclusive, the failure to show sufficient past reliability of the informant, the fact that the

informant's tip did not provide specific logistical details of the drug transaction, and the fact that the police did not independently verify defendant's name using a license check or any other method, compel this conclusion. I would hold that the trial court erred in denying defendant's motion to suppress and would vacate and remand for a new trial.

For the above reasons I respectfully dissent. Because defendant would receive a new trial, I would not address defendant's second and third assignments of error in light of the fact that the informant's identity was revealed to defendant at the previous trial and would no longer be an issue; and because defendant would have sufficient time to subpoena Cunningham prior to a new trial.

JOHNNY ROBERT GUESS, JR., PLAINTIFF v. TERRY ANTHONY PARROTT, BRIDGET CHRISTINA PARROTT, D/B/A PARROTT TRUCKING, DEFENDANTS

No. COA02-1071

(Filed 16 September 2003)

1. Attorneys— contingent fee—multiple attorneys—quantum meruit claim by attorney

An attorney who has provided a legal service pursuant to a contingency fee agreement and then been fired has a viable claim in quantum meruit against the former client or its subsequent representative. The first of plaintiff's two attorneys in this negligence action properly stated a claim, and the trial court properly denied the second attorney's motion to dismiss.

2. Attorneys— contingency fee—apportionment between attorneys—no right to jury trial

The trial court did not err by denying a law firm's request for a jury trial to apportion a contingency fee between two attorneys. The right to a trial by jury exists only by statute or if it existed in the common law at the time the North Carolina Constitution of 1868 was adopted. The rule of quantum meruit recovery by attorneys is modern, and the apportionment of attorneys' fees among the various lawyers who have represented a party has not been regulated by statute.

3. Attorneys— contingency fee—apportionment between attorneys—quasi-quantum meruit approach

A trial court in North Carolina may use the quasi-quantum meruit approach to apportion a contingency fee between attorneys if it believes that such a method aptly characterizes what the discharged attorney is entitled to receive. In this case, the trial court's findings were sufficient and there was no abuse of discretion.

Appeal by plaintiff and the firm of Lloyd T. Kelso & Associates from order entered 10 April 2002 by Judge Richard D. Boner in Gaston County Superior Court. Heard in the Court of Appeals 20 May 2003.

Lloyd T. Kelso & Associates, by Lloyd T. Kelso, for the firm of Lloyd T. Kelso & Associates and for plaintiff, appellants.

Melrose, Seago & Lay, P.A., by Randal Seago, for the firm of Melrose, Seago & Lay, P.A., appellees.

McCULLOUGH, Judge.

This appeal arises out of a dispute between attorneys for the firms of appellant Lloyd T. Kelso & Associates and appellee Melrose, Seago & Lay, P.A., as to entitlement to attorneys' fees stemming from the underlying case. The underlying case involved an automobile accident that occurred on 24 July 1999 in which plaintiff Johnny Robert Guess, Jr., was injured when his vehicle collided with a tractor-trailer driven by defendant Terry Anthony Parrott.

Shortly after the accident, plaintiff's father and brother, on 26 July 1999, contacted the appellee law firm of Melrose, Seago & Lay, P.A., and made arrangements with Randal Seago to represent plaintiff. On 29 July 1999, plaintiff and Randal Seago entered into a contingency fee agreement in which plaintiff promised to pay appellee one-third of any recovery. Further, plaintiff would reimburse appellee for expenses and costs advanced by it.

Mr. Seago went about the task of representing plaintiff. He filed a complaint on 6 January 2000. The parties negotiated at mediation, asking for $750,000.00. A settlement could not be reached as defendants would not go above $200,000.00. Plaintiff would not lower his demand under $650,000.00. Therefore, this matter went to trial on 29 January 2001. During the trial, a "high/low agreement" was made by the parties that guaranteed plaintiff $250,000.00, plus $15,000.00 for

costs, regardless of the outcome, but capped recovery at $800,000.00. Defendants increased their offer to $350,000.00, but it was not accepted. The trial ended deadlocked at 10-2 in favor of defendants, and a mistrial was declared.

Following the unsuccessful trial, Seago and other attorneys at appellee law firm were involved in negotiations with their client, plaintiff, and defendants. Plaintiff made a settlement offer of $500,000.00, while defendants were willing to settle for $265,000.00. Both offers were rejected by the respective parties.

Plaintiff became dissatisfied with the representation provided to him by appellee law firm and informed them of such. Acceding to plaintiff's wishes, appellee filed a motion to withdraw on 23 April 2001. An order granting such was entered on 20 April 2001.

Thereafter, plaintiff secured the services of appellant Lloyd Kelso of Lloyd T. Kelso & Associates. Plaintiff entered into a contingency fee agreement with Kelso, promising to pay 35% of the amount recovered. Once retained, Kelso reviewed plaintiff's file that he had brought over from appellee. Kelso developed a strategy and hired several new experts. Kelso also revisited witnesses, including some who did not testify in the previous trial.

By September 2001, Kelso approached defendants about settlement. Kelso made a new request on behalf of plaintiff in the amount of $1,286,421.30. On 14 January 2002, a hearing was held as to the validity of the "high/low agreement" from the first trial and the issue of apportioning attorneys' fees between plaintiff's attorneys. The parties were ordered into mediation and eventually settled plaintiff's case for $525,000.00 on 22 January 2002. This amount was able to be procured, appellant contends, largely because of its work on the case. Further, appellant contends that had the "high/low agreement" not been in effect, the recovery could have been more. Either way, this amount was in excess of what plaintiff was offered during appellee's representation of plaintiff. The attorneys' fees issue was not resolved in mediation.

On 4 February 2002, appellee filed a motion requesting a portion of the attorneys' fees in the case. Appellant filed its motion in opposition on 15 February 2002, requesting a jury trial on the issue of the reasonable value of appellee's services. A hearing was held during the 25 February 2002 Mixed Session of Cleveland County Superior Court on 28 February 2002 before The Honorable Richard D. Boner as to whether a jury trial should be had. It was determined that the trial

court would conduct a bench trial on the attorneys' fees issue during the 26 March 2002 Civil Session of Gaston County Superior Court before the same judge.

After the trial court heard the arguments and evidence on that date, it filed its order on 17 April 2002. In this order and in addition to the facts already discussed herein, the trial court found that both firms entered into contingency fee agreements with, provided competent legal services to, and advanced costs and expenses on behalf of plaintiff. In finding of fact #12, the trial court found that

> [p]rior to the Plaintiff's discharge of Melrose, Seago & Lay, P.A., the law firm had 244.72 hours in attorney and staff time invested in the case and this amount of time was reasonable and necessary to competently represent the Plaintiff's interests in this matter. Prior to its discharge by the Plaintiff, Melrose, Seago & Lay, P.A. had provided significant services to the Plaintiff in this matter.

As to appellant's time in the case, the trial court found that it had "invested 332.02 hours of attorney and staff time in this case." The trial court then found that:

> 14.
>
> The case between the Plaintiff and the Defendants was ultimately settled by Lloyd T. Kelso & Associates on behalf of the Plaintiff in the amount of $525,000.00, thereby generated a contingency fee of $183,750.00. During 2000, both Lloyd T. Kelso & Associates and Melrose, Seago, & Lay, P.A. charged $200.00 per hour for litigation services. Lloyd T. Kelso & Associates incurred $40,565.73 in advanced costs and expenses on behalf of the Plaintiff during the time it represented the Plaintiff in this case. Lloyd T. Kelso & Associates performed additional and different work in preparing the case for trial including having additional medical evaluations performed of the Plaintiff, hiring another accident re-construction expert and taking depositions.
>
> 15.
>
> After Lloyd T. Kelso & Associates undertook representation of the Plaintiff, it was able to settle the case for $150,000.00 over the Defendants' previous high offer made during the first trial in this matter, and $260,000.00 more than the Defendants offer made immediately after the first trial concluded.

16.

Although Lloyd T. Kelso & Associates undertook additional and different work on behalf of the Plaintiff in preparing the case for trial, this does not change the fact that Melrose, Seago & Lay, P.A. did a competent job of representing the Plaintiff at the first trial, and that Melrose, Seago, & Lay P.A.'s performance during the first trial on behalf of the Plaintiff was within the range of competence to be expected of attorneys practicing personal injury law in North Carolina.

Based on these findings, the trial court concluded that:

4. The representation of Melrose, Seago, & Lay P.A. conferred a valuable benefit upon the Plaintiff for which it has not been compensated.

5. Melrose, Seago & Lay, P.A. is entitled to recover the reasonable value of its services in quantum meruit from the Plaintiff from the contingency fee funds generated by the successful settlement of his case for the work it performed on behalf of the Plaintiff until unilaterally discharged by the Plaintiff on April 20, 2001.

6. It would be unjust for the Plaintiff and/or Lloyd T. Kelso & Associates to be enriched by the legal services and representation provided by Melrose, Seago, & Lay P.A. without having to compensate Melrose, Seago, & Lay P.A. for those services.

7. Considering the totality of the circumstances of this case, the reasonable value for services for which Melrose, Seago, & Lay P.A. is entitled to recover is $86,500.00 from the $183,750.00 contingency fee generated by the ultimate successful settlement of this case.

Appellant was awarded the remaining funds from the generated fee, and both parties were awarded their costs. Appellant Lloyd T. Kelso & Associates appeal from this order.

Appellant makes several assignments of error and presents the following questions on appeal: Did the trial court commit reversible error (I) by denying its motion to dismiss appellee's motion to determine attorneys' fees; (II) by entering judgment after conducting the hearing without a jury after a request was made for such; (III) in finding that appellee was entitled to recover attorneys' fees of $86,500.00 pursuant to quantum meruit; and (IV) by abusing

its discretion by awarding $86,500.00 as that amount was not supported by the evidence.

I.

[1] Appellant contends that the trial court erred by denying its motion to dismiss for several reasons, including that appellee failed to state a claim upon which relief could be granted. We disagree.

> On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford Cty., 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citations omitted).

Appellee's motion alleges that it provided valuable legal services to plaintiff pursuant to its contingency fee agreement. Subsequent to the agreement and services, appellee was unilaterally discharged by plaintiff. The case was settled afterward by another law firm, appellant, which has received compensation. Appellee's motion asked for three alternative remedies, two of which based an award of attorneys' fees in quantum meruit.

The first inquiry is whether such a claim exists. This Court has had occasion to address the issue of whether "an attorney may recover on a contingent fee contract when his clients have discharged him prior to final disposition of the case." *Covington v. Rhodes*, 38 N.C. App. 61, 63, 247 S.E.2d 305, 307 (1978), *disc. review denied*, 296 N.C. 410, 251 S.E.2d 468 (1979). In holding that an attorney may not recover on the contract but only the reasonable value of his services, this Court stated:

> A contract for legal services is not like other contracts. The client has the right to discharge his attorney at any time, and it is our view that upon such discharge the attorney is entitled to recover the reasonable value of the services he has already provided. As the New York Court noted . . .: "The rule secures to the attorney the right to recover the reasonable

> value of the services which he has rendered, and is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential."

Id. at 66, 247 S.E.2d at 309.

Further, in a more recent case, this Court allowed a discharged attorney to pursue an action in quantum meruit against the settling attorney itself, and not the client. *See Pryor v. Merten*, 127 N.C. App. 483, 485-87, 490 S.E.2d 590, 592-93 (1997), *disc. review denied*, 347 N.C. 578, 502 S.E.2d 597 (1998).

> North Carolina has not addressed the issue of whether an attorney, who before being discharged performed significant services for a client in a contingent fee relationship, may recover from the settling attorney in quantum meruit. Other courts have addressed and resolved the issue. *Joye v. Heuer*, 813 F.Supp. 1171 (D.S.C. 1993) (court approved of a quantum meruit distribution of the fees among the attorneys in direct proportion to the hours worked in the case); *see also Potts v. Mitchell*, 410 F.Supp. 1278 (W.D.N.C. 1976) (discharged attorney's quantum meruit recovery was granted from funds being held as the contingency fee). We find these federal decisions persuasive and accordingly we conclude the trial court properly allowed the quantum meruit action by [the discharged attorney] to proceed. To require [the discharged attorney] to proceed against party plaintiffs would unfairly require plaintiffs to pay attorney's fees in excess of the one-third contingency fee to which they agreed. *See Covington*, 38 N.C. App. at 65, 247 S.E.2d at 308. We believe the more equitable result is to allow the discharged attorney to proceed against the new attorney for the prior attorney's rightful share of the total attorney's fees.

Id. at 487, 490 S.E.2d at 592-93.

Thus, a claim by an attorney who has provided legal service pursuant to a contingency fee agreement and then fired has a viable claim in North Carolina in quantum meruit against the former client or its subsequent representative. Appellee's motion properly states a claim, and the supporting facts necessary thereunder.

Appellant's other arguments in support of this assignment of error are without merit. Thus, this assignment of error is overruled.

II.

[2] Appellant next contends that the trial court erred by denying its request for a jury trial on the factual issue of determining the reasonable value of appellee's services rendered to plaintiff before discharge. Appellant argues that Article I, Section 25 and Article IV, Section 13 of our state constitution mandate that this issue be presented to a jury.

Section 25 of our state constitution states: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25 (2001).

> [A]rticle I, section 25 contains the sole substantive guarantee of the important right to trial by jury under the state constitution while article IV, section 13 ensures that the right as defined in article I will be available in all civil cases, regardless of whether they sound in law or equity.

Kiser v. Kiser, 325 N.C. 502, 507, 385 S.E.2d 487, 489 (1989).

We disagree with appellant, however, and hold that determinations of the reasonable value of services rendered by an attorney, in situations such as the one before us, is the duty of the trial court, reviewable on appeal only for abuse of discretion.

In *Kiser*, our Supreme Court further stated the law pertaining to the right to a jury trial:

> The right to trial by jury under article I has long been interpreted by this Court to be found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted. Conversely, where the prerogative did not exist by statute or at common law upon the adoption of the Constitution of 1868, the right to trial by jury is not constitutionally protected today. Where the cause of action fails to meet these criteria and hence a right to trial by jury is not constitutionally protected, it can still be created by statute.

Id. at 507-08, 385 S.E.2d at 490 (citations omitted).

Appellee argues that it is entitled to reasonable compensation under the theory of "quantum meruit," an equitable remedy, which is defined by Black's Law Dictionary to mean "as much as deserved." *Black's Law Dictionary*, 1243 (6th ed. 1990). Under current North

Carolina law, discussed above, an attorney, working pursuant to a contingency fee contract, who is discharged without cause by his or her client, is entitled to recover the reasonable value of his or her services. This is the so-called "modern rule." *See Covington*, 38 N.C. App. at 64, 247 S.E.2d at 308; *see also* George L. Blum, Annotation, *Limitation to Quantum Meruit Recovery, Where Attorney Employed Under Contingent-Fee Contract is Discharged Without Cause*, 56 A.L.R. 5th 1 (1998).

As can be gathered by the name, this was not always so. *Covington*, examining the law of other jurisdictions, noted that the "older rule, and still the rule in some jurisdictions," allowed an attorney so positioned to recover the entire contingent fee. *Id.* at 64, 247 S.E.2d at 307; *see, e.g., Higgins v. Beaty*, 242 N.C. 479, 88 S.E.2d 80 (1955) (involving a fixed fee contract and holding that an attorney may recover on the contract). This was so because courts would apply the general law of contract. *See O'Brien v. Plumides*, 79 N.C. App. 159, 161, 339 S.E.2d 54, 55, *cert. improvidently allowed*, 318 N.C. 409, 348 S.E.2d 805 (1986). However, as explained in section I of this opinion, the general contract rules were cast aside in favor of the modern rule for reasons of public policy dealing with clients and their ability to maintain their counsel of choice. *See also id.*

Thus, appellee points out that until the adoption of the modern rule, clients presumably had no right to unilaterally discharge an attorney and force him to pursue a quantum meruit claim, and therefore the right to a jury trial is not protected by Article I, Section 25. We agree. This case falls within the realm of a number of claims cited in the *Kiser* opinion that have been found to have no right to a jury trial:

> *See, e.g., In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 309 S.E.2d 183 (no jury trial right where sovereign immunity would have prevented the suit at common law); *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (no jury trial right in case involving parental rights); *In re Annexation Ordinances*, 253 N.C. 637, 649, 117 S.E.2d 795, 804 (1961) ("The right to a trial by jury is not guaranteed in those cases where the right and the remedy have been created by statute since the adoption of the Constitution [of 1868]"); *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E.2d 201 (no jury trial right in petition for trucking franchise certificate); *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (no jury trial right for controversy

over tax valuation); *Unemployment Compensation Comm. v. Willis*, 219 N.C. 709, 15 S.E.2d 4 (1941) (no jury trial right in cases involving administration of the tax laws); *Hagler v. Highway Commission*, 200 N.C. 733, 158 S.E. 383 (1931) (no jury trial right under the Workmen's Compensation Act); *McInnish v. Bd. of Education*, 187 N.C. 494, 122 S.E. 182 (1924) (no jury trial right for discretionary administrative decision regarding site for school building); *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921) (jury of six constitutionally acceptable in insanity hearing); *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E.2d 57 (1985) (no jury trial right for equitable distribution action).

Kiser, 325 N.C. at 508, 385 S.E.2d at 490.

We note the case of *Pryor v. Merten*, quoted at length above, as an example. *Pryor*, 127 N.C. App. at 485-87, 490 S.E.2d at 592-93. That case involved a motion in the cause by the discharged attorney and a hearing before the trial court. It is unclear but doubtful that a request for a jury trial was made. As can be gleaned from the quote reproduced in section I, the position of the trial court is central to this inquiry. *See also id.* at 487, 490 S.E.2d at 592-93. Further, other jurisdictions recognize the role of the trial court in this situation. *See Ingber v. Sabato*, 229 A.D.2d 884, 887, 645 N.Y.S.2d 918, 920 (1996) ("[T]he courts clearly 'possess the traditional authority "to supervise the charging of fees for legal services" pursuant to their "inherent and statutory power to regulate the practice of law." ' "). *Id.* (quoting *Koral v. Koral*, 185 A.D.2d 298, 299, 586 N.Y.S.2d 288, 290 (1992) (quoting *Matter of First Natl. Bank v. Brower*, 42 N.Y.2d 471, 474, 368 N.E.2d 240, 1242 (1977))); *Wegner v. Arnold*, 305 Ill. App. 3d 689, 693, 713 N.E.2d 247, 250 (1999) (" 'The trial judge has broad discretion in matters of attorney fees due to the advantage of close observation of the attorney's work and the trial judge's deeper understanding of the skill and time required in the case.' "). *Id.* (quoting *Kannewurf v. Johns*, 260 Ill. App. 3d 66, 74, 632 N.E.2d 711, 716 (1994)).

The apportionment of attorneys' fees among the various lawyers who have represented a party has not been regulated by statute and is therefore within the province of the trial court. Accordingly, appellant had no right to have the reasonable value of appellee's services determined by a jury, as this issue is committed to the sound discretion of the trial court.

This assignment of error is overruled.

III. & IV.

[3] Appellant's final two arguments contend that the trial court erred in determining and awarding the $86,500.00 amount to appellee. We disagree.

We recognize that no case in North Carolina dealing with the discharge of an attorney who is rendering legal services pursuant to a contingency fee contract has specifically set forth any guidelines for the trial court to follow when determining the reasonable value of the discharged attorney's services. It is noted that North Carolina trial courts are not unfamiliar with such a position. Trial courts are often asked to exercise their discretion in awarding attorneys' fees. *See, e.g.*, N.C. Gen. Stat. § 6-21.1 (2001) (allows trial court to award, in its discretion, attorneys' fees in a personal injury case when there was an unwarranted refusal by an insurance company in a suit and the recovery was less than $10,000.00); *Washington v. Horton*, 132 N.C. App. 347, 357, 513 S.E.2d 331, 334-35 (1999) (setting forth factors for the trial court to consider in making its award). The factors set forth in *Horton* do not necessarily set forth a proper guide in the current context as it deals with a much narrower determination because of the parameters set forth in the statute.

Courts from other jurisdictions have set forth factors helpful in the current situation. The New York case of *Ingber v. Sabato* states:

> It is equally clear that the proper measure of plaintiffs' compensation is quantum meruit and that the amount to which they, as discharged attorneys who had been employed under a contingent fee contract, are entitled depends on the court's interpretation of various factors in its determination of the reasonable value of the services rendered. Such factors include, *inter alia*, the terms of the percentage agreement, the nature of the litigation, difficulty of the case, time spent, amount of money involved, results achieved and amounts customarily charged for similar services in the same locality.

Ingber, 229 A.D.2d at 887, 645 N.Y.S.2d at 920 (citations omitted). *See also Wegner*, 305 Ill. App. 3d at 693, 713 N.E.2d at 250 ("In making its determination, the trial court should assess all of the relevant factors, including the time and labor required, the attorney's skill and standing, the nature of the cause, the novelty and difficulty of the subject matter, the attorney's degree of responsibility in managing the case,

the usual and customary charge for that type of work in the community, and the benefits resulting to the client.").

These factors are consistent with our own case law when trial courts have discretion to award attorneys' fees. For example, N.C. Gen. Stat. § 75-16.1 (2001) authorizes attorneys' fees in unfair and deceptive trade practices cases. *See United Laboratories, Inc. v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993). In *Kuykendall*, our Supreme Court held:

> The Court of Appeals held that there was sufficient evidence before the trial court to support an award of attorneys fees pursuant to N.C.G.S. § 75-16.1, but it concluded the trial court made insufficient findings on the question of the reasonableness of the amount awarded. The Court of Appeals, therefore, remanded the case for findings of fact "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney." . . .
>
> In addition to these findings suggested by the Court of Appeals, the trial court should consider and make findings concerning "the novelty and difficulty of the questions of law"; "the adequacy of the representation," the "difficulty of the problems faced by the attorney," especially any "unusual difficulties," and "the kind of case . . . for which the fees are sought and the result obtained[.]" The court may also in its discretion consider and make findings on "the services expended by paralegals and secretaries acting as paralegals if, in [the trial court's opinion], it is reasonable to do so."

Id. at 195, 437 S.E.2d at 381-82 (citations omitted). *See also Owensby v. Owensby*, 312 N.C. 473, 475-77, 322 S.E.2d 772, 774-75 (1984) (same factors for attorneys' fees in divorce and alimony actions); *Lowder v. All Star Mills, Inc.*, 82 N.C. App. 470, 479-80, 346 S.E.2d 695, 700-01 (1986) (Attorneys' fees for derivative shareholder action awarded by N.C. Gen. Stat. § 55-55(d) use the same factors); *see generally, Middleton v. Russell Group, Ltd.*, 126 N.C. App. 1, 15-19, 483 S.E.2d 727, 735-37, *disc. review denied*, 346 N.C. 548, 488 S.E.2d 805 (1997) (ERISA actions); *see also* N.C. State Bar, Rule 1.5 (2002).

We hold that the factors set forth above are proper guidelines for the trial courts to follow when determining the reasonable value of a discharged attorney's services. These determinations are reviewable upon appeal only for abuse of discretion.

In the present case, the trial court made several findings of fact and conclusions of law. These noted that: (1) appellee hired an accident reconstruction expert and two other experts to evaluate the client's physical condition; (2) the amount promised to appellee under the contingency fee contract was 1/3; (3) proof of liability in this case was difficult; (4) defendant and insurer vigorously defended the case; (5) settlement offers from defendant; (6) "it was reasonable for the Plaintiff to have two (2) attorneys at trial given the questionable issue of liability, and the fact that the case had the potential of a very large award for the Plaintiff if the jury found the Defendants to be liable"; (7) the hours worked by appellee, reproduced above in finding of fact #12; (8) the hours worked by appellant and its contingency fee contract amount of 35%; (9) the amount charged by the attorneys; (10) settlement offers and results obtained by appellant; (11) the competency of appellee; and (12) the work provided by each firm.

The trial court awarded appellee $86,500.00. This amount represents its proportionate amount, based upon hours of work put into the case, of the total contingency fee, $183,750.00, generated by plaintiff's case.

First, we hold that the trial court made sufficient findings to support its award of attorneys' fee. The trial judge presiding over the hearing on attorneys' fees was the same judge that presided over the mistrial. He was in the best position to make the determination of ability and skill of the parties, as well as to the difficulty of the case.

Secondly, the trial court did not abuse its discretion in awarding to appellee the amount that it did, using the method that it did. As we have said, the trial court has broad discretion in awarding attorneys' fees in the present situation, capped only by the principle that a client cannot be required to pay more than the contingent fee to which he agreed with his current counsel (35%). *See Merten*, 127 N.C. App. at 487, 490 S.E.2d at 592-93. Thus, the trial court could have awarded a fee based on charges for hourly work (X hours at X price = reasonable services). Further, the trial court could have adjusted the award up or down, considering what the true value of the services to the client amounted to in its opinion.

In the present case, the trial court employed a method described by other jurisdictions as "quasi-quantum meruit" recovery. *See* 56 A.L.R. 5th at 102-03.

> [T]he court seemed to employ a "quasi-quantum meruit" approach in that it held that the attorney was entitled to a percentage of the amount awarded the client but that the percentage was to be determined by limiting the sum due from the client to that recovered by the successor attorney and apportioning it by comparing the nature and amount of the work done by the subject attorney to that performed by the successor attorney.

Id. (referring to *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La. 1978)); *see also Goldstein and Price, P.C. v. Tonkin & Mondl, L.C.*, 974 S.W.2d 543 (Mo. Ct. App. 1998); *Gary E. Rosenberg, P.C. v. McCormack*, 250 A.D.2d 679, 672 N.Y.S.2d 892 (1998). *But see Jones & Granger v. Johnson*, 788 So.2d 381 (Fla. Ct. App. 2001)) (attorney not entitled to portion of award, but only quantum meruit).

We hold that in North Carolina, a trial court situated as the one in the present case may employ such a method if it believes, in its discretion, that such a method aptly characterizes what the discharged attorney is entitled, or is as much as he deserves.

Therefore, as we find that the trial court did not abuse its discretion in any manner in handling the present matter, its ruling and order is

Affirmed.

Judges WYNN and ELMORE concur.

MURPHY FAMILY FARMS AND MURPHY FARMS, INC. D/B/A MURPHY FAMILY FARMS, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT

No. COA02-1205

(Filed 16 September 2003)

1. Environmental Law— hog waste—violation of water quality standards

A de novo review revealed that the trial court erred in an action involving water violations and hog waste by failing to uphold the eight violations of the water quality standards for dissolved oxygen, because the water discharged by petitioner con-

tinued to be intermixed with the waters of the State thus allowing respondent to assess a penalty under N.C.G.S. § 143-215.6A for each day that the violation continued.

2. Environmental Law— hog waste—violation of water quality standards—notice requirements

The trial court did not err in an action involving water violations and hog waste by setting aside the two penalties assessed by EMC for violations of notice requirements of petitioner's permit, because: (1) the pumping of sand, grit, and wastewater into Lagoon 3 was not an interruption that caused the emergency action plan to be initiated; and (2) there was no requirement for petitioner to make a five-day written report when there was no requirement for petitioner to make a 24-hour report that sand, grit, and wastewater were transferred from the innovative treatment system to Lagoon 3.

3. Costs—expert deposition—investigative and enforcement costs

Although the trial court did not abuse its discretion in an action involving water violations and hog waste by taxing the deposition costs for petitioner's expert against respondent EMC, it did abuse its discretion by reducing the amount of the investigative and enforcement costs, because: (1) the trial court made no findings about the reasonableness of the enforcement costs or whether they revealed violations as required by N.C.G.S. § 143-215.3(a)(9); and (2) there was no authority for the trial court to reduce these costs commensurate with the reduction in the amount of penalties assessed.

Judge WYNN dissenting.

Appeal by respondent from judgment entered 15 May 2002 by Judge Benjamin G. Alford in Duplin County Superior Court. Heard in the Court of Appeals 21 May 2003.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Henry W. Jones, Jr. and Brian S. Edlin, for petitioners-appellees.

Roy Cooper, Attorney General, by Jill B. Hickey, Assistant Attorney General, and Francis W. Crawley, Special Deputy Attorney General, for the State.

STEELMAN, Judge.

Respondent, the North Carolina Department of Environment and Natural Resources (DENR), appeals a judgment that reversed portions of a final agency decision involving water violations and hog waste. For the reasons discussed herein, we affirm in part and reverse in part.

Petitioner, Murphy Family Farms (Murphy), operates a hog production facility known as Vestal Farms in Duplin County, North Carolina. Prior to 1998, Murphy treated its animal waste in five lagoons. On 19 June 1998, Murphy obtained a permit to operate an innovative waste treatment system. This system was used in lieu of the lagoons to treat the animal waste. The innovative system was a "closed loop system" which treated the waste and then recycled the water to the hog operations. Murphy's permit provided that if the innovative system failed, then the waste could be temporarily diverted to the five lagoons.

Prior to April 1999, sand and grit accumulated in the aeration basin of the innovative treatment system. To correct this problem, Murphy pumped 120 cubic yards of sand and grit and 170,000 gallons of wastewater into Lagoon 3 on 16-18 April 1999. On 19 April 1999, Lagoon 3 breached and discharged over one million gallons of wastewater into Persimmon Branch of the Cape Fear River Basin.

After the breach, the Division of Water Quality of DENR performed tests each day from 19 April 1999 to 26 April 1999 at five sample stations along Persimmon Branch. These tests showed violations of the dissolved oxygen water quality standards on each of the eight days. The tests also showed violations of fecal coliform bacteria standards on 19-23 April 1999.

DENR assessed civil penalties against Murphy for violations of Chapter 143 as follows:

$4,000	for making an outlet to the waters of the State without a permit required by G.S. 143-215.1(a)(1).
$26,000	for 8 of 8 violations of G.S. 143-215.1(a)(6) and NCAC 2B.0211(3)(b) by exceeding the water quality standard for dissolved oxygen over the period April 19 through April 23, 1999.
$3,250	for one violation of G.S. 143-215.1(a)(1) and NCAC 2B.0211(3)(e) by exceeding the water quality standard

for fecal coliform bacteria over the five-day period April 19 through April 23, 1999.

$1,250	for one violation of G.S. 143-215.6A(a)(2) by failure to comply with Permit No. AWI310082, Part II, Condition 4 (to divert stormwater from the animal wastewater facility).
$1,250	for one violation of G.S. 143-215.6A(a)(2) by failure to comply with Permit No. AWI310082, Part III, Condition 6g (failure to notify the Regional Office within 24 hours following any interruptions or failures of the animal waste management system).
$1,250	for one violation of G.S. 143-215.6A(a)(2) by failure to comply with Permit No. AWI310082, Part III, Condition 6 (failure to provide a written report to the Regional Office within 5 calendar days of the lagoon failure).
$37,000	TOTAL CIVIL PENALTY, which is 25.7 percent of the maximum penalty authorized by G.S. 143-215.6A.
$3,650.33	Enforcement costs
$40,650.33	TOTAL AMOUNT DUE

Murphy requested a contested case hearing before an administrative law judge (ALJ). The ALJ entered a recommended decision as follows: (1) a reduction in the civil penalties from $37,000.00 to $9,750.00; and (2) a proportional reduction in enforcement costs to $963.60. The ALJ reduced the number of dissolved oxygen violations from eight to one. He further reduced the amount of the penalties for the dissolved oxygen and fecal coliform bacteria violations from $3,250.00 to $2,250.00 per violation and stated that Murphy did not violate the notice provisions of its permit. Both parties appealed.

On 19 February 2001, the Environmental Management Commission (EMC) rendered a final agency decision. The EMC did not adopt portions of the ALJ's recommended decision, but reduced the penalties to $32,500.00 due to mathematical errors. It found eight violations of the dissolved oxygen levels and two notice violations. Enforcement costs of $3,650.33 were awarded. Petitioner filed a petition for judicial review in the Duplin County Superior Court on 26 March 2001.

The trial court refused to uphold the penalties as determined by the EMC. The trial court ordered that petitioner pay: (1) $4,000.00 for making an outlet to State waters without a permit; (2) $2,250.00 for one violation of the water quality standards for dissolved oxygen; (3) $2,250.00 for one violation of exceeding the water quality standard for fecal coliform bacteria; (4) $1,250.00 for one violation of failing to divert storm water from the system; and (5) $1,011.14 for investigation and enforcement costs. The trial court found no notice violations under petitioner's permit. Respondent appeals.

In reviewing the trial court's order on a final agency decision, this Court must determine whether the trial court: (i) applied the correct standard of review; and (ii) whether it did so properly. *Dillingham v. North Carolina Dep't. of Human Resources*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). The standard of review by the trial court is determined by the type of error asserted; errors of law are reviewed *de novo*, while the 'whole record test' is applied to allegations that the agency decision was not supported by the evidence, or was arbitrary and capricious. *Woodburn v. N.C. State Univ.*, 156 N.C. App. 549, 552 577 S.E.2d 154, 156 (2003) (citations omitted); *Hedgepeth v. North Carolina Div. of Servs. for the Blind*, 142 N.C. App. 338, 346-47, 543 S.E.2d 169, 174 (2001).[1] Here, the allegations contend that the agency's decision was an error of law. Thus, the trial court appropriately applied *de novo* review.

[1] In its first assignment of error, respondent argues that the trial court erred in failing to uphold the eight violations of the water quality standards for dissolved oxygen. We agree.

The trial court concluded:

> [Petitioner] committed one violation of N.C. Gen. Stat. § 143.215.1(a)(6) and 15A N.C. Admin. Code 2B .0211(3)(b) by causing or permitting any water, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards for dissolved oxygen. The Final Agency Decision was affected by other error of law when it interpreted and applied N.C. Gen. Stat.

1. Section 150B-51(c) now provides that "[i]n reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the [ALJ's] decision, the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law." N.C. Gen. Stat. § 150B-51(c) (2003). However, this provision only applies to cases commenced on or after 1 January 2001 and is not applicable to the instant case, which was filed on 22 September 1999.

> § 143.215.1(a)(6) and 15A N.C. Admin. Code 2B .0211(3)(b) to conclude [petitioner] committed eight separate violations on the facts, prejudicing the substantial rights of [petitioner]. [Petitioner's] undisputed evidence demonstrated that all of the contents of lagoon number 3 discharged on 19 April 1999. Pursuant to N.C. Gen. Stat. § 150B-51(b), the Final Agency Decision is therefore modified to conclude [petitioner] committed one violation of N.C. Gen. Stat. § 143.215.1(a)(6) and 15A N.C. Admin. Code 2B .0211(3)(b).

The EMC has statutory authority to set standards for water quality. *See* N.C. Gen. Stat. § 143-214.1(a)(1) (2001). The North Carolina Administrative Code, in 15A N.C. Admin. Code 2B .0211(3)(b), sets forth the applicable standard for dissolved oxygen in the waters of this State. Section 143-215.1 of the North Carolina General Statutes provides, in pertinent part:

> (a) Activities for Which Permits Required.—No person shall do any of the following things or carry out any of the following activities unless that person has received a permit from the Commission and has complied with all conditions set forth in the permit:
>
> . . . .
>
> (6) Cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of this Article.

N.C. Gen. Stat. § 143-215.1(a)(6) (2001). Murphy was penalized for discharging waste into the waters of this State resulting in a violation of the dissolved oxygen standard under 2B .0211(3)(b) of the Administrative Code continuously for eight days.

There is no factual dispute that Murphy discharged wastewater into the waters of this State. Nor is there any question that this discharge resulted in a violation of the dissolved oxygen standards. The issue is whether there was one violation, based upon a single discharge on 19 April 1999, or eight violations from 19 April through 26 April 1999.

The provisions of N.C. Gen. Stat. § 143-215.1(a)(6) are stated in the disjunctive and not in the conjunctive. The prohibition contained in this section applies to waste "discharged to *or* in any manner intermixed with the waters of the State[.]" (Emphasis added). Murphy's violation under this section was that it caused its waste to be "intermixed" with the waters of this State in violation of the applicable water quality standards. This violation was ongoing for a period of eight days.

Section 143-215.6A provides that respondent may assess a penalty for each day that a violation continues:

> (a) A civil penalty of not more than twenty-five thousand dollars ($ 25,000) may be assessed by the Secretary against any person who:
>
> (1) Violates any classification, standard, limitation, or management practice established pursuant to G.S. 143-214.1, 143-214.2, or 143-215
>
> . . . .
>
> (b) If any action or failure to act for which a penalty may be assessed under this section is continuous, the Secretary may assess a penalty not to exceed twenty-five thousand dollars ($ 25,000) per day for so long as the violation continues, unless otherwise stipulated.

N.C. Gen. Stat. § 143-215.6A (2001). Because the waste discharged by Murphy continued to be intermixed with the waters of the State, respondent was entitled to assess a penalty under section 143-215.6A for each day that the violation continued. The trial court erred in reducing the number of dissolved oxygen violations from eight to one.

[2] In its second assignment of error, respondent argues that the trial court erred in setting aside the two penalties it assessed for violations of notice requirements of Murphy's permit. We disagree.

Respondent alleged that petitioner violated Section IV, subsection 6(g) of its permit by failing to notify respondent within 24 hours following the interruption or failure of the animal waste management system and failing to notify respondent in writing within five days of the lagoon failure. The permit provides that:

6. Regional Notification

The Permittee shall report by telephone . . . as soon as possible, but in no case more than 24 hours following first knowledge of the occurrence of any of the following events:

. . . .

(g) Any interruptions or failures of the animal waste management system that causes the emergency action plan to be initiated.

The first notice violation penalty was assessed for a failure to notify respondent within 24 hours of the time that sand, grit and wastewater was transferred from the innovative treatment system to Lagoon 3 on 16-18 April 1999. Under the provisions of paragraph 6(g), the notice requirement was triggered only by an interruption or failure "that causes the emergency action plan to be initiated." The pumping of sand, grit and wastewater into Lagoon 3 was an interruption of the innovative system. However, it was not an interruption that caused the emergency action plan to be initiated. Such a plan was to be implemented only "in the event that wastes from [the] operation [were] leaking, overflowing or running off site." None of these events occurred on 16-18 April 1999, the time period for which the penalty was assessed.

The second notice violation penalty was assessed for a failure to file a written report within five calendar days with respondent's regional office that sand, grit and wastewater were transferred from the innovative treatment system to Lagoon 3 on 16-18 April 1999. Under the terms of the permit, this reporting requirement was a supplement to the 24-hour reporting requirement discussed above. Since there was no requirement for petitioner to make a 24-hour report, there was no requirement to make a five-day written report. This assignment of error is without merit.

[3] In its third assignment of error, respondent argues that the trial court erred by taxing the costs for petitioner's expert against respondent and by reducing the amount of the investigative costs. We agree as to the investigative costs.

It is within the trial court's discretion to tax costs against a party. N.C. Gen. Stat. § 6-20 (2001). Whether deposition expenses may be taxed as part of the costs is also within the trial court's discretion. *Alsup v. Pitman*, 98 N.C. App. 389, 390 S.E.2d 750 (1990). In *Dixon*,

Odom & Co. v. Sledge, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982), this Court held that "even though deposition expenses do not appear expressly in the statutes they may be considered as part of 'costs' and taxed in the trial court's discretion." The deposition expenses must be reasonably necessary. *Muse v. Eckberg*, 139 N.C. App. 446, 533 S.E.2d 268 (2000); *Sealey v. Grine*, 115 N.C. App. 343, 444 S.E.2d 632 (1994).

The trial court's discretion will not be disturbed on appeal absent an abuse of discretion. *Alsup*, supra. Respondent did not contend that the costs were not reasonable. We hold that the trial court did not abuse its discretion, and affirm the trial court's decision to tax the deposition costs of petitioner's expert.

As to the enforcement costs, the final agency decision stated that "The record supports total investigation and enforcement costs of three thousand six hundred fifty dollars and thirty-three cents ($3,650.33) which are assessed pursuant to N.C.G.S. § 143-215.3(a)(9)." The trial court concluded that "Investigative costs are modified commensurate with the Final Agency Decision as reversed or modified by the foregoing Conclusions of Law" and reduced the investigation enforcement costs to $1,011.14.

Section 143-215.3(a)(9) provides that:

> If an investigation conducted pursuant to this Article or Article 21B of this Chapter reveals a violation of any rules, standards, or limitations adopted by the Commission pursuant to this Article or Article 21B of this Chapter, or a violation of any terms or conditions of any permit issued pursuant to G.S. 143-215.1 or 143-215.108, or special order or other document issued pursuant to G.S. 143-215.2 or G.S. 143-215.110, the Commission may assess the reasonable costs of any investigation, inspection or monitoring survey which revealed the violation against the person responsible therefor.

N.C. Gen. Stat. § 143-215.3(a)(9) (2003). Thus, any investigative and enforcement costs assessed by the EMC must: (1) be reasonable; and (2) have revealed a violation against the responsible person. The trial court made no findings about the reasonableness of the enforcement costs or whether they revealed violations. Rather, the trial court reduced these costs commensurate with the reduction in the amount of penalties assessed. We find no authority for such an approach in section 143-215.3(a)(9). In the instant case, the investigation by

respondent found numerous violations of various statutes. We hold that the trial court erred in reducing the investigative and enforcement costs.

AFFIRMED IN PART; REVERSED IN PART.

Judge HUDSON concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

Because I disagree with the majority's holding that the trial court erroneously concluded only one violation of N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C. Admin. Code 2B .0211 (3)(b) occurred, I dissent.

N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C. Admin. Code 2B .0211 (3)(b), prohibit any person from causing or permitting any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards delineated in the DENR regulations without a permit. In this case, Murphy Family Farms indisputably violated dissolved oxygen standards by discharging waste into North Carolina waters. However, under N.C. Gen. Stat. § 143-215.1(a)(6) and 15A N.C. Admin. Code 2B .0211 (3)(b), the discharge amounted to one violation, not a separate violation for each day that DENR chose to test the waters[2].

The majority, recognizing N.C. Gen. Stat. § 143-215.1(a)(6) is stated in the disjunctive, held Murphy's violation "was that it caused its waste to be intermixed with the waters of this State in violation of the applicable water quality standards for an ongoing period of eight days." However, "[i]n construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with rea-

2. After the lagoon's breach, the Division of Water Quality of the Department of Environment and Natural Resources established a monitoring period from 19 April 1999 through 26 April 1999, during which it conducted water quality evaluations. Although the water quality was below acceptable levels on each of these eight days, the Division of Water Quality did not conduct any tests after 26 April 1999. Nevertheless, Kerr T. Stevens, Director of Water Quality, testified during his deposition that if the testing had indicated substandard water quality levels after 26 April 1999, Murphy would have been cited for additional violations.

son and common sense and did not intend untoward results." *State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978); *see also Hilgreen v. Sherman's Cleaners & Tailors, Inc.*, 225 N.C. 656, 36 S.E.2d 252 (1945) (stating that (1) statutes imposing a civil penalty must be strictly construed and (2) "a literal reading [of a statute] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and their legislative purpose).

N.C. Gen. Stat. § 143-215.1(a)(6) states:

> (a) Activities for Which Permits Required.—No person shall do any of the following things or carry out any of the following activities unless that person has received a permit from the Commission and has complied with all conditions set forth in the permit:
>
> (6) Cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of this Article.

As the majority stated, these provisions are stated in the disjunctive and not in the conjunctive. However,

> the popular use of 'or' and 'and' is so loose, and so frequently inaccurate, that it has infected statutory enactments. For this reason, their strict meaning is more readily departed from than that of other words. In this respect, it is clear that the courts have power to change and will change 'and' to 'or' and vice versa, whenever such conversion is required by the context, or is necessary to harmonize the provisions of a statute and give effect to all its provisions, or to save it from unconstitutionality, or, in the general, to effectuate the obvious intention of the legislature.

Sale v. Johnson, 258 N.C. 749, 755-56, 129 S.E.2d 465, 469 (1963).

By enacting N.C. Gen. Stat. § 143-215.1(a)(6), the legislature intended to prevent the discharge or intermixing of pollutants with the waters of our State. *See* N.C. Gen. Stat. § 143-211. Under N.C. Gen.

Stat. § 143-213(9), the legislature interpreted 'discharge of waste' to include "discharge, spillage, leakage, pumping, placement, emptying, or dumping into the waters of the State." Moreover, the Oxford English Dictionary defines 'intermix' as "to mix together, mix intimately or intermingle."

In this case, all of the waste from the Murphy lagoon was discharged in one day from one lagoon breach. This single discharge caused the intermixing of the waste with the waters of this State. Under these facts, without a clear mandate from our legislature, I believe it is inappropriate to impose civil penalties (based on the number of days DENR chose to test the waters) when a single event caused the discharge and the intermixing.

STATE OF NORTH CAROLINA v. GERALD HASKINS, DEFENDANT

No. COA02-1225

(Filed 16 September 2003)

1. Firearms and Other Weapons— possessing a weapon on educational property—criminal intent—willfulness

The trial court did not err in a prosecution of a bail bondsman for possessing a weapon on educational property by failing to instruct on criminal intent or willfulness, because: (1) N.C.G.S. § 14-269.2 by its plain terms does not include any reference to criminal intent or mens rea; (2) the purpose of N.C.G.S. § 14-269.2 is to deter students and others from bringing any type of gun onto school grounds based on the increased necessity for safety in our schools; and (3) contrary to defendant's assertion that the exemptions under N.C.G.S. § 14-269.2 violate his equal protection rights, the exemptions bear a rational relationship to a legitimate government interest.

2. Firearms and Other Weapons— possessing a weapon on educational property—affirmative defense of reasonable necessity unavailable

The trial court did not err in a prosecution of a bail bondsman for possessing a weapon on educational property by instructing the jury that the affirmative defense of reasonable necessity was not a defense to N.C.G.S. § 14-269.2 and by failing to allow

defense counsel to read the law of necessity to the jury, because: (1) defendant bail bondsman could have left his gun safely off campus and then notified the school principal that an armed fugitive was on the premises and that the school needed to be secured; (2) defendant could have notified the police or could have asked the school principal to notify the police; and (3) defendant could have avoided the statutory violation by leaving his gun in a locked car or with one of his colleagues and then entered school grounds.

3. Firearms and Other Weapons— possessing a weapon on educational property—bail bondsman—state actor exemption inapplicable

The trial court did not err in a possessing a weapon on educational property case by concluding as a matter of law that defendant was not a state actor exempt from the prohibitions of N.C.G.S. § 14-269.2 even though defendant was a bondsman attempting to arrest a fugitive, because: (1) bail bondsmen and runners are not officers of the state; and (2) the statutory right of arrest given to a surety under N.C.G.S. § 58-71.30 does not create a law enforcement officer in the person of the bail bondsman.

Appeal by defendant from judgment entered 10 April 2002 by Judge Wade Barber in Superior Court, Orange County. Heard in the Court of Appeals 19 August 2003.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Miles & Montgomery, by Mark Montgomery for the defendant-appellant.

WYNN, Judge.

By this appeal, defendant, Gerald Haskins, presents the following issues for our consideration: (I) Whether the trial court's failure to instruct on criminal intent constitutes error; (II) Whether the trial court's failure to give an instruction on the affirmative defense of reasonable necessity and to allow defense counsel to read the law of necessity to the jury constituted reversible error; and (III) Whether the trial court erroneously concluded as a matter of law that defendant was not a state actor exempt from the prohibitions of G.S. § 14-269.2. After careful review, we find no error in the proceedings below.

On the morning of 22 March 2001, defendant, a licensed Bail Runner, was in pursuit of Lakendris McAdoo, a fugitive facing felony drug charges.[1] McAdoo had failed to appear for a court appearance and a court order had been issued for his arrest. Defendant worked for the bonding company that had issued McAdoo's bond. He, along with three other bondsmen, searched for McAdoo intending to arrest him under their statutory authority as Bondsmen. Each of the bondsmen wore jackets with the word "Bondsmen" written across the back.

Pertinent to this appeal, defendant pursued McAdoo to an elementary school, entered the school with a gun in his holster, asked a faculty member if she had seen anyone, and then exited the back of the school. Meanwhile, school personnel called the Orange County Sheriff's Department and placed the school on "lockdown," a procedure in which the teachers keep the children in locked classrooms for their safety. Shortly thereafter, an investigator arrived at the school, approached defendant, retrieved his weapon and arrested him for possessing a weapon on educational property in violation of G. S. § 14-269.2(b).

Following his conviction of the charged offense by a jury, the trial court sentenced defendant to a suspended sentence of 3 to 4 months, conditioned upon 24 months of supervised probation and payment of certain monetary conditions. Defendant appeals.

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[1] On appeal, defendant first contends that although N.C. Gen. Stat. § 14-269.2 does not explicitly contain an element of criminal intent or *mens rea*, willfullness or unlawfulness should be read into the statute because, as stated by the United States Supreme Court in *Morrissette v. U.S.*, strict liability offenses are disfavored in our criminal jurisprudence. We disagree.

N.C. Gen. Stat. § 14-269.2 (2001) in pertinent part states:

> Weapons on campus or other educational property.
>
> (b) It shall be a Class I felony for any person to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

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1. For simplicity, we refer to defendant as a "bondsman" throughout this opinion.

The plain terms of this provision do not include any reference to criminal intent or *mens rea*. "It is true that an act may become criminal only by reason of the intent with which it is done, but the performance of an act which is expressly forbidden by statute may constitute an offense in itself without regard to the question of intent." *State v. Lattimore*, 201 N.C. 32, 34, 158 S.E. 741, 742 (1931). "The Legislature, unless it is limited by constitutional provisions imposed by the State and Federal Constitutions, has the inherent power to define and punish any act as a crime, because it is indisputedly a part of the police power of the State." *State v. Anderson*, 3 N.C. App. 124, 126, 164 S.E.2d 48, 50 (1968).

Defendant points to the U.S. Supreme Court's decision in *Morrissette v. U.S.*, 342 U.S. 246 (1952), as standing for the proposition that there can be no criminal liability without criminal intent. However, in *Morrissette*, the Court considered the absence of criminal intent in a statutory federal crime whose elements contained terms borrowed from the common law. The Court subsequently interpreted its holding in *Morrissette* to mean that,

> where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

United States v. Freed, 401 U.S. 601, 607-08, 28 L. Ed. 2d 356, 361-62 (1971). Moreover, in *Morrissette*, the Court recognized that although "the presence of a vicious will or *mens rea* was a long requirement of criminal responsibility, . . . the list of exceptions grew, especially in the expanding regulatory area involving activities affecting public health, safety, and welfare." *Id.*; *see also Morrissette*, 342 U.S. at 252-59, 96 L. Ed. 2d. at 295-98. Thus, the U.S. Supreme Court has upheld the imposition of criminal penalties without the finding of criminal intent on the part of the violator. *See id.* (discussing *U.S. v. Dotterweich*, 320 U.S. 277, 284, 88 L. Ed. 48, 53).

The statute in this case, N.C. Gen. Stat. § 14-269.2, was enacted for the purpose of "deter[ring] students and others from bringing any type of gun onto school grounds" because of "the increased necessity for safety in our schools." *In re Cowley*, 120 N.C. App. 274, 276, 461 S.E. 2d 804, 806 (1995). Accordingly, *Morrissette* does not require the insertion of a criminal intent into N.C. Gen. Stat. § 14-269.2. *See also*

State v. Yarboro, 194 N.C. 498, 503, 140 S.E. 216, 218 (1927) (stating that "by virtue of the police power the law-making body may enact laws for the enjoyment of private and social life, the beneficial use of property, the security of the social order, and the prevention and punishment of injuries, as well as for the protection of the life, safety, health, morals, and comfort of the citizen").

Defendant also argues without a *mens rea* element, N.C. Gen. Stat. § 14-269.2 offends the Equal Protection Clause of the North Carolina and United States Constitution.

> The Equal Protection Clause of Article I, § 19 of the North Carolina Constitution and the Equal Protection Clause of § 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person equal protection of the laws. . . . To determine if a regulation violates either of these clauses, North Carolina courts apply the same test. The court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the regulation meets the relevant standard of review. Strict scrutiny applies when a regulation classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right. If a [statute] receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation is substantially related to an important government interest. If a [statute] draws any other classification, it receives only rational-basis scrutiny, and the party challenging the [statute] must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid.

DOT v. Rowe, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001).

In this case, defendant contends N.C. Gen. Stat. § 14-269.2 "without *mens rea* would violate Equal Protection by making irrational distinctions between those guilty of a felony and those not." As an example, defendant argues a school custodian cleaning the building at night carrying a weapon for protection would be guilty of a Class I felony whereas a volunteer fireman wielding a shotgun during an elementary school fire prevention talk would be immune from prosecution. In other words, defendant argues N.C. Gen. Stat. § 14-269.2

creates a constitutionally impermissible distinction between those persons exempt from prosecution in subsection (g) and those persons lacking criminal intent but yet subject to prosecution. Such a distinction receives rational basis review, which requires the party challenging the statute to show that it bears no rational relationship to any legitimate government interest. *See id.* If the party cannot so prove, the regulation is valid. *See id.*

As stated, N.C. Gen. Stat. § 14-269.2 was enacted for the purpose of "deter[ring] students and others from bringing any type of gun onto school grounds" because of "the increased necessity for safety in our schools." *Cowley*, 120 N.C. App. at 276, 461 S.E. 2d at 806. Thus, any person who possesses or carries, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school is guilty of a Class I felony. *See* N.C. Gen. Stat. § 14-269.2. However, G. S. § 14-269.2 does not apply to (1) a weapon used solely for education or school sanctioned ceremonial purposes, (2) a weapon used in a school-approved program conducted under the supervision of an adult whose supervision has been approved by the school authority, (3) firefighters, (4) emergency service personnel, (5) N.C. Forest Service personnel, (6) certain people, such as the military, law enforcement and the national guard, acting in their official capacity, (7) any private police employed by an educational institution when acting in the discharge of official duties, (8) home schools, or (9) a person who takes possession of a weapon from another person and immediately delivers the weapon, as soon as practicable, to law enforcement authorities. *See* N.C. Gen. Stat. §§ 14-269.2(g)-(h) and 14-269(b). Thus, for example, demonstrations for educational purposes, such as civil war re-enactments, emergency personnel responding to a school crisis or emergency situation and a teacher or principal taking a gun away from a student are exempt from prosecution under this statute. Accordingly, we conclude the exemptions to N.C. Gen. Stat. § 14-269.2 bear a rational relationship to a legitimate government interest. Indeed, the exemptions strike an appropriate balance between the safety of our children and the furtherance of education in this state.

In his next argument, defendant contends the trial court's failure to instruct on the element of willfulness constitutes reversible error because the defendant was indicted for willfully, feloniously, and unlawfully possessing a weapon on educational property. However, the use of the words willfully, feloniously, and unlawfully in an indict-

ment are not an indication of the level of *mens rea* to be proven beyond a reasonable doubt in order to convict defendant of the indicted offense. Rather, these words are used to characterize the offense as a felony offense and to put the defendant on notice that he must defend against a felony charge. *See State v. Callett*, 211 N.C. 563, 191 S.E. 27 (1937) (holding that the failure to use the word feloniously as characterizing the charge in those cases where the criminal offense is punishable with death or imprisonment renders the indictment fatally defective); *but see State v. Blakney*, 156 N.C. App. 671, 673, 577 S.E.2d 387, 389 (2003) (stating that "while its inclusion is still the better practice, the word feloniously is not required for a valid felony indictment if the indictment references the specific statute making the crime a felony").

Accordingly, even assuming defendant acted without criminal intent, the trial court's refusal to instruct on criminal intent or to allow defendant to read the law on strict liability to the jury did not constitute reversible error because we conclude N.C. Gen. Stat. § 14-269.2 does not include a *mens rea* element.

[2] Next, defendant contends the trial court erred in instructing the jury that necessity was not a defense to N.C. Gen. Stat. § 14-269.2. Instead, defendant argues the trial court should have given his requested special instruction on necessity and should have allowed defendant's motion to read the law on necessity to the jury. We disagree.

"In North Carolina, requests for special jury instructions are allowable pursuant to G.S. §§ 1-181 and 1A-1, Rule 51(b). It is well settled that the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case. However the trial court may exercise discretion to refuse instructions based on erroneous statements of the law." *State v. Napier*, 149 N.C. App. 462, 463-64, 560 S.E.2d 867, 868-69 (2002).

"Under the necessity defense, a person is excused from criminal liability if he acts under a duress of circumstances to protect life or limb or health in a reasonable manner and with no other acceptable choice. The rationale behind the defense is based upon the public policy that the law ought to promote the achievement of higher values at the expense of lesser values, and that sometimes the greater good for society will be accomplished by violating the literal language of the

criminal law. If the harm which will result from compliance with the law is greater than that which will result from violation of it a person is justified in violating it." *State v. Thomas*, 103 N.C. App. 264, 265, 405 S.E.2d 214, 215 (1991).

In the case *sub judice*, defendant contends that upon learning someone saw a gun in the fugitive's possession, he became concerned about the safety of the elementary school children and pursued the fugitive onto the school grounds out of a need to protect the children. He further stated that he was not concerned about the money the bonding company would lose due to the fugitive's breach of his bail conditions. Whereas we agree the protection of elementary school children is a laudable goal, we conclude the necessity defense was not applicable in this case because the evidence, even in the light most favorable to defendant, showed that several alternatives were available to defendant. First, defendant could have left his gun safely off campus and then notified the school principal that an armed fugitive was on the premises and that the school needed to be secured. Indeed, after a teacher notified the principal an armed man was on campus, the school entered "lockdown". Second, defendant could have notified the police or could have asked the school principal to notify the police. Indeed, a sheriff's deputy arrived at the school within three minutes after notification. Third, defendant could have avoided the statutory violation by leaving his gun in a locked car or with one of his colleagues and then entering school grounds. Accordingly, we find the trial court correctly instructed the jury that the defense of necessity did not apply here as a matter of law and appropriately denied defendant's request for a special instruction on necessity and his request to read the law of necessity to the jury.

[3] In his final argument, defendant contends that because he was a bondsman attempting to arrest a fugitive, he was an officer of the state acting in the performance of his official duties and was therefore excused from felony liability pursuant to N.C. Gen. Stat. §§ 14-269.2(g)(1a) and 14-269(b)(2), (4) (2001) (exempting United States civil and law enforcement officers and state, county, city or town officers charged with the execution of the laws of the State when they are acting in the discharge of their duties from the prohibitions of 14-269.2). We disagree.

Bail bondsmen and runners are not officers of the State. A public office is a position created by the constitution or statutes and a public official exercises a portion of the sovereign power and makes dis-

cretionary decisions. *See Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999). Bail bondsmen and runners do not hold a public office created by our state constitution or statutes; although the positions are defined by statute, they are regulated by statutory provisions that are enforced by the Commissioner of Insurance. *See* N.C. Gen. Stat. § 58-71-5 (2001) (providing the "Commissioner shall have full power and authority to administer the provisions of this Article, which regulates bail bondsmen and runners and to that end to adopt and promulgate rules and regulations to enforce the purposes and provisions of this Article"). Moreover, the statutory right of arrest to a surety under N.C. Gen. Stat. § 58-71-30, does "not create a law enforcement officer in the person of the bail bondsman". *State v. Mathis*, 349 N.C. 503, 513, 509 S.E.2d 155, 161 (1998). Indeed, the statutory right of arrest simply codifies a part of the common law powers of sureties, which in the case of a bail bondsman, are:

> based on the underlying source of the bondsman's authority to recapture the principal which derives from the contractual relationship between the surety and the principal. Essentially, the bond agreement provides that the surety post the bail, and in return, the principal agrees that the surety can retake him at any time, even before forfeiture of the bond. By entering into the contract, not only does the principal *voluntarily* consent to be committed to the custody of the surety, but under common law, he also implicitly agrees that the surety or the surety's agent may break and enter his home and use reasonable force in apprehending him. The contract establishes the surety's and bondsman's right of recapture as private in nature, with the understanding that the government will not interfere. Thus, this common law right of recapture established that seizure of the principal by the surety is technically not an "arrest" at all and may be accomplished without process of law.

Id. at 510, 509 S.E.2d at 159 (stating also that "the term arrest in the context [of a bail bondsman arresting a fugitive] is meant to convey an apprehension, seizure or recapture" and not the traditional meaning of "depriving another of his liberty"). Therefore, bail bondsmen and runners are not officers of the State exercising the power of the sovereign in a discretionary manner but rather are sureties regulated by statutory provisions that codify in part the common law governing the surety-principal relationship between bondsmen and the criminally accused. Accordingly, the trial court did not err when it concluded as a matter of law that defendant was not an officer of the

State, instructed the jury that none of the exemptions in N.C. G.S. § 14-269.2 were applicable to defendant, and instructed the jury that a bondsman had authority to seize a fugitive.

No error.

Judges McGEE and HUDSON concur.

ALLEN WELTER AND WIFE, BARBARA WELTER, PETITIONERS-APPELLANTS v. ROWAN COUNTY BOARD OF COMMISSIONERS; ROWAN COUNTY ZONING BOARD OF ADJUSTMENT; AND MARION LYTLE, INDIVIDUALLY, RESPONDENTS-APPELLEES

No. COA02-1048

(Filed 16 September 2003)

Zoning— non-conforming use—meaning of discontinued use—judicial review

Whether a non-conforming go-cart track discontinued the non-conforming use during a lengthy period of repairs was remanded to the superior court for further review. The superior court should have exercised a de novo review of the ordinance's meaning of "discontinued use," and the case could not be disposed of by the Court of Appeals because the record was incomplete and further findings were required.

Appeal by petitioners from order dated 2 May 2002 by Judge Larry G. Ford in Superior Court, Rowan County. Heard in the Court of Appeals 17 April 2003.

Jonathan S. Williams; and Ketner & Associates, by John W. (Jay) Dees, II, for petitioners-appellants.

The Holshouser Law Firm, by John L. Holshouser, Jr., for respondents-appellees.

McGEE, Judge.

The Rowan County Board of Commissioners (Commissioners) adopted the Rowan County Zoning Ordinance (the zoning ordinance) on 19 January 1998, covering the unincorporated areas in Rowan County. Allen and Barbara Welter (petitioners) bought an existing go-

cart track, known as Millbridge Speedway (the speedway), as an investment in 1989. The speedway was built prior to the adoption of the zoning ordinance. Under the zoning ordinance, the speedway location was zoned rural agricultural. The speedway, therefore, became a nonconforming use under the zoning ordinance. Go-cart tracks are not specifically defined under the zoning ordinance but are covered under "amusement and recreational services" in the zoning ordinance. Article VII, Section 8, of the zoning ordinance provides that nonconforming uses "left vacant, abandoned or discontinued for a period of 360 days shall only be re-established as a conforming use." "Discontinue" is defined in the zoning ordinance as "to stop or cease the use of a property."[1]

In the spring of 1999, a tenant of the speedway left the premises damaged and unoccupied. Petitioners could not find an acceptable tenant for the summer of 1999. In the fall, a tenant agreed to lease the speedway if it was repaired. A lease was prepared covering the term from September 1999 to August 2002. The damage to the track was extensive and between December 1999 and the fall of 2000 petitioners paid for equipment, floodlights, cement work, scales, a new 7,000 gallon water tank, fencing, a public address system and plumbing, welding, and electrical services. Petitioner Allen Welter and others worked on weekends making the necessary repairs, which totaled approximately $30,000.00. Petitioner Allen Welter and the tenant testified that while the speedway was being repaired, the tenant, his family and about thirty friends, as well as petitioners and petitioners' grandchildren, practiced racing on the speedway. The two further testified that they held private races and "played" around on the speedway with go-carts. These were not public events. No other events, for which tickets were sold and which were open to the public, were held during this period. The tenant paid rent until it became clear the speedway would not be ready for the summer 2000 season.

Residents living near the speedway contacted the zoning administrator, Marion Lytle (Lytle), in 2000 to discuss prohibiting reopening of the speedway. These residents sent letters to Lytle stating that the last races at the speedway were in 1999. Petitioner Barbara Welter met with Lytle on 30 January 2001. She agreed no races were held in the summer of 2000, but she presented numerous receipts for work

1. We note that in several of the documents in the record, both the Board of Adjustment and the zoning administrator defined "discontinue" as to "stop or cease the *regular* use of the property." However, the clear terms of the zoning ordinance do not include the modifier "regular" in its definition of "discontinue."

done on the speedway during 2000. Lytle sent a letter to petitioners on 26 February 2001, stating that race tracks, including go-cart race tracks, were not a permitted use in a residential agricultural district. Lytle concluded in the letter that "the property discontinued its *regular* use as a *public* go-kart speedway for a period of greater than 360 days" and could no longer be used as a "public speedway." (emphasis added).

Petitioners appealed Lytle's decision to the Rowan County Zoning Board of Adjustment (Board of Adjustment). Following a hearing, the Board of Adjustment upheld Lytle's decision. Petitioners filed a petition for a writ of certiorari with the superior court dated 21 May 2001. The superior court entered an amended order dated 5 November 2001 finding that the Board of Adjustment's decision lacked sufficient findings of fact for the court to review. The superior court remanded the matter to the Board of Adjustment and allowed petitioners to amend their pleadings. The Board of Adjustment made findings of fact that there was conflicting evidence about whether racing had occurred at the speedway since 1999 and entered a new order upholding Lytle's decision on 19 November 2001. The Board of Adjustment based its decision on the fact that no admission fees had been collected for more than 360 days. Petitioners filed an amended petition for writ of certiorari dated 14 February 2002 and respondents filed an amended answer on 20 February 2002. The superior court entered an order dated 2 May 2002 affirming the Board of Adjustment's decision.

Petitioners first argue that the superior court did not employ the appropriate standard of review of the Board of Adjustment's decision. Specifically, petitioners argue the Board of Adjustment considered only collection of admission fees by petitioners to determine whether petitioners had discontinued their use of the speedway.

Our Supreme Court has stated that

> the task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:
>
> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980).

Where the appealing party contends that the decision was unsupported by the evidence or was arbitrary and capricious, the trial court applies the " 'whole record' " test. *In re Appeal of Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998) (citations omitted). "The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (citation omitted). "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted).

However, if the appealing party contends the decision was based on an error of law, the trial court employs a *de novo* review. *Willis*, 129 N.C. App. at 501, 500 S.E.2d at 725 (citations omitted). "Under a *de novo* review, the superior court 'consider[s] the matter anew[] and freely substitut[es] its own judgment for the agency's judgment.' " *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). "Moreover, '[t]he trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.' " *Sun Suites Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 528, *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) (quoting *Sutton*, 132 N.C. App. at 389, 511 S.E.2d at 342).

When our Court reviews the decision of a trial court reviewing an agency decision,

> "the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly."

Mann Media, Inc., 356 N.C. at 14, 565 S.E.2d at 18 (citations omitted).

We now consider whether the superior court employed the appropriate standard of review and, if so, whether it applied that standard properly. Questions involving the interpretation of an ordinance are questions of law. *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 136-37, 431 S.E.2d 183, 186-87 (1993). Thus, the superior court should have applied *de novo* review to the Board of Adjustment's alleged misinterpretation of the ordinance. *Id.* As discussed above, the superior court " 'must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.' " *Sun Suites Holdings, LLC*, 139 N.C. App. at 272, 533 S.E.2d at 528 (quoting *Sutton*, 132 N.C. App. at 389, 511 S.E.2d at 342). The superior court, in affirming the Board of Adjustment's decision, made the following pertinent findings:

> 2) That the Rowan County Zoning Board of Adjustment made findings of fact pursuant to said Order, finding that the Petitioner's facility in question, to wit; Millbridge Speedway, was discontinued as public speedway for a period of more than 360 days, further finding that the term "discontinue" is defined in Article II, of the Rowan County Zoning Ordinance as "to stop or cease the regular use of the property", citing supporting testimony by various individuals who lived in the vicinity of Millbridge Speedway; . . .
>
> . . .
>
> 4) That the Rowan County Zoning Board of Adjustment further concurred with the ruling of Zoning Administrator that Millbridge Speedway had discontinued its regular use as a public speedway for greater than 360 days and that its use as a speedway is not permitted unless the property is rezoned to a classification which allows this use.

5) That this Court finds that the findings of fact and decisions of the Rowan County Zoning Board of Adjustment as above set forth were fully supported by competent, material and substantial evidence in the record filed with this Court pursuant to the Writ of Certiorari.

Review of the superior court's order shows the superior court did not employ the required *de novo* review of the Board of Adjustment's interpretation of the zoning ordinance, specifically in determining the meaning of the terms "discontinued use" and "use" in the ordinance as they relate to the present proceedings.

Based on a recent line of cases, instead of remanding such a case to the superior court for exercise of the proper *de novo* review of the zoning ordinance's interpretation, "an appellate court's obligation to review a superior court order for errors of law . . . can be accomplished by addressing the *dispositive issue(s)* before the agency and the superior court without examining the scope of review utilized by the superior court." *Eastern Outdoor, Inc. v. Board of Adjust. of Johnston Cty.*, 150 N.C. App. 516, 519, 564 S.E.2d 78, 80-81 (2002), *appeal dismissed*, 356 N.C. 670, 577 S.E.2d 116 (2003) (emphasis added) (quoting *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J. dissenting)). Since our Supreme Court reversed this Court's decision in *Capital Outdoor, Inc.*, adopting Judge Greene's dissent in a *per curiam* decision, 355 N.C. 269, 559 S.E.2d 547 (2002), our Court has addressed the *dispositive issues* before our Court in several recent opinions, despite the failure of the superior court to conduct the appropriate review or specify the review it was conducting of the administrative board's decision. *See, e.g., N.C. Dep't of Health & Human Servs. v. Maxwell*, 156 N.C. App. 260, 262-63, 576 S.E.2d 688, 690-91 (2003); *Shackleford-Moten v. Lenoir Cty. DSS*, 155 N.C. App. 568, 572-73, 573 S.E.2d 767, 770 (2002), *disc. review denied*, 357 N.C. 252, 582 S.E.2d 609 (2003); *Sack v. N.C. State Univ.*, 155 N.C. App. 484, 492, 574 S.E.2d 120, 127-28 (2002); and *Eastern Outdoor, Inc.*, 150 N.C. App. at 519, 564 S.E.2d at 80-81.

However, in the present case there are two problems with taking such an approach. First, it is not clear that all of the sections of the zoning ordinance necessary for a proper interpretation of the relevant portions of the ordinance are included in the record. Second, interpretation by our Court of the portions of the zoning ordinance at issue in this case would not necessarily be dispositive of the case

given the need for further findings of fact. In each of the cases cited above, our Court only addressed the underlying issue when all of the necessary facts and evidence were before us, and when by doing so, we would dispose of the case. *See, e.g., Sack*, 155 N.C. App. at 493, 574 S.E.2d at 127-28 (" '[w]e do not believe a remand is necessary, however, because . . . the entire record of the hearing is before us.' ") (citation omitted).

First, as noted above, our Court has only engaged in the review announced in *Capital Outdoor, Inc.* when all of the necessary facts and evidence were before us. We note that in the present case, while the parties have included some sections of the zoning ordinance in the record, other sections which may impact the proper interpretation of the zoning ordinance are not included. The sections of the zoning ordinance included in the record do not provide guidance on the zoning ordinance's specific application to race tracks. While it is not necessary that an entire zoning ordinance be in the record if all relevant portions are present, the piecemeal fashion in which the zoning ordinance is included in the record before us, with no method for determining whether the omitted portions are relevant for our interpretation, dissuades this Court from interpreting the ordinance at this stage.

Second, even if we interpreted the meaning of the terms "use" and "discontinued use" in the context of the speedway in the present case, without having the benefit of possibly relevant sections of the zoning ordinance in the record, such interpretation would not necessarily be dispositive of the case. In Lytle's letter to petitioners, he concluded that the "use" in this particular case was for a "*public* speedway." (emphasis added). However, Lytle's letter begins with a different definition of "use" in the present case, stating that go-cart racing in general is "not a permitted use in the RA district and therefore the speedway is a non-conforming situation."[2] This statement focuses on racing of go-carts on the track, while Lytle's conclusion in the letter that the speedway had ceased to be used as a "public go-kart speedway" focused on the fact that the track had not been open to the public and there had been no selling of tickets. The Board of Adjustment upheld Lytle's decision, focusing on the fact that the speedway "was not operated as a commercial operation, i.e., no money was collected for admission fees, etc.," and that the speedway was not open to the public for 360 days, "constitut[ing] activities at the track as a private,

2. We note that the record does not include the section of the zoning ordinance that may provide the definition for the term "non-conforming situation."

not a commercial operation." This basis for the Board of Adjustment's decision could result in the speedway's continued use for racing go-carts, as long as there was no payment by the public for tickets to enter and watch such races.

Another possible interpretation of the word "use" as it applies to the speedway, which was indicated in Lytle's letter to petitioners, focuses on the racing of go-carts on the track, regardless of whether or not tickets are sold. If this latter interpretation were adopted, the case would not be disposed of because there is still an issue of fact as to whether any go-cart racing occurred during the 360 days preceding Lytle's original decision. Although the superior court previously remanded the case to the Board of Adjustment for findings of fact to support its first decision, the findings submitted by the Board of Adjustment in response to this request do not include sufficient findings of fact on this issue. In response to the superior court's instructions, the Board of Adjustment stated, in pertinent part, as follows:

> Substantial evidence presented in support of the zoning administrator's ruling includes the following:
>
> (a) Testimony by Jackie and Danny Shaw who reside approximately 1/8 of a mile from the track that the last race held at the track was prior to May 1999.
>
> (b) Testimony by Mr. O.L. Beaver . . . that no racing had occurred since spring of 1999.
>
> (c) Testimony by Mr. Allen Welter that no racing occurred in the Summer of 1999 and a year was spent upgrading the track.
>
> (d) Testimony by Mr. Glen Chapman that racing occurred in March 2000 and occurred while the trac[k] was closed.
>
> (e) Testimony by Marion Lytle that the track had discontinued use as a public go-cart track because it was not operated as a commercial operation, i.e., no money was collected for admission fees, etc.

None of these statements are proper findings of fact in that they merely recite that there was testimony as to each of the above contentions, but do not find the facts. *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (noting that "mere recitations of the evidence" are not the ultimate findings required, and "do not reflect the processes of logical reasoning" required) (citation omitted); *Dunlap v. Clarke Checks, Inc.*, 92 N.C. App. 581, 584,

375 S.E.2d 171, 174 (1989) ("Findings of fact that merely restate a party's contentions or testimony without finding the facts in dispute are not adequate. It is the duty of the fact finder to resolve conflicting evidence.") (citing *Wall v. Timberlake*, 272 N.C. 731, 158 S.E.2d 780 (1968)). Secondly, even if each statement was considered an appropriate finding of fact, there is a direct contradiction between a finding (1) that there were no races run at the track and (2) that there was racing conducted at the track. That contradiction must be resolved by the Board of Adjustment.

In the present case, where the superior court failed to exercise the appropriate standard of review of an administrative board's decision and where we cannot dispose of the case by resolving the issue ourselves, we appropriately remand the case to the trial court. We therefore remand this case to the superior court for proper review of the Board of Adjustment's interpretation of the zoning ordinance. We thus need not address petitioners' remaining assignments of error.

Reversed and remanded.

Judges McCULLOUGH and LEVINSON concur.

STEVE CARSON AND PATTIE CARSON, PLAINTIFFS v. KENNETH R. BRODIN AND MASONITE CORPORATION, DEFENDANTS

No. COA02-1294

(Filed 16 September 2003)

1. Appeal and Error— appealability—denial of motion to dismiss—challenge to jurisdiction

The denial of a motion to dismiss was immediately appealable where the motion specifically challenged the jurisdiction of the court over defendant's person. N.C.G.S. § 1-277(b).

2. Jurisdiction— long-arm—contract to build house in Virginia

Plaintiffs sufficiently alleged contacts with North Carolina to give the court personal jurisdiction over defendant in an action arising from a contract with a Greensboro couple to build a house in Virginia. N.C.G.S. § 1-75.4(4)(a).

3. Jurisdiction— minimum contacts—contract to build house in Virginia

There were sufficient minimum contacts to establish specific jurisdiction and satisfy due process where defendant entered into a contract with North Carolina residents to build a house in Virginia; that contract was executed in North Carolina; defendant made numerous telephone calls and mailings to North Carolina during the contract negotiations and throughout the three-year construction period; defendant visited plaintiffs in North Carolina two or three times; and defendant sent bills to North Carolina which were paid from plaintiffs' North Carolina bank account.

Appeal by defendant Kenneth R. Brodin from an order entered 26 June 2002 by Judge W. Douglas Albright in Superior Court in Guilford County. Heard in the Court of Appeals 4 June 2003.

Pinto, Coates, Kyre & Brown, P.L.L.C., by David L. Brown and Deborah J. Bowers, for defendant-appellant Kenneth R. Brodin.

Forman Rossabi Black, P.A., by T. Keith Black, for plaintiffs-appellees.

HUDSON, Judge.

Defendant Kenneth R. Brodin appeals the trial court's denial of his motion to dismiss for lack of personal jurisdiction. For the reasons set forth below, we affirm the decision of the trial court.

BACKGROUND

Plaintiffs Steve and Pattie Carson are residents of Guilford County, North Carolina. In November 1993, they decided to build a vacation home in Virginia. They entered into a contract with defendant, a Virginia resident, to construct a home in the Water's Edge development on Smith Mountain Lake in Franklin County, Virginia.

The Water's Edge developer maintains a builder referral list for individuals who are interested in purchasing a lot in the community and having a qualified local builder build their residence. Prior to November 1993, defendant was listed as a qualified builder on the referral list. According to defendant's affidavit, this referral list was the full extent of his attempts to market his services to potential clients. His clients are typically referred to him by others based on his reputation, and he obtains clients primarily through business referrals and word of mouth. He has never had any offices, employees, or

sales representatives in North Carolina, and he has never marketed his services in North Carolina.

Plaintiffs learned about defendant by consulting the builder referral list in Virginia. The initial contact between the parties came from plaintiffs and occurred in Virginia in November 1993. Before this contact, defendant had never spoken to plaintiffs, nor had he attempted to solicit or market his services to them.

In November 1993, plaintiffs went to Virginia and signed a contract with defendant for construction of their house. After problems developed with the lot that plaintiffs had purchased, they traded lots with the developer. Defendant executed a contract to build on the new lot and mailed it to plaintiffs in North Carolina. Plaintiffs signed the new contract in North Carolina and mailed it back to defendant.

After the contract was signed, defendant visited plaintiffs in North Carolina at least twice and possibly three times to discuss the construction project. Defendant also telephoned plaintiffs in North Carolina on numerous occasions. Additionally, defendant mailed invoices to plaintiffs in North Carolina, and plaintiffs sent payments from their bank account in North Carolina. Defendant completed construction on the home in July 1996.

In June 2001, plaintiffs sued defendant for breach of contract, breach of warranty, and negligence, all relating to the construction of their home in Virginia. Plaintiffs later amended the complaint to add Masonite Corporation ("Masonite") as a defendant and to allege additional claims for relief against both defendant and Masonite. In August 2001, Masonite served a notice, pursuant to 28 U.S.C. § 1441, to remove the action to the United States District Court for the Middle District of North Carolina. Also in August 2001, defendant moved to dismiss, to transfer venue, and filed an answer to the amended complaint in the United States District Court. Along with the motion to dismiss, defendant filed an affidavit addressing his contention that his contacts in North Carolina were not sufficient to give the state personal jurisdiction over him.

In September 2001, plaintiffs filed a motion to remand the case to Guilford County Superior Court. The magistrate judge recommended that plaintiffs' motion be granted, and the case was remanded to state court on 4 February 2002. On 2 May 2002, defendant noticed a hearing on his motion to dismiss, which the parties orally argued on 4 June 2002. The trial judge denied the motion, and defendant now appeals.

ANALYSIS

[1] Before addressing the merits of defendant's claim, we note that, although defendant is appealing from the denial of a motion to dismiss, his appeal is properly before us. N.C. Gen. Stat. § 1-277 provides that:

> (b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.

N.C. Gen. Stat. § 1-277(b) (2001). Defendant's motion specifically challenges the jurisdiction of the court over defendant's person and is thus immediately appealable. Defendant contends that the trial court erred by denying his motion to dismiss because his contacts were not sufficient with North Carolina to give the North Carolina court jurisdiction. We disagree.

[2] A court must engage in a two-part inquiry to determine whether it has personal jurisdiction over a non-resident defendant. *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). First, the court must determine whether the North Carolina "long-arm" statute authorizes jurisdiction over the defendant. If it does, the court must then determine whether the exercise of jurisdiction over the defendant is consistent with due process. *Id.* The burden is on the plaintiff to establish that one of the statutory grounds for jurisdiction is applicable. *Stallings v. Hahn*, 99 N.C. App. 213, 215, 392 S.E.2d 632, 633 (1990). The long-arm statute is to be liberally construed in favor of finding jurisdiction. *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 338, 477 S.E.2d 211, 216 (1996).

Plaintiffs contend that the courts of this State have jurisdiction over defendant under the following provisions of the North Carolina long-arm statute:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) . . . of the Rules of Civil Procedure under any of the following circumstances:
>
> . . . .

(4) Local Injury; Foreign Act.—In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:

(a) Solicitation or services activities were carried on within this State by or on behalf of the defendant[.]

N.C. Gen. Stat. § 1-75.4 (2001).

In order for Section 1-75.4(4)(a) to apply, the plaintiff must establish: "1) an action claiming injury to a North Carolina person or property; 2) that the alleged injury arose from activities by the defendant outside of North Carolina; and 3) that the defendant was engaging in solicitation or services within North Carolina 'at or about the time of the injury.' " *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 113, 516 S.E.2d 647, 649-50 (1999) (quoting N.C. Gen. Stat. § 1-75.4(4)). The statute does not require there to be evidence of proof of such injury; the plaintiff need only allege an injury. *Godwin v. Walls*, 118 N.C. App. 341, 349, 455 S.E.2d 473, 480 (1995), *disc. review allowed*, 341 N.C. 419, 461 S.E.2d 757 (1995).

The amended complaint contains the following pertinent paragraph:

> 5. Prior to the signing of the contract, Brodin made numerous calls into the state of North Carolina to confer with Plaintiff and, on at least one occasion, visited the state of North Carolina to discuss and view various designs of homes located in Greensboro, North Carolina. Brodin mailed the construction contract into the state of North Carolina for review by Plaintiffs, where it was ultimately signed. . . .

In paragraphs 5, 14, 18, 25, 30, 39, 44, and 50, plaintiffs allege as to the enumerated claims that they "have been damaged" and "have incurred" or "have suffered damages" resulting from defendant's actions.

The term " 'injury to the person or property' " 'should be given a broad meaning consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit the actions thereunder to traditional claims for bodily injury and property damages.' " *Godwin*, 118 N.C. App. at 349, 455 S.E.2d at 480 (quoting *Sherwood v.*

Sherwood, 29 N.C. App. 112, 115, 223 S.E.2d 509, 512 (1976)). By way of example, this Court has acknowledged that actions for damages for alienation of affections and criminal conversation constitute "injury to person or property" as denoted by N.C. Gen. Stat. § 1-75.4(3). *Golding v. Taylor*, 19 N.C. App. 245, 247, 198 S.E.2d 478, 479, *cert. denied*, 284 N.C. 121, 199 S.E.2d 659 (1973). We also have concluded that claims for loss of potential profits and damage to business reputation constitute injury under Section 1-75.4(4)(a). *Fran's Pecans*, 134 N.C. App. at 113, 516 S.E.2d at 650 (citing *Vishay Intertechnology, Inc. v. Delta International Corp.*, 696 F.2d 1062, 1067 (4th Cir. 1982)).

The allegations of the amended complaint are sufficient to bring plaintiffs' claim within the terms of Section 1-75.4(4)(a). The amended complaint alleges injury in the form of losses to plaintiffs, residents of North Carolina, as a result of breach of contract, breach of express warranty, breach of the implied warranty of habitability, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, and negligence. Moreover, the complaint alleges that these local injuries were the result of acts or omissions by defendant outside of North Carolina. In addition, as required by the statute, the complaint alleges that defendant engaged in "[s]olicitation or services activities . . . carried on within this State," N.C. Gen. Stat. § 1075.4(4)(a), where it indicates that defendant negotiated and contracted with plaintiffs to build a house and by repeatedly visiting, telephoning, and billing them in North Carolina to carry out that contract.

Finally, under Section 1.75-4(4), a defendant need only be carrying on solicitation or services within North Carolina "at or about the time of the injury." Statutes used to establish personal jurisdiction are to be liberally construed in favor of establishing the existence of personal jurisdiction. *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 757 (1998). Here, as indicated above, plaintiffs alleged that defendant made two or three visits to North Carolina in furtherance of the building of plaintiffs' home and made numerous phone calls to plaintiffs in North Carolina. These activities were alleged to have contributed to plaintiffs' injury and are proximate enough in time to fulfill the statute's requirements. *Fran's Pecans*, 134 N.C. App. at 113, 516 S.E.2d at 650. We conclude that plaintiffs sufficiently alleged contacts with the state to give the court personal jurisdiction over defendant. N.C. Gen. Stat. § 1.75-4(4)(a).

[3] We next consider whether the exercise of *in personam* jurisdiction satisfies due process, not offending " '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), *overruled as stated in Precision Const. Co. v. J.A. Slattery Co. Inc.*, 765 F.2d 114 (8th Cir. Mo. 1985)). North Carolina exercises specific jurisdiction over a party when it exercises personal jurisdiction in a suit arising out of that party's contacts within the state. *Fraser v. Littlejohn*, 96 N.C. App. 377, 383, 386 S.E.2d 230, 234 (1989). To establish specific jurisdiction, the court looks at "the relationship among the parties, the cause of action, and the forum state" to see if minimum contacts are established. *ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 669, 386 S.E.2d 766, 768 (1990). "The test for minimum contacts is not mechanical, but instead requires individual consideration of the facts in each case." *Fran's Pecans*, 134 N.C. App. at 114, 516 S.E.2d at 650. The activity must be such that defendant could reasonably anticipate being brought into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 62 L. Ed. 2d 490, 498 (1980). "The factors to consider for minimum contacts include: (1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state; and (5) the convenience to the parties." *Fran's Pecans*, 134 N.C. App. at 114, 516 S.E.2d at 650.

Here, defendant has engaged in sufficient contacts with North Carolina. He entered into a contract with North Carolina residents that those residents executed in North Carolina. He made numerous phone calls and mailings into the state during the contract negotiations and throughout the three-year construction period. He visited plaintiffs in North Carolina two and possibly three times. Defendant sent bills into North Carolina, which were paid from plaintiffs' North Carolina bank account. By negotiating within the state and entering into a contract with North Carolina residents, defendant purposefully availed himself of the privilege of conducting activities within North Carolina with the benefits and protection of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958). Defendant's actions in contracting with North Carolina residents establish minimum contacts for specific jurisdiction because the actions are directly related to the basis of plaintiffs' claim. *Fran's Pecans*, 134 N.C. App. at 115, 516 S.E.2d at 651. Because we have found minimum

contacts sufficient to establish specific jurisdiction, due process is satisfied. Under these circumstances, we need not address general jurisdiction. *Id.*

Litigating this matter in North Carolina serves the best interests of both plaintiffs and the State of North Carolina. Plaintiffs live in North Carolina, executed the contract in North Carolina, and conducted much of the contract and construction negotiations and discussions in the state. "North Carolina has a manifest interest in providing its residents with a convenient forum for addressing injuries inflicted by parties out of state." *Fran's Pecans*, 134 N.C. App. at 115, 516 S.E.2d at 651. We hold that defendant has made sufficient minimum contacts to justify the exercise of personal jurisdiction in this state without violating due process. *C.f., Hanes Constr. Co. v. Hotmix & Bituminous Equip. Co.*, 146 N.C. App. 24, 552 S.E.2d 177, *per curiam rev'd*, 354 N.C. 560, 557 S.E.2d 529 (2001) (adopting Judge Campbell's dissent holding that the exercise of jurisdiction was not constitutional where no prior business activity took place in North Carolina and defendant never entered the state to negotiate or perform the parties' agreement).

CONCLUSION

For the reasons set forth above, we affirm the decision of the trial court.

Affirmed.

Judges TIMMONS-GOODSON and STEELMAN concur.

E. VERNON FERRELL, JR., PLAINTIFF v. EUGENE DOUB AND DJD INVESTMENTS, INC., DEFENDANTS

No. COA02-1160

(Filed 16 September 2003)

1. Easements— use of street—dedication and use

Summary judgment was correctly granted for plaintiff on the existence and scope of an easement over a street. The evidence before the court clearly showed that plaintiff had acquired an easement by dedication and by use.

2. Easements— unreasonable use—blocking a street

Defendants' ability to use a street over which plaintiff had an easement was not inhibited unreasonably where the trial court ruled that a forty-foot eight-wheeled construction trailer parked in the middle of the street was an unreasonable interference with plaintiff's right of ingress and egress. Nothing in the court's order prohibits defendants from making a reasonable use of their land.

3. Injunction— prior judgment incorporated—insufficient connection to prior party

The trial court erred when issuing a current injunction by incorporating by reference a prior injunction where there was no evidence that defendants were in active concert or participation with a party to the prior action. Succeeding in ownership of the property through foreclosure did not cause the prior judgment to be automatically binding upon defendants.

Appeal by defendants from judgment entered 13 June 2002 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 18 August 2003.

Robinson & Lawing, L.L.P., by Norwood Robinson and John N. Taylor, Jr., for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Richard T. Rice and Candice S. Wooten, for defendants-appellants.

TYSON, Judge.

Eugene Doub ("Doub") and DJD Investments, Inc. (collectively, "defendants") appeal from an order granting summary judgment in favor of Vernon Ferrell, Jr. ("plaintiff"). We affirm in part and reverse in part.

I. Background

Plaintiff filed a complaint on 30 November 2001 against defendants seeking to enjoin parking of defendants' trailers or vehicles on Lot 114D, which is used as a street named Parr Street ("Parr Street"), or from taking other actions to impede the use and enjoyment of plaintiff's easement over Parr Street by residents of the Mountain Lodge Apartments.

Plaintiff is the owner of real property located in Forsyth County, North Carolina, that is identified on a recorded subdivision map as

Lots 104 and 105. 124 residential apartments, known as the Mountain Lodge Apartments, that were built thirty-five years ago and continuously used as apartments, are located on these lots. On the eastern end of these lots, Bethania Station Road is located. Parr Street, a sixty-foot wide paved street, runs between Lots 104 and 105 in a westerly direction. The only access to the apartment parking lot on Lot 104 is by Parr Street. At the western end of Parr Street is an earthen dike perpendicular to the street. The apartment buildings are located within a flood plain. The dike protects the apartments from flooding from the stream that runs behind the dike.

All the lots at issue were originally part of a large single tract of land owned by J.R. Yarbrough ("Yarbrough"). In the 1960s, Yarbrough subdivided the tract and sold Lots 104 and 105 to D.W. Snow, who built the apartments. At that time, Yarbrough set aside Parr Street on the recorded map and dedicated it as a public street. Parr Street has been used continuously by the owners, apartment tenants, and the public for thirty-five years.

In 1974, plaintiff purchased the apartment complex. At that time, Lots 114C and Parr Street were conveyed to Old Town Shopping Center, Inc. ("Old Town"). Doub began acquiring and developing property adjacent to the apartments and Parr Street throughout the 1970s and 1980s. Doub had actual knowledge of plaintiff's use of the Parr Street easement. In 1981, Yarbrough conveyed Parr Street to Doub. By 1985, Parr Street was described in eight conveyances between Yarbrough and Doub. In 1994, Doub reconveyed Parr Street to Yarbrough and recorded a deed of trust on the real property subject to the Parr Street easement.

In 1995, plaintiff brought a suit against Yarbrough and Old Town to enjoin them from conducting certain fill activity and construction on Parr Street. Defendants were not joined as party defendants. On 20 December 1996, the Honorable William Z. Wood, Jr. entered a judgment finding that plaintiff had acquired both an easement by dedication and by prior use over Parr Street for ingress and egress to Mountain Lodge Apartments. Yarbrough and Old Town were enjoined from conducting any fill activity on Parr Street.

Doub foreclosed the deed of trust on the property under Parr Street, purchased it at the trustee sale in September of 1998, and moved one of his construction trailers onto Parr Street. Shortly thereafter, plaintiff brought suit to enjoin defendants from parking their trailers on Parr Street. Defendants timely filed an answer and coun-

terclaim. Plaintiff moved for summary judgment asserting that no genuine issue of material fact existed as to whether plaintiff had acquired an easement over Parr Street for ingress and egress to the apartments. On 13 June 2002, the trial court granted plaintiff's motion for summary judgment and dismissed defendants' counterclaims. The trial court also ruled that the prior judgment against Yarbrough and Old Town from 1996 was binding on defendants. Defendants appeal.

II. Issues

The issues are whether the trial court erred in: (1) granting plaintiff's motion for summary judgment on the issue of the existence of an easement, (2) restricting defendants' ability to utilize Parr Street in a manner that is consistent with plaintiff's reasonable use and enjoyment his easement, and (3) holding that the prior 1996 injunction entered against Yarbrough and Old Town is binding on defendants.

III. Granting of Summary Judgment

[1] Defendants assert the trial court improperly granted summary judgment in favor of plaintiff. Rule 56 of the North Carolina Rules of Civil Procedure states that summary judgment will be granted "[i]f 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) (2000).

Where the forecast of evidence available demonstrates that a party cannot present a *prima facie* case at trial, no genuine issue of material fact exists and summary judgment is appropriate. *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 858 (1988). "[I]n ruling on a motion for summary judgment the court does not resolve issues of fact and must deny the motion if there is any issue of genuine material fact." *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972).

Defendants assert that the trial court's grant of summary judgment as to the existence and scope of the easement across Parr Street was erroneous. We disagree. The evidence before the trial court clearly showed that plaintiff and tenants of the apartment complex had acquired an easement by dedication and by prior use. Defendants conceded that plaintiff's evidence showed the essential elements of

an easement by prior use. Yarbrough had: (1) common ownership of the dominant and servient parcels of land, (2) use of Parr Street for access to the other part of the land, and (3) that this use was apparent, continuous, and permanent before the transfer of the land. Plaintiff also produced evidence that the easement is reasonably necessary to the use and enjoyment of the apartments located on Lot 104, since it is the only access to the parking lots serving the apartments located on Lot 104.

Defendants conceded that plaintiff's evidence also showed the elements of an easement by dedication. Yarbrough dedicated Parr Street in a recorded plat to be used as a public street. The dedication was accepted by implication by continuous public use for more than thirty-five years. "[A]cceptance may be shown not only by formal action on the part of the authorities having charge of the matter, but, under certain circumstances, by the user as of right on the part of the public. . . ." *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 368, 90 S.E.2d 898, 901 (1956). No genuine issue of material fact exists that plaintiff acquired an easement over Parr Street and that defendants had actual and record notice of this easement.

IV. Use of the Parr Street Easement

[2] Defendants assert that the trial court prevented them from utilizing Parr Street in a reasonable manner which does not substantially impede the use of Parr Street by plaintiff and the apartment tenants.

The owner of land subject to an easement has the right to use his land in any manner and for any purpose which is not inconsistent with the reasonable use and enjoyment of the existing easement. *Hundley v. Michael*, 105 N.C. App. 432, 413 S.E.2d 296 (1996). The entire length (300 feet) and width (sixty feet) of Parr Street was dedicated as an easement for vehicular access to the apartment lots. Defendants, the owners of the lot subject to the easement, parked a forty-feet eight-wheeled construction trailer in the middle of Parr Street. This trailer remained parked for ten months until Doub was ordered to remove it by the court. Defendants assert that the placing of a forty-feet eight-wheeled construction trailer in the middle of Parr Street is not inconsistent with the right of ingress or egress to plaintiff's apartment complex.

The trial court ruled that plaintiff and tenants of the apartments had obtained an easement by both dedication and by prior use. He further ruled that plaintiff and his tenants had a right of travel over

Parr Street and enjoined defendants from unreasonably interfering with that right. The trial court granted defendants the right to use the lot under Parr Street, as long as defendants' use did not interfere with the rights of plaintiff and his tenants, and ruled that plaintiff should not interfere with defendants' right to use Parr Street.

After reviewing all the evidence, the trial court ruled that defendants' placement of a forty-feet eight-wheeled construction trailer in the middle of the easement was an unreasonable interference of plaintiff's right of ingress and egress. Evidence that the trailer was parked in the middle of Parr Street and blocked or obstructed plaintiff's and his tenants' access to the apartments, shows no genuine issue exists whether this trailer was an unreasonable interference to plaintiff's right of ingress and egress across Parr Street. Nothing in the trial court's order prohibits defendants from making a reasonable use of their land. It simply prohibits them from interfering with plaintiff's and his tenants' enjoyment of his easement. Defendants' assignment of error is overruled.

V. Prior Injunction

[3] In North Carolina, an entity that is not a party to a lawsuit cannot be bound by an injunction issued as a result of that litigation, absent the existence of a relationship between a party and the nonparty and notice of the injunction proceeding. *Trotter v. Debnam*, 24 N.C. App. 356, 210 S.E.2d 551 (1975).

North Carolina law requires that persons affected by injunctions are to be given notice before the issuance of an injunction. N.C. Gen. Stat. § 1A-1, Rule 65(a) (2000). Absent notice, the court lacks personal jurisdiction over the nonparty, and the injunction is void to the nonparty. *Helbein v. Southern Metals Co.*, 119 N.C. App. 431, 433, 458 S.E.2d. 518, 519 (1995).

Defendants contend they were not parties to the 1996 action, and were not either officers, agents, servants, employees, or attorneys of any party as defined by Rule 65(d). Defendants deny being in "active concert or participation with a party" to the prior proceedings as defined by Rule 65(d). Defendants also contend they received no notice of the prior lawsuit filed by plaintiff against Yarbrough and Old Town. Plaintiff contends that the trial court did not err in applying the 1996 judgment against defendants because plaintiff filed a new lawsuit against defendants rather than a motion to hold defendants in contempt of the prior judgment.

North Carolina General Statute § 1A-1, Rule 65(d) states:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts enjoined or restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise.

N.C. Gen. Stat. § 1A-1, Rule 65(d) (2000) (emphasis supplied).

Rule 65(d) of the North Carolina Rules of Civil Procedure is identical to the corresponding Federal Rule of Civil Procedure, except for the requirement that the judge state the reasons for granting the injunction and the acts to be restrained. The rule limits the scope of injunctive power and should not be construed to allow courts to "grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13, 89 L. Ed. 661, 666 (1945).

Defendants were beneficiaries of a valid and recorded deed of trust on the land under Parr Street prior to the initiation of the lawsuit between plaintiff and Yarbrough and Old Town. Despite record notice, plaintiff failed to provide defendants with notice as required by Rule 65(d). Defendants assert they did not learn of the 1996 injunction until immediately prior to the initiation of this lawsuit. Defendants also contend that a court cannot enlarge the group upon whom an injunction is binding beyond those individuals enumerated in Rule 65(d) of the North Carolina Rules of Civil Procedure.

According to the United States Supreme Court, "the [use of the] term 'successors and assigns' in an enforcement order . . . may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure." *Id.* at 14, 89 L. Ed. at 666. "Whether one brings himself in contempt as a successor or assign depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order." *Id.* at 15, 89 L. Ed at 667. It is not the successive relationship that subjects a party to the purview of Rule 65(d), but the "relation between the defendant and the successor which might of itself establish liability within the terms of Rule 65(d)." *Id.*

The mere fact that defendants succeeded Yarbrough and Old Town to ownership, through foreclosure of Parr Street, does not cause the prior judgment to be automatically binding upon defendants. Some evidence must exist to support a finding that defendants were "in active concert or participation with one or more of the named parties to the action or their officers, agents, servants, employees, or attorneys." *Trotter*, 24 N.C. App. at 362, 210 S.E.2d at 555. Plaintiff offered and the trial court found none.

Here, the trial court specifically incorporated by reference the 1996 injunction into the 2002 injunction and made all terms of the prior injunction binding upon defendants. The 1996 injunction prevents defendants from conducting any fill activity or construction on Lot 104, Lot 105, and Parr Street and from any construction, excavation or fill activity that would alter or affect the present configuration of the dike or stream.

N.C. Gen. Stat. § 1A-1, Rule 65(d) specifically states the trial court "shall describe in reasonable detail and *not by reference to the complaint or other document*, the act or acts enjoined or restrained." N.C. Gen. Stat. § 1A-1, Rule 65(d) (2000) (emphasis added). The trial court could not make the 1996 injunction binding upon the defendants by incorporating it by reference. We reverse that portion of the trial court's order that purports to bind defendants to the provisions of the 1996 injunction.

VI. Conclusion

We affirm that portion of the order granting summary judgment to plaintiff on the issue of the existence of an easement across Parr Street and ordering of the removal of the forty-feet eight-wheeled construction trailer. We reverse that portion of the trial court's order purporting to bind defendants to the provisions of the 1996 injunction.

Affirmed in part and reversed in part.

Chief Judge EAGLES and Judge STEELMAN concur.

PAUL McROY AND PATTY SUE McROY, PLAINTIFFS V.
MARION EUGENE HODGES, JR., DEFENDANT

No. COA02-1399

(Filed 16 September 2003)

1. Appeal and Error— appealability—interlocutory order—child custody

Although the trial court's child custody order places temporary custody of the minor child with plaintiff maternal grandparents, it is a final order and is not interlocutory because it places permanent custody of the minor child with defendant father and sets forth no reconvening date.

2. Child Support, Custody, and Visitation— custody—grandparents—best interests of child

The trial court erred in a child custody case by granting permanent custody of the minor child to defendant father instead of to plaintiff maternal grandparents, because: (1) all of the evidence tended to show that defendant had little or no contact with and demonstrated no interest in the minor child until the death of the child's mother, which occurred little more than a month before the custody hearing; (2) the trial court found that defendant had engaged in conduct inconsistent with his constitutionally protected status as a parent and that the best interests of the child standard applied; (3) the trial court's finding that it was in the minor child's best interests for permanent custody to be placed with defendant was premature, speculative, and unsupported by the evidence when the minor child had no relationship with defendant; and (4) plaintiffs assisted in the care and nurturing of the minor child since his birth, and the minor child resided with plaintiffs on several occasions both with and without his mother.

Appeal by plaintiffs from order entered 2 July 2002 by Judge Samuel G. Grimes in Beaufort County District Court. Heard in the Court of Appeals 20 August 2003.

Darrell B. Cayton, Jr. for plaintiff appellants.

W. Michael Spivey for defendant appellee.

TIMMONS-GOODSON, Judge.

Paul and Patty Sue McRoy ("plaintiffs") appeal from an order of the trial court granting temporary custody of Brandon Paul Hodges ("Brandon") to plaintiffs, and granting permanent custody to Marion Eugene Hodges, Jr. ("defendant"). For the reasons stated herein, we reverse the order of the trial court.

The pertinent facts of the instant appeal are as follows: Plaintiffs are the maternal grandparents of Brandon, who was born 30 May 1994. Brandon's mother, Robin Hodges ("Hodges"), died on or about 8 February 2002. From his birth until the time of his mother's death, Brandon resided with his mother. Brandon also occasionally resided with plaintiffs. Defendant, Brandon's natural father, had extremely limited contact with Brandon prior to Hodges' death. After Hodges died, defendant expressed interest in visiting with and eventually establishing custody of Brandon. On 13 February 2002, plaintiffs filed a complaint requesting temporary and permanent custody of Brandon in Beaufort County District Court. The matter came before the trial court on 2 July 2002, at which time the trial court made the following pertinent findings of fact:

> 10. Plaintiff Paul McRoy is currently employed as a painter. Plaintiff Patty Sue McRoy, 52 years old, is currently a homemaker. They have been married for 22 years.
>
> 11. Defendant is currently employed with Highway Mobile Home Movers and earns approximately $23,000 per year. Defendant's wife, Debra Hodges, is presently disabled from an automobile accident, and is not working outside the home. Defendant and his wife have been married approximately one year. Defendant has another son, Ridge Allen Hodges, 9, who lives with his mother, Lisa Shepard Martin, in Washington, North Carolina. Defendant visits with this child, although not on any set schedule.
>
> 12. Defendant testified he and Robin Hodges were never married, but lived together for approximately six months in 1993. When the minor child, Brandon Paul Hodges, was born on May 30, 1994, defendant and Robin Hodges were not living together. At that time, both defendant and Robin Hodges were living unstable lives, and both experienced problems with alcohol and drugs. The minor child was born prematurely, but the defendant did not visit the child in the hospital. Defendant first saw the child when he was approximately 5-6 months old. Defendant testified he

attempted to visit or make contact with the child during infancy, but there was animosity between defendant, Robin Hodges, and the plaintiffs, and therefore, no visits occurred.

13. Defendant admitted that since Brandon Paul Hodges was an infant until February, 2002, he had little or no contact with said child. During this time, defendant never sent any Christmas or birthday cards/presents, visited the child at school or sporting events, or otherwise made any real efforts to visit with the minor child. Also during this time, defendant consulted with a lawyer regarding the custody/visitation of said child, but was unable to afford the fees to hire a lawyer. During this time, defendant's sister, Lynn Hodges, loaned defendant money, and accumulated more than $3000.00 in educational savings for Ridge Allen Hodges, defendant's other son. However, defendant never sought to borrow money from his sister or other family member during this time in order to hire an attorney. Since the death of Robin Hodges, defendant desires to accept responsibility for the said minor child, and wants custody of same.

14. In 1996, defendant checked himself into Tideland Mental Health Center for drug and alcohol abuse. He completed a 28 day rehabilitation program, and then was transferred to a halfway house for six months in Rocky Mount. Defendant has been alcohol/drug free since that time. Defendant moved away from Beaufort County in an effort to clean himself up.

15. Defendant further testified that in 1996, after completing rehabilitation, he resided in Rocky Mount, North Carolina. Robin Hodges traveled to Rocky Mount with the said minor child to visit defendant. At that time, Robin Hodges asked defendant to reconcile with her, and when the defendant refused, Robin Hodges told defendant he would never see the said minor child again.

16. Defendant had opportunities to be in the presence of Brandon Paul Hodges while defendant was attending soccer/baseball games of his other son, Ridge. However, during these times, defendant failed to introduce himself or otherwise make contact with Brandon prior to February, 2002.

17. From February 28, 2002 until the date of this hearing, defendant has exercised visitation, by consent and pursuant to a graduated schedule, with the minor child. These visitations occurred in

Beaufort County, at which time defendant attended some baseball practices, took the child to a playground/movie, or spent time with the child at the home of Pat Hodges, defendant's mother. As of this hearing, the minor child had not spent any overnights with the defendant.

18. Defendant has consistently paid child support for the benefit of Brandon Paul Hodges, except for periods when he was out of work/between jobs. On several occasions, defendant's tax refunds have been intercepted for child support purposes.

19. Plaintiffs, particularly Patty Sue McRoy, assisted Robin Hodges in the care and nurturing of the said minor child since his birth. On several occasions Robin Hodges and the minor child lived with the plaintiffs. In addition, the minor child lived with the plaintiffs during the times that Robin Hodges was admitted to some type of inpatient treatment center or hospital for substance abuse or manic depression. Even when Robin Hodges and the minor child were not living with plaintiffs, Patty Sue McRoy saw Robin and the child almost daily.

. . . .

21. Since February 8, 2002, plaintiffs arranged for the minor child to meet with a counselor at Tideland Mental Health Center concerning the death of the child's mother. As of this hearing, the child had met with a counselor on approximately two occasions.

22. Elizabeth Beacham testified that as manager of Glenview Apartments from approximately 1995-1999, she had occasion to see Robin Hodges, Patty Sue McRoy and the minor child frequently. When the child was only a few years old, she heard defendant state he was the father of said child but wanted nothing to do with him. . . .

23. Lisa Shepard Martin is the mother of Ridge Allen Hodges, the other son by defendant. Defendant has paid child support to her for the benefit of said child, and has visited sporadically with the said child, although not pursuant to any set schedule. Ms. Martin had no reason to doubt the defendant's fitness as a parent. Ridge Allen Hodges has visited defendant in [defendant's town of residence].

24. Plaintiff Patty Sue McRoy testified she felt it was in the child's best interests that he live primarily with the plaintiffs, giv-

ing due consideration to the wishes of the child. Said plaintiff said the minor child was like her own. Defendant testified he felt the child's best interests would be served by completing the school year while living with plaintiffs so the child would not have to change schools. Defendant further testified he desired to have custody of the said child by the start of the next school year in August, 2002, after a graduated visitation schedule was put in effect.

25. Defendant currently interacts well with his neighbors, including children. Both plaintiffs and defendant are fit and proper persons to exercise the care, custody and control of the minor child, Brandon Paul Hodges.

26. Prior to February 8, 2002 (death of Robin Hodges), defendant acted in a manner inconsistent with his constitutionally protected custody right pursuant to Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997) and Penland v. Harris, 135 N.C. App. 359, 520 S.E.2nd [sic] 105 (1999). Therefore, plaintiffs/grandparents are entitled to maintain an action for custody pursuant to N.C.G.S. 50-13.1(a).

27. Robin Hodges, the mother of the minor child, did not allow the defendant to establish a relationship with the said minor child, although the defendant acquiesced in Robin Hodges' conduct.

28. Plaintiffs have resided in Beaufort County during the said minor child's entire life, as has defendant's mother and sister, all of which defendant has been aware.

29. In chambers in the presence of counsel, Brandon Paul Hodges, 7 years old, testified he and Ridge Allen Hodges are good friends. He further stated he wished to live with the plaintiffs. The Court, in light of the child's age, maturity and demeanor places very little weight on his testimony as it relates to his best interests.

30. Plaintiffs are fit and proper persons to exercise the care, custody and control of Brandon Paul Hodges, and it is currently in the best interests of the said minor child that his custody be placed temporarily with the plaintiffs through the 2002 summer. During this time, the defendant will continue to establish a relationship with the minor child through a gradually increased schedule of visitation. It is also in the child's best interests that

> custody be transferred to the defendant once a relationship is established between the child and defendant. . . .

The trial court thereafter concluded that it was in Brandon's best interests to remain in plaintiffs' custody until August 2002, at which time defendant would be granted permanent custody. From the order granting permanent custody to defendant, plaintiffs appeal.

Plaintiffs argue that the trial court erred in granting permanent custody of Brandon to defendant. For the reasons stated hereafter, we agree with plaintiffs and therefore reverse the order of the trial court.

[1] We note initially that, contrary to the argument by defendant, the order of the trial court is a final order and is therefore not interlocutory. Although the order places temporary custody with plaintiffs, it places permanent custody of Brandon with defendant. It moreover establishes visitation rights and a visitation schedule for both parties. Even where an order grants only temporary custody, it is not interlocutory unless the trial court states a clear and specific reconvening time in the order, and the time interval between the two hearings is reasonably brief. *See Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000); *Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999). In the present case, the order of the trial court sets forth no reconvening date, and clearly places permanent custody with defendant. Because the order is a final one, it is not interlocutory and is properly before this Court.

[2] Section 50-13.2(a) of the North Carolina General Statutes provides that the court "shall award the custody of [a minor] child to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2 (2001). In custody matters, the best interests of the child is the polar star by which the court must be guided. *See In re DiMatteo*, 62 N.C. App. 571, 572, 303 S.E.2d 84, 85 (1983). Although the trial judge is granted wide discretion, a judgment awarding permanent custody must contain findings of fact in support of the required conclusion of law that custody has been awarded to the person who will best promote the interest and welfare of the child. *See Story v. Story*, 57 N.C. App. 509, 513-16, 291 S.E.2d 923, 926-27 (1982); *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child."

Steele v. Steele, 36 N.C. App. 601, 604, 244 S.E. 2d 466, 468 (1978). "The welfare of the child is the paramount consideration to which all other factors, including common law preferential rights of the parents, must be deferred or subordinated . . . ." *Griffith v. Griffith*, 240 N.C. 271, 278, 81 S.E. 2d 918, 923 (1954). Where a parent engages in conduct inconsistent with his or her constitutionally protected status, such paramount status is lost, and application of the "best interest of the child" standard in a custody dispute with a nonparent does not offend constitutional considerations. *See Speagle v. Seitz*, 354 N.C. 525, 530-31, 557 S.E.2d 83, 86-87 (2001) (holding that the trial court properly awarded minor child to paternal grandparents rather than mother under the best interests standard).

In the instant case, neither the evidence presented nor the findings of the trial court support the trial court's conclusion that Brandon's interests would best be served by placing permanent custody with defendant. All of the evidence, as well as the trial court's findings, tended to show that defendant had little or no contact with and demonstrated no interest in the minor child until the death of the child's mother, which occurred little more than a month before the custody hearing. As such, the trial court determined that defendant had engaged in behavior inconsistent with his constitutionally protected status as a parent. At the time of the hearing, defendant had visited with Brandon, but had not spent more than one consecutive day with him. The trial court recognized that Brandon had no relationship with defendant, but nevertheless found that "once a relationship [was] established" it would be in Brandon's best interests to live with defendant. The trial court then set a time frame of approximately four months for transferral of custody, during which time defendant and Brandon presumably "would establish a relationship." The trial court had no evidence, however, and therefore made no findings, concerning the *quality* of the relationship that it assumed defendant and Brandon would enjoy after four months. As such, the trial court's finding that it was in Brandon's best interests for permanent custody to be placed with defendant is premature, speculative and unsupported by the evidence.

In contrast to defendant, the evidence showed that plaintiffs assisted "in the care and nurturing of the said minor child since his birth." Plaintiff Patty Sue McRoy interacted with Brandon on a daily basis. Over the course of his life, Brandon resided with plaintiffs on several occasions, both with and without his mother. Following the death of his mother, plaintiffs assumed all responsibility for Brandon,

including obtaining grief counseling for the child. There was substantial evidence presented by plaintiffs at the hearing regarding their devotion to Brandon, as well as their life-long financial support of him.

"When the court finds that both parties are fit and proper persons to have custody, as it did here, and then adjudges that it is in the best interest of the child for the father to have custody, such holding will be upheld. But it must be supported by competent evidence." *Green v. Green*, 54 N.C. App. 571, 574, 284 S.E.2d 171, 174 (1981). Our examination and consideration of the record leads us to the conclusion that the findings of fact set out above are not supported by competent evidence, and that the remaining findings of fact are not sufficient to support the conclusion that it was in the child's best interest that his custody be awarded to his father. *See id.* As such, this case must be remanded for a new hearing on the issue of permanent custody.

Reversed and remanded.

Judges HUNTER and ELMORE concur.

KENNETH EASON, PLAINTIFF v. UNION COUNTY, DEFENDANT, AND UNION COUNTY, THIRD PARTY PLAINTIFF v. JOHN PERRY CONSTRUCTION AND JOHN PERRY, JOHN SMETHURST AND ALLEN TATE REALTY COMPANY, INC., THIRD PARTY DEFENDANTS

No. COA02-1161

(Filed 16 September 2003)

1. **Counties— negligent inspection of house—public duty doctrine**

   The public duty doctrine does not bar a claim against a county for negligent inspection of a private residence.

2. **Counties— negligent inspection of house—reliance on certificate of occupancy not shown—summary judgment**

   Summary judgment was properly granted for defendant county on a claim for negligent inspection of a house purchased by plaintiff where plaintiff failed to show any reliance on the certificate of occupancy in purchasing the house.

3. Counties— negligent inspection—contributory negligence

The trial court correctly granted summary judgment for defendant county on a claim for negligent inspection where plaintiff's own negligence contributed to his damages. Plaintiff relied on the promises of a realtor and a builder rather than the certificate of occupancy, he failed to have the house reinspected or to obtain the warranty prior to purchase, and he took title with knowledge of the uncompleted and needed repairs.

Appeal by plaintiff from judgment entered 11 June 2002 by Judge Susan C. Taylor in Union County Superior Court. Heard in the Court of Appeals 18 August 2003.

Weaver, Bennett & Bland, P.A., by Benjamin L. Worley, for plaintiff-appellant.

Lovejoy & Bolster, P.A., by Jeffrey S. Bolster, for defendant-appellee.

No brief filed for John Perry Construction, John Perry, John Smethurst, or Allen Tate Realty Company, Inc.

TYSON, Judge.

Kenneth Eason ("plaintiff") appeals from 11 June 2002 order granting summary judgment in favor of Union County ("defendant"). We affirm.

I. Background

In the Fall of 1998, plaintiff sought to purchase a home in the Waxhaw area of Union County, North Carolina. Plaintiff inquired about a house located at 6611 Providence Road South ("the house"). He contacted the listing real estate agent, John Smethurst ("Smethurst") of the Allen Tate Realty Company, Inc. John Perry ("Perry") and his construction company, John Perry Construction, Inc. ("Perry Construction") were the builder and seller of the house.

Plaintiff made an initial "low offer" of $200,000.00, which Perry Construction accepted. This offer was contingent upon: (1) the house passing an independent inspection, (2) the resolution of any flooding problems on the property, and (3) the purchase of a 2/10 home warranty for plaintiff by Perry Construction. Smethurst recommended and plaintiff hired Estep's Home Service ("Estep"), who performed the independent inspection on 28 September 1998.

Estep's report noted elevated moisture content in the floor joists and girders and the need for additional piers under the girders to provide adequate foundation support. Prior to closing, Smethurst informed plaintiff that the moisture problem was resolved by putting another polyvapor barrier on the beams. Estep's report indicated that water and electrical services were disconnected during the inspection, and noted that the heating, air conditioning, plumbing, septic system, and electrical service had not been tested. Estep recommended that all fixtures and systems be inspected after the water and electrical services were connected. In his deposition, plaintiff acknowledged that he visited the house three times prior to closing. Each time he visited, the electricity and plumbing were turned on and appeared to function properly. Estep's report also noted cracking in the driveway. Funds were deposited in escrow prior to closing to address this defect.

Prior to closing, Perry Construction provided a "Seller's Disclosure of Property" form, which plaintiff signed on 21 September 1998. The structural component section of this form disclosed the house had foundation defects, but did not set out further explanation.

The original closing date was scheduled for 16 October 1998. Plaintiff postponed the closing after discovering the repairs noted in Estep's report were not complete. Smethurst knew that plaintiff was reluctant to close before the repairs were completed. On 21 October 1998, Smethurst strongly urged plaintiff to close on the house or that someone else would quickly buy the house at the contract price. Smethurst verbally assured plaintiff that Perry would finish the remaining repairs within the following week.

Perry did not attend the closing. He called two and a half hours after the scheduled closing time and the closing attorney acted on his behalf. Plaintiff closed on the house without reinspecting the premises, relying on the advice and assurances of Smethurst and Perry. Immediately after moving into the house, plaintiff realized the repairs had not been completed. Plaintiff also discovered additional defects, which did not appear on the inspection report.

Perry failed to complete the house or make the promised repairs. On 21 September 1999, plaintiff filed action against Perry and Perry Construction for unfair and deceptive trade practices and breach of warranty. During that lawsuit, plaintiff obtained plans for the house and a building permit, issued by defendant, for construction of a 1,804 square foot one-story six-room house. Perry Construction built a

2,945 square foot two-story ten-room house. Plaintiff also obtained the certificate of occupancy for the house issued by defendant's Department of Inspection on 18 December 1997. Plaintiff did not bring action against Smethurst, Allen Tate Realty Company, Inc., or Estep. Plaintiff seeks recovery against defendant based on negligent inspection. Defendant moved for summary judgment based on: (1) contributory negligence and (2) the public duty doctrine. Judge Taylor granted defendant's motion for summary judgment and plaintiff appealed.

II. Issues

Plaintiff assigns as error the trial court's finding that: (1) no genuine issues of material fact existed regarding plaintiff's claim of negligent inspection, and (2) plaintiff was contributorily negligent as a matter of law.

III. Standard of Review for Summary Judgment

Summary judgment is appropriate when the moving party establishes that the opposing party cannot produce evidence to support an essential element of the claim or an essential element of the opposing party's claim does not exist. *Collingwood v. G.E. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). By moving for summary judgment, a defendant may force a plaintiff to produce evidence showing the ability to make out a *prima facie* case. *Id.* All inferences of fact are construed in favor of the nonmoving party. *Id.*

Rule 56 of the North Carolina Rules of Civil Procedure states that summary judgment will be granted "[i]f 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) (2000). Determining what constitutes a genuine issue of material fact requires consideration of whether an issue is supported by substantial evidence. *Dewitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Id.*, (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Thompson v. Wake County Bd. of*

Educ., 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977), (quoting *State ex. rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977)). Substantial evidence requires "more than a scintilla or a permissible inference." *Dewitt*, 355 N.C. at 681, 565 S.E.2d at 146, (quoting *Utilities Comm'n v. Great S. Trucking Co.*, 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943)).

[1] Defendant's motion for summary judgment asserted that the public duty doctrine barred plaintiff's claim. We reiterate our Supreme Court's decision in *Thompson v. Waters* that the public duty doctrine does not bar a claim against the county for negligent inspection of a private residence. 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000).

IV. Negligent Inspection

[2] To determine whether summary judgment was properly granted, we first consider whether plaintiff produced evidence tending to show each element of negligent inspection. Plaintiff must establish that: (1) defendant owed a legal duty to plaintiff, (2) defendant breached that duty, and (3) defendant's breach proximately caused plaintiff's injury. *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002).

Our Courts define proximate cause 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." *Adams v. Mills*, 312 N.C. 181, 192, 322 S.E.2d 164, 172 (1984). Proximate cause is an inference of fact to be drawn from all the facts and circumstances. *Id.* at 193, 322 S.E.2d at 172. The court will declare whether or not an act was the proximate cause of an injury only if all the facts indicate only one inference may be drawn. *Id.*

Viewed in the light most favorable to the nonmoving party, plaintiff failed to forecast substantial evidence showing defendant's negligence proximately caused his damages. During his deposition, plaintiff admitted he did not review or have any discussions with anyone regarding defendant's certificate of occupancy prior to the closing. Plaintiff only attempted to contact defendant, regarding the certificate of occupancy, after he purchased the house. Plaintiff now asserts he would not have purchased the house but for the certificate of occupancy issued by defendant. This assertion alone is insufficient evidence to allow a reasonable mind to conclude

the defendant's certificate of occupancy proximately caused plaintiff's damages.

Plaintiff failed to show any reliance on the certificate of occupancy in purchasing the house. Defendant's issuance of the certificate of occupancy was not the proximate cause of plaintiff's damages. Plaintiff failed to show evidence of an essential element of his claim. This assignment of error is overruled.

V. Contributory Negligence

[3] In the alternative, we also conclude the trial court properly granted summary judgment because plaintiff's own negligence contributed to his damages. When a defendant moves for summary judgment alleging contributory negligence, "the trial court must consider any evidence tending to establish plaintiff's contributory negligence in the light most favorable to the defendant, and if diverse inferences can be drawn from it, the issue must be submitted to the jury." *Cobo v. Raba*, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998). Contributory negligence is appropriate for summary judgment "only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached." *Martishius*, 355 N.C. at 479, 562 S.E.2d at 896.

Plaintiff admits "he was the victim of misrepresentations and other deceptions on the part of John Perry Construction, John Smethurst, and/or Estep Home Services." Plaintiff argues he acted reasonably by hiring an independent inspector and attempting to purchase a warranty. The inspection report indicated several defects and clearly stated that a reinspection was needed after utilities were connected. Plaintiff visited the house on three occasions prior to closing while the utilities were connected. Plaintiff purchased the house with full knowledge that certain defects had not been repaired. Plaintiff never received a written copy or verification of the 2/10 warranty he paid for. He relied on Smethurst's representations that the warranty was "on its way."

Plaintiff's precautionary, but unsuccessful, measures do not excuse his negligence and make defendant liable. He relied on Smethurst and Perry's promises, not the certificate of occupancy issued by defendant. Plaintiff's failure to have the house reinspected, obtain the warranty prior to purchase, and taking of title with knowledge of the uncompleted and needed repairs, all contributed to and proximately caused his damages. This assignment of error is overruled.

VI. Conclusion

Summary judgment to defendant is affirmed.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

STATE OF NORTH CAROLINA v. JOHN BURCH

No. COA02-1137

(Filed 16 September 2003)

Assault— habitual misdemeanor assault—motion to dismiss—sufficiency of evidence

The trial court erred by failing to dismiss the charge of habitual misdemeanor assault and the case is remanded for resentencing on defendant's conviction for assault inflicting serious injury, because: (1) the State failed to present any evidence of defendant's prior misdemeanors as required by N.C.G.S. § 15A-928(b), and defendant did not stipulate to the five prior misdemeanors before the State rested its case; and (2) there was no discussion in the record of an agreement to bifurcate the proceedings and submit the issue of defendant's prior record to the jury at a later time.

Appeal by defendant from judgment entered 29 January 2002 by Judge Howard E. Manning, Jr. in Person County Superior Court. Heard in the Court of Appeals 18 August 2003.

Roy Cooper, Attorney General, by Valerie L. Bateman, Assistant Attorney General, for the State.

William H. Dowdy for defendant-appellant.

STEELMAN, Judge.

Defendant, John Burch, appeals his conviction of habitual misdemeanor assault. For the reasons discussed herein, we reverse and remand.

The State's evidence tended to show that on 12 March 2001, defendant and the victim, Barbie Mangum, were boyfriend and girlfriend. On that date, Mangum went to defendant's house. Later that evening, they began to argue about defendant's former girlfriend. Subsequent to the argument, Mangum went to lie down in a bedroom. She was later awakened by defendant slapping her face. He pushed her off the bed, choked her, and continued to slap her in her face. Defendant demanded that Mangum perform oral sex on him. At first, Mangum refused, but finally relented amid continuous blows to her face. Mangum performed oral sex. While she was on her knees, defendant punched her in her eye, causing her to fall backwards.

Mangum sought treatment for her injuries at a hospital. She informed the medical staff that she had been beaten.

Defendant's evidence tended to show that on the morning of 13 March 2001, defendant's mother, Willa Burch, who lived with defendant, saw defendant and Mangum asleep in defendant's bed. Mangum later woke up and showed Burch what defendant had done to her face. Burch gave Mangum some ice and they all sat down at the kitchen table.

Tracy Caldwell, defendant's sister, stated that defendant, Mangum and a man named Mike Hargus were smoking marijuana on the evening of 12 March 2001. Caldwell was at the house until about 3:00 a.m., at which point she saw Mangum at the kitchen table with defendant. There were no bruises on her face.

Officer Rodney Chandler of the Person County Sheriff's Department arrested defendant on 14 March 2001. He was charged with habitual misdemeanor assault and other more serious crimes. The other charges were either dismissed by the trial court or defendant was found not guilty by the jury. The trial court did not submit the charge of habitual misdemeanor assault to the jury, but rather submitted only the charge of assault inflicting serious injury. The jury found defendant guilty of that charge, a misdemeanor. Following the return of the jury's verdict, defendant admitted to five prior misdemeanors and was sentenced to ten to twelve months in prison. Defendant appeals.

Because we find defendant's second assignment of error to be dispositive of the case, we do not reach his first and third assignments of error.

Defendant argues that the trial court erred in failing to dismiss the habitual misdemeanor assault charge at the close of the State's evidence. We agree.

The criminal law of this State contains two distinct types of "habitual" classifications. The first type includes habitual felon under Article 2A of Chapter 14 and violent habitual felon under Article 2B of Chapter 14. This category classifies the transgression as a status, not a substantive offense. *See State v. Penland*, 89 N.C. App. 350, 365 S.E.2d 721 (1988). The habitual felon status must be charged in an indictment separate from the principal felony. N.C. Gen. Stat. §§ 14-7.3, 14-7.9 (2001); *State v. Winstead*, 78 N.C. App. 180, 336 S.E.2d 721 (1985). The defendant must first be tried before a jury on the principal felony. N.C. Gen. Stat. §§ 14-7.5, 14-7.11 (2001). During the trial on the principal felony, it may not be revealed to the jury that the defendant is being charged as a habitual felon. *Id.* Only in the event that the jury finds a defendant guilty of the principal felony will the habitual felon indictment be presented to the jury. *Id.*

Trials involving habitual felons and violent habitual felons are bifurcated, with two separate trials before the same jury; the first on the principal felony and the second on the habitual felon status. The defendant may not stipulate to habitual felon status, but must either plead guilty or be found guilty by a jury. *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001).

The second type of habitual offenses include habitual misdemeanor assaults and habitual impaired driving. N.C. Gen. Stat. §§ 14-33.2; 20-138.5 (2001). Trials for these offenses are required to follow the procedures set forth in Chapters 15A and 20, which are different from those set forth for habitual felons and violent habitual felons in Chapter 14. Section 15A-928 applies to offenses when "the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter." N.C. Gen. Stat. § 15A-928(a) (2003). These habitual offenses are substantive offenses; the "habitual" aspect is not merely a status. *State v. Smith*, 139 N.C. App. 209, 533 S.E.2d 518, *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000). The prior convictions of a defendant are an element of the habitual offense. N.C. Gen. Stat. §§ 14-33.2; 20-138.5. The State must prove all elements of a crime beyond a reasonable doubt. "Elements of criminal offenses present questions of fact which must be resolved by the jury upon the State's proof of their existence beyond a reasonable

doubt." *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 469, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986).

Section 15A-928(c) sets forth specific procedures which must be followed for this type of habitual offense:

> (c) After commencement of the trial and before the close of the State's case, the judge in the absence of the jury must arraign the defendant upon the special indictment or information, and must advise him that he may admit the previous conviction alleged, deny it, or remain silent. Depending upon the defendant's response, the trial of the case must then proceed as follows:
>
> (1) If the defendant admits the previous conviction, that element of the offense charged in the indictment or information is established, no evidence in support thereof may be adduced by the State, and the judge must submit the case to the jury without reference thereto and as if the fact of such previous conviction were not an element of the offense. The court may not submit to the jury any lesser included offense which is distinguished from the offense charged solely by the fact that a previous conviction is not an element thereof.
>
> (2) If the defendant denies the previous conviction or remains silent, the State may prove that element of the offense charged before the jury as a part of its case. This section applies only to proof of a prior conviction when it is an element of the crime charged, and does not prohibit the State from introducing proof of prior convictions when otherwise permitted under the rules of evidence.

N.C. Gen. Stat. § 15A-928(c). The purpose of this procedure is to afford the defendant an opportunity to admit the prior convictions which are an element of the offense and prevent the State from presenting evidence of these convictions before the jury. However, if the defendant fails to admit the prior convictions, then the State may present evidence of them to the jury as an element of the habitual crime.

In the instant case, defendant was charged in a two-count indictment, in accordance with N.C. Gen. Stat. § 15A-928(b), with habitual misdemeanor assault, a felony. In order to prove defendant's guilt, the State was required to prove the following two elements: (1) the defendant had been convicted of five prior misdemeanors, two of which were assaults; and (2) the defendant committed an assault

under N.C. Gen. Stat. § 14-33(c) or 14-34. N.C. Gen. Stat. § 14-33.2 (2003). *See also* N.C.P.I.—Crim. 208.45 (1999). The State put on evidence that defendant committed an assault inflicting serious injury pursuant to section 14-33(c)(1).

However, defendant was not arraigned by the trial court as required by section 15A-928(c). The State introduced no evidence of the five prior misdemeanor convictions. There was no stipulation by defendant of the prior misdemeanors until after the return of the jury verdict. Upon the State's resting its case, defendant moved for a dismissal of the habitual misdemeanor assault charge. This motion was renewed at the close of all the evidence.

A trial for habitual misdemeanor assault is not a bifurcated proceeding. The fact that defendant was not arraigned in accordance with section 15A-928(c) did not relieve the State of its burden to prove the five prior misdemeanors beyond a reasonable doubt.

Upon defendant's motion to dismiss at the close of the State's evidence, the only issue for the trial court is whether there was substantial evidence presented of each essential element of the charged offense and of the defendant being the perpetrator. *State v. Crawford*, 344 N.C. 65, 472 S.E.2d 920 (1996). In this case, the State failed to present *any* evidence of the prior misdemeanors.

The State argues that this case should be controlled by this Court's ruling in *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995). In *Jernigan*, the defendant was charged with habitual impaired driving. The defendant was not arraigned in accordance with section 15A-928(c). However, prior to the commencement of the trial, the defendant stipulated to prior DWI convictions. Based on that stipulation, the State introduced no evidence of the defendant's prior conviction and the charge that was submitted to the jury was impaired driving rather than habitual impaired driving. This Court then held that the failure to arraign the defendant in accordance with section 15A-928(c) was not prejudicial error.

We hold that *Jernigan* is not controlling here given the facts of this case. We have carefully reviewed the record in this case. It is devoid of any stipulation by defendant as to the five prior misdemeanors before the State rested its case. Nor is there any discussion in the record of an agreement to bifurcate the proceedings and submit the issue of defendant's prior record to the jury at a later time.

The State failed to present evidence of an essential element of the offense of habitual misdemeanor assault. Defendant's motion to dismiss should have been granted. We therefore vacate his conviction of habitual misdemeanor assault. Defendant's conviction of assault inflicting serious injury is remanded for resentencing.

REVERSED AND REMANDED.

Chief Judge EAGLES and Judge TYSON concur.

KAREN CARLSON, AS ADMINISTRATRIX OF THE ESTATE OF MARK ELLIOTT CARLSON, PLAINTIFF v. OLD REPUBLIC INSURANCE COMPANY; AAU INSURANCE COMPANY; LEANN LITTLEFIELD AND JENNIFER JEWELL, EXECUTRICES OF THE ESTATE OF DAVID DRYE; AND LEANN LITTLEFIELD AND JENNIFER JEWELL, EXECUTRICES OF THE ESTATE OF ANN DRYE, DEFENDANTS

No. COA02-1284

(Filed 16 September 2003)

1. **Appeal and Error— appealability—interlocutory order—partial summary judgment—duty of insurance company to defend—substantial right**

Although an order of partial summary judgment on the issue of whether an insurance company has a duty to defend in the underlying wrongful death action is an appeal from an interlocutory order, it affects a substantial right that might be lost absent immediate appeal.

2. **Insurance— aircraft accident—indemnification—summary judgment motion**

The trial court did not err in a wrongful death action arising out of an aircraft accident by denying plaintiff administratrix's motion for summary judgment on the issue of whether defendant insurance company had a duty to indemnify the pilot's estate and by denying defendant's motion for summary judgment seeking a declaration that coverage did not exist under either of its two policies, because a genuine issue of material fact remained in regards to coverage for the pilot's estate when the pilot's status as an insured depended on whether the pilot was acting within the

scope of his duties as an officer, director, or stockholder of the pertinent corporation or as an independent contractor.

Appeal by defendant Old Republic Insurance Company from judgment entered 12 April 2002 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 August 2003.

Pinto Coates Kyre & Brown, PLLC, by Deborah J. Bowers, John I. Malone, Jr. and Paul D. Coates, for plaintiff-appellee.

Dean & Gibson, L.L.P., by Susan L. Hofer, for defendant-appellant.

MARTIN, Judge.

Plaintiff, as Administratrix of the Estate of Mark Elliott Carlson, brought this action seeking, *inter alia*, a declaratory judgment that defendant Old Republic Insurance Company (hereinafter "Old Republic") provided coverage under two insurance policies issued by it, for claims arising out of the 14 June 1999 crash of a Cessna aircraft registered to and owned by the David Drye Company, L.L.C. The aircraft's pilot, Kelly Ward, and three passengers, David Drye, Ann Drye and plaintiff's decedent, Mark Carlson, were killed in the crash. At the time of the accident, Ward was a part owner in Corporate Air Fleet, Inc. (hereinafter "Corporate Air") and owner of Ward's Aircraft Services, Inc. (hereinafter "Ward's Services"). Corporate Air maintained its own planes and those owned by others. In addition, it used its own planes to provide charter air service to fly persons or products. Ward's Services supplied aircraft maintenance and service and owned hangers for the purpose of aircraft storage.

Plaintiff, as administratrix of Carlson's estate, filed a suit in Mecklenburg County seeking damages for his wrongful death arising out of the aircraft accident. In the complaint, plaintiff alleged that Corporate Air and Ward's Services failed to provide adequate maintenance, repair, inspection or service on the airplane, and that such negligence contributed to the crash. In addition, the suit alleged that Ward was negligent in piloting the airplane and that he failed to provide adequate ground maintenance.

At the time of the accident, there were in force two insurance policies, an Airport Liability Policy and an Aviation Policy, issued by Old Republic to Corporate Air and Ward's Services. The Airport

Liability Policy provided comprehensive liability insurance to both Corporate Air and Ward's Services for ground services such as maintenance, fuel and oil, and for claims arising out of airport and airport premises operations. The Aviation Policy provided coverage to Corporate Air for bodily injury liability and property damage liability arising from the ownership, maintenance and use of specifically listed aircraft.

After the actions were tendered to Old Republic for defense and indemnification of Corporate Air, Ward's Services and Ward pursuant to these policies, Old Republic issued a reservation of rights letter as to coverage for Corporate Air and Ward's Services, and denied coverage for Ward. Plaintiff then filed this action requesting a declaration that coverage existed under the insurance policies. Old Republic answered, denying coverage and requesting a declaration to that effect. Plaintiff moved for partial summary judgment declaring that Old Republic is obligated to indemnify Corporate Air and/or Ward's Services under the Airport Policy should the plaintiff prevail in the underlying claim. Old Republic moved for summary judgment declaring that coverage did not exist under either policy and therefore, Old Republic would have no duty to defend or to indemnify for the accident.

The trial court entered an order in which it determined that Old Republic had a duty to defend Corporate Air and Ward's Services under the Airport Policy in the underlying wrongful death action, and that Old Republic's Airport Policy provided coverage to Ward's Services and/or Corporate Air for damages, if any, "in connection with the maintenance or service of the airplane . . . ." Holding that genuine issues of fact existed as to Old Republic's duty under the Airport Policy to defend and indemnify the Estate of Kelly Ward in the underlying wrongful death action, the trial court denied plaintiff's motion for summary judgment insofar as it sought such a declaration. Old Republic's motion for summary judgment was denied. Old Republic appeals.

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[1] An order of partial summary judgment on the issue of whether an insurance company has a duty to defend in the underlying action "affects a substantial right that might be lost absent immediate appeal." *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000). Therefore, this interlocutory appeal is properly before us for review.

[2] "[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "[T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Id.* 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). Thus, the issue is whether a genuine issue of material fact existed as to insurance coverage under the Airport Policy for maintenance and service of the aircraft.

In interpreting insurance policies, we are guided by the general rule that in the construction of insurance contracts,

> any ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company. Exclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy.

Maddox v. Colonial Life & Accident Ins. Co., 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). When an endorsement provision can be construed as in direct conflict with the coverage provisions of the policy, "the provisions most favorable to the insured, i.e. those in the endorsement, are controlling." *Drye v. Nationwide Mut. Ins. Co.*, 126 N.C. App. 811, 815, 487 S.E.2d 148, 150 (1997). "Since the objective of construing an insurance policy is to ascertain the intent of the parties, the courts should resist piecemeal constructions and should, instead, examine each provision in the context of the policy as a whole." *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 602, 544 S.E.2d 797, 800 (2001).

The Airport Policy provides that Old Republic will pay on behalf of the insured all damages which the insured is legally obligated to pay because of bodily injury or property damage. In addition, Old Republic has the right and duty to defend any such suit. However, there is an applicable exclusion, upon which defendant relies, stating that this coverage does not apply:

(b) to **bodily injury** or **property damage** arising out of the ownership, maintenance, operation, use loading or unloading of

(1) any **automobile** or **aircraft** owned or operated by or rented or loaned to the named insured, or

(2) any other **automobile** or **aircraft** operated by any person in the course of his employment by the **named insured**.

According to the policy, "if the named insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such" is considered an insured.

Included in the Airport Policy, immediately after the cover page, are "Special Airport Provisions" that apply to the comprehensive general liability insurance provided by the policy. This endorsement states:

With respect to the premises designated in the policy as an airport and all operations necessary or incidental thereto:

. . .

3. The exclusion in the policy with respect to aircraft applies only to aircraft owned by or rented or loaned to the **insured** or **in flight** by or for the account of the **insured**.

Although defendant argues that if Ward was operating the aircraft as a principal or employee of Corporate, the exclusion allowed denial of coverage, the endorsement modifies the applicable exclusion by omitting the term "operate." Reading the two clauses together, the only time the exclusion applies, thereby disallowing coverage, is when the aircraft is owned by, rented or loaned to the insured, or when the aircraft was in flight by or for the account of the insured. The intent of the Airport Policy was to cover events arising from the insured's conduct, as long as those events did not occur in connection with planes that were the property of the insured. The Aviation Policy, although not at issue before this Court, provided coverage to the insured for events involving planes owned, maintained or used by the insured.

The Cessna aircraft that crashed in this incident was owned by the David Drye Company, L.L.C. and it had not been rented by or

loaned to Corporate Air or Ward's Services. The flight, which was to transport the owners and an employee of the David Drye Company, L.L.C., was in flight for the account of that company. Therefore, the trial judge correctly ruled that the Airport Policy provided coverage should the insured be found liable.

Defendant contends that the trial court erred in granting partial summary judgment for the plaintiff while denying summary judgment for defendant because the only question of material fact was whether Ward provided piloting services as an employee of Corporate Air or individually as an independent contractor. Since the Airport Policy covered only ground services and airport premises operations, the status of the pilot had no effect on coverage of the Airport Policy. Therefore summary judgment on this issue was proper.

Because his status as an insured depended on whether Ward was acting within the scope of his duties as an officer, director or stockholder with Corporate Air or as an independent contractor, a genuine issue of material fact remained in regards to coverage for the Estate of Kelly Ward under both the Airport Policy and the Aviation Policy. Thus, the court's denial of plaintiff's summary judgment motion on the issue of whether Old Republic had a duty to defend and indemnify the Estate of Kelly Ward was proper as was the denial of defendant's summary judgment motion seeking a declaration that coverage did not exist under either policy.

Affirmed

Judges McCULLOUGH and LEVINSON concur.

JANE CONSTANCE SHERMAN, PLAINTIFF v. HOME DEPOT U.S.A., INC., DEFENDANT

No. COA02-1368

(Filed 16 September 2003)

1. Workers' Compensation— lien—reduction by court—no abuse of discretion

The reduction of a workers' compensation lien to $55,667 from $168,000 was not an abuse of discretion where the court considered the factors delineated by the legislature and determined that the reduced lien was fair and equitable. N.C.G.S. § 97-10.2(j).

2. Workers' Compensation— action against third-party— attorney fees

A superior court order that a workers' compensation insurance carrier pay $56,602 of plaintiff's litigation expenses against a third party was not an abuse of discretion. Although the carrier argued that the court was ordering it to pay attorney fees without authority, the order read in its entirety concerned litigation costs and clarified that plaintiff could seek no further payment from the carrier for either litigation costs or attorney fees.

Appeal by an unnamed party from an order entered 3 June 2002 by Judge Abraham Penn Jones in Durham County Superior Court. Heard in the Court of Appeals 19 August 2003.

Pulley, Watson, King & Lischer, P.A., by Guy W. Crabtree, for plaintiff-appellee.

Morris, York, Williams, Surles, & Barringer, L.L.P., by John F. Morris, and Keith B. Nichols, for unnamed party-appellant.

CALABRIA, Judge.

Companion Property and Casualty Insurance Company ("Companion"), the workers' compensation insurance carrier for Jane Constance Sherman's ("plaintiff") employer, appeals the 3 June 2002 order of the Superior Court reducing its workers' compensation lien to $55,667.00 and ordering Companion to pay $56,602.00 to plaintiff's attorneys. We find no abuse of discretion in the reduction of the lien, and conclude the trial court properly ordered Companion to pay a portion of the litigation costs. Accordingly, we affirm the order of the Superior Court.

On 15 November 1999, plaintiff was injured in an automobile accident when a loaded flatbed trailer became detached from its vehicle and struck her vehicle. Plaintiff's permanent injuries are extensive. Her injuries include a broken neck, a de-gloving laceration of her face and head, and severe brain damage. Since plaintiff was in the course and scope of her employment at the time, her injuries are compensable under the Workers' Compensation Act. Plaintiff received, and will continue to receive, said compensation from Companion. Plaintiff recovered $500,000.00 from the insurance company of the driver of the other vehicle. Companion waived its subrogation rights to that payment.

Thereafter, plaintiff brought this action against Home Depot, Inc. ("Home Depot") for negligence by improperly loading the trailer. Home Depot denied liability but settled the claim for $1,300,000.00. Companion asserted its subrogation rights to this settlement. The amount of the workers' compensation lien at the time of the hearing was approximately $168,000.00. The Superior Court determined "a reduction of Companion's lien to the amount of $55,667.00 is fair and reasonable. . . ." The Superior Court ordered Companion to pay $56,602.00 toward plaintiff's litigation costs. Companion appeals.

Companion asserts the Superior Court erred by (I) reducing its workers' compensation lien to $55,667.00 under N.C. Gen. Stat. § 97-10.2(j); and (II) improperly ordering Companion to pay $56,602.00 to plaintiff's attorneys.

I. Lien Reduction

[1] Companion argues the trial court abused its discretion in reducing the workers' compensation lien to $55,667.00. North Carolina law provides:

> Notwithstanding any other subsection in this section . . . in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to . . . [the Superior Court] to determine the subrogation amount. . . . [T]he judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C. Gen. Stat. § 97-10.2(j) (2001). However, "the discretion granted [to the Superior Court judge] under G.S. § 97-10.2(j) is not unlimited; 'the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported . . . [by] findings of fact and conclusions of law sufficient to provide for meaningful appel-

late review.' " *In Re Biddix*, 138 N.C. App. 500, 504, 530 S.E.2d 70, 72 (2000) (quoting *Allen v. Rupard*, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990)).

The Superior Court, in considering the applicable factors to guide its decision, found as fact: plaintiff's claim against Home Depot was settled for $1,300,000.00; plaintiff received $500,000.00 from an additional claim; the attorney's fees were $390,000.00; the litigation costs were in excess of $169,806.00. The amount of the workers' compensation lien "was approximately $168,000.00 and was increasing each week." Plaintiff's life care plan demonstrated that the cost of her care "over the remainder of her life will exceed $1,500,000.00 and that her diminished earning capacity over the remainder of her life will exceed $500,000.00." Finally, the court found plaintiff has suffered disfigurement, scarring, and partial use of her left eye, spine, back, and brain. The court concluded it was reasonable for plaintiff to accept settlements of her claims, considering that she might not have recovered at trial, and that "the amount recovered by Plaintiff in the two above described settlements will not adequately compensate Plaintiff for all of the damage she has suffered and will continue to suffer over the remainder of her life." Therefore, the court determined "given the totality of the circumstances of this case, a reduction of Companion's lien to the amount of $55,667.00 is fair and reasonable. . . ."

In determining whether the Superior Court's order was reasonable or an abuse of discretion, we find instructive our prior decisions. In *Biddix*, this Court upheld the reduction of a workers' compensation lien to zero where the trial court determined the $25,000.00 settlement was inadequate to compensate plaintiff, who had broken her femur and wrist, required a metal rod be placed in her leg and suffered emotional trauma. *Biddix*, 138 N.C. App. at 505, 530 S.E.2d 70, 72-73. In *U.S. Fidelity and Guaranty Co. v. Johnson*, 128 N.C. App. 520, 495 S.E.2d 338 (1998), this Court upheld the Superior Court's reduction of a workers' compensation lien to zero where the settlement of $372,825.00 was inadequate to compensate the employee's family following his death. In *Wiggins v. Bushranger Fence Co.*, 126 N.C. App. 74, 483 S.E.2d 450 (1997), this Court upheld the reduction of a workers' compensation lien to zero because the equities of the case justified the $900,000.00 settlement to the employee's family. In the case at bar, the Superior Court considered the factors delineated by the legislature, and, consistent with previous cases, determined, in its discretion, that although the settlement was inadequate to com-

pensate plaintiff, a workers' compensation lien of $55,667.00 was fair and equitable.

Finally, Companion argues the Superior Court's result permits a double recovery by plaintiff, thereby "defeat[ing] the purpose and spirit of the Workers' Compensation Act." However, as we have previously acknowledged: "[w]e are cognizant of the potential for plaintiff to receive a double recovery . . . [however] we [previously] determined that the statute contemplated and allowed for such a recovery if justified by the equities of the case." *Wiggins*, 126 N.C. App. at 77-78, 483 S.E.2d at 452. Accordingly, we cannot find Judge Jones abused his discretion, and we affirm the order of the trial court.

II. Litigation Costs and Attorneys Fees

[2] Companion appeals asserting the trial court improperly ordered payment of $56,602.00 to plaintiff's attorney because the court had no authority to order Companion to pay a portion of the attorneys fees. We find the order required Companion to pay a portion of the litigation costs and not attorneys fees.

North Carolina law expressly provides, "the judge shall determine, in his discretion . . . the amount of cost of the third-party litigation to be shared between the employee and employer." N.C. Gen. Stat. § 97-10.2(j). In the present case, the Superior Court concluded as a matter of law, "given the totality of the circumstances of this case, requiring Companion to pay the sum of $56,602.00 toward Plaintiff's litigation costs is fair and reasonable in the Court's discretion." The court found as fact "[p]laintiff's attorneys either advanced or incurred costs related to the litigation in excess of $169,806.00." The court, having considered the statutory factors, determined that Companion should pay one-third of the litigation costs, and ordered them to pay $56,602.00, which is one-third of $169,806.00. The court further ordered the remaining approximately two-thirds of the litigation costs be paid from the $1,300,000.00 settlement to the attorneys.

Nevertheless, Companion asserts the following conclusion of law supports its claim that the court was ordering it to pay attorneys fees: "payment of the sum of $56,602.00 by the [(sic)] Companion to Plaintiff's attorneys, Pulley, Watson, King & Lischer, P.A., will fully and forever satisfy its responsibility under NCGS § 97-10.2 for payment to Plaintiff of its share of litigation expenses and attorney fees." While reading this passage alone could indicate the payment of

$56,602.00 was for both litigation costs and attorneys fees, in light of the entire order such a conclusion would be contradictory. The court specifically stated the payment was for a portion of the litigation costs. Moreover, the court found as fact the attorney fee was $390,000.00, concluded as a matter of law it was fair and reasonable, and ordered payment of $390,000.00 to the attorneys from the $1,300,000.00 settlement. Therefore, reading this passage in the context of the entire order, it is apparent the court was not ordering Companion to pay plaintiff's attorney's fees, but was clarifying that plaintiff could seek no further payment from Companion for either litigation costs or attorneys fees. Accordingly, we overrule this assignment of error.

The order of the Superior Court is

Affirmed.

Judges WYNN and HUDSON concur.

IN THE MATTER OF CHADWICK O'NEAL

No. COA02-906

(Filed 16 September 2003)

Juveniles— probation violation hearing—assault—motion to dismiss—double jeopardy

The trial court did not violate a juvenile's double jeopardy rights by denying his motion to dismiss the assault charge even though the juvenile had previously admitted to the same offense at the juvenile's probation violation hearing, because: (1) double jeopardy protections do not apply to probation revocation hearings when a probation violation hearing is not a criminal prosecution; (2) the imposition of a new term of probation or possibly confinement in juvenile cases is punishment for the original offense for which the juvenile was adjudicated delinquent and not for any of the offenses that form the basis of the trial court's determination that a probation violation has occurred; and (3) the juvenile was not punished twice for the same offense.

IN RE O'NEAL

[160 N.C. App. 409 (2003)]

Appeal by respondent from juvenile disposition order entered 26 March 2002 by Judge John W. Dickson in District Court, Cumberland County. Heard in the Court of Appeals 24 April 2003.

Attorney General Roy Cooper, by Barbara A. Shaw, Assistant Attorney General, for the State.

Peter Wood for respondent-appellant.

McGEE, Judge.

Chadwick O'Neal (the juvenile) was adjudicated a delinquent juvenile on 30 January 2001 for the commission of the offenses of misdemeanor assault with a deadly weapon and misdemeanor assault on a government official in violation of N.C. Gen. Stat. § 14-33(c). The juvenile was placed on probation for one year subject to conditions imposed by the trial court on 2 February 2001.

A juvenile court counselor filed a motion for review for violation of the conditions of probation by the juvenile on 20 September 2001, alleging that:

1. On or about 2-28-01, the juvenile was removed from his placement . . . .

2. On or about 2-28-01, the juvenile was removed from his placement due to him being disrespectful to authority figures and fighting with a low functioning resident.

3. Being removed from the Ft. Bragg Leadership camp for refusing to follow instructions and disruptive behavior.

4. On or about 8-29-01, the juvenile became physically aggressive with his sister.

5. On or about 8-31-01, the juvenile was placed in school detention for refusing to follow instructions in school and disrupting the class.

6. On or about 9-6-01, the juvenile did not have his study log available for the court counselor after being given prior notice on 8-31-01.

7. On or about 9-6-01, after the court counselor left school the juvenile went to class and again disrupted class by refusing to follow directions and calling the teacher names.

8. On or about 9-8-01, the juvenile became physically aggressive with his sister.

9. On or about 9-8-01, the juvenile went behind his mother's back and played his video game after he was already instructed not to.

10. On or about 9-13-01, the juvenile became physically aggressive with another juvenile and the police were called.

Following a hearing on 23 October 2001, the trial court entered an order finding that the juvenile admitted the allegations in the motion, except the allegations that he was physically aggressive with his sister. The trial court concluded as a matter of law that the juvenile willfully violated the terms of his probation and ordered that the disposition hearing be continued so that the juvenile could attend and successfully complete a training program. At the disposition hearing on 28 February 2002, the trial court entered an order placing the juvenile on a new Level II Juvenile Probation for a period of one year.

A juvenile petition for misdemeanor assault was filed against the juvenile on 19 February 2002, alleging that the juvenile committed a delinquent act of assaulting a person under the age of twelve by choking him with his hands, on 11 September 2001. The misdemeanor assault petition was heard on 26 March 2002. The juvenile moved to dismiss the charge based on double jeopardy, which was denied by the trial court. The trial court took judicial notice of the fact that the 11 September 2001 offense alleged in the petition for misdemeanor assault and the 13 September 2001 aggressive behavior with another juvenile, allegation number 10 in the motion for review for probation violation, were the same incident.

After hearing evidence, the trial court entered a juvenile adjudication order finding that the State had proven the allegations in the petition for misdemeanor simple assault beyond a reasonable doubt and finding the juvenile guilty of simple assault. In a disposition order entered the same day, the trial court ordered that the juvenile continue at his current probation Level II. The juvenile appeals from this order.

The juvenile's sole assignment of error is that the trial court erred in denying his motion to dismiss the assault charge when the juvenile had previously admitted to the same offense at the juvenile's proba-

tion violation hearing. The juvenile argues the trial court's denial of his motion to dismiss was in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The Double Jeopardy Clause

> protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.

State v. Thompson, 349 N.C. 483, 495, 508 S.E.2d 277, 284 (1998).

"The protection of the Double Jeopardy Clause applies to juvenile proceedings and attaches when the judge, as trier of fact, begins to hear evidence." *In re Phillips*, 128 N.C. App. 732, 734, 497 S.E.2d 292, 293, *disc. review denied*, 348 N.C. 283, 501 S.E.2d 919 (1998) (citing *Breed v. Jones*, 421 U.S. 519, 531, 44 L. Ed. 2d 346, 356-57 (1975)). However, the Supreme Court in *Breed* only extended double jeopardy protection to adjudicatory or delinquency hearings. *Breed*, 421 U.S. at 529-31, 44 L. Ed. 2d at 355-56; *see also Barker v. Estelle*, 913 F.2d 1433, 1437 (9th Cir. 1990), *cert. denied*, 500 U.S. 935, 114 L. Ed. 2d 465 (1991) (noting that as long as the risk of adjudication of the alleged offenses is not present in the juvenile hearing, jeopardy does not attach). The Supreme Court noted in *Breed*, a case dealing with double jeopardy in the transfer of a juvenile from juvenile court to be tried as an adult, that nothing in its holding prevented "States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding." *Breed*, 421 U.S. at 538 n.18, 44 L. Ed. 2d at 360 n.18.

We apply the same reasoning to probation revocation proceedings for juveniles. This Court has long held that "[a] probation violation hearing is not a criminal prosecution." *State v. Monk*, 132 N.C. App. 248, 252, 511 S.E.2d 332, 334, *appeal dismissed and disc. review denied*, 350 N.C. 845, 539 S.E.2d 1 (1999) (citing *State v. Pratt*, 21 N.C. App. 538, 204 S.E.2d 906 (1974)). In a probation violation hearing, "all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the defendant had, without lawful excuse, willfully violated a valid condition of probation." *Pratt*, 21 N.C. App. 538, 540, 204 S.E.2d 906, 907 (1974). In a juvenile probation violation hearing, the trial court must only find by a preponderance of the evidence

that a juvenile has violated the conditions of his probation under N.C. Gen. Stat. § 7B-2510(e) (2001). It is well established that double jeopardy protections do not apply to probation revocation hearings. *United States v. Woods*, 127 F.3d 990, 992-93 (11th Cir. 1997); *United States v. Woodrup*, 86 F.3d 359, 363 (4th Cir.), *cert. denied*, 519 U.S. 944, 136 L. Ed. 2d 245 (1996); *Knight v. United States*, 73 F.3d 117, 123 (7th Cir. 1995), *cert. denied*, 519 U.S. 827, 136 L. Ed. 2d 46 (1996); *United States v. Whitney*, 649 F.2d 296, 298 (5th Cir. 1981).

The juvenile focuses on the punishments that he could be subject to for violation of his probation. However, as discussed in *Monk*, " '[a]lthough revocation of probation results in the deprivation of a probationer's liberty, *the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty.*' " *Monk*, 132 N.C. App. at 253, 511 S.E.2d at 335 (emphasis in original) (quoting *State v. Young*, 21 N.C. App. 316, 320, 204 S.E.2d 185, 187 (1974)). We acknowledge that in adult criminal cases a violation of probation usually results in the activation of a previously imposed sentence, while in juvenile cases a probation violation usually results in a new imposition of probation or even confinement, since there is generally no suspended term of confinement in juvenile cases imposing probation. *Compare Young*, 21 N.C. App. at 320, 204 S.E.2d at 187, *with In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395 (2003). Even with the differences between the juvenile system and the criminal justice system, *see State v. Tucker*, 154 N.C. App. 653, 657-59, 573 S.E.2d 197, 200-01 (2002), *disc. review denied*, 356 N.C. 691, 578 S.E.2d 597 (2003), the better view is to treat a juvenile probation violation as analogous to the revocation of probation in the criminal justice system, in that this imposition of a new term of probation, or possibly confinement, in juvenile cases is punishment for the original offense for which the juvenile was adjudicated delinquent, not for any of the offenses that form the basis of the trial court's determination that a probation violation has occurred. *See Monk*, 132 N.C. App. at 253, 511 S.E.2d at 335; *Young*, 21 N.C. App. at 320, 204 S.E.2d at 187.

In the probation violation hearing in the present case, the trial court only found by a preponderance of the evidence that the juvenile had violated the conditions of his probation. This determination was not made in an adjudicatory hearing, and the extension of double jeopardy protection to juvenile adjudications as discussed in *Breed* does not apply here. Further, as discussed above the juvenile was not punished twice for the same offense. Therefore, jeopardy did not

attach at the 23 October 2001 probation violation hearing so as to preclude the later hearing adjudicating the juvenile delinquent for simple assault.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FREEMAN v. TRIANGLE GRADING & PAVING, INC. No. 02-1269	Ind. Comm. (I.C. 875760)	Affirmed
IN RE HINSHAW No. 02-1320	Randolph (90J127)	Affirmed
IRBY v. THE NEW TELEPHONE CO. No. 02-1359	Ind. Comm. (I.C. 972374)	Affirmed
JOHNSON v. N.C. LICENSE PLATE AGENCY No. 02-1155	Ind. Comm. (I.C. 073741)	Affirmed
REALISCAPE, INC. v. BURR No. 02-1377	Wake (00CVS11868)	Affirmed in part, reversed and remanded in part
STATE v. COLE No. 02-850	Onslow (99CRS58846)	No error
STATE v. DUDLEY No. 02-1113	Guilford (01CRS50031)	No error on appeal. Defendant's Motion for Appropriate Relief denied in part and granted in part and remanded for hearing
STATE v. GREEN No. 02-1357	New Hanover (01CRS2309) (01CRS2328)	No error
STATE v. MURPHY No. 02-1443	Pender (01CRS50225) (02CRS255) (01CRS2984)	No error
STATE v. NEWTON No. 02-1312	Guilford (00CRS108267) (00CRS108270)	No error

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, APPELLEE
v. NORTH CAROLINA RATE BUREAU, APPELLANT

IN THE MATTER OF THE FILING DATED MAY 1, 2001 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES

No. COA02-891

(Filed 7 October 2003)

1. **Insurance— ratemaking process—automobile and motorcycle liability insurance—investment income from capital and surplus funds—return on insurance operations**

The Commissioner of Insurance did not improperly consider investment income from capital and surplus funds while calculating the ordered automobile and motorcycle liability insurance rates, because: (1) the Commissioner focused on the return on insurance operations as the appropriate target for his calculations; (2) the evidence regarding the eighteen year average return on insurance operations is more than a scintilla or a permissible inference that sufficiently supports the Commissioner's setting of rates; and (3) the Commissioner is not required to set his target as the total rate of return.

2. **Insurance— ratemaking process—automobile and motorcycle liability insurance—policyholder dividends—rate deviations**

The Commissioner of Insurance did not fail to give due consideration to the impact of policyholder dividends and rate deviations in his ratemaking calculations for the ordered automobile and motorcycle liability insurance rates, because: (1) the ratemaking formula is not required to contain an explicit adjustment for dividends and deviations in order to prove due consideration was given to them; (2) dividends and deviations should not be added to the rate since they are already included within the computation of the average rate; (3) dividends and deviations are part of profit and a provision for profit already exists; and (4) although the Commissioner analyzed this issue from the average insurance company, his conclusions and findings also discussed the effect of the average rate on the industry and the overall aggregate profit of the industry.

3. Insurance— ratemaking process—automobile and motorcycle liability insurance—investment income from policyholder-supplied funds

The Commissioner of Insurance did not improperly calculate the investment income available from policyholder-supplied funds in its ratemaking calculations for the ordered automobile and motorcycle liability insurance rates, because: (1)if rate deviations were also considered within the investment income from policyholder-supplied funds portion of the equation, deviations would be counted twice; and (2) agents' balances and prepaid expenses were within the control of the individual insurance companies and should not impact the ratemaking process in a way that disadvantages consumers.

4. Insurance— ratemaking process—automobile and motorcycle liability insurance—excessive, inadequate, or unfairly discriminatory rates

The Commissioner of Insurance did not err by substituting its ratemaking procedure without first finding that the North Carolina Rate Bureau's procedure would produce excessive, inadequate, or unfairly discriminatory automobile and motorcycle liability insurance rates, because: (1) the Commissioner is not required to find each portion of the Bureau's filing improper before he can substitute his own ratemaking structure; and (2) in order to use his own data or calculations or to set rates, the Commissioner must only conclude that the Bureau's filing as a whole would result in excessive, inadequate, or unfairly discriminatory rates.

Judge TYSON dissenting.

Appeal by North Carolina Rate Bureau from order entered 14 December 2001 by the North Carolina Commissioner of Insurance. Heard in the Court of Appeals 10 June 2003.

Young, Moore and Henderson, P.A., by R. Michael Strickland, William M. Trott, Marvin M. Spivey, Jr. and Terryn D. Owens, for appellant.

North Carolina Department of Insurance, by Sherri L. Hubbard and Stewart L. Johnson, for appellee.

EAGLES, Chief Judge.

The North Carolina Rate Bureau ("Bureau") appeals from an order entered by the North Carolina Commissioner of Insurance ("Commissioner") that denied the Bureau's request for an adjustment in automobile insurance rates. The Bureau asserts four arguments on appeal: (1) the Commissioner improperly considered investment income on capital and surplus funds while deriving his underwriting profit provisions; (2) the Commissioner did not give due consideration to dividends and deviations; (3) the Commissioner overstated the amount of investment income generated from policyholder-supplied funds; and (4) the Commissioner improperly substituted his own ratemaking procedure. After careful review of the record, briefs and arguments of counsel, we discern no error and affirm the Commissioner's order.

The Bureau is a statutorily created entity. The Bureau was created by the General Assembly to replace and assume the duties of the North Carolina Automobile Rate Administrative Office, the North Carolina Fire Insurance Rating Bureau, and the Compensation Rating and Inspection Bureau of North Carolina. G.S. § 58-36-1(1) (2001). The Bureau is not an agency of the State. *See Allstate Ins. Co. v. Lanier*, 242 F. Supp. 73 (E.D.N.C. 1965), *aff'd*, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930, 17 L. Ed. 2d 212 (1966). It represents the companies that sell automobile insurance in North Carolina, along with other types of insurers. *See* G.S. § 58-36-1(1).

The Commissioner of Insurance is an elected official of the State of North Carolina. G.S. § 58-2-5 (2001). The Commissioner's duties as chief officer of the Department of Insurance are broadly described as "the execution of laws relating to insurance." G.S. § 58-2-1 (2001). The North Carolina Supreme Court has listed the Commissioner's duties as follows:

> [F]aithfully executing all laws governing insurance companies and the authority to adopt rules to enforce that law; preventing practices injurious to the public; furnishing the necessary forms for statements required by companies, associations, orders, or bureaus; reporting to the Attorney General any violations of law relating to insurance companies; instituting civil actions or criminal prosecutions for violations of the insurance statutes; giving a statement or synopsis of any insurance contract upon proper application by any citizen; administering all oaths required in the discharge of his official duty; compiling and making available to

the public the lists of rates charged, including explanations of coverages provided by insurers; and adopting rules governing what constitutes an uninsurable facility.

State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 350 N.C. 539, 541, 516 S.E.2d 150, 151 ("1996 Auto") (citing G.S. § 58-2-40), *reh'g denied*, 350 N.C. 852, 539 S.E.2d 11 (1999).

An insurance company may write insurance in North Carolina only after it has become a member of the Bureau. G.S. § 58-36-5 (2001). The Bureau files a rate change proposal with the Commissioner on behalf of its member companies. G.S. § 58-36-1(3) (2001). Any rate change must be approved by the Commissioner. G.S. § 58-36-70(a) (2001). If the Commissioner does not approve the Bureau's proposed rates, the Commissioner may set the insurance rates according to statute. G.S. § 58-36-70(d) (2001); *see* G.S. § 58-36-10 (2001).

After the Commissioner enters an order that rejects the Bureau's ratemaking structure, the Bureau may appeal to this Court. G.S. §§ 58-2-80, 58-36-25 (2001). The two most recent filings by the Bureau have resulted in appeals to this Court and the Supreme Court. The disagreement between the Bureau and the Commissioner regarding the legal significance of the two previous appeals forms the basis for the current appeal.

The Bureau filed a rate adjustment request for automobile insurance on 1 February 1994. The Commissioner entered an order on 28 September 1994 rejecting the Bureau's rates and substituting a different schedule of rates. The Bureau appealed to this Court. In an opinion dated 17 December 1996, this Court remanded the case to the Commissioner with instructions to modify his order. The Commissioner issued a new, modified order on 10 September 1997. The 10 September 1997 order was reversed on appeal to this Court on 29 December 1998.

While the 1994 filing proceeded on appeal, the Bureau filed for another rate change on 1 May 1995. The Bureau amended its filing on 1 April 1996. After hearings in July and August 1996, the Commissioner disapproved the Bureau's rate proposal. By orders issued on 4 October 1996 and 31 October 1996 the Commissioner lowered rates for car insurance by 8.3% and raised the motorcycle insurance rates by 3.2%. In an opinion filed on 16 June 1998, this Court reversed the Commissioner's orders in part and affirmed in part. The

Supreme Court affirmed the Court of Appeals' opinion on 25 June 1999. Both the 1994 and 1996 rate filing disputes were eventually settled by the parties.

The Bureau filed the requested rate change at issue here on 1 May 2001. The filing requested an increase of 10.6% for private passenger automobile rates and a decrease of 2.4% for motorcycle rates. The Commissioner held a hearing on the matter from 25 September 2001 until 31 October 2001. The Bureau's filing was over 1,000 pages in length. The evidence included nearly seventy exhibits, testimony from nine expert witnesses and four additional witnesses. The Commissioner rejected the Bureau's requested rates in his order dated 14 December 2001. Instead, the Commissioner ordered a rate reduction of 13.0% for automobile rates and a reduction of 15.9% for motorcycles. The Bureau appeals from this order.

When reviewing an order by the Commission, this Court "must examine the whole record and determine whether the Commissioner's conclusions of law are supported by material and substantial evidence." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 129 N.C. App. 662, 664, 501 S.E.2d 681, 684 (1998) ("1996 Auto-COA"), *aff'd*, 350 N.C. 539, 516 S.E.2d 150 (1999). "The whole record test requires the reviewing court to consider the record evidence supporting the Commissioner's order, to also consider the record evidence contradicting the Commissioner's findings, and to determine if the Commissioner's decision had a rational basis in the material and substantial evidence offered." *State ex rel. Comr. of Ins. v. Rate Bureau*, 124 N.C. App. 674, 678, 478 S.E.2d 794, 797 (1996) ("1994 Auto") (quoting *State ex rel. Comr. of Insurance v. N.C. Rate Bureau*, 75 N.C. App. 201, 208, 331 S.E.2d 124, 131, *disc. rev. denied*, 314 N.C. 547, 335 S.E.2d 319 (1985) ("1983 Farm")), *disc. rev. denied*, 346 N.C. App. 184, 486 S.E.2d 217 (1997). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' It is 'more than a scintilla or a permissible inference.' " *1994 Auto*, 124 N.C. App. at 678, 478 S.E.2d at 797 (citations omitted) (quoting *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 205, 214 S.E.2d 98, 106 (1975)).

The Commissioner determines the weight and sufficiency of the evidence presented during the hearing, including the credibility of any witnesses. *See State ex rel. Comr. of Insurance v. N. C. Rate Bureau*, 96 N.C. App. 220, 221, 385 S.E.2d 510, 511 (1989) ("1987 Workers' Compensation"). "[I]t is not our function to substitute our judgment for that of the Commissioner when the evidence is con-

flicting." *1987 Workers' Compensation*, 96 N.C. App. at 221, 385 S.E.2d at 511. Instead, the Commissioner's order is presumed correct if it is supported by substantial evidence. G.S. §§ 58-2-80 and 58-2-90(e) (2001). The order must conform to the guidelines set out in G.S. § 58-36-10:

> (1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory.
>
> (2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which that information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.

G.S. § 58-36-10. As long as the Commissioner's order meets the criteria of G.S. § 58-36-10 and is supported by material and substantial evidence, the order should be upheld.

I.

[1] The Bureau first argues that the Commissioner improperly considered investment income from capital and surplus funds while calculating the ordered insurance rates. In order to analyze the Bureau's argument, we must first look at the structure of the insurance industry and the holdings of the *1994 Auto* and *1996 Auto* cases. *See 1996 Auto*, 350 N.C. 539, 516 S.E.2d 150 (1999); *1994 Auto*, 124 N.C. App. 674, 478 S.E.2d 794 (1996).

An insurance company's total profit is derived from two distinct parts of the insurance business—(1) profit earned by the insurance operations and (2) profits earned by investing capital and surplus funds. The profit from insurance operations includes both the underwriting profit and investment income from policyholder-supplied funds. The underwriting profit can be defined as the difference

between insurance premiums collected and the amount the company pays out for losses and expenses. Policyholder-supplied funds are the amount of premiums paid to the insurance company. Policyholder-supplied funds are usually invested during the insurance coverage period.

The investment income produced by policyholder-supplied funds should be given due consideration during the ratemaking process. *See* G.S. § 58-36-10(2). The underwriting profit portion has been the traditional focus of the dispute between the Commissioner and the Bureau. In past orders, the Commissioner improperly considered investment income from capital and surplus funds. *See 1996 Auto*, 350 N.C. 539, 516 S.E.2d 150 (1999); *1994 Auto*, 124 N.C. App. 674, 478 S.E.2d 794 (1996).

In addition to the statutory structure, this Court and the Supreme Court have placed additional requirements upon the ratemaking process:

> Three basic principles of law pertain to the setting of insurance rates: (1) the Commissioner must set rates that will produce a fair and reasonable profit and no more; (2) what constitutes a fair and reasonable profit 'involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk'; and (3) the underwriting business, which includes the collection and investment of premiums, is the only basis for calculating the profit provisions.

1996 Auto, 350 N.C. at 541, 516 S.E.2d at 151 (citations omitted) (quoting *In re N.C. Fire Ins. Rating Bureau*, 275 N.C. 15, 39, 165 S.E.2d 207, 224 (1965)). In the orders that gave rise to the *1994 Auto* and *1996 Auto* appeals, the Commissioner defined "business ventures of comparable risk" as the total profit of the insurance industry. In order to set a rate equal to comparable businesses in those orders, the Commissioner subtracted capital investment income and investment income from policyholder-supplied funds from total returns to reach the underwriting profit:

Total profits of the industry

\- capital/surplus investment income

= profits from insurance operations.

Profits from insurance operations

- income from policyholder-supplied funds

= underwriting profit.

Both orders (1994 and 1996) were reversed because the Commissioner improperly considered the investment income on capital and surplus funds. *See 1996 Auto*, 350 N.C. at 545, 516 S.E. 2d at 153-54 ("This Court has made it clear that unless the legislature changes the law, investment income from capital and surplus cannot be considered when setting insurance rates.") and *1994 Auto*, 124 N.C. App. at 686, 478 S.E.2d at 802 ("The formula used must exclude investment income earned on capital and surplus."). The Supreme Court prohibited the Commissioner from including capital and surplus income in the ratemaking formula because "[i]n determining whether an insurer has made a reasonable profit, the amount of business done rather than its capital should be considered . . . ." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 444, 269 S.E.2d 547, 586 (1980) ("1977 Auto") (quoting 2 Ronald A. Anderson, *Couch Cyclopedia of Insurance Law* § 21:38 (2d ed. 1959)). Here, the Bureau argues that the Commissioner has committed the same error in his 2001 order as he did in the 1994 and 1996 orders. We disagree.

In the 2001 order, the Commissioner altered his ratemaking formula in one significant way. Rather than attempting to find a total return, the Commissioner set the return on insurance operations as his target. The Commissioner made the following pertinent findings of fact:

> 150. The Bureau proposes a return on operations equivalent to a target total return. A target total return is an appropriate return for the whole of an insurance company taking into account investment income from capital and surplus.
>
> 151. The Bureau's target total return is a range of 13.1% to 15.3% and is based upon the cost of capital with the addition of a .49% market to book conversion factor. [Expert witness] Appel indicates that the law in North Carolina allows for a return on operations in this range.
>
> 152. The Bureau uses a cost of capital as a measure of the returns that other businesses of comparable risk can earn in the market. However, the returns that the cost of capital measures are the returns those other businesses earn from all sources of

income. Thus, the cost of capital is a total return, which in the insurance industry includes consideration of income from capital and surplus.

153. Department witnesses Cohn, Schwartz and D'Arcy testify that the Bureau's total return includes investment income on capital and surplus by virtue of the cost of capital calculation, described more fully below.

. . . .

156. In other jurisdictions, setting the cost of capital as the target return is appropriate; however, other jurisdictions may consider all sources of income in calculating profit. In North Carolina, only one source of income, the insurance operations, may be considered, while the investment income from capital and surplus may not.

. . . .

159. Miller indicates that the law in North Carolina is unique in that insurers are allowed a return on operations which, in other States, would be equivalent to the return on operations plus the return on capital and surplus. Miller's statement, thus, substantiates the Department's claims that the Bureau's return includes consideration of investment income on capital and surplus.

. . . .

161. In addition to the Bureau's consideration of investment income from capital and surplus in setting the target return, the Bureau's target return is excessive. In calculating the total return as the target, the Bureau is setting the return for the insurance operations alone (which is a partial return) commensurate with the total returns of other businesses, including the insurance business. This is simply not "comparable" as required by law.

162. The lack of "comparability" is evidenced by the Bureau's prospective range of returns of 13.1% to 15.3% compared to the average pre-tax historical returns on insurance operations during an eighteen year period of the countrywide property/casualty industry of approximately 3.7% and the ten year average pre-tax returns in competitive rating states of 4.3% liability and 6.4% physical damage. This lack of "comparability" is further evidenced by the resulting profit provisions of 9.5% and 14.0%,

which are higher than several of the witnesses have ever encountered in any jurisdiction and certainly higher than the profit provisions recently utilized by the top ten writers in three neighboring states.

163. In contrast to the Bureau, the Department witnesses calculate a return on operations taking into consideration only the income generated by the insurance activity.

164. The Department witnesses' recommended returns are compared to the risk or operational returns (partial returns) of businesses of comparable risk.

165. The returns which the Department witnesses propose range from pre-tax returns of 4.3% to 4.5% for liability and 3.5% to 6.4% for physical damage to post tax returns of 3.7% to 6.8% for liability and 4.3% to 6.8% for physical damage.

166. The Department witnesses recommend a return on operations that is not a total return because North Carolina law requires that profit be set on the insurance operations only and that profit from the investment business not be considered. Furthermore, a return on operations that is not a total return provides the proper comparison to businesses of comparable risk.

167. Unlike the Bureau, the Department witnesses did not recommend a target total return because: (1) a total return includes consideration of investment income from capital and surplus; (2) calculating a return for only one source of insurance industry income based upon the returns generated by all sources of income of other businesses does not constitute "comparable risk," as required by the law of this State.

168. The evidence in this case is overwhelming that it is impossible to calculate a target total return without considering investment income on capital and surplus.

169. In an attempt to circumvent the illegality of including investment income from capital and surplus in the calculation of the target rate of return, Bureau witness Appel states that the prohibition against considering investment income from capital and surplus applies only to the calculation of the profit provisions, not to the establishment of a target rate of return. However, there is absolutely no legal foundation for this con-

tention and the recent North Carolina Supreme Court decision in the 1996 case states otherwise.

170. Based upon the material and substantial evidence in this case, the Commissioner finds that the appropriate target rate of return in this case is a return on operations which is not equivalent to a total return. A total return requires consideration of investment income from capital and surplus which violates the ratemaking laws of this State. Furthermore, a total return makes an inappropriate comparison to businesses that are not of comparable risk, which leads to excessive returns. For those reasons, the Bureau's target range of returns is herein rejected.

(Internal citations omitted.) In this order, the Commissioner focused on the return on insurance operations as the appropriate target for his calculations. In order to compare the insurance operations return to an industry of comparable risk, the Commissioner relied upon an expert opinion by Department witness Allan I. Schwartz. Schwartz testified that the eighteen year average return on insurance operations for the property and casualty insurance industry was 3.7%. Schwartz adjusted his estimate of the return on operations in order to account for the slight difference in risk between the property and casualty industry and the private passenger automobile insurance industry. The Bureau has not argued that this property and casualty industry information is not indicative of an industry of comparable risk. Indeed, we note that the Bureau's own expert, Dr. James H. Vander Weide, used property and casualty industry information when formulating his expert opinion. G.S. § 58-36-10(2) does not require the Commissioner or any expert witness to use only three years of North Carolina data when calculating the reasonable margin of underwriting profit. Those geographical and temporal restrictions only apply to the consideration of the loss and expense experience, which is not in dispute here. As a result, we hold that the evidence regarding the eighteen year average return on insurance operations is "more than a scintilla or a permissible inference" that sufficiently supports the Commissioner's setting of rates.

In addition, we find the Bureau's argument that the Commissioner must set his target as the total rate of return to be unpersuasive. No statute or any case has required the Commissioner to focus on the total rate of return for the insurance industry. Instead, previous appellate court opinions have declared that the return on operations is the only portion of income the Commissioner can consider during the ratemaking process. If the Commissioner had compared

total returns here, as he did in previous ratemaking orders, the Commissioner would have been required to add capital and surplus funds somehow. By using insurance operations as the comparable industry, the Commissioner did not need to consider investment income on capital and surplus funds. Accordingly, the investment income on capital and surplus funds has not been used in the 2001 ratemaking calculation. The Commissioner's underwriting profit provision comports with the requirements of G.S. § 58-36-10 as well as the holdings of *1994 Auto* and *1996 Auto*. We conclude there is substantial evidence to support the Commissioner's findings of fact and conclusions of law on this issue. Therefore this assignment of error is denied.

II.

[2] The Bureau next argues that the Commissioner failed to give due consideration to the impact of policyholder dividends and rate deviations in his ratemaking calculations. We disagree.

Policyholder dividends are a return of premiums to insurance purchasers, much like a rebate. Policyholders pay premiums at the manual rate, then receive a rebate or "dividend" at the end of the policy term. *See* G.S. § 58-36-60 (2001). The manual rate is set by the Commissioner through the ratemaking process and is the rate insurance companies must charge customers unless a deviation is allowed. Rate deviations occur when a company receives permission to charge certain policyholders more or less than the manual rate. *See* G.S. § 58-36-30 (2001). If a policyholder is given a rate deviation, the policyholder pays less than the manual rate from the beginning of the policy period.

The Bureau contends that dividends and deviations are a necessary tool for competition among insurance companies. Without deviations or dividends, the Bureau argues that insurance companies could not attract "good risk" policyholders. According to its argument, dividends and deviations are not profits. The Bureau believes that an adjustment of 5.0% should be included as a separate term in the ratemaking calculation in order to counteract the effect of dividends and deviations. Without this provision, the Bureau argues that a premium shortfall will occur. This argument is unpersuasive.

Due consideration of policyholder dividends and rate deviations is required by statute. *See* G.S. § 58-36-10(2) ("Due consideration shall be given . . . to dividends, savings or unabsorbed premium deposits

allowed or returned by insurers to their policyholders, members, or subscribers."). The *1994 Auto*, *1996 Auto-COA*, and *1996 Auto* cases are also instructive on this issue because the treatment of dividends and deviations was considered in those appeals.

The ratemaking formula is not required to contain an explicit adjustment for dividends and deviations in order to prove due consideration was given to them. *See 1996 Auto*, 350 N.C. at 547, 516 S.E.2d at 154-55 (" '[D]ue consideration' does not require that a numerical adjustment of the rates be made in order to reflect the effects of dividends and deviations."); *1996 Auto-COA*, 129 N.C. App. at 667, 501 S.E.2d at 686; *1994 Auto*, 124 N.C. App. at 681, 478 S.E.2d at 799. It has also been held that dividends and deviations can be treated as profits rather than as expenses. *1996 Auto-COA*, 129 N.C. App. at 668, 501 S.E.2d at 686 (citing *1994 Auto*, 124 N.C. App. at 682, 478 S.E.2d at 800). The Bureau's arguments contradict these established guidelines and are therefore overruled.

The Commissioner made the following pertinent findings of fact regarding dividends and deviations:

> 406. The Commissioner finds and concludes that any margin for the payment of dividends and deviations in excess of the margin provided for in the average manual premium is unreasonable and produces rates that are excessive and unfairly discriminatory.
>
> 407. Based on the foregoing, the Commissioner finds that an average manual rate with profit provisions of -2.8% for liability and +1.0% for physical damage will provide approximately 4.5% to 5.0% of manual premiums, or approximately $120-135 million, as savings that may be used to pay dividends and to grant deviations to insureds, assuming the same book of business.
>
> 408. The approximately 4.5% to 5.0% of premium or approximately $120-135 million provided in the manual rate for policyholder dividends and deviations by the Bureau member companies is reasonable, adequate and is provided in the rates, which are adopted and approved herein by this Order and which are not inadequate, excessive, or unfairly discriminatory.
>
> 409. Dividends and deviations in excess of the approximately 4.5% to 5.0% of premium or approximately $120-135 million may occur, as in the past. If so, the excess may come from companies which are prepared to accept, on an individual basis,

less than the average profit provided in the manual rate, from accumulated surplus, from lower expenses, from an excessive rate level implemented by the Bureau or from sources which are not within the jurisdiction of the Commissioner.

410. This approximately 4.5% to 5.0% of premium will become retained earnings, i.e., profit, if it is not distributed as dividends and deviations. Including more than the 4.5% to 5.0% of premium that comes from savings for dividends and deviations in the rate calculation will cause rates to spiral and become excessive and unfairly discriminatory.

The Commissioner also found that dividends and deviations are transfer payments or profit. The Commissioner found that including a specific provision for dividends and deviations was unnecessary because the use of an average rate implicitly included consideration of dividends and deviations. After careful review, we conclude that there is sufficient record evidence to support the Commissioner's findings.

The Commissioner's reasons for refusing to adjust the ratemaking formula by adding a provision for dividends and deviations are twofold. First he states that dividends and deviations should not be added to the rate because they are already included within the computation of the average rate. The average rate takes into account the companies that deviate as well as those that do not deviate. Similarly, the average is already reduced by those companies that provide dividends. Any explicit provision would double-count dividends and deviations, which would lead to "spiraling"—a rise in insurance rates. In addition, the Commissioner finds that dividends and deviations are part of profit, instead of an expense for insurance companies. Since a provision for profit already exists, adding an additional provision in the ratemaking formula for these types of profit is redundant.

We hold that the Commissioner's findings of fact are based upon substantial and competent evidence. The Commissioner's findings of fact indicate that the insurance industry will have approximately 4.5% to 5.0% profit to use for dividends and deviations if they choose to do so. The Commissioner's finding that dividends and deviations are profit is based upon the opinion that these are monies voluntarily surrendered by the insurance companies. Treatment of dividends and deviations as profit has been approved by this Court before. *See 1996 Auto-COA*, 129 N.C. App. at 668, 501 S.E.2d at 686 (citing *1994 Auto*, 124 N.C. App. at 682, 478 S.E.2d at 800). In addition, designating divi-

dends and deviations as "profit" and failure to adjust the ratemaking formula with a specific provision for them does not mean that the due consideration required by statute has been denied. Here, the Commissioner listed each expert witness's treatment of dividends and deviations in his findings of fact. The Commissioner then stated why he found one expert's opinion more persuasive than the others, and why he chose to treat dividends and deviations as he did. We note again that the Commissioner is not required to numerically adjust the rates to show that he has provided due consideration of any of the factors in G.S. § 58-36-10. *See 1996 Auto*, 350 N.C. at 547, 516 S.E.2d at 154-55. Here, this technique of analysis indicates that the Commissioner provided due consideration to dividends and deviations as required by G.S. § 58-36-10.

The Bureau's arguments regarding competition and premium shortfalls are essentially arguments that dividends and deviations should not be treated as profit. We reject these arguments for the reasons stated above.

The Bureau also argues that the Commissioner's order should focus on the aggregate industry rather than the average company. The Bureau cites the following:

> The statute contemplates that the rates shall be fixed with a view of the aggregate earnings and profits for the insurance business in the State. Each company may make as much money as it can. Some may make enormous profits, some may do a losing business, but the average profit, that is, the average profit on the aggregate business, must be reasonable.

1977 Auto, 300 N.C. 381, 444-45, 269 S.E.2d 547, 586 (1980) (quoting *Aetna Ins. Co. v. Hyde*, 285 S.W. 65 (Mo. 1926), *cert. dismissed*, 275 U.S. 440, 72 L.Ed. 357 (1928)). Here, the Commissioner chose to analyze the issue of dividends and deviations from the standpoint of an "average" insurance company. However, his conclusions and findings also discussed the effect of the average rate on the industry and the overall aggregate profit of the industry. Therefore, assuming that the *1977 Auto* case requires the Commissioner to consider the effect of the average rate on the industry and the overall aggregate profit of the industry, he has done so according to the order.

After careful review of the record, we hold that the Commissioner's findings and conclusions were adequately supported by the evidence and do not produce an excessive, inadequate or

unfairly discriminatory rate. Accordingly, this assignment of error is overruled.

III.

[3] The Bureau also contends that the Commissioner improperly calculated the investment income available from policyholder-supplied funds. The Commissioner found that rate deviations should not be included in the calculation of the investment of policyholder-supplied funds. The Commissioner also found that no reduction in investment income should be included to account for agents' balances and prepaid expenses. We conclude that sufficient evidence supports the Commissioner's findings and conclusions.

As the Commissioner stated in his findings, investment income is dependent upon three factors: (1) the amount of money invested, (2) the length of time the funds are invested, and (3) the rate of return. Here, the Bureau disputes the Commissioner's decision regarding the first two factors—the amount invested and the duration of the investment. The Bureau argues that rate deviations reduce the amount of premiums that insurance companies are able to invest. The Commissioner calculated the amount of money available for investment without reducing that amount to account for rate deviations. The Commissioner based his calculation upon the testimony of Department of Insurance's expert witness Schwartz. Also, the Commissioner considered deviations within his calculation of the underwriting profit provision. If rate deviations were also considered within the investment income from policyholder-supplied funds portion of the equation, deviations would be counted twice. This double-counting would produce an excessively high rate of return on insurance operations according to the Commissioner's ratemaking formula. Therefore we hold that the Commissioner's refusal to reduce investment income from policyholder-supplied funds in order to consider rate deviations is supported by material and substantial evidence.

The Bureau also faults the Commissioner's refusal to reduce the estimated investment income projection as a result of agents' balances and prepaid expenses. Agents' balances occur when insurance policyholders pay for their coverage in installment payments throughout the policy term. "Prepaid expenses" refers to the insurance companies' practice of paying expenses from their reserve funds before the policy premiums are paid by consumers. The Bureau argues that agents' balances and prepaid expenses negatively affect

overall investment income. Both agents' balances and prepaid expenses reduce the amount of time policyholder-supplied funds are invested. The Commissioner based his calculations on the assumption that the insurance company would have the full manual rate premium over the entire coverage period. The Commissioner found that his treatment of agents' balances and prepaid expenses was consistent with the testimony of expert witnesses Cohn and Schwartz. In addition, the Commissioner stated that his calculations were consistent with the calculations used to set rates that were examined in the *1994* and *1996 Auto* opinions.

In *1994 Auto*, this Court wrote:

> Section F of the Commissioner's order examined the issue of investment income from unearned premium, loss, and loss expense reserve funds [or "policyholder-supplied funds"]. In this section, the Commissioner clearly defined the factors involved in considering investment income; selected a reasonable rate of return (7%) on investments; and carefully explained why he concluded the Bureau's amount of reserves subject to investment was incorrect.

1994 Auto, 124 N.C. App. at 691, 478 S.E.2d at 805. Here, the Commissioner summarized the evidence given by the expert witnesses on both sides of the dispute. The Commissioner noted that two expert witnesses had adopted his treatment of agents' balances and prepaid expenses from the *1994* and *1996 Auto* cases. Then the Commissioner summarized his method of calculating investment income on policyholder-supplied funds in the previous orders. After finding that the Bureau had not offered new evidence on this matter, the Commissioner found that his calculation in the 2001 order was identical to the one approved by this Court in the earlier filing. Adopting the reasoning of this Court in *1994 Auto*, the Commissioner found that:

> 433. The policy reason for disallowing deductions for agents' balances and prepaid expenses is that, unlike the customary consumer transactions, in an insurance transaction the policyholder must pay for the insurance benefit in advance of the service provided. This pre-payment of premiums allows the insurance companies to invest this unearned revenue for profit. For this reason, policyholders, should, in the ratemaking process, receive the full benefit of income that results from investing policyholder funds.

Also see 1994 Auto, 124 N.C. App. at 691, 478 S.E.2d at 805. The Commissioner also repeated this Court's finding that agents' balances and prepaid expenses were within the control of the individual insurance companies and should not impact the ratemaking process in a way that disadvantages consumers. We conclude that there is substantial evidence in the record to support the Commissioner's calculation of investment income from policyholder-supplied funds.

IV.

[4] The Bureau's final argument on appeal is that the Commissioner erred by substituting his ratemaking procedure without first finding that the Bureau's procedure would produce excessive, inadequate or unfairly discriminatory rates. We disagree.

The Bureau takes exception to the Commissioner's rejection of its data set. The Bureau's calculations were based upon one year of data that met certain reliability standards. The Bureau had used the one year data set in previous filings without objection from the Commissioner. However, here the Commissioner chose to use a three-year average data set instead. The Commissioner found that "[t]he use of three years of data will produce rates that are neither inadequate, excessive or unfairly discriminatory." The Commissioner did not find that the Bureau's data would produce excessive, inadequate or unfairly discriminatory rates. The Bureau contends that without this specific finding regarding its data, the Commissioner could not substitute his own data set. This argument is not persuasive.

G.S. § 58-36-10(1) states that "[r]ates or loss costs shall not be excessive, inadequate or unfairly discriminatory." "If the Commissioner after the hearing finds that the filing does not comply with the provisions of this Article, he may issue an order disapproving the filing, determining in what respect the filing is improper, and specifying the appropriate rate level or levels that may be used . . . ." G.S. § 58-36-70(d). These two statutes focus upon the propriety of the entire filing instead of specific parts of the filing. As a result, we hold that the Commissioner is not required to find each portion of the Bureau's filing improper before he can substitute his own ratemaking structure. Instead, the plain language of G.S. § 58-36-70(d) indicates that the Commissioner must analyze the entire rate filing to determine whether the overall calculation will result in excessive, inadequate or unfairly discriminatory insurance rates. Therefore, it was not necessary for the Commissioner to find that the data set used by

the Bureau would produce a calculation that created rates that were excessive, inadequate or unfairly discriminatory. The Commisioner, in order to use his own data or calculations, or to set rates, must only conclude that the Bureau's filing as a whole would result in excessive, inadequate or unfairly discriminatory rates. Here, the Commissioner concluded:

> II. Inasmuch as the Bureau has failed to give due consideration to the factors set forth in Conclusions of Law, Part I, the Bureau's proposed rate level increase for private passenger cars of ten and six tenths percent (+10.6%) is excessive and unfairly discriminatory for the reasons set forth in Findings Part I through Part VI and elsewhere in this Order, which are incorporated herein by reference. Accordingly, the Bureau's request for a rate increase of ten and six tenths percent (+10.6%) is denied and the filing is disapproved.

Because the Commissioner's conclusion was adequately supported by material and substantial evidence, this assignment of error is overruled.

V.

After careful review of the record, we hold that the Commissioner's order establishes a rate level that is not inadequate, excessive or unfairly discriminatory. The Commissioner appropriately considered the factors outlined in G.S. § 58-36-10 and applied his discretion according to the limits of the *1994 Auto* and *1996 Auto* opinions. The Commissioner's findings of fact are supported by material and substantial evidence. For the foregoing reasons, the Commissioner's order setting automobile and motorcycle liability insurance rates is affirmed.

Affirmed.

Judge STEELMAN concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

I respectfully dissent from the majority's opinion.

I. Issue

The issue before this court is whether the Commissioner's order is supported by material and substantial evidence where the expert witness, whose opinion the Commissioner relied upon to support his findings of fact, ignored and expressly excluded consideration of statutorily required factors.

II. Standard of Review

On judicial review, this Court employs the "whole record test" to determine whether material and substantial evidence supports the findings of fact and conclusions of law of the Commissioner. *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau (1996 Auto)*, 350 N.C. 539, 547, 516 S.E.2d 150, 155, *reh'g denied*, 350 N.C. 852, 539 S.E.2d 11 (1999). "The whole record test requires the reviewing court to consider the record evidence supporting the Commissioner's order, to also consider the record evidence contradicting the Commissioner's findings, and to determine if the Commissioner's decision had a rational basis in the material and substantial evidence offered." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 124 N.C. App. 674, 678, 478 S.E.2d 794, 797 (1996). The Commissioner's order, if supported by substantial and material evidence, is presumed to be correct and proper. *1996 Auto*, 350 N.C. at 547, 516 S.E.2d at 155. This Court should not substitute its judgment for that of the Commissioner's when the evidence is conflicting. *Id.* at 548, 516 S.E.2d at 155.

The record shows that the Commissioner's findings of fact fail to conform to these requirements and are not supported by substantial and material evidence in the whole record. The order failed to meet the requirements of N.C. Gen. Stat. § 58-36-10.

III. Reliance on Countrywide Loss and Expense Experience

The Bureau asserts in their first assignment of error, that the Commissioner relied on expert testimony that does not compare returns on insurance operations in North Carolina to industries of comparable risk in North Carolina.

N.C. Gen. Stat. § 58-36-10 (2001) requires:

> (2) Due consideration *shall* be given to actual loss and expense experience within *this State* for the most recent *three-year period* for which that information is available . . . Provided, however, that countrywide expense and loss experience and other

> countrywide data may be considered *only* where credible North Carolina experience or data is not available.

(emphasis supplied).

The statute requires that the Commissioner "shall" consider North Carolina data over the most recent three-year period in making his findings of fact. N.C. Gen. Stat. § 58-36-10(2) (2001). The Commissioner may consider countrywide data "*only*" if he finds that the North Carolina data is not "credible" or "available." *Id.*

When finding returns on insurance operations, the Commissioner primarily relied on the expert opinion of the department's witness Allan I. Schwartz ("Schwartz"). Schwartz testified that the eighteen year average return on countrywide insurance operations for the property and casualty insurance industry was 3.7%. He further testified that property/casualty risks are lower than the risks associated with automobile liability. Relying on this testimony, the Commissioner made the following finding of fact:

> 162. The lack of "comparability" is evidenced by the Bureau's prospective range of returns of 13.1% to 15.3% compared to the average pre-tax historical returns on insurance operations during an *eighteen year period* of the *countrywide* property/casualty industry of approximately 3.7% and the *ten year average* pre-tax returns in *competitive rating states* of 4.3% liability and 6.4% physical damage. This lack of "comparability" is further evidenced by the resulting profit provisions of 9.5% and 14.0%, which are higher than several of the witnesses have ever encountered in any jurisdiction and certainly higher than the profit provisions recently utilized by the top ten writers in three *neighboring states.*

(emphasis supplied). The Commissioner had previously and expressly found that the North Carolina data required to be considered by the statute was credible and available. The Commissioner made the following findings of fact:

> 85. N.C. Gen. Stat. § 58-36-10 does require due consideration of the latest three years of data, that data *is available* in the filing for all three years and, according to the Bureau's credibility standards, all three years *are fully credible.* There doesn't appear to be any reason, therefore, for all three years not to be used. In fact, there appears to be a number of reasons why three years of data should be used in the rate calculations . . . .

> 86. Therefore, based on the evidence in this case, the Commissioner finds that use of the three year unweighted average of the indications for the years 1997-1999 is the appropriate way to provide due consideration of the latest three years of experience for the bodily injury, property damage, medical payments, comprehensive and collision coverages. The use of three years of data will produce rates that are neither inadequate, excessive or unfairly discriminatory.

(emphasis supplied).

In spite of these findings, the Commissioner relied on *countrywide* data from the property/casualty industry sector and data from neighboring states to set the overall return on operations at Schwartz's calculation of 3.7%. Schwartz admitted in his testimony that property and casualty risks were lower than automobile liability risks. Schwartz testified that "[p]roperty and casualty insurance companies are better than average (lower risk) for beta, safety and price stability, and lower than average (higher risk) for earnings predictability. Overall, the property and casualty insurance industry is of about average or somewhat below average risk."

The Commissioner also considered data from the past eighteen years and failed to abide by the statutory time frame requiring data from the "most recent three-year period." N.C. Gen. Stat. § 58-36-10(2) (2001). By relying on countrywide data after finding that North Carolina data was "credible" and "available" and by relying upon data six times older than the "most recent three year period," the Commissioner's findings of fact failed to comply with the statutory requirements and do not support his conclusions. *Id.*

IV. Due Consideration of Dividends and Deviations

A. Zero Percent Factor

The Bureau also contends the Commissioner did not give "due consideration" to dividends and deviations.

N.C. Gen. Stat. § 58-36-10 (2001) requires: "(1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory. (2) Due consideration shall be given . . . to *dividends, savings, or unabsorbed premium deposits* allowed or returned by insurers to their policyholders, members, or subscribers . . . ." (emphasis supplied). N.C. Gen. Stat. § 58-36-10(1) requires the Commissioner to determine whether the proposed rates will produce "a fair and reasonable profit and no more." *1996 Auto*, 350 N.C. at 542, 516 S.E.2d at 151.

In *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, Judge Johnson found "[t]he Commissioner . . . elected to assign a valuation of zero to dividends returned to policyholders and rate deviations." 102 N.C. App. 824, 404 S.E.2d 368, slip op. at 7 (May 7, 1991) (No. 9010INS864) (unpublished) (Judges, now Justices, Parker and Orr concurring); Rule 30(e)(3). This Court held:

> [t]he net result of the Commissioner's decision is that the calculated rates are completely unaffected by dividends and deviations. As we have carefully considered the Commissioner's findings of fact, calculations and conclusions of law, we are nonetheless unable to adopt his argument that by assigning zero values to both dividends and deviations, he has complied with existing case law.

Id. (citations omitted).

All evidence was presented to the Commissioner in the form of expert testimony. The Commissioner again relied on Schwartz's expert testimony. Schwartz testified that allowing dividends and deviations to be included as a factor in the rate decision, was against "good public policy" and would result in unfairly discriminatory rates. Schwartz also testified that on "public policy grounds . . . it is not appropriate to build an additional cost factor for dividends and deviations back into the manual rate level" and that "dividends and deviations should not be built back into the manual rate level . . . since that procedure would eliminate any savings . . . . " Relying on this testimony, the Commissioner's findings of fact applied a "zero percent factor" for dividends and deviations in setting the insurance rates.

Public policy in North Carolina is and has been set by the North Carolina Legislature. N.C. Gen. Stat. § 58-36-10(2) (2001) requires "[d]ue consideration shall be given . . . to dividends, savings, or unabsorbed premium deposits allowed" in setting rates. No specific number must be assigned to these factors. *1996 Auto*, 350 N.C. at 547, 516 S.E.2d at 154-55. However, there must be substantial evidence in the record to show that dividends and deviations were given "due consideration." *Id.* In *1996 Auto*, our Supreme Court found that the Commissioner's rates expressly included a 5% margin for dividends and deviations and held that substantial evidence supported the Commissioner's findings of fact regarding dividends and deviations. *Id.* at 548, 516 S.E.2d at 155. That case is distinguishable. Here, the Commissioner claims that he included a 4.5 to 5% margin as he did in

1996 Auto. However, unlike in *1996 Auto*, nothing in the Commissioner's order shows that this 4.5 to 5% margin was expressly included in the rates. The order simply states that the 4.5 to 5% margin is "implicit" in his calculations. In his dissent from the *1996 Auto* case, Chief Justice Mitchell stated:

> [T]he Commissioner is required to give each factor some weight and that this must be reflected in his order. Otherwise, a reviewing court is faced with an inadequate appellate record and must, as here, simply accept the Commissioner's conclusory statements that he has taken all of the statutory factors into account. It is not enough for the Commissioner to note in conclusory fashion that dividends and deviations crossed his mind when he was entering his order.

Id. at 549, 516 S.E.2d at 156. The majority opinion states:

> The weight to be given the respective factors is for the Commissioner to determine in the exercise of his sound discretion and expertise, but he may not arrive at his determination as to the propriety of the filing by shutting his eyes to experience shown by evidence of reasonably probative value. . . .

Id. at 547, 516 S.E.2d at 155, quoting *State ex. rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 471, 488-89, 234 S.E.2d 720, 729-30 (1977). N.C. Gen. Stat. § 58-36-10(2) requires that the Commissioner "shall" give "due consideration" to dividends and deviations, not "implicit" inclusion.

B. Classification of Dividends and Deviations

In their second assignment of error, the Bureau asserts error in the Commissioner's finding that dividends and deviations are "profits" to the Bureau's member companies rather than costs.

As previously noted, "[t]he whole record test requires the reviewing court to consider the record evidence supporting the Commissioner's order, to also consider the record evidence contradicting the Commissioner's findings, and to determine if the Commissioner's decision had a rational basis in the material and substantial evidence offered." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 124 N.C. App. at 678, 478 S.E.2d at 797. The Commissioner relied on Schwartz's expert opinion and found that dividends and deviations were "profits" instead of costs for the Bureau's member companies. The Commissioner concluded that since a provision for

profit already existed, adding an additional provision in the ratemaking formula for these types of profit is redundant. The Commissioner based these findings on Schwartz's opinion that these dividends and deviations are a "voluntarily distribution based upon individual company management decisions." As Judge Johnson held in *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*:

> In addition, we are unprepared to adopt his finding that dividends and deviations are voluntary decisions of the member companies and cannot be guaranteed by the Rate Bureau or the Commissioner. To the extent that the Commissioner ignored dividends to policyholders and rate deviations in his calculations, the ordered underwriting profit provisions must be recalculated to reflect an adjustment for these rating criteria.

102 N.C. App. 824, 404 S.E.2d 368, slip op. at 7 (May 7, 1991) (citations omitted). The logic of that case applies equally here.

The Commissioner also found that including a specific provision for dividends and deviations was "unnecessary" because the use of an average rate "implicitly" included consideration of dividends and deviations. The Commissioner's findings that dividends and deviations are profits and not costs to the Bureau's member companies has no basis in fact. Treating dividends and deviations as profits and assuming a zero percent factor forces the Bureau's member companies to either: (1) absorb these costs, which causes the rates to be "inadequate," or (2) exclude higher risk policyholders who would otherwise qualify for the manual rate, which causes the rates to be "discriminatory." N.C. Gen. Stat. § 58-36-10(1) (2001).

1. Absorption of Costs by Bureau's Member Companies

The Commissioner set his rate based upon the "average" profit or return. The "average" or midpoint return places an equal number of policyholders in the risk pool on either side of the average. Lower risk policyholders demand and receive discounts or deviations from the manual rate from the Bureau's member companies. Deviations are discounts from the manual rates and are never paid by the policyholders. *1996 Auto*, 350 N.C. at 545, 516 S.E.2d at 154; *see* N.C. Gen. Stat. § 58-36-30 (2001). Dividends are, essentially, rebates returned to policyholders at the end of the policy period. *Id.*; *see* N.C. Gen. Stat. § 58-36-60 (2001). The reason the statute requires "due consideration" of discounts and deviations in setting rates is that both reductions from the manual rate are tools the Bureau's member companies

expend to attract and retain lower risk policyholders within the risk pool. *Id.* at 546, 516 S.E.2d at 154.

Retention of lower risk policyholders in the risk pool is the basis for the legislature's policy choice that dividends and deviations be given "due consideration" in setting rates. Without retention of lower risk policyholders in the risk pool, the relative risk of the pool to the insurer increases.

Expressly excluding or ignoring the costs of dividends and deviations to a zero percent factor in setting the manual rate causes the average risk of the pool to shift higher, destroys the equilibrium required by the statute, and makes rates "inadequate." N.C. Gen. Stat. § 58-36-10(1) (2001). Applying a zero percent factor excludes "due consideration" of dividends and deviations, shifts the average risk, and causes the relative risk of the pool to be 4.5 to 5.0% higher, without providing the insurer offsetting compensation for the higher risk. To disallow insurers from treating dividends and deviations as costs requires the companies to absorb this cost and to subsidize rates for higher risk drivers. This forces the insurer to absorb these costs on a pool that is riskier than "average," and makes the rates "inadequate." *Id.*

2. Exclusion of Higher Risk Policyholders

If insurers are not allowed consideration for dividends and deviations, they may seek to exclude higher risk drivers from manual rates who would have otherwise qualified. If otherwise qualified drivers are excluded from manual rates, this "zero percent factor" for dividends and deviations makes the rates "discriminatory." *Id.* Using a zero percent factor for dividends and deviations causes the relative risk of the pool of policyholders to be higher than the average risk of the pool. Higher risk policyholders, who would have otherwise qualified for manual rates, may be excluded from manual rates and be assigned to the reinsurance facility in order to restore balance to the risk pool. In this situation, if dividends and deviations are not treated as costs, rates become "discriminatory" against excluded policyholders, who would have otherwise qualified for manual rates. *Id.* The statute's requirement of "due consideration" to dividends and deviations reflects the General Assembly's public policy choice: (1) to provide affordable insurance coverage to the widest possible pool of drivers, at rates that are neither excessive, inadequate, or unfairly discriminatory and (2) to encourage efficient and economic practices for the purchase of liability insurance by all owners of vehicles oper-

ated on our highways. N.C. Gen. Stat. § 58.40-1 (2001); *also see generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Qu. J. Econ. 488, 488-90, 492-500 (1970) (2001 Nobel Laureate in Economics).

V. Substantial Evidence to Support Findings of Fact

Judicial reviews of other North Carolina Commissions' orders have held that findings of fact are not supported by substantial evidence when the expert opinion, upon which these findings were based, ignored legally required factors. *Holley v. Acts, Inc.*, 357 N.C. 228, 581 S.E.2d 750 (2003); *In re Corbett*, 355 N.C. 181, 558 S.E.2d 82 (2002). *Holley* involved an appeal from the Industrial Commission granting a worker's compensation claim. Our Supreme Court held "when such expert testimony is based merely upon speculation and conjecture, . . . it is not sufficiently reliable to qualify as competent evidence . . . ." 357 N.C. at 232, 581 S.E.2d at 753. Our Supreme Court reversed the Industrial Commission and held that the expert opinion evidence, upon which the Industrial Commission relied to make its findings, failed to meet the "reasonable degree of medical certainty" standard required by law. *Id.* at 234, 581 S.E.2d at 754. Without expert testimony based upon legal requirements, no competent evidence supported the Industrial Commission's findings of fact. The Supreme Court reversed the Industrial Commission's decision. *Id.*

In re Corbett involved an appeal from the Property Tax Commission's order of value of real property. Our Supreme Court held that "based on statutory mandate, once it is determined that valuation or revaluation of a property is statutorily required, any valuation which is not made in accordance with the schedules, standards and rules used in the County's most recent general reappraisal or horizontal adjustment is in violation of the statutory requirements of section 105-287." 355 N.C. at 189, 558 S.E.2d at 87. Our Supreme Court stated "if the provisions of [the statute] are triggered, it necessarily follows that the *only* statutorily permissible method of valuation is through the application of the County's schedules, standards and rules." *Id.* at 185, 558 S.E.2d at 84. Our Supreme Court reversed and remanded because the expert witness did not follow the statutory requirements in formulating his opinion. *Id.* at 189, 558 S.E.2d at 87.

VI. Conclusion

N.C. Gen. Stat. § 58-36-10 (2001) requires that the Commissioner's findings shall give "due consideration" to "credible" and "available" North Carolina data from the "most recent three year period" and to

dividends and deviations in setting rates. The Commissioner primarily relied on one expert's testimony, who not only ignored, but expressly excluded on "public policy grounds," these statutorily required factors in formulating his opinion. This expert witness also based his opinion on eighteen year old countrywide data after the Commissioner had found North Carolina data from the most recent three year period to be "credible" and "available." Schwartz's opinion testimony failed to comply with the statute and fails to provide substantial evidence to support the Commissioner's findings of fact. I would reverse and remand this case to the Commissioner to base his order on substantial evidence that includes "due consideration" to the General Assembly's statutory requirements. I respectfully dissent.

STATE OF NORTH CAROLINA v. ALLAN THOMAS LASSITER

No. COA02-1279

(Filed 7 October 2003)

1. **Evidence— relevance—bullet hole in mobile home—victim's cause of death uncertain**

The admission of evidence about a bullet hole in defendant's mobile home was not an abuse of discretion in a first-degree murder prosecution (with a voluntary manslaughter verdict) where the victim's cause of death could not be determined. Although there was evidence that she had suffered blunt force trauma to her head, this did not preclude the possibility that she was shot. Moreover, the admission of this evidence was not prejudicial even if erroneous because it was but a small piece of a large circumstantial puzzle.

2. **Evidence— expert testimony—dwelling fire not caused by grease**

The admission of testimony that a fire at defendant's mobile home could not have been caused by grease as defendant contended was admissible in a prosecution for first-degree murder and setting fire to a dwelling house. The witness was a qualified expert, and his testimony was not limited to enlightening the jury about everyday grease fires, but concerned the reasons this was not an everyday grease fire.

3. Homicide— voluntary manslaughter—provocation—sufficiency of evidence

The trial court correctly denied defendant's motion to dismiss a voluntary manslaughter charge where there was sufficient evidence of an intentional killing with provocation. A jury could reasonably infer that the victim rebuffed defendant's desire for a more intimate relationship, provoking a passionate response in defendant and leading to voluntary manslaughter.

4. Homicide— voluntary manslaughter—defendant as perpetrator—sufficiency of evidence

There was sufficient evidence in a first-degree murder prosecution (with a manslaughter verdict) that defendant was the last person in the presence of the victim and thus the perpetrator of her intentional killing.

5. Arson— burning dwelling for fraudulent purposes—concealing evidence of killing

There was sufficient evidence that defendant had burned his dwelling for fraudulent purposes where there was substantial evidence that defendant intentionally burned his mobile home and substantial evidence of his guilt of voluntary manslaughter. A jury could reasonably infer that defendant sought to suppress the truth and deliberately deceive law enforcement in the investigation of the death by setting fire to his dwelling.

6. Homicide— alleged error in first-degree murder instruction—manslaughter conviction

There was no plain error in a first-degree murder instruction on premeditation and deliberation where defendant was convicted for voluntary manslaughter. Premeditation and deliberation are not elements of voluntary manslaughter.

7. Arson— instruction—concealing evidence of homicide—fraudulent purpose

The trial court did not err by instructing the jury that concealing evidence of a homicide was a fraudulent purpose under N.C.G.S. § 14-65.

Appeal by defendant from judgments entered 8 October 2001 by Judge Henry W. Hight, Jr., in Vance County Superior Court. Heard in the Court of Appeals 20 August 2003.

Attorney General Roy Cooper, by Assistant Attorney General Susan R. Lundberg, for the State.

Daniel F. Read for defendant appellant.

McCULLOUGH, Judge.

Defendant Allan Thomas Lassiter was tried before a jury in the Criminal Session of the Vance County Superior Court. Defendant was charged with one count of first-degree murder, one count of occupant or owner setting fire to a dwelling house, and two counts of burning personal property. The trial commenced on 17 September 2001. On 8 October 2001, the jury found the defendant guilty of voluntary manslaughter and fraudulently setting fire to and burning a dwelling house; and not guilty of the two counts of burning personal property.

The State's evidence tended to show the following: Angela Griffin ("Angela"), Sharon Keeling ("Keeling"), Troy Stainback ("Stainback"), and defendant, were all friends. As of the week of 11 October 1999, the intricacies of the relationships among these four individuals were as follows: Angela and defendant had been friends since 1992, and shared a close relationship where defendant sometimes stayed overnight at Angela's house in her bedroom. Stainback and Angela had an off-and-on intimate relationship and Stainback was the father of Angela's son Logan. Angela had moved back to her parents' from Stainback's, but during the week of 11 October 1999 she was again spending some nights at his house. Keeling and defendant had been involved in an intimate relationship which ended in September of 1999, and defendant was the father of Keeling's daughter Jessica. Keeling and Angela were best friends and coworkers at a restaurant, the Wildflower Cafe.

The State offered testimony setting forth the defendant's repeated tactic of winning the affections of women already involved in a relationship by telling these women that their current partner was cheating on them. Tammy Stokes ("Stokes"), a State's witness, testified that while she and defendant were both married, they engaged in an illicit affair. Stokes also testified that defendant told her that her husband was continuously cheating on her. In early October of 1999, defendant arranged for Stainback, Angela's off-and-on boyfriend, to go out with Lisa Rhodes. Stainback and Rhodes did go out together.

The week of 11 October 1999, defendant made numerous phone calls to the Wildflower Cafe, Stainback's house, and Angela's parent's

house. On 11 October 1999, defendant called the Wildflower Cafe twice and talked with someone other than Keeling. Keeling testified that defendant had never called her at work, nor had he ever come to visit her there. Angela received a phone call at the Wildflower Cafe on the morning of 11 October 1999. Later that day or later that week, as a result of this phone call, Angela and Keeling went to the residence of Stainback to spy on him from the woods. They were looking for a girl who was supposed to have been there with Stainback.

Angela was last seen alive on the evening of 15 October 1999. She worked at the Wildflower Cafe that morning and early afternoon. While she was working, defendant and Shane Farrar ("Farrar") ate lunch at the Wildflower and talked with Angela. Later that afternoon, Angela went to Keeling's house and left her son with Keeling so that she could go out and find Stainback. Angela told Keeling that she would be back in an hour. Keeling never saw Angela again.

Around 6:00 p.m., Angela called Everett Grissom's ("Grissom") house twice looking for Stainback. While Angela refused to give Grissom her location so that he could have Stainback call her back, phone records indicate that Angela was calling from defendant's mobile home phone number. The times of these calls match both Grissom's phone records and defendant's. Angela spoke to Stainback during the second call. Stainback and Grissom then went to Wilmington, North Carolina for the weekend.

From 6:29 p.m. on 15 October 1999, until 12:36 a.m. on the morning of 16 October 1999, a number of people called defendant's mobile home phone number, but defendant never answered the phone. Defendant had plans to go to a party with Farrar that night, but Farrar was one of those unable to reach him. During the time defendant was unreachable as to incoming calls, defendant called Keeling's house from 7:49 p.m. on into the night, approximately eight times. Each call was a short conversation between Keeling and defendant. Keeling testified that during one of the these conversations, defendant told her he had gone to Middleburg to dine at the Middleburg Steakhouse, but that he had been unable to because the steakhouse was closed that Friday. When asked where he was the evening of 15 October 1999, defendant gave the following responses: to Investigator J.M. Cordell of the Vance County Sheriff's Department, he said he had been with Melanie Carlile ("Carlile"), Jennifer Hobgood ("Hobgood") and Mark Sizemore ("Sizemore") at Joker's Pool Room commencing between 10:00 p.m. and 12:00 a.m. until 2:00 a.m. on 16 October 1999. To his landlady, defendant said that he was hanging drywall. To

Angela's mother, defendant said that he had planned on spending the night with Angela, Keeling, and their kids at Stainback's house. Evidence was also presented that defendant offered to pay a friend any amount of money to verify that he was with defendant the night that Angela disappeared.

Defendant had known Carlile for three months, and their relationship had turned intimate about a week before 15 October 1999. At 1:12 a.m. on 16 October 1999, Carlile called and spoke with defendant from Joker's Pool Room. Carlile had tried reaching defendant thirteen times at his mobile home, but defendant was unreachable until the 1:12 a.m. call. Carlile testified that defendant was hesitant to come to the Joker, stating that he said he "was dirty and didn't feel like going nowhere." At about 1:30 a.m., defendant met up with Carlile, Hobgood, and Sizemore. Carlile first made a statement that defendant arrived in ragged clothing, but then later testified that he was wearing a new outfit. Hobgood testified that defendant arrived at Joker's in worn clothing with dirt on his pants. They stayed at the bar shooting pool until closing, 2:00 a.m., and then all returned to Carlile's father's house. Defendant stayed at Carlile's house until approximately 7:30 a.m. on 16 October 1999. It was the first night he had spent with Carlile.

On the morning of 16 October 1999, shortly after defendant had returned to his mobile home, there was a fire in the home's interior. Defendant claimed the cause was hot grease used in preparation of Tater Tots. He claims he went to the door of the mobile home to throw them out, but the wind blew it back in on him and that was how the fire started. Defendant had no observable injuries or burns from the fire, and made no complaint of injuries or burns on the day of the fire.

Based solely on what defendant told the firefighters the day of the fire, the Vance County Fire Lieutenant's report of the fire listed its source as a pan of grease. The State's arson and fire expert witness, Agent David Campbell ("Agent Campbell"), testified that it was physically impossible for defendant's mobile home fire to have been caused by ignited vegetable oil/grease being spilled on the carpet. Agent Campbell testified that in his opinion the fire was intentionally set by someone pouring a large quantity of an ignitable liquid in the living room area and setting it on fire. This was based in part on Agent Campbell's finding of hydrocarbon sooting on the inside of the mobile home windows suggesting a hydrocarbon fuel was the source of the fire. Vegetable oil, alleged by defendant to be

the source of the fire, is not a hydrocarbon and would not leave a hydrocarbon sooting.

Also on the morning of 16 October 1999, a hole that looked like a bullet hole was observed in the front side of the mobile home under the front windows in the area where the most intensive burning had occurred. The owners of the mobile home testified that this "bullet" hole was not in the mobile home when they rented it to defendant, nor did they believe it to have been present until the morning of the fire on 16 October 1999. S.B.I. agent and crime scene specialist Al Langley ("Agent Langley") examined the mobile home and determined that the hole in the front of the mobile home was a .22 caliber bullet hole fired from the inside of the mobile home.

At about 8:00 a.m. on the morning of 16 October 1999, Keeling called Angela's mother Diane Griffin ("Diane"), and told her that Angela had not returned to pick up Logan. During the day of 16 October 1999, Diane tried to locate Angela, but could not. Around 5:00 p.m. on that same day, Diane called the Vance County Sheriff's Department and reported Angela missing.

Later that day, Angela's car was found parked at the Middleburg Variety Store in Middleburg. The driver's seat was pushed back against the backseat, indicating that the person who had driven the car to the Middleburg Variety Store was a person much taller than Angela. Angela was about five feet two inches while defendant is about six feet four inches.

In early February 2000, Angela's skull and other skeletal remains were found in a field and wooded area just off Brookstone Road and Currin Road. A "shallow grave" near Angela's remains had been dug some several months prior to the discovery of the remains. Defendant lived nine-tenths of a mile from the "shallow grave" and the location of Angela's remains. The condition of Angela's remains were consistent with her having been dead since October of 1999. Angela's skull showed numerous fractures on the left, right, and back sides. The State's medical expert witness determined that these fractures were blunt force injuries that were the likely cause of Angela's death.

The interior of the mobile home, the carpeting, and other furnishings that had been in the mobile home at the time of the fire, were tested for traces of blood. These tests were inconclusive. Agent Susan Barker ("Agent Barker") confirmed that extreme heat can destroy blood, and a fire can prevent detectives from finding evidence of blood.

The jury found the defendant guilty of (1) voluntary manslaughter of Angela Griffin and (2) fraudulently setting fire to and burning a dwelling house; and not guilty of the two counts of burning personal property. The trial court determined defendant had a prior record level of II. He was therefore sentenced to consecutive terms of 77 to 102 months for the offense of voluntary manslaughter, and 8 to 10 months for the offense of fraudulently setting fire to and burning a dwelling house. Defendant entered notice of appeal of the judgment against him on 8 October 2001.

On appeal, defendant argues the trial court erred by (I) allowing the introduction of testimony regarding an alleged .22 caliber bullet hole in the front side of defendant's mobile home; (II) allowing expert testimony that it was physically impossible for grease to have caused the fire in the mobile home; (III) denying defendant's motion to dismiss on grounds of sufficiency of the evidence; (IV) instructing the jury that premeditation and deliberation can be inferred from evidence of how a defendant handles a victim's body; and (V) instructing the jury that concealing evidence relating to the death of Angela Griffin was a fraudulent purpose pursuant to N.C. Gen. Stat. § 14-65 (2001). For the reasons set forth herein, we are not persuaded by defendant's arguments and conclude he received a trial free from reversible error.

I. The .22 Caliber Bullet Hole

[1] By his first assignment of error, defendant contends the trial court erred by allowing testimony regarding an alleged .22 caliber bullet hole in the front side of defendant's mobile home. Because there was no evidence that Angela's death was caused by a gunshot, no evidence that anyone heard a shot, and no evidence that defendant had a .22 caliber rifle, defendant argues the bullet hole evidence is irrelevant.

The scope of relevant evidence in North Carolina is as follows: Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2001). Generally, all relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2001). The North Carolina Supreme Court has consistently stated that in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. *State v. Arnold*, 284 N.C. 41, 47, 199 S.E.2d 423, 427 (1973); *see also State v. Riddick*, 316

N.C. 127, 137, 340 S.E.2d 422, 428 (1986); *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994).

Defendant was charged with the murder of Angela Griffin. The State's evidence did establish that Angela had been intentionally killed, though the exact cause of death could not be determined. From the examination of her skull, a likely cause of death was blunt force traumas to her head. However, in light of other relevant facts circumstantial to the bullet hole, the traumas to her head do not preclude the possibility that Angela may have also been shot at but not struck, shot and wounded, or even shot and killed.

On 8 November 1999, Agent Langley determined by physical examination and chemical testing that the hole in the front side of the mobile home rented and occupied by defendant was a .22 caliber bullet hole. Agent Langley also determined that the bullet had been fired from inside the mobile home to the outside. The bullet was never found.

Testimony established that defendant had a rifle or shotgun in the living room of the mobile home on the morning of 16 October 1999. Furthermore, it was undisputed that there was what appeared to be a bullet hole in the front side of the mobile home on 16 October 1999. It was also undisputed that when defendant rented the mobile home there was no bullet hole, and there were no reports of one thereafter until 16 October 1999.

While there was no evidence presented during the trial directly linking the .22 caliber bullet hole in the mobile home to the killing of Angela, the bullet hole was located at the deepest and heaviest burn area in the mobile home. This was below the windows. This fact supports the State's theory that the fire was intentionally set by defendant to cover up evidence pertaining to Angela's death. Evidence was presented at trial that extreme heat can destroy blood.

The trial court has discretion on admission of evidence. This Court will only disturb such discretion " 'unless it "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." ' " *State v. Burgess*, 134 N.C. App. 632, 635, 518 S.E.2d 209, 211 (1999) (quoting *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988))). In the instant case, the following facts support the trial judge's discretionary decision to admit evidence pertaining to the bullet hole: (1) the cause of

death of Angela cannot be conclusively established; (2) the defendant allegedly had a rifle or shotgun in his mobile home on the 16 October 1999; (3) testimony established the bullet hole was not known by or reported to the owner of defendant's mobile home before 16 October 1999; (4) testimony established the bullet had been fired from inside the mobile home to the outside; and (5) the location of the bullet hole on the inside of the mobile home was at the deepest and heaviest burn area. These facts establish that the trial court's decision to admit this evidence was not arbitrary.

Finally, had we found the trial court's decision to admit the bullet hole evidence was arbitrary, defendant still has the burden of showing that but for its admission, he would not have been convicted of voluntary manslaughter. We agree with the State that the bullet hole evidence was a rather small piece of evidence in this elaborate circumstantial case, and did not so prejudice defendant to establish that its admittance was more than harmless.

II. Expert Testimony Regarding Fire Causation

[2] Defendant's second issue alleging error contends the trial court erred in allowing expert witness Agent Campbell to testify regarding the impossibility that grease could have caused the fire of 16 October 1999. Defendant argues that Agent Campbell's expert opinion was merely speculation. We do not agree.

Generally, "a witness as an expert may give testimony in the form of an opinion if his or her specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *State v. Blakeney*, 352 N.C. 287, 311-12, 531 S.E.2d 799, 816-17 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001); *State v. Eason*, 328 N.C. 409, 421-22, 402 S.E.2d 809, 815 (1991); *see* N.C. Gen. Stat. § 8C-1, Rule 702 (2001). "The expert may base such an opinion on information not otherwise admissible, so long as it is the type of information reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Eason*, 328 N.C. at 421, 402 S.E.2d at 815. Our Supreme Court has also held that a properly qualified arson expert may offer opinion testimony that fire was set intentionally. *State v. Hales*, 344 N.C. 419, 424-25, 474 S.E.2d 328, 330-31 (1996).

Agent Campbell testified that he has 40 years of experience with firefighting. His experience is comprised of over 3000 hours of fire department training and fire investigation training. Agent Campbell

received his training from a large number of institutions and organizations recognized in the field of fire training and fire investigation, including the International Association of Arson Investigators, the North Carolina Fire Institute, and the North Carolina State Bureau of Investigation. This training includes learning fire chemistry behavior, fire cause and origin, and arson. Agent Campbell is also a level-three instructor in the field of fire and arson investigation who teaches numerous courses each year for institutes such as the International Association of Arson Investigators and the United States Bureau of Alcohol, Tobacco, and Firearms.

Agent Campbell was accepted without objection as an expert in the field of fire chemistry and behavior, fire cause and origin, and arson and fire investigation. Defendant objected to Agent Campbell's testimony that the fire was caused by a hydrocarbon source, and that it was physically impossible for grease to have started the fire because, as tested, the fire would go out when it hit the floor. Defendant believes that the jury could be trusted to form its own common sense conclusions about cooking fires and no assistance from an expert is permissible. We disagree.

Agent Campbell was a qualified expert whose testimony assisted the trier of fact as to the potential origin and cause of the fire in defendant's mobile home. His testimony was not limited to enlightening the jury as to how an everyday grease fire occurs, but expanded on why this was not an ordinary grease fire.

Agent Campbell's testimony revealed that the fire moved rapidly, and was fueled by a hydrocarbon, also know as a Class B fuel or material, which produced hydrocarbon soot inside the mobile home. A hydrocarbon is anything that comes from a fractional distillation process, such as gasoline, kerosene, paint thinner, and lighter fluid. Vegetable oil is not such a hydrocarbon, and would not leave any hydrocarbon soot on the interior windows of the mobile home. Furthermore, Agent Campbell testified as to the burn pattern of the fire. In the living room, there was no fire burned V-pattern. However, such a V-pattern was found on the hallway walls and the kitchen. Additionally, he testified that he found hydrocarbon soot patterns under the bottom of the trailer, which was also the location of the deepest burn areas. This reinforced all of the other findings that established that the fire did not start in a specific place, such as the stove, but rather over a large area. This is consistent with the pouring of a quantity of easily ignitable liquid over an area of the living room floor.

Agent Campbell testified further that in his opinion it was physically impossible for the 16 October 1999 fire in defendant's mobile home to have been caused by grease. His testimony was based on an experiment he ran attempting to ignite Food Lion Vegetable Oil. After several failed attempts at igniting the hot oil, he finally did so using a plumber's (benzomatic) torch. He then poured the ignited oil onto the floor where the fire went out, leaving grease patterns on the floor. No traces of grease where found on defendant's living room carpet.

Agent Campbell was a qualified expert who testified as to the source and cause of the fire of 16 October 1999 in defendant's mobile home. His expert opinion that the source of this fire was a hydrocarbon fuel, that it was impossible for ignited vegetable oil to have been the source of the fire, and that the fuel was poured in a large quantity on the living room floor of the mobile home was properly admitted. This assignment of error is overruled.

III. The Trial Court's Denial of Defendant's Motion to Dismiss

Defendant next contends that the trial court erred in denying his motion to dismiss at the close of the State's evidence and at the close of all of the evidence, claiming that the evidence was insufficient to support the charges. Defendant was charged with: (1) first degree murder; (2) fraudulently setting fire to dwelling houses under N.C. Gen. Stat. § 14-65 (2001); and (3) the burning of personal property under N.C. Gen. Stat. § 14-66 (2001). Defendant was found guilty of voluntary manslaughter and of fraudulently setting fire to dwelling houses under N.C. Gen. § 14-65 (2001).

In *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000), our Supreme Court reiterated the standard of review for motions to dismiss in criminal trials. The Court quoted *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980):

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the iden-

tity of the defendant as the perpetrator of it, the motion should be allowed.

Id. at 98, 261 S.E.2d at 117 (citations omitted).

When circumstantial evidence is being used to establish the sufficiency of the evidence, we review the evidence supporting the convictions in accord with the following standards: In reviewing challenges to the sufficiency of evidence, "we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of the defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

A. Voluntary Manslaughter

[3] Voluntary manslaughter is the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation. *State v. Jackson*, 145 N.C. App. 86, 91, 550 S.E.2d 225, 229 (2001). Voluntary manslaughter occurs when one kills intentionally, but does so in the heat of passion aroused by adequate provocation or in the exercise of self-defense where excessive force is used or defendant is the aggressor. *Id.* To survive a motion to dismiss a charge of voluntary manslaughter, the State must bring forth a quantum of evidence, viewed in their favor, that allows a reasonable inference that Angela was intentionally killed and that defendant was the perpetrator of the killing.

1. Intentional Killing and Adequate Provocation

In the instant case, there is uncontroverted evidence that the remains of Angela Griffin were found in February of 2000. The remains included her skull, skeletal remains, bones, and pieces of blond hair. The remains were found near a "shallow grave" in the area of Brookstone Road and Currin Road. The area where the remains were found was approximately nine-tenths of a mile from the defendant's mobile home. Evidence of record establishes that the condition of these remains is consistent with Angela having been dead since October of 1999. Angela was last seen alive on the afternoon of 15 October 1999.

Angela's skull had numerous fractures on the right, left, and back. The Chief Medical Examiner, Dr. John Butts ("Dr. Butts"), determined that these skull fractures were blunt force injuries caused by the head being struck with a heavy object at considerable velocity, or by the head being slammed against a hard surface. Dr. Butts also testified these fractures were probably the cause of Angela's death. Considering this evidence in the light most favorable to the State, we believe a reasonable jury could infer that Angela was intentionally killed on the night of 15 October 1999.

Furthermore, we believe the State put forth a sufficient quantum of evidence to survive a motion to dismiss, which, when viewed in their favor, substantially supports the reasonable inference by the jury that defendant could have had adequate provocation for the intentional killing of Angela the night of 15 October 1999. Evidence established that defendant had a history of breaking up intimate relationships by gaining the confidences of both partners. He did so by leading the man astray, and informing the woman that her man was cheating on her. Defendant's purpose was to then induce the woman to be intimate with him.

The State offered evidence that defendant was very close to Angela, and had spent the night at Angela's house and even in her room on a number of occasions. This occurred despite the fact that Angela had a long-term boyfriend, Stainback, with whom she had a child, and with whom defendant was friends. The State presented the testimony of Lisa Rhodes that defendant had arranged for her to go out with Stainback in October of 1999. Phone records establish that on 11 October 1999 defendant called the Wildflower Cafe, where Angela worked, during the morning hours. Keeling, defendant's ex-girlfriend, testified that she did not talk to defendant on 11 October

1999 while at work at the Wildflower, but that Angela did take a call that morning. Evidence suggests that in reaction to this phone call, Angela went with Keeling to Stainback's house to spy on him. Throughout the week of 11 October 1999, phone records also indicate that defendant called Angela numerous times at work, at Stainback's house, and at her parents' home. Circumstantial evidence suggests also that Angela and Stainback's relationship was still regular, as Angela was spending more nights over at his home.

Viewing the above evidence in the light most favorable to the State, we believe the trial court did not err in allowing the jury to infer that defendant was seeking to break up Stainback's and Angela's relationship with the prospect of having a more intimate relationship with Angela. Circumstantial evidence suggests that defendant set Stainback up with Rhodes so that he could then tell Angela that Stainback was cheating on her. This evidence also shows that Angela took a call which led her to spy on Stainback to see if in fact he was cheating. From this evidence, we believe a jury could reasonably infer that Angela rebuffed defendant's desire to have a more intimate relationship with her, provoking a response of passion in defendant and leading to voluntary manslaughter.

2. Defendant as the Perpetrator of the Offense

[4] The State also provides a sufficient quantum of circumstantial evidence that defendant was the last person in the presence of Angela and thus the perpetrator of the intentional killing of Angela. Phone records establish that in the early evening of 15 October 1999, at 6:01 p.m. and 6:10 p.m., someone from defendant's phone number called Grissom's phone number. Grissom and Stainback were leaving together from Grissom's house to go to Wilmington for the weekend. Grissom testified that on that same day around 6:00 p.m., Angela called twice attempting to locate Stainback, and that Angela would not reveal her location to Grissom for the purposes of having Stainback call her back. Grissom also testified that at no time on 15 October 1999 did he talk to defendant on the phone.

Evidence shows that on the evening and night of 15 October 1999, defendant could not be reached by phone. He had made plans with Farrar, a friend with whom he had lunch that day at the Wildflower Cafe, to go to a party in Virginia. Defendant never answered Farrar's phone calls that evening regarding the party. Phone records show some thirteen calls were made by Carlile between 7:09 p.m. on 15 October 1999 and 12:36 a.m. on 16 October 1999, all unanswered.

Defendant did answer a call at 1:12 a.m. on 16 October 1999 from Carlile asking him to come to Joker's Pool Room. Carlile testified that defendant joined them at Joker's around 1:30 a.m. Carlile testified that defendant was reluctant to come because he said he was filthy and was washing his clothes. There is some conflicting testimony as to whether defendant was wearing disheveled clothing or a new outfit when he arrived at Joker's.

Keeling testified that defendant called her a number of times on the evening of 15 October 1999. During one of these calls, he told Keeling that he drove to Middleburg Steakhouse for dinner but that it was closed. Angela's car, found 16 October 1999 at the Middleburg Variety, had the driver's seat pushed all the way back against the backseat, indicating that the person driving the car was much taller than Angela. Angela was about five feet two inches while defendant is about six feet four inches.

Finally, the State provided evidence that defendant gave a number of conflicting statements concerning where he was the night of 15 October 1999 and tried to establish an alibi.

The evidence put forth by the State, viewed in the light most favorable to the State, is sufficient to support the inference that defendant was the perpetrator of the intentional killing of Angela. Therefore, we believe the trial court properly denied the motion to dismiss.

B. Burning of a Dwelling for Fraudulent Purposes

[5] The elements for the charge of fraudulently burning a dwelling under N.C. Gen. Stat. § 14-65 are that the accused was the owner or occupier of a building that was used as a dwelling house and that the accused either set fire to, burned, or caused the dwelling to be burned wantonly and willfully or for fraudulent purposes. *State v. Payne*, 149 N.C. App. 421, 424, 561 S.E.2d 507, 509 (2002).

It is undisputed that defendant occupied the mobile home, used it as a dwelling, and was alone in the home at the time the fire commenced. Furthermore, the State has established substantial evidence that the fire was not caused accidentally, but started in the living room of the home from a hydrocarbon source.

Defendant claims that the facts of this case, under existing case law, preclude this Court from finding defendant set fire to the mobile home for a fraudulent purpose when that alleged purpose is to burn

evidence of guilt of another crime. We disagree and hold that there was substantial evidence from which a reasonable jury could infer defendant's setting fire to his mobile home was for a fraudulent purpose pursuant to N.C. Gen. Stat. § 14-65.

Defendant relies on *State v. White*, 288 N.C. 44, 215 S.E.2d 557 (1975), arguing that the burning of a dwelling house to conceal evidence is not a "fraudulent purpose" as intended by N.C. Gen. Stat. § 14-65. We disagree with defendant's preclusive reading of *White*. At issue in *White* was common law arson, where the defendant in that case attempted to burn the dwelling of another for purposes of intimidating the occupant, a State's witness. In his jury instruction, the trial judge had supplanted the "fraudulent purpose" terminology of N.C. Gen. Stat. § 14-65 for the language of the charged crime of common law arson, "willful and malicious." Our Supreme Court stated:

> We do not decide whether the precise use of the term made here by the able trial judge constituted legal error. It might be argued that he defined "fraudulent purpose" to be in this case burning of the dwelling for the purpose of intimidating its occupant, a State's witness. This act would also be a wilful and malicious burning. Since, the argument goes, two or more things equal to the same thing are equal to each other the charge is saved from error. Be that as it may, and without considering all the factual circumstances which may be embraced by the term "fraudulent purpose," we believe that the concept has no place in a common law arson case. The better practice is to maintain a clear distinction between this ancient crime and burning for a fraudulent purpose as defined by G.S. 14-65.

White, 288 N.C. at 50, 215 S.E.2d at 561. We believe that destroying evidence in one's dwelling by setting fire to that dwelling fits within N.C. Gen. Stat. § 14-65 and is not precluded by the Supreme Court's restraint in *White* to assign a more narrow definition of "fraudulent purpose."

Fraud is defined as "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usu[ally] a tort, but in some cases (esp[ecially] when the conduct is willful) it may be a crime." Black's Law Dictionary 660 (7th ed. 1999) There is substantial evidence that defendant intentionally burned the mobile home where he lived. As set out above in this opinion, there is substantial evidence of defend-

ant's guilt of the voluntary manslaughter of Angela. Taking the evidence in a light most favorable to the State, a jury could reasonably infer that defendant sought to suppress the truth and deliberately deceive law enforcement in the investigation of Angela's death by setting fire to his dwelling. We hold this to be a fraudulent purpose under N.C. Gen. Stat. § 14-65.

IV. Jury Instruction Regarding Premeditation and Deliberation

[6] In defendant's fourth argument, he acknowledges in his brief that he failed to object to a jury instruction given by the trial court which gave examples of circumstances from which premeditation and deliberation could be inferred. Specifically, the trial court stated that an inference of premeditation and deliberation may be drawn from how a defendant handled the body from the time of the killing until the defendant disposed of the victim's body. Because defendant failed to object to this jury instruction, he must show the trial court committed plain error. Defendant supports his claim by arguing that there was no direct evidence that he ever handled Angela's body.

Plain error review by this Court is well settled in North Carolina:

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th. Cir. 1982) (footnotes omitted) (emphasis in original), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). Thus, for this Court to find plain error in the jury instruction concerning how a juror might draw inferences of premeditation and deliberation, defendant must show that absent such an instruction he would not have been found guilty of voluntary manslaughter.

Defendant was charged with first-degree murder. Premeditation and deliberation are the distinguishing elements of first-degree murder. Premeditation and deliberation are not elements of voluntary manslaughter, as set out above in this opinion. The trial court's example of how these elements of first-degree murder may be inferred is not plain error on a guilty verdict of voluntary manslaughter. The Supreme Court addressed this issue some time ago: The verdict finding defendant guilty of the lesser offense of voluntary manslaughter rendered harmless any errors in the court's instructions on the greater offense, absent a showing that the verdict was affected thereby. *State v. Mangum*, 245 N.C. 323, 330-31, 96 S.E.2d 39, 45 (1957); *see also State v. De Mai*, 227 N.C. 657, 44 S.E.2d 218 (1947). After careful review of the record and transcript, we see nothing to show that the challenged instruction to first-degree murder in any way affected the verdict rendered finding defendant guilty of voluntary manslaughter. This assignment of error is therefore overruled.

V. Jury Instruction as to a Fraudulent Purpose

[7] Defendant's final argument contends that the trial court committed plain error when it instructed the jury that concealing evidence of Angela's death was a fraudulent purpose under N.C. Gen. Stat. § 14-65. Defendant argues that there is no North Carolina authority that burning a dwelling to conceal evidence is a "fraudulent purpose" under N.C. Gen. Stat. § 14-65. Our standard of review for plain error is cited above in *Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1985).

As we held previously, we have determined burning one's dwelling to frustrate an investigation is a "fraudulent purpose" and within the proscription of N.C. Gen. Stat. § 14-65. The trial court therefore did not commit plain error when it instructed the jury that concealing evidence relating to Angela's death could be considered a "fraudulent purpose."

Upon careful review of the record, the transcript, and the arguments presented by the parties, we conclude defendant received a fair trial, free from reversible error.

No error.

Judges MARTIN and LEVINSON concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. CHARLOTTE AREA MANUFACTURED HOUSING, INC., DEFENDANT

No. COA02-1305

(Filed 7 October 2003)

Costs— appraisal fees—maps—trial exhibits

The trial court did not err in a highway condemnation case by partially denying defendant's motion to tax costs against plaintiff DOT associated with appraisal fees, maps, and trial exhibits, because: (1) there is no express statutory authority to tax these costs; and (2) N.C.G.S. § 6-20 is not authority for a trial court to tax non-N.C.G.S. § 7A-305(d) costs.

Appeal by defendant from an order entered 17 May 2002 by Judge Clarence E. Horton, Jr. in Cabarrus County Superior Court. Heard in the Court of Appeals 20 August 2003.

Attorney General Roy Cooper, by Assistant Attorney Generals James M. Stanley, Jr. and Douglas W. Corkhill, for the State.

Peter E. McArdle and Raymond A. Warren, for defendant-appellant.

LEVINSON, Judge.

Defendant appeals from an order partially denying its motion to tax costs against the Department of Transportation (DOT) following a highway condemnation case. We affirm.

I.

On 2 November 1998, DOT brought these two condemnation actions for the acquisition of a new highway right of way over two parcels of the defendant's land and posted bonds pursuant to N.C.G.S. § 136-103 (2001). On 3 November 1999, the defendant answered and asserted that the bonds posted by DOT were not fair compensation. The cases were consolidated for trial, and on 5 November 2001, a jury awarded substantially higher values for both parcels than DOT had deposited with the clerk of court pursuant to N.C.G.S. § 136-103. On 14 December 2001, the trial court entered judgment and ordered DOT to pay the costs of the action. The defendant sought to have its expenses associated with mediation, expert witness fees, expert appraisal fees, maps, and trial exhibits included in

the costs taxed against DOT. The trial court granted defendant's motion with respect to mediation expenses and reasonable and necessary expert witness fees; the trial court denied defendant's motion with respect to appraisal fees, maps, and trial exhibits.

The trial court made the following findings of fact:

> 2. At the trial of this matter, defendant tendered three witnesses as experts in the area of property appraisal. Mr. Thomas B. Harris and Mr. Edward M. Wright, both of the firm of T.B. Harris, Jr. & Associates, testified as to the fair market value of the tracts of property in question immediately before and after the taking by the plaintiff; Mr. John McPherson also testified to the same subject matter.
>
> . . . .
>
> 4. The charges submitted by T.B. Harris, Jr. & Associates include charges for both appraisal fees and fees for preparation and testifying in court at the trial of this matter. Although some of the charges are not completely specific, after careful examination it appears to the court that the sums of $3,500.00 . . . , $625.00 . . . , and $2,500.00 . . . , totaling $6,625.00, clearly represent appraisal costs.
>
> 5. The remainder of the amount invoiced by T.B. Harris, Jr. & Associates, to wit: $16,998.76, includes charges by both Thomas B. Harris and Edward M. Wright. The total sum includes charges for pre-trial discussions with counsel for defendant, pre-trial preparation time reviewing materials, actual trial testimony time (including time spent traveling to and from the courthouse). . . .
>
> . . . .
>
> 7. Mr. John P. McPherson also was subpoenaed and testified as an expert witness for defendant. His invoice to the defendant was in the total sum of $12,531.25, $10,000.00 of which represented appraisal costs. . . .
>
> 8. Mr. Roger D. Shoaf of Shoaf Grading Company, and Mr. Tommy Abernathy, of Hal Abernathy, Inc., submitted invoices in the amount of $500.00 each for estimates on grading the subject property. . . . Further, Accuracy Sitework Estimators, Inc., submitted a bill to Mr. Shoaf in the sum of $650.00 for cut and fill estimates for the subject property. The court finds that the

amount of $1,650.00 for invoices submitted by Mr. Shoaf, Mr. Abernathy, and Accuracy Sitework Estimators, Inc., are a part of the appraisal costs incurred by defendant in this matter.

9. Defendant has requested reimbursement for charges for maps, photographs, enlargement and mounting of exhibits, all in the total amount of $4,310.00. . . .

The trial court made the following conclusions of law:

A. There is no authority for the court to award any amount to defendant for its appraisal costs. Costs may be awarded by this court only pursuant to statutory authority, *Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972), and our statutes do not provide for allowance of appraisal fees in condemnation proceedings. See, in the context of a domestic case, the discussion of the Court of Appeals in *Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). . . . Further, G.S. [§] 136-119 specifically provides for certain limited situations when appraisal fees may be recovered by a landowner, but none of those statutory exceptions apply to this situation. If appraisal fees were recoverable in all condemnation matters, there would be no need for the statutory exceptions.

. . . .

C. The court is not able to find any statutory authority pursuant to which it can reimburse defendant for its costs for maps and exhibits. Our Supreme Court has not spoken to this point, and our Court of Appeals has allowed such assessment of costs only in the limited situation where costs are sought pursuant to Rule 41(d), following a Rule 41(a) voluntary dismissal. See, for example, *Lewis v. Setty*, 140 N.C. App. 536, 537 S.E.2d 505 (2000).

Defendant appeals from the trial court's conclusions that it lacked the authority to tax DOT with the defendant's expenses associated with appraisal fees, maps, and trial exhibits. Defendant makes two arguments on appeal, namely, that the trial court had discretion under N.C.G.S. § 6-20 (2001) to tax as costs: (1) appraisal fees incurred by the defendant, and (2) sums expended by the defendant for maps and trial exhibits.

The defendant properly concedes that N.C.G.S. § 136-119 (2001) does not authorize the taxing of the appraisal costs incurred in the present matter. Accordingly, our analysis is confined to whether

the trial court had discretion under N.C.G.S. § 6-20 to tax the sums in question.

II.

" '[W]here an appeal presents [a] question[] of statutory interpretation, full review is appropriate, and [we review] a trial court's conclusions of law . . . *de novo*.' " *Coffman v. Roberson*, 153 N.C. App. 618, 571 S.E.2d 255 (2002) (quoting *Edwards v. Wall*, 142 N.C. App. 111, 115, 542 S.E.2d 258, 262 (2001)), *disc. review denied*, 356 N.C. 668, 557 S.E.2d 111 (2003). Where a trial court erroneously concludes that it lacks discretion to award costs, the matter should be remanded to permit the trial court to exercise its discretion. *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982).

Several statutes guide our resolution of the issues presented in this case. Article 28 of the General Statutes is titled "Uniform Costs and Fees in the Trial Divisions." In Article 28, N.C.G.S. § 7A-305 (d) and (e) (2001) provide:

> (d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:
>
> (1) Witness fees, as provided by law.
>
> (2) Jail fees, as provided by law.
>
> (3) Counsel fees, as provided by law.
>
> (4) Expense of service of process by certified mail and by publication.
>
> (5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
>
> (6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars ($50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.
>
> (7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such

appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(8) Fees of interpreters, when authorized and approved by the court.

(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law.

N.C.G.S. § 7A-320 (2001) provides that "[t]he costs set forth in this Article [28] are complete and exclusive, and in lieu of any other costs and fees."

Chapter 6 is titled "Liability for Court Costs." N.C.G.S. § 6-1 (2001) refers to the definition of costs provided in N.C.G.S. § 7A-305(d): "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter." N.C.G.S. § 6-20 states that "[i]n other actions [not set forth in 6-18 and 19], costs may be allowed or not, in the discretion of the court, unless otherwise provided by law."

In an opinion written by former Justice (later Chief Justice) Susie Sharpe, the North Carolina Supreme Court clearly indicated that a court may only tax costs pursuant to enabling legislation:

> In considering any question involving court costs the following principles are pertinent: At common law neither party recovered costs in a civil action and each party paid his own witnesses. Today in this State, "all costs are given in a court of law in virtue of some statute." The simple but definitive statement of the rule is: "[C]osts in this State, are entirely creatures of legislation, and without this they do not exist."
>
> Since costs may be taxed solely on the basis of statutory authority, it follows *a fortiori* that courts have no power to adjudge costs "against anyone on mere equitable or moral grounds." Furthermore, even when allowed by statute, "[c]osts and expenses unnecessarily incurred by the prevailing party will not be taxed against the unsuccessful party."
>
> City properly concedes that respondents, to whom judgement was given, are entitled to recover their actual costs reasonably

> incurred and specifically authorized by statutes. Clearly, however, such reimbursement is the limit of their entitlement.

City of Charlotte v. McNeely, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (quoting *Costin v. Baxter*, 29 N.C. 111, 112 (1846), *Clerk's Office v. Commissioners*, 121 N.C. 29, 30, 27 S.E. 1003 (1897), 20 C.J.S. Costs §§ 1, 2 (1940), 20 C.J.S. Costs § 256 (1940)) (citations omitted).

The cases decided by this Court suggest two differing analytical approaches have been used to determine which expenses may be considered "costs." One line of authority holds that any reasonable and necessary expense may be considered a "cost;" the other line of authority holds that the term "costs" encompasses only those expenses either listed in N.C.G.S. § 7A-305(d) or previously recognized as assessable by the common law.

The "reasonable and necessary" line of cases

Notwithstanding the language in *McNeely*, some cases from this Court have held that trial courts have broad discretionary authority under N.C.G.S. § 6-20 to tax any expenses that are deemed "reasonable and necessary." *Coffman*, 153 N.C. App. at 628-29, 571 S.E.2d at 261-62; *Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 680, 468 S.E.2d 513, 516 (1996) ("We must look to the provisos of section 6-20, which vests the trial judge with discretionary authority to allow costs as justice may require."), *disc. review denied*, 344 N.C. 438, 476 S.E.2d 119 (1996).

Though such items are not explicitly defined as costs in any statute, this Court has upheld awards of, *e.g.*, deposition costs, *Alsup v. Pitman*, 98 N.C. App. 389, 391, 390 S.E.2d 750, 751-52 (1990), and *Dixon*, 59 N.C. App. at 286, 296 S.E.2d at 516; trial exhibits and travel expenses for hearings and trial, *Coffman*, 153 N.C. App. at 628-29, 571 S.E.2d at 261-62; bond premiums in an ejectment action, *Minton*, 121 N.C. App. at 680, 468 S.E.2d at 516; expert witness fees, *Lewis v. Setty*, 140 N.C. App. 536, 539-40, 537 S.E.2d 505, 507-08 (2000); and charges by expert witnesses for time spent outside of trial, *Campbell v. Pitt County Memorial Hosp., Inc.*, 84 N.C. App. 314, 328, 352 S.E.2d 902, 910, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987), *overruled on other grounds*, *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990). Likewise, this Court has upheld the decision of a trial court not to award costs where such a decision was not an abuse of discretion. *Estate of Smith v. Underwood*,

127 N.C. App. 1, 13, 487 S.E.2d 807, 815 ("[s]ince the enumerated costs [for expert witnesses, discovery, subpoena charges, transcript costs, the cost of reproducing documents for use at trial as exhibits, and miscellaneous postage charges] sought by plaintiffs are not expressly provided for by law, it was within the discretion of the trial court whether to award them"), *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997).

The rationale for affording broad discretion to trial courts to determine what items may be taxed as costs is based on a loose interpretation of N.C.G.S. § 6-20. The "reasonable and necessary" cases begin by noting that "in those civil actions not enumerated in § 6-18, 'costs may be allowed or not, in the discretion of the court. . . .' " *Lewis*, 140 N.C. App. at 538, 537 S.E.2d at 506 (quoting N.C.G.S. § 6-20). Those cases then interpret section 6-20's "discretion" language to be conferring not only the discretion to determine whether or not costs should be allowed, but also the authority to define the scope of expenditures that may be taxed. *See, e.g., Coffman*, 153 N.C. App. at 628-29, 571 S.E.2d at 261-62; *see also Cosentino v. Weeks*, 160 N.C. App. —, — S.E.2d — (COA-02-1327, filed 7 October 2003) (discussing in more detail how some opinions from this Court have read N.C.G.S. § 6-20's use of the word "discretion" to confer two different kinds of discretion).

In *Alsup*, a plaintiff alleged that N.C.G.S. § 7A-320, enacted in 1983, overruled this Court's recognition of reasonable and necessary deposition expenses as taxable costs. *Alsup*, 98 N.C. App. 389, 390 S.E.2d 750. N.C.G.S. § 7A-320 provides that "[t]he costs set forth in this Article are complete and exclusive, and in lieu of any other costs and fees." In *Alsup*, this Court held that N.C.G.S. § 7A-320 did not affect this Court's recognition of deposition expenses. *Id.* at 391, 390 S.E.2d at 751. Specifically, this Court observed that "§ 7A-305, which specifies in subsection (d) the costs recoverable in civil actions, also provides in subsection (e) that '[n]othing in this section shall affect the liability of the respective parties for costs as provided by law.' Consequently, we find that the authority of trial courts to tax deposition expenses as costs, pursuant to § 6-20, remains undisturbed." *Id.* (quoting N.C.G.S. § 7A-305). Subsequent cases have held that "[w]hile case law has found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be 'reasonable and necessary.' " *Minton*, 121 N.C. App. at 680, 468 S.E.2d at 516.

The "explicitly delineated" approach

Other cases from this Court have strictly limited the trial court's authority to award costs to those items (1) specifically enumerated in the statutes, or (2) recognized by existing common law. *See Crist v. Crist*, 145 N.C. App. 418, 423-24, 550 S.E.2d 260, 264-65 (2001) ("[A] trial court . . . is prohibited from assessing costs in civil cases which are neither enumerated in section 7A-305 nor 'provided by law.' "); *Muse v. Eckberg*, 139 N.C. App. 446, 447, 533 S.E.2d 268, 269 (2000) ("[A]s with statutory authorizations for costs, we strictly construe [case law] and limit it to expenses that are directly related to a deposition."); *Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271 ("While the trial court has broad discretion to allow costs, N.C. Gen. Stat. § 6-20 [], it may exercise that discretion only within the bounds of its statutory authority."), *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

Accordingly, where such expenses were not specifically recognized by statute or existing common law, this Court has disallowed the taxing of travel expenses, *Crist*, 145 N.C. App. at 424, 550 S.E.2d at 265; x-ray films and copies made of records, *Sealy v. Grine*, 115 N.C. App. 343, 444 S.E.2d 632 (1994); copying, phone calls, postage, and travel not directly stemming from a deposition, *Muse*, 139 N.C. App. at 447, 533 S.E.2d at 269; appraisal fees by witnesses voluntarily selected by the defendant, *Wade*, 72 N.C. App. at 384, 325 S.E.2d at 271; and attorney, appraisal, and engineering fees not specifically allowed under N.C.G.S. § 136-119, *Dept. of Transportation v. Container Co.*, 45 N.C. App. 638, 640, 263 S.E.2d 830, 831 (1980).

The following rationale has been offered for strictly limiting the discretion of trial judges to determine what items may be taxed as costs:

> The "complete and exclusive" listing of assessable costs is set forth in Article 28. Section 7A-305, contained within Article 28, specifically enumerates the costs to be assessed in civil actions. In addition to these specifically enumerated costs, the trial court is to assess "costs as provided by law." This Court, prior to the passage of section 7A-320 (which made the costs enumerated in Article 28 "complete and exclusive"), held that deposition expenses are assessable costs. It follows that deposition expenses are "costs as provided by [case] law"; therefore the passage of section 7A-320 did not preclude the assessment of deposition expenses as costs by the trial court. The trial court may

> not, however, assess as costs any expenses which are neither enumerated within Article 28 nor "provided by law."

Sara Lee Corp. v. Carter, 129 N.C. App. 464, 474, 500 S.E.2d 732, 738 (1998) (holding that a trial court lacked the discretion to tax fees assessed by a bank to assemble records and appear and testify pursuant to subpoena), *reversed on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999) (citations omitted).

We observe that the "explicitly delineated" cases are more consistent with the context and plain meaning of N.C.G.S. § 6-20 than are the "reasonable and necessary" cases. Section 6-20 is located in Chapter 6, the first section of which reads "[t]o the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter." N.C.G.S. § 6-1. Thus, the term "costs" in N.C.G.S. 6-20 refers to "costs" as delineated in N.C.G.S. § 7A-305(d). *See Crist*, 145 N.C. App. at 423-24, 550 S.E.2d at 264-65. Moreover, N.C.G.S. § 6-20 follows sections 6-18 and 6-19, which require an award of costs to one of the parties in certain types of actions. The costs to be awarded under N.C.G.S. §§ 6-18 and 19 are the costs specifically delineated in N.C.G.S. § 7A-305(d). *See* N.C.G.S. § 6-1.

Furthermore, the language of N.C.G.S. § 6-20 states that "[i]n other actions, costs may be allowed or not, in the discretion of the court . . . ." By referring to "other actions," section 6-20 apparently grants a trial judge discretion to determine whether or not costs should be taxed to a party in an action not specified in sections 6-18 and 6-19. Thus, the discretion granted is the discretion to allow costs, not the discretion to judicially create costs. Put differently, the word "discretion" qualifies the word "allowed," not the word "costs." Thus, N.C.G.S. § 6-20, read closely and in context, is not strong authority for a trial court to tax non-7A-305(d) costs. *See Crist*, 145 N.C. App. at 423-24, 550 S.E.2d at 264-65; *contra Minton*, 121 N.C. App. at 680, 468 S.E.2d at 516.

III.

We thus conclude that the cases from this Court irreconcilably conflict as to whether legislation permits the taxing of items not listed in the North Carolina General Statutes as assessable or recoverable costs. *Compare Coffman*, 153 N.C. App. at 628-29, 571 S.E.2d at 261-62 (reading N.C.G.S. § 6-20 as statutory authority for a trial court to tax practically any costs found to be reasonable and necessary), *with Crist*, 145 N.C. App. at 423-24, 550 S.E.2d at 264-65 (hold-

ing that the discretion of a trial judge to award costs is strictly limited to the items enumerated in N.C.G.S. § 7A-305(d) and those items already recognized by this Court's common law). To resolve the present case, we must necessarily choose one approach.

We choose to follow the "explicitly delineated" approach because this approach is premised upon an interpretation of N.C.G.S. § 6-20 that is more consistent with the Supreme Court's pronouncement that costs are creatures of statute. *McNeely*, 281 N.C. at 691, 190 S.E.2d at 185. In doing so, we are constrained by the paramount precedent of *McNeely* and therefore cannot recognize the common law expenses previously permitted by this Court. To follow the "reasonable and necessary" approach would do further violence to the plain meaning of N.C.G.S. §§ 6-1, 6-20, and 7A-320 and further erode the general rule that non-statutory costs are not taxable.[1]

IV.

We now turn to the question of whether the trial court erred in finding that it lacked express statutory authority to tax expenses associated with appraisal fees, maps, and trial exhibits.

A.

Appraisal Fees

In its first argument on appeal, the defendant contends that the authority for a trial court to tax appraisal costs is grounded in N.C.G.S. § 6-20. We do not agree.

There is no express statutory authority to tax defendant's appraisal fees as costs. N.C.G.S. § 7A-305(d), the statute which delineates generally recoverable costs, does not mention appraisal fees. N.C.G.S. § 136-119, which deals with highway condemnation costs, does not authorize the taxing of appraisal fees in the present matter. *See* N.C.G.S. § 136-119 (authorizing appraisal fees (1) when the final judgement is that DOT cannot acquire the property, (2) when DOT abandons the proceeding, and (3) in inverse condemnation cases); *Container Co.*, 45 N.C. App. at 640-41, 263 S.E.2d at 831 (holding that appraisal fees not fitting within the three enumerated categories could not be taxed).

1. For a discussion of the impact of the distinction between statutory and common law costs in the Rule 41(d) context, see an opinion also decided this date, *Cosentino v. Weeks*, 160 N.C. App. 511, 586 S.E.2d 787 (2003).

We find it telling that the General Assembly made appraisal fees taxable in only three specific situations. *See* N.C.G.S. § 136-119. If the General Assembly had wished to make appraisal fees recoverable in other situations, it could have done so easily. *See Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) ("Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.").

In the present case, the trial judge concluded that he lacked the authority to award appraisal fees as costs. This conclusion is consistent with our analysis under the "explicitly delineated" approach. *Accord Wade*, 72 N.C. App. 372, 325 S.E.2d 260. The first assignment of error is, therefore, overruled.

B.

The defendant's second argument on appeal is that the trial court erred in ruling that it lacked the authority to tax map and trial exhibit expenses. We disagree.

Maps

The North Carolina General Statutes do not expressly provide for the taxing of expenses related to maps. N.C.G.S. § 7A-305(d) does not mention maps, and N.C.G.S. § 6-20 does not, on its face, make map expenses taxable. *See Crist*, 145 N.C. App. at 423-24, 550 S.E.2d at 264-65; *contra Minton*, 121 N.C. App. at 680, 468 S.E.2d at 516.

Our Supreme Court has indicated that map expenses are not generally taxable. *McNeely*, 281 N.C. at 691-92, 190 S.E.2d at 185 ("[T]he expense of procuring surveys, maps, plans, photographs and 'documents' are not taxable as costs unless there is clear statutory authority therefor or they have been ordered by the court."). The *Coffman* and *Lewis* line of cases cannot be interpreted to overrule *McNeely*.

In the present case, the trial court correctly found that it was without the statutory authority to tax map expenses. The second assignment of error is, therefore, overruled with respect to the taxing of map expenses.

Trial exhibits

The North Carolina General Statutes do not explicitly authorize a trial court to tax expenses related to trial exhibits; however, some of

the "reasonable and necessary" cases from this Court have held that a trial court has the discretion under N.C.G.S. § 6-20 to order that a party be reimbursed for trial exhibits. *Coffman*, 153 N.C. App. at 629, 571 S.E.2d at 261; *Lewis*, 140 N.C. App. at 539-40, 537 S.E.2d at 507; *Smith*, 127 N.C. App. at 12, 487 S.E.2d at 814-15.

"Without question, this Court is required to follow decisions of our Supreme Court until the Supreme Court orders otherwise." *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 621, 504 S.E.2d 102, 106 (1998) (citing *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993)). This panel also is required to follow precedent established by prior panels of this Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). However, where an opinion from this Court has been inconsistent with prior decisions of this Court and our Supreme Court, we have declined to follow it. *See Heatherly*, 130 N.C. App. at 621, 504 S.E.2d at 106; *Cissell v. Glover Landscape Supply, Inc.*, 126 N.C. App. 667, 669-70 n.1, 486 S.E.2d 472, 473-74 n.1, *disc. review denied*, 347 N.C. 396, 494 S.E.2d 408 (1997), *rev'd on other grounds*, 348 N.C. 67, 497 S.E.2d 283 (1998).

We conclude that our duty is to follow the rule established by the Supreme Court in *McNeely* and this Court's "explicitly delineated" cases, which generally adhere to that rule. *See Dunn*, 334 N.C. at 118, 431 S.E.2d at 180 (requiring this Court's compliance with Supreme Court precedent). We therefore decline to follow those opinions from this Court which purport to make trial exhibit expenses taxable in the discretion of a trial court. *See Heatherly*, 130 N.C. App. at 621, 504 S.E.2d at 106; *Cissell*, 126 N.C. App. at 669-70, 486 S.E.2d at 473-74.

In the present case, the trial court concluded it was without express statutory authority to tax the costs of trial exhibits. In light of the Supreme Court's pronouncement in *McNeely*, 281 N.C. at 690, 190 S.E.2d at 184, and this Court's holdings in *Crist*, 145 N.C. App. at 423-24, 550 S.E.2d at 264-65, *Muse*, 139 N.C. App. at 447, 533 S.E.2d at 269, and *Wade*, 72 N.C. App. at 384, 325 S.E.2d at 271, the trial court did not reach an erroneous conclusion. The second assignment of error is, therefore, overruled with respect to the taxing of trial exhibit expenses.

Admittedly, the current status of our common law breeds much confusion for the bench and bar regarding something seemingly as simple as what constitutes a "cost." Regrettably, our opinion may

contribute to the confusion. Barring intervention by our General Assembly or Supreme Court, the law of costs will remain unclear.

Affirmed.

Judges MARTIN and McCULLOUGH concur.

MAXINE COX, W.E. CARTER, CHESHIRE HOWARD "BUDDY" PARKER, JAMES I. CAREY, AND JEANNETTE CAREY, WILMA STROTHER, TERRY K. WAMSLEY, AND WIFE, KIM WAMSLEY, J. LEMAR WHEELER, PERCY G. ROGERS, WALTER W. CREWS, JR., DOUGLAS ADCOCK, GEORGE WHITT, AND LINDA HENSON, PETITIONERS v. FRANKLIN WILLS HANCOCK, IV, AND WIFE, ANNE HANCOCK, DAVID DRYE COMPANY, CITY OF OXFORD, MARSHALL COOPER, ANNIE NESBITT, HOWARD FRAZIER, WILLIAM O. BETTS, ALLAN BAKER, PATRICIA O. THOMAS, ELLIS BAGBY, TINGLEY MOORE, AND TOM THORNTON IN THEIR OFFICIAL CAPACITY AS THE OXFORD ZONING BOARD OF ADJUSTMENT, RESPONDENTS

No. COA02-1143

(Filed 7 October 2003)

1. **Zoning— application for special use permit—real party in interest**

An application for a special use permit did not fail for lack of the landowners' signature on the application. The application was submitted by the prospective vendee, who is the real party in interest.

2. **Zoning— apartment complex—unified housing development**

There was sufficient evidence supporting the Oxford Board of Adjustment's determination that an apartment complex qualified as a unified housing development under the Oxford zoning ordinance and qualified for a special use permit.

3. **Zoning— special use permit—required plans for storm water drainage—oral presentation**

There was sufficient evidence that an application for a special use permit contained plans for storm water drainage, as required by the zoning ordinance, where the minutes of a Board of Adjustment meeting indicated that respondent's agent orally presented the storm drainage and water removal plans.

4. Zoning— special use permit—board of adjustment—members not present at all meetings

Neighbors opposing a special use permit for an apartment complex were not deprived of due process by a change in the membership of the board of adjustment between two meetings at which evidence was presented. The two members who did not attend the first meeting but who did attend the second were provided access to the minutes of the first meeting and to the exhibits presented by the parties. There was extensive presentation of evidence and cross-examination at the second meeting, and the change in board membership had no effect on petitioners' ability to present their arguments against the project.

5. Zoning— special use permit—acting chair of board of adjustment—relationship with landowner

Neighbors opposing a special use permit for an apartment complex were not denied due process by a familial relationship between the acting chair of the board of adjustment and respondent Franklin Hancock, who wished to sell his land to the apartment builder. The party claiming bias has the burden of proof, and there was no showing here of bias by the acting chair or that he stood to benefit from his vote on the project. Additionally, petitioners did not raise the issue before or during the board's hearing.

Appeal by petitioners from order entered 21 March 2002 by Judge James C. Spencer, Jr. in Granville County Superior Court. Heard in the Court of Appeals 18 August 2003.

Currin & Dutra, L.L.P., by Lori A. Dutra, for petitioner-appellants.

Royster, Cross & Currin, L.L.P., by James E. Cross, Jr. and Drew H. Davis, for respondent-appellees.

EAGLES, Chief Judge.

Petitioners appeal from an order affirming a decision by the Board of Adjustment of the City of Oxford to issue a Special Use Permit to respondents David Drye Company ("Drye Co.") and Mr. and Mrs. Franklin Hancock, IV. Petitioners assert three arguments on appeal: (1) that respondents did not make a prima facie showing that its application met the requirements for issuance of a permit; (2) that

the change in membership of the Board of Adjustment deprived petitioners of due process; and (3) that the familial relationship between the respondent landowners and the acting chairman of the Board deprived petitioners of due process. After careful review of the record, briefs and arguments by counsel, we affirm.

The record evidence tends to show the following. Respondent Drye Co. applied for a Special Use Permit from the City of Oxford's Board of Adjustment. Drye Co. planned to build a 130-unit apartment complex on land owned by respondents Franklin Hancock, IV, and his wife Anne Hancock. The land was located outside the City of Oxford but within the Board of Adjustment's jurisdiction. The Board of Adjustment held a public hearing on 22 October 2001. The Special Use Permit application was the only item on the Board's agenda on 22 October. Board of Adjustment members attending the four hour long 22 October meeting included Acting Chairman Tingley Moore, Pat Thomas, Tom Thornton, Allan Baker, William Betts, Chandler Currin, Jr., Marshall Cooper, and Howard Frazier. Acting Chairman Tingley Moore is married to respondent Franklin Hancock's aunt. Petitioners are landowners with homes adjacent to the subject property. At the hearing on 22 October, petitioners stated their objections to the issuance of the Special Use Permit. Petitioners presented numerous exhibits and the testimony of sixteen witnesses. The major focus of petitioners' complaints against the building project centered around an existing storm water runoff problem and fears that the proposed construction would exacerbate that problem. Respondents presented information about the drainage plan for the property and their construction plan.

The Board did not vote on the issuance of the Special Use Permit during the 22 October meeting. Maxine Cox, one of the petitioners, voiced concern about delaying the vote until the following meeting. At approximately 11:30 p.m., Acting Chairman Moore declared that the meeting was "recessed" until 5 November 2001. The parties were instructed by the City Attorney Thomas Burnette to take their exhibits with them and return the exhibits for the 5 November meeting. The City's Planning Director, Cheryl Hart, certified that the parties' exhibits were in her office and that she notified the Board members that the exhibits were available for viewing in her office before the 5 November meeting.

On 5 November 2001, the Board resumed its consideration of the Special Use Permit application filed by respondent Drye Co. The membership of the Board of Adjustment changed between the 22

October and 5 November meetings. One member who was present at the 22 October meeting, Chandler Currin, Jr., resigned before the 5 November meeting. The Board members present at the 5 November meeting were Acting Chairman Tingley Moore, Pat Thomas, Tom Thornton, Allan Baker, William Betts, Annie Nesbitt, Marshall Cooper, Howard Frazier and Ellis Bagby. Two of these members, Annie Nesbitt and Ellis Bagby, had not attended the 22 October meeting. All Board members at the 5 November meeting were provided with written minutes from the 22 October meeting. These minutes were not verbatim transcripts, but contained a summary of the exhibits and testimony from the 22 October meeting. Michael Hedrick, representing respondent Drye Co., presented several exhibits and testified further at the 5 November meeting. Petitioners, along with their counsel, were present and cross-examined Hedrick. Petitioners also presented testimony of individuals opposed to the building project. After all of the evidence was presented, the Board voted unanimously to approve the Special Use Permit. By an order entered 21 March 2002, the trial court affirmed the approval of the permit. Petitioners appeal.

As an appellate court, we must review the sufficiency and competency of the evidence presented to the Board of Adjustment in order to determine whether that evidence supported the Board's action. *See Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980); *see also Grandfather Village v. Worsley*, 111 N.C. App. 686, 688, 433 S.E.2d 13, 15, *disc. rev. denied*, 335 N.C. 237, 439 S.E.2d 146 (1993). The Supreme Court has described the review of a decision about an application for a conditional use permit as including:

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

Concrete Co., 299 N.C. at 626, 265 S.E.2d at 383.

[1] Petitioners first argue that the trial court incorrectly found that substantial, competent and material evidence supported the issuance of the Special Use Permit. Petitioners contend that the application for the permit failed for three reasons: (1) the respondent landowners did not sign the application; (2) an apartment complex does not qualify as a "Unified Housing Development" allowed by Special Use Permit in the RA zone; and (3) the applicants failed to include information in the application regarding storm drainage and sanitary sewerage. We disagree.

Petitioners contend that the permit application did not comply with City of Oxford Zoning Ordinance § 630.2, which states in pertinent part:

> The owner or owners of all property included in the petition for a Special Use Permit shall submit an application to the Building Inspector. Such application shall include all of the requirements pertaining to it in this section.

Oxford Zoning Ordinance § 630.2. The respondent landowners, Franklin Wills Hancock and Anne Hancock, did not sign the application for the Special Use Permit. The application was submitted by Michael Hedrick, an agent of respondent Drye Co. Petitioners argue that the application was not submitted by the property owners and does not comply with § 630.2. We disagree. The Supreme Court has held that a prospective vendee whose purchase of the property in question depends upon the granting of a Special Use Permit is the real party in interest. *See Refining Co. v. Board of Aldermen*, 284 N.C. 458, 464-65, 202 S.E.2d 129, 134 (1974). A prospective vendee is the appropriate party "in position to furnish the plans, specifications, and other data which under ordinance requirements, must accompany any application for a special use permit." *Refining Co.*, 284 N.C. at 465, 202 S.E.2d at 134 (citing *Burr v. City of Keene*, 196 A.2d 63 (N.H. 1963)). Here, respondent Drye Co. was the prospective vendee of the property. As the prospective vendee, Drye Co. was a proper party to submit the application for the Special Use Permit. Respondent Hancock was not required to sign the application or otherwise participate in the Board's decision regarding the Special Use Permit. This assignment of error is overruled.

[2] Petitioners next argue that the granting of the Special Use Permit was inappropriate because the definition of "Unified Housing Development" allowed by the Special Use Permit does not include a multifamily apartment complex. The property at issue here has been

zoned by the Board as being within Zone "RA," which allows for residential and agricultural uses. Oxford Zoning Ordinance § 301 contains a table of permitted uses for various zoning districts. "Unified Housing Developments" are allowed within an RA-zoned property only when a Special Use Permit is granted. Oxford Zoning Ordinance § 301. "Unified Housing Development" is defined within City of Oxford Zoning Ordinance § 612 as "consisting of one or more principal structures or buildings and accessory structures or buildings to be constructed on a lot or plot not subdivided into the customary streets and lots . . . ." Single-family dwellings, two-family dwellings and the conversion of an existing home into a two-family dwelling are allowed in the RA district without a Special Use Permit. Oxford Zoning Ordinance § 301. Multi-family dwellings are not allowed within the RA zoned district. Oxford Zoning Ordinance § 301. The Board found that the construction project planned by respondent Drye Co. was a Unified Housing Development allowable in the RA zoned district upon the granting of a Special Use Permit. The Board then granted the Special Use Permit.

On review, this Court must analyze the evidence presented to the Board to determine whether the evidence supported the Board's determination that the apartment complex qualified as a Unified Housing Development. In addition, the evidence must support the granting of the Special Use Permit. The City of Oxford Zoning Ordinance § 612 contains all the requirements for a Unified Housing Development, as follows:

> 612.1 The yard regulations and height regulations set forth in this ordinance may be modified for a unified housing development, provided that, for such development as a whole, excluding driveways and streets, but including parks and other permanent open spaces, densities shall not be greater than ten (10) dwelling units per acre of the site on which such development is located. No unified housing development shall contain less than two (2) acres.
>
> 612.2 The use regulations in Article 300 may be modified to permit uses which are necessary and incidental to the operation of the development, such as maintenance buildings and management offices. Such structures shall be in appropriate harmony and character with surrounding property.
>
> 612.3 Points of access and egress shall consist of a driveway or roadway at least twenty (20) feet in width and no wider

than twenty-five (25) feet, and shall be located a sufficient distance from highway intersections to minimize traffic hazards, inconvenience and congestion.

612.4 The number, width and location of curb cuts shall be such as to minimize traffic hazards, inconvenience and congestion.

612.5 Parking areas shall have a stabilized surface as approved by the Director of Public Works, and all parking areas and traffic lanes shall be clearly marked.

612.6 Storm and sanitary sewerage shall be provided, as approved by the Director of Public Works.

612.7 Adequate screening, by means of planting or fencing, may be required as needed to protect adjacent property.

612.8 Plans shall be submitted showing:

1. Topography of the site, at contour intervals no greater than five (5) feet.
2. Location and approximate size of all existing and proposed buildings and structures within the site and existing buildings and structures within five hundred (500) feet adjacent thereto.
3. Proposed points of access and egress together with the proposed pattern of internal circulation.
4. Proposed parking areas.
5. Proposed provision for storm and sanitary sewerage, including both natural and man-made features, and the proposed treatment of ground cover, slopes, banks and ditches.

612.9 Off-street parking and loading shall be provided in accordance with Article 500.

Oxford Zoning Ordinance § 612. Respondents' representative, Michael Hedrick, presented evidence satisfying each of these requirements. Hedrick testified that the apartment complex would be located on a parcel of land that was 13.1284 acres in area. The apartment complex would contain 130 units, which did not exceed the density requirement within § 612.1. The planned clubhouse and management office were shown to be incidental to the use of the remain-

ing property according to § 612.2. The apartment complex driveway, as shown by the plans, was 24 feet in width, within the 20 to 25 feet required under § 612.3. Also, the driveway was planned and placed after consultation with a Department of Transportation official, so that traffic hazards, congestion and traffic were considered. Hedrick testified that only one curb cut, as mentioned in § 612.4, was planned on Highway 158. The apartment complex plan included 1.5 parking spaces for each residential unit. In addition, the builder planned to do curbing work, provide a gutter, and layer the parking area with asphalt, although those additional improvements were not specifically required by § 612.5. The preliminary plans submitted as part of the application showed the locations of the complex's proposed connections to the City's sewer line, as required by § 612.6. Hedrick also discussed the placement of several detention basins for storm water, which were included in the preliminary plans. Respondents also submitted a landscape plan that outlined their plans to provide plants and fencing around and within the apartment complex, according to § 612.7. Respondents submitted plans showing all the amenities listed in § 612.8. Hedrick testified that the requirements of § 612.9 had been fulfilled, pointing out that all parking spaces were eight feet and six inches wide and twenty feet long, while the access areas were at least twenty feet wide. The Board was provided evidence that each requirement of § 612 was fulfilled from which it could have logically concluded that the apartment complex plan constituted a Unified Housing Development as defined in City of Oxford Zoning Ordinance § 612.

In addition to meeting the requirements of the Unified Housing Development section of the zoning ordinance, respondents also were required to show that a Special Use Permit was appropriate. According to City of Oxford Zoning Ordinance § 630.4, a Special Use Permit may be granted when an applicant demonstrates:

630.4.1 That the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved.

630.4.2 That the use meets all required conditions and specifications of this ordinance.

630.4.3 That the use will not substantially injure the value of adjoining or abutting property, or that the use of a public necessity, and

630.4.4 That the location and character of the use if developed according to the plan as submitted and approved will be in harmony with the area in which it is to be located and in general conformity with the plan of development of the City of Oxford and its environs.

Oxford Zoning Ordinance § 630.4. Respondent Drye Co. offered evidence showing that the apartment complex would not endanger public health or safety. Hedrick testified regarding the plans for traffic control as well as the project's surface water control and containment systems. Hedrick submitted evidence tending to show that the apartment complex would actually increase the value of the surrounding property, rather than injure it. In addition, several witnesses from the community spoke in favor of the project, showing that affordable housing was a public necessity. Hedrick presented a zoning map of the city, which indicated that adjoining land on one side of the project was zoned as single-family residential land. The adjoining land on the opposite side of the project location was restricted to industrial use. Hedrick offered an opinion that the proposed apartment complex could serve as a buffer between the two areas, thus conforming with the general area. As discussed above, Hedrick also offered ample evidence that the proposed use met the requirements of zoning ordinance § 612. Accordingly, we hold that substantial, competent, and material evidence supported the Board's decision to grant the Special Use Permit. This assignment of error is overruled.

[3] Petitioners argue that respondents' application was incomplete because it did not contain plans for storm sewerage as required by Zoning Ordinance § 612.8. This topic was the main focus of many of the petitioners' objections to the project. Ordinance § 612.8 only requires the submission of proposed plans for storm drainage and water sewerage. Within the body of the written application, respondent Drye Co. did not offer any evidence demonstrating compliance with § 612.8, but on the face of the application, beside § 612.8 a typed notation stated "[s]ee accompanying sheets for each." The record on appeal does not contain these additional sheets. However, the minutes reflect that Hedrick, on behalf of respondent Drye Co., orally presented and discussed the proposed plans for two storm drainage detention ponds, along with proposals for water removal from the apartment complex site. This oral explanation took place at both the 22 October meeting and at the 5 November meeting. As a result of this evidentiary presentation, extensive discussions among the Board, petitioners and Hedrick took place at both meetings regarding the

issue of storm water drainage. This oral evidence by Hedrick was sufficient, competent and material evidence to support the Board's decision to grant the Special Use Permit. Therefore, this assignment of error is overruled.

[4] Petitioners' second contention on appeal is that they were deprived of due process as a result of the change in Board membership between the two meetings during which evidence was presented. We disagree.

In a quasi-judicial proceeding, the petitioner's claim must be afforded due process, including the opportunity for presentation of evidence and cross-examination of witnesses. *See Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383. Petitioners argue that the eight Board members who attended the 22 October meeting were not the same members who attended the 5 November meeting. Nine Board members attended the 5 November meeting. In fact, two members of the Board, Annie Nesbitt and Ellis Bagby, were present on 5 November but had not attended the 22 October meeting. One member, Chandler Currin, Jr., attended the 22 October meeting but resigned before the 5 November meeting. The remaining seven Board members were present at both meetings. The 5 November meeting lasted approximately two hours. During both the 22 October and 5 November meetings, petitioners and their attorney were present. Petitioners offered evidence of the existing storm water drainage problem and their fears about how the proposed construction might exacerbate that problem. At both meetings, petitioners' attorney had the opportunity to cross-examine respondents' agent Hedrick and did so extensively.

Petitioners contend that the continuity of the Board was broken between the two meetings. Petitioners attempt to distinguish this case from *Baker* and *Brannock*. *See Brannock v. Board of Adjustment*, 260 N.C. 426, 132 S.E.2d 758 (1963) (per curiam) and *Baker v. Town of Rose Hill*, 126 N.C. App. 338, 485 S.E.2d 78 (1997). In *Baker*, a change in the Board's membership occurred between two meetings when evidence was presented concerning a Conditional Use Permit. *See Baker*, 126 N.C. App. at 343, 485 S.E.2d at 81-82. One new member was added to the Town Board. *Id.* However, that new member was provided with a copy of the entire record of the earlier meeting. *Id.* In *Brannock*, the membership of the Winston-Salem Zoning Board of Adjustment changed between the hearing on the special permit and the vote approving the application. *See Brannock*, 260 N.C. at 427, 132 S.E.2d at 759. However, the

Supreme Court held that "the changes in membership did not break the continuity of the Board" because "[t]he new members had access to the minutes and records of the various hearings and the required majority participated and joined in all decisions." *Brannock*, 260 N.C. at 427, 132 S.E.2d at 759.

Here, the two members of the Board who did not attend the 22 October meeting but did attend the 5 November meeting were provided access to the minutes of the 22 October meeting at least two days before the 5 November meeting. In addition, the members of the Board were informed that all exhibits presented by the parties on 22 October were available for viewing in the City Planning Director's office prior to the 5 November meeting. This access to the minutes and exhibits from the earlier meeting, combined with the extensive presentation of evidence and cross-examination at the 5 November meeting assures that petitioners were provided with due process. The change in Board membership had no effect on petitioners' ability to present their arguments against the building project to the Board. This assignment of error is overruled.

[5] Petitioners also argue that the familial relationship between the Acting Chairman of the Board of Adjustment, Tingley Moore, and respondent Franklin Hancock deprived petitioners of due process. We disagree.

The Supreme Court has held that "[d]ue process requires an impartial decisionmaker." *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 511, 434 S.E.2d 604, 614 (1993). In addition, the Court held that "[a] fixed opinion that is not susceptible to change may well constitute impermissible bias, as will . . . a close familial or business relationship with an applicant." *Id.* at 511, 434 S.E.2d at 614 (citing *Crump v. Bd. of Educ.*, 326 N.C. 603, 392 S.E.2d 579 (1990); *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914 (1986)). Here, respondent landowner Hancock was married to Acting Chairman Moore's aunt. Although this raises the possibility of partiality, it is the burden of the party claiming bias to show that bias exists. *See Crump*, 326 N.C. at 615-16, 392 S.E.2d at 585. Petitioners failed to show any bias on Mr. Moore's part or that he stands to receive any benefit from his vote on the proposed project. Therefore, petitioners have not met their burden of proof to show that bias existed. In addition, petitioners did not raise this issue during or before the Board's hearing. This assignment of error is overruled.

For the reasons stated, we affirm the trial court's order affirming the decision of the Board of Adjustment of the City of Oxford to grant the Special Use Permit to respondent Drye Co.

Affirmed.

Judges TYSON and STEELMAN concur.

GRANVILLE MEDICAL CENTER, PLAINTIFF v. TONY TIPTON D/B/A TIPTON & ASSOCIATES HEALTHCARE CONSULTING AND TIPTON & ASSOCIATES, INC., D/B/A TIPTON & ASSOCIATES HEALTHCARE CONSULTING, DEFENDANTS

No. COA02-1180

(Filed 7 October 2003)

1. Judgments— entry of default—failure to show good cause

The trial court did not abuse its discretion in a breach of contract action by denying defendant's motion to set aside an entry of default, because: (1) defendant failed to respond for seven months after service of the summons and then asked to be excused based on the fact that he was not a lawyer and did not know it was important to respond to the summons; (2) there was no reason to presume that the trial court failed to apply the good cause standard; and (3) assessing the credibility of defendant's affidavits was within the trial court's authority.

2. Process and Service— affidavit—presumption of proper service

The trial court did not err in a breach of contract action by applying the presumption that defendant was properly served with a summons even though defendant did not personally sign the registry receipt indicating delivery of the summons, because: (1) N.C.G.S. § 1-75.10(4) does not require the affidavit to state the name of the individual who signed the receipt; (2) defendant cites no case for the proposition that an affidavit of service of process is not in accordance with N.C.G.S. § 1-75.10(4) unless it accurately identifies the person who signed for delivery of the summons and unless the person was the defendant to whom the summons was directed; and (3) Rule 4(j2)(2) raises a presumption that the person who received the mail and signed the receipt was

an agent of the addressee authorized to be served or to accept service of process.

3. Judgments— entry of default—presumption of proper service

The trial court did not err in a breach of contract action by denying defendant's motion to set aside an entry of default even though defendant's affidavit allegedly rebutted the presumption of proper service by showing that the person signing for receipt of the summons was not in any way connected with defendant, because: (1) the fact that the individual was not defendant's agent or principal does not necessarily mean he had no connection to defendant; and (2) absent from defendant's affidavit is any allegation that he did not receive the summons or did not receive notice of the suit.

4. Judgments— default judgment—failure to include findings of fact or conclusions of law

Although defendant contends the trial court's order for default judgment cannot stand based on the fact that it does not include findings of fact or conclusions of law, the trial court's failure to include them is not reversible error because defendant did not ask for findings of fact or conclusions of law to be included in the trial court's order, N.C.G.S. § 1A-1, Rule 52(a)(2).

Appeal by defendant from order entered 4 April 2002 by Judge Evelyn W. Hill in Granville County Superior Court. Heard in the Court of Appeals 20 August 2003.

Hopper & Hicks, LLP, by William L. Hopper and James C. Wrenn, Jr., for plaintiff-appellee.

Edmundson & Burnette, L.L.P., by James T. Duckworth, III, for defendant-appellant.

LEVINSON, Judge.

Defendant (Tony Tipton) appeals from entry of default and default judgment. The relevant facts are these: On 19 July 2001, plaintiff filed a complaint alleging breach of contract against defendants Tony Tipton, d/b/a Tipton & Associates Healthcare Associates; and Tipton & Associates, Inc., d/b/a Tipton & Associates Healthcare Consulting. The present appeal involves only Tony Tipton individually. Civil summonses were issued 19 July 2001, addressed to Tipton

individually and as registered agent for Tipton & Associates, Inc. On 21 August 2001 plaintiff filed an Affidavit of Service by Certified Mail, accompanied by a signed postal receipt showing service of the summons on 23 July 2001.

On 29 October 2001, plaintiff filed a motion for entry of default, alleging that defendants had failed to respond to the summons and had not filed an answer or other pleading. The Clerk of Court filed entry of default against defendant on 29 October 2001. On 18 February 2002 plaintiff filed a motion for entry of default judgment against defendants. Defendant's first response to the lawsuit was on 15 March 2002, seven months after the summonses were issued, when he filed a motion to strike the entry of default, accompanied by his affidavit. A hearing was conducted on 28 March 2002. On 9 April 2002 the trial court entered an order denying defendant's motion to strike the entry of default, and entering default judgment against him. From this order, defendant appeals.

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[1] Defendant raises four issues on appeal. He argues first that the trial court's denial of his motion to strike the entry of default constituted an abuse of discretion. We disagree.

An entry of default may be set aside pursuant to N.C.G.S. § 1A-1, Rule 55(d) (2001), which provides that "[f]or good cause shown the court may set aside an entry of default. . . ." A Rule 55 motion to set aside entry of default "is addressed to the sound discretion of the court[,]" *Old Salem Foreign Car Serv. v. Webb*, 159 N.C. App. 93, 97, 582 S.E.2d 673, 676 (2003), " 'whose decision will not be disturbed on appeal absent a showing of abuse of that discretion.' " *Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc.*, 140 N.C. App. 521, 528, 537 S.E.2d 227, 232 (2000) (quoting *Automotive Equipment Distributors, Inc. v. Petroleum Equipment & Service, Inc.*, 87 N.C. App. 606, 608, 361 S.E.2d 895, 896 (1987), and *Lumber Co. v. Grizzard*, 51 N.C. App. 561, 563, 277 S.E.2d 95, 96 (1981)).

"Inasmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry of default[.]" *Peebles v. Moore*, 48 N.C. App. 497, 504-05, 269 S.E.2d 694, 698 (1980), *modified and aff'd*, 302 N.C. 351, 275 S.E.2d 833 (1981). However, while "it is entirely proper for the court to give consideration to the fact that default judgments are not favored in the law[,] . . . it is also true that rules which require responsive pleadings within a limited time serve important social goals, and a party should

not be permitted to flout them with impunity." *Howell v. Haliburton*, 22 N.C. App. 40, 42, 205 S.E.2d 617, 619 (1974). Further, the defendant "has the burden of establishing good cause to set aside entry of default. A judge is subject to a reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *RC Associates v. Regency Ventures, Inc.*, 111 N.C. App. 367, 374, 432 S.E.2d 394, 398 (1993) (citing *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 392 S.E.2d 663 (1990), *disc. review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991), and *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)).

In his motion to set aside the entry of default, defendant argued that "good cause exists for the Court to strike the entry of default against him." He asserted that the "good cause" consisted of the following:

> That [defendant] is not a lawyer, and is unfamiliar with the procedural and substantive rules of law of the State of North Carolina. That he did not know nor understand the consequences of a failure to timely respond to the complaint and summons. That as soon as he learned the gravity and importance of the situation, he notified counsel . . . to make an appearance for him and to draft a motion to strike the entry of default.

On appeal, defendant contends the trial court abused its discretion by denying his motion. In support of this argument, defendant relies heavily upon *Beard v. Pembaur*, 68 N.C. App. 52, 313 S.E.2d 853, *cert. denied*, 311 N.C. 750, 321 S.E.2d 126 (1984), in which this Court held the trial court abused its discretion, and reversed the court's denial of a motion to set aside the entry of default. However, the pertinent facts of *Beard* are quite different from those of the case *sub judice*. In *Beard* a plaintiff who was "vigorously" pursuing discovery nonetheless missed the deadline for filing an answer to defendant's counterclaim because of an error of law made by plaintiff's counsel. We concluded that "[p]laintiff's counsel made technical errors in this case . . . *but he was not dilatory*." *Id.* at 57, 313 S.E.2d at 856 (emphasis added). However, in the instant case, defendant failed to respond for seven months after service of the summons as indicated by the signed postal receipt, and then asked to be excused because he "is not a lawyer." We conclude that *Beard* is inapposite to the present case, and that *First Citizens Bank & Tr. Co. v. Cannon*, 138 N.C. App. 153, 530 S.E.2d 581 (2000), presents a closer analogy. In *First Citizens*, this Court upheld a lower court's denial of a motion to set aside entry of default, stating:

> [Defendant] filed her motion to set aside the entry of default . . . [and] *alleged that she "was unaware that she was required to file an Answer to the Plaintiff's complaint as she is not an attorney and has not been involved in civil litigation, other than the present domestic civil action."* The trial court found that [defendant] had not shown "good cause" to set aside the entry of default and denied defendant [her] motion. . . . [W]e cannot say on these facts that the decision of the learned trial court not to set aside the entry of default was unsupported by reason.

Id. at 158, 530 S.E.2d at 584 (emphasis added). The ruling in *First Citizens* is consistent with other North Carolina appellate law; this Court generally has upheld the denial of a motion to set aside entry of default where the evidence shows defendant simply neglected the matter at issue. *See, e.g., Old Salem*, 159 N.C. App. at 98, 582 S.E.2d at 676-77 (upholding denial of motion where defendant "explained that [their company] normally did the suing" but "offered no other explanation for defendant's failure to respond to plaintiff's summons"); *Silverman v. Tate*, 61 N.C. App. 670, 673, 301 S.E.2d 732, 734 (1983) (upholding trial court's denial of motion to set aside entry of default where there was "ample evidence from which the court may have found that defendant was negligent in establishing promptly any defenses he may have had").

Defendant also argues that the order denying his motion is defective because it fails to articulate that the court applied the "good cause shown" standard. However, there is no evidence in the record that defendant asked the court to include in its order the standard applied:

> When no reason is assigned by the court for a ruling which may be made as a matter of discretion . . . or because of a mistaken view of the law, the presumption on appeal is that the court made the ruling in the exercise of its discretion. *If a party adversely affected by the ruling desires to review it on appeal, he may request the court to let the record show whether the ruling is made as a matter of law or in the exercise of the court's discretion.*

Brittain v. Aviation, Inc., 254 N.C. 697, 703-04, 120 S.E.2d 72, 76 (1961) (emphasis added) (citations omitted). Where the record is silent on a particular point, we presume that the trial court acted correctly. *See State v. Reaves*, 132 N.C. App. 615, 620, 513 S.E.2d 562, 565,

disc. review denied, 350 N.C. 846, 539 S.E.2d 4 (1999); see *also Phelps v. McCotter*, 252 N.C. 66, 67, 112 S.E.2d 736, 737 (1960) (noting the "well established principle that there is a presumption in favor of the regularity and validity of the proceedings in the lower court"). Adhering to this principle, we find no reason to presume that the trial court failed to apply the "good cause" standard.

Defendant also argues that the trial court engaged in an "entirely improper analysis" by weighing the credibility of affidavits and other record evidence in ruling on defendant's motion. However, assessing the credibility of defendant's affidavits was within the trial court's authority. *See, e.g., Strauss v. Hunt*, 140 N.C. App. 345, 351, 536 S.E.2d 636, 640 (2000):

> "When the officer's return of the summons shows legal service, a presumption of valid service of process is created . . . [which] is rebuttable." Defendant attempted to rebut this presumption [with two] affidavit[s]. . . . As the evidence presented by the parties was contradictory, "the credibility of the witnesses and the weight of the evidence were for determination by the court below in discharging its duty to find the facts." We thus will not disturb the court's findings, and affirm that part of the court's order holding service was properly made on defendant.

(quoting *Greenup v. Register*, 104 N.C. App. 618, 620, 410 S.E.2d 398, 400 (1991), and *Harrington v. Rice*, 245 N.C. 640, 643, 97 S.E.2d 239, 241 (1957)). Nor is the trial court required to accept defendant's affidavits as true. *See Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002) (where plaintiff and defendant offered contradictory affidavits regarding service of process "it is the duty of the trial court to evaluate such evidence"), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003).

In the instant case, the defendant's proffered "good cause" was that he was not an attorney and therefore did not know it was important to respond to the summons. We conclude that the trial court's order denying defendant's motion to set aside the entry of default was not unsupported by reason, and further conclude that defendant failed to show the trial court abused its discretion in denying his motion to set aside the entry of default. This assignment of error is overruled.

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[2] Defendant next argues that, in its determination that defendant was properly served with the summons in this case, the trial court

"erred in applying a rebuttable presumption standard of proof of service." We conclude the trial court applied the correct standard.

Defendant argued in his motion to set aside the entry of default that "improper service *entitles him* to an order striking the entry of default against him individually." (emphasis added). Proof of service of process is governed by N.C.G.S. § 1A-1, Rule 4, and N.C.G.S. § 1-75.10 (2001). Rule 4 provides in pertinent part that service may be effected on an individual by "mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C.G.S. § 1A-1, Rule 4(j)(1)(c) (2001). Proof of service is addressed in N.C.G.S. § 1-75.10(4) (2001):

> Where the defendant . . . challenges the service of the summons upon him, proof of the service of process shall be as follows:
>
> . . . .
>
> (4) . . . [If] [s]ervice [is] by Registered or Certified Mail[,] . . . by affidavit of the serving party averring:
>
> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

Under N.C.G.S. § 1A-1, Rule 4(j2)(2) (2001), a party who seeks a default judgment "shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. [§] 1-75.10(4)[.]" Rule 4(j2)(2) further provides that the affidavit, when accompanied by the postal delivery receipt signed by the person who received the summons, "raises a presumption that the person who received the mail . . . and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process[.]" Regarding this provision, this Court has long held that

> the provision in [Rule 4(j2)] . . . contemplates merely that the registered or certified mail be delivered to the address of the party

> to be served and that a person of reasonable age and discretion receive the mail and sign the return receipt on behalf of the addressee. A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service.

Lewis Clarke Associates v. Tobler, 32 N.C. App. 435, 438, 232 S.E.2d 458, 459 (citing *Finance Co. v. Leonard*, 263 N.C. 167, 139 S.E.2d 356 (1964), and *Harrington*, 245 N.C. 640, 97 S.E.2d 239), *cert. denied*, 292 N.C. 641, 235 S.E.2d 60 (1977).

In the instant case, the uncontradicted evidence established that: (1) a civil summons addressed to defendant was sent to him *via* U.S. Postal Service by Certified Mail, Return Receipt Requested; (2) the summons was delivered 23 July 2001, and a signature obtained on the registry receipt; (3) the plaintiff executed an affidavit attesting to these facts, and attaching the registry receipt bearing a signature showing delivery of the summons. We conclude that this evidence complies with the statutory requirements and gives rise to the rebuttable presumption of proper service.

Defendant, however, asserts that the presumption of proper service does not arise in this case because, although plaintiff's affidavit states the summons was received "by and through Tony Tipton, . . . as evidenced by the attached Registry Receipt," the registry receipt bears the signature of an "F. Hedgepeth." On the basis of this discrepancy between the language of the affidavit and the signature on the registry receipt, he contends that there can be no presumption that service of process was proper. We disagree for several reasons.

First, G.S. § 1-75.10(4) does not require the affidavit to state the name of the individual who signed the receipt. Further, the presumption arises upon proof of delivery, regardless of the identity of the signer:

> A reasonable inference to be drawn from the receipts in this case is that the summons and complaint were delivered to a person at the defendant's address whose initials are "ES," and that "ES" received the summons and complaint on behalf of [defendant]. It can be assumed that "ES" was a person of reasonable age and discretion authorized to receive registered mail and sign the receipt for [defendant].

Lewis Clarke, 32 N.C. App. at 438, 232 S.E.2d at 459. Defendant cites no cases for the proposition that an affidavit of service of process is

not in accordance with G.S. § 1-75.10(4) unless it accurately identifies the person who signed for delivery of the summons, and unless that person was the defendant to whom the summons was directed. In fact, North Carolina appellate case law tends to establish the contrary. For example, in *Steffey v. Mazza Construction Group*, 113 N.C. App. 538, 540, 439 S.E.2d 241, 243 (1994), *disc. review improvidently allowed*, 339 N.C. 734, 455 S.E.2d 155 (1995), the defendant argued that service was improper because "the city manager was not served with the certified mail service[.] . . . Instead, some unidentified individual apparently signed for the envelope." This Court disagreed, and held that "Rule 4(j2)(2) raises a presumption that the person who received the mail and signed the receipt was an agent of the addressee authorized to be served or to accept service of process." *Id.; see also In re Williams*, 149 N.C. App. 951, 959, 563 S.E.2d 202, 206 (2002) (where "certified receipt was signed . . . presumably by a [person] of suitable age and discretion authorized to sign the receipt on behalf of respondent," this Court held there was "sufficient compliance with Rule 4 to raise a rebuttable presumption of valid service"), and *Poole v. Hanover Brook, Inc.*, 34 N.C. App. 550, 554-55, 239 S.E.2d 479, 482 (1977), *cert. denied*, 294 N.C. 183, 241 S.E.2d 518 (1978):

> [W]e find no merit in defendant's argument that service was insufficient because the record does not show that it was made on a proper person. . . . [I]t is a reasonable inference from the return receipt that the summons and complaint were delivered to a person . . . [who] received the summons and complaint on behalf of [defendant.] The summons itself was properly directed to defendant. . . . It can be assumed that [signer] was a person of reasonable age and discretion authorized to receive registered mail and sign the receipt for the addressee.

We conclude that the trial court properly applied the presumption that defendant was properly served based upon the evidence in the record. This assignment of error is overruled.

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[3] Defendant argues next that, assuming the trial court properly applied the presumption of proper service, the court nonetheless erred by denying his motion to set aside entry of default. Defendant contends his affidavit rebutted the presumption of proper service, and required the trial court to set aside the entry of default. We disagree.

"The purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him." *Harris v. Maready*, 311 N.C. 536, 541, 319 S.E.2d 912, 916 (1984) (citation omitted). Moreover,

> [a] suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Id. at 544-45, 319 S.E.2d at 917-18 (quoting *Wiles v. Construction Co.*, 295 N.C. 81, 84-85, 243 S.E.2d 756, 758 (1978)). Thus, a defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit, rather than simply questioning the identity, role, or authority of the person who signed for delivery of the summons. *See In re Williams*, 149 N.C. App. at 959, 563 S.E.2d at 206 (where defendant "did not rebut this presumption by showing he never received the summons and complaint" Court finds "defendant was sufficiently served with process"); *Poole*, 34 N.C. App. at 555, 239 S.E.2d at 482 (defendant who "did not attempt to rebut this presumption by showing that he did not receive copies of the summons and complaint" held to have "failed to show that service of process was insufficient because a delivery was not made to a proper person").

In the present case, defendant's affidavit essentially states that (1) he did not personally sign the registry receipt indicating delivery of the summons, (2) the receipt was signed by "S" or "F" Hedgepeth, and (3) defendant had never employed a person named Hedgepeth "as an agent, officer, employee, or principal[.]" On this basis, defendant asserts his affidavit proves the person signing for receipt of the summons "was not in any way connected with the defendant." However, as the trial court observed, the fact that Hedgepeth was not defendant's agent or principal does not necessarily mean he had *no* connection to defendant. Further, as discussed above, the crucial issue is not whether the individual signing for the summons was formally employed by defendant as his agent, but whether or not defendant in fact received the summons. Conspicuously *absent*

from defendant's affidavit is any allegation that he did not receive the summons, or did not receive notice of the suit.

We conclude that it was not error for the trial court to conclude that defendant was properly served with the summons. This assignment of error is overruled.

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[4] Finally, defendant argues that the trial court's order for default judgment cannot stand because it does not include findings of fact or conclusions of law. This argument is without merit.

As there is no suggestion in the record that defendant asked for findings of fact or conclusions of law to be included in the trial court's order, the court's failure to do so is not reversible error. N.C.G.S. § 1A-1, Rule 52 (a)(2) (2001) ("Findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party[.]"); *Condellone v. Condellone*, 137 N.C. App. 547, 550, 528 S.E.2d 639, 642 ([A] "trial court is not required to make findings of fact unless requested to do so by a party."), *disc. review denied*, 352 N.C. 672, 545 S.E.2d 420 (2000). This assignment of error is overruled.

For the reasons discussed above, we conclude the trial court did not err by denying defendant's motion to set aside the entry of default, nor by entering an order for default judgment. Accordingly, the trial court's order is

Affirmed.

Judges MARTIN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. CLARENCE ANTONIO OWENS

No. COA02-1469

(Filed 7 October 2003)

1. Larceny; Possession of Stolen Property— larceny and possession—same property—only one conviction

While a defendant may be indicted and tried on charges of larceny and possession of the same property, the defendant may be convicted of only one of those offenses. Therefore, where

the trial court entered judgment for felonious larceny and felonious possession of the same cigarettes, judgment should have been arrested as to the felonious possession conviction, and the consolidation of the convictions for judgment did not cure this error.

2. Appeal and Error— meaningful review—video recording

The recording of jury selection with only microphones and a video camera did not deprive a larceny defendant of meaningful appellate review. Although there were numerous notes in the transcript concerning the lack of an audible or visual response from the jurors, the context of the questioning and the likely responses were ascertainable from the record.

3. Larceny— sufficiency of evidence

There was sufficient evidence to deny defendant's motion to dismiss a charge of felonious larceny of cigarettes valued at $3,500 from a food store.

4. Evidence— subsequent offenses—lapse of time—similarity of circumstances

The trial court did not abuse its discretion in a larceny prosecution by admitting evidence of break-ins which occurred nine and twelve months after the break-in for which defendant was charged. The lapse of time was not too remote considering the similarities between the incidents.

5. Evidence— prior offense—habitual felon conviction

The trial court did not err in a larceny prosecution by allowing defendant to be questioned about a previous habitual felon conviction. N.C.G.S. § 14-7.5 only prohibits informing the jury of habitual felon indictments which are pending.

6. Criminal Law— prosecutor's argument—not prejudicial

Defendant suffered no prejudicial error from comments in the prosecutor's closing argument in a prosecution for larceny and possession of stolen goods.

Appeal by defendant from judgment dated 6 February 2002 by Judge D. Jack Hooks, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 10 September 2003.

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

Jeffrey Evan Noecker for defendant-appellant.

BRYANT, Judge.

Clarence Antonio Owens (defendant) appeals a judgment and commitment dated 6 February 2002 entered consistent with a jury verdict finding him guilty of felonious larceny and felonious possession of stolen goods.

On 7 November 2000, defendant was indicted on charges of felonious breaking and entering, felonious larceny, felonious possession of stolen goods, and conspiracy to commit felonious breaking and entering. With respect to the charge of felonious larceny, the indictment stated in pertinent part that defendant "unlawfully, willfully and feloniously did steal, take and carry away assorted cigarettes, the personal property of Economy Food Center, Incorporated . . . having a total value of . . . $3,500.00." Defendant was also separately indicted for being a habitual felon.

The evidence at trial revealed that an Economy Food store in Cumberland County, North Carolina was broken into during the early morning hours of 14 February 2000. The perpetrator, who was caught on tape by the store's surveillance camera, had shattered the glass door of the business to gain entrance, thereby triggering the store's alarm system, and loaded approximately $3,500.00 worth of cigarette cartons into a white agricultural bag. The identity of the perpetrator could not be determined from the video footage as he was wearing a mask. Nobody was present at the scene when the police arrived.

At approximately nine o'clock in the morning on 15 February 2000, James Smith, a local pharmacist, was driving on a road near the Economy Food store when he noticed a van parked on his grandfather's farm. When Smith stopped to investigate, he saw a woman sitting on the passenger side of the van. Smith asked the woman if she was having car trouble, to which she replied "No." The woman appeared very nervous, and upon further inquiry by Smith, she said she was waiting for her brother. Having become suspicious of the situation, Smith began following a trail of footprints he saw on the ground leading away from the van and noticed a man pulling a large white bag. Smith called out to the man, asking what he was doing, and then placed a telephone call on his cell phone to his neighbor, a

state highway patrolman, asking him to come over. Subsequently, Smith again asked the man what he was doing on the property and also inquired about the contents of the bag. The man initially told Smith "it didn't concern [him]." Some moments later though, the man explained he was "doing this for Chief," whom he claimed to be the owner of the property. Shortly thereafter the man "took off running," leaving the bag behind. When Smith looked inside the abandoned bag, he saw that it was full of cigarettes. At trial, Smith identified defendant as the man he had seen that day.

Sherman Ammons, whose nickname is "Chief," testified that he was currently serving a prison sentence pursuant to a plea agreement for his involvement in the break-in of the Economy Food store on 14 February 2000. Ammons testified that on that date, he and defendant had driven around to locate a suitable store to break into for cigarettes. After having chosen the Economy Food store, defendant put on his gloves and ski mask. Ammons, the driver, pulled up to the store front, and defendant exited the vehicle and retrieved his bag from the trunk. According to Ammons, this bag was the same one abandoned in Smith's presence on 15 February 2000 and introduced into evidence at trial. Defendant then broke the glass panel of the store door with a bolt cutter, thereby setting off the alarm, which in turn prompted Ammons to drive away as defendant stepped inside the store. Around nine in the morning on 15 February 2000, Ammons received a telephone call from defendant asking him to pick defendant up on a dirt road approximately two and a half to three miles from the Economy Food store. When Ammons met defendant at the arranged location, defendant told him he had hidden the bag of cigarettes in a barn; but when he returned to the place with his sister to collect it, he ran away without the bag when the property owner noticed him.

The State further introduced evidence of two additional break-ins committed by defendant in Cumberland County that occurred between 14 February 2000 and the time of defendant's arrest. This evidence included a break-in at a B.P. gas station during the early morning hours on 27 November 2000, which also involved the breaking of a glass door for entry and the carrying away of cartons of cigarettes in a large white bag. At the scene, a police officer was able to identify defendant in flight and dropping the bag of stolen cigarettes in the process. The other incident occurred on 21 February 2001, a little over a year after the Economy Food store break-in. During a police surveillance operation at the Smokers' Depot in

Fayetteville, a vehicle arrived, from which a man carrying a white agricultural bag exited. The man shattered the glass front door of the business and proceeded toward a display case of Newport cigarettes. After placing the cigarettes in his bag, the man became aware of the police and fled. Two officers at the scene, however, were able to identify the man as defendant. The police searched for defendant, but did not find and arrest him until 8 March 2001.

At the conclusion of the State's evidence, defendant made a motion to dismiss all the charges. The motion was denied, and defendant testified in his own defense, denying participation in the Economy Food store break-in. During cross-examination, the State asked defendant about his prior convictions, including having previously been found to be a habitual felon. At the end of all the evidence, defendant renewed his motion to dismiss, which the trial court denied. The jury returned a verdict finding defendant guilty of felonious larceny and felonious possession of stolen goods but deadlocked as to the charges of felonious breaking and entering and conspiracy to commit felonious breaking and entering. Subsequently, the trial court entered judgment as to both felonious larceny and felonious possession of stolen goods and sentenced defendant as a habitual felon.

The issues on appeal are whether: (I) the trial court erred in failing to arrest judgment on the felonious possession of stolen goods conviction; (II) the incomplete recording of the trial proceedings deprived defendant of his right to meaningful appellate review; (III) the trial court erred in denying defendant's motion to dismiss; (IV) the trial court abused its discretion in admitting evidence of the additional break-ins; (V) it was plain error for the trial court to allow the State to question defendant on his status as a habitual felon; and (VI) the trial court's failure to intervene and declare a mistrial based on certain comments by the State amounted to plain error.

I

[1] Our review of the record on appeal has revealed a substantial error relating to the judgment in this case that has not been raised by defendant. We thus exercise our discretion under the North Carolina Rules of Appellate Procedure to address this error. *See* N.C.R. App. P. 2. In entering judgment on both the felonious larceny and possession convictions, which were based on the taking and possession of the same items, i.e. $3,500.00 worth of cigarettes, the trial court violated the rule established in *State v. Perry* that while a

defendant may be indicted and tried on charges of larceny and possession of the same property, the defendant may be convicted of only one of the offenses. *State v. Perry*, 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982); *see State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992). The judgment should therefore have been arrested as to the felonious possession conviction. *See State v. Hargett*, 157 N.C. App. 90, 93, 577 S.E.2d 703, 705 (2003). Because consolidation of the convictions for judgment does not cure this error, we vacate that portion of the judgment and remand for entry of judgment and sentencing on the larceny conviction. *See State v. Barnett*, 113 N.C. App. 69, 78, 437 S.E.2d 711, 717 (1993).

II

[2] In his first assignment of error, defendant contends the failure to properly record the criminal proceedings effectively deprived him of the right to meaningful appellate review, entitling him to a new trial. In his brief to this Court, defendant explains that, prior to trial, he had moved for and was allowed recordation of all the proceedings; yet, during jury selection, conducted in a different courtroom, no court reporter or transcriptionist was present and only microphones and a video camera were used. As a result, there are numerous places in the transcript where the transcriptionist who prepared the transcript for appeal noted that there was "[n]o audible response" and that she was "unable to see a visual response" from the potential jurors.

Defendant, however, makes no attempt to explain to this Court how he was prejudiced at the trial level. As this Court has previously held, "the use of general allegations [of prejudice] is insufficient to show reversible error resulting from the loss of specific portions of testimony caused by gaps in recording." *In re Clark*, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) (rejecting the respondent's argument for a new trial after she had "generally asserted that the failure to record all of the testimony . . . was prejudicial, [but had] point[ed] to nothing specific in the record to support her argument"). Moreover, a review of the transcript reveals that all of the questions posed by counsel prior to and comments made immediately following the missing responses are included in the transcript and at no point was such a missing response followed by an objection from defense counsel. Because the context of the questioning and the likely responses that were elicited from the potential jurors are therefore ascertainable from the record, defendant was not denied meaningful appellate review, *see State v. Hammonds*, 141 N.C. App. 152, 166, 541 S.E.2d

166, 177 (2000) (overruling the defendant's argument where a "review of the record . . . satisfie[d the Court] that while some specific portions of the record [were] indeed lost, in every case the context of the purportedly objectionable rulings [could] be reconstructed"), *aff'd*, 354 N.C. 353, 554 S.E.2d 645 (2001) (per curiam), and his argument is without merit.

III

[3] We next address defendant's argument that the trial court erred in denying his motion to dismiss the charge of felonious larceny.[1]

In order to withstand a motion to dismiss, the State must present substantial evidence of each essential element of the offense and of the defendant's identity as the perpetrator. *State v. Riddle*, 300 N.C. 744, 746, 268 S.E.2d 80, 81 (1980). "Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Morgan*, 111 N.C. App. 662, 665, 432 S.E.2d 877, 879 (1993). In reviewing the trial court's denial of a motion to dismiss, the evidence must be construed in the light most favorable to the State. *State v. Neal*, 109 N.C. App. 684, 686, 428 S.E.2d 287, 289 (1993). To convict a defendant of felonious larceny, it must be shown that he: (1) took the property of another, (2) with a value of more than $1,000.00, (3) carried it away, (4) without the owner's consent, and (5) with the intent to deprive the owner of the property permanently. *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983); N.C.G.S. § 14-72(a) (2001).

In this case, the evidence, taken in the light most favorable to the State, established all the elements of felonious larceny. Ammons testified that he and defendant had agreed to break into the Economy Food store to steal cigarettes and that he had seen defendant, who was equipped with a large white bag, break the glass door of the store and enter the building. Ammons left when the store's alarm went off but met defendant again the next morning. At this meeting, defendant told Ammons he had hidden the bag containing the stolen cigarettes in a barn near the store but had abandoned it after the property owner appeared. This version of the events is corroborated by Smith's testimony of having seen defendant on his grandfather's farm attempting to carry away a large bag filled with cigarettes. In addition, the cigarettes stolen from the Economy Food store were valued

1. Defendant also assigned as error the trial court's denial of his motion to dismiss the charge of felonious possession of stolen goods. In light of our decision to vacate the judgment as to that conviction, we need not address this issue.

at $3,500.00, thus exceeding the required threshold amount for felonious larceny. *See* N.C.G.S. § 14-72(a). As this evidence was sufficient to overcome defendant's motion to dismiss, this assignment of error is overruled.

IV

[4] Defendant also contends the trial court abused its discretion in admitting evidence of the additional break-ins that occurred after 14 February 2000. Defendant concedes in his brief to this Court that this evidence was properly admitted under Rule 404(b) of the North Carolina Rules of Evidence for the purpose of establishing identity, *modus operandi*, and common plan or scheme and restricts his argument to whether the probative value of the evidence outweighed the danger of unfair prejudice under Rule 403.

Rule 403 requires the trial court to determine "whether the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial." *State v. Schultz*, 88 N.C. App. 197, 202, 362 S.E.2d 853, 857 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988) (per curiam). The required degree of similarity is that which results in the jury's "reasonable inference" that the defendant committed both the prior and present acts. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). The decision to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. *State v. White*, 349 N.C. 535, 552, 508 S.E.2d 253, 264-65 (1998).

Although the additional break-ins occurred nine and twelve months after the Economy Food store break-in, this lapse of time is not too remote considering the great similarity between these incidents and the Economy Food store break-in in terms of the identity of the perpetrator, the method of entry, the type of bag used, and the goods stolen. *See State v. Wortham*, 80 N.C. App. 54, 62, 341 S.E.2d 76, 81 (1986) ("[e]vidence may be admitted even though remote in time, if its 'signature' value is high"), *rev'd in part on other grounds*, 318 N.C. 669, 351 S.E.2d 294 (1987). Defendant was identified by police officers at both the 27 November 2000 and the 21 February 2001 break-in; defendant gained entry to the stores in the same manner as was employed at the Economy Food store, i.e. shattering the glass panel of the front door; and during each break-in, the perpetrator used a large white bag to carry away cartons of cigarettes. Based on the signature value of this evidence, the trial court therefore did not abuse its discretion in concluding that any prejudi-

cial effect was substantially outweighed by the probative value of admitting the evidence.

V

[5] Defendant further asserts it was plain error for the trial court to allow the State to question defendant with respect to his having previously attained the status of habitual felon. We disagree.

During cross-examination, the State made inquiry as to defendant's criminal record, concluding with the questions, answered in the affirmative by defendant, "What about being a[] habitual felon?" and "[Y]ou, sir, are a[] habitual felon, isn't that correct?" Defendant argues this was in violation of N.C. Gen. Stat. § 14-7.5, which prohibits the State from revealing to the jury the existence of a *pending* habitual felon indictment unless the defendant has already been found guilty of the principal felony charged. *See* N.C.G.S. § 14-7.5 (2001). In this case, however, the State's questions did not refer to the pending habitual felon indictment against defendant but simply served to elicit information on defendant's criminal record, including a *previous* habitual felon conviction. *See State v. Aldridge*, 67 N.C. App. 655, 659, 314 S.E.2d 139, 142 (1984) ("[i]t is well established that, if the accused takes the stand in his own behalf, he may be questioned about prior convictions"). Thus, section 14-7.5 was not violated. *See id.* (finding no violation of section 14-7.5 in the absence of any evidence that the jury knew of the present habitual felon indictment during the trial on the underlying offense). Accordingly, the trial court did not err in failing to intervene during this line of questioning.

VI

[6] In his next assignment of error, defendant contends the trial court's failure to intervene and declare a mistrial based on certain comments by the State during closing arguments amounted to plain error.

Plain error analysis requires a defendant to show a " 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnote omitted)). After a thorough review of the transcript in this case, we conclude that none of the State's comments constituted error; however, even if they had

amounted to error, considering the evidence presented against defendant at trial (as discussed in issue III), defendant cannot show that the comments were so prejudicial as to amount to plain error. Consequently, this assignment of error is overruled.

In light of the need to remand this case for resentencing, we do not address defendant's remaining assignment of error challenging his sentence.

Trial—no error.

Sentencing—vacate felonious possession of stolen goods conviction and remand for resentencing on felonious larceny conviction.

Judges MARTIN and GEER concur.

STATE OF NORTH CAROLINA v. MICHAEL KEITH HOLDEN

No. COA02-1478

(Filed 7 October 2003)

1. Constitutional Law; Rape— right to unanimous verdict— instruction—first-degree statutory rape of female under age of thirteen

The trial court erred in a first-degree statutory rape of a female under the age of thirteen case by depriving defendant of his constitutional right to a unanimous jury verdict before being found guilty of a crime when it failed to distinguish between each of the ten counts submitted to the jury, because the effect of the instruction was to permit the jury to return guilty verdicts without agreeing that defendant committed a particular offense, or without agreeing on which two particular incidents of statutory rape occurred. N.C. Const. art. I, § 24.

2. Jurisdiction— instruction—law of jurisdiction

The trial court erred in a first-degree statutory rape of a female under the age of thirteen case by failing to instruct the jury on the law of jurisdiction where the trial court submitted all ten offenses to the jury and jurisdiction was contested.

3. Venue— motion for change—pretrial publicity

The trial court did not abuse its discretion in a first-degree statutory rape of a female under the age of thirteen case by denying defendant's pretrial motions for change of venue based on alleged prejudicial pretrial publicity, because: (1) defendant failed to provide the Court of Appeals with a transcript of jury selection to show juror responses as to whether existing community prejudice would prevent a fair trial; and (2) the newspaper articles provided in the record on appeal as exhibits to the motions for change of venue are factual and noninflammatory news stories.

4. Evidence— sheriff's testimony—corroboration

The trial court did err in a first-degree statutory rape of a female under the age of thirteen case by admitting a sheriff's testimony about his questioning of the victim as corroborative evidence, because: (1) the sheriff's testimony from his interview of the victim is generally consistent with the trial testimony of the victim; and (2) the variances in detail relate simply to the credibility and weight of the testimony and are not sufficient to render the sheriff's testimony contradictory to the victim's trial testimony.

5. Jurisdiction— statutory rape—commission of offense within state—sufficiency of evidence

Although the trial court did not err by denying defendant's motions to dismiss five of the ten charges of first-degree statutory rape of a female under the age of thirteen based on the fact that there was substantial evidence those offenses occurred in North Carolina, the trial court erred by failing to dismiss the remaining five counts because there was no evidence that more than five of the ten charged offenses occurred in North Carolina.

Appeal by defendant from judgments entered 16 January 2002 by Judge Jerry R. Tillett in Gates County Superior Court. Heard in the Court of Appeals 27 August 2003.

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

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

HUNTER, Judge.

Michael Keith Holden ("defendant") appeals from judgments dated 16 January 2002 entered consistent with jury verdicts finding him guilty of two counts of first degree statutory rape of a female under the age of thirteen years. As we determine that the trial court's jury instructions violated defendant's constitutional right to a unanimous jury verdict, we grant a new trial on both counts.

The State's evidence presented at trial tends to show that on the date of the trial the victim was thirteen years old. Around Christmas 1999, the victim was living with her mother, her brother, defendant, and two of defendant's nieces in Courtland, Virginia. After Christmas 1999, they moved to the victim's grandmother's house in Gates County, North Carolina. The victim testified that while they were living in Gates County, defendant had sex with her twice in a van on Cotton Gin Road and three times at her grandmother's house. The victim also testified that defendant had sex with her on other occasions, but she could not recall the number of times.

Edward Webb, the Sheriff of Gates County ("Sheriff Webb"), testified that in May 2000 he was visited by the victim and her parents. Sheriff Webb testified that during this interview the victim stated she and defendant had sex as many as ten times. The trial court instructed the jury this evidence was only for purposes of corroboration, and that if the jury found this testimony was, in fact, corroborative of the victim's testimony the jury could consider it to support the victim's testimony. All jurors indicated they understood the instructions and could follow them.

Sheriff Webb asked the victim about the occurrences of sexual intercourse in North Carolina and the victim responded that those occurred on Cotton Gin Road near a white pole off of Highway 37, which was in Gates County. On those occasions, defendant removed the victim's underwear, got on top of her, and began pushing back and forth. This testimony was admitted over defendant's objection as corroborative evidence and the jury was instructed to only consider it as such.

The victim's parents indicated she was pregnant and Sheriff Webb set up an appointment with the Department of Social Services for a pregnancy test. Prior to this appointment, the victim's father reported that the victim and her mother were missing. Defendant had also disappeared. The ensuing search involved both the State and Federal

Bureaus of Investigation and Sheriff Webb put out newspaper articles in an effort to track down leads and get information about the missing victim. The victim and her mother were ultimately located in Greensboro and the victim subsequently gave birth to a baby. DNA testing revealed a greater than 99.99% match that defendant was the father of the baby. Further testing revealed DNA from a stain containing spermatozoa in the backseat of the van where defendant allegedly raped the victim contained matches to both the DNA profile of defendant and that of the victim. Defendant was apprehended and charged with ten counts of rape.

Prior to the trial of this case, defendant made two motions for a change of venue based on the pretrial publicity following his flight, which the trial court denied. Defendant also moved for a bill of particulars to specify to which particular act each of the ten charged counts were related. This motion was also denied. At the close of the State's case and again after the presentation of all evidence, defendant moved to dismiss the charges for insufficient evidence that the offenses occurred in North Carolina. The trial court denied these motions and submitted all ten counts to the jury, with only a single instruction on the law, no instruction on jurisdiction, and without differentiating among the ten counts.

The issues are whether: (I) the trial court deprived defendant of his constitutional right to a unanimous jury verdict by submitting multiple offenses to the jury without differentiating between them; (II) the trial court erred by failing to instruct the jury on the law regarding jurisdiction; (III) the trial court erred in denying the motions for change of venue; (IV) Sheriff Webb's testimony about his discussion with the victim was non-corroborative hearsay testimony and should have been excluded; and (V) there was sufficient evidence that the crimes charged occurred in North Carolina.[1]

I.

[1] Defendant argues that he was deprived of his constitutional right to a unanimous jury verdict before being found guilty of a crime by the trial court's failure to distinguish between each count submitted to the jury. At the outset, we note that although defendant did not object at trial to the jury instructions and argues plain error to this

1. As we grant defendant a new trial on the basis of the trial court's instructions, we do not address assignments of error related to sentencing, nor do we address assignments of error that are unlikely to re-occur in a new trial. We do, however, address those issues which are likely to arise in the course of a new trial.

Court, the failure to object to alleged errors by the trial court that violate a defendant's "right to a trial by a jury of twelve" does not waive his right to raise the question on appeal. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

Article I, Section 24 of the North Carolina State Constitution requires that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24; *see also* N.C. Gen. Stat. §§ 15A-1201, -1237(b) (2001) (jury verdict must be unanimous). A jury instruction that "allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991).

In this case, the trial court instructed the jury on the elements of the offense of first degree statutory rape and then charged the jury

> that if you find . . . that on or about the date or dates that have been alleged, [defendant] engaged in vaginal intercourse with the victim . . . and that at the time the victim was a child under the age of thirteen (13) years and that [defendant] was at least twelve (12) years old and was at least four (4) years older than the victim, it would be your duty to return a verdict of guilty of the . . . charge of first degree rape.

The trial court, however, made no attempt to distinguish among the ten different counts submitted to the jury. Further, a review of the indictments in this case reveals they are simply short form indictments that each alleges defendant committed first degree statutory rape occurring within a time period between 1 November 1999 and 12 May 2000, without specifying any specific date for any offense. Moreover, the verdict sheets returned by the jury indicate verdicts of guilty of first degree statutory rape without specifying a particular offense. " '[G]enerally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense.' " *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d 361, 363 (1987) (citation omitted). Just as in *Lyons*, which dealt with a disjunctive assault instruction, *Lyons*, 330 N.C. at 306-07, 412 S.E.2d at 314, the effect of the instruction in the case *sub judice* is to permit the jury to return guilty verdicts without agreeing that defendant committed a particular offense, or specifically in this case without agreeing on which two particular incidents of statutory rape defendant was guilty.

The trial court submitted ten counts of rape to the jury and there was evidence of five incidents of rape, including three at the victim's grandmother's house and two in a van on Cotton Gin Road. Thus, without any instruction differentiating between the multiple counts, it was possible for a jury to return a verdict of guilty of two counts of statutory rape with some jurors believing defendant guilty of the incidents in the van, and others believing defendant guilty of two incidents at the victim's grandmother's house, or any number of other combinations. *See id.* Based upon a review of the record, transcript, indictments, jury instructions and verdict sheets, it is, therefore, impossible to determine whether the jury unanimously found that defendant committed any particular offense of statutory rape. Accordingly, the jury instructions were fatally ambiguous and deprived defendant of his right to a unanimous verdict and defendant is entitled to a new trial on two counts of statutory rape. Although we grant defendant a new trial on both counts appealed to this Court, we nevertheless undertake a review of defendant's remaining assignments of error that are likely to re-occur at a new trial.

II.

[2] Defendant assigns error to the trial court's failure to instruct the jury on the law of jurisdiction.[2]

In cases where jurisdiction is challenged and the trial court determines the evidence is sufficient for a jury to make the determination of whether the crime occurred in North Carolina, " 'the trial court must instruct the jury that unless the State has satisfied it beyond a reasonable doubt that the [crime] occurred in North Carolina, a verdict of not guilty should be returned.' " *State v. White*, 134 N.C. App. 338, 340, 517 S.E.2d 664, 666 (1999) (quoting *State v. Rick*, 342 N.C. 91, 100-01, 463 S.E.2d 182, 187 (1995)). Furthermore, the jury should be instructed to return a special verdict indicating lack of jurisdiction if it is not satisfied beyond a reasonable doubt that jurisdiction existed in North Carolina. *Id.* Thus, in the case *sub judice*, where the trial court submitted all ten offenses to the jury and jurisdiction was contested, the trial court erred by failing to instruct the jury on the law of jurisdiction.

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2. Defendant has waived appellate review of this issue by not objecting to the omission of the instruction at trial and by failing to assign plain error in his record on appeal, we nevertheless, in our discretion under Rule 2 of the Rules of Appellate Procedure review this issue to prevent its re-occurrence upon re-trial of this matter. N.C.R. App. P. 2.

III.

[3] Defendant next argues that the trial court erred by denying his pretrial motions for change of venue based on prejudicial pretrial publicity.

"The test for determining whether a change of venue should be granted is 'whether, due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial.' " *State v. Hill*, 347 N.C. 275, 284, 493 S.E.2d 264, 269 (1997) (quoting *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1983)). Under this test, the burden is on defendant to show a reasonable likelihood "that the prospective jurors will base their decision in the case upon pretrial information rather than the evidence presented at trial and will be unable to remove from their minds any preconceived impressions they might have formed." *Id.* at 284-85, 493 S.E.2d at 269. "The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process." *State v. Madric*, 328 N.C. 223, 228, 400 S.E.2d 31, 34 (1991). "[W]here [a] defendant shows only that the publicity surrounding his case consists of . . . factual, noninflammatory news stories, a trial court's denial of a change of venue is proper." *State v. Cole*, 343 N.C. 399, 413, 471 S.E.2d 362, 368 (1996). A trial court's ruling on a motion for a change of venue will not be overturned absent a showing of abuse of discretion. *Hill*, 347 N.C. at 285, 493 S.E.2d at 269.

In this case, defendant has failed to provide this Court with a transcript of jury selection. Furthermore, the newspaper articles provided in the record on appeal as exhibits to the motions for change of venue are factual and non-inflammatory news stories. Thus, defendant has failed to show any abuse of discretion on the part of the trial court, and we conclude there was no error in the denial of the motions to change venue.

IV.

[4] Defendant also assigns error to the admission of Sheriff Webb's testimony about his questioning of the victim as corroborative evidence.

"Our courts have long held that a witness's prior consistent statements may be admissible to corroborate the witness's in-court testimony." *State v. Guice*, 141 N.C. App. 177, 201, 541 S.E.2d 474, 489 (2000). "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). Where corroborative testimony tends to add strength and credibility to the testimony of another witness, the corroborating testimony may contain new or additional facts. *State v. Farmer*, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993). Variances in detail between the generally corroborative testimony and the testimony of another witness reflect only upon the credibility of the statement. *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983). Whether testimony is, in fact, corroborative is a factual issue for the jury to decide, after proper instruction by the trial court. *State v. Burns*, 307 N.C. 224, 231-32, 297 S.E.2d 384, 388 (1982).

In this case, Sheriff Webb's testimony from his interview of the victim is generally consistent with the trial testimony of the victim, except to recount certain specific details the victim could not recall or did not specifically testify to at trial, including the number of times she and defendant had intercourse and a more detailed description of the intercourse in the van on Cotton Gin Road. These variances in detail relate simply to the credibility and weight of the testimony and are not sufficient to render Sheriff Webb's testimony contradictory to the victim's trial testimony. Thus, the trial court did not err in admitting Sheriff Webb's testimony regarding his interview of the victim as corroborative evidence.

V.

[5] Defendant finally contends the trial court erred by denying his motions to dismiss based upon insufficient evidence that the offenses occurred in North Carolina.

When the jurisdiction of the trial court is challenged in a criminal case, the burden is on the State to prove beyond a reasonable doubt that the offenses occurred in North Carolina. *See State v. Batdorf*, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977). "A motion to dismiss is properly 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. Wheeler*, 138 N.C. App. 163, 165, 530 S.E.2d 311, 312 (2000) (citation omitted). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, allowing the State the benefit of every reason-

able inference derived therefrom. *Wheeler*, 138 N.C. App. at 165, 530 S.E.2d at 312.

In this case, the victim testified that shortly after Christmas 1999 she was living in Gates County, North Carolina at her grandmother's house. She further testified that defendant had sex with her three times at her grandmother's house. The victim also testified that defendant had intercourse with her twice in a van on Cotton Gin Road. Sheriff Webb identified the location in which these two incidents occurred as being on Cotton Gin Road within Gates County, North Carolina. Therefore, there was substantial evidence that five of the ten charged offenses occurred in North Carolina. The only evidence of the remaining five charged offenses was Sheriff Webb's testimony that the victim told him that defendant had sex with her ten times. This evidence was admitted only as corroborative evidence and not as substantive evidence of the crimes charged. Nor was there any evidence of where those remaining five offenses allegedly took place. Thus, the trial court erred in not dismissing the remaining five counts as there was no evidence that more than five of the ten charged offenses occurred in North Carolina.[3]

New trial.

Judges TIMMONS-GOODSON and ELMORE concur.

ANTHONY COSENTINO, PLAINTIFF v. KATHERINE P. WEEKS, M.D., AND CAROLINA HEALTHCARE GROUP, P.C., DEFENDANTS

No. COA02-1327

(Filed 7 October 2003)

Costs— expert witness fees—deposition transcripts—court reporter fees—deposition-related attorney travel expenses

The trial court did not abuse its discretion in a medical negligence and negligent supervision case by denying defendants' motion for costs with respect to their expert witness fees, depo-

3. The trial court apparently did not dismiss the additional five counts because defendant was unable to distinguish specifically which five counts should have been dismissed. Defendant's pretrial motion for a bill of particulars was, however, denied and the State provided no correlation between the individual counts and the specific alleged offense and/or surrounding facts to which they related.

sition transcripts and court reporter fees, and deposition-related attorney travel expenses following a voluntary dismissal without prejudice by plaintiff, because: (1) these items are not specifically set forth as costs in the General Statutes; (2) there is no authority for the proposition that a trial court must award non-statutory common-law costs to a defendant under N.C.G.S. § 1A-1, Rule 41(d); and (3) the language of N.C.G.S. §6-20 does not compel a trial court to award any costs.

Appeal by defendants from order and judgment entered 30 May 2002 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 August 2003.

Erwin and Eleazer, P.A., by L. Holmes Eleazer, Jr., Fenton T. Erwin, Jr. and Peter F. Morgan, for plaintiff-appellee.

Shumaker Loop & Kendrick, LLP, by Scott M. Stevenson and Elizabeth A. Martineau, for defendants-appellants.

LEVINSON, Judge.

Defendants herein appeal from an order denying in part their motion for costs made following a voluntary dismissal taken by plaintiff without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. This case is best read in tandem with *Department of Transportation v. Charlotte Area Manufactured Housing, Inc.*, 160 N.C. App. 461, 586 S.E.2d 780 (COA02-1305, filed 7 October 2003), also decided this day, as both cases address related legal issues.

On 21 June 2000 Anthony Cosentino (plaintiff) filed a suit against Katherine P. Weeks, M.D. and Carolina Health Care Group, P.C., alleging medical negligence and negligent supervision. Plaintiff also named two other defendants not parties to the present appeal. On 5 November 2001, the morning of the trial, plaintiff took a voluntary dismissal without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a) (2001) (hereinafter "Rule 41(a)"). On 21 November 2001 plaintiff filed the current action against defendants Weeks and Carolina Health Care Group, P.C. (defendants), alleging the same claims.

On 4 February 2002 defendants filed a motion for costs pursuant to N.C.G.S. § 1A-1, Rule 41(d) (2001) (hereinafter "Rule 41(d)"). Defendants asked the trial court to tax the plaintiff with the following costs: (1) defendant's expert witness fees; (2) deposition transcripts and court reporter fees; (3) attorney travel costs associated

with attending depositions; and (4) mediation costs. The trial judge granted the motion with respect to the mediation costs and denied the motion with respect to all other expenses.

From this order and judgment, defendants appeal, contending that Rule 41(d) "costs" means both those expenses which may be awarded pursuant to this Court's reading of N.C.G.S. §6-20 (2001) (hereinafter "common law costs"), and also the costs set out in N.C.G.S. § 7A-305(d) (2001) (hereinafter "N.C.G.S. § 7A-305(d) costs"). On this basis, defendants assert that the trial court erred by denying their motion to tax plaintiff with defendant's expert witness fees, court reporter and deposition fees, and deposition-related attorney travel expenses, even though these items are not specifically set forth as costs in the General Statutes.

" '[W]here an appeal presents [a] question[] of statutory interpretation, full review is appropriate, and [we review a trial court's] conclusions of law *de novo*.' " *Coffman v. Roberson*, 153 N.C. App. 618, 623, 571 S.E.2d 255, 258 (2002) (quoting *Edwards v. Wall*, 142 N.C. App. 111, 115, 542 S.E.2d 258, 262 (2001)), *disc. review denied*, 356 N.C. 668, 557 S.E.2d 111 (2003). Where a trial court erroneously concludes that it lacks discretion to award costs, the matter should be remanded to permit the trial court to exercise its discretion. *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982).

Resolution of the issues presented in this case requires discussion of several statutes. N.C.G.S § 1A-1, Rule 41 (2001) governs voluntary dismissals without prejudice:

(a) Voluntary dismissal; effect thereof.—

(1) By Plaintiff; by Stipulation.—Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any

claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

. . . .

(d) Costs.—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

Article 28 of the General Statues is titled "Uniform Costs and Fees in the Trial Divisions." Located in Article 28, N.C.G.S. § 7A-305 (d) and (e) (2001) address costs in civil actions:

(d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.

(2) Jail fees, as provided by law.

(3) Counsel fees, as provided by law.

(4) Expense of service of process by certified mail and by publication.

(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.

(6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars ($50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.

(7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(8) Fees of interpreters, when authorized and approved by the court.

(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law.

N.C.G.S. § 7A-320 (2001) provides that "[t]he costs set forth in this Article [28] are complete and exclusive and in lieu of any other costs and fees."

Chapter 6 is titled "Liability for Court Costs." N.C.G.S. § 6-1 (2001) refers to the definition of costs provided in N.C.G.S. § 7A-305(d): "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter." N.C.G.S. § 6-20 states that "[i]n other actions [not set forth in §§ 6-18 and 6-19], costs may be allowed or not, in the discretion of the court, unless otherwise provided by law."

Though such items are not explicitly listed as costs in the General Statutes,[1] this Court has upheld awards of, *e.g.*, deposition costs,

1. To resolve the issues presented in this case, we must analyze this Court's opinions recognizing the authority of a trial court to award common law costs pursuant to N.C.G.S. § 6-20. The North Carolina Supreme Court has indicated that a court may only tax costs pursuant to enabling legislation, *City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179, 184 (1972). The cases from this Court irreconcilably conflict as to whether legislation permits the taxing of items not specifically enumerated in the North Carolina General Statutes. *See Charlotte Area Manufactured Housing*, 160 N.C. App. at 467-69, 586 S.E.2d at 784-85 (providing a more complete discussion of the conflict in our jurisprudence concerning costs). To summarize, some cases hold that the term "costs" means only those items explicitly recited in the General Statutes; others hold that the term "costs" includes expenses the trial court deems reasonable and necessary. *Compare Coffman*, 153 N.C. App. at 628-29, 571 S.E.2d at 261-62 (reading N.C.G.S. § 6-20 as statutory authority for a trial court to tax practically any expense found to be "reasonable and necessary"), *with Crist v. Crist*, 145 N.C. App. 418, 423-24, 550 S.E.2d 260, 264-65 (2001) (holding that the discretion of a trial judge to award costs is strictly limited to the items enumerated in N.C.G.S. § 7A-305(d) and to those items already recognized by this Court's common law). Our analysis in the case *sub judice* should not be interpreted as an endorsement of, or an expansion of, common law costs.

Alsup v. Pitman, 98 N.C. App. 389, 391, 390 S.E.2d 750, 751-52 (1990); trial exhibits and travel expenses for hearings and trial, *Coffman*, 153 N.C. App. at 628-29, 571 S.E.2d at 261-62; bond premiums in an ejectment action, *Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 680, 468 S.E.2d 513, 516 (1996); expert witness fees, *Lewis v. Setty*, 140 N.C. App. 536, 539-40, 537 S.E.2d 505, 507-08 (2000); and charges by expert witnesses for time spent outside of trial, *Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 328, 352 S.E.2d 902, 910, *aff'd*, 321 N.C. 260, 362 S.E.2d 273 (1987), *overruled on other grounds*, *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990). Likewise, this Court has upheld the decision of a trial court not to award costs on an abuse of discretion standard. *Estate of Smith v. Underwood*, 127 N.C. App. 1, 13, 487 S.E.2d 807, 815 ("[s]ince the enumerated costs [for expert witnesses, discovery, subpoena charges, transcript costs, the cost of reproducing documents for use at trial as exhibits, and miscellaneous postage charges] sought by plaintiffs are not expressly provided for by law, it was within the discretion of the trial court whether to award them"), *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997).

The following explanation has been offered for upholding a trial court's award of common law costs:

> "[C]osts which are not allowed as a matter of course under G.S. § 6-18 or § 6-19 . . . may be allowed in the discretion of the court under G.S. § 6-20. . . ." Thus, costs which are to be taxed under Rule 41(d) may also include those costs allowable under N.C. Gen. Stat. § 6-20. "N.C. Gen. Stat. § 6-20 provides that in those civil actions not enumerated in § 6-18, 'costs may be allowed or not, in the discretion of the court, unless otherwise provided by law.' " The negligence action voluntarily dismissed by plaintiff *sub judice* is not one of the actions enumerated in §§ 6-18 or 6-19, thus it falls within the scope of N.C. Gen. Stat. § 6-20.
>
> The trial court's discretion to tax costs pursuant to N.C. Gen. Stat. § 6-20 is not reviewable on appeal absent an abuse of discretion. "While case law has found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be 'reasonable and necessary.' "

Lewis, 140 N.C. App. at 538-39, 537 S.E.2d at 506-07 (quoting *Estate of Smith*, 127 N.C. App. at 12, 487 S.E.2d at 815, N.C.G.S. § 6-20, and *Minton*, 121 N.C. App. at 680, 468 S.E.2d at 516) (citations omitted).

Examination of this rationale indicates that the *Lewis* panel read N.C.G.S. § 6-20 as conferring two different kinds of discretion: (1) the discretion to determine whether costs should be awarded where no statute mandates an award of costs in a particular civil action, and (2) the discretion to determine whether an expense may be taxed as a cost notwithstanding the fact that such an expense is not listed in N.C.G.S § 7A-305(d). *See id.*

The first kind of discretion, the discretion to determine whether costs should be awarded in a particular civil action, is clearly granted by the plain language of the statute. *See Charlotte Area Manufactured Housing, Inc.*, 160 N.C. App. at 467-69, 586 S.E.2d at 784-85. There are numerous statutes that require a trial court to award costs in particular types of actions. For example, N.C.G.S. § 6-18(2) (2001) requires a trial court to award costs to a prevailing plaintiff in an action to recover the possession of personal property; if the plaintiff does not prevail in that action, then N.C.G.S. § 6-19 (2001) requires the trial court to award costs to the defendant. Where no statute requires an award of costs to one of the parties, N.C.G.S. § 6-20 vests the trial court with the discretion to award costs to either party. *See, e.g., Lewis*, 140 N.C. App. at 538, 537 S.E.2d at 507 ("The negligence action voluntarily dismissed by plaintiff *sub judice* is not one of the actions enumerated in §§ 6-18 or 6-19, thus it falls within the scope of N.C. Gen. Stat. § 6-20.").

The second kind of discretion, the discretion to award non-statutory common law costs, arises from certain opinions of this Court which have interpreted N.C.G.S. § 6-20 as authorizing an award of non-N.C.G.S. 7A-305 costs. *See id.* "While case law has found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be 'reasonable and necessary.' " *Minton*, 121 N.C. App. at 680, 468 S.E.2d at 516; *see also Coffman*, 153 N.C. App. at 629, 571 S.E.2d at 262. This second kind of discretion has been the subject of considerable dispute, *see Charlotte Area Manufactured Housing*, 160 N.C. App. at 468-69, 586 S.E.2d at 784-85. It is not disputed, however, that certain opinions of this Court have held that a trial judge did not abuse its discretion by awarding *some* of the common law costs at issue in the instant case.[2] *See Coffman*, 153 N.C. App. at 628-29, 571 S.E.2d at

2. In the present case, defendants seek reimbursement for, *inter alia*, travel expenses incurred by counsel in traveling to-and-from depositions. Defendants have not pointed us to any specific authority allowing attorney travel costs to be taxed pursuant to N.C.G.S. § 6-20 or Rule 41(d). Prior cases allowing a discretionary award of deposition-related costs are ambiguous as to whether the travel expenses allowed

261-62 (deposition costs and travel expenses for hearings and trial); *Lewis*, 140 N.C. App. at 539-40, 537 S.E.2d at 507-08 (expert witness fees); *Sealy v. Grine*, 115 N.C. App. 343, 347-48, 444 S.E.2d 632, 635 (1994) (obtaining copies of depositions from a reporting service and court reporting services).

We turn next to consideration of defendants' argument that Rule 41(d) *required* the trial court to tax plaintiff with discretionary common law costs. Rule 41(d) requires an award of costs, upon motion by a defendant, where a plaintiff takes a voluntary dismissal without prejudice and subsequently re-files. Thus, where Rule 41(d) applies, the first kind of N.C.G.S. § 6-20 discretion, the discretion to award costs, is inapplicable because Rule 41(d) mandates that costs "shall be awarded." The issue presented in the instant case is whether Rule 41(d) costs include the common law costs found to exist by virtue of the second kind of N.C.G.S. § 6-20 discretion which has been judicially created by this Court. We have carefully reviewed the relevant statutes and cases, and we find no authority for the proposition that a trial court *must* award non-statutory common-law costs to a defendant pursuant to Rule 41(d).

Rule 41(d) does not mention common law costs, and defendants have not presented any evidence that the legislature intended to incorporate common law costs into Rule 41(d). Moreover, this Court has held that "[t]he 'costs' to be taxed under . . . Rule 41(d) against a plaintiff who dismisses an action under . . . Rule 41(a), means the costs recoverable in civil actions as delineated in [N.C.G.S.] § 7A-305(d). . . ." *Sealy*, 115 N.C. App. at 347, 444 S.E.2d at 635 (citing *McNeely*, 281 N.C. at 691, 190 S.E.2d at 185). Accordingly, it would appear that N.C.G.S. § 1A-1, Rule 41(d) does not require the taxing of any non-statutory common law costs.

Furthermore, we note that the language of N.C.G.S. § 6-20 does not compel a trial court to award any costs. N.C.G.S. § 6-20 says "costs may be allowed or not, in the discretion of the court[.]" Notably, this statute contains the words "may" and "discretion." "Nothing else appearing, the legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning." *Wood v. Stevens & Co.*, 297 N.C. 636, 643, 256 S.E.2d 692, 697 (1979). "Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." *In re Hardy*, 294 N.C. 90,

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therein were for attorneys. *See Sealy*, 115 N.C. App. at 347-48, 444 S.E.2d at 635; *Coffman*, 153 N.C. App. at 628-29, 571 S.E.2d at 261-62.

97, 240 S.E.2d 367, 372 (1978). Thus, to the extent that N.C.G.S. § 6-20 permits a trial court to tax common law costs, the plain language of the statute does not *require* that any costs be awarded.

This interpretation is reinforced by this Court's jurisprudence purporting to interpret N.C.G.S. § 6-20. Generally, our cases have found common law costs to be permissive rather than mandatory. *See Coffman*, 153 N.C. App. at 629, 571 S.E.2d at 262 ("Defendants have failed to show that the trial court abused its *discretion* in allowing these costs to be taxed to defendants.") (emphasis added); *Alsup*, 98 N.C. App. at 392, 390 S.E.2d at 752 ("The trial court . . . had full authority to tax, *in its discretion*, deposition expenses as costs pursuant to [N.C.G.S.] §§ 1A-1, Rule 41(d), and 6-20. We find no abuse of the court's *discretion*.") (emphasis added). The same rule has obtained where Rule 41(d) is applicable. *See, e.g., Lewis*, 140 N.C. App. 536, 537 S.E.2d 505. In *Lewis*, a plaintiff against whom costs were taxed pursuant to Rule 41(d) contended that the trial court improperly taxed expert witness fees and trial exhibits. Significantly, this Court did not hold that the trial court had to award costs pursuant to Rule 41(d); rather, this Court held that "the trial court . . . did not abuse its *discretion* in taxing the expert witness fees to plaintiff pursuant to [N.C.G.S.] § 6-20," and "the trial court rightly exercised its *discretion* and allowed the costs for the trial exhibits . . . pursuant to [N.C.G.S.] § 6-20." *Id.* at 539-540, 537 S.E.2d at 507-08 (emphasis added). Thus, N.C.G.S. § 6-20, as interpreted, does not make an award of costs compulsory—not even in the Rule 41(d) context.

In the present case, the trial court denied defendants' motion for costs with respect to their expert witness fees, deposition transcripts and court reporter fees, and deposition-related attorney travel expenses. We need not decide whether the trial court had authority to award these non-statutory common law expenses because, even assuming *arguendo* that all the expenses denied by the trial court are recoverable as common law costs, the trial court denied, "in its discretion," defendants' motion to assess them. The defendants have not alleged that the trial court abused its discretion.

Affirmed.

Judges MARTIN and McCULLOUGH concur.

AREA LANDSCAPING, L.L.C., PLAINTIFF v. GLAXO-WELLCOME, INC., THE BRICKMAN GROUP, LTD., MICHAEL MUELLER, DEFENDANTS

No. COA02-960

(Filed 7 October 2003)

1. **Wrongful Interference— tortious interference with contract—justification for bid**

Summary judgment was properly granted for defendant Brickman on a claim for tortious interference with plaintiff's contract to provide landscaping services for defendant Glaxo. Brickman's bid for the contract was a legitimate business interest and indicates a non-malicious motive for its "interference" with plaintiff's contract. Plaintiff did not present evidence that Brickman acted without justification.

2. **Wrongful Interference— tortious interference with contract—employee responsible for bid process—non-malicious explanation**

Summary judgment was properly granted for defendant Mueller on a claim for tortious interference with plaintiff's contract to provide landscaping services to defendant Glaxo where Mueller was the Glaxo employee responsible for providing landscaping services who opened plaintiff's contract for bids, ultimately awarding the new contract to defendant Brickman. Plaintiff's bid for the new contract was nearly $1 million higher than Brickman's, which provided a legitimate, non-malicious business explanation for Mueller's actions.

3. **Trade Secrets— contract bid—disclosure authorized in process**

Summary judgment was appropriate on a trade secrets claim where plaintiff contended that defendant Mueller had revealed confidential information from a contract bid, but, as a part of the bidding process, plaintiff signed a letter that allowed Glaxo (Mueller's employer) to use and disclose bid information at its discretion.

4. **Fraud— reasonable reliance—sharing contract bid information**

Summary judgment was properly granted for defendants on a fraud claim arising from the sharing of bid information with a competitor. There were provisions in the bid information suffi-

cient to put plaintiff on notice that submitting a bid was tantamount to surrendering control of that information. Any contrary assumption by plaintiff was not reasonable reliance.

5. Costs— attorney fees—action not brought in bad faith

There was no abuse of discretion in a trial court finding that an action arising from a contract bidding process was not brought in bad faith, lacking in justiciable issues of fact or law, or frivolous or malicious, and an order denying defendant attorney fees was affirmed.

Appeal by plaintiff from order entered 18 February 2002 by Judge Wade Barber in Orange County Superior Court. Cross-appeal by defendants from order entered 24 April 2002 by Judge Wade Barber in Orange County Superior Court. Heard in the Court of Appeals 18 August 2003.

Wallace W. Bradsher, Jr., for plaintiff-appellant-cross-appellee.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Pressly M. Millen, for defendant-appellee-cross-appellants.

EAGLES, Chief Judge.

Plaintiff Area Landscaping, L.L.C. ("Area") appeals from an order granting summary judgment in favor of defendants Glaxo-Wellcome, Inc. ("Glaxo"), The Brickman Group, Ltd. ("Brickman"), and Michael Mueller. Area argues that the trial court erred in granting defendants' motion for summary judgment because several genuine issues of material fact exist. Defendants cross-appeal from an order denying sanctions against plaintiff. Defendants argue that the trial court should have sanctioned plaintiff with payment of full trial costs and payment of defendants' attorney fees. After careful review of the record and briefs, we disagree and affirm both orders.

In July 1997, Area entered into a contract with Glaxo which bound Area to provide landscaping services for Glaxo over a five-year term until July 2002. Glaxo was Area's only customer from 1991 to 1999. In the summer of 1996, an angry confrontation about Area's services occurred between Michael Mueller, a Glaxo employee, and Barney Pittman, one of Area's co-owners. Area contends that Mueller in response opened the bidding process on the landscaping contract before Area's contract expired. On 5 October 1999, Glaxo notified Area that the landscaping contract would be put up for bid. The 1997 contract between Area and Glaxo contained a clause that allowed

Glaxo to terminate the agreement for any reason, as long as Area was given thirty days' notice. However, Area alleges that the bidding process would not have been initiated in 1999 but for Mueller's animosity following his argument with Barney Pittman. Area contends that Mueller gave Brickman, a competitor, confidential information that belonged to Area. This "inside information" allowed Brickman to underbid Area and be awarded the new contract. Area's complaint alleges that Mueller and representatives from Brickman discussed Area's irrigation methods and the various components of Area's contract bid.

Brickman offered to provide landscaping services for Glaxo for $699,456 in 2000. Brickman's price estimate increased to $720,432 for 2002. Area offered landscaping services for a price of $1,648,839 each year, with an additional charge for irrigation. Glaxo awarded the contract to Brickman. On 14 December 1999, Glaxo representative Darren Dasburg wrote to Area, informing Area that the new contract had been awarded to Brickman and that Area's contract would be cancelled on 31 January 2000.

Area sued defendants Glaxo, Mueller and Brickman for tortious interference with contract, fraud, unfair and deceptive trade practices and violations of the North Carolina Trade Secrets Protection Act. Defendant Glaxo asserted several counterclaims against Area regarding the performance of the landscaping contract. The trial court granted defendants' motion for summary judgment. Defendants voluntarily dismissed their counterclaims and filed a motion requesting payment of costs and defendants' attorney fees. The trial court allowed the motion for costs, ordering plaintiff to pay $3,506 out of a requested $4,323 in costs. However, the trial court denied defendants' motion for attorney fees. Area appeals from the order granting summary judgment. Defendants cross-appeal from the order denying attorney fees.

[1] On appeal, Area argues that the trial court erred in granting summary judgment in favor of defendants because there are several genuine issues of material fact. We disagree and affirm.

The trial court granted defendants' motion for summary judgment on plaintiff's tortious interference with contract claim. Summary judgment is only appropriate if there are no genuine issues of material fact and any party is entitled to judgment as a matter of law. *See* G.S. § 1A-1, Rule 56 (2001). An issue of fact is material if it would constitute any element of a claim or defense. *See Surrette v.*

Duke Power Co., 78 N.C. App. 647, 650, 338 S.E.2d 129, 131 (1986) (quoting *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980)).

Here, Area alleges that defendants Mueller and Brickman tortiously interfered with its contractual relationship with Glaxo. A cause of action for tortious interference with contract requires proof of the following elements:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Beck v. City of Durham, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002) (quoting *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)). In order to demonstrate the element of acting without justification, the action must indicate "no motive for interference other than malice." *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674, 541 S.E.2d 733, 738 (2001). A defendant may encourage the termination of a contract "if he does so for a reason reasonably related to a legitimate business interest." *Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 318, 498 S.E.2d 841, 850 (quoting *Fitzgerald v. Wolf*, 40 N.C. App. 197, 200, 252 S.E.2d 523, 524 (1979)), *disc. rev. denied*, 348 N.C. 695, 511 S.E.2d 649 (1998). Area alleged that defendant Brickman, a rival landscaping business, tortiously interfered with its contract with Glaxo. However, Area failed to present evidence that Brickman acted without justification. Its bid for the landscaping contract was a legitimate business interest and indicates a non-malicious motive for their "interference" with Area's contract. The motion for summary judgment was appropriately granted for defendant Brickman.

[2] Area's complaint also alleged that defendant Mueller interfered with the Glaxo contract. Mueller was an employee of Glaxo whose job duties included the supervision of various contractors that provided services on Glaxo's campuses, specifically including landscaping. In naming an involved, "non-outsider" as a defendant in its interference with contract claim, Area's complaint is unusual. However, despite defendants' arguments to the contrary, the naming of a non-outsider defendant is not a bar to recovery. As this Court explained in a tortious interference with contract case regarding an

employment contract: "It is true that so-called 'non-outsiders' often enjoy qualified immunity from liability for inducing their corporation or other entity to breach its contract . . . ." *Lenzer v. Flaherty*, 106 N.C. App. 496, 513, 418 S.E.2d 276, 286 (citing *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976)), *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 348 (1992). However, the qualified immunity is lost if the non-outsider acts with a wrongful purpose. *See Lenzer*, 106 N.C. App. at 513, 418 S.E.2d at 286. Thus, the insider employee Mueller would not be immune from plaintiff's allegation of tortious interference with contract if he pursued the termination of Glaxo's contract without justification and with malice. Here, Area has failed to show that Mueller acted without justification. The undisputed evidence indicated that Area's unsuccessful bid for the contract was nearly $1 million higher than the contract price quoted by Brickman. The substantially less expensive price certainly provided a legitimate, non-malicious business explanation for Mueller's actions. Therefore, plaintiff's complaint and forecast of evidence was not sufficient to allege tortious interference with contract against defendant Mueller. Summary judgment as to this claim was appropriately granted.

[3] Area also alleges that defendant Mueller did not manage the contract bidding process fairly. Specifically, Area contends that Mueller revealed to Brickman confidential information from Area's bid regarding irrigation costs that allowed Brickman to present a lower bid. These allegations give rise to three causes of action by Area: (1) a claim under G.S. § 66-152 *et seq.*, the Trade Secrets Protection Act; (2) a claim under G.S. § 75-1.1 for unfair or deceptive trade practices; and (3) a claim for fraud. The same event, the alleged disclosure of Area's bid information, forms the basis for all three claims. Area claims that the information in its bid was sealed. Area states that it did not intend for third party competitors to have access to its pricing information when it submitted a bid for the Glaxo contract.

The owner of a trade secret may pursue a civil action if that secret is misappropriated. G.S. § 66-153 (2001). "Trade secret" is defined in G.S. § 66-152(3) as follows:

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being known or readily ascertainable through inde-

pendent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and

b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

G.S. § 66-152(3) (2001). "Misappropriation" is defined as the use of another's trade secret "without express or implied authority or consent . . . ." G.S. § 66-152(1) (2001). Information regarding customer lists, pricing formulas and bidding formulas can qualify as a trade secret under G.S. § 66-152(3). *See Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 542 S.E.2d 689 (2001); *Novacare Orthotics & Prosthetics E., Inc.*, 137 N.C. App. 471, 528 S.E.2d 918 (2000). To determine what information should be treated as a trade secret, a court should consider the following factors:

(1) the extent to which information is known outside the business;

(2) the extent to which it is known to employees and others involved in the business;

(3) the extent of measures taken to guard secrecy of the information;

(4) the value of information to business and its competitors;

(5) the amount of effort or money expended in developing the information; and

(6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

State ex rel. Utilities Comm'n v. MCI, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999) (quoting *Wilmington Star News v. New Hanover Regional Medical Center*, 125 N.C. App. 174, 180-81, 480 S.E.2d 53, 56 (1997)). In order to survive a motion for summary judgment, Area must allege facts that would allow a reasonable finder of fact to conclude that the information in the bid was not "generally known or readily ascertainable" and that Area has made reasonable efforts to maintain the information's secrecy. *Bank Travel Bank v. McCoy*, 802 F. Supp. 1358, 1360 (E.D.N.C. 1992), *aff'd sub nom., Amariglio-Dunn v. McCoy*, 4 F.3d 984 (4th Cir. 1993) (unpublished).

Here, Area did not act reasonably to maintain the secrecy of its bid information. Pamela Pittman, on behalf of Area, signed a document entitled "Proposal Letter" as part of the bidding process

for the landscaping contract. That proposal letter contained the following clause:

> By submitting this proposal, Bidder [Area] agrees that all information received by Glaxo Wellcome from Bidder, as a result of this Request for Proposal and subsequent thereto, shall become the property of Glaxo Wellcome, to be used and disclosed at its sole discretion without further obligation to Bidder, copyright or other restrictive legend notwithstanding.

Area contends that this clause did not give Glaxo the right to share information with a third party. Also Area argues that it understood that the information within the bid would be confidential. However, the disclaimer in the proposal letter contained no such reservations. The disclaimer allowed Glaxo to use and disclose bid information "at its sole discretion." By signing this letter and submitting information according to these specifications, Area did not take actions to protect the bid information. Therefore, the information did not qualify as a trade secret as defined in G.S. § 66-152(3). Also, assuming *arguendo* that Mueller gave Brickman the information, he did not misappropriate it according to G.S. § 66-152(1) because Area gave Glaxo express consent to use the information "at its sole discretion." Summary judgment on the trade secrets claim was appropriate because there were no genuine issues of material fact and defendants were entitled to judgment as a matter of law.

[4] Area also alleged that defendants' misuse of its trade secret was an unfair or deceptive trade practice according to G.S. § 75-1.1. Since the trial court properly granted summary judgment as to the trade secret claim, this claim must also fail.

Similarly, Area's cause of action for fraud was vulnerable to summary judgment. An allegation of fraud must contain the following elements: "(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002) (quoting *Helms v. Holland*, 124 N.C. App. 629, 634, 478 S.E.2d 513, 516 (1996)), *disc. rev. denied*, 356 N.C. 694, 577 S.E.2d 889 (2003). "[R]eliance on alleged false representations must be reasonable." *State Properties*, 155 N.C. App. at 72, 574 S.E.2d at 186 (citing *Johnson v. Owens*, 263 N.C. 754, 140 S.E.2d 311 (1965)). Here, Area alleges that defendants Glaxo and Mueller falsely represented that the information in its bid package would be kept confidential.

Area's argument relies upon the written instructions Glaxo sent to Area and all potential bidders along with the proposal letter in the "Request for Proposal" or RFP. These instructions included a section entitled "Confidentiality" as follows:

> This RFP, and all information contained herein, is confidential. No information concerning this RFP or the work required shall be released to third parties, except prospective subcontractors or consultants as required for the preparation of the proposal, *without the prior written consent of Glaxo Wellcome. All proposals submitted in response to this RFP are the property of Glaxo Wellcome without further obligation to Bidder.*

(Emphasis added). The confidentiality provision cited above indicates clearly that the bid information is the property of Glaxo that can be divulged only with Glaxo's permission. This provision, which Area cites as a indication that Glaxo would keep the information in the bid confidential does not conflict with the express written agreement in the proposal letter granting Glaxo permission to use Area's bid information "at its sole discretion." Both of these provisions were sufficient to put Area on notice that submitting its pricing information to Glaxo was tantamount to surrendering control over the use of that information. Any assumption by Area that its information would not be controlled or used by Glaxo in its sole discretion conflicted with the explicit terms of the proposal letter and Request for Proposal. This assumption did not constitute reasonable reliance that would support a cause of action based upon fraud. Summary judgment for defendants was appropriate on this claim.

[5] On cross-appeal, defendants argue that the trial court should have granted defendants' motion for attorney fees. Defendants' motion for attorney fees was supported by four separate arguments: (1) that attorney fees were appropriate according to G.S. § 66-154(d) because plaintiff Area's claim for misappropriation of trade secrets was made in bad faith; (2) that attorney fees were permitted according to G.S. § 6-21.5 because Area did not present a justiciable claim; (3) that attorney fees were appropriate under G.S. § 1D-45 because Area filed a frivolous and malicious claim for punitive damages; and (4) that attorney fees should have been awarded according to G.S. § 75-16.1 because Area's unfair and deceptive trade practice claim was frivolous and malicious.

Defendants argue that the lack of evidence in support of Area's claims indicates that Area knowingly prosecuted a specious claim.

According to defendants' argument, this claim was frivolous and malicious, produced by bad faith, and was not justiciable. However, the trial court explicitly found that "Plaintiff's action was not brought in bad faith, lacking in justiciable issues of fact or law, or frivolous or malicious." Defendants argue that this finding was an abuse of the trial court's discretion, but do not offer any persuasive reason why the trial court should have made a contrary decision. The decision to award or deny the award of attorney fees will not be disturbed on appeal unless the trial court has abused its discretion. Defendants failed to show abuse of discretion. Accordingly, defendants' assignments of error in the cross-appeal are overruled.

For the reasons stated, we affirm the trial court's order granting defendants' motion for summary judgment and the order denying the payment of defendants' attorney fees.

Affirmed.

Judges TYSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. ERIC MONTESE CRUTCHFIELD, DEFENDANT

No. COA02-1429

(Filed 7 October 2003)

1. **Appeal and Error; Search and Seizure— motion to suppress—no objection at trial—timing of search—trial court findings binding**

   The denial of a first-degree murder defendant's motion to suppress evidence seized from his home was not preserved for appeal because defendant did not object to the evidence when it was offered at trial. Even so, defendant could not have prevailed because there was evidence supporting the trial court's resolution of a conflict about whether a search began before the warrant arrived.

2. **Confessions and Other Incriminating Statements— waiver of rights—effects of medication**

   The trial court's findings concerning the medication given to defendant at a hospital and his waiver of rights were supported by testimony and are binding on appeal.

3. Evidence— identification—child's testimony—admissible

A child's testimony that the person who shot him in the night was a shadow the size and shape of his daddy was properly admitted in defendant's first-degree murder and assault prosecution. The testimony was not an identification of defendant, and issues concerning the reliability of the child's statements were for the jury.

Appeal by defendant from judgments entered 11 January 2002 by Judge Howard E. Manning in Durham County Superior Court. Heard in the Court of Appeals 19 August 2003.

Attorney General Roy Cooper, by Assistant Attorney General H. Dean Bowman and Assistant Attorney General David J. Adinolfi II, for the State.

Mary March Exum, for defendant-appellant.

HUDSON, Judge.

A jury found defendant guilty of first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The court sentenced defendant to life imprisonment without possibility of parole for the first degree murder and 92 to 120 months for the assault with a deadly weapon with intent to kill. Defendant appeals.

Background

Victims Briana and Ricardo Crutchfield were the children of defendant and his ex-wife, Pamela Beasley McClary. Ricardo was born in March 1989 and Briana in October 1992. McClary and defendant were divorced in June 1994. The children were in their mother's custody, but visited with their father on weekends whenever they wished to, rather than on a set visitation schedule.

On Saturday, 13 February 1999, defendant picked up nine-year-old Ricardo and six-year-old Briana from McClary's father's home for a weekend visit. McClary spoke to Ricardo on the telephone on Sunday. Defendant was to return the children to McClary's father's home by 5:30 a.m. on Monday, 15 February 1999. On that day, McClary arrived at her father's home at 5:30 a.m., but defendant and the children were not there. When they had still not arrived at 5:46 a.m., McClary called defendant's home. Ricardo answered the phone and said, "Mama, I don't know what happened, I'm bleeding," and told his mother he could not wake his sister.

McClary rushed to defendant's home and let herself inside with a key. In an upstairs bedroom, she found Briana lying on a waterbed soaked in blood. She believed both children had been shot, and called 911. Ricardo told McClary that he thought his daddy had hit him with a belt buckle. The police arrived at defendant's home and ambulances took the children to different hospitals. While McClary was at Duke University Medical Center with Ricardo, she received word from Durham Regional Hospital that Briana had died.

In the meantime, the police began their investigation at defendant's home. Neither McClary nor the police had seen defendant. They eventually discovered him at about 7:50 a.m. hiding in the crawlspace beneath the house. When officers found him, defendant was bleeding from his own injuries and said he had been shot. Defendant was taken to Durham Regional Hospital.

Before trial, the court held a voir dire hearing on defendant's motions to suppress several pieces of evidence, including items seized at his home and statements he gave police at the hospital. Witnesses included investigating officers and hospital personnel. The court denied the motions, and witnesses gave similar testimony at trial.

The evidence showed that officers executed a search warrant for defendant's home at approximately 9:30 a.m. The witnesses' testimony conflicted as to the exact time the search warrant arrived and the times when various items were collected from the house. Police ID technician Bruce Preiss had written in his reports for that day that the search warrant had arrived at 10:30 a.m. However, Preiss testified that the report was incorrect, and that he had actually arrived at defendant's home at approximately 8:30 a.m., that the warrant arrived at about 9:30 a.m. and that his search began at 9:50 a.m. Preiss also acknowledged other mistakes in his report about the time and place certain items were collected from the home.

Defendant received treatment for his injuries and medication while at the hospital. At approximately 3:30 p.m., Dr. Larkin Daniels took defendant off the ventilator and entered an order allowing the police to question defendant. Detective Harris of the Durham Police Department spoke to a nurse at the hospital about defendant's condition to determine whether he could be interviewed. Defendant indicated that he wanted to talk to the detective, who then advised him of his Miranda rights. Defendant signed a rights waiver form at 5:25

p.m. and then gave a statement to the detective. Defendant signed the statement after Detective Harris read it back to him.

At trial, several medical personnel and experts testified about defendant's mental state and level of medication at the time of the statement. Additional details will be provided in the discussion of the motions.

Nine-year-old Ricardo initially resisted talking about what had happened to him and his sister at his father's home. Four months passed before Ricardo expressed a willingness to discuss the events of 15 February 1999. In June 1999, McClary contacted police investigators who attempted to interview him, but Ricardo once again declined to talk. Ricardo received continuing therapy following the shootings, and eventually he began to discuss the events of 15 February 1999.

At trial, Ricardo testified that he had been awakened in the night by a "pow" and described seeing a shadow the same size and shape as his daddy. He called out "Dad," but the shadow kept walking. He then heard a scream and another "pow." Ricardo's statement to investigators corroborated his in-court testimony.

The jury convicted defendant of the first degree murder of Briana and assault with a deadly weapon with intent to kill inflicting serious injury on Ricardo.

Analysis

I.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress the evidence collected from his home. In his motion to suppress, defendant argued that the evidence collection began before the search warrant arrived at defendant's home. The Property Incident Report completed by technician Preiss on 15 February 1999 indicated that a number of items, including the murder weapon, had been collected at 8:30 a.m. The search warrant was issued at 9:00 a.m. on 15 February 1999, and executed at 9:30 a.m. The court conducted a voir dire hearing out of the jury's presence to hear from technician Preiss and others on this issue.

At the hearing, Preiss verified his signature on the report, but testified that he had incorrectly entered the time on the report. Preiss stated that he had actually collected the evidence in question at approximately 9:50 a.m., rather than at 8:30 a.m. Detective Harris also

testified at the hearing. Harris testified that the warrant had arrived at defendant's home at 9:30 a.m, but that the search of the home did not begin until 10:50 a.m. He stated that Preiss was mistaken in his voir dire testimony that the items were collected at 9:50 a.m. Harris further testified that other than the mistakes regarding time, Preiss's report was an accurate account of the evidence collection that morning.

Following this hearing, the trial court found as facts that the warrant had been issued at 9:00 a.m., had arrived at defendant's home at 9:30 a.m., and that the search itself had begun at approximately 9:52 a.m, and thereupon denied the motion to suppress. When the state introduced the evidence at trial, defendant's trial counsel did not object. Defendant now argues that the trial court erred in denying the motion to suppress and admitting the evidence and that this error entitles him to a new trial.

A pretrial motion to suppress is a type of motion in limine. *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), *cert. denied* 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Such a "pretrial motion to suppress is not sufficient to preserve for appeal the question of the admissibility of [evidence when defendant] did not object at the time the [evidence] was offered." *Id.* Here, defendant did not object to the evidence when it was offered for admission at trial, and thus this assignment of error is not properly before this Court.

However, even if defendant had properly preserved this issue for our review, he could not prevail. This Court's review of the denial of a motion to suppress is "limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Further, the trial court's resolution of a conflict of evidence is binding on appeal, and its findings of fact are conclusive if they are supported by evidence. *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501-02 (2000), *cert. denied* 531 U.S. 1165, 148 L. Ed. 2d 992 (2001).

Here, the evidence regarding the timing of the execution of the search warrant and the collection of evidence was conflicting. The trial court resolved conflicts in the voir dire testimony in his findings of fact, based on the testimony of technician Preiss and Detective Harris. The findings of fact about the timing of the warrant and

search are supported by evidence presented at the hearing and are thus conclusive on appeal. The findings, in sum, support the conclusions of law and the ruling of the trial court, which were proper in light of the totality of the circumstances as found by the court. *State v. Breeze*, 130 N.C. App. 344, 353, 503 S.E.2d 141, 148, *disc. review denied* 349 N.C. 532, 526 S.E.2d 471 (1998).

II.

[2] Defendant next argues that he is entitled to a new trial because the medication he received at the hospital prevented him from knowingly and intelligently waiving his Miranda rights before giving his statement to Detective Harris at 5:30 p.m. on 15 February 1999. We disagree.

The court conducted a voir dire hearing on defendant's motion to suppress the statement. At the hearing, the court heard testimony from a number of experts and medical personnel. Defendant called Registered Nurse Joyce Ann Davis to testify about the effects of intravenous morphine. Dr. Holly Rogers, a psychiatrist, testified that the morphine would have made defendant "out of it" and would have affected his thinking. She also testified that defendant's statement to Detective Harris was partially coherent, but also very disorganized. Dr. Rogers noted that morphine can cause patients to fantasize.

The State called Dr. Walter Burns, a general surgeon, in rebuttal. Dr. Burns gave his opinion that defendant's ability to make rational decisions would not have been affected by the morphine he had received. Two nurses also testified for the State about defendant's rationality and coherence near the time of the statement. Detective Harris testified that defendant had appeared to understand his Miranda rights and to have had a clear mind when he chose to give his statement. The trial court did not rule immediately after the hearing.

Dr. Larkin Daniels, the physician who had treated defendant at the hospital on the day of the shootings, testified that he had entered an order allowing the police to interview defendant several hours prior to the statement being taken. At that time, defendant was alert and completely awake. Following Dr. Daniels' testimony, the trial court denied defendant's motion to suppress the statement, and the statement was later admitted before the jury.

As previously noted, the trial court's resolution of conflicting evidence is binding on appeal, and the court's findings of fact are con-

clusive if they are supported by evidence. *Brewington*, 352 N.C. at 498, 532 S.E.2d at 501-02. This standard of review applies to a trial court's determination of the voluntariness of a confession. *State v. Payne*, 327 N.C. 194, 208-09, 394 S.E.2d 158, 166 (1990), *cert. denied* 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). Here, the trial court made extensive findings of fact about the defendant's medication and hospitalization which are supported by the testimony at the hearing. The resolution of the conflicting opinions and testimony presented in that hearing were the province of the trial court, and we will not now disturb it on appeal. In addition, these findings fully support the conclusions of law and ruling on the motion which was proper in light of the circumstances as a whole. *Breeze*, 130 N.C. App. at 353, 503 S.E.2d at 148.

III.

[3] In defendant's final assignment of error, he argues that the trial court erred in its denial of his motion to suppress the in court and prior "identifications" of defendant by his son Ricardo. We disagree.

Defendant based his motion on Ricardo's age and dependence on his mother (a witness for the State), as well as his previous statements about what had happened to him the night of the shootings. The trial court held a voir dire hearing on this motion during trial.

Ricardo's mother testified about his reluctance to talk about the shootings and about his interviews and discussions with police and district attorneys. Defendant called a child psychologist who testified that children are highly suggestible because they like to please adults, and gave her opinion that Ricardo may have used information he gained after the shootings to "fill in the blanks" in his memories of 15 February 1999. The motion to suppress was ultimately denied and Ricardo was allowed to testify that the person who shot him was the same size and shape as his daddy.

Contrary to defendant's assertions, we do not consider Ricardo's testimony to have been an identification of his father; rather, he merely described the person who shot him as someone of the same size and shape. Further, defendant's arguments about Ricardo's credibility and suggestibility, and the reliability of his statements were matters of weight for the jury rather than issues of admissibility. *See State v. Small*, 131 N.C. App. 488, 491, 508 S.E.2d 799, 801 (1998).

The jury is the sole judge of the credibility of each witness and must decide whether to believe the testimony of any particular witness. *State v. Green*, 129 N.C. App. 539, 545, 500 S.E.2d 452, 456 (1998), *affirmed* 350 N.C. 59, 510 S.E.2d 375 (1999). The trial court properly allowed Ricardo's testimony about what he saw the night of the shootings to be presented and gave defendant the opportunity to argue to the jury about its weight. We overrule this assignment of error.

Conclusion

For the reasons set forth above, we find no error in defendant's conviction.

No error.

Judges WYNN and McGEE concur.

FNB SOUTHEAST, PLAINTIFF v. JOHN B. LANE, TRUSTEE OF THE CRAIG M. KEEFER TRUST ESTABLISHED U/A NOVEMBER 9, 1993, CRAIG M. KEEFER, TRUSTEE OF THE CRAIG M. KEEFER TRUST, ESTABLISHED U/A NOVEMBER 9, 1993, DEFENDANTS

No. COA02-1424

(Filed 7 October 2003)

1. Pleadings— motion to amend—not timely filed

The trial court did not abuse its discretion by refusing to hear a motion to amend an answer which was not timely filed. N.C.G.S. § 1A-1, Rule 6.

2. Trusts— action on guaranty—trustee's authority

The trial court correctly granted summary judgment for plaintiff bank in its action for costs, expenses, interest, and attorney fees arising from a loan agreement guaranteed by a trust. Although defendant contended that the trustee had participated in the transaction in violation of the terms of the trust, the record does not show that the plaintiff had knowledge of the trustee's breach, and plaintiff did conduct a reasonable investigation into the trustee's authority.

3. Costs— attorney fees—action on indebtedness—guaranty agreement

The trial court correctly awarded attorney fees for plaintiff in an action for expenses, interest, and costs against a trust which was the guarantor of a loan. The guaranty agreement constituted evidence of indebtedness under N.C.G.S. § 6-21.2.

Appeal by defendant from order entered 7 June 2002 by Judge W. Douglas Albright, Superior Court, Guilford County. Heard in the Court of Appeals 26 August 2003.

Tuggle Duggins & Meschan, P.A., by Kenneth J. Gumbiner and Michael S. Fox, for defendants.

Carruthers & Roth, P.A., by Kenneth R. Keller and Norman F. Klick, Jr., for plaintiff.

WYNN, Judge.

On appeal, Craig M. Keefer, Trustee of the Keefer Trust[1] presents the following questions: (I) Was it an abuse of discretion for the trial court to refuse to hear Keefer Trust's motion to amend its answer; (II) Did the trial court erroneously grant summary judgment in favor of FNB Southeast; and (III) Did the trial court erroneously award attorneys fees to FNB Southeast? After careful review, we uphold the trial court's judgment.

In November 1999, FNB Southeast, a bank, entered into a loan agreement with Apparel Sales and Printing, Inc., a company wholly owned by 3-I, Inc. which in turn was 80% owned by Keefer Trust. In 2000, Apparel Sales and Printing sought modification of the loan agreement in order to release some of the equipment secured by the loan. The parties agreed that the Keefer Trust would guarantee the new loan. Before entering into the collateral substitution agreement, FNB Southeast requested and examined Keefer Trust's financial statements and trust documents and obtained an opinion letter from the trust attorneys regarding the trust's authority to enter into the agreement. Thereafter, FNB Southeast, Apparel Sales and Printing, and Keefer Trust trustee, John B. Lane, executed the modified loan agreement on 17 November 2000. In September 2001, the loan agreement was modified to permit the loan payments for August, September and October 2001 to be made by 31 October 2001.

1. In this matter, we refer to defendant as "Keefer Trust".

However, when Apparel Sales and Printing failed to make the payment, FNB Southeast brought the subject action seeking $785,370.14 plus costs, expenses, interest, and attorney's fees. Keefer Trust answered on 21 February 2002.[2]

Thereafter, FNB Southeast moved for summary judgment. However, following a 25 March 2002 deposition and FNB Southeast's production of documents, Keefer Trust moved on 31 May 2002 to amend its answer to include three affirmative defenses. On 4 June 2002, the trial court refused Keefer Trust's motion to amend and granted FNB Southeast's motion for summary judgment. Keefer Trust appeals.

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[1] Keefer Trust first argues the trial court abused its discretion in refusing to hear the motion to amend its answer. We disagree.

Under N.C. Gen. Stat. § 1A-1, Rule 15, after service of a responsive pleading, "a party may amend his pleading only by leave of court or by written consent of the adverse party." Accordingly, Keefer Trust could amend its answer by FNB Southeast's written consent, which was never given, or by leave of court. Although Rule 15 further provides that leave to amend should be freely given, we review the denial of a motion of to amend under the abuse of discretion standard. *See Duncan v. Ammons Constr. Co., Inc.*, 87 N.C. App. 597, 361 S.E.2d 906 (1987).

In this case, the trial court held the motion for leave to amend was not timely filed as of the date of the hearing. Under N.C. Gen. Stat. § 1A-1, Rule 6(d), "a written motion . . . and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court." "In computing any period of time prescribed or allowed by these rules . . . the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included . . . When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." N.C. Gen. Stat. § 1A-1, Rule 6.

Here, Keefer Trust filed its motion to amend on Friday, 31 May 2002, and the hearing was held on Tuesday, 4 June 2002. Since the

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2. Default judgment was entered against John B. Lane, former trustee of the Keefer Trust, on 18 March 2002. He is not a party to this appeal.

motion was not timely filed under Rule 6, we find no abuse of discretion by the trial court in refusing to hear the motion.

[2] Keefer Trust next contends the trial court erroneously granted FNB Southeast's motion for summary judgment because a genuine issue of material fact existed as to FNB Southeast's knowledge regarding the trustee's lack of authority to enter into the guaranty agreement.[3]

In its complaint, FNB Southeast sought $785,370.14 plus costs, expenses, interest, and attorney's fees from Keefer Trust based upon the guaranty agreement. In its answer, Keefer Trust admitted that Apparel Sales and Printing executed the loan agreement; FNB Southeast made loans to Apparel Sales and Printing; Keefer Trust trustee, John B. Lane, executed the substitution and guaranty agreements; and Apparel Sales and Printing stopped making payments to FNB Southeast as required.

Nonetheless, despite admitting all of the essential allegations required to collect on a guaranty, Keefer Trust contends summary judgment was improvidently granted because a genuine issue of material fact existed as to whether FNB Southeast knew or should have known that the Keefer Trust's trustee, John B. Lane, participated in the transaction in violation of the terms of the trust. Keefer Trust argues that if FNB Southeast had actual or constructive knowledge of the trustee's breach of the trust agreement, FNB Southeast would become liable to Keefer Trust for any amount paid to FNB Southeast from the trust pursuant to the guaranty and that such liability would negate any liability of Keefer Trust to FNB Southeast under the guaranty.

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3. "Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Martin Architectural Prods. v. Meridian Constr. Co.*, 155 N.C. App. 176, ——, 574 S.E.2d 189, 191 (2002). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "An issue is genuine if it can be proven by substantial evidence." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "The movant has the burden of showing that summary judgment is appropriate. Furthermore, in considering summary judgment motions, we review the record in the light most favorable to the nonmovant." *Hayes v. Turner*, 98 N.C. App. 451, 456, 391 S.E.2d 513, 516 (1990). "If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to set forth *specific facts* showing that there is a genuine issue for trial. The nonmoving party may not rest upon the mere allegations of his pleadings." *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982).

An individual or entity who aids or assists a trustee with knowledge of the trustee's misconduct in misapplying assets is directly accountable to the persons injured. *See Abbitt v. Gregory*, 201 N.C. 577, 596-99, 160 S.E. 896, 906-07 (1931); *see also Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 414, 363 S.E.2d 643, 651 (1988) (stating "all persons aiding and assisting trustees of any character with a knowledge of their misconduct in misapplying assets are directly accountable to the persons injured. The wrong of participation in a breach of trust is divided into two elements, an act or omission, which further completes the breach of trust by the trustee, and knowledge at the time that the transaction amounted to a breach of trust or the legal equivalent of such knowledge" is a "general principle of trust law [that] has been applied by the North Carolina courts").

Keefer Trust argues that an affidavit from Lisa Lesavoy, successor trustee of the Craig M. Keefer Trust, and deposition testimony from Laura Pratt, Vice President of FNB Southeast, show that FNB Southeast had actual or constructive knowledge that the trustee was violating the terms of the trust agreement. In her affidavit, Ms. Lesavoy states:

> 12. . . . Because of the relationship between LANE and SAMSON, SAMSON, and, accordingly, FNB, knew or should have known, prior to making the aforesaid loan, that LANE had caused the Keefer TRUST to advance, loan or invest in excess of $52,770,000.00 in the CHC's representing in excess of eight-four (84%) percent of the net Trust assets and more than eighty-five (85%) percent of the initial value of the Keefer TRUST, thereby extending and continuing the hereinbefore described breach of the express provisions of the governing instrument; and that most of which advances or loans were neither collectible nor secured by a mortgage, security agreement or other collateral so as to secure the Trust and gain priority as against other creditors of the CHC's.
>
> 13. After consultation with my counsel, and for the reasons hereinbefore and hereinafter set forth, I verily believe that the execution and delivery of the guaranty by John Lane to Plaintiff was in breach of the express provisions of the subject Trust Agreement and that the Plaintiff, through its officers, servants and agents knew or should have known that said guaranty was in breach of the Trust Agreement.

The affidavit also points out that FNB Southeast received copies of the Trust Agreement and trust financial statements indicating substantial trust assets were committed to closely held corporations. Furthermore, Keefer Trust contends Laura Pratt's deposition testimony that FNB Southeast requested, received and examined the trust agreement and financial statements is an indication that FNB Southeast had actual notice of the trust's requirement that certain percentages of the trust's initial principal value, the principal value of all assets transferred to the trust from the grantor's custodial account, be retained and not distributed without court approval. However, Keefer Trust did not present any evidence that FNB Southeast was aware of the trust's initial principal value. Indeed, neither the three financial statements from 1999 and 2000 nor the trust agreement provide the initial principal value of the trust. Although the trust agreement refers to an annexed Schedule A that describes the property transferred to the trust, the Schedule A is not included in the record on appeal and there is no indication by either party that FNB Southeast ever received a copy of the document. Accordingly, the record fails to show that FNB Southeast had actual notice or knowledge that the trustee was breaching the trust agreement and his fiduciary duty to the trust when he entered the substitution of collateral agreement with FNB Southeast.

Moreover, the record fails to show that FNB Southeast had constructive notice or knowledge of the trustee's breach of the trust agreement. "At common law a person who deals with another whom he knows to be a trustee is put upon inquiry as to the extent of the trustee's powers and charged with knowledge of the facts which a reasonable investigation would disclose. . . . The third party must examine the trust instrument and look to other sources of information in order to satisfy himself that the trustee has authority to enter into the transaction which he is seeking to consummate." *Kaplan v. First Union Nat'l. Bank*, 99 N.C. App. 570, 573 393 S.E.2d 344, 346 (1990).

In this case, FNB Southeast requested and reviewed the trust agreement, three 1999 and 2000 trust financial statements, and received an opinion letter from Haynsworth Baldwin Johnson and Greaves, L.L.C., legal counsel to the trustee, which stated "the guaranty documents and the performance by guarantor of his obligations thereunder do not conflict with or result in a violation of the trust agreement pursuant to which the trust was established and is governed . . . [and that] no registration with, consent or approval of, or

other action by any federal, state, or local governmental authority or regulatory body is required for the execution, delivery, or performance by guarantor of the guaranty documents or any other documents delivered to lender in connection with the lien." Thus, the record indicates FNB Southeast conducted a reasonable investigation into the trust's authority to enter into the substitution of collateral agreement prior to approving the substitution agreement. Accordingly, we uphold the trial court's grant of summary judgment in favor of FNB Southeast.

[3] Finally, Keefer Trust contends the trial court erroneously awarded FNB Southeast's attorneys fees relating to this action because a guaranty agreement does not constitute evidence of indebtedness under N.C. Gen. Stat. § 6-21.2 which provides in pertinent part that:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions . . .
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the outstanding balance owing on said note, contract or other evidence of indebtedness.

The guaranty in this case was written, signed by the trustee, and, in the event of Apparel Sales and Printing's default, was a legally enforceable obligation to pay money, and therefore, constituted evidence of indebtedness. *See Stillwell Enterprises v. Interstate Equip. Co.*, 300 N.C. 286, 294, 266 S.E.2d 812, 817 (1980) (holding the term "evidence of indebtedness as used in G.S. 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money). Thus, we conclude that the guaranty agreement in this case constituted evidence of indebtedness under N.C. Gen. Stat. § 6-21.2. We, therefore, uphold the trial court's decision to award attorneys fees in this case.

Affirmed.

Judges HUDSON and CALABRIA concur.

VIVIAN S. KNIGHT, EMPLOYEE, PLAINTIFF v. ABBOTT LABORATORIES, EMPLOYER, SELF-INSURED (KEMPER RISK MANAGEMENT SERVICES, SERVICING AGENT), DEFENDANT

No. COA02-1486

(Filed 7 October 2003)

1. **Workers' Compensation— injury by accident—verbal confrontation with supervisor**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not suffer an injury by accident when she confronted her supervisor about her vacation request in which both parties raised their voices, plaintiff became emotionally upset, and thereafter claimed she suffered psychological problems as a result of the incident, because: (1) plaintiff deliberately initiated the meeting with her supervisor to voice her disagreement with his decision to award the vacation day to another employee, and it was not unexpected that this action would lead to a heated discussion involving raised voices by both individuals; and (2) exposure to an abusive supervisor is a risk shared by any employee in any profession or even outside the workplace in an abusive relationship, and therefore the heated confrontation with plaintiff's supervisor was not so unusual such as to constitute an interruption in the normal work routine.

2. **Workers' Compensation— verbal confrontation—psychological problems**

The Industrial Commission did not err in a workers' compensation case by finding that the greater weight of the evidence shows the verbal confrontation between plaintiff employee and her supervisor did not cause plaintiff's psychological problems, because: (1) the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony; and (2) the Commission expressly found that the testimony and opinions of defendant's expert that the confrontation did not cause plain-

tiff psychological problems carried greater weight than the testimony of plaintiff's experts based on the fact that defendant's expert performed psychological testing which plaintiff's experts had not done.

3. Workers' Compensation— evidentiary findings of fact— discretion of Commission

Although plaintiff employee contends the Industrial Commission erred in a workers' compensation case by failing to make certain evidentiary findings of fact, the Commission chooses what findings to make based on its consideration of the evidence and the Court of Appeals is not at liberty to supplement the Commission's findings.

4. Workers' Compensation— occupational disease—failure to address issue

The Industrial Commission erred in a workers' compensation case by failing to address plaintiff employee's occupational disease claim and the case is remanded to the Commission for consideration of this issue.

Appeal by plaintiff from an opinion and award entered 12 July 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 27 August 2003.

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

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Matthew P. Blake, for defendant-appellees.

HUNTER, Judge.

Vivian S. Knight ("plaintiff") appeals from an opinion and award filed 12 July 2002 of the Full Commission of the North Carolina Industrial Commission ("the Commission") denying her workers' compensation benefits for alleged psychological injury resulting from a confrontation with her supervisor. We affirm the portion of the Commission's decision related to plaintiff's injury by accident claim and remand in part for the Commission to rule on plaintiff's occupational disease claim.

Plaintiff was employed by Abbott Laboratories ("defendant") from 1980 to 1994. Only one person from plaintiff's work crew was permitted to take vacation at any one time. On 25 March 1994, after

learning that a co-worker with less seniority had received a vacation day that plaintiff had requested, plaintiff went to the office of her supervisor, Fred Fuller ("Fuller"). Fuller, a large man, became upset when plaintiff asked about her vacation request, rose from his desk, and began talking to plaintiff in a loud, angry voice waving his hands and fingers in plaintiff's face. After the confrontation, in which both parties raised their voices, ended abruptly, plaintiff returned to her workstation in tears. Fuller subsequently approached plaintiff and granted her the vacation day, but plaintiff remained emotionally upset. Since the confrontation, plaintiff is totally disabled and is unable to work.

Following the confrontation, plaintiff had broken out in hives and sought medical attention after her shift ended. Plaintiff was treated by her family doctor, Dr. James Bryant, who referred her to Dr. Soong Lee, a psychiatrist, and Dr. Victor Mallenbaum, a psychologist. Dr. Mallenbaum testified that he was plaintiff's treating psychologist. Following plaintiff's first visit on 27 June 1994, Dr. Mallenbaum diagnosed her with Post Traumatic Stress Disorder and recurrent major depression. Although, plaintiff had a prior history of depression, Dr. Mallenbaum opined that the confrontation caused plaintiff's symptoms or substantially aggravated any pre-existing condition, and that plaintiff was permanently and totally disabled.

Dr. Thomas Gualtieri, a neuropsychiatrist, testified for the defense that he conducted an independent medical examination of plaintiff on 10 August 1994.[1] Dr. Gualtieri began by taking a patient history, which revealed that plaintiff had been involved in an automobile accident in 1993, which potentially caused a brain injury. Plaintiff was unable to recall past incidents of her medical history, but could remember in detail the confrontation with Fuller. She was also unable to complete forms normally given to patients with head injuries. Furthermore, although plaintiff performed poorly on a memory test in which she was required to remember three words in five minutes such as "hat," "river," and "tree," she was able to remember in detail issues surrounding her disability insurance and compensation. Dr. Gualtieri performed physical, neurological, and mental exams. He was, however, not really able to perform tests as plaintiff was not cognitively testable, and would not cooperate with the testing. Dr. Gualtieri concluded that although it was possible plaintiff suffered from any of a number of psychiatric conditions, which could include severe anxiety disorders, somatoform disorders, severe anx-

1. Plaintiff stipulated to the expertise of Dr. Gualtieri.

iety or depression, or could even be malingering, in his opinion there was no credible evidence plaintiff suffered from Post Traumatic Stress Disorder. His opinion was based on the lack of a credibly traumatic event, the lack of normal symptoms of Post Traumatic Stress Disorder, and her presentation in his office.

The Commission found "[a]fter reviewing the medical records, the testimony of witnesses[,] and the depositions of medical experts, the Commission gives greater weight to the testimony and opinions of Dr. Gualtieri . . . ." The Commission further found the greater weight of the evidence showed that the 25 March 1994 confrontation did not cause plaintiff's psychological problems, and that the evidence showed plaintiff had initiated the meeting with Fuller and "[t]he confrontation . . . did not constitute an unexpected, unusual[,] or untoward occurrence; nor did it constitute an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." Based upon its findings, the Commission concluded that plaintiff did not sustain an injury by accident arising out of the course of her employment and was not entitled to workers' compensation benefits.

The issues are whether: (I) plaintiff suffered an injury by accident; (II) there is sufficient evidence to support the Commission's finding that the confrontation was not the cause of plaintiff's psychological problems; (III) this Court should supplement the Commission's evidentiary findings; and (IV) the Commission erred in failing to address plaintiff's occupational disease theory.

"In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, [an appellate court] is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980).

I.

[1] Plaintiff first contends the Commission erred by concluding that she did not suffer injury by accident. The North Carolina Workers' Compensation Act does not provide for compensation simply for injury, but rather only for " 'injury by accident.' " *Pitillo v. N.C. Dep't of Envtl. Heath & Natural Res.*, 151 N.C. App. 641, 644, 566 S.E.2d 807, 811 (2002) (citation omitted).

> 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. at 645, 566 S.E.2d at 811 (quoting *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999) (citation omitted)). An injury is not an injury by accident "if the relevant events were 'neither unexpected nor extraordinary,' and it was only the '[claimants'] emotional response to the [events that] was the precipitating factor.' " *Pitillo*, 151 N.C. App. at 645, 566 S.E.2d at 811 (quoting *Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991)).

In *Pitillo*, this Court concluded that a plaintiff who had allegedly suffered a nervous breakdown and stress induced anxiety brought on by a meeting with her supervisor about a performance review was not an injury by accident. *Pitillo*, 151 N.C. App. at 645-46, 566 S.E.2d at 811-12. Determinative in that case were findings of fact that the plaintiff had initiated the meeting, and the meeting was not out of the ordinary and everyone involved was treated courteously. *Id.*

In this case, although plaintiff initiated the meeting with Fuller, she contends his behavior toward her was unexpected and traumatic. The Commission found, however, and the evidence shows that both plaintiff and Fuller raised their voices and both were participants in the argument initiated by plaintiff's complaint that she had improperly been deprived of her desired vacation day. The Commission also recognized that while such confrontations may be infrequent, disagreements between an employee and a supervisor are not uncommon and found that the confrontation between plaintiff and Fuller "did not constitute an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." We agree with the Commission's findings. The evidence shows that plaintiff deliberately initiated the meeting with Fuller to voice her disagreement with his decision to award the vacation day to another employee. It is not unexpected that this would lead to a heated discussion involving raised voices on both the part of the supervisor and employee. Furthermore, in an analogous case, our Supreme Court, in an occupational disease claim, by a per curiam decision has indicated that exposure to an abusive supervisor is a risk shared by any employee in any profession or even outside the

workplace in an abusive relationship. *See Woody v. Thomasville Upholstery, Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002) (*per curiam*) (adopting the dissent in *Woody v. Thomasville Upholstery, Inc.*, 146 N.C. App. 187, 201-02, 552 S.E.2d 202, 211-12 (2001) (Martin, J. dissenting)). Therefore, the heated confrontation with plaintiff's supervisor was not so unusual such as to constitute an interruption in the normal work routine.

As in *Pitillo*, the evidence at most reveals the events themselves did not result in injury, but rather that it was plaintiff's emotional response to the meeting, which she had initiated, that resulted in her psychological harm. *See Pitillo*, 151 N.C. App. at 645-46, 566 S.E.2d at 811. Thus, we conclude the Commission's findings of fact support its conclusion that plaintiff did not suffer a compensable injury by accident.

II.

[2] Plaintiff also challenges the Commission's finding that the greater weight of the evidence shows the confrontation did not cause plaintiff's psychological problems.

" 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation omitted). As a result, this Court " 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. . . .' " *Id.* at 681, 509 S.E.2d at 414 (citation omitted). Instead, this Court must only determine whether there is any evidence tending to support the Commission's finding of fact. *Id.*

The Commission expressly found that the testimony and opinions of defendant's expert, Dr. Gualtieri, carried greater weight than the testimony of plaintiff's experts, in particular because he performed psychological testing, which plaintiff's experts had not done. The Commission then went on to find that the evidence of record showed the confrontation between plaintiff and her supervisor did not cause plaintiff's psychological problems. Dr. Gualtieri testified that based on his evaluation of plaintiff he found no credible evidence of Post Traumatic Stress Disorder related to the confrontation. This opinion was grounded in a lack of what he termed a "credibly traumatic" event, symptoms inconsistent with Post Traumatic Stress Disorder, and her presentation in his office. He also testified that a subsequent review of her medical records did not change his initial evaluation. Dr. Gualtieri indicated that a number of other "stressors" existed in

plaintiff's life that would contribute to psychological problems. He did conclude that plaintiff may suffer from one of a number of other psychological conditions, but those would have pre-existed the confrontation with Fuller and would not have been caused by it. Furthermore, he stated that aggravation of a pre-existing psychological condition as a rule resulted in only a temporary exacerbation of the previous psychological condition and would not lead to total and permanent disability. Thus, the record in this case contains evidence to support a finding that the confrontation between plaintiff and Fuller was not the cause of her psychological conditions.

III.

[3] Plaintiff further argues that the Commission erred by not making certain evidentiary findings of fact. However, " '[t]he Commission chooses what findings to make based on its consideration of the evidence[, and this] [C]ourt is not at liberty to supplement the Commission's findings[.]' " *Pitillo*, 151 N.C. App. at 644, 566 S.E.2d at 810 (quoting *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998)). Thus, we decline to review this assignment of error.

IV.

[4] Plaintiff finally contends the Commission erred by failing to address her occupational disease claim. We agree.

"[W]hen [a] matter is 'appealed' to the full Commission . . . , it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties." *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992). In this case, the parties agree that plaintiff alleged she suffered from an occupational disease and the Commission failed to address this allegation.[2] Accordingly, we must remand this case to the Commission for consideration of plaintiff's occupational disease claim.

Affirmed in part, remanded in part.

Judges TIMMONS-GOODSON and ELMORE concur.

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2. All three members on the panel of the Commission cited *Woody*, an occupational disease case, in their respective opinions but did so only in the context of plaintiff's injury by accident claim, and did not specifically apply *Woody* to plaintiff's separate occupational disease claim.

STATE OF NORTH CAROLINA v. DIONNE TERRELL PHILLIPS

No. COA02-1509

(Filed 7 October 2003)

Search and Seizure— anticipatory search warrant—tripartite test—motion to suppress drugs

The trial court did not err in a trafficking in cocaine and maintaining a dwelling for the keeping of a controlled substance case by denying defendant's motion to suppress evidence seized pursuant to an anticipatory search warrant, because the warrant met the tripartite test including: (1) the triggering event for execution of the warrant was the successful controlled delivery of a Federal Express package to the listed address, and a magistrate is not required to set forth the precise time following the occurrence of the triggering event when an officer must execute the warrant; (2) the warrant precluded delegation of power to the executing officer to find probable cause and ensured the contraband was present at the time of the warrant's execution when the execution of the warrant was contingent on delivery of the package to the listed address; and (3) it is undisputed that the package was delivered and taken into the listed address prior to the execution of the search warrant, and defendant failed to cite any authority for his proposition that a valid and correct address not contained in a city directory would be deficient as a means of establishing with reasonable certainty the premises to be searched.

Appeal by defendant from judgment entered 5 June 2002 by Judge Henry E. Frye, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 11 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General David J. Adinolfi, II, for the State.

J. Clark Fischer, for defendant-appellant.

CALABRIA, Judge.

Dionne Terrell Phillips ("defendant") appeals the trial court's denial of a motion to suppress evidence seized pursuant to an anticipatory search warrant. Because we find no constitutional infirmity, we affirm.

On the morning of 23 January 2002, James Anders ("Detective Anders") was working with the Guilford County Sheriff's Department's interdiction drug unit at a Federal Express facility in Greensboro. Detective Anders, a twenty-six-year veteran of the sheriff's department with over nineteen years' experience in the vice and narcotics division, scanned packages coming into the area by means of parcel company services to isolate those containing narcotics.

When a parcel from California exhibited several characteristics indicating the possible presence of drugs, Detective Anders set the parcel aside for inspection by a K-9 unit. When the K-9 unit indicated the presence of narcotics in the package, a search warrant was obtained and executed. Detective Anders discovered the package contained approximately 1,000 grams of crack cocaine.

Detective Anders obtained a second search warrant for the address to which the package was to be delivered based on the discovery of the narcotics and arranged a controlled delivery of the resealed package. The package itself was addressed to Sonya Moore at 1412 Hamlet Place, Greensboro, North Carolina. The pertinent part of the search warrant stated:

> On this date, this applicant and other officers will attempt to make a controlled delivery of the Federal Express Package addressed to Sonya Moore, 1412 Hamlet Pl., Greensboro, N.C. If this Federal Express Package is delivered to said residence within the forty eight hours of the Issuance of this Warrant, this search warrant will be executed shortly therafter (sic).

The controlled delivery took place that same day shortly before 11 o'clock in the morning. Since there was no answer and the label indicated a signature release, allowing the package to be left at the destination if no one was home to sign for its receipt, the officer attempting the delivery left the package on the porch. A few minutes later, defendant opened the front door from the inside of the house and retrieved the package. Approximately twenty minutes later, Detective Anders executed the search warrant and forced entry into defendant's residence when no one answered the door. Detective Anders found defendant in the bathroom, using his body to prevent entry and flushing crack cocaine down the commode.

Defendant was arrested and subsequently indicted for trafficking by possession of 400 grams or more of cocaine and maintaining a dwelling for the purpose of keeping controlled substances.

Defendant moved to suppress the evidence seized pursuant to the anticipatory search warrant. The trial court denied defendant's motion by order entered 29 May 2002 after concluding the description of the premises to be searched in the anticipatory warrant was adequate and it was appropriately drafted. Defendant was found guilty of trafficking by possessing 400 grams or more of cocaine and knowingly maintaining a dwelling for the keeping of a controlled substance. The trial court sentenced defendant to 175 months to 219 months' imprisonment. Defendant appeals.

On appeal, defendant asserts the trial court erred in denying his motion to suppress because the anticipatory search warrant was facially invalid and failed to comply with the requirements of this Court's holding in *State v. Smith*, 124 N.C. App. 565, 478 S.E.2d 237 (1996).

Anticipatory search warrants are "issued in advance of the receipt of particular property at the premises designated in the warrant . . . ." *U.S. v. Ricciardelli*, 998 F.2d 8, 10 (1st Cir. 1993). Issuance of an anticipatory warrant is "based on a showing of future probable cause to believe that an item will be at a specific location at a particular time in the near future." Norma Rotunno, Annotation, *Validity of Anticipatory Search Warrants—State Cases*, 67 A.L.R.5th 361, 374 (1999). In *Smith*, this Court noted our Constitution afforded greater protection for anticipatory search warrant challenges than its federal counterpart, and we examined our Constitution and general rules governing the issuance of a search warrant. *Smith*, 124 N.C. App. at 570, 478 S.E.2d at 240. We concluded that anticipatory search warrants did not violate constitutional strictures so long as it satisfied the following tripartite test:

> (1) The anticipatory warrant must set out, on its face, explicit, clear, and narrowly drawn triggering events which must occur before execution may take place; (2) Those triggering events, from which probable cause arises, must be (a) ascertainable, and (b) preordained, meaning that the property is on a sure and irreversible course to its destination; and finally, (3) No search may occur unless and until the property does, in fact, arrive at that destination.

Smith, 124 N.C. App. at 577, 478 S.E.2d at 245. These requirements secure the privacy interests accorded by our Constitution, minimize the potential for abuse in warrants conditioned on what may occur in the future, and ensure that the magistrate fulfills his proper role in

determining whether probable cause exists. *Smith*, 124 N.C. App. at 572-73, 478 S.E.2d at 241-42.

I. Triggering Event

The first prong requires that the face of the warrant set out "explicit, clear, and narrowly drawn triggering events" permitting execution of the warrant. *Smith*, 124 N.C. App. at 577, 478 S.E.2d at 245. "The warrant must minimize the officer's discretion in deciding whether or not the 'triggering event' has occurred to 'almost ministerial proportions.' " *Smith*, 124 N.C. App. at 573, 478 S.E.2d at 242 (quoting *Ricciardelli*, 998 F.2d at 12). In the instant case, Detective Anders had no discretion to decide whether or not the triggering event had occurred. On the contrary, the triggering event was the successful controlled delivery of the Federal Express package to the listed address. Once delivery occurred, the warrant could be executed. Accordingly, we hold the trial court correctly found the first prong of *Smith* was met.

Defendant nevertheless asserts the warrant in the instant case failed to appropriately limit the time during which either the triggering event for probable cause or the execution of the warrant would occur. Specifically, defendant contends forty-eight hours is too long for law enforcement to be entitled to execute a search warrant and the phrase "shortly thereafter" regarding the timing of execution after delivery is ambiguous. We disagree.

We note defendant asserts a requirement distinct from the tripartite test set out in *Smith*. *Smith* required, in relevant part, only that the execution of the search warrant succeed the triggering event and that the triggering event be appropriately drawn. By way of contrast, defendant's argument concerns post-issuance timing of the warrant's triggering event and execution.

The central concern in *Smith* was whether the officer executing the warrant could create the circumstances justifying its execution, and in so doing, violate one's privacy rights. *Smith*, 124 N.C. App. at 572, 478 S.E.2d at 241. When the warrant is executed after an appropriately drawn triggering event occurs, probable cause, justifying the invasion of privacy, has been established by a neutral and detached magistrate.

Addressing defendant's arguments in the instant case, the forty-eight hour window to which defendant objects merely provided when the warrant would expire by its own terms. The language of the war-

rant clearly stated "[o]n this date, . . . officers will attempt to make a controlled delivery" and required execution "shortly thereafter." This designation was reasonably precise in specifying the time frame in which execution of the warrant was to occur. Given the variety of circumstances which can be presented at the time a warrant is executed, we cannot agree with defendant that a magistrate must set forth the precise time following the occurrence of the triggering event when an officer must execute the warrant.

II. Sure and Irreversible Course to Destination

The second requirement adopted by *Smith* is the so-called "sure and irreversible course to destination" rule. *Smith*, 124 N.C. App. at 572-73, 478 S.E.2d at 242 (citing *Ricciardelli*, 998 F.2d at 12-13). Stated succinctly, "contraband must be on a sure, irreversible course to the situs of the intended search, and any future search 'of the destination must be made *expressly* contingent upon the contraband's arrival there.' " *Smith*, 124 N.C. App. at 573, 478 S.E.2d at 242 (quoting *Ricciardelli*, 998 F.2d at 12). This requirement prevents probable cause determinations from passing from the magistrate to the officer executing the warrant and ensures "the contraband, though not yet at the location of the intended search, will almost certainly be there at the time of the search." *Id.*

In the instant case, the package was addressed and sent through Federal Express. It was intercepted, and a controlled delivery to the listed address was undertaken. Anticipatory warrants executed after a controlled delivery of a package sent to a listed address by mail or a parcel service have been overwhelmingly approved. Norma Rotunno, Annotation, *Validity of Anticipatory Search Warrants—State Cases*, 67 A.L.R.5th 361, 376 (1999). Moreover, by making execution of the warrant contingent on delivery of the package to the listed address, the warrant precluded delegation of power to the executing officer to find probable cause and ensured the contraband was present at the time of the warrant's execution. Accordingly, we hold the trial court correctly found the second prong of *Smith* was met.

III. Time of Search

Finally, the third prong requires that any search must await the arrival of the contraband to the destination. *Smith*, 124 N.C. App. at 577, 478 S.E.2d at 245. It is undisputed that the package was delivered and taken into the listed address prior to the execution of the search warrant. Nothing more is required by this prong of *Smith*.

Defendant asserts the warrant application provided insufficient information as to the premises to be searched because it listed an address not found in the Greensboro City Directory. Defendant concedes that, relevant to this case, a search warrant need only contain a "designation sufficient to establish with reasonable certainty the premises . . . to be searched" to satisfy N.C. Gen. Stat. § 15A-246(4) (2001). Defendant cites no authority for, nor can we accept, the proposition that a valid and correct address, regardless of whether it is contained in a city directory, would be deficient as a means of establishing with "reasonable certainty the premises . . . to be searched." We have carefully considered defendant's remaining arguments and find them to be without merit.

Affirmed.

Judges McGEE and HUNTER concur.

STACY BATTS, JAYQUAN BATTS, AND SHAYQUAN BATTS, BY AND THROUGH THEIR GUARDIAN AD LITEM, WILLIAM LEWIS KING, PLAINTIFFS v. SHAWAN L. BATTS, DEFENDANT, THIRD-PARTY PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, THIRD-PARTY DEFENDANT

No. COA02-1647

(Filed 7 October 2003)

1. **Appeal and Error— appealability—denial of motion to dismiss—sovereign immunity**

The denial of a motion to dismiss that asserted sovereign immunity was immediately appealable.

2. **State— negligence action—State as third party defendant—direct action not barred**

Plaintiff was not barred by sovereign immunity or the Tort Claims Act from directly asserting a claim against third-party defendant DOT for negligently maintaining a city street. The Tort Claims Act constitutes a waiver of sovereign immunity, the provisions of the Act were modified by Rule 14(c) of the North Carolina Rules of Civil Procedure to allow the State to be made a third party, and Rule 14(a) allows a plaintiff to assert claims directly against a third-party defendant if those claims arose

from the same transaction as plaintiff's claim against the original defendant.

3. State— third-party defendant—direct claim against State

There is no conflict between statutes requiring resolution of specific versus general language in the provisions of the Tort Claims Act and the provisions of N.C.G.S. § 1A-1, Rule 14, which concern a direct negligence claim against the State after it has been added as a third party. The issue is legislative intent, which clearly was to allow plaintiffs to assert claims directly against the State when the State had been added to the lawsuit by a third-party complaint.

Appeal by the State from order entered 16 August 2002 by Judge Frank R. Brown in Wilson County Superior Court. Heard in the Court of Appeals 8 September 2003.

Taylor Law Office, by W. Earl Taylor, Jr. for plaintiff-appellees.

Walter, Clark, Allen, Herrin & Morano, by Jerry A. Allen, Jr. for defendant/third-party plaintiff.

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

STEELMAN, Judge.

The issue before this Court, one of first impression, is whether a plaintiff may assert a claim against the State as a third-party defendant in our trial courts. Based on the facts presented in this case, we answer in the affirmative.

This appeal arises out of a motor vehicle collision that took place on 13 May 2001 in Elm City, North Carolina. The accident involved a stop sign that was allegedly obstructed from the view of motorists by tree limbs. Plaintiffs filed a complaint in the Superior Court of Wilson County seeking monetary damages for injuries caused by the negligence of defendant Shawan L. Batts, the driver of the car in which plaintiffs were passengers, and the Town of Elm City. Defendant Batts filed a cross-claim for indemnity and contribution against the Town of Elm City and also a third-party complaint against North Carolina Department of Transportation ("NCDOT"), seeking indemnity and contribution. The third-party complaint alleged that NCDOT was negligent in maintaining a public street and failing to remove tree limbs that obstructed motorists' view of the stop sign. Plaintiffs

subsequently obtained leave of court to amend their complaint to add NCDOT as a party defendant and dismissed their claims against the Town of Elm City. Plaintiffs' allegations against NCDOT in their amended complaint are identical to those of defendant Batts in her third-party complaint. NCDOT filed a motion to dismiss plaintiffs' claim, asserting sovereign immunity as an affirmative defense. The trial court denied this motion. NCDOT appeals.

[1] Initially, we note that this appeal is properly before the Court in accordance with N.C. Gen. Stat. § 1-277(b), which allows any interested party an "immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant." N.C. Gen. Stat. § 1-277(b) (2001). Moreover, "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Price v. Davis*, 132 N.C. App. 556, 558-59, 512 S.E.2d 783, 785 (1999).

[2] In its first assignment of error, NCDOT argues that plaintiff is barred by sovereign immunity and by the Tort Claims Act (N.C. Gen. Stat. § 143-91) from directly asserting a claim against it. We disagree.

As a general rule, the State enjoys sovereign immunity, which protects it from liability for negligent conduct on the part of its agents or employees. *Gammons v. North Carolina Dep't of Human Resources*, 344 N.C. 51, 472 S.E.2d 722 (1996). However, this immunity can be abrogated by an express waiver of the General Assembly. *See Midgett v. N.C. DOT*, 152 N.C. App. 666, 568 S.E.2d 643, *cert. denied*, 356 N.C. 438, 572 S.E.2d 786 (2002). The Tort Claims Act constitutes such a waiver, allowing claims against the State up to the limits set forth in sections 143-291(a1), 143-299.2 and 143-299.4. It also confers exclusive jurisdiction over tort claims against the State upon the North Carolina Industrial Commission. N.C. Gen. Stat. 143-291(a) (2003). *See also Guthrie v. North Carolina State Ports Authority*, 307 N.C. 522, 539-40, 299 S.E.2d 618, 628 (1983); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E.2d 182, 187 (1982). Statutes waiving sovereign immunity must be strictly construed. *Selective Ins. Co. v. NCNB Nat'l Bank*, 324 N.C. 560, 563, 380 S.E.2d 521, 523 (1989).

The provisions of the Tort Claims Act were modified and superceded by the provisions of Rule 14(c) of the North Carolina Rules of Civil Procedure. Rule 14 provides:

> (c) Rule applicable to State of North Carolina.—Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina

> may be made a third party under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Tort Claims Act.

N.C. Gen. Stat. § 1A-1, Rule 14(c) (2003). Subsection (c) was not originally a part of Rule 14. It was added in 1975 by a session law titled "An Act to Permit the State to be Interpled in Tort Actions." 1975 N.C. Sess. Laws, ch. 587, § 1. Presently and at the time of the 1975 amendment, Rule 14 contained subsection (a), which states in pertinent part:

> The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and crossclaims as provided in Rule 13.

N.C. Gen. Stat. § 1A-1, Rule 14(a) (2003).

Under the clear language of Rule 14(a), once a third-party defendant is added to a lawsuit, a plaintiff may assert claims directly against the third-party defendant, subject only to the limitation that the claim arose out of the same transaction or occurrence as the plaintiff's original claim against the original defendant.

The Tort Claims Act waives sovereign immunity. By the addition of Rule 14(c), the General Assembly created an exception to the general rule that claims against the State under the Tort Claims Act must be pursued before the Industrial Commission as to third-party claims. The 1975 amendment to Rule 14 does not place any limitations on the application of Rule 14(a) to claims against the State. Rule 14 must be construed as a whole and not in separate parts. By adding subsection (c) to Rule 14, the General Assembly waived the State's immunity to claims brought by a plaintiff under Rule 14(a), subject to the express limitations contained therein. "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658-59, 174 S.E.2d 793, 804-05 (1970). Since the claims asserted by plaintiff against NCDOT are identical to those asserted by defendant Batts against NCDOT, and since these claims arise out of the same transaction and occurrence that is the subject matter of plaintiff's original claim,

plaintiff is permitted to assert its claims against NCDOT under the provisions of Rule 14.

Allowing plaintiff to assert claims directly against NCDOT is also consistent with the general purposes of Rule 14. In *Heath v. Board of Comm'rs*, 292 N.C. 369, 376, 233 S.E.2d 889, 893 (1977), *cert. denied*, 297 N.C. 453, 256 S.E.2d 807 (1979) (citations omitted), our Supreme Court stated that:

> The purpose of Rule 14 is to promote judicial efficiency and the convenience of parties by eliminating circuity of action. When the rights of all three parties center upon a common factual setting, economies of time and expense can be achieved by combining the suits into one action. Doing so eliminates duplication in the presentation of evidence and increases the likelihood that consistent results will be reached when multiple claims turn upon identical or similar proof. Additionally, the third-party practice procedure is advantageous in that a potentially damaging time lag between a judgment against defendant in one action and a judgment in his favor against the party ultimately liable in a subsequent action will be avoided. In short, Rule 14 is intended to provide a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically.

In *Selective Ins. Co. v. NCNB Nat'l Bank*, 324 N.C. 560, 380 S.E.2d 521 (1989), our Supreme Court allowed the assertion of a crossclaim under Rule 13(g) against the State in an action to which it was already a party. The court noted that the provisions for assertion of a crossclaim under Rule 13 and a third-party complaint were comparable. The court stated that "[a]llowing claims against the State for contribution and indemnification to be asserted as crossclaims accomplishes the legislative purpose behind Rule 13(g) and avoids absurd or bizarre consequences, by preventing the necessity of a second action before the Industrial Commission to settle claims between the coparties." *Id.* at 566, 380 S.E.2d at 525.

NCDOT would have this Court hold that while it is permissible for Batts, a defendant and third-party plaintiff, to assert claims against it under Rule 14(c), plaintiffs must assert identical claims in a different forum (the Industrial Commission). This position is contrary to the express provisions of Rule 14 and the rulings of our Supreme Court in *Heath* and *Selective*. This assignment of error is without merit.

[3] In its second assignment of error, NCDOT argues that the specific provisions of the Tort Claims Act control over the general terms of Rule 14 and cannot be construed as a waiver of sovereign immunity. We disagree.

As noted above, Rule 14(c) creates an exception to the general rule that claims against the State must be litigated before the Industrial Commission pursuant to the Tort Claims Act.

A specific statute will only control over a general statute when there is a conflict between those statutes. *See Meyer v. Walls*, 122 N.C. App. 507, 513, 471 S.E.2d 422, 427 (1996), *aff'd in part, rev'd and remanded on other grounds in part*, 347 N.C. 97, 489 S.E.2d 880 (1997). In the instant case, there is no conflict between Rules 14(a) and (c). Accordingly, this is not a general versus specific language issue. The pertinent issue here is the overall legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, "the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980)). Further, it is a well-known rule of construction that provisions in a statute should be construed together and reconciled with each other whenever possible. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 400, 269 S.E.2d 547, 561 (1980). Therefore, all parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation. *Duke Power Co. v. Clayton*, 274 N.C. 505, 164 S.E.2d 289 (1968).

As discussed above, it was the clear intent of the General Assembly to allow plaintiffs to assert claims directly against the State when the State had been previously added to the lawsuit by a third-party complaint. This assignment of error is without merit.

AFFIRMED.

Chief Judge EAGLES and Judge McCULLOUGH concur.

PAMELA JAMES, PLAINTIFF v. PERDUE FARMS, INC., EMPLOYER, SELF-INSURED (CRAWFORD & COMPANY, SERVICING AGENT), DEFENDANT

No. COA02-795

(Filed 7 October 2003)

Workers' Compensation— fibromyalgia—not a listed compensable occupational disease—plaintiff's burden not met

A workers' compensation claim arising from repetitive motion injuries was properly denied by the Industrial Commission. Although the Commission erred by requiring that plaintiff show that her fibromyalgia was a direct result of her employment rather than a significant contributing factor, the error does not warrant reversal because the Commission concluded that there was insufficient evidence that plaintiff's employment placed her at more risk for this condition than the general population, and that conclusion was supported by the findings.

Appeal by plaintiff from judgment entered 4 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 March 2003.

Daniel F. Read for plaintiff-appellant.

Haynsworth, Baldwin, Johnson & Greaves, L.L.C., by Brian M. Freedman and J. Mark Sampson, for defendant-appellee.

ELMORE, Judge.

Pamela James (plaintiff) appeals an opinion and award of the North Carolina Industrial Commission denying her workers' compensation claim.

Plaintiff was employed at the Perdue Farms, Inc. (Perdue) facility in Lewiston, North Carolina from 1984 to 1995. During her tenure at Perdue, plaintiff worked in various jobs, each of which required plaintiff to use her hands to perform repetitive motions. In 1989 or 1990, plaintiff began to experience pain in her hands and, later, in her neck, shoulders, and arms. In the following years, plaintiff sought treatment from a number of doctors, but the pain continued. Plaintiff's condition eventually led to a medical leave of absence in 1995 from which plaintiff did not return to work.

Plaintiff filed a claim for workers' compensation with the North Carolina Industrial Commission. On 15 May 2001, Deputy

Commissioner George T. Glenn, II issued an opinion and award in favor of plaintiff finding that plaintiff had developed carpel tunnel syndrome, fibromyalgia, chronic pain, and depression as a direct result of her employment. Defendant appealed to the Full Commission and, on 4 April 2002, the Commission issued an opinion and award reversing the Deputy Commissioner and denying plaintiff's claim. The Commission's single conclusion of law states the following:

> There was insufficient evidence to prove that plaintiff developed carpel tunnel syndrome, fibromyalgia, chronic pain and depression as a direct result of her position with Perdue Farms. There was insufficient evidence to prove that plaintiff's position placed her at an increased risk of developing these occupational disease [sic] as compared to general population not so employed.

Plaintiff gave notice of appeal to this Court on 25 April 2002.

On appeal to this Court, plaintiff contends that the Commission misapplied the law relating to compensability of occupational diseases. Specifically, plaintiff argues that the Commission erred in requiring her to prove that her fibromyalgia was a direct result of her employment, rather than to prove that her employment was a significant contributing factor in her condition. We agree that the Commission erred in requiring plaintiff to show that her fibromyalgia was a direct result of her employment. We hold, however, that the Commission's error relating to causation does not warrant reversal of its decision to deny plaintiff's claim.

On appeal of a decision of the Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The evidence is to be viewed in the light most favorable to the plaintiff, and the plaintiff is entitled to the benefit of every reasonable inference that may be drawn therefrom. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

Fibromyalgia is not one of the enumerated compensable occupational diseases listed under section 97-53 of our General Statutes. Plaintiff, therefore, bears the burden of proving that she suffers from an occupational disease as defined by N.C. Gen. Stat. § 97-53(13)

(2001). *Poole v. Tammy Lynn Ctr.*, 151 N.C. App. 668, 672, 566 S.E.2d 839, 842 (2002). The North Carolina Supreme Court has established a three-part test to determine whether a condition is compensable under N.C. Gen. Stat. § 97-53(13), requiring a plaintiff to show: 1) that the condition for which plaintiff seeks compensation is "characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged;" 2) that the condition is "not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation;" and 3) that there is "a causal connection between the disease and the [claimant's] employment." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983). Although the Commission erred in its application of the third element of the *Rutledge* test, we hold that the Commission's denial of plaintiff's claim is still supported by plaintiff's failure to meet the first two elements of the test.

The third element of the *Rutledge* test requires plaintiff to demonstrate a causal link between the condition for which plaintiff seeks compensation and plaintiff's employment. *Rutledge*, 308 N.C. at 93, 301 S.E.2d at 365. This element of the test is satisfied if plaintiff's employment "significantly contributed to, or was a significant causal factor in, the disease's development." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371 (2000). The Commission's use of the phrase "direct cause" in its conclusion of law, as opposed to "significant contributing or causal factor," suggests that the Commission did not apply the correct standard with respect to the causation element. On the facts of the case *sub judice*, however, the Commission's error does not warrant reversal of its decision to deny plaintiff's claim.

In addition to demonstrating a causal link between the plaintiff's condition and her employment, plaintiff must also satisfy the first two elements of the *Rutledge* test. These first two elements are met "if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Id.* at 94, 301 S.E.2d at 365 (quoting *Booker v. Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979)). The Commission concluded that plaintiff had not satisfied her burden of showing that her employment exposed her to an increased risk of developing fibromyalgia.

The second sentence of the Commission's conclusion of law states the following: "There was insufficient evidence to prove that plaintiff's position placed her at an increased risk of developing these occupational disease [sic] as compared to general population not so employed." This conclusion relates directly to the first two elements of the *Rutledge* test, and there is no indication that the Commission incorrectly applied the law relating to those two elements.

Furthermore, the Commission's conclusion that there was insufficient evidence to prove that plaintiff's employment placed her at an increased risk of developing fibromyalgia is supported by the Commission's findings of fact, which *inter alia* record the testimony of Dr. Robert Hansen, a neurologist who examined plaintiff. Finding of fact number seventeen states that Dr. Hansen "felt that the work [in which plaintiff was engaged] was hard on the hands and there is an increased risk of developing hand pain and problems." However, Dr. Hansen was quick to distinguish between the pain caused by fibromyalgia and the condition itself. Finding of fact number twenty-two states that Dr. Hansen testified that plaintiff's work is "demanding" and "will make any of us hurt. It'll make people with fibromyalgia hurt more. So it clearly is significant in terms of increasing somebody's pain. But that doesn't cause the problem." The distinction between plaintiff's pain and her underlying condition is a significant one. Plaintiff must demonstrate that her employment exposed her to an increased risk of developing the *disease*. *Rutledge*, 308 N.C. at 93-94, 301 S.E.2d at 365. The Commission determined that plaintiff had not done so.

On the facts of the case *sub judice*, the Commission's error relating to causation does not warrant reversal of its decision to deny plaintiff's claim. The plaintiff must meet each element of the *Rutledge* test. Whether or not plaintiff can satisfy the causation element of the test under the correct legal standard, the Commission's decision to deny plaintiff's claim was still appropriate because plaintiff had not satisfied the first two elements of the test. The Commission's conclusion that plaintiff had not satisfied her burden of showing that her employment exposed her to an increased risk of developing fibromyalgia is supported by the applicable law and by the Commission's findings of fact. Accordingly, we affirm the Commission's decision to deny plaintiff's claim.

Finally, we note that plaintiff's brief discusses neither the Commission's conclusion of law as it relates to plaintiff's carpel tunnel syndrome or depression nor the sufficiency of the evidence sup-

porting the Commission's finding of fact number twenty-seven. To the extent that these issues may have been raised by plaintiff's assignments of error, they are therefore deemed abandoned pursuant to North Carolina Rule of Appellate Procedure 28(a).

Affirmed.

Judges MARTIN and HUDSON concur.

STATE OF NORTH CAROLINA v. JEFFERY RICARDO ROBINSON

No. COA02-1412

(Filed 7 October 2003)

Jury— conversations with jury foreman alone—failure to summon full jury into courtroom for instructions

The trial court erred in a conspiracy to traffic in cocaine, trafficking in cocaine, and possession with intent to sell or deliver cocaine case by engaging in three conversations with the jury foreman alone regarding the charges and jury deliberations outside the presence of the remainder of the jury, and defendant is granted a new trial, because: (1) the full jury must be summoned into the courtroom when giving instructions on the law applicable to the case under N.C.G.S. § 15A-1234; (2) it cannot be known whether the jury foreman truly understood the answers provided to him by the trial court or whether he conveyed them correctly to the other jurors; and (3) it is impossible to know whether the other jurors themselves understood the instructions provided to them by the foreman when deliberating and deciding their verdict.

Appeal by defendant from judgment entered 14 September 2001 by Judge Russell G. Walker, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 9 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General Edwin Lee Gavin, II, for the State.

Walter L. Jones, for defendant-appellant.

TYSON, Judge.

Jeffery Ricardo Robinson ("defendant") appeals from a jury's verdict finding him guilty of conspiracy to traffic in cocaine and possession with intent to sell or deliver cocaine. We reverse and grant a new trial.

I. Background

Defendant was indicted on 13 December 1999 on charges of conspiracy to traffic in cocaine, trafficking in cocaine, and possession of cocaine with intent to sell and deliver. Included with this last charge was the lesser included offense of possession of cocaine. At the conclusion of the trial, the trial court instructed the jury on the charges in the indictment and the lesser included offense of possession of cocaine. The trial court also instructed the jury on the defense of entrapment. Defendant made no objection to the jury instructions.

After the instructions were given, the jury retired to deliberate. At 3:45 p.m., the jury sent out questions to the court. The court instructed the bailiff to bring in the jury foreman, Mr. Meisner ("Meisner"). The court addressed Meisner as follows:

> THE COURT: Mr. Meisner, if you would, I'm going to answer these two questions to you and let you convey the answers to the jury. The first question was, 'Does Robinson have to conspire with only one other person to commit conspiracy to traffic in cocaine and be found guilty?' The answer to that question is 'yes.' And your second question was, 'Is Thomas Benton the correct name to appear in the conspiracy to traffic charge?' The answer to that question is 'yes.' If you would communicate that to your other jurors."

Meisner then returned to the jury room to resume deliberations. At 4:55 p.m., the court inquired of Meisner as to whether progress was being made. Meisner responded that progress was being made. Ten minutes later, the court informed counsel that the jury had sent in another question. The question was, "Why does the third charge not show count three?" The court instructed Meisner, alone, to again be brought in. When Meisner entered, the court addressed him as follows:

> THE COURT: Mr. Meisner, to answer your question, case number 99-97658 was a two-count indictment. The first count

> was trafficking; the second count was possession with intent to sell or deliver. There is a lesser included offense of that second count, which is the possession of cocaine. So, it was not numbered as a count.

Meisner indicated that he understood and returned to the jury. At 5:15 p.m., the jury returned with its verdicts. The jury found the defendant guilty of conspiracy to traffic in cocaine, not guilty of trafficking in cocaine, and guilty of possession with intent to sell or deliver cocaine.

II. Issue

The sole issue is whether the trial court erred by engaging in numerous conversations with the jury foreman alone regarding the charges and jury deliberations outside the presence of the remainder of the jury.

III. Conversations Outside the Presence of the Full Jury

A. Application of N.C. Gen. Stat. § 15A-1233(a)

N.C. Gen. Stat. § 15A-1233(a) (2001) requires:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

In *State v. Ashe*, our Supreme Court held:

> This statute imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue.

314 N.C. 28, 34, 331 S.E.2d 652, 656 (1985). "While the statute does not expressly say that the trial judge must have the jurors conducted to the courtroom, we have no doubt that the legislature intended to

place this responsibility on the judge presiding at the trial." *Id.* at 35, 331 S.E.2d at 657. Our Supreme Court concluded that:

> Our jury system is designed to insure that a jury's decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge's instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a *jury foreman*, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, *even the jury foreman*, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. Then, each juror, rather than determining for himself or herself the import of the request and the court's response, must instead rely solely upon their spokesperson's secondhand rendition, however inaccurate it may be.
>
> Thus, we hold that for the trial court in this case to hear the jury foreman's inquiry and to respond to it without first requiring the presence of all jurors was an error in violation of N.C.G.S. § 15A-1233.

Id. at 36, 331 S.E.2d at 657 (emphasis supplied).

This Court, in *State v. Tucker* found that the Supreme Court's reasoning in *Ashe* concerning N.C. Gen. Stat. § 15A-1233(a) equally applies to N.C. Gen. Stat. § 15A-1234(a). 91 N.C. App. 511, 515, 372 S.E.2d 328, 331 (1988). N.C. Gen. Stat. § 15A-1234(a) (2001) states:

> (a) After the jury retires for deliberations, the judge may give appropriate additional instructions to: (1) Respond to an inquiry of the jury made in open court; or (2) Correct or withdraw an erroneous instruction; or (3) Clarify an ambiguous instruction; or (4) Instruct the jury on a point of law which should have been covered in the original instructions.

This Court held that the same danger present in *Ashe* was present in this case: "the question presented and the trial court's response may be inaccurately relayed by the foreman to the remaining jurors." *Tucker*, 91 N.C. at 515, 372 S.E.2d at 331. This Court held:

> [t]he situation in this case may present more danger because the request involved the court's instructions on the elements necessary to prove each offense, and not just a request to review the transcript as was the case in *Ashe*. We hold it was error for the trial court to fail to bring the entire jury to the courtroom to respond to the jury's question.

Id. This Court held that the full jury must be summoned into the courtroom when giving instructions on the law applicable to the case under N.C. Gen. Stat. § 15A-1234(a). *Id.*

Here, the trial court spoke to the jury foreman on three different occasions outside of the presence of the full jury. The court answered questions concerning the charges against defendant on two different occasions. The other communication concerned the progress of the jury's deliberations. Each time, the court stated to the jury foreman that it would allow him to "convey the answers to the jury." This is in direct violation of the requirements of N.C. Gen. Stat. § 15A-1234(a), the holdings of this Court, and our Supreme Court. By failing to summon all twelve jurors to the courtroom before providing answers to various questions, the trial court violated statutes and case law.

B. Reversible Error

After finding that the trial court erred in communicating with the jury foreman outside the presence of the full jury, we must determine whether this error was prejudicial to the defendant. We hold that it was.

In *Tucker*, this Court found reversible error in failing to summon the full jury into the courtroom. Again, following the reasoning in *Ashe*, this Court held:

> Although the foreman might have relayed this exact message, he might have as easily have conveyed some altered message or phrased the judge's response in his own words in such a way as to alter its connotation and its import. The manner in which he reported his request and the response might have led the other jurors to believe the trial court thought the evidence which the jury wanted reviewed unimportant or not worthy of further consideration.

Id. at 516, 372 S.E.2d at 331. As our Supreme Court stated in *Ashe*, the purpose of the statute is to prevent the jury foreman "through misun-

derstanding, inadvertent editorialization, or an intentional misrepresentation," from "inaccurately relaying the jury's request or the court's response, or both, to the defendant's detriment." *Ashe*, 314 N.C. at 36, 331 S.E.2d at 657.

Here, we cannot know whether the jury foreman truly understood the answers provided to him by the trial court or whether he conveyed them correctly to the other jurors. Further, it is impossible to know whether the other jurors themselves understood the instructions provided to them by the foreman when deliberating and deciding their verdict. If all twelve jurors had been summoned to the courtroom as required by the statute and case law, there would be no question whether all twelve were conveyed the same answers in the same manner. We hold that it was reversible error by the trial court to not summon the full jury into the courtroom before answering their questions.

IV. Conclusion

The trial court committed reversible error. Defendant is granted a new trial.

New trial.

Judges WYNN and LEVINSON concur.

JASON H. MOORE, PLAINTIFF v. SHELLEY H. MOORE (PLATTE), DEFENDANT

No. COA02-1267

(Filed 7 October 2003)

1. Child Support, Custody, and Visitation— findings—mere recitation of testimony

An order denying plaintiff the reinstatement of visitation rights with his daughter was remanded for further findings where there was directly conflicting evidence and the court merely recited the testimony of witnesses without resolving the factual disputes.

2. Child Support, Custody, and Visitation— denial of all visitation rights—no finding of unfitness

The trial court erred by denying plaintiff the reinstatement of visitation rights with his daughter based on the best interest of the child. The court did not find plaintiff to be an unfit parent based upon clear, cogent, and convincing evidence, and the matter was remanded for a determination of plaintiff's fitness.

Appeal by plaintiff from order entered 2 April 2002 by Judge William G. Stewart in Wilson County District Court. Heard in the Court of Appeals 18 August 2003.

Ellis & Winters, L.L.P., by Paul K. Sun, Jr., and Davis, Flanagan, Bibbs & Smith, P.L.L.C., by Mark L. Bibbs, for plaintiff-appellant.

Thomas R. Sallenger, for defendant-appellee.

TYSON, Judge.

Jason H. Moore ("plaintiff") appeals from an order denying reinstatement of his visitation rights with his minor child. We reverse and remand.

I. Background

Plaintiff and Shelley Moore (now Shelley Platte) ("defendant") were married in August 1997 and divorced in August 2000. A daughter was born of the marriage on 27 February 1998. An order dated 26 April 2001 was entered awarding defendant legal custody of the child and plaintiff was allowed supervised visitation.

On 5 July 2001, defendant filed a motion to suspend plaintiff's visitation rights pending a sexual abuse investigation by the Wilson County Department of Social Services and Raleigh Pediatrics at Wake Memorial Hospital. Defendant alleged that the three-year old child had been exposed to improper sexual contact with plaintiff. The allegations arose after the child revealed to her maternal grandmother that plaintiff had touched her genitals while she and plaintiff were swimming in his mother's pool during a scheduled visit. All visitation with plaintiff was suspended on 19 July 2001 and a protective order was entered pending further investigation.

Plaintiff filed a motion to reinstate visitation on 3 December 2001. The trial court heard testimony from a social worker and expert

witnesses in the field of child sexual abuse, each of whom had conducted interviews with the child. The psychologist testified that the child had spontaneously disclosed that plaintiff had licked her genitals and that she had licked plaintiff's genitals. The social worker testified that the child disclosed that plaintiff had touched her genitals while they were in the pool, and demonstrated the manner in which he purportedly did so, but did not disclose where any other sexual contact occurred. There was no physical evidence of sexual abuse.

Plaintiff, plaintiff's mother, and plaintiff's two sisters testified that plaintiff was never alone with the child in the pool or at any other time during the supervised visitations and denied any allegations of sexual abuse. The child did not testify. The Wilson Police Department conducted a criminal investigation, but did not initiate criminal charges.

The trial court denied plaintiff's motion to reinstate visitation, finding that it was not in the best interest of the child that plaintiff's visitation be resumed. The trial court concluded that the protective order entered 19 July 2001 should remain in full force and effect in the child's best interest.

II. Issues

Plaintiff contends that the trial court erred by: (1) failing to make sufficient findings of fact and conclusions of law necessary to determine the issues raised and (2) applying a best interest analysis when prohibiting any and all visitation rights of a parent.

III. Findings of Fact

[1] N.C. Gen. Stat. 1A-1, Rule 52(a)(1) provides: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law . . . ." N.C. Gen. Stat. 1A-1, Rule 52(a)(1) (2001).

> While Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick v. Quick, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). "[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a con-

scious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984). "Where there is directly conflicting evidence on key issues, it is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence, rather than merely reciting what the evidence may tend to show." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000).

Here, the trial court merely recited the testimony of witnesses. "This is indicated by the trial court's repeated statements that a witness 'testified' to certain facts or other words of similar import." *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000). There was directly conflicting evidence regarding the allegations of sexual abuse. Therapists and social workers testified that the child disclosed instances of sexual abuse, while plaintiff, his mother, and his two sisters testified that the alleged conduct did not and could not have happened. No physical evidence of abuse was presented.

The trial court's recitation of the testimony of witnesses and findings of fact are insufficient to support its conclusions on the ultimate facts based on the weight of the evidence. We reverse and remand to the trial court for further findings of fact supporting the ruling and to determine the source of the minor child "acting out things that, at three-years old, she has had to have been seeing."

IV. Burden of Proof

[2] The "Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000). "[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). N.C. Gen. Stat. § 50-13.5(i) states:

> [T]he trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2001). North Carolina courts have held that unless the child's welfare would be jeopardized, courts generally should be reluctant to deny all visitation rights to the divorced parent of a child of tender age. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E.2d 324 (1967). "In the absence of extraordinary circumstances, a parent should not be denied the right of visitation." *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971), (quoting *Willey v. Willey*, 253 Iowa 1294, 115 N.W.2d 833 (1962)). North Carolina case law also states that when severe restrictions are placed on the right of visitation, N.C. Gen. Stat. § 50-13.5(i) requires the trial judge to make findings of fact supported by competent evidence of unfitness of the parent or the judge must find that the restrictions are in the best interest of the child. *Falls v. Falls*, 52 N.C. App. 203, 208, 278 S.E.2d 546, 551 (1981); *see also Johnson v. Johnson*, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

It is presumed that fit parents act in the best interest of their children. *Troxel*, 530 U.S. at 69, 147 L. Ed. 2d at 59. A parent's right to a relationship with his child is constitutionally protected. *See Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 519 (1978). Once conduct that is inconsistent with a parent's protected status is proven, the "best interest of the child" test is applied. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). Without proof of inconsistent conduct, the "best interest" test does not apply and the trial court is limited to finding that the natural parent is unfit in order to prohibit all visitation or contact with his or her child.

The burden of proof rests upon the person seeking to show by clear, cogent, and convincing evidence the unfitness of a natural parent to overcome his constitutionally protected rights. N.C. Gen. Stat. § 7B-1111(b) (2001). Here, in effect, the trial court terminated plaintiff's right to visitation and any contact with his daughter without terminating his obligations as a parent. The proper evidentiary standard of proof in termination of parental rights proceedings is clear and convincing evidence. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). In termination proceedings, "the burden . . . shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence." N.C. Gen. Stat. § 7B-1111(b) (2001).

Plaintiff was prohibited from all visitation rights or any contact whatsoever with his child. To sustain this total prohibition of visitation or contact, defendant must prove plaintiff's unfitness. The trial

court did not find the plaintiff to be an unfit parent based upon clear, cogent, and convincing evidence. We reverse and remand.

V. Conclusion

The trial court merely recited the testimony of witnesses and failed to make the required findings of fact resolving the critical factual disputes. We reverse and remand this case for further findings of fact and for determination of the plaintiff's fitness as a parent, if plaintiff is to be denied all visitation or contact with his daughter. The protective order of 19 July 2001 remains in full force and effect, pending hearing on remand.

Reversed and remanded.

Chief Judge EAGLES and Judge STEELMAN concur.

JIMMY SPRINGER, EMPLOYEE, PLAINTIFF v. McNUTT SERVICE GROUP, INC., EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, SERVICING AGENT), DEFENDANT

No. COA02-1514

(Filed 7 October 2003)

1. Workers' Compensation— disability—burden of proof—not met

The Industrial Commission did not err by concluding that a workers' compensation plaintiff failed to meet his burden of proving that he was disabled. The Commission found that no physician prohibited plaintiff from working or had found that plaintiff could not work in any employment, defendant offered expert testimony that an average person could have found suitable employment, taking into account plaintiff's limitations, and the Commission found that plaintiff had suffered only minor injuries from his fall and that his testimony about his limitations was not credible.

2. Workers' Compensation— no further medical treatment— findings

The Industrial Commission's findings that a workers' compensation plaintiff was not in need of further medical treatment as a result of his injuries were supported by competent evidence.

3. Workers' Compensation— denial of disability—grounds

The Court of Appeals did not reach the question of whether a workers' compensation plaintiff was denied disability payments for his refusal of light duty work. The Industrial Commission correctly found that plaintiff had not met his burden of showing disability.

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission entered 26 August 2002 by Commissioner Bernadine S. Ballance. Heard in the Court of Appeals 9 September 2003.

David Gantt, for plaintiff-appellant.

Young Moore and Henderson P.A., by Jeffrey T. Linder, for defendant-appellee.

TYSON, Judge.

Jimmy Springer ("plaintiff") appeals from the Opinion and Award of the Full Commission of the Industrial Commission ("Commission") denying his worker's compensation claim. We affirm.

I. Facts

Plaintiff was employed as a heating and air mechanic on 3 August 1999 by McNutt Service Group, Inc. ("defendant"). Plaintiff claimed that he sustained an injury by accident to his left knee and right hip when he slipped and bumped his left knee while walking across some boards at work. Plaintiff is fifty-two years old and has worked the majority of his life as a heating/cooling ("HVAC") duct work installer. This work involves lifting duct work weighing as much as 150 pounds and requires plaintiff to work in cramped areas to install equipment for HVAC units. Prior to starting work with defendant in February 1999, plaintiff had not worked for ten years. Plaintiff had been receiving Social Security Disability benefits due to injuries he sustained at his prior job to his left arm and right shoulder and due to a right hip dislocation he suffered in a motorcycle accident. Plaintiff received

written clearance from the Social Security Administration before going back to work in February 1999.

On 3 August 1999, plaintiff was installing duct work in the attic of Rex's Gun Shop when his left boot slipped off of a 2 x 4 wooden stud. He fell and struck his left knee. Plaintiff had not experienced or complained of knee problems prior to this injury. The following day, plaintiff returned to work experiencing pain in his left knee and right hip. He was assigned to a job at the Bath and Body Shop. On this job, plaintiff aggravated the injuries from the previous day when he slipped on an attic sprinkler line. Plaintiff notified defendant verbally and by leaving a written note in the office of Mark Sawyer, defendant's vice president. Plaintiff left a telephone message that he was hurt and would be seeking medical attention. Plaintiff did not seek medical attention until a week later on 10 August 1999. During this period of time, Scarlet Laughter, defendant's director of personnel, repeatedly called plaintiff to advise him that company policy required him to schedule an examination with Western Carolina Occupational Health Center. An appointment was set for 10 August 1999 and plaintiff was seen by Dr. John B. Lange ("Dr. Lange"). Plaintiff was diagnosed with right hip and left knee contusions, given work restrictions, and told to return in a week.

On 23 August 1999, plaintiff went to Dr. Louis Schroeder ("Dr. Schroeder"), his personal physician. Dr. Schroeder noted that Plaintiff was not limping and that there were no other findings other than tenderness. Plaintiff returned to Western Carolina Occupational Health Center and was again seen by Dr. Lange. Dr. Lange prescribed Celebrex and continued the prior work restrictions for two weeks. Subsequently, plaintiff was examined by Dr. Jon Silver and Dr. Tally Eddings ("Dr. Eddings"). Dr. Eddings diagnosed plaintiff as having illotibial band friction syndrome. On 19 September 2000, Dr. James Lipsey ("Dr. Lipsey"), who in the past had examined plaintiff for his right hip condition, performed an independent medical examination. Dr. Lipsey found no evidence of significant injury to plaintiff's right hip attributable to his fall at work. Dr. Lipsey had no treatment recommendation for plaintiff's left knee injury.

After the initial medical examination by Western Carolina Occupational Health Center, defendant offered plaintiff light duty work. Plaintiff did not return to work or return phone calls regarding his return to work. Plaintiff was terminated. Plaintiff testified that he has not sought any type of work since his injury.

II. Issues

The issues are whether the Commission erred in: (1) ruling plaintiff was not disabled, (2) ruling plaintiff does not need further medical treatment, and (3) denying plaintiff disability benefits after finding plaintiff refused light duty employment.

III. Disability

In reviewing a decision of the Commission, an appellate court is limited to a consideration of whether competent evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Findings of fact by the Commission are conclusive upon appeal if supported by competent evidence, even though other evidence supports contrary findings. *Pittman v. International Paper Co.*, 132 N.C. App. 151, 156, 510 S.E.2d 705, 709 (1999). "The Commission's conclusions of law, however, are reviewed *de novo*." *Bailey v. Western Staff Servs.*, 151 N.C. App. 356, 359, 566 S.E.2d 509, 511 (2002).

The employee bears the burden of proving each and every element of compensability. *Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (1989). The employee can prove that he is disabled in one of four ways by production of: (1) medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) evidence that he is capable of some work, but has after a reasonable effort been unsuccessful in his efforts to obtain employment; (3) evidence that he 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) evidence that he has obtained other employment at a wage less than that earned prior to the injury. *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

[1] Plaintiff contends the Commission erred when it concluded that plaintiff failed to meet his burden of proving he was disabled under prong three of the *Russell* test. We disagree.

The Commission found no physician had prohibited plaintiff from working or had found that plaintiff could not work in any employment as a result of his knee and hip complaints. Dr. Lange never totally restricted plaintiff from work. Dr. Eddings did not find plaintiff to be totally disabled from any work. The Commission also found

that it would not be futile under prong three of the *Russell* test for plaintiff to have sought work.

Defendant offered expert evidence by Jane Veal, a vocational rehabilitation professional, who testified that an average person with some effort could have found suitable employment taking into account plaintiff's physical limitations. She specifically identified several jobs, including security guard positions, motel clerk, and forklift operators plaintiff was capable of performing if he had searched for work. The Commission also found plaintiff's testimony regarding his physical limitations was not credible and plaintiff only suffered minor injuries from his fall. The Commission's finding that a search for work would not be futile, as required by prong three of *Russell*, is supported by competent evidence. Plaintiff's assignment of error is overruled.

IV. Further Medical Treatment

[2] The Commission found that plaintiff was not in need of further medical treatment as a result of his injuries. Plaintiff contends competent medical evidence does not support this finding.

Dr. Lipsey examined plaintiff for his earlier hip injury and testified that any changes in plaintiff's hip condition were associated with a progression of his preexisting degenerative condition. Dr. Lipsey also testified that he "found no evidence of significant injury" related to plaintiff's 3 August 1999 accident. The Commission noted that Dr. Lipsey was in the best position to opine on plaintiff's hip condition as he was the only doctor who examined plaintiff before and after his 3 August 1999 accident.

The Commission also found plaintiff was not in need of further medical treatment as a result of his left knee contusions. Dr. Lipsey testified that no treatment recommendations were indicated for plaintiff's left knee condition and that no structural injuries to that knee were evident. The Commission's findings are supported by competent evidence. Plaintiff's second assignment of error is overruled.

V. Refusal of Light Duty Work

[3] Plaintiff's third assignment of error is that his disability payments could not be denied based on an alleged refusal of a "make work" job that was not available to the general public.

The Commission did not deny plaintiff disability compensation on these grounds. The Commission found plaintiff failed to meet his

burden of proving he was disabled irrespective of whether he refused an offer of suitable employment. The Commission's findings of fact that plaintiff failed to meet his burden of proving he was disabled is supported by competent evidence. We do not reach the merits of plaintiff's third assignment of error.

VI. Conclusion

The Commission's findings of fact and conclusions of law concerning plaintiff's failure to prove his disability and that he requires no further medical attention are supported by competent evidence in the record. We need not reach the merits of the denial of plaintiff's disability compensation due to his refusal of light duty work. The Opinion and Award of the Commission is affirmed.

Affirmed.

Judges WYNN and LEVINSON concur.

STATE OF NORTH CAROLINA v. ISAAC H. REYNOLDS

No. COA02-1510

(Filed 7 October 2003)

1. **Homicide— second-degree murder—failure to instruct on lesser-included charge of involuntary manslaughter**

The trial court erred in a second-degree murder case by failing to instruct the jury on involuntary manslaughter and the case is remanded for a new trial, because: (1) where the circumstances as described by defendant suggest that the victim was unintentionally killed with a deadly weapon during a physical struggle with defendant, the trial court should charge the jury on the offense of involuntary manslaughter; and (2) defendant in this case testified that he attempted to knock a loaded and cocked gun from the victim's hand, providing evidence from which a jury could find culpable negligence.

2. **Homicide— short-form murder indictment—constitutionality**

The use of a short-form murder indictment is constitutional and authorized by N.C.G.S. § 15-144.

Appeal by defendant from judgment entered 4 February 2002 by Judge Charles C. Lamm, Jr., in Alexander County Superior Court. Heard in the Court of Appeals 10 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the State.

Russell J. Hollers III for defendant appellant.

TIMMONS-GOODSON, Judge.

Isaac H. Reynolds ("defendant") appeals his conviction of the second degree murder of Heather Morgan ("Morgan"). For the reasons stated herein, we vacate defendant's conviction and remand the case for a new trial.

The State's evidence at trial tended to show the following. Defendant supplied Morgan with pain pills, alcohol, marijuana and crack. A month prior to Morgan's death, Morgan expressed her fear of defendant to numerous friends, family members, and co-workers. On at least one occasion, Morgan told her cousin that she believed defendant would kill her. On the day of Morgan's death, Morgan informed defendant that she would not accompany him on a trip. As she attempted to exit defendant's trailer, defendant shot Morgan in the chest.

Defendant's evidence at trial tended to show that Morgan pointed a gun at defendant and "cocked it." When defendant tried to knock the gun away, a "scuffle" ensued and the gun discharged into Morgan's chest, killing her.

At the close of the evidence, the trial court instructed the jury on the crimes of first degree murder, second degree murder, and voluntary manslaughter. The trial court further instructed on self-defense and accident. Defendant's request for an instruction on involuntary manslaughter was denied.

Defendant brings forth three assignments of error on appeal. Defendant argues that the trial court erred when it failed to: (1) instruct the jury on the offense of involuntary manslaughter; (2) strike a juror for cause; and (3) dismiss the case based on the State's use of the "short-form" murder indictment.

[1] The dispositive issue on appeal is whether the trial court erred by failing to instruct the jury on involuntary manslaughter where

defendant's evidence supported the instruction. We hold that the trial court committed error when it failed to so instruct the jury. Thus, we vacate defendant's conviction and remand the case for a new trial. As such, we do not address the merits of defendant's second assignment of error. Defendant's third assignment of error is without merit for the reasons addressed below.

The trial court must give a requested instruction, at least in substance, if a defendant requests it and the instruction is correct in law and supported by the evidence. *State v. Lamb*, 321 N.C. 633, 644, 365 S.E.2d 600, 605 (1988). In determining whether the evidence supports an instruction requested by a defendant, the evidence must be interpreted in the light most favorable to him. *State v. Ataei-Kachuei*, 68 N.C. App. 209, 212, 314 S.E.2d 751, 753 (1984). The trial judge making the decision must focus on the sufficiency of the evidence, not the credibility of the evidence. *Id.* Failure to give the requested instruction where required is a reversible error. *Ataei-Kachuei*, 68 N.C. App. at 214, 314 S.E.2d at 754.

Our Supreme Court has defined involuntary manslaughter as "the unlawful and unintentional killing of another human being, without malice, which proximately results from an unlawful act not amounting to a felony . . . or from an act or omission constituting culpable negligence." *State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983). Culpable negligence is defined as an act or omission suggesting a disregard for human rights and safety. *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E.2d 905, 917 (1978); *State v. Tidwell*, 112 N.C. App. 770, 774, 436 S.E.2d 922, 925 (1993).

There is no evidence that defendant killed Morgan while engaged in an unlawful act not amounting to a felony. Thus, to support an involuntary manslaughter instruction, defendant must present evidence that Morgan's death was the result of culpable negligence. *Tidwell*, 112 N.C. App. at 774, 436 S.E.2d at 925. The only evidence from which culpable negligence could be found was defendant's testimony that he knocked a "cocked" and loaded gun from Morgan's hand and struggled with her for control of the gun. Thus, we must decide whether such acts can constitute culpable negligence.

Our courts have addressed similar circumstances in at least two previous cases. In *State v. Wallace*, the State's evidence tended to show that the defendant shot his girlfriend, the decedent, in her home after she asked him to leave. 309 N.C. at 142, 305 S.E.2d at 550. The defendant testified that the decedent verbally threatened him and

started for a gun. *Wallace*, 309 N.C. at 143, 305 S.E.2d at 550. Defendant further testified that he grabbed the gun from decedent's hand and, while attempting to throw it across the room, the gun discharged into decedent, killing her. *Id.* At trial, the court refused defendant's request for an involuntary manslaughter instruction. *Wallace*, 309 N.C. at 145, 305 S.E.2d at 551. The jury was charged on second degree murder, voluntary manslaughter, self-defense and accident. *Id.* After the jury convicted the defendant of second degree murder, defendant appealed, arguing that the trial court erred when it failed to instruct the jury on involuntary manslaughter. *Id.* Our Supreme Court concluded that based on the defendant's testimony, the trial court was required to provide an involuntary manslaughter jury instruction. *Wallace*, 309 N.C. at 145-49, 305 S.E.2d at 551-54.

In a more recent Court of Appeals decision, *State v. Tidwell*, the State's evidence tended to show that the defendant reached for a gun in an attempt to prevent the decedent from committing suicide, but during the struggle, the gun discharged and killed decedent. 112 N.C. App. at 774-75, 436 S.E.2d at 925. The defendant's request for an involuntary manslaughter jury instruction was denied. *Tidwell*, 112 N.C. App. at 774, 436 S.E.2d at 925. On appeal to this Court, we concluded that the trial court's failure to provide the requested involuntary manslaughter jury instruction was prejudicial error. *Tidwell*, 112 N.C. App. at 776, 436 S.E.2d at 927. Where the circumstances as described by the defendant suggest "that the victim was unintentionally killed with a deadly weapon during a physical struggle with the defendant, the trial court should charge the jury on the offense of involuntary manslaughter." *Tidwell*, 112 N.C. App. at 775, 436 S.E.2d at 926.

Defendant testified that he attempted to knock a loaded and "cocked" gun from Morgan's hand, which is similar behavior to that alleged in *Wallace*. 309 N.C. at 143, 305 S.E.2d at 550. Defendant further testified that he began to "scuffle" with Morgan for control of the gun, alleging similar behavior as that in *Tidwell*. 112 N.C. App. at 775, 436 S.E.2d at 925. Based on *Wallace* and *Tidwell*, this Court concludes that there was sufficient evidence presented from which a jury could find culpable negligence. Thus, defendant's evidence regarding Morgan's unintentional death required the trial court to instruct the jury on involuntary manslaughter.

In light of the prejudicial error by the trial court, we hold defendant is entitled to a new trial.

[2] Defendant's third assignment of error argues that the State's use of the "short-form" murder indictment denied defendant the due process, equal protection, notice and fair trial rights guaranteed him by the United States Constitution and the North Carolina Constitution. However, defendant acknowledged that the short-form murder indictment is authorized by N.C. Gen. Stat. § 15-144 (2001). We further note that the constitutionality of the short-form murder indictment has been upheld by the North Carolina Supreme Court. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000). Thus, we hold accordingly.

Vacate and Remand for New Trial.

Judges HUDSON and ELMORE concur.

TIBER HOLDING CORPORATION, REGIS INSURANCE COMPANY, AND CHARTER CAPITAL CORPORATION, PLAINTIFFS v. MICHAEL J. DiLORETO AND WIFE, CAMILLE DiLORETO, DEFENDANTS

No. COA02-1389

(Filed 7 October 2003)

Appeal and Error— preservation of issues—directed verdict and j.n.o.v.—issues not raised

The trial court did not err by denying plaintiff's motion for judgment n.o.v. in an action arising from the allegedly fraudulent transfer of property. Plaintiffs are procedurally precluded from making the evidentiary showing necessary to set aside the jury verdict for defendant because they did not raise at trial the issues upon which they now rely.

Appeal by plaintiffs from judgment filed 5 March 2002 and from order filed 26 April 2002 by Judge Quentin T. Sumner in Currituck County Superior Court. Heard in the Court of Appeals 21 August 2003.

Poyner & Spruill LLP, by J. Nicholas Ellis, for plaintiff-appellants.

Hornthal, Riley, Ellis & Maland, L.L.P., by L.P. Hornthal, Jr., for defendant-appellees.

BRYANT, Judge.

Tiber Holding Corporation, Regis Insurance Company, and Charter Capital Corporation (collectively plaintiffs) appeal a judgment entered 5 March 2002 in favor of defendants Michael J. DiLoreto and his wife Camille DiLoreto and an order entered 26 April 2002 denying plaintiffs' motion for a judgment notwithstanding the verdict and a new trial.

On 30 September 1999, plaintiffs filed a complaint against defendants alleging they had been damaged by a fraudulent transfer of certain property by Mr. DiLoreto to himself and his wife as tenants by the entirety. In April 1996, plaintiffs had obtained a large monetary judgment against Mr. DiLoreto for wrongful conversion, fraud, and breach of fiduciary duty. On 21 November 1996, a date prior to the execution of this judgment, Mr. DiLoreto conveyed real property previously titled solely in his name to himself and his wife as tenants by the entirety. When this case went to trial, Mrs. DiLoreto testified that when the real property in question was bought in 1987, she believed herself to be a joint owner. It was only at a meeting with their attorney to discuss the preparation of wills in April 1996 that Mrs. DiLoreto discovered the property was titled only to her husband. According to Mrs. DiLoreto, Mr. DiLoreto's subsequent conveyance of the property to himself and his wife was a correction of this error.

At the close of the evidence, plaintiffs moved the trial court for a directed verdict. The motion was based on plaintiffs' contention that (1) "no value ha[d] been paid" for the 21 November 1996 transfer and (2) Mrs. DiLoreto had notice at the time of the transfer that the property was titled solely in her husband's name and that her husband was subject to a lawsuit by plaintiffs. The trial court denied plaintiffs' motion, and the case was submitted to the jury for deliberations. The jury subsequently returned a verdict finding that: (1) when Mr. DiLoreto transferred the subject property to himself and his wife, he retained sufficient assets to pay his existing creditors;[1] (2) the transfer did not constitute a voluntary conveyance; (3) Mr. DiLoreto did not transfer the property with the intent to hinder, delay, or defraud his creditors; and (4) Mrs. DiLoreto did not participate in or have actual knowledge of a purpose and intent to delay, hinder, or defraud her husband's creditors. Following the entry of judgment on 5 March 2002 denying plaintiffs' claim, plaintiffs filed a motion, on 8 March

1. These assets included Mr. DiLoreto's twenty-three percent stock ownership in Tiber Holding Corporation.

2002, for judgment notwithstanding the verdict and, alternatively, a new trial contending that the uncontroverted evidence was contrary to the jury's answers on all four issues to be decided. The trial court denied the motion.

The dispositive issue is whether plaintiffs have preserved for appeal the question of the sufficiency of the evidence for purposes of establishing a fraudulent conveyance.

The law of fraudulent conveyances in North Carolina in 1996, the time Mr. DiLoreto made the transfer in question, is set forth in *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914). In *Aman*, our Supreme Court listed three separate principles[2] under which a conveyance would be classified as fraudulent: (1) "[i]f the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing"; (2) "[i]f the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, . . . although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained"; and (3) "[i]f the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee* or of which he has notice." *Id.* at 227, 81 S.E. at 164.

In their brief to this Court, plaintiffs contend the trial court erred in denying their post-verdict motion because the evidence established that the transfer was not "upon valuable consideration," *id.*, and was therefore a voluntary conveyance. Plaintiffs then proceed to explain why under the two principles for voluntary conveyances, the evidence was also undisputed on the issue of Mr. DiLoreto's intent to defraud and his failure to retain sufficient property to pay his debts. Thus, according to plaintiffs, the trial court should have ruled as a matter of law that the transfer by Mr. DiLoreto was fraudulent under the first two principles in *Aman*.[3]

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2. *Aman* actually lists five principles; however, two of those address what is not a fraudulent conveyance. *Aman*, 165 N.C. at 227, 81 S.E. at 164.

3. In their brief, plaintiffs also argue that the evidence was clear that Mrs. DiLoreto participated in and had knowledge of her husband's scheme to delay, hinder, or defraud his creditors, an element of the third *Aman* principle, but continue to insist that Mrs. DiLoreto "had not paid anything of value to [her husband] for the transfer." Since principle 3 only applies to a "conveyance [based] upon a valuable consideration," we therefore do not address this argument. *See Aman*, 165 N.C. at 227, 81 S.E. at 164.

This argument is without merit for the simple reason that plaintiffs cannot rely on principles 1 and 2 on appeal when they based their motion for a directed verdict only on one element contained in those principles, i.e. a lack of valuable consideration, and an element only relevant to principle 3, i.e. Mrs. DiLoreto's notice of the titling of the property and the lawsuit against her husband. *See Broyhill v. Coppage*, 79 N.C. App. 221, 225, 339 S.E.2d 32, 36 (1986) ("[a] motion for directed verdict must state the grounds therefor . . . and grounds not asserted in the trial court may not be asserted on appeal"); *see also Smith v. Carolina Coach Co.*, 120 N.C. App. 106, 114, 461 S.E.2d 362, 367 (1995); *Lee v. Tire Co.*, 40 N.C. App. 150, 156, 252 S.E.2d 252, 256-57 (1979) (" '[a] motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus the movant cannot assert grounds not included in the motion for directed verdict' ") (citation omitted). As to the elements of principles 1 and 2 that went unchallenged by the motion for directed verdict, the jury found that Mr. DiLoreto did not intend to hinder, delay, or defraud his creditors and that he retained sufficient property to pay his creditors. Accordingly, we are bound by the jury's verdict as to these issues, and plaintiffs are procedurally precluded from making the evidentiary showing necessary to set aside the jury verdict or to justify a new trial. *See Lee v. Rice*, 154 N.C. App. 471, 474, 572 S.E.2d 219, 221 (2002) ("[a] motion for a directed verdict tests the legal sufficiency of the evidence").

Affirmed.

Judges McGEE and GEER concur.

IN RE: ORE, A MINOR CHILD, DOB: 3/10/97, ESTER ORTIZ LECHUGA, PETITIONER V. ALETA REGINA ORE, RESPONDENT

No. COA03-73

(Filed 7 October 2003)

Termination of Parental Rights— neglect—impairment

The trial court did not err by terminating respondent mother's parental rights under N.C.G.S. § 7B-1111(a)(1) on the basis of neglect in a case where petitioner paternal grandmother

filed for the termination of respondent's parental rights, because: (1) N.C.G.S. § 7B-1103(a)(5) grants the authority to petition for termination of parental rights to any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion, and the minor child in this case has lived with petitioner for the two years next preceding filing the motion; (2) nothing supports respondent's assertion that termination on the basis of neglect is appropriate only when a child has been taken from a parent due to neglect; (3) respondent rarely visited with her child, despite having the right to weekly supervised visitation; (4) respondent spoke to her child on the phone only after calling petitioner to ask for money and petitioner requested she speak with the child; (5) respondent's attempts to visit with the child were often made at inappropriate times; and (6) an express finding of fact regarding the impairment of the minor child is not required where the evidence supports such a finding, and respondent continuously failed to parent or even maintain contact with her child.

Appeal by respondent from order entered 10 October 2002 by Judge William M. Neely in Randolph County District Court. Heard in the Court of Appeals 11 September 2003.

Scott N. Dunn, for petitioner-appellee.

Rebekah W. Davis, for respondent-appellant.

CALABRIA, Judge.

Aleta Regina Ore ("respondent") appeals the 10 October 2002 order terminating her parental rights. We affirm the order of the trial court terminating respondent's parental rights on the basis of neglect.

The child was born on 10 March 1997. In 1998, her father was granted custody, which he maintained until his death in 1999. Thereafter, on 20 April 2000, the child's paternal grandmother, Ester Ortiz Lechuga ("petitioner") was awarded temporary custody of the minor child. On 18 October 2000, petitioner was awarded permanent custody of the minor child, and respondent was awarded weekly supervised visitation. On 15 May 2002, petitioner filed for termination of respondent's parental rights. The hearing was held on 22 August 2002, and although respondent did not attend, she was represented by counsel. Respondent asserts the court erred in finding,

inter alia, petitioner neglected the child within the meaning of N.C. Gen. Stat. § 7B-101, and improperly terminated her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1). We disagree and affirm the order of the trial court.

Respondent asserts: (1) termination on the basis of neglect applies only when the child has been removed from the parent's custody by the Department of Social Services; (2) petitioner failed to prove she neglected the child; (3) petitioner failed to prove the child was impaired or there was a substantial risk of impairment due to neglect, and therefore the court erred in terminating respondent's parental rights.

First, the plain language of the statute grants the authority to petition for termination of parental rights to "[a]ny person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion." N.C. Gen. Stat. § 7B-1103(a)(5) (2001). Since the minor child lived with petitioner for the two years next preceding filing the motion, she was a proper person to file the petition. The statute thereafter provides the grounds for terminating parental rights. N.C. Gen. Stat. § 7B-1111 (2001). One basis for termination is finding the parent has neglected the juvenile. N.C. Gen. Stat. § 7B-1111(a)(1). Nothing in the language of the statute supports respondent's assertion that termination on the basis of neglect is appropriate only when "a child has been taken from a parent due to neglect." While the most common application of termination on the basis of neglect may arise after a child is removed from a parent's custody on this basis, we find no support for respondent's argument that the trial court improperly failed to limit the statute's application.

Second, respondent asserts petitioner failed to prove she neglected the child. A neglected juvenile is "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent. . . ." N.C. Gen. Stat. § 7B-101(15) (2001). The trial court found as fact respondent rarely visited with her child, despite having the right to weekly supervised visitation. She spoke to her child on the phone only after calling petitioner to ask for money and petitioner requested she speak with the child. Moreover, respondent's attempts to visit with the child were often made at inappropriate times; for example four days before the hearing, respondent arrived at petitioner's door at 12:30 a.m. demanding money and visitation with the child. Through this lack of contact, the court found "[r]espondent has neglected the minor child in that she has not provided any parental

guidance, personal contact, love or custodial /spiritual support for at least six (6) months prior to the filing of this petition. . . ." Respondent argues her actions do not constitute neglect because "[i]nfrequent visitation is not neglect" nor is failure to provide " 'parental guidance, personal contact, love or custodial/ spiritual support.' " We disagree. As we have previously explained:

> 'Neglect may be manifested in ways less tangible than failure to provide physical necessities. Therefore, on the question of neglect, the trial judge may consider, in addition, a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship.'

In re Pierce, 67 N.C. App. 257, 263, 312 S.E.2d 900, 904 (1984) (quoting *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982)). The trial court in the case at bar considered the parental relationship and found the child was neglected. We do not discern error.

Finally, respondent asserts the trial court erred in terminating her parental rights without finding the child was impaired, or there was a substantial risk of impairment, by her neglect. To prove neglect in a termination case, there must be clear, cogent and convincing evidence of (1) neglect and (2) as a consequence of the neglect, "the juvenile has sustained 'some physical, mental, or emotional impairment . . . or [there is] a substantial risk of such impairment. . . .' " *In re Reyes*, 136 N.C. App. 812, 815, 526 S.E.2d 499, 501 (2000) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)). In the case at bar, the court did not make any findings of fact regarding the impairment prong, but this Court previously reasoned that an express finding of fact regarding impairment is not required where the evidence supports such a finding. *Safriet*, 112 N.C. App. at 753, 436 S.E.2d at 902. In the case at bar, the court found that respondent had failed to parent, or even maintain contact with, the child. Moreover, the court found respondent's neglectful behavior was likely to continue for the foreseeable future because "[r]espondent has a history of being incarcerated for various criminal offenses as well as a long history of substance abuse and failure to address those problems with necessary treatment. . . ." Finally, the court added that "these incapabilities of being capable to provide for proper care and supervision will continue for the foreseeable future." These facts demonstrate not only neglect, but also that the minor child was at a substantial risk of impairment due to the neglect. Accordingly, defendant's assignment of error is overruled.

Since the termination of respondent's parental rights was proper on the basis of neglect, and a valid finding on one of the grounds for termination provided in the statute is "sufficient to support an order terminating parental rights[,]" we need not address respondent's remaining assignments of error. *In re Williamson*, 91 N.C. App. 668, 678, 373 S.E.2d 317, 322-23 (1988).

Affirmed.

Judges McGEE and HUNTER concur.

CECIL BARNES, PLAINTIFF v. ST. ROSE CHURCH OF CHRIST, DISCIPLES OF CHRIST, AN UNINCORPRATED RELIGIOUS ASSOCIATION; DAMEION ROYAL, INDIVIDUALLY AND AS PASTOR OF ST. ROSE CHURCH OF CHRIST, DISCIPLES OF CHRIST; LESLIE ARTIS, WILLIAM SMITH, CURTIS BEST, ANDREW McINTOSH, AND ROSETTA BARNES IN THEIR CAPACITY AS TRUSTEES OF AND FOR ST. ROSE CHURCH OF CHRIST, DISCIPLES OF CHRIST, AN UNINCORPORATED RELIGIOUS ASSOCIATION AND ST. ROSE CHURCH OF CHRIST, DISCIPLES OF CHRIST, INC., A NORTH CAROLINA NONPROFIT CORPORATION AND DAMEION ROYAL, INDIVIDUALLY AND IN THE CAPACITY OF PASTOR AND PURPORTED CHIEF EXECUTIVE OFFICER OF ST. ROSE CHURCH OF CHRIST, DISCIPLES OF CHRIST, DEFENDANTS

No. COA02-1482

(Filed 7 October 2003)

Appeal and Error— appealability—preliminary injunction—substantial right not affected

The appeal of a preliminary injunction was dismissed as interlocutory where the dispute involved the legal status of a church and the transfer of its assets, and the court's order placed the assets of the church and its day-to-day finances in the hands of a neutral party until the litigation could be completed. Defendants lost no substantial right.

Appeal by defendants from orders entered 13 September 2002 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 27 August 2003.

Davis Bibbs & Smith, P.L.L.C., by David C. Smith and Mark L. Bibbs, for plaintiff-appellee.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr. and M. Greg Crumpler, for defendant-appellants.

HUNTER, Judge.

St. Rose Church of Christ, Disciples of Christ, Dameion Royal, Leslie Artis, William Smith, Curtis Best, Andrew McIntosh, Rosetta Barnes, and St. Rose Church of Christ, Disciples of Christ, Inc. (collectively "defendants") appeal from (A) a preliminary injunction filed 13 September 2002 freezing the assets of St. Rose Church of Christ, Disciples of Christ ("the church") and appointing a receiver to handle the financial affairs of the church, and (B) an order filed 13 September 2002 granting the receiver specific powers to administer the church's financial affairs. We conclude this appeal is interlocutory and does not affect a substantial right of the parties. Accordingly, this appeal is dismissed.

On 19 August 2002, Cecil Barnes ("plaintiff") filed a complaint alleging that defendant Dameion Royal ("Royal"), the pastor of the church, had converted the legal status of the church from an unincorporated religious association ("the association") to a non-profit corporation without proper authorization. The complaint further alleged that following the conversion to a non-profit corporation, assets of the association were transferred to corporate accounts in breach of Royal's fiduciary duty as an agent of the association. Plaintiff requested that the trial court enjoin the transfer of assets and appoint a receiver to manage the church's finances and assets.

A preliminary injunction is an interlocutory order, *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 466, 556 S.E.2d 331, 334 (2001), as is an order appointing a receiver during litigation, *Lowder v. All Star Mills*, 309 N.C. 695, 701, 309 S.E.2d 193, 198 (1983). "An appeal of an interlocutory order will not lie to an appellate court unless the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Southern Uniform Rentals v. Iowa Nat'l Mutual Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988). "[T]he determination of whether a substantial right is involved in the appeal depends on whether that right is one which will be lost or irremediably and adversely affected if the order is not reviewed before final judgment." *Id.* In order to resolve the question of the existence of a substantial right it is usually necessary to consider the particular facts of a case and the procedural context in which the interlocutory order arose. *See Wade S. Dunbar Ins. Agency, Inc.*, 147 N.C. App. at 466, 556 S.E.2d at 334. A two-part test has emerged to decide if an immediate appeal of an interlocutory order is warranted: " 'the right itself must be substantial and the deprivation of that substantial right

must potentially work injury . . . if not corrected before appeal from final judgment.' " *Action Cmty. Television Broadcasting Network, Inc. v. Livesay*, 151 N.C. App. 125, 129, 564 S.E.2d 566, 569 (2002) (quoting *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)).

In this case, defendants note several effects of the preliminary injunction and generally argue that the appointment of a receiver prevents them from conducting their own business. Assuming that the trial court's interlocutory orders do involve a substantial right by preventing defendants from conducting their own business, defendants have failed to show that the preliminary injunction and appointment of the receiver will potentially result in any harm. In fact, the orders themselves are designed to maintain the *status quo* of the church's finances during this litigation by placing the assets of the church and control of the day to day finances in the hands of a neutral party until this litigation involving control of those assets and finances is completed. *See Stancil v. Stancil*, 94 N.C. App. 760, 763-64, 381 S.E.2d 720, 722-23 (1989) (order requiring bond to be posted, in lieu of a receiver, clearly designed to protect the *status quo* of the parties was interlocutory and did not affect a substantial right).

The order specifying the powers of the receiver authorizes the receiver to pay the ordinary operating expenses of the church as well as salary and a housing allowance for Royal, prohibits the church from incurring new liabilities, and allows the receiver to continue the collection of donations. Thus, the day to day operation of the church is not halted by the trial court's orders, and the effect of the orders is to prevent removal of the church's assets prior to a determination of which entity and set of bylaws properly controls the affairs of the church in order to prevent any potential harm to the assets of the church. Therefore, there is no substantial right of defendants that will be lost or irremediably and adversely affected prior to a determination on the merits. Accordingly this appeal is dismissed as interlocutory and not affecting a substantial right.

Dismissed.

Judges TIMMONS-GOODSON and ELMORE concur.

STATE OF NORTH CAROLINA v. SHERRY ELAINE ROACHE HALL, DEFENDANT

No. COA02-1552

(Filed 7 October 2003)

Probation and Parole— revocation—after expiration of probation period

A judgment was arrested where the court attempted to revoke defendant's probation after the probation period expired without findings or evidence of a reasonable effort to conduct the hearing earlier. N.C.G.S. § 15A-1344(f).

Appeal by defendant from judgment entered 19 August 2002 by Judge Zoro J. Guice in Superior Court, Polk County. Heard in the Court of Appeals 16 September 2003.

Attorney General Roy Cooper, by Associate Attorney General Wendy L. Greene, for the State.

Leslie C. Rawls for the defendant-appellant.

WYNN, Judge.

Under *State v. Camp*, 299 N.C. 524, 528, 263 S.E.2d 592, 594-95 (1980), to revoke a defendant's probation after the period of probation has expired, the trial court must find "that the State had 'made reasonable effort . . . to conduct the hearing earlier.' " (citing N.C. Gen. Stat. § 15A-1344(f))[1]. In this case, although defendant's probation period ended on 17 May 2002, the trial court conducted a hearing on 19 August 2002—after the expiration of defendant's period of probation and suspension. Because the record shows that the trial court did not make any findings (nor is there evidence in the record to support such findings) that the State made reasonable effort to

1. N.C. Gen. Stat. § 15A-1344(f) provides:

Revocation after Period of Probation.—The court may revoke probation after the expiration of the period of probation if:

(1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and

(2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

conduct the hearing earlier, we are compelled by *State v. Camp* to hold that "jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment against defendant." *Id.* Accordingly, as in *Camp*, the judgment appealed from is arrested and defendant is discharged.

Judgment arrested.

Judges TYSON and LEVINSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

AITON v. LENG No. 02-1339	Buncombe (99CVD5042)	Affirmed
AITON v. LENG No. 02-1709	Buncombe (99CVD5042)	Remanded
BLACK v. BLACK No. 02-1441	Guilford (00CVD7855)	Affirmed
CAMP v. KIMBERLY-CLARK CORP. No. 01-68	Ind. Comm. (I.C. 686290)	Affirmed in part and remanded in part
CAROLINA TEL. & TEL. CO. v. INDUSTRIIAL POWER & LIGHTING, INC. No. 02-1360	Pender (01CVS774)	Reversed and remanded
CLARK v. DIVISION OF SOCIAL SERVS. No. 02-1278	Wake (01CVS5243)	Affirmed
HURLEY v. LEACH No. 02-1255	Rowan (02CVS23)	Affirmed
IN RE BARBOSA No. 02-736	Buncombe (01J202)	Vacated and remanded
IN RE BIKMAN No. 02-1463	Buncombe (01J124)	Affirmed
IN RE BOYD No. 03-226	Mecklenburg (02J812)	Appeal dismissed
IN RE BROWN No. 02-901	Rowan (00J194) (00J195)	Affirmed
IN RE HOLMAN No. 03-167	Rowan (00J315)	Affirmed
LAHRMER v. NORRIS No. 02-1511	Rutherford (02CVS372)	Affirmed
NORTON v. STILLS No. 02-1437	Madison (99SP19)	Affirmed
STATE v. BYRD No. 02-1541	Cumberland (00CRS57640)	No error
STATE v. DIXON No. 02-1635	Forsyth (01CRS54853)	Affirmed
STATE v. HARPER No. 02-1573	Craven (01CRS7463) (01CRS50765)	No error

STATE v. JOHNSON No. 02-1687	Wake (02CRS14384) (02CRS37574)	Dismissed
STATE v. JOHNSON No. 03-296	Forsyth (02CRS10439) (02CRS52947)	No error
STATE v. LEATHERWOOD No. 02-1467	Haywood (00CRS3299) (00CRS3644) (00CRS3896) (00CRS5250)	No error in trial; remanded for resentencing
STATE v. LOCKLEAR No. 02-1676	Robeson (97CRS23688) (97CRS23689) (97CRS23690)	No error
STATE v. McEACHERN No. 02-1711	Cumberland (01CRS52631)	No error
STATE v. PAYNE No. 02-1199	Forsyth (01CRS57464)	Affirmed
STATE v. RORIE No. 02-1555	Cleveland (01CRS53720) (01CRS53721) (01CRS53722) (02CRS77)	No error
STATE v. ROYSTER No. 03-135	Wake (01CRS96051)	No error
STATE v. RUFFIN No. 02-1651	Bertie (01CRS50635)	No error
STATE v. STANLEY No. 02-1630	Brunswick (01CRS6486) (02CRS740)	No error
STATE v. TUCKER No. 03-313	Polk (99CRS440)	New trial
STATE v. URIBE No. 02-1523	Columbus (01CRS53343)	No error
STATE v. WILLIAMS No. 02-1370	Pitt (01CRS62293)	Affirmed
STATE v. WOODCOCK No. 03-20	Wake (01CRS68313)	No error
WAGNER v. WRH MORTGAGE, INC. No. 02-1440	Forsyth (01CVS9133)	Affirmed

MATTHEWS v. CITY OF RALEIGH

[160 N.C. App. 597 (2003)]

HARRY DOUG MATTHEWS, EMPLOYEE, PLAINTIFF v. CITY OF RALEIGH, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA02-1550

(Filed 21 October 2003)

1. Workers' Compensation— occupational disease—toxic encephalopathy

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff auto body repairman suffered a compensable occupational disease based on his exposure to isocyanates while painting cars which contributed to his toxic encephalopathy, because: (1) the evidence supports the Commission's finding that plaintiff had a greater exposure to isocyanates and other toxic chemicals than does the general nonspraypainting public; (2) the record contains competent evidence of the amount of exposure posited in the hypothetical questions answered by two experts, and reliance on their estimate was not improper; (3) there was competent evidence of the toxins to which plaintiff was exposed, the dangers posed by these particular chemicals, and the extent of plaintiff's exposure; and (4) there was testimony regarding relevant medical literature.

2. Workers' Compensation— causation—medical evidence—lung disease

The Industrial Commission did not err in a workers' compensation case by concluding there was competent medical evidence that plaintiff auto body repairman's exposure to workplace chemicals including paint caused or significantly contributed to his lung disease, because: (1) plaintiff demonstrated a greater exposure than the general public to isocyanates and other toxic chemicals released during spraypainting; (2) plaintiff presented competent medical evidence that his employment placed him at a greater risk of developing lung disease than the general public; (3) the Commission's findings of fact demonstrated sufficient consideration of the extent of exposure during employment, the extent of exposure outside employment, and absence of the disease prior to the work-related exposure as shown by the employee's medical history; and (4) the Commission was free to believe an expert witness's diagnosis while rejecting that same expert's testimony on causation where the evidence was conflicting.

3. Workers' Compensation— total disability—wage earning capacity

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff auto body repairman was totally disabled, because: (1) plaintiff was limited by lack of education, neurological and cognitive damage, and inability to sustain the degree of attention necessary to hold a job; (2) the Court of Appeals has approved methods of proof other than medical evidence to show that an employee has lost wage earning capacity; and (3) the record contains competent evidence from a doctor to the effect that plaintiff is totally disabled.

Appeal by defendant from opinion and award entered 24 July 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 September 2003.

Teague, Campbell, Dennis & Gorham, L.L.P., by Robert C. Kerner, Jr., for defendant-appellant.

Law Office of Leonard Jernigan, by Leonard T. Jernigan, Jr., N. Victor Farah, and Lauren R. Trustman, for plaintiff-appellee.

LEVINSON, Judge.

Defendant (City of Raleigh) appeals from an Opinion of the Industrial Commission (Commission) awarding plaintiff (Harry Matthews) medical benefits and permanent total disability. We affirm the Industrial Commission.

The evidence before the Commission is briefly summarized as follows: Plaintiff was born in 1945 and has a seventh grade education. He worked for defendant as an auto paint and body repairman from 1975 to 1996, a period of twenty-one years. Throughout his employment with defendant, plaintiff worked at the same location, a two-car garage with attached paint room. His tasks included repainting city vehicles after they were repaired, using spray paint. At the hearing, plaintiff testified that he painted an average of two cars a week.

When plaintiff started working for defendant in 1975, he was thirty years old, married, and in good health. In 1982, after working for defendant for seven years, plaintiff experienced severe breathing problems and was admitted to Johnston Memorial Hospital, in Smithfield. He was also admitted to Duke University Hospital several

times during 1982, where he was treated for respiratory difficulties by Dr. Herbert Saltzman, a pulmonary specialist. As part of this treatment, Dr. Saltzman requested samples of the paint products plaintiff used at work. When plaintiff was released from Duke Hospital, Dr. Saltzman's discharge summary stated that plaintiff "works in a paint and body shop where he is heavily exposed to paint vapors[,]" and advised that "[i]t is important that this patient no longer be exposed to . . . noxious fumes . . . includ[ing] Isocyanate vapor[.]" Plaintiff stopped painting cars for the first three months after he returned to work, but subsequently resumed painting. However, in an effort to spare plaintiff further health problems, his coworker, Vernon Cummings, did more of the painting than plaintiff.

In the early 1980's, plaintiff began experiencing significant psychological and cognitive problems, including memory loss, inability to concentrate, and difficulty conducting his everyday affairs. He was treated by several physicians, including Dr. Mark Williams. Dr. Williams diagnosed toxic encephalopathy, a brain disorder caused by exposure to an external toxin source. Plaintiff continued to work for defendant until 1996. On 5 May 1998, he filed a claim for workers' compensation benefits, which defendant denied. Following a hearing on 27 March 2000, a deputy commissioner of the Industrial Commission issued an opinion denying plaintiff's claim on 12 July 2001. Plaintiff appealed, and the case was reviewed by the Full Commission on 23 January 2002. The Commission reversed the deputy commissioner and issued an Opinion and Award in favor of plaintiff on 24 July 2002. The Commission's opinion concluded that plaintiff suffered from toxic encephalopathy caused by long term exposure to chemicals associated with auto painting, such as diisocyanates. The Commission further concluded that plaintiff's toxic encephalopathy was an occupational disease, and that he was totally disabled. The Commission awarded plaintiff medical benefits and permanent total disability compensation. From this opinion and award, defendant appeals.

Standard of Review

Upon appeal from an opinion of the Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Thus, in its review of a workers' compensation claim, 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.' " *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)). Further, "evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* (citation omitted). Findings of fact made by the Industrial Commission "are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Murray v. Associated Insurers, Inc.*, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995) (citing *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981)). Moreover:

> "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." . . . [T]he Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible.

Deese, 352 N.C. at 115, 116, 530 S.E.2d at 553 (quoting *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274).

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[1] Defendant presents three arguments on appeal. Defendant argues first that the Commission erred in its conclusion that plaintiff had suffered a compensable occupational disease. Specifically, defendant contends that the record contains "no competent medical evidence" to support the Commission's findings and conclusions regarding plaintiff's exposure to isocyanates and whether his exposure caused or significantly contributed to his toxic encephalopathy. We disagree.

N.C.G.S. § 97-53 (2001), which lists various compensable occupational diseases, does not include toxic encephalopathy among these. However, pursuant to N.C.G.S. § 97-53(13) (2001), a disease not listed in the statute may nonetheless be compensable if the plaintiff shows that:

> (1) [the disease is] characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) [the disease is] not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)).

Notwithstanding "the overriding legislative goal of providing comprehensive coverage for occupational diseases," *Booker v. Medical Center*, 297 N.C. 458, 471, 256 S.E.2d 189, 198 (1979), the plaintiff has the burden of proof on all three elements of the *Rutledge* test. *Keel v. H & V Inc.*, 107 N.C. App. 536, 539, 421 S.E.2d 362, 365 (1992). "The first two elements of the *Rutledge* test are satisfied where the claimant can show that 'the employment exposed the worker to a greater risk of contracting the disease than the public generally.' " *Robbins v. Wake Cty. Bd. of Educ.*, 151 N.C. App. 518, 521, 566 S.E.2d 139, 142 (2002) (quoting *Rutledge*, 308 N.C. at 94, 301 S.E.2d at 365).

"The third element of the test is satisfied if the employment 'significantly contributed to, or was a significant causal factor in, the disease's development.' " *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371 (quoting *Rutledge*, 308 N.C. at 101, 301 S.E.2d at 369-70), *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). "Significant [exposure] is to be contrasted with [exposure that is] negligible, unimportant, . . . miniscule, or of little moment." *Rutledge*, 308 N.C. at 102, 301 S.E.2d at 370. Thus, "[w]orkplace exposure is a significant factor if without the exposure 'the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.' " *Keel*, 107 N.C. App. at 539, 421 S.E.2d at 365 (quoting *Gay v. J. P. Stevens & Co.*, 79 N.C. App. 324, 330, 339 S.E.2d 490, 494 (1986)).

In its evaluation of the third element—the causal connection between plaintiff's employment and his developing an occupational disease—the Industrial Commission may consider circumstantial evidence:

> In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation must of necessity be based on circumstantial evidence. Among the circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history.

Booker, 297 N.C. at 476, 256 S.E.2d at 200. Additionally, the Commission is not restricted to medical evidence in its determination of whether plaintiff's exposure to a disease-causing agent at work significantly contributed to his contracting the disease:

> In determining whether a claimant's exposure to [a harmful agent] has significantly contributed to, or been a significant causative factor in, [occupational] disease, the *Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony.*

Harvey v. Raleigh Police Dept., 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (quoting *Rutledge*, 308 N.C. at 105, 301 S.E.2d at 372), *disc. review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989). In the instant case, defendant concedes that there was evidence of plaintiff's exposure to paint and solvents. Defendant, however, contends that plaintiff failed to prove any "significant" exposure to toxic chemicals and fumes, and argues that the evidence showed only "very limited" exposure to the relevant chemicals. On this basis, defendant asserts that the Industrial Commission's reliance on the medical opinions of Drs. Mason and Williams was "improper." We disagree. The Industrial Commission's findings of fact included, in pertinent part, the following:

> 1. Plaintiff, born January 5, 1945, has a seventh grade education. Plaintiff was employed by the City of Raleigh as an auto body repairman between November 5, 1975 and May 3, 1996. Plaintiffs job . . . included . . . painting of all or portions of the vehicles.
>
> 2. Plaintiff was in good health and had no breathing problems when he began working for defendant. . . .
>
> 3. The painting room was approximately 40 feet by 60 feet[.] . . . The only ventilation in the paint booth when Plaintiff began work with defendant was "a big stack going up through the roof like a chimney." Plaintiff would use a paint gun that . . . "just blows the paint."
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> 4. Plaintiff painted approximately two cars per week. Each car would require three coats of paint with each coat taking approximately 20 to 30 minutes to apply. . . .
>
> 5. . . . [B]etween 1975 and 1981, painting would sometimes be done in the body shop[.] . . . There was no ventilation in the body shop area until sometime in 1981 or 1982 . . .

6. Plaintiff wore a mask that covered the nose and mouth when painting. Plaintiff testified to having continuous trouble with the mask slipping around his nose and allowing the paint fumes to enter the mask. . . .

7. Plaintiff also had exposure to the paint on the remainder of the face that was not covered by the mask. In the summer months . . . plaintiff would work in short-sleeve shirts which left his hands and arms exposed to the paint. . . .

8. Plaintiff was exposed to paints and solvents, including DXR80, a urethane hardener made by PPG which mixes with the paint to make it harder and more durable. Plaintiff also used Sherwin-Williams product V6V241, a medium solids hardener.

9. . . . In 1995, defendant provided a full-face mask that supplied fresh air while you paint.

10. Plaintiff first noticed he was having memory problems in 1988 or 1989[.] . . . Plaintiff's wife testified that plaintiff had never had breathing problems prior to working with defendant and that plaintiff began to get forgetful and confused at times in the early 1980's. . . . [S]he could tell when he had been painting at work by the paint smell on his clothes and the smell of paint fumes on his breath when he exhaled. Plaintiff would have a foggy blue tint from the paint across the bridge of his nose and all over his hands and arms when he came home from . . . painting cars.

11. Dr. Mason testified, and the Full Commission finds as fact, that diisocyanate compounds . . . can be absorbed through the skin as well as be inhaled, resulting in direct injury to the lungs and can cause damage to target organs such as the central nervous system and brain. . . .

12. The central nervous system serves as a short-term immediate repository for these materials and quite high concentrations can be reached on an acute administration according to Dr. Mason. The paint sprayed by plaintiff was in aerosol form, which means the material is still in liquid form[.] . . . These particles or droplets contain very high concentrations of the product itself.

13. The Material Safety Data Sheets referenced [in] Dr. Freedman's deposition and in the Duke University Medical Center records for the product called DXR-80, which plaintiff was

exposed to, indicate: Inhalation. Vapor and spray mist harmful if inhaled. . . . Vapor irritates eyes, nose and throat. Repeated exposure to high concentrations may cause irritation of the respiratory system and permanent brain and systemic damage.

14. Dr. Mason testified, and the Full Commission finds as fact, that damage from severe and acute exposures to the diisocyanates may manifest acute effects even though they may not be immediately apparent and there may be low-level exposures on a continuing basis with chronic effects occurring long after the initial exposure.

15. Plaintiff was seen at Duke University Medical Center by Dr. Saltzman, a pulmonary specialist. . . . Dr. Saltzman instructed plaintiff not to work around isocyanates.

16. Encephalopathy is a disorder of brain function and toxic encephalopathy is due to external toxins in the environment[.] . . . [S]ymptoms of an external toxic encephalopathy condition would be decreased concentration, excitability, various motor and sensory disturbances, . . . [and] behavioral and psychological changes in personality and irritability. These symptoms result from toxins getting into the body fat from inhalation, contact through the skin, or ingestion.

17. There are three types of toxic encephalopathy. . . . Type three results from significant exposure over a long period of time and includes behavioral and cognitive changes as well as abnormalities seen on neuroimaging studies. Type three is irreversible. Dr. Williams testified, and the Full Commission finds as fact, that plaintiff has type three toxic encephalopathy with irreversible neurobehavioral symptoms[.] . . .

18. Dr. Mark E. Williams further testified, and the Full Commission finds as fact, that plaintiff's changes in cognitive function and behavior were caused by his repeated exposure to diisocyanate and other potentially toxic chemicals in his employment with defendant.

19. Dr. Williams cited several bases for his opinion including plaintiff's history of extensive exposure to solvents without suitable protection; his pattern of illness, including changes of memory and cognitive function, behavior changes, and increasing isolation and suspicion; plaintiff's [other] symptoms that are consistent with exposure, such as lung disease and respiratory

illnesses; and plaintiff's dementia, which was clearly different from . . . Alzheimer's disease. . . .

20. Dr. Mason and Dr. Williams testified, and the Full Commission finds as fact, that plaintiff's exposures to solvents in his workplace placed him at an increased risk of developing his disease as compared to the public in general.

. . . .

23. The Full Commission places more weight on the testimony of Dr. Williams and Dr. Mason than that of Dr. Freedman and Dr. Allen Hayes. . . .

24. Plaintiff's job with defendant placed him at an increased risk of developing toxic encephalopathy as compared to the public in general and his condition is due to causes and conditions characteristic of and peculiar to his employment and is not an ordinary disease of life to which the public is equally exposed. The chemical exposures plaintiff was subjected to in his employment with defendant caused him to develop toxic encephalopathy resulting in loss of cognitive functioning and behavioral changes.

Based on these findings, the Industrial Commission concluded that:

1. Plaintiff's toxic encephalopathy was caused by and due to causes and conditions characteristic of and peculiar to plaintiff's employment with defendant. Plaintiff's toxic encephalopathy is not an ordinary disease of life to which the general public not so employed is equally exposed, and is, therefore, an occupational disease. N.C. Gen. Stat. 97-53(13).

2. Plaintiff's lung disease and dementia were caused, or significantly contributed to, by his exposure to diisocyanates and other chemicals during his employment with defendant.

We have carefully reviewed the record and conclude that each of these findings is supported by evidence in the record. We further conclude that these findings of fact adequately establish the Commission's conclusions of law.

Plaintiff was required to show "that the substance [to which he was exposed] is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public

generally is exposed." *Caulder v. Waverly Mills*, 314 N.C. 70, 75, 331 S.E.2d 646, 649 (1985) (worker's exposure to dust from snythetic fibers). However, plaintiff is not required to prove that he was exposed to a specific quantity of paint fumes or chemicals. Indeed, "[o]ur Supreme Court rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment." *Keel*, 107 N.C. App. at 541, 421 S.E.2d at 366 (citing *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 668, 303 S.E.2d 795, 797 (1983) ("unreasonable to assume that the legislature intended an employee to . . . [take] measurements during his employment in order to lay the groundwork for a workers' compensation claim"), and *Gay*, 79 N.C. App. at 334, 339 S.E.2d at 496 (plaintiff not required to document concentration of toxic compounds in dye, as it "would be impossible for plaintiff to obtain measurements of the levels of toxic substances")). In the instant case, the evidence easily supports the Industrial Commission's finding that plaintiff had a greater exposure to isocyanates and other toxic chemicals than does the general non-spraypainting public.

We also reject defendant's argument that the medical opinions of Drs. Williams and Mason were necessarily based upon an "overstatement" of plaintiff's exposure to isocyanate and other chemicals released during autobody spray painting. Plaintiff testified several times that he had painted an average of two cars a week for 21 years, and elaborated on the number of coats of paint and the drying time for each coat of paint. Defendant's argument that the medical experts relied upon an inaccurate estimate of plaintiff's exposure to paint fumes is based upon defendant's contention that plaintiff's co-worker Vernon Cummings "did about 60 to 70%" of the painting. However, the transcript does not include such a statement; moreover, to the extent that the evidence raised factual conflicts, these were for the Industrial Commission to resolve. *Deese*, 352 N.C. 109, 530 S.E.2d 549. The record contains competent evidence of the amount of exposure posited in the hypothetical questions answered by Drs. Mason and Williams (that plaintiff spray painted an average of two cars a week); reliance upon this estimate was not improper. Thus, "we think the hypothetical questions assume facts which the evidence directly, fairly and reasonably tends to establish, and were competent. The probative force was for the Commission." *Blassingame v. Asbestos Co.*, 217 N.C. 223, 236, 7 S.E.2d 478, 486 (1940). Moreover, "omission of a material fact from a hypothetical question does not necessarily render the question objectionable or the answer incompetent. It is

left to the cross-examiner to bring out facts supported by the evidence that have been omitted and thereby determine if their inclusion would cause the expert to modify or reject his earlier opinion." *Rutledge*, 308 N.C. at 91, 301 S.E.2d at 364.

We also note that in addition to expert testimony, evidence was introduced regarding the size of the painting room, the lack of ventilation, inadequacy of masks or other protection, and the nature of the chemicals involved. Plaintiff's wife testified concerning plaintiff's appearance and odor following "painting days" at work, and about his gradual physical and mental decline during his period of exposure. The record also includes medical evidence regarding the biological mechanism whereby paint fumes may cause toxic encephalopathy, and evidence that the disease may be caused by chronic or long-term exposure to relatively low amounts of isocyanates.

Defendant also argues that the Industrial Commission's opinion must be reversed on the grounds that the medical opinions offered by Drs. Mason and Williams were "not adequately supported by medical literature." Defendant relies heavily on *Beaver v. City of Salisbury*, 130 N.C. App. 417, 502 S.E.2d 885 (1998), *disc. review dismissed as improvidently granted*, 349 N.C. 351, 514 S.E.2d 89 (1999), to support the argument that plaintiff's compensation is dependent upon corroboration by medical literature showing a causal relationship between exposure to isocyanates and toxic encephalopathy. In *Beaver* the plaintiff-firefighter argued that his lymphoma was an occupational disease caused by exposure to carcinogens found in smoke. However, he did not establish what toxins or carcinogens the smoke had exposed him to. Additionally, the plaintiff had no outward symptoms that would have enabled witnesses to link his employment to the chronology of his disease. In this context, the absence of medical literature tending to establish that his employment exposed him to a greater risk than the general public may well have been fatal; however, the case does not stand for the proposition that plaintiff is always required to produce medical articles at a hearing in order to establish that he has suffered from an occupational disease. We conclude that the facts of *Beaver* are easily distinguished from the present case. In the instant case, there was competent evidence of the toxins to which plaintiff was exposed, the dangers posed by these particular chemicals, and the extent of plaintiff's exposure. Moreover, in the instant case there *was* testimony regarding relevant medical literature: Dr. Williams testified there wasn't "any question" that it is "well-documented in the literature that toxic substances like

solvents can cause toxic encephalopathy." He testified further that this connection had been known for "at least 100 years" and that "there have been a number of studies from a variety of settings and in a number of foreign countries, and they all point to the same conclusion." On cross-examination Dr. Williams testified that he had reviewed some of this literature while he was treating plaintiff in order to confirm his diagnosis. In addition, Dr. Mason testified about the specific chemicals to which plaintiff was exposed, and the medical and scientific literature that he had reviewed regarding these chemicals. Further, plaintiff experienced progressive symptoms which corresponded with his period of employment.

We conclude that the evidence regarding plaintiff's exposure to isocyanates and other chemicals was sufficient to support the Industrial Commission's findings and its conclusion that this exposure caused or substantially contributed to his toxic encephalopathy. This assignment of error is overruled.

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[2] Defendant argues next that there was "no competent medical evidence" that plaintiff's exposure to workplace chemicals caused or significantly contributed to his lung disease. We disagree.

As discussed above, the plaintiff was required to prove by the preponderance of the evidence that:

> (1) [the disease is] characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) [the disease is] not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a "causal connection between the disease and the [claimant's] employment."

Rutledge, 308 N.C. at 93, 301 S.E.2d at 365 (quoting *Hansel*, 304 N.C. at 52, 283 S.E.2d at 106). The first two elements, which address the relationship between plaintiff's employment and his *risk* of contracting the disease, may be met by proof that " 'the employment exposed the worker to a greater risk of contracting the disease than the public generally.' " *Robbins*, 151 N.C. App. at 521, 566 S.E.2d at 141-42 (quoting *Rutledge*, 308 N.C. at 94, 301 S.E.2d at 365). In order to prove that his employment exposed him to a greater risk of the disease than the general public, the plaintiff must establish (1) that his employment exposed him to some circumstance, agent, or substance to a greater extent than the exposure experienced by the general public, and (2) that the agent to which plaintiff had a greater exposure is a

cause of the disease from which plaintiff suffers. *See Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 475, 577 S.E.2d 345, 354 (2003) (upholding award where "Commission was presented with competent evidence that [claimant] was exposed to disease causing [agent] while working for [employer]"); *Poole v. Tammy Lynn Ctr.*, 151 N.C. App. 668, 674, 566 S.E.2d 839, 843 (2002) (proof of occupational disease requires "proof of exposure 'to the disease or disease-causing agents during employment' " (quoting *Booker*, 297 N.C. at 476, 256 S.E.2d at 200)). In the instant case, it is beyond dispute that plaintiff demonstrated a greater exposure than the general public to isocyanates and other toxic chemicals released during spraypainting. To establish that exposure to isocyanates and other chemicals in paint fumes placed plaintiff at a greater risk than the general public of developing lung disease, plaintiff was required to present competent medical evidence. *See Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 623, 534 S.E.2d 259, 262 (2000) ("findings regarding the nature of a disease its characteristics, symptoms, and manifestations—must ordinarily be based upon expert medical testimony"), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001). In this regard, we note the following pertinent evidence and findings of fact:

> 11. Dr. Mason testified, and the Full Commission finds as fact, that diisocyanate compounds . . . can be . . . inhaled, resulting in direct injury to the lungs. . . .
>
> . . . .
>
> 13. The Material Safety Data Sheets referenced [in] Dr. Freedman's deposition and in the Duke University Medical Center records for the product called DXR-80, which plaintiff was exposed to, indicate: Inhalation. Vapor and spray mist harmful if inhaled. May cause irritation and/or allergic respiratory reaction in lungs. Vapor irritates eyes, nose and throat. Repeated exposure to high concentrations may cause irritation of the respiratory system. . . .
>
> . . . .
>
> 15. Plaintiff was seen at Duke University Medical Center by Dr. Saltzman, a pulmonary specialist. Dr. Saltzman assessed plaintiff with . . . Isocyanate precipitation of aggravation of asthma. Dr. Saltzman instructed plaintiff not to work around isocyanates.
>
> . . . .

> 19. Dr. Williams cited several bases for his opinion including . . . plaintiff's symptoms that are consistent with exposure such as lung disease and respiratory illnesses. . . .

We conclude that plaintiff presented competent medical evidence that his employment placed him at a greater risk of developing lung disease than the general public.

In addition to establishing the generalized connection between his employment and a greater risk of lung disease, plaintiff was also required to prove that in his particular case exposure to isocyanates and other toxic fumes caused or substantially contributed to his lung disease. In this regard, the Industrial Commission was not restricted to consideration of expert medical testimony:

> In the case of occupational diseases proof of a causal connection between the disease and the employee's occupation *must of necessity be based on circumstantial evidence.* Among the circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history.

Booker, 297 N.C. at 476, 256 S.E.2d at 200. Thus, as discussed above:

> In determining whether a claimant's exposure to [disease causing agent] has significantly contributed to, or been a significant causative factor in, [his disease], the *Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony.*

Rutledge, 308 N.C. at 105, 301 S.E.2d at 372.

In the present case, the Industrial Commission made extensive findings of fact establishing (1) that plaintiff was exposed to isocyanates and certain other chemicals released in paint fumes, (2) the mechanism by which long term exposure to even low levels of these chemicals may cause permanent damage to the respiratory system, (3) Dr. Saltzman's medical treatment of plaintiff for respiratory problems and his warning, as early as 1982, that plaintiff should have no further contact with isocyanates, (4) expert medical opinion that plaintiff's exposure to isocyanates and other chemicals released during spray painting placed him at greater risk of developing "breathing problems," (5) expert medical opinion that plaintiff's lung disease was "consistent with" his exposure to isocyanates, and (6) the

absence of any respiratory illness in plaintiff's medical history prior to his employment with defendant. We conclude that the Industrial Commission's findings of fact demonstrate sufficient consideration of "the following circumstances . . . '(1) the extent of exposure . . . during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history.' " *Cialino*, 156 N.C. App. at 475, 577 S.E.2d at 354 (quoting *Booker*, 297 N.C. at 475, 256 S.E.2d at 200).

Defendant also asserts that the Industrial Commission should have made findings in accordance with Dr. Hayes' testimony that plaintiff suffered from bronchial asthma with hyperactivity, which Dr. Hayes believed was *not* caused by exposure to isocyanates or other toxic paint fumes and vapors. However, "it is well established in this jurisdiction that the Commission may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the witness." *Taylor v. Cone Mills*, 306 N.C. 314, 323, 293 S.E.2d 189, 195 (1982). The Commission was thus free to believe Dr. Hayes' diagnosis while rejecting his opinion on causation and, as discussed above, "where the evidence is conflicting, the Commission's finding of causal connection between the [toxic agent] and the disability is conclusive." *Anderson*, 265 N.C. at 434, 144 S.E.2d at 275.

We conclude that the record evidence and the Industrial Commission's findings of fact adequately support its conclusion that plaintiff's workplace exposure to isocyanates and other toxic chemicals caused or significantly contributed to his lung disease. This assignment of error is overruled.

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[3] Finally, defendant argues that the evidence was insufficient to support the Commission's findings and conclusion that plaintiff was totally disabled. This argument is without merit.

Under N.C.G.S. § 97-2(9) (2001), disability is an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Our Supreme Court has consistently held that:

> "In order to support a conclusion of disability, the Commission must find: (1) [] plaintiff was incapable . . . of earning the same wages [he] had earned before [his illness] in the same employment, (2) [] plaintiff was incapable . . . of earning the same

> wages . . . in any other employment, and (3) [] plaintiff's incapacity to earn was caused by plaintiff's [illness]."

Cialino, 156 N.C. App. at 476, 577 S.E.2d at 354 (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 594, 290 S.E.2d 682, 683 (1982)). "Initially, the claimant must prove the extent and degree of his disability. On the other hand, once the disability is proven, there is a presumption that it continues until 'the employee returns to work at wages equal to those he was receiving at the time his injury occurred.' " *Watson*, 92 N.C. App. at 475-76, 374 S.E.2d at 485 (quoting *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971)).

In the instant case, the Industrial Commission's finding of fact included, in relevant part, the following:

> 1. Plaintiff, born January 5, 1945, has a seventh grade education. Plaintiff was employed by [defendant] . . . between November 5, 1975 and May 3, 1996. . . .
>
> . . . .
>
> 21. Dr. Williams found, and the Full Commission finds as fact, that plaintiff was totally disabled and that the damage to plaintiff's nervous system is permanent and could progress some as plaintiff ages. . . . He went on to say that plaintiff may require additional supervision as the symptoms progress.
>
> 22. Stephen Carpenter, a rehabilitation counselor, found plaintiff to be totally disabled and unemployable since May of 1996. Mr. Carpenter said trying to place plaintiff in a job would be a waste of time because of the severe loss of cognitive function. Plaintiff did poorly on reading, spelling, and mathematical testing with results in the range level of a fourth and fifth grader. Plaintiff is marginally to functionally illiterate and just based on age and education, plaintiff has significant vocational loss. Plaintiff's biggest impairment to employability is his loss of mental function capacity and inability to sustain concentration and attention necessary for working a normal eight-hour day.

We conclude that these finding of fact are based on competent evidence in the record and that they support the Industrial Commission's conclusion that plaintiff was permanently and totally disabled. *See, e.g.*, *Rivera v. Trapp*, 135 N.C. App. 296, 303, 519 S.E.2d 777, 781 (1999) (award of total disability upheld where evidence showed plaintiff could not lift heavy objects and that his "limited ability to under-

stand English, coupled with his exclusive background in construction work" made him relatively unemployable); *Adams v. Kelly Springfield Tire Co.*, 123 N.C. App. 681, 684, 474 S.E.2d 793, 796 (1996) (upholding disability award where "most employment would be futile due to plaintiff's . . . lack of education, manic depressive disorder, [and] limitations on lifting due to his back"). Plaintiff herein is similarly limited by lack of education, neurological and cognitive damage, and inability to sustain the degree of attention necessary to hold a job.

Defendant argues that plaintiff must prove his disability with *medical* evidence. However, "this Court has approved methods of proof other than medical evidence to show that an employee has lost wage earning capacity, and is therefore, entitled to total disability benefits." *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 343, 561 S.E.2d 298, 302, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 193 (2002). Moreover, the record contains competent testimony by Dr. Williams to the effect that plaintiff is totally disabled.

We conclude that the Industrial Commission did not err by concluding that plaintiff was permanently and totally disabled. This assignment of error is overruled.

For the reasons discussed above, the Opinion and Award of the Industrial Commission is

Affirmed.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. ROBERT DENNIS WEAVER, JR.

No. COA02-1422

(Filed 21 October 2003)

Embezzlement— aiding and abetting—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charges of conspiracy to embezzle and embezzlement both based on the theory that defendant aided and abetted embezzlement committed by his former wife, because: (1)

defendant cannot be convicted of aiding and abetting embezzlement without proof that an embezzlement was committed; (2) mere access to personal property will not satisfy the requirement that to be properly convicted of embezzlement, the accused must have received the property lawfully in the course of and under the terms of her employment; and (3) although defendant's former wife misappropriated funds, the State failed to prove that she was guilty of embezzlement where there was no evidence from which the jury could find that she ever had lawful possession either of the blank checks that she forged (or of the U.S. currency deposits represented by the checking accounts) or of the signature stamp essential to make the checks negotiable when the evidence was uncontradicted that she had no general authority to write checks and had to obtain express permission regarding each individual check before she could fill it out.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 4 December 2001 by Judge Michael E. Helms in Buncombe County Superior Court. Heard in the Court of Appeals 9 September 2003.

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

Cloninger, Lindsay, Hensley, & Searson, P.L.L.C., by Stephen P. Lindsay, for defendant-appellant.

Amy E. Ray, for defendant-appellant.

LEVINSON, Judge.

Robert Weaver (defendant) appeals from convictions of conspiracy to embezzle and embezzlement from R & D Plastics, Inc. (R & D), and International Color, LLC (International Color). We reverse.

The relevant facts are summarized as follows: R & D, a small family-owned company, was engaged in the manufacture of injection molded plastic items. R & D was founded in 1979 by Dennis Weaver (Dennis), the company's owner and president. His wife, Shirley Weaver (Shirley), was R & D's financial officer and held the position of secretary/treasurer. Defendant, Dennis and Shirley's son, served as R & D's plant manager for approximately 15 years, starting in the mid 1980's. In 1996, Robert, Dennis, and two other men jointly purchased International Color, a color compounding plant that specialized in

tinting plastic materials. During the 1990's, defendant also set up Technicraft, another small business whose employees did finishing work on various plastic items. Technicraft was initially owned by Shirley and Kimberly Weaver (Kimberly); however, Kimberly later purchased Shirley's share and became Technicraft's sole owner.

Kimberly was first employed by R & D in the mid 1980's as a receptionist. In 1986 she and defendant were married; by the time of defendant's trial in 2001 they had divorced. During the course of her twelve year employment at R & D, Kimberly's responsibilities grew to include the maintenance of certain financial records. In 1997 and 1998 her duties included balancing bank statements against the company's computerized financial records and recording monthly reports pertaining to inventory, invoices, and the monthly profit and loss statement. Dennis or Shirley occasionally gave Kimberly permission to fill out an individual check if, for example, a COD delivery arrived while Shirley was not available. However, she had no general check-writing authority, and was not permitted to fill out a check unless she first obtained express authorization from Shirley or Dennis. Kimberly was not generally entrusted with, or permitted to access on her own initiative, either the checkbooks, the loose blank checks, or Shirley's signature stamp.

In 1997 and 1998 Kimberly obtained blank checks for R & D's and International Color's bank accounts. Using Shirley's signature stamp without permission, Kimberly forged over twenty checks totaling approximately $498,000.00. The theft was discovered in May, 1998. In August, 2001, defendant was indicted on twelve counts of embezzlement, each alleging that he aided and abetted Kimberly. Two indictments alleged that defendant aided and abetted Kimberly's embezzlement of International Color; the remainder alleged that he aided and abetted her embezzlement from R & D. He was also charged in a separate indictment with conspiracy to embezzle from R & D and International Color. He received a suspended sentence and was placed on supervised probation. From these convictions, defendant appeals.

Defendant raises several issues on appeal. He argues first that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. The indictments issued against defendant, charging him with embezzlement or conspiracy to embezzle, all allege guilt on the theory that he aided and abetted embezzlement committed by his former wife, Kimberly Weaver. Defendant argues on appeal that these

convictions should be reversed because the State failed to prove that the principal (Kimberly) was guilty of embezzlement.

N.C.G.S. § 14-90 (2001) provides in relevant part that:

> If any . . . agent, consignee, clerk, bailee or servant . . . shall embezzle or . . . misapply or convert to his own use, any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank . . . or any other valuable security . . . which shall have come into his possession or under his care, he shall be guilty of a felony.

"The crime of embezzlement, unknown to the common law, was created and is defined by statute." *State v. Ross*, 272 N.C. 67, 69, 157 S.E.2d 712, 713 (1967) (citation omitted). "Embezzlement . . . is a statutory offense which is strictly construed." *State v. Bonner*, 91 N.C. App. 424, 427, 371 S.E.2d 773, 775 (1988), *disc. review denied*, 323 N.C. 705, 377 S.E.2d 227 (1989).

Although "there is similarity in some respects between larceny and embezzlement, they are distinct offenses." *State v. Griffin*, 239 N.C. 41, 44, 79 S.E.2d 230, 232 (1953). In *Griffin*, the North Carolina Supreme Court explained the distinction between the two offenses:

> Generally speaking, to constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent. . . . It involves a trespass either actual or constructive. . . . The embezzlement statute makes criminal the fraudulent conversion of personal property by one . . . [who was] entrusted with and received into his possession lawfully the personal property of another, and thereafter . . . converted the property to his own use.

Id. at 45, 79 S.E.2d at 232-33. Accordingly, "[t]he elements of embezzlement on which the State must offer substantial evidence in order to withstand a motion to dismiss are:

> (1) [T]hat the defendant was the agent of the prosecut[ing witness], and
>
> (2) *by the terms of his employment had received property* of his principal;
>
> (3) that he *received it in the course of his employment;* and
>
> (4) knowing it was not his own, converted it to his own.

State v. Keyes, 64 N.C. App. 529, 531, 307 S.E.2d 820, 822 (1983) (emphasis added). Thus, our appellate courts have held that larceny, rather than embezzlement, is the proper charge where there is no evidence that the defendant obtained possession of stolen property "in the course of his employment" or "by the terms of his employment." *See, e.g., State v. Whitley*, 208 N.C. 661, 663, 182 S.E. 338, 340 (1935):

> [D]efendant [argues] that the evidence tends to show embezzlement, rather than larceny, . . . he being foreman of the waste-house of the Cannon Mills[.] . . . [T]he fact that [defendant] was . . . foreman of the waste-house did not change his theft of the goods from larceny to embezzlement. The goods were not taken from the waste-house. They were sometimes concealed in the waste-house . . . [b]ut, *[defendant] at no time had lawful possession of the property.*

(emphasis added). Conversely, conviction of embezzlement, rather than larceny, may be upheld when a defendant's possession of property was obtained in the normal course of his employment. In *State v. Lancaster*, 37 N.C. App. 528, 532, 246 S.E.2d 575, 578, *cert. denied*, 295 N.C. 650, 248 S.E.2d 255 (1978), this Court upheld defendant's conviction of embezzling small hardware items from a warehouse where defendant's "job description and specific duties were that he would have total responsibility for the warehouse, including hiring and firing, shipping and receiving[.]" Similarly, in *State v. Buzzelli*, 11 N.C. App. 52, 55, 180 S.E.2d 472, 475, *cert. denied*, 279 N.C. 350, 182 S.E.2d 583 (1971), conviction of embezzlement was upheld where the defendant was a bookkeeper:

> charged with the duty of receiving money of her employer each day, [and] deciding how much should be deposited each day in her employer's bank account. . . . [She] received [$7,820.00] in the course of her employment . . . [and] caused only $7,220.79 thereof to be deposited in her employer's bank account and deposited the remaining $600.00 in her own account[.]

In the present case, defendant does not dispute that Kimberly misappropriated funds from R & D and International Color. He argues, however, that Kimberly did not receive the blank checks that she forged (or the U.S. currency in the checking accounts) "in the course of her employment" or "by the terms of her employment." We conclude the evidence supports defendant's contention in this regard.

The evidence was uncontradicted that Kimberly had no general authority to write checks, and had to obtain express permission regarding each individual check before she could fill it out. Shirley testified that during 1997 and 1998 she began training Kimberly to take over her job, and gave Kimberly limited responsibility for recording some of R & D's and International Color's financial data. She also testified, however, that "checks [we]re supposed to be approved by me. . . . I wrote the checks, and I stamped the checks with my stamp. The stamp was kept in my desk." When questioned by the trial court, Shirley was even more emphatic that Kimberly had no authority to write checks:

> COURT: With regard to Kimberly, what authority did she have at R & D and/or International Color with regard to writing checks.
>
> SHIRLEY: *She had no authority to write any checks.*
>
> COURT: But she would call you from time to time to say, "I need to write a check," is that what you said?
>
> SHIRLEY: That's correct.
>
> COURT: And you would give her authority?
>
> SHIRLEY: To write that check.

(emphasis added). In Kimberly's own words:

> COURT: And is it your testimony that you had standing authority to write checks for International Color?
>
> KIMBERLY: No, sir, I did not.
>
> COURT: The same as R & D?
>
> KIMBERLY: Correct. I had to have direct permission from either Shirley, and if Shirley was not available, Dennis Weaver.

Thus, Kimberly would have violated the explicit terms of her employment by taking possession of a check or filling it out before obtaining permission, even if her purpose were simply to pay a legitimate bill. In short, Kimberly did not have the right, entitlement, or privilege to write checks or to possess or utilize that which made the checks negotiable, Shirley's signature stamp.[1]

1. The dissent notes that Kimberly pled guilty to embezzlement. Assuming *arguendo* that her negotiated plea to the offense of embezzlement has any relevance to this appeal, the record in the instant case is devoid of any details concerning the factual basis utilized for her plea.

The State correctly cites the rule that possession of property may be actual or constructive. *State v. Jackson*, 57 N.C. App. 71, 76, 291 S.E.2d 190, *disc. review denied*, 306 N.C. 389, 294 S.E.2d 216 (1982). However, "[a]lthough defendant's possession of the entrusted property may be actual or constructive, even constructive possession of property requires 'an intent and capability to maintain control and dominion' over it.' " *Bonner*, 91 N.C. App. at 426, 371 S.E.2d at 775 (quoting *State v. Jackson*, 57 N.C. App. at 76, 291 S.E.2d at 194). The defendant in *Bonner* was convicted of violating N.C.G.S. § 14-91 (2001), which makes it a felony for "any . . . person . . . having or holding in trust . . . property and effects of the [State] . . . [to] embezzle or knowingly and willfully misapply or convert the same to his own use[.]" The defendant in *Bonner*, who was director of continuing education at a community college, "had the authority subject to his superiors' approval to hire instructors[.]" The State's evidence tended to show that defendant had "executed contracts with twenty-eight 'bogus' instructors to teach nonexistent adult education classes to fictional students." *Bonner*, 91 N.C. App. at 425, 371 S.E.2d at 774. Defendant's motion to dismiss the charge of embezzlement on the grounds that he never held funds or State property in trust was denied. On appeal this Court held:

> the requirement that defendant misapply funds which he "holds in trust" expresses the requirement distinctive to embezzlement that the defendant "received the property he embezzled in the course of his employment and by virtue of his fiduciary relationship with his principal." . . . Although defendant's possession of the entrusted property may be actual or constructive, even constructive possession of property requires "an intent and capability to maintain control and dominion" over it.
>
> The State's theory . . . was that defendant's authority to hire [instructors] . . . constituted holding state property in trust by virtue of defendant's alleged "control" of funds[.] . . . [T]he State introduced no evidence to suggest defendant's position ever gave him the capability . . . to "maintain control and dominion" over any state funds at issue.
>
> We note defendant required his superiors' ultimate approval to hire instructors. More important, the power entrusted to defendant to hire instructors did not in any event maintain control of the state funds CFTI eventually paid those instructors. The State's expansive theory of "constructive possession" fails to distinguish

> between being entrusted with constructive possession of property and gaining the necessary possession by deception: only the former constitutes holding state property in trust necessary for embezzlement under Section 14-91. . . .
>
> The cases cited by the State to support defendant's possession are all distinguishable since in each the defendant's employment gave him either actual possession of his principal's property or the capability to maintain control and dominion over it.

Bonner, 91 N.C. App. at 426-27, 371 S.E.2d at 774-75 (quoting *State v. Kornegay*, 313 N.C. 1, 22, 326 S.E.2d 881, 897 (1985)).

We find *Bonner* analogous to the instant case. Like the defendant in *Bonner*, Kimberly was required to obtain her superior's approval to execute a check, and was never entrusted with the power to possess or maintain control over checks or the signature stamp necessary to make the checks negotiable. As in *Bonner*, we conclude that the "State's expansive theory of 'constructive possession' fails to distinguish between being entrusted with constructive possession of property and gaining the necessary possession by deception[.]" *Id.*

The State also correctly contends that principles of agency are relevant to our determination of whether a defendant obtained property in the course of her employment. *See State v. Johnson*, 335 N.C. 509, 438 S.E.2d 722 (1994). However, the fact that Kimberly was an agent of R & D or International Color begs the question of whether she acted *within the scope of her agency* when she obtained possession of R & D's and International Color's blank checks. In *Johnson*, cited by the State, the defendant received a settlement check in his capacity as the prosecuting witness's attorney. *Id.* Similarly, in *State v. Jackson*, 57 N.C. App. 71, 291 S.E.2d 190 (1982), also cited by the State, the defendant "while acting as an agent of the hospital and during the course of his employment there, took the deliveries of meat intended for the hospital[.]" *Id.* at 77, 291 S.E.2d at 194.

However, in the instant case, the evidence was undisputed that Kimberly had no authority to possess or write checks under the terms of her employment. On the contrary, the evidence tended to show that Shirley and Dennis did not trust Kimberly with access to their money. Shirley testified that she "just didn't understand how we could be growing so and that we would be short on money" and that consequently "six months before Kim left, I had [] two of the girls in the plant working with me to make sure that Kim and [defendant] were not double or triple billing[.]"

Moreover, Kimberly's testimony about defendant's role in her criminal activity also tends to establish that she did not come into possession of the checks or the signature stamp lawfully in the course of and by the terms of her employment. Kimberly testified that defendant had told her, in effect, to "sneak into mom's desk and steal her stamp." This clearly indicates that she did not have lawful possession of the stamp. Kimberly did not testify that the defendant said, *e.g.*, "next time you're writing checks, just write an extra one" or "next time you're using mom's stamp, use it to stamp this check."

The State stresses that it was by virtue of her employment that Kimberly had "access" to blank checks. However, the law is clear that mere access to personal property will not satisfy the requirement that, to be properly convicted of embezzlement, the defendant must have received the property lawfully, in the course of and under the terms of her employment. In *Keyes*, 64 N.C. App. 529, 307 S.E.2d 820, the defendants took advantage of their status as employees to gain access to certain property. However in *Keyes*, as in the present case:

> The State offered no substantial evidence that either defendant had received the [property] by virtue of their fiduciary capacity. . . . [D]efendants[' supervisor] testified that: I had never given them approval to purchase [items of property]. . . . Nor had I given either of them authority to sell [the property]. . . . The evidence shows that *defendants may have had access to [the property], but there is no evidence that they received [the property] by the terms of their employment.*

Id. at 531-32, 307 S.E.2d at 822. On this basis, this Court held:

> There is a difference between having access to property and possessing property in a fiduciary capacity. Embezzlement is the fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner, *i.e.*, in a fiduciary capacity. Larceny is the fraudulent conversion of property by one who has acquired possession of it by trespass. *The fact that a defendant is an employee of a business does not change theft of goods from larceny to embezzlement if the defendant never had lawful possession of the property.*

Id. at 532, 307 S.E.2d at 822-23 (emphasis added). We conclude that *Keyes* is functionally indistinguishable from the present case and controls the outcome herein. We conclude that there was no

evidence from which the jury could find that Kimberly ever had lawful possession either of the blank checks that she forged (or of the U.S. currency deposits represented by the checking accounts) or of the signature stamp essential to make the checks negotiable. Consequently, the State failed to prove that Kimberly was guilty of embezzlement.

The defendant cannot be convicted of aiding and abetting embezzlement without proof that an embezzlement was committed. " 'It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. The allegations and the proof must correspond.' " *State v. Rhome*, 120 N.C. App. 278, 298, 462 S.E.2d 656, 670 (1995) (quoting *State v. Muskelly*, 6 N.C. App. 174, 176, 169 S.E.2d 530, 532 (1969)). In the case *sub judice*, the State failed to present sufficient evidence that funds were embezzled. Accordingly, defendant cannot be guilty of aiding and abetting Kimberly's embezzlement.

Our resolution of this issue makes it unnecessary to reach defendant's other arguments. His convictions are

Reversed.

Judge WYNN dissents.

Judge TYSON concurs.

WYNN, Judge dissenting.

Indisputably, Defendant's wife Kimberly Weaver, while serving as a bookkeeper for R&D Plastics and International Color, converted over $500,000.00 from the companies for her and Defendant's use and benefit. With the money, the couple remodeled and landscaped their home and bought horses, hunting dogs, a dog lot with septic tank, a new roof, a new deck with an awning, new lights and vanities, a tile floor, an oak wash stand, an oak wardrobe, an antique desk, a new kitchen, the most expensive Sears refrigerator, a gas Jenn-Aire range, ceramic sinks, wallpaper, French doors, a Persian rug, an antique buffet, a new coffee table, a big-screen TV, a surround sound stereo system, a large TV cabinet, new molding, bunk beds, a 1934 World Series poster, bathroom fixtures, a solid cherry canopied crib, a changing table, and custom curtains.

Notwithstanding Kimberly Weaver's conviction on the charge of embezzlement pursuant to a plea agreement, her testimony on behalf of the State, and clear evidence showing that Defendant assisted in the embezzlement, the majority now concludes that Kimberly Weaver did not embezzle $500,000 from the company, and therefore, Defendant's convictions of embezzlement should be reversed. I respectfully disagree.

Three different corporations, with overlapping ownership, are involved in this case. Dennis Weaver, Defendant's father, was president of R&D Plastics, Inc. and Defendant's mother, Shirley Weaver, was its secretary-treasurer. Defendant's wife, Kimberly Weaver, served as R&D's bookkeeper and Defendant Robert Weaver served as R&D's plant manager. Defendant, his father, and two other men owned shares in International Color, L.L.C. Dennis Weaver served as International Color's registered agent and Kimberly Weaver handled the day to day operations. Kimberly Weaver, the only person in International Color's office, handled receivables, payables and bank deposits. Technicraft was a corporation owned by Kimberly Weaver and she also handled its finances.

Pursuant to her plea, Kimberly Weaver was convicted of embezzling $468,590.63 from R&D and $40,000.00 from International Color. The record shows that she used misprinted R&D checks, which were supposed to be shredded and not used, and bank counter checks. She wrote checks from R&D Plastics to Technicraft, her corporation, totaling $438,562.00. She also wrote checks totaling $30,028.63 to several credit card companies. She used Shirley Weaver's signature stamp to sign the checks.

As R&D's bookkeeper, Kimberly entered the payables, made and recorded bank deposits, opened the bank statements, balanced the accounts, reconciled the bank statements with the general ledger, did the monthly ending and closed monthly accounts. Although Shirley Weaver was responsible for paying the bills, Kimberly would get authorization to write checks for COD shipments or other expenses when necessary. Through these responsibilities and acting under the cover of her position with the company, Defendant's wife was able to facilitate her embezzlement.

Moreover, Kimberly Weaver testified that pursuant to Defendant's instructions, she would use the misprinted checks and Shirley's signature stamp to write a check. When she received money to be deposited in the mail, which was her responsibility to open, she

would deposit the money and then enter the bank deposit as a lesser amount than actually deposited in the company records. She also used International Color's money, over which Kimberly Weaver had complete control, to hide the embezzlement. She wrote two $10,000.00 International Color checks which were payable to R&D. She testified these checks were written to cover up the deposit deficit. By making false record entries and using International Color's money, Kimberly Weaver was able to make the accounts balance in order to have enough money to pay the monthly bills. Indeed, when Shirley Weaver would question why there was not enough money to pay the monthly bills when she knew R&D was making a profit, Kimberly Weaver would "discover" a deposit that did not get recorded.

Under these facts, Kimberly Weaver had constructive possession of R&D and International Color's money. In *State v. Jackson*, 57 N.C. App. 71, 76, 291 S.E.2d 190, 194 (1982), this Court held the possession element of embezzlement may be established by either actual or constructive possession. "Constructive possession of goods exists without actual personal dominion over them, but with an intent and capability to maintain control and dominion over them." *Id.* Through her record maintenance, Kimberly Weaver was aware of the accounts receivable at R&D and International Color. In anticipation of the forthcoming bank deposits, Kimberly Weaver was able to write checks for her (and her husband's) personal use. She would then manipulate the records in order to hide the impermissible and unauthorized transactions. Her actions constituted embezzlement, and she was properly convicted of that crime.

To make out a prima facie case of embezzlement, the State must prove four elements: (1) that defendant was an agent of the employer, (2) that defendant had received the employer's property by the terms of his employment, (3) that he received the property in the course of his employment, and (4) knowing it was not defendant's own, converted it to his own use. *Id.* It is clear Defendant's wife was an agent of R&D and International Color. By the terms of her employment, Kimberly Weaver was required to make bank deposits, maintain accurate financial records, and to write authorized checks when necessary. Through the course of her employment, she received the bank statements, the bank deposits and had access to financial records. Kimberly Weaver also converted R&D's and International Color's money for personal use knowing the money was not her own.

The majority holds, however, that Kimberly Weaver did not have access to the checks without permission pursuant to the terms of her employment and therefore the third element is missing. However, Defendant, plant manager for R&D Plastics, instructed Kimberly Weaver to use Shirley Weaver's signature stamp to write checks. Kimberly Weaver testified:

> Robert, [Defendant], came to me and said, "Let's"—There was something that needed to be done or he wanted done on the home, and the credit cards were to their maximum limit, and we did not have the funds to do whichever, I can't remember specifically, and he told me to borrow the money from R&D Plastics. And when I questioned him how, he said, "Well, just go upstairs and take the stamp out of Mom's drawer and just stamp the check and put it into Technicraft.
>
> . . .
>
> Q: . . . What would you do? As far as when you would decide it was time to write a check—How would you decide we need more money from R&D Plastics?
>
> A: Robert Weaver would tell me . . . I would write a check for the amount that he had asked me to.

Moreover, the testimony indicates that Kimberly Weaver used misprinted checks that were to be shredded and not used. The misprinted checks incorrectly listed South Dakota instead of North Carolina as R&D's address. Shirley Weaver testified that all of the checks had not been shredded because no one had time to do it all at the same time. Her testimony established that Kimberly Weaver had access to and lawfully possessed the misprinted checks that she used to embezzle company money.

Furthermore, accepting the majority's holding as correct, Kimberly Weaver would still be guilty of embezzlement of International Color's funds. Both Shirley Weaver and Kimberly Weaver testified that Kimberly Weaver handled International Color's receivables, payables and bank deposits. Thus, she had access to and wrote checks by the terms of and in the course of her employment with International Color. Moreover, Defendant, a co-owner of International Color, directed Kimberly to use the checks.

Under these facts, I would hold the State established Kimberly Weaver embezzled over $500,000 from R&D, Inc. and International

Color, L.L.C. as Kimberly Weaver had constructive possession of the funds. Since the evidence shows conclusively that Defendant assisted Kimberly Weaver in that embezzlement, I would uphold his convictions.

RIFENBURG CONSTRUCTION, INC., PLAINTIFF v. BRIER CREEK ASSOCIATES LIMITED PARTNERSHIP, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RTP ASSEMBLAGE ASSOCIATES, LLC; ATHENA AIRPORT ASSEMBLAGE, LP; AND ATHENA AIRPORT ASSEMBLAGE CORP, DEFENDANTS

No. COA02-1391

(Filed 21 October 2003)

1. **Immunity— sovereign—road building agreement with property owner—no waiver for contractor**

There was no contract, and no waiver of sovereign immunity, between the North Carolina Department of Transportation and a contractor who had been hired to build a road by defendant Brier Creek. Because public monies partially funded the project, NCDOT concurred in the award of the contract under N.C.G.S. § 136-28.6, but NCDOT did not award the contract to plaintiff and plaintiff's own actions indicate that it was aware that it was entering into a contract with Brier Creek rather than NCDOT.

2. **Immunity— sovereign—joint venture—road building**

There was no joint venture, and no waiver of sovereign immunity as to a contractor, where NCDOT entered into a contract with a property owner to share costs for the construction of a roadway which resulted in NCDOT acquiring a right-of-way at no additional costs. The authorizing statute, N.C.G.S. § 136-28.6, does not refer to a joint venture; moreover, plaintiff failed to establish the elements of a joint venture in that NCDOT's involvement amounted to unilateral approval of the quality of work performed by the property owner.

3. **Immunity— sovereign—partnership—road building**

NCDOT was not a partner with a property owner, and did not waive sovereign immunity as to a contractor, where NCDOT contracted with the property owner to share the costs of building the road and to receive a right-of-way at no additional cost. The authorizing statute, N.C.G.S. § 136-28.6, does not refer to the cre-

ation of a partnership, and nothing in the agreement between the property owner and NCDOT indicates that the parties entered into an agreement as co-owners of a business for profit.

4. Highway and Streets— road building—agreement with state—remedies

The remedies available under N.C.G.S. § 136-29 are not applicable to a contractor who contracted with the owner of a tract of land for the building of a road. Those remedies are only available to a contractor who has completed a contract with NCDOT; plaintiff neither entered into nor completed a contract with NCDOT.

Judge WYNN dissenting.

Appeal by defendant North Carolina Department of Transportation from order entered 17 May 2002 by Judge Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 16 September 2003.

Safran Law Offices, by Victor A. Anderson, Jr. and Bonnor E. Hudson, III, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Herrin, for defendant-appellant North Carolina Department of Transportation.

TYSON, Judge.

The North Carolina Department of Transportation ("NCDOT") appeals from an order denying its motion to dismiss, upon sovereign immunity grounds, Rifenburg Construction, Inc.'s ("plaintiff") third cause of action.

I. Facts

Plaintiff is a New York corporation that is authorized to do business in North Carolina. Defendant Brier Creek Associates Limited Partnership ("Brier Creek") is a Delaware limited liability corporation authorized to do business in North Carolina. Defendants RTP Assemblage Associates, LLC, Athena Airport Assemblage, LP, and Athena Airport Assemblage Corp are either general or limited partners of Brier Creek. NCDOT is an agency of the State of North Carolina.

Brier Creek owned a large tract of land located within Wake County, North Carolina and desired to construct a road across the property. This road was to extend from U.S. Highway 70 to Aviation Parkway and would be dedicated to the State of North Carolina as a public road. On 6 May 1998, NCDOT and Brier Creek entered into a construction agreement ("agreement") pursuant to N.C. Gen. Stat. § 136-28.6. This statute authorizes NCDOT to participate in private engineering and construction contracts for roads that will be constructed by private developers and become part of the State's highway system. Pursuant to the agreement, Brier Creek was to construct a four-lane divided roadway for travel between Aviation Parkway and U.S. Highway 70. The right-of-way for the roadway was to be conveyed to NCDOT prior to Brier Creek advertising for competitive bids to construct this project. The agreement provided that construction costs would be shared equally between Brier Creek and NCDOT. NCDOT was to approve Brier Creek's award of the construction contract if NCDOT was to share in the costs. After completion of construction, the road would be absorbed into the State's highway system and maintained by NCDOT.

On 12 April 1999, Brier Creek conveyed by deed the right-of-way for the road to NCDOT. On 17 June 1999, Brier Creek and plaintiff entered into a contract to construct the roadway. NCDOT concurred in the awarding of this contract. Plaintiff began work on the roadway, completed phase I, and was paid for its work. By 6 May 2001, plaintiff had completed phase II and the roadway was accepted by NCDOT as part of the State's highway system. On 5 April 2001, the roadway was open for traffic. On 4 May 2001, NCDOT accepted maintenance of the roadway.

Plaintiff is still owed in excess of $1,056,915.76 for construction of the roadway. Brier Creek and its partners refused to pay plaintiff the money owed. Plaintiff filed a lien against the property upon which the road is located on 30 August 2001. On 2 November 2001, plaintiff filed a complaint alleging that NCDOT was liable to plaintiff for the amount owed. Plaintiff filed its verified claim on 23 January 2002, in accordance with the 1995 NCDOT Standard Specifications Section 107-25 and N.C. Gen. Stat. § 136-29. NCDOT denied plaintiff's claim. The trial court denied NCDOT's motion to dismiss. NCDOT appeals.

II. Issue

The sole issue is whether the trial court erred in denying NCDOT's motion to dismiss pursuant to Rules 12(b)(1), (b)(2), (b)(6),

and (h)(3) of the North Carolina Rules of Civil Procedure, based on the doctrine of sovereign immunity.

III. Sovereign Immunity

The defense of sovereign immunity is a matter of personal jurisdiction that falls under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 116 (1987). In other cases, our courts have held sovereign immunity to also be a defense under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328, 293 S.E.2d 182, 184 (1982).

As a sovereign, the State is immune from suit absent its waiver of immunity. *Guthrie v. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983). "Sovereign immunity is a legal principle which states in its broadest terms that the sovereign will not be subject to any form of judicial action without its express consent." *Id.* at 535, 299 S.E.2d at 625. The State is not subject to suit "unless by statute it has consented to be sued or has otherwise waived its immunity from suit." *Ferrell v. North Carolina State Highway Comm'n*, 252 N.C. 830, 833, 115 S.E.2d 34, 37 (1960). Our Supreme Court has held:

> It is axiomatic that the sovereign cannot be sued in its own courts or in any other without its consent and permission. Except in a limited class of cases the State is immune against any suit unless and until it has expressly consented to such action. . . . An action against a Commission or Board created by Statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State. The State is immune from suit unless and until it has expressly consented to be sued. It is for the General Assembly to determine when and under what circumstances the State may be sued.

Great American Ins. Co. v. Comm'r of Ins., 254 N.C. 168, 172-73, 118 S.E.2d 792, 795 (1961) (quoting *Prudential Ins. Co. of America v. Powell*, 217 N.C. 495, 8 S.E.2d 619, 621 (1940)) (internal citations omitted). Sovereign immunity can be waived when the State enters into a valid contract. *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). The State "implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Id.*

A. Contract between NCDOT and Plaintiff

[1] N.C. Gen. Stat. § 136-18(1) (2001) gives NCDOT the authority to enter into contracts for the construction of highways. N.C. Gen. Stat. § 136-28.1 (2001) sets forth NCDOT's contract letting procedures. N.C. Gen. Stat. § 136-28.6 (2001) allows NCDOT to participate in private engineering and construction agreements for roads constructed by private developers that will become part of the State's highway system upon completion. The General Assembly limited NCDOT's involvement in private agreements under N.C. Gen. Stat. § 136-28.6. This statute requires the developer, not NCDOT, to let the contract. NCDOT agrees to share in the costs of the project conditioned upon the right-of-way to the roadway being provided without cost to NCDOT. NCDOT merely concurs in the award of the contract. While both NCDOT and the developer share in the construction costs, the developer is responsible for and manages the project. Construction is required to be completed in accordance with the State's standards for road construction. Agreements between developers and NCDOT are memorialized in a "Construction Agreement."

Here, the contract between Brier Creek and plaintiff was not let pursuant to N.C. Gen. Stat. § 136-28.1. Rather, the contract at issue was a "Construction Agreement" under N.C. Gen. Stat. § 136-28.6. NCDOT did not advertise for the construction of the roadway or solicit bids as required by N.C. Gen. Stat. § 136-28.1. NCDOT did not award the contract to plaintiff or give notice of the award to plaintiff. Because public monies partially funded the construction of the roadway, NCDOT concurred in the award to plaintiff by Brier Creek pursuant to N.C. Gen. Stat. § 136-28.6. Plaintiff's own actions indicate that plaintiff was aware that it was entering into a contract with Brier Creek, not NCDOT.

Our Supreme Court has held:

> We will not imply a contract in law in derogation of sovereign immunity. . . . We emphasized, however, that "[t]he State is liable only upon contracts *authorized by law*. When it enters into a contract it does so voluntarily and authorizes its liability. Consistent with the reasoning of *Smith*, we will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the State has intentionally waived its sovereign immunity and consented to be sued for damages for breach of the contract it never entered in fact. Only when the State has implicitly waived sovereign immunity by *expressly*

> entering into a *valid* contract . . . may a plaintiff proceed with a claim against the State upon the State's breach.

Whitfield v. Gilchrist, 348 N.C. 39, 42-43, 497 S.E.2d 412, 415 (1998) (quoting *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976)) (internal citations omitted). No contract was entered into between NCDOT and plaintiff. NCDOT did not waive its sovereign immunity as to plaintiff.

B. Joint Venture between NCDOT and Brier Creek

[2] N.C. Gen. Stat. § 136-28.6 (2001) specifically authorizes NCDOT to participate in private engineering and construction agreements for roads constructed by private developers that become part of the State's highway system upon completion. Plaintiff contends that when NCDOT entered into the agreement with Brier Creek, pursuant to N.C. Gen. Stat. § 136-28.6, it waived its sovereign immunity and formed a joint venture with Brier Creek. Plaintiff argues that once the joint venture was formed NCDOT became liable for the wrongful acts of its joint venturer. We disagree.

NCDOT entered into an agreement with Brier Creek to share costs for a roadway constructed on Brier Creek's property. In return for partial funding pursuant to the statute, Brier Creek granted NCDOT a right-of-way to the roadway without cost. Brier Creek advertised and solicited bids from contractors to construct this roadway. Brier Creek selected plaintiff from the bidders. NCDOT merely concurred in the selection because public monies were being used to partially fund the project. Although NCDOT personnel may have interacted with plaintiff's employees, NCDOT dealt solely with Brier Creek pursuant to the agreement. NCDOT had no direct connection with, ties to, nor entered into any contract with plaintiff.

NCDOT did not waive its sovereign immunity with respect to plaintiff. NCDOT entered into an agreement with Brier Creek pursuant to N.C. Gen. Stat. § 136-28.6 and waived its sovereign immunity with respect to Brier Creek, not plaintiff. No language in the statute refers to a joint venture being created when NCDOT enters into this agreement. We will not read this interpretation into the statute. When a state agency, such as NCDOT, enters into an agreement with a developer, who then alone enters into a contract with a contractor, the state agency waives its sovereign immunity only to the original party to their agreement not to others. Otherwise, if an agency of the State provides money for a project, the State would be deemed to be a joint

venturer and would have waived sovereign immunity with all parties with any connection to the contract. We do not interpret this to be the General Assembly's intent in creating this statute.

Were the statute interpreted to hold that a joint venture was created to waive sovereign immunity for plaintiff, we would hold that plaintiff failed to establish the elements of a joint venture. A joint venture exists when there is: "(1) an agreement, express or implied, to carry out a single business venture *with joint sharing of profits*, and (2) an *equal right of control* of the means employed to carry out the venture." *Rhoney v. Fele*, 134 N.C. App. 614, 620, 518 S.E.2d 536, 541 (1999) (quoting *Edwards v. Bank*, 39 N.C. App. 261, 275, 250 S.E.2d 651, 661 (1979)). In *Cheape v. Town of Chapel Hill*, our Supreme Court discussed joint ventures and stated:

> A joint venture is an association of persons with intent, by way of contract, express or implied to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term. . . . Facts showing the joining of funds, property, or labor, in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a necessary fiduciary relation, will justify a finding that a joint adventure exists.

320 N.C. 549, 561, 359 S.E.2d 792, 799 (1987) (quoting *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 8-9, 161 S.E.2d 453, 460 (1968)). Our Supreme Court has further held that a joint venture does not exist where each party to an agreement cannot direct the conduct of the other. *Pike*, 274 N.C. at 10, 161 S.E.2d at 461.

Brier Creek had control of the day-to-day management and progress of the project. All work was required to be completed in accordance with NCDOT's *Standard Specifications for Roads and Structures* and was subject to NCDOT's approval. Those standards insure the safety of the traveling public—the ultimate beneficiaries of the road. As NCDOT maintained approval over the conformity of the work with its standards, Brier Creek had no right to control NCDOT. NCDOT's involvement and approval insured that the roadway was constructed in accordance with the terms of the agreement and to the State's standards. This involvement amounted to unilateral approval of the quality of work performed by Brier Creek. No joint venture existed. NCDOT did not waive sovereign immunity as to plaintiff.

C. Partnership between NCDOT and Brier Creek

[3] Plaintiff contends that it is entitled to recover against NCDOT because Brier Creek and NCDOT were "partners" in the construction of the roadway. We disagree.

As stated above regarding a joint venture, no language in the statute refers to a partnership being created when NCDOT entered into this type of agreement with Brier Creek. Were this the case, anytime an agency of the State provided money for a project the State would be deemed to be a partner and sovereign immunity would be waived to all parties with any connection to the agreement. Nothing shows this interpretation to be the General Assembly's intent in creating this statute. We will not write this interpretation into the statute.

Were the statute interpreted to hold that a partnership is created, we would hold that the elements of a partnership are not met in this case.

N.C. Gen. Stat. § 59-36 (2001) states:

> (a) A partnership is an association of two or more persons to carry on as co-owners a business for profit. (b) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this Article . . . ."

Nothing in the agreement entered into between NCDOT and Brier Creek or other evidence indicates that the parties entered into any agreement as co-owners of any business for profit or that they were established under this statute. This agreement was established pursuant to N.C. Gen. Stat. § 136-28.6 and is not deemed a partnership under N.C. Gen. Stat. § 59-36(b). NCDOT was simply engaged in an agreement, pursuant to statute, to obtain a road for use by the traveling public as part of the State's highway system. NCDOT did not enter into a partnership with Brier Creek and did not waive its sovereign immunity as to plaintiff.

D. Application of N.C. Gen. Stat. § 136-29

[4] Plaintiff contends that N.C. Gen. Stat. § 136-29 allows them to sue NCDOT because NCDOT is liable as a joint venturer or partner to Brier Creek. We have already held that NCDOT was neither a joint venturer nor a partner to Brier Creek and has not waived its sovereign immunity as to plaintiff.

N.C. Gen. Stat. § 136-29 (2001) states:

> (a) A contractor *who has completed a contract with the Department of Transportation* to construct a State highway and who has not received the amount he claims is due under the contract may submit a verified written claim to the State Highway Administrator . . . .

(emphasis supplied). The remedies available under this statute are applicable to a contractor who has "completed a contract" with NCDOT under the provisions of N.C. Gen. Stat. § 136-28.1. Plaintiff neither entered into nor completed any contract with NCDOT. Brier Creek is the appropriate party to whom this statute applies. Plaintiff's argument fails.

IV. Conclusion

The North Carolina General Assembly determines the manner in which the State is to be sued. We hold that sovereign immunity bars plaintiff's suit against NCDOT. The order of the trial court is reversed and remanded to the trial court to enter an order dismissing with prejudice on sovereign immunity grounds plaintiff's claims against NCDOT.

Reversed and Remanded.

Judge LEVINSON concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

In this appeal, Rifenburg Construction alleges that the North Carolina Department of Transportation (NCDOT) entered into a contract with Brier Creek which formed a joint venture or partnership with Brier Creek. As such, Rifenburg Construction argues that "once the partnership or joint venture was formed, then NCDOT became liable for the wrongful acts of its partner or joint venturer, Brier Creek, committed in the ordinary course of business." I agree with Rifenburg Construction and the trial judge in this case; accordingly, I dissent from the majority opinion.

Chapter 136 of our General Statutes authorizes NCDOT to enter into construction contracts by either (1) contracting directly with road construction contractors under N.C. Gen. Stat. § 136-28.1, or by

(2) contracting with developers to jointly build roads under N.C. Gen. Stat. § 136-28.6.[1] It appears undisputed that in this case, NCDOT entered into a contract with the developer, Brier Creek, under N.C. Gen. Stat. § 136-28.6. Under that agreement, Brier Creek advertised for bids and awarded the road construction contract to Rifenburg Construction. While NCDOT argues that it was not an express party to that contract, a Rule 12(b) dismissal of this case is precluded because the facts are sufficient to find that the N.C. Gen. Stat. § 136-28.6 contract between NCDOT and Brier Creek created a joint venture or partnership.

It is well established that a joint venture exists when (1) parties combine their property, money, efforts, skill or knowledge in a common undertaking (2) for the benefit of the parties in which (3) each has a right in some measure to direct the conduct of the other. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968). Here, under their contract authorized by N.C. Gen. Stat. § 136-28.6, NCDOT and Brier Creek combined money, property, efforts, skill, and knowledge to a common undertaking (road construction) for the benefit of both parties. Brier Creek benefitted by having a road built with the help of State funds through its property, and NCDOT benefitted by having a public road built with monetary assistance from the developer.[2] Thus, elements one and two are established.

The last element under *Pike*—"each has a right in some measure to direct the conduct of the other"—presents the focal issue in the case. I disagree with the majority's conclusion that NCDOT did not have some measure of direct control because NCDOT's "involvement amounted to unilateral approval of the quality of work performed by Brier Creek" and NCDOT "merely concurred in the selection because public monies were being used to partially fund the project." Instead, the record shows that under the N.C. Gen. Stat. § 136-28.6 agreement, NCDOT had the right to review and approve payment applications, review and approve design of the project, and review and approve construction of the project. Coupled with its ability to control the contract funds, NCDOT by reviewing and approving the applications, design and construction most assuredly had the "right in some measure to direct the conduct of" Brier Creek. Likewise, Brier Creek had

1. The majority correctly recognizes that the Supreme Court of North Carolina has held that the State of North Carolina waives sovereign immunity when it enters into a contract authorized by law. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

2. The record shows that NCDOT and Brier Creek shared equally the $7,200,000 estimated cost of constructing the road.

the "right in some measure to direct the conduct of" NCDOT by controlling the cost of the project. The record shows that the N.C. Gen. Stat. § 136-28.6 contract required NCDOT to pay half of the legitimate costs of the project. It follows that Brier Creek was able to obligate NCDOT to pay additional sums by how it planned, supervised, and constructed the project. Some direction of NCDOT is evident in Brier Creek's ability to obligate NCDOT to pay a certain amount of money for the project.

A joint venture is a type of partnership and it is governed by substantially the same rules as a partnership. *Pike*, 274 N.C. 1, 161 S.E.2d 453 (1968). Each partner in a partnership is jointly and severally liable to third parties for the acts and obligations of the partners. N.C. Gen. Stat. § 59-45, *Hardy & Newsome, Inc. v. Whedbee*, 244 N.C. 682, 94 S.E.2d 837 (1956). Thus, I would uphold the trial court's denial of NCDOT's motion to dismiss this action on sovereign immunity grounds. Moreover, I disagree with the majority's contention that remedies available under N.C. Gen. Stat. § 139-29 are available only to those contractors who have directly entered into agreements with NCDOT under the provisions of N.C. Gen. Stat. § 139-28.1. The language of the statute applies it to "A contractor who has completed a contract with the Department of Transportation. . . ." N.C. Gen. Stat. § 139-29(a). Plaintiff is a contractor and completed the contractual duties it owed the joint venture that included NCDOT. There is nothing in the statute or case law that indicates that this language would exclude a joint venture.

In conclusion, the majority opinion allows NCDOT to make a contract with a developer under N.C. Gen. Stat. § 136-28.6 and reap the benefits that it could have under a contract with a road contractor under N.C. Gen. Stat. § 136-28.1 with complete immunity from liability for any breach of the construction contract. Thus, while NCDOT controls the developer, oversees the project, attains land for a new road free of cost, benefits from the developers contribution of costs, tailors the project to meet its desires, and reaps substantial benefits from the construction, the majority nonetheless holds that under the doctrine of sovereign immunity, NCDOT should be completely absolved from any liability for a breach of the construction contract that arises under its G.S. 136-28.6 contract with the developer, Brier Creek. In short, the majority allows NCDOT to use sovereign immunity as a "shield" to escape contractual duties and responsibilities while it enjoys at half the cost, the benefits it would gain by contracting directly with the road contractor under G.S. 136-28.1.

Since I do not believe this to have been the legislative intent, I respectfully, dissent.

GLENN R. CARROLL, EMPLOYEE, PLAINTIFF v. TOWN OF AYDEN, EMPLOYER, AND SELF-INSURED (N.C. LEAGUE OF MUNICIPALITIES, SERVICING AGENT), DEFENDANTS

No. COA02-1551

(Filed 21 October 2003)

1. Workers' Compensation— occupational disease—hepatitis C—increased risk

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff sewer worker was not exposed to an increased risk of hepatitis C at work, because: (1) a defense expert's testimony that he could not identify plaintiff's job as the source of hepatitis C infection when there was no evidence of direct exposure to infected blood was competent evidence supporting this finding; and (2) the Commission's findings of fact cannot be overruled merely based on plaintiff's presentation of evidence which would support a contrary finding.

2. Workers' Compensation— occupational disease—hepatitis C—causation—expert testimony

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff sewer worker's hepatitis C infection was not caused by his employment even though plaintiff contends the Commission should have given greater weight to the deposition testimony of plaintiff's expert witness rather than defendant's expert witness based on the fact that plaintiff's expert actually treated plaintiff while defendant's expert merely reviewed material about plaintiff, because: (1) the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible; and (2) defense expert's testimony is competent record evidence which supports the Commission's findings of fact.

Judge WYNN dissenting.

Appeal by plaintiff from an opinion and award entered 17 July 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 September 2003.

Stanley Law Firm, by Wade A. Stanley, for plaintiff-appellant.

Lewis & Roberts, P.L.L.C., by Jack S. Holmes, for defendants-appellees.

LEVINSON, Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission denying plaintiff's Workers' Compensation claim. We affirm.

Plaintiff was employed by the Town of Ayden, North Carolina, in 1980 in the water and sewer department. His initial job duties included tasks associated with installation, maintenance, and repair of the Town's water and sewer system. In performing his duties, plaintiff was regularly exposed to raw sewage containing materials such as water, urine, feces, grease, feminine hygiene products, prophylactics, small amounts of blood, and other items and substances that people flush down toilets.

The sewage sometimes touched plaintiff's skin or entered his eyes and mouth. When plaintiff had cuts or abrasions, the sewage came into contact with his broken skin. Plaintiff was promoted to foreman in 1984, and later to superintendent; after each promotion, his exposure to raw sewage became less frequent.

In 1992, liver function tests conducted during a physical examination of plaintiff indicated possible liver problems. Testing revealed that plaintiff did not have hepatitis A or B. In 1998, routine blood work for an unrelated problem also yielded abnormal liver function test results. Plaintiff's physician referred him to Dr. Douglas F. Newton, an internist and gastroenterologist, who diagnosed plaintiff with hepatitis C. In Dr. Newton's opinion, plaintiff had been infected for about six years and had acquired the infection due to contact with sewer water.

Plaintiff filed a workers' compensation claim alleging that his hepatitis C was a compensable occupational disease as defined in N.C.G.S. § 97-53(13) (2001). In support of his claim, plaintiff offered Dr. Newton's deposition testimony, in which the doctor offered an opinion that, to a reasonable degree of medical certainty, plaintiff was

likely infected with hepatitis C through work-related contact with sewage. Plaintiff also presented evidence that his wife of twenty-seven years had tested negative for hepatitis C, and testified that he had no history of blood transfusions, tattoos or intravenous drug use, and had not had extramarital sexual contact.

Defendant offered the deposition testimony of Dr. John F. Campbell, an expert in infectious diseases. Dr. Campbell never treated plaintiff; his testimony was based upon plaintiff's job description and personnel file, interrogatories, and plaintiff's medical file. Dr. Campbell testified that he was unaware of any studies linking plaintiff's occupation with a greater-than-average risk of hepatitis C infection. Moreover, Dr. Campbell indicated that, while he could not determine the cause of plaintiff's hepatitis C, he saw no evidence of plaintiff contracting hepatitis C at work.

The Commission found, in pertinent part:

> 10. Because Dr. Newton attributed plaintiff's hepatitis to his exposure to sewage at work, plaintiff filed this workers' compensation claim. Defendant then presented the issue to Dr. Campbell, an internist and infectious disease specialist who had worked for the Center for Disease Control for two years during his career. Dr. Campbell searched the medical literature and found no studies which showed Hepatitis C to be present in sewage or that sewage could transfer the virus. There was no scientific evidence to support the theory that sewer workers were at an increased risk of acquiring the infection and, in view of the large number of sewage systems and sewer workers, the doctor was of the opinion that the risk would have been noticed if it existed. Despite the large number of patients he had treated for Hepatitis C, Dr. Campbell had never had a patient claim to have contracted the disease from exposure to sewage.
>
> 11. Dr. Campbell explained that Hepatitis C is a virus which is transmitted through a blood borne route. . . . Hepatitis C is usually transmitted by shared intravenous needles, but there have been less frequent reports of sexual transmission and rare cases of cuts or punctures allowing the virus to enter the blood stream when exposed to infected blood. . . . In addition, the Hepatitis C virus has a very short life span outside of the host, which has hampered research since it cannot be cultured. The fact that the Hepatitis C virus does not survive long outside the host renders transmission through sewer waste unlikely. There has been con-

siderable effort in medicine to identify the routes of transmission for Hepatitis C. Contact with sewer waste has not been identified as a potential cause for Hepatitis C.

12. Dr. Newton was too quick to attribute plaintiff's condition to his exposure to sewage. Not only did Dr. Newton not have scientific authority to support his opinion, he could not base his opinion on his own experience in medical practice since he had not treated another sewer worker for Hepatitis C. In addition, as noted by Dr. Campbell, there are disincentives for patients to disclose the types of activities which could lead to infection.

13. Although plaintiff was exposed to untreated sewer water which would have contained some blood and although he worked at times with cuts or abrasions on his skin, he has not proven by the greater weight of the evidence to have been placed at an increased risk of developing Hepatitis C by reason of his exposure to untreated sewage in his employment with defendant. Nor was his exposure to untreated sewage proven to have been a significant contributing factor in his contraction of the disease.

14. Plaintiff has not proven that he developed an occupational disease which was due to causes and conditions characteristic of and peculiar to his employment with defendant employer and which excluded all ordinary diseases of life to which the general public was equally exposed.

The Commission made the following relevant conclusion of law:

1. Plaintiff's Hepatitis C was not an occupational disease which was due to causes and conditions characteristic of and peculiar to his employment with defendant-employer and which excluded all ordinary diseases of life to which the general public was equally exposed. Dr. Newton's bald opinion is not accepted as credible evidence of causation because his opinion is not based on accepted medical principles of differential diagnosis and is not supported by the accepted medical literature.

(citations omitted).

The Full Commission, with one Commissioner dissenting, denied compensation. Plaintiff now appeals the Commission's opinion and award, contending (1) the Commission erred in finding that plaintiff was not exposed to hepatitis C at work, and (2) the Commission erred

in concluding that plaintiff's hepatitis C infection was not caused by his employment.

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 competent evidence, even when there is evidence to support contrary findings." *Pittman v. Int'l 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 per curiam*, 351 N.C. 42, 519 S.E.2d 524 (1999). "[T]his Court is 'not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached.' " *Baker v. Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (quoting *Rewis v. Ins. Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946)), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996). "[T]he full Commission is the sole judge of the weight and credibility of the evidence. . . ." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 680-81, 509 S.E.2d 411, 413-14 (1998)). "[T]he Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Id.* This Court reviews the Commission's conclusions of law *de novo*. *Griggs v. E. Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Under the Workers' Compensation Act, a compensable occupational disease includes "[a]ny disease . . . proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C.G.S. § 97-53(13) (2001).

> For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment."

Rutledge v. Tultex Corp., 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 105-06 (1981)). "[T]he first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Id.* at 93-94, 301 S.E.2d at 365. Proof of the third element, causal connection between the disease and the employee's occupation, often will be based on circumstantial evidence. *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 476, 256 S.E.2d 189, 200 (1979). "Among the circumstances which may be considered are the following: (1) the extent of exposure to the disease or disease-causing agents during employment, (2) the extent of exposure outside employment, and (3) absence of the disease prior to the work-related exposure as shown by the employee's medical history." *Id.*

[1] Plaintiff first contends that the competent record evidence compelled a finding that his employment placed him at an increased risk of contracting hepatitis C. This is so, plaintiff argues, because (1) raw sewage came into contact with plaintiff's cuts and abrasions, (2) plaintiff testified that he has not engaged in other risk-enhancing behavior, and (3) plaintiff's treating physician, Dr. Newton, offered an expert opinion that plaintiff's employment resulted in his illness.

The Commission found that plaintiff's employment did not place him at an increased risk of contracting hepatitis based in large part on the deposition testimony of defendant's expert witness, Dr. Campbell. Dr. Campbell testified that exposure to sewer water has not been linked to the transmission of hepatitis C. Dr. Campbell also testified that hepatitis C does not survive outside of a host body for any significant amount of time, that transmission usually requires exposure of the skin to fairly large volumes of infected blood, and that no evidence exists that exposure to diluted amounts of infected blood can transmit hepatitis C. Dr. Campbell concluded that he could not identify plaintiff's job as the source of hepatitis C infection because he had seen no evidence of direct exposure to infected blood.

Dr. Campbell's testimony is competent evidence which supports the Commission's finding that plaintiff was not at an increased risk of contracting hepatitis C as a result of his employment-related contact with raw sewage. We cannot overrule the Commission's findings of fact merely because plaintiff presented evidence which would support a contrary finding. *See Pittman*, 132 N.C. App. at 156, 510 S.E.2d at 709.

[2] Plaintiff next contends that the Commission erred in concluding that his hepatitis C infection was not caused by his employment. The gravamen of this contention is that the Commission should have given greater weight to the deposition testimony of plaintiff's expert witness, Dr. Newton, than to defendant's expert witness, Dr. Campbell. This is so, plaintiff argues, because Dr. Newton actually treated plaintiff while Dr. Campbell reviewed material about plaintiff submitted to him by defense counsel.

"[T]he Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. In the present case, however, the Commission did explain its assessment of the credibility of the witnesses; the findings of fact indicate that the Commission found Dr. Campbell's testimony more persuasive than Dr. Newton's tetimony. As already indicated, Dr. Campbell's testimony is competent record evidence which supports the Commission's findings of fact. These findings of fact support the Commission's conclusion that compensation is unwarranted.

The assignments of error are overruled. The Industrial Commission's opinion and award is

Affirmed.

Judge WYNN dissents.

Judge TYSON concurs.

WYNN, Judge dissenting.

"It is the duty of the Commission to consider *all* of the competent evidence, make *definitive* findings, draw its conclusions of law from these findings, and enter the appropriate award. In making its findings, the Commission's function is to *weigh and evaluate* the *entire* evidence and determine as best it can where the truth lies." *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980). Moreover, in workers' compensation cases, it is a "general principle that the provisions of the Workers' Compensation Act should be construed liberally so that benefits are not denied to an employee based on a narrow or strict interpretation of the statute's provisions." *Grantham v. Cherry Hosp.*, 98 N.C. App. 34, 37, 389 S.E.2d 822, 823 (1990). In this case, because I believe the Commission did not consider all of the competent evidence and did not base its decision

upon a fair and liberal construction of N.C. Gen. Stat. § 97-53(13), I respectfully dissent.

The record indicates the Commission was presented with evidence of blood-borne pathogen regulations implemented by OSHA, with which the Town of Ayden had to comply.[1] Under OSHA standard 1910.1030, after reviewing all of the evidence in the rulemaking record, OSHA "determined that employees face a significant health risk as the result of occupational exposure to blood and other potentially infectious materials (OPIM) because they may contain blood-borne pathogens. These pathogens include but are not limited to HBV, which causes hepatitis B; HIV, . . ., hepatitis C virus . . . ." Included in the employees at risk were "employees handling regulated waste, custodial workers required to clean up contaminated sharps or spills of blood or OPIM, . . . maintenance workers, such as plumbers." Therefore, OSHA required certain standards to be implemented to minimize the risk of infection. Therefore, even though both experts testified they were not aware of any literature indicating sewer maintenance workers were at a greater risk of contracting Hepatitis C than the general public, there was competent evidence in the record indicating sewer maintenance workers were indeed at a greater risk than the general public. Accordingly, finding of fact 10, which states in part: "there was no scientific evidence to support the theory that sewer workers were at an increased risk of acquiring the infection" is not supported by the record.

Moreover, the Commission based its decision upon an improper inference from the evidence presented. In Findings of Fact 11-12, the Commission described the testimony of Dr. John Campbell and Dr. Douglas F. Newton. Dr. Newton, a licensed physician for 26 years and a board-certified expert specialist in gastroenterology and internal medicine, treated plaintiff, analyzed plaintiff's medical records and questioned plaintiff about his medical history, any possible history of risky behaviors, and his employment. In contrast, Dr. Campbell had been licensed in North Carolina for 13 years and had never treated plaintiff. Although Dr. Campbell had worked for two years with the Center for Disease Control, he did not conduct any research in Hepatitis C and has never published on the subject. Rather, Dr. Campbell's worked in epidemic intelligence at the CDC. In order to render an opinion, Dr. Campbell researched medical literature and reviewed plaintiff's medical and employment records.

1. Violation of the standard could result in civil or criminal penalties. *See* N.C. Gen. Stat. §§ 95-131, 95-138 and 95-139.

In rendering its finding on Dr. Newton's testimony, the Commission stated: ."Dr. Newton was too quick to attribute plaintiff's condition to his exposure to sewage. Not only did Dr. Newton not have scientific authority to support his opinion, he could not base his opinion on his own experience in medical practice since he had not treated another sewer worker for Hepatitis C."

A close analysis of the depositions indicate the doctors provided essentially the same testimony regarding Hepatitis C. Both doctors testified that Hepatitis C is a blood-borne pathogen that infects the liver and can possibly lead to death. They both testified that most people get it through direct exposure through cuts or injections and that IV drug use was the most common method. They also testified that people could get it through blood transfusions but that it was rare to get it through sexual conduct. Finally, they both testified that they were unaware of any medical literature linking Hepatitis C to sewer maintenance workers or indicating Hepatitis C could be transmitted through sewer water and neither doctor had treated another sewer worker for Hepatitis C.

Based upon a complete history of plaintiff's behaviors, employment and medical care, Dr. Newton attributed plaintiff's Hepatitis C infection to workplace exposure. However, without the benefit of plaintiff's complete history and based upon his assessment of the medical literature, Dr. Campbell testified that plaintiff did not contract it from workplace exposure and could not state a cause of his Hepatitis C.

Disregarding the OSHA standard and the similarities in the testimony, the Commission based Findings of Fact 11 and 12 solely upon the doctors' testimony that they were unaware of any medical literature indicating Hepatitis C could be transmitted through sewer water or that sewer workers were at a greater risk of contracting the disease. Notably, neither doctor testified that there was no scientific evidence of such a connection.

Finally, the Commission, disregarding plaintiff's work environment and behavioral history, neglected its duty to apply a fair and liberal construction to the statute. As plaintiff explained to his doctor and the Commission, he began working for the Town of Ayden as a water and sewer maintenance and lift station technician in 1980. From 1980 until 1986, he worked on a daily basis for an average of 4-5 hours in untreated, raw sewage that contained needles, syringes,

blood, urine, feces, feminine hygiene products, prophylactics and any other thing people flushed down a toilet. Because he was working with metal and rough surfaces, he would frequently get cuts and abrasions which he treated with antiseptic and covered with a band-aid. Plaintiff also had a condition where his nose would bleed easily and it was not unusual for plaintiff to come out of the sewer with a nosebleed. While unclogging sewer mains and pipes, it was not unusual for plaintiff to be showered with raw, untreated sewage and it was not uncommon for sewage to enter his eyes and mouth. His rain suit and clothes would become saturated with sewage and would come into contact with his skin. His gloves would puncture and tear and raw sewage would seep into his gloves and rubber boots. Dr. Newton testified that given this exposure to blood and raw sewage and after eliminating all other possible causes of infection, he opined that plaintiff contracted Hepatitis C at work because there was no other source of exposure.

Ignoring plaintiffs workplace exposure to blood, plaintiff's testimony indicating he had not participated in any behaviors that could have been another potential source of Hepatitis C infection, Dr. Newton's expert opinion, and OSHA regulations indicating sewer maintenance workers were at an increased risk of contracting Hepatitis C, the Commission chose to rely upon the doctors' lack of knowledge regarding medical literature on the subject. In my opinion, the Commission failed to consider all of the competent evidence, did not fulfill its duty to apply a liberal construction to N.C. Gen. Stat. § 97-53(13), and did not try to determine as best it could where the truth lay. *See Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980). As the determination of whether an occupational disease exists is a mixed question of law and fact, I would conclude plaintiff established by a preponderance of the evidence that he did suffer from an occupational disease. *See Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 436, 571 S.E.2d 860, 862 (2002) (stating "Plaintiff has the burden of proving [an occupational disease] by a preponderance of the evidence").

WATSON ELECTRICAL CONSTRUCTION CO., PLAINTIFF v. SUMMIT COMPANIES, LLC, JAMES L. HODGIN; AND NANCY T. HODGIN, DEFENDANTS

No. COA02-1366

(Filed 21 October 2003)

1. Construction Claims— subcontractor against owners—breach of contract

The trial court did not err by granting summary judgment for property owners (the Hodgins) on a subcontractor's breach of contract claim. Plaintiff-subcontractor did not claim that it had a direct contract with the Hodgins, and did not produce evidence that the Hodgins ratified the contract between plaintiff and the general contractor.

2. Liens— subcontractor against property owners—claims of general contractor dismissed—no funds available

Summary judgment was properly granted for the property owners on a subcontractor's lien claims against the property owners. The lien on real property was properly dismissed because an arbitrator had determined that the general contractor (Summit) had breached the contract and dismissed its lien, and the subcontractor is bound by any defense available against the contractor. The lien on funds owed to the general contractor was properly dismissed because the arbitrator determined that, after a set-off, the general contractor was indebted to the property owners.

3. Construction Claims— quantum meruit—summary judgment

Summary judgment was correctly granted for property owners on a quantum meruit claim by a subcontractor where the owners made monthly payments to the general contractor until the general contractor abandoned the project.

4. Construction Claims— oral guaranty—main purpose rule—issue of fact

There was a genuine issue of fact as to whether an oral guaranty was given to a subcontractor by the property owners and whether application of the main purpose rule was warranted in a construction case in which the general contractor had abandoned the project.

5. Construction Claims— subcontractor against property owners—third-party beneficiary

The trial court correctly granted summary judgment for property owners on a subcontractor's claim for damages as a third-party beneficiary. Even assuming that the property owners (the Hodgins) agreed to pay the general contractor an amount for the subcontractors, there was no new consideration to the property owners. Moreover, an arbitration proceeding resulted in an award in full settlement of all claims.

6. Construction Claims— subcontractor against property owners—false representation

Summary judgment was correctly granted for the property owners (the Hodgins) on a claim for false representation by a subcontractor seeking payment under an alleged guarantee by the property owners. The evidence indicates that the Hodgins paid the general contractor in a timely fashion and issued two party checks to resolve subcontractor's liens, as promised.

7. Construction Claims— subcontractor against property owners—unfair trade practice

Summary judgment was properly granted for property owners on an unfair and deceptive trade practice claim by a subcontractor. The claim was based on allegedly fraudulent conduct, but summary judgment was properly granted for the property owners on a fraud claim, and plaintiff did not show substantial aggravating circumstances in any breach of contract.

Appeal by plaintiff from order entered 14 June 2002 by Judge Wade Barber, Superior Court, Orange County. Heard in the Court of Appeals 19 August 2003.

Stark Law Group, by Thomas H. Stark, for plaintiff.

Burns, Day & Presnell, P.A., by Daniel C. Higgins and Daniel T. Tower, for defendants James L. Hodgin and Nancy T. Hodgin.

WYNN, Judge.

Under *Mace v. Bryant Construction Corporation*, 48 N.C. App. 297, 303, 269 S.E.2d 191, 194-95 (1980), this Court held, "because the subcontractor is entitled to a lien under G.S. 44A-23 only by way of subrogation, his lien rights are dependent upon the lien rights of the general contractor." In this case, because the general contractor did

not have any lien rights against the owner, the first-tier subcontractor, likewise, had no rights. However, we hold that the evidence creates an issue of fact as to whether the owners gave the subcontractor an oral guaranty, and if so, whether the "main purpose rule" should be applied in this case. Accordingly, we affirm in part and reverse in part the trial court's grant of summary judgment.

The underlying facts tend to show that the owners, James and Nancy T. Hodgins, contracted with Summit Companies, LLC[1] to serve as the general contractor in the construction of the Rockhaven Dialysis Center in Orange County, North Carolina. In September 1999, Summit hired Watson Electrical Construction Company to replace Port Beacon Electric, the original electrical subcontractor. On 1 December 1999, the Hodgins made their last payment to Summit; in return, Summit waived its lien rights for all labor and materials furnished through 30 November 1999.

In the meantime, after not receiving payment for work performed, Watson Electrical ceased work on the site on 30 November 1999. On 19 January 2000, Watson Electrical filed a Claim of Lien and Lien of Funds for $100,932.10 and initiated an action to perfect the lien on 21 January 2000.

In February 2000, the Hodgins declared Summit in default, terminated Summit as the general contractor on the project, and contracted with another general contractor to complete the project. On 1 March 2000, Summit filed a claim of lien on the project for $495,617.60, and thereafter, filed a complaint against the Hodgins on 8 August 2000. Pursuant to their contract, the parties submitted their disagreement to arbitration which resulted in (1) a determination that since the Hodgins owed Summit $294,000 and Summit owed the Hodgins $575,000, Summit should pay $281,000 to the Hodgins; (2) the dismissal of Summit's claim of lien with prejudice; and (3) a determination that the award was in full settlement of all claims and counterclaims submitted to arbitration. After the arbitration award in the Summit litigation, the trial court for the subject litigation entered summary judgment favoring the Hodgins. Watson Electrical appealed from the summary judgment.[2]

[1] Upon reviewing this appeal by Watson Electrical, we summarily reject its first argument that the trial court erred by granting summary

1. Defendant Summit Companies, L.L.C., is not a party to this appeal.

2. "Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

judgment on its claim for breach of contract because Watson Electrical neither claimed that it had a direct contract with the Hodgins nor produced evidence tending to show that the Hodgins ratified the contract between Summit and Watson. *See Simmons v. Morton*, 1 N.C. App. 308, 310, 161 S.E.2d 222, 223 (1968). Accordingly, we uphold the trial court's grant of summary judgment on Watson Electrical's breach of contract claim.

[2] Next, Watson Electrical argues that the trial court erred by granting summary judgment against its claims for enforcement of lien and a lien on funds. Regarding the claim for enforcement of lien, this Court has long recognized that a lien in favor of a subcontractor may arise either directly under G. S. 44A-18 and G.S. 44A-20 or by subrogation under G. S. 44A-23" *Con Co. v. Wilson Acres Apartments, Ltd.*, 56 N.C. App. 661, 664, 289 S.E.2d 633, 635 (1982). Under Chapter 44, Watson Electrical filed and served a Lien and Notice of Claim of Lien by First-Tier Subcontractor on the Hodgins' real property on 19 January 2000 and filed suit to perfect the lien on 31 January 2000. G. S. 44A-23 provides in pertinent part as follows:

> A first tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, enforce the lien of the contractor created by Part 1 of Article 2 of this Chapter. . . . Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

"This statute grants to a first tier subcontractor a lien upon real property based upon a right of subrogation to the direct lien of the general contractor on the improved real property as provided in G. S. 44A-8. Because the subcontractor is entitled to a lien under G.S. 44A-23 only by way of subrogation, his lien rights are dependent upon the lien rights of the general contractor. Thus, if the general contractor has no

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there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Martin Architectural Products v. Meridian Construction*, 155 N.C. App. 176, 180, 574 S.E.2d 189, 191 (2002). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). "An issue is genuine if it can be proven by substantial evidence." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). "The movant has the burden of showing that summary judgment is appropriate. Furthermore, in considering summary judgment motions, we review the record in the light most favorable to the nonmovant." *Hayes v. Turner*, 98 N.C. App. 451, 456, 391 S.E.2d 513, 516 (1990).

right to a lien, the first tier subcontractor likewise has no such right." *Mace v. Bryant Construction Corp.*, 48 N.C. App. 297, 303, 269 S.E.2d 191, 194-95 (1980). The subcontractor is "bound by any defenses available against the contractor." *Con Co. v. Wilson Acres Apartments, Ltd.*, 56 N.C. App. 661, 664, 289 S.E.2d 633, 635 (1982). Moreover, "the subcontractor . . . [can] acquire no better right by subrogation than that of the principal. . . . They may assert only the lien rights which the general contractor has in the project. The general contractor can enforce the lien only for the amount due on the contract, and therefore, [the subcontractor is] similarly limited." *Vulcan Materials Co. v. Fowler Contracting Corp.*, 111 N.C. App. 919, 921-22, 433 S.E.2d 462, 464 (1993).

In this case, after Watson Electrical filed its action to enforce its claim of lien, Summit filed a claim of lien against the real property and sought enforcement of its lien. The Hodgins filed a demand for arbitration and asserted claims against Summit for breach of contract, breach of warranty, negligence and fraud. The arbitrator determined that the Hodgins owed Summit $294,000.00 for work performed and materials provided through 16 February 2000, and Summit owed the Hodgins $575,000.00 for corrected work and uncompleted work; accordingly, the arbitrator ordered Summit to pay the Hodgins the sum of $281,000.00. Thus, the arbitrator ultimately determined that Summit breached the contract, awarded the Hodgins damages, and dismissed Summit's claim of lien. Since the subcontractor is bound by any defenses available against the contractor, *see Con Co. v. Wilson Acres Apartments, Ltd.*, 56 N.C. App. 661, 664, 289 S.E.2d 633, 635 (1982), we uphold the trial court's grant of summary judgment in favor of the Hodgins on Watson Electrical's claim of lien on the real property.

However, a subcontractor's lien on funds does not arise by subrogation; rather, under G.S. 44A-18(1), "a lien in favor of [the subcontractor can] attach only to funds owed by owner to contractor." *Lewis-Brady Builders Supply, Inc. v. Bedros*, 32 N.C. App. 209, 231 S.E.2d 199, 200 (1977). In Mr. Hodgin's supplemental affidavit in support of his motion for summary judgment, he stated that the Hodgins had not paid Summit any money in connection with the project since 1 December 1999. Watson's last day on the project was 30 November 1999. Moreover, "the amount owed by owner to the contractor at any particular time must be determined in the light of the existing circumstances and the contract between owner and contractor." *Id.* at 212, 231 S.E.2d at 201. Due to Summit's breach, the Hodgins were

"entitled to set off any amount [they] may have owed [Summit] against the damages caused by [Summit's] breach of contract. Only after these developments could it be determined what amount, if any, [the Hodgins] owed [Summit]." *Id.* As stated, the arbitrator determined that after the set-off, Summit was indebted to the Hodgins. Accordingly, the trial court properly granted summary judgment in favor of the Hodgins on Watson Electrical's lien on funds.

[3] In Watson Electrical's fourth cause of action, it seeks to recover damages from the Hodgins under the theory of *quantum meruit*. "*Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy based upon a quasi contract or a contract implied in law. . . . An implied contract is not based on an actual agreement, and *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties. Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment." *Paul L. Whitfield, P.A. v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414-15 (1998). "Unjust enrichment has been described as:

> the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle underlying various legal doctrines and remedies, that *one person should not be permitted unjustly to enrich himself [or herself] at the expense of another.*

Furthermore, the mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play. There must be some added ingredients to invoke the unjust enrichment doctrine." *Peace River Electric Cooperative, Inc. v. Ward Transformer Company, Inc.*, 116 N.C. App. 493, 509, 449 S.E.2d 202, 213 (1994); *see also Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (1984) (stating recovery under *quantum meruit* based upon contract implied-in-law is only proper in circumstances such that it would be "unfair" for the recipient to retain the benefit of the claimant's services).

In this case, the Hodgins contracted with Summit for the construction of a dialysis center for $1,000,000. Until Summit abandoned the project, the Hodgins paid Summit in monthly progress payments. Even though the Hodgins were "enriched" by the work performed by Watson Electrical, based upon these facts, a genuine issue

of material fact does not exist as to whether any such enrichment was unjust because the Hodgins made regular payments to Summit. Accordingly, we uphold the trial court's grant of summary judgment on this claim.

[4] In its fifth cause of action, Watson Electrical alleges the Hodgins, as guarantors of payment, are liable to Watson Electrical for sums due under the contract and their failure to pay constitutes a breach of the guaranty of payment. In the Hodgins' forecast of evidence in support of summary judgment, Mr. Hodgin denies agreeing to guarantee payment in his affidavit. However, in opposition to defendants' motion for summary judgment, Watson Electrical presented the deposition testimony of Dennis Cole, Watson Electrical's field supervisor, and Keith Clifford, a Watson Electrical project manager. Mr. Cole and Mr. Clifford stated that during their work site visit on 21 September 1999, they had a conversation with Mr. Hodgin in which Mr. Hodgin assured them Watson Electrical would be paid and that Mr. Hodgin would issue a two-party check if necessary. Ikey Huffman, Watson's Burlington Division Manager, stated that Mr. Cole and Mr. Clifford relayed that assurance to him upon their return from the work site. However, Watson Electrical neither obtained nor received a signed writing from the Hodgins guaranteeing payment.

A suretyship promise must be in writing. Under the North Carolina Statute of Frauds,

> No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

N.C. Gen. Stat. § 22-1 (2001). Thus, pursuant to the Statute of Frauds, enforcement of the alleged oral guaranty would be barred. Nevertheless, Watson Electrical contends the oral guaranty is enforceable pursuant to the main purpose rule. North Carolina has "long recognized the rule that the promise to pay the debt of another is outside the statute and enforceable if the promise is supported by an independent and sufficient consideration running to the promisor. This rule is generally referred to as the 'main purpose rule' or the 'leading object rule.' " *McKenzie Supply Company v. Motel Development Unit 2, Inc.*, 32 N.C. App. 199, 202-03, 231 S.E.2d 201, 204 (1977); *see also Burlington Industries, Inc. v. Foil*, 284 N.C. 740,

202 S.E.2d 591 (1974) ("Generally, if it is concluded that the promisor had the requisite personal, immediate, and pecuniary interest in the transaction in which a third party is the primary obligor, then the promise is said to be original rather than collateral and therefore need not be in writing to be binding.").

Watson Electrical contends there is a genuine issue of material fact as to (1) whether the oral guaranty was given and (2) whether the main purpose rule is applicable. Watson Electrical contends that the Rockhaven project was behind schedule and over budget, the relationship between the owners and the general contractor was deteriorating and the Hodgins wanted the project completed without delay. According to Watson Electrical, the prospect of having another electrical contractor walk off the job invoked images of further delays and increased costs that induced Mr. Hodgin to make assurances to Watson Electrical that regardless of the circumstances, Watson Electrical would be paid. However, the Hodgins contend that they did not have "a personal, immediate, and pecuniary interest in seeing that Summit hired Watson to do the electrical work" because they had a fixed price contract with Summit to construct the project for an amount not to exceed $1,000,000. Nonetheless, in Mr. Hodgin's deposition, he stated he had concerns about Summit's ability to finish the project and that the delays, additional interest cost and the loss of income was "killing" him. Mr. Hodgin further stated that he had several conversations with Summit about finishing the building because "you know, . . . we had hundreds of thousands of dollars invested in this thing, plus the interest on our loans. And, yes, there was a lot of conversation with Adams, not particularly to the electrical, but the project total." He was under pressure to get the project done.

"Whether a promise is an original one not coming within the statute of frauds, or a collateral one required by the statute to be in writing, is to be determined from the circumstances of its making, the situation of the parties, and the objects to be accomplished. Where the intent is doubtful, the solution usually lies in summoning the aid of a jury. . . . However, [if] there is insufficient evidence as a matter of law to bring the main purpose rule into play, the case should not be allowed to go to the jury under the theory of the main purpose rule." *Burlington Industries*, 284 N.C. 740, 752, 202 S.E.2d 591, 599 (1974). After carefully reviewing the pleadings, affidavits, and depositions, we find a genuine issue of material fact exists as to (1) whether an oral guaranty was given, and (2) whether an application of the main purpose rule is warranted on the facts of this case. Accordingly, we

find summary judgment was improvidently granted on Watson Electrical's claim for breach of guaranty.

[5] In its sixth cause of action, Watson Electrical contends it should recover damages because it was a third-party beneficiary to an alleged February 2000 contract entered into between the Hodgins and Summit for $250,000. "To establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit." *LSB Financial Services, Inc. v. Harrison*, 144 N.C. App. 542, 548, 548 S.E.2d 574, 578 (2001). Watson Electrical relies on deposition testimony from Mr. Hodgin and Thomas Adams, owner of Summit Corporation, which he contends demonstrates a genuine issue of material fact as to the existence of a February 2000 contract for the benefit of the subcontractors. From the evidence presented by both parties, it is clear that an agreement was never reached between the parties regarding a $250,000 payment. According to Mr. Hodgin, between 30 November 1999 and 16 February 2000, the date Summit was terminated from the project, there were discussions between Summit and the Hodgins regarding change orders and several lien claimants. Mr. Hodgin stated that Summit threatened to abandon the job if it was not paid $250,000 within several days. Mr. Hodgin never agreed to pay $250,000. However, Mr. Adams stated an agreement was reached where the Hodgins agreed to pay an additional $250,000, that based upon this agreement, he called several subcontractors and told them they would receive payment in a few days and that after notifying the subcontractors, Mr. Hodgin repudiated the deal. Nonetheless, these facts do not create a genuine issue of material fact as to whether an enforceable contract was entered into by the parties.

"An enforceable contract is one supported by consideration. Moreover, where a contract has been partially performed, as is the case here, a modification of its terms is treated as any other contract and must also be supported by consideration. It is well established that consideration sufficient to support a contract or a modification of its terms consists of any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee. Consideration is the glue that binds parties together, and a mere promise, without more, is unenforceable." *Lee v. Paragon Group Contractors, Inc.*, 78 N.C. App. 334, 337, 337 S.E.2d 132, 134 (1985).

In this case, even assuming the Hodgins agreed to pay Summit $250,000 in order to pay various subcontractors, no new consideration flowed to the Hodgins. Under the original contract between Summit and the Hodgins, Summit agreed to construct the dialysis center for the fixed price of $1,000,000. Any additional money above the $1,000,000 would constitute a contractual modification requiring new consideration. Moreover, the record shows that all claims, including the alleged $250,000 contract, were determined in the arbitration proceeding. Under that proceeding, the arbitrator held that the award was in "full settlement of all claims and counterclaims submitted." Accordingly, we hold the trial court properly granted summary judgment on this claim.

[6] In its seventh cause of action, Watson Electrical contends it reasonably relied to its detriment upon Mr. Hodgin's allegedly false representation that he would guarantee payment to Watson Electrical and, therefore, the Hodgins should pay damages in the amount of $100,932.10 plus interest.

"To make out a case of actionable fraud, plaintiffs must show: (a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that defendant knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that defendant made the false representation with the intention that it should be relied upon by plaintiff; (e) that plaintiffs reasonably relied upon the representation and acted upon it; and (f) that plaintiffs suffered injury." *Johnson v. Phoenix Mutual Life Insurance Company*, 300 N.C. 247, 253, 266 S.E.2d 610, 615 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988), *Boyd v. Drum*, 129 N.C. App. 586, 501 S.E.2d 91 (1998), and *Symons Corp. v. Insurance Co. of North America*, 94 N.C. App. 541, 380 S.E.2d 550 (1989).

The facts, viewed in the light most favorable to Watson Electrical, indicate that Watson Electrical's representatives and Mr. Hodgin had a conversation in the parking lot after Watson Electrical's work site visit. During this conversation, Mr. Hodgin allegedly stated Watson Electrical would be paid for their services and he would issue a two-party check if necessary. After nonpayment, Watson Electrical contacted Mr. Hodgin and Mr. Hodgin informed them there was money remaining on the contract. The facts also indicate Mr. Hodgin issued several two-party checks to subcontractors in order to resolve claims

of lien and that he paid Summit in a timely fashion which tends to negate any allegation that Mr. Hodgin made a false statement regarding the issuance of two party checks. Accordingly, on these facts, a genuine issue of material fact does not exist regarding whether Mr. Hodgin made a false statement or misrepresentation about guaranteeing payment.

[7] In its final cause of action, Watson Electrical contends it is entitled to treble damages because Mr. Hodgin's conduct was unfair and/or deceptive within the meaning of Chapter 75 of the North Carolina General Statutes. In its brief, Watson Electrical indicates Mr. Hodgin's allegedly fraudulent conduct is the conduct upon which this cause of action is based. As stated, summary judgment was properly granted on Watson Electrical's fraud claim and therefore, summary judgment was properly granted on Watson Electrical's unfair and deceptive trade practices cause of action. Furthermore, "it is well recognized . . . that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1" *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367-68, 533 S.E.2d 827, 832-33 (2000). Thus, "plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act." *Id.* Watson Electrical has not met this showing in this case; accordingly, summary judgment was properly granted on this issue.

In summation, we hold summary judgment was properly granted on all causes of action with the exception of the breach of oral guaranty claim. Accordingly the order below is,

Affirmed in part, reversed in part.

Judges HUDSON and CALABRIA concur.

MELISSA REGISTER, PLAINTIFF v. STEVE ALLEN WHITE, DEFENDANT

No. COA02-1585

(Filed 21 October 2003)

1. Appeal and Error— appealability—order denying arbitration

An order denying arbitration is immediately appealable.

2. Arbitration— time for demanding—UIM insurance—exhaustion of liability coverage

A UIM claimant's right to demand arbitration arises when the liability insurer has offered a settlement exhausting its coverages, and the time limitation for demanding arbitration begins when the right has arisen rather than when the injury occurred. The trial court erred in this case by concluding that plaintiff's demand for arbitration was not timely.

3. Arbitration— UIM claim—underlying liability suit—not inconsistent with arbitration

A UIM claimant's suit against the driver of a car in which she was injured was not inconsistent with her right to arbitrate her UIM claim, and she did not waive arbitration by taking advantage of discovery procedures not available in arbitration.

Appeal by plaintiff from order entered 5 August 2002 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 11 September 2003.

Duffus & Melvin, P.A., by J. David Duffus, Jr., and Benjamin E. Waller, for plaintiff-appellant.

Harris, Creech, Ward and Blackerby, P.A., by Charles E. Simpson, Jr., and Joseph E. Elder, for unnamed defendant-appellee.

CALABRIA, Judge.

Melissa Register ("plaintiff") appeals the 5 August 2002 order denying her motion to compel arbitration. Since we find plaintiff's claim was not barred by the applicable statute of limitations and plaintiff did not waive her right to arbitration, we reverse.

On 30 June 1998, plaintiff was involved in an automobile accident while riding as a passenger in Steve Allen White's ("defendant") car. Thereafter, plaintiff filed suit against defendant. On 8 August 2001, defendant's insurance company tendered the full limits of its policy, $50,000.00, to plaintiff. On 24 September 2001, plaintiff demanded arbitration with unnamed defendant, North Carolina Farm Bureau Insurance Company ("Farm Bureau"), who provided underinsured motorist coverage ("UIM") to plaintiff. The trial court held "[p]laintiff failed to demand arbitration of Farm Bureau Insurance of North Carolina, Inc. within the time allowed by contract, thus, barring her

claim for arbitration." The court further concluded, pursuant to the factors in *Sullivan v. Bright*, 129 N.C. App. 84, 497 S.E.2d 118 (1998), plaintiff waived her right to arbitration. We disagree.

[1] Although an order denying arbitration is interlocutory, the parties do not dispute it is immediately appealable because it involves a substantial right that might be lost were the right to appeal delayed. *Park v. Merrill Lynch*, 159 N.C. App. 120, 122, 582 S.E.2d 375, 377 (2003). Therefore, we properly have jurisdiction to consider plaintiff's appeal.

"In considering a motion to compel arbitration, the trial court must determine (1) whether the parties have a valid agreement to arbitrate, and (2) whether the subject in dispute is covered by the arbitration agreement. The trial court's conclusion is reviewable *de novo* by this Court." *Brevorka v. Wolfe Constr., Inc.*, 155 N.C. App. 353, 356, 573 S.E.2d 656, 658-59 (2002) (internal citations omitted). In determining whether an enforceable agreement exists, the court considers whether the parties have waived their contractual right to arbitrate and whether the demand for arbitration was timely. *Sullivan*, 129 N.C. App. at 86, 497 S.E.2d at 120 (regarding waiver); *Adams v. Nelsen*, 313 N.C. 442, 329 S.E.2d 322 (1985) (regarding waiver and time limitation). The trial court concluded a valid contract existed and provided for arbitration, but that plaintiff failed to demand arbitration within the time limit set forth in the contract, and, alternatively, she waived her right to arbitration by taking advantage of judicial discovery procedures.

"North Carolina has a strong public policy favoring the settlement of disputes by arbitration. Our strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). This rule applies " ' "whether the problem at hand is the construction of the contract language itself or an allegation of waiver[,]" ' " the issues we now consider. *Id.*, (quoting *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (quoting *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983))).

I. Time Limitation

[2] Plaintiff asserts the trial court erred in concluding she failed to assert her right to arbitration of her UIM coverage from Farm Bureau within the time limitation provided in the contract. We agree.

An insurance policy is a contract and "its provisions govern the rights and duties of the parties thereto. 'As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued.' " *Brown v. Lumbermens Mut. Casualty Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (quoting *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978)). " 'All parts of a contract are to be given effect if possible. It is presumed that each part of the contract means something.' " *Brown*, 326 N.C. at 393, 390 S.E.2d at 153 (quoting *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986)). However, " '[a] latent ambiguity may arise where the words of a written agreement are plain, but by reason of extraneous facts the definite and certain application of those words is found impracticable.' " *Jefferson-Pilot Life Ins. Co. v. Smith Helms Mulliss & Moore*, 110 N.C. App. 78, 81, 429 S.E.2d 183, 185 (1993) (quoting *Miller v. Green*, 183 N.C. 652, 654, 112 S.E. 417, 418 (1922)).

"[T]he meaning of ambiguous language within an insurance policy is a question of law for the court." *Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 452-53, 481 S.E.2d 349, 355 (1997). "Any ambiguity in the policy language must be resolved against the insurance company and in favor of the insured." *Brown*, 326 N.C. at 392, 390 S.E.2d at 153. "Further, as our courts are not favorably disposed toward provisions limiting the scope of coverage, exclusions are ' "to be strictly construed to provide the coverage which would otherwise be afforded by the policy." ' " *Markham*, 125 N.C. App. at 454, 481 S.E.2d at 356 (quoting *Durham City Bd. of Education v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, 426 S.E.2d 451, 453 (1993) (quoting *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981))).

With these principals in mind we turn to the issue of time limitation in the case at bar. Plaintiff sought to enforce the UIM provision of the insurance contract, which provides:

> We will also pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured caused by an accident. The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle. We will pay for these damages only after the limits of liability under any applicable liability bonds or policies have been exhausted by payments of judgments or settlements. . . .

Therefore, an insured may seek UIM coverage only after the liability policy has paid to the full extent of its limits. The policy language tracks the statutory language of N.C. Gen. Stat. § 20-279.21(b)(4) which explains UIM coverage.[1] To enforce this provision, the contract further provided, "the insured may demand to settle the dispute by arbitration." Finally, the contract provided the following time limitation for demanding arbitration: "[a]ny arbitration action against the company must begin within the time limit allowed for bodily injury or death actions in the state where the accident occurred." This language is precisely as required by the North Carolina Rate Bureau in Rate Bureau Amendatory Endorsement NC 00 09 (Ed. 5-94) for personal auto policies.[2] Since the accident in the case at bar occurred in North Carolina, a three-year time limit is applicable and begins when the bodily harm reasonably should have become, or actually became, apparent. N.C. Gen. Stat. § 1-52(16) (2001).

The terms of the contract, on their face, appear plain and enforceable. The coverage provision states that UIM insurance is triggered only when the liability policy has been exhausted; the arbitration provision provides plaintiff must demand arbitration of a UIM claim within the time limit for bodily injury claims. Farm Bureau asserts there is no ambiguity because the three-year limitation is an independent provision, and an insured must demand arbitration of the UIM coverage regardless of whether her right thereto has arisen.[3] We disagree.

In considering the interaction between the UIM and arbitration provisions of an identical insurance contract, this Court held a plaintiff's arbitration rights do not arise until her right to UIM coverage arises, which is when she is offered a settlement for the full extent of

1. "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." N.C. Gen. Stat. § 20-279.21(b)(4) (2001).

2. The endorsement amended the Personal Auto Policies NC 00 01, for those written on or after 1 May 1994. The new arbitration provision was required to either be attached or incorporated into a company's policy. *See* George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance, 2002 Edition: A Handbook*, App. G (2002).

3. This argument conflicts with George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance, 2002 Edition: A Handbook*, 256-57 (2002), which explains that since an insured may demand arbitration only after the liability policy has been exhausted, the insured may not demand arbitration before the insurer tenders its limits.

the liability policy.[4] *Hackett v. Bonta*, 113 N.C. App. 89, 97, 437 S.E.2d 687, 692 (1993). Therefore, a plaintiff's right to demand arbitration for UIM coverage does not arise until the liability insurer offers a settlement exhausting its limits. Since the insured's right to arbitration of UIM coverage is dependent upon a full settlement from the liability insurer, and such a settlement may occur after the three-year time limitation has expired, a latent ambiguity exists regarding the time limitation for demanding arbitration. *See Jefferson-Pilot*, 110 N.C. App. at 81, 429 S.E.2d at 185 (a latent ambiguity is where the words appear clear until facts make application of those words "impracticable"). A latent ambiguity must be resolved in favor of the insured and providing coverage. *See Brown*, 326 N.C. at 392, 390 S.E.2d at 153 (in favor of the insured); *Markham*, 125 N.C. App. at 454, 481 S.E.2d at 356 (in favor of coverage). Moreover, "[i]n no event can the limitations period begin to run until the injured party is at liberty to sue." *Glover v. First Union National Bank*, 109 N.C. App. 451, 455, 428 S.E.2d 206, 208 (1993). We see no reason to distinguish arbitration, and hold this rule also applies to injured parties who have foregone their right to sue in favor of arbitration. We hold a UIM insured's right to demand arbitration arises when the liability insurer has offered a settlement exhausting its coverage, and only once this right has arisen may the time limitation for demanding arbitration commence.

Applying this rule in the case at bar, plaintiff's right to demand arbitration did not arise when she was injured on 30 June 1998, but rather arose on 8 August 2001, and therefore she timely demanded arbitration on 24 September 2001.[5] We find the trial court erred in determining plaintiff's claim was time barred before her right to pursue compensation from Farm Bureau vested.[6]

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4. We find the factual distinction in *Hackett*, that one insurance company provided both the liability and the UIM insurance, immaterial. In *Hackett*, the Court held plaintiff's arbitration rights under the UIM policy were triggered when State Farm offered to settle both claims for more than the limits on the liability policy, because only then could plaintiff reasonably assume the limits of the liability policy were exhausted. We apply the same rule here, where two different insurance companies provide the liability and UIM coverage.

5. No issue of notice arises since the contract provides the insured must notify the insurer "promptly of how, when and where the accident or loss happened."

6. We note our analysis is distinct from that utilized by this Court in its recent unpublished opinion *Carter v. Cook*, 158 N.C. App. 743, 582 S.E.2d 82 (2003). Since this opinion was not published it has no precedential value and we need not address it further.

II. Waiver

[3] Plaintiff also asserts the trial court erred in determining she waived her right to arbitration by "t[aking] advantage of judicial discovery procedures not available in arbitration" and that Farm Bureau "expended significant amounts of money" on behalf of defendant in the underlying action.

> Our Supreme Court has explained:
>
> Waiver of a contractual right to arbitration is a question of fact. Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.

Cyclone Roofing Co., 312 N.C. at 229, 321 S.E.2d at 876 (internal citations omitted). Examples of such prejudice include, "a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon. . . ." *Id.*, 312 N.C. at 230, 321 S.E.2d at 877 (internal citations omitted). The questions presented are: (1) whether plaintiff has taken actions which are inconsistent with arbitration; and (2) whether Farm Bureau was prejudiced by such actions. *Id.* Since we find plaintiff has taken no action inconsistent with her right to arbitration, we need not reach the issue of prejudice.

Farm Bureau asserts plaintiff's suit against defendant was inconsistent with her arbitration rights because plaintiff availed herself of discovery unavailable in arbitration and Farm Bureau expended significant funds to defend the suit. However, the suit was necessary for plaintiff to enforce her rights against the liability insurer, and Farm Bureau voluntarily exercised its right to appear in the lawsuit. N.C. Gen. Stat. § 20-279.21(b)(3)(a) (2001). Plaintiff's right to arbitration cannot be waived by a UIM carrier's choice to participate in litigation brought to pursue the liability policy claim. Moreover, in determining the issue of waiver raised by a UIM carrier, our Court has considered only those actions by plaintiff in the existing lawsuit occurring after the liability insurer tendered its full coverage upon settlement of the liability policy. *Sullivan*, 129 N.C. App. at 87, 497

S.E.2d at 121. In the case at bar, following the liability carrier's settlement, plaintiff promptly ceased pursuing litigation and demanded arbitration of her UIM coverage pursuant to her contract with Farm Bureau. Therefore, we find plaintiff in no way acted inconsistently with her right for arbitration. Accordingly, we hold the trial court erred finding plaintiff waived her arbitration rights.

We reverse the order of the trial court and remand with instructions to enter an order compelling arbitration.

Reversed and remanded.

Judges McGEE and HUNTER concur.

KELLY CRISP LONG, PLAINTIFF v. CHARLES N. LONG, DEFENDANT

No. COA02-1230

(Filed 21 October 2003)

1. Divorce— separation agreement—alimony—cohabitation

The trial court erred by concluding as a matter of law that plaintiff wife had cohabitated as defined under N.C.G.S. § 50-16.9, thus allowing defendant husband to stop paying plaintiff alimony in accordance with the parties' separation agreement, because the trial court's order lacked adequate findings of fact to support a conclusion of cohabitation when the findings were mere recitations of testimony and evidence.

2. Divorce— separation agreement—no interference provision

The trial court erred by concluding that defendant husband had not breached the parties' unincorporated separation agreement with regard to the "no interference" provision based on plaintiff wife's conduct even though it found defendant's conduct would be a violation of the clause, because: (1) breach by one party does not automatically excuse the other party's performance under the separation agreement; (2) the parties' "no interference" provision is independent from any other provision of their separation agreement, and there is nothing to indicate that a failure by plaintiff to abide by any provision authorizes defendant to breach the "no interference" provision;

and (3) there was no conduct by plaintiff that would excuse defendant's admitted conduct.

3. Divorce— separation agreement—time and method of payment provisions

The trial court did not err by failing to find that defendant husband breached the time and method of payment provisions of the separation agreement even though defendant failed to pay plaintiff wife by direct deposit or by the first of the month in either May or June 2000, because: (1) to be actionable, the breach must substantially defeat the purpose of the contract or be characterized as a substantial failure to perform, and plaintiff received the support payments; and (2) while the deviation in method of payment might have been inconvenient, the deviation did not substantially defeat the purpose of the agreement, nor was it a substantial failure to perform.

4. Costs— attorney fees—enforcement of separation agreement

Although the trial court did not err by failing to award plaintiff wife attorney fees based on plaintiff's claims being denied by the trial court, this issue may be reconsidered by the trial court in light of the Court of Appeals' conclusion that defendant breached the "no interference" clause of the parties' separation agreement.

Appeal by plaintiff from judgment entered 28 September 2001 by Judge Paul G. Gessner in Wake County District Court. Heard in the Court of Appeals 8 September 2003.

The Sandlin Law Firm, by Deborah Sandlin and John Patrick McNeil, for plaintiff-appellant.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for defendant-appellee.

EAGLES, Chief Judge.

This is an appeal from an order, issued after a bench trial, concluding that the defendant had not breached the parties' separation agreement. Plaintiff argues on appeal: (1) that the trial court erred as a matter of law in concluding that plaintiff was cohabiting, (2) that the findings of fact were not supported by competent evidence, (3) that the court erred in concluding that defendant had not breached

the "no interference" provision, (4) that the court erred in concluding that defendant had not breached the time and method of payment provisions and (5) that the court erred in denying the plaintiff's request for attorneys' fees.

Plaintiff and defendant were married on 22 March 1992 and separated on 8 July 1998. The parties are the parents of two minor children. Plaintiff and defendant were granted a divorce on 3 March 2000. An "Interim Separation Agreement" was entered into by the parties on 11 April 2000. This agreement included detailed provisions related to alimony, child support and a "no interference" provision. Under the agreement, defendant was obligated to pay alimony and child support for their two children to the plaintiff by direct deposit from his bank account to hers on the first day of each month, commencing 1 May 2000. The agreement permitted termination of alimony payments upon the occurrence of the first of a list of events. One of these triggering events was "cohabitation by Wife (plaintiff), as that term is defined in N.C.G.S. § 50-16.9." The agreement also provided that neither party was to molest or interfere with the other party in any manner.

Defendant paid the alimony and child support in May and June 2000, but not in the manner prescribed in the agreement. Instead of using the direct deposit method, the defendant paid plaintiff by personal check and payment was late. Plaintiff received the May payments around 4 May 2000 and the June payments around 12 June 2000. During this time, plaintiff and defendant communicated with each other extensively via telephone and email and less frequently in person. The parties' communication was very strained and rude. Also during this time, plaintiff began dating Mr. Parker Bowers. At the end of June, defendant's attorney notified plaintiff by letter that defendant would no longer make the alimony payments because of the plaintiff's cohabitation with Mr. Bowers. On 7 August 2000, plaintiff filed a complaint alleging breach of contract and seeking damages, specific performance, attorneys' fees, a temporary restraining order and a preliminary injunction. In his answer, defendant denied any breach and further pled plaintiff's cohabitation as a bar to alimony after June 2000, as allowed by the separation agreement. The trial court denied plaintiff's claims in an order entered 20 September 2001. Plaintiff appeals.

[1] Plaintiff contends that the trial court erred as a matter of law in concluding that plaintiff had cohabited as defined in N.C. Gen. Stat. § 50-16.9. The parties' separation agreement allowed defendant to

stop paying plaintiff alimony upon the occurrence of any one of several events, including "cohabitation by Wife, as that term is defined in N.C.G.S. § 50-16.9." N.C. Gen. Stat. § 50-16.9(b) says:

> As used in this subsection, cohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations. Nothing in this section shall be construed to make lawful conduct which is made unlawful by other statutes.

N.C. Gen. Stat. § 50-16.9(b) (2001). Plaintiff argues that the trial court did not properly apply this statute, because it relied on findings that merely evidenced a dating relationship between plaintiff and Parker Bowers. We disagree.

Plaintiff's argument focuses on statutory language from the first sentence, "dwelling together continuously and habitually." Plaintiff discounts that the statute's second sentence provides that cohabitation is evidenced by certain acts. N.C. Gen. Stat. § 50-16.9(b). "The rules of statutory construction require presumptions that the legislature inserted every part of a provision for a purpose and that no part is redundant." *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991). N.C. Gen. Stat. § 50-16.9(b) clearly says that cohabitation is evidenced by "the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations." N.C. Gen. Stat. § 50-16.9(b). In order for the trial court to conclude that cohabitation has occurred, it should make findings that the type of acts included in the statute were present.

While we conclude that the trial court applied the correct standard, its conclusions based on that standard must still be supported by adequate findings of fact. Here, the trial court's order lacks adequate findings of fact to support a conclusion of cohabitation because the findings were mere recitations of testimony and evidence. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) requires that "[i]n all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1)

(2001). This Court has found that findings that merely recapitulate the testimony or recite what witnesses have said do not meet the standard set by the rule. *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 323 S.E.2d 368 (1984). Here, the trial court made several findings similar to the following:

> 11. Several witnesses for Defendant, including a private detective hired by Defendant, and Bowers' former girlfriend who lives in the same neighborhood, testified that they had seen vehicles known to be operated by Bowers, including a truck with the name of Bowers' employer emblazoned on it, in Plaintiff's driveway or in Plaintiff's garage overnight on numerous occasions.
>
> 12. The private detective's report indicated that a vehicle known to be driven by Bowers was at Plaintiff's house overnight on May 17, 2000; May 18, 2000; May 24, 2000; May 25, 2000; May 26, 2000; May 30, 2000; May 31, 2000; June 2, 2000; June 3, 2000; June 6, 2000; June 9, 2000; June 13, 2000; and June 22, 2000.

These findings are inadequate as they are "mere recitations of the evidence and do not reflect the processes of logical reasoning." *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000). As the findings of fact regarding cohabitation are inadequate, the conclusions of law that the plaintiff cohabited and that the defendant was relieved from paying alimony cannot stand. Accordingly, we reverse and remand to the trial court for further findings of fact consistent with this opinion.

[2] Plaintiff also argues that the trial court erred in concluding that defendant had not breached the separation agreement with regard to the "no interference" provision of the agreement. Separation agreements that have not been incorporated into a divorce judgment are governed by general contract principles and are enforceable and modifiable only under such principles. *Jones v. Jones*, 144 N.C. App. 595, 548 S.E.2d 565 (2001). The elements of breach of contract are (1) the existence of a valid contract and (2) breach of the terms of the contract. *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). In order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform. *Fletcher v. Fletcher*, 123 N.C. App. 744, 752, 474 S.E.2d 802, 807-08 (1996), *disc. rev. denied*, 345 N.C. 640, 483 S.E.2d 706 (1997). The trial court's decision as to whether a breach is material is a conclusion of law and is therefore

not binding on appeal, but is reviewable as any other conclusion of law. *Id.* at 752, 474 S.E.2d at 807.

The "no interference" provision of the separation agreement provided:

> 1. The parties may and shall continue to live apart for the rest of their lives. Each shall be free from interference, direct or indirect, by the other as fully as though unmarried. Each may for his or her own separate benefit engage in any employment, business or profession he or she may choose.
>
> 2. Neither party will molest or interfere with the other party in any manner, at any time, nor will either party compel or attempt to compel the other party to cohabit or dwell with him or her. Neither party will go on or about the premises of the other without his or her consent.

The trial court found:

> 25. Defendant admitted in his answer as well as in his trial testimony to making the following statements about or to Plaintiff: "Your day is on the way,"; "Are you scared yet?"; "It's finally time for you to pay for what you've done," and, "You are getting ready to see difficult. You are clueless. Get your head out of his (Bowers') rear-end and look around." However, Defendant denied in his answer as well as in his trial testimony that said remarks were in any way verbally abusive or made as a threat to Plaintiff and this Court finds that the evidence at trial tended to show that there was obnoxious conduct between both parties, and that even though Defendant, by his own admissions and testimony, did not always conduct himself in a manner that was best for the parties' children, neither did Plaintiff.

The trial court apparently did find that the conduct on the part of the defendant would be a violation of the "no interference clause" but did not find breach due to plaintiff's conduct.

However, breach by one party does not automatically excuse the other party's performance under the separation agreement. In *Smith v. Smith*, it was held,

> (1) that it is not every violation of the terms of a separation agreement by one spouse that will exonerate the other from performance; (2) that in order that a breach by one spouse of his or her covenants may relieve the other from liability from the latter's

> covenants, the respective covenants must be interdependent rather than independent; and (3) that the breach must be of a substantial nature, must not be caused by the fault of the complaining party, and must have been committed in bad faith.

Smith v. Smith, 225 N.C. 189, 197-98, 34 S.E.2d 148, 153 (1945). In *Smith*, the Court found that the husband's duty to pay alimony was independent of the wife's duty to not interfere with her former husband. *Id.* at 198, 34 S.E.2d at 154. Here, the "no interference" provision of the separation agreement is independent from any other provision of the agreement. There is nothing to indicate that a failure by the plaintiff to abide by any provision authorizes the defendant to breach the "no interference" provision. We see no conduct by the plaintiff which would excuse the defendant's admitted conduct. We conclude that the defendant's conduct did rise to the level of "interference, molestation and harassment." Accordingly, we reverse the trial court's conclusion that defendant had not substantially interfered with or harassed plaintiff.

[3] Plaintiff also argues that the trial court erred in failing to find that defendant breached the time and method of payment provisions of the separation agreement. Breach of contract is a conclusion of law reviewable by this Court. *Fletcher*, 123 N.C. App. at 752, 474 S.E.2d at 807. There was a breach of the agreement's terms here. It is undisputed that defendant failed to pay the plaintiff by direct deposit or by the first of the month in either May or June. However, to be actionable, the breach must substantially defeat the purpose of the contract or be characterized as a substantial failure to perform. *Id.* at 752, 474 S.E.2d at 807-08. Here, the plaintiff did receive the required support payments. While the deviation in method of payment might have been inconvenient, the deviation did not substantially defeat the purpose of the agreement nor was it a substantial failure to perform. Accordingly, this assignment of error fails.

[4] Plaintiff further argues that the trial court erred in failing to award her attorneys' fees. The separation agreement allowed:

> In the event either party shall institute an action to enforce the provisions of this agreement, the party prevailing in said action, whether by adjudication or settlement, shall be entitled to recover their suit costs, including attorney's fees at a reasonable hourly rate, from the other party.

The separation agreement only allows the award of attorneys' fees to the prevailing party in an action. The trial court did not have the

authority to modify this contract. Since plaintiff's claims were denied by the trial court, the trial court could not award attorneys' fees to the plaintiff. However, this issue may be reconsidered by the trial court in light of our conclusion that defendant breached the "no interference" clause of the separation agreement.

Affirmed in part, remanded in part.

Judges McCULLOUGH and STEELMAN concur.

ROGER SIMMONS AND WIFE, JUDITH SIMMONS, PLAINTIFFS v. EMILY SIMMONS ARRIOLA, DEFENDANT

No. COA02-1344

(Filed 21 October 2003)

1. Child Support, Custody, and Visitation— custody—visitation—substantial change in circumstances—best interests of child—extension of temporary order

The trial court did not err in a child custody case between plaintiff maternal grandparents and defendant mother by specifying visitation provisions that were not contained in the initial custody order entered on 17 July 1998 and by modifying other provisions of the mediated consent order without applying the substantial change in circumstances standard and instead using the best interests of the child standard, because: (1) the initial order in the present case does not specify visitation periods, and therefore, is incomplete and cannot be considered final; (2) the order's language providing for regular review coupled with the court's failure to completely determine the issue of visitation periods for defendant shows the order was temporary; (3) the circumstances of this case, in which defendant is recovering from a traumatic brain injury that was anticipated to improve over time, provided a compelling reason to sustain the temporary order; and (4) the periodic reviews of defendant's medical condition and the subsequent setting of specific visitation periods were necessary to ensure that defendant's status as a full legal parent was preserved.

2. Appeal and Error— motion to dismiss appeal—timeliness of filing brief

Plaintiff maternal grandparents' motion to dismiss defendant mother's appeal in a child custody case is allowed under N.C. R. App. P. 13(c), because: (1) defendant's brief as an appellant was untimely filed; and (2) defendant sought no extension of time to file her appellant's brief.

Appeals by plaintiffs and defendant from order entered 5 July 2002 by Judge Jimmy L. Myers in Iredell County District Court. Heard in the Court of Appeals 10 September 2003.

Pope, McMillan, Kutteh, Simon & Privette, P.A., by Charles A. Schieck, for plaintiffs-appellants.

Homesley, Jones, Gaines & Dudley, by Edmund L. Gaines, for defendant-appellee.

MARTIN, Judge.

Plaintiffs, who are defendant-mother's parents and the maternal grandparents of the two minor children involved in this proceeding, brought this action seeking custody of defendant's two minor daughters, Katherine, age 10, and Kristin, age 9, and for child support. Pursuant to a mediated consent order entered 17 July 1998, the district court found that due to a traumatic brain injury suffered by defendant, she was "currently unable, because of her condition and through no fault of her own, to ensure the complete safety and welfare of the children." Accordingly, the court ordered, with defendant's consent, that plaintiffs and defendant would have joint custody of the children, with plaintiffs to have primary physical custody and defendant to have "reasonable and liberal visitation," including physical and telephone access to the children that does not "disrupt the children's school or social activities." The court ordered that plaintiffs consult with defendant regarding all major decisions affecting the children's health, education, and welfare and that defendant make no major decision regarding the children without plaintiffs' concurrence. The order further provided:

> 7. LONG-RANGE GOAL: It is the long-range goal to return the children to full participation in their lives with the Mother, and for the Mother to have full participation in the children's lives.

8. REGULAR REVIEW: This agreement shall be reviewed regularly, at a minimum, annually, to ensure that the Mother gains more rather than less participation in the children's lives as the years pass. Any of the parties may request a review by the Court if the goal is not being met, or if any other question arises under this agreement.

On 13 April 1999, plaintiffs filed a motion seeking review of the custody arrangement and alleging the parties had reached an impasse regarding custody and visitation. On 28 May 1999, the court entered a consent order in which the parties agreed to the appointment of an independent expert to conduct a custody evaluation to assist the court. Following a surfeit of motions, counter-motions, and responses filed by the parties, extending over approximately fifty-five pages of the record before this Court, the matter was heard on 8, 9 and 10 February 2000 and on 30 June 2000. On 25 August 2000, the district court entered an order in which it concluded, *inter alia*, that there had been no substantial change in circumstances affecting the welfare of the children sufficient to justify modification of the mediated consent order and that it was in the best interests of the minor children that primary physical custody should remain with the plaintiffs. The court granted visitation to defendant from 20 July 2000 until the beginning of school in the fall of 2000, and thereafter on alternating weekends and for three-quarters of all holidays from school. All other provisions of the mediated consent order, including the provision requiring periodic reviews, were left in effect.

Defendant filed additional motions seeking a change of custody which were denied by orders dated 12 March 2001 and 5 July 2002. In the latter order, the court specifically concluded that it was reviewing the 17 July 1998 mediated consent order. The court found that defendant's present husband had exhibited serious anger management problems, had directed profanity at the minor children, had engaged in other conduct which had placed the minor children in fear, and that the environment at defendant's residence was not suitable as a primary residence. Citing *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), the court concluded that the 17 July 1998 consent order was temporary in nature and thus, the defendant had a constitutionally protected status as the children's natural parent. However, requiring the children to remain in her residence exposed to domestic violence constituted conduct inconsistent with that status. Accordingly, the court applied a "best interests of the children" standard to its review

of the consent order rather than a presumption of custody with the natural parent or "a substantial change in circumstances affecting the welfare of the children" standard. Notwithstanding, the court concluded both that there had been no substantial change in circumstances affecting the welfare of the minor children and that it was in the best interests of the children to remain in the primary physical custody of plaintiffs. The provisions of the prior order requiring periodic review were left in effect; however, the prohibition against defendant transporting the children in her car was eliminated and defendant was granted additional visitation for the summer of 2002, with any visitations missed by defendant during the summer of 2002 as a result of the children's school or church functions to be made up on a "day-for-day" basis during the school year. Both plaintiffs and defendant gave notice of appeal from the 5 July 2002 order.

I.

[1] In their appeal, plaintiffs contend the district court erred by specifying visitation provisions that were not contained in the initial custody order entered on 17 July 1998 and by modifying other provisions of the mediated consent order without applying the "substantial change in circumstances" standard and without finding such a change in circumstances. *See* N.C. Gen. Stat. § 50-13.7(a) (2001) (child custody orders may not be modified without a showing of changed circumstances by either party). After careful consideration, we reject their argument.

The same standards that apply to changes in custody determinations are also applied to changes in visitation determinations. *See Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978) (holding that "visitation privileges are but a lessor degree of custody"); *Lamond v. Mahoney*, 159 N.C. App. 400, 402-03, 583 S.E.2d 656, 658 (2003). If a child custody or visitation order is considered final or permanent, the court may not make any modifications to that order without first determining that there has been a "substantial change in circumstances" in the case. *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002). However, if a child custody or visitation order is considered temporary, the applicable standard of review for proposed modifications is "best interest of the child," not "substantial change in circumstances." *Id.*

An order is considered temporary only if it either (1) states a "clear and specific reconvening time" that is reasonably close in prox-

imity to the date of the order; or (2) does not determine all the issues pertinent to the custody or visitation determination. *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000). A trial court's mere designation of an order as "temporary" is not determinative. *Id.* In this case, the initial 1998 consent order provided that due to the defendant-mother's traumatic brain injury, the "reasonable and liberal" visitation granted defendant was to be "monitored and reviewed on a regular basis to ensure that the Mother gains more rather than less participation in the children's lives as the years pass." The order set forth that such reviews shall be conducted "regularly, and at a minimum, annually." The initial order also made no determination as to how "reasonable and liberal visitation" should be interpreted or carried out.

In *Brewington v. Serrato*, this Court ruled that a provision in a child custody order permitting visitation "at such times as the parties may agree" could not be sustained. 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985). The Court held that a trial court is obligated to include in all final visitation orders a provision specifying actual visitation periods. *Id.* The initial order in the present case does not specify visitation periods and, therefore, is incomplete and cannot be considered final. The language providing for regular review coupled with the court's failure to completely determine the issue of visitation periods for defendant persuades us that the 17 July 1998 order was a temporary order.

Our holding that the 17 July 1998 order was a temporary order should not be interpreted as approval of the use of temporary orders that are indefinite in nature or are effective for unreasonably long periods of time, absent a compelling reason. It is the public policy of this State that in all cases where it is practicable, child custody orders should be entered as permanent or final so as to avoid the "turmoil and insecurity" that children face from constant litigation of their custody status. *See Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998); *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546 (order that set a reconvening date more than a year after its issuance was permanent where there were no unresolved issues). However, the circumstances of this case, in which defendant is recovering from a traumatic brain injury that was anticipated to improve over time, provide such a compelling reason. Defendant's injury and inability to care for her children is recited as the sole reason for her relinquishment of custody in the 17 July 1998 order. While this case falls at the outer boundaries of sustainable temporary orders, the periodic

reviews of defendant's medical condition and the subsequent setting of specific visitation periods were necessary to ensure that her status as a "full legal parent" was preserved. Under such circumstances, the extended nature of the temporary order was appropriate. Therefore, we hold the district court did not err in applying the "best interests of the child" standard, instead of the "substantial change in circumstances" standard, and in modifying the provisions of the 17 July 1998 order.

II.

[2] Defendant also gave notice of appeal from the 5 July 2002 order, contending the trial court erred in ruling that her conduct was inconsistent with her constitutionally protected status as a natural parent. Plaintiffs have moved to dismiss her appeal for failure to comply with Rule 13(a) of the North Carolina Rules of Appellate Procedure, which requires that an appellant file and serve an appellant's brief within thirty days after the printed record on appeal has been mailed to the parties by the clerk of the appellate court to which the appeal has been taken. N.C. R. App. P. 13(a).

In the present case, the printed record was mailed to the parties by the clerk of this Court on 30 October 2002. Plaintiffs-appellants' brief was timely filed on 29 November 2002, the date upon which it was mailed to the clerk and to defendant's counsel, as evidenced by the certificate of service, and it was received by the clerk on 2 December 2002. *See* N.C. R. App. P. 26(a)(1). No appellant's brief was filed by defendant. On 20 December 2002, defendant moved for an extension of time to file her *appellee's* brief, which motion was granted and she was allowed to file the appellee's brief on or before 28 January 2003. On 27 January 2003, a document entitled "Defendant-Appellant's Brief" was filed by mail with the clerk and plaintiffs' counsel, and was received by the clerk on 28 January 2003. The document contained two arguments in response to those contained in the plaintiffs-appellants' brief, and one argument in support of the three assignments of error asserted by defendant in the record on appeal.

Although defendant's arguments, as appellee, in response to the assignments of error asserted by plaintiffs in their appeal were timely filed, her argument in support of the assignments of error asserted by her as an appellant are not timely presented in the brief which she filed on 27 January 2003. Her brief as an appellant was due thirty days after the record on appeal was mailed by the clerk;

she has sought no extension of time to file her appellant's brief. Plaintiffs' motion, made as appellees, to dismiss defendant's appeal is therefore allowed. N.C. R. App. P. 13(c).

Plaintiffs' appeal:

Affirmed.

Defendant's appeal:

Dismissed.

Judges BRYANT and GEER concur.

IN RE: IAN CHRISTOPHER BRADSHAW, A MINOR CHILD

No. COA02-1325

(Filed 21 October 2003)

1. Trials— inadequate recordation—failure to show prejudice

Respondent father has not shown he was prejudiced for the purpose of receiving meaningful appellate review in a termination of parental rights case by the inadequate recording of the proceedings on 27 March 2000, because: (1) respondent made no attempt to reconstruct the evidence and makes only general allegations of prejudice in his brief; and (2) a review of the transcript indicated that much of the missing testimony was clearly referenced and repeated by the witnesses, including respondent, when the hearing continued on 28 March 2000. N.C.G.S. § 7B-806.

2. Termination of Parental Rights— neglect—failure to provide financial support—failure to convey love or affection

The trial court did not err by terminating respondent incarcerated father's parental rights to his minor child based on neglect, because: (1) respondent neither provided support for the minor child nor sought any personal contact with or attempted to convey love or affection for the minor child; (2) respondent never inquired about the minor child in his infrequent correspondence with petitioner mother; (3) although respondent claimed that he drew pictures of Disney characters on some of his letters to petitioner for the purpose of entertaining the minor child, respondent

admitted having sent his last letter to petitioner sometime in 1998; and (4) there was only one telephone call by respondent to petitioner which was in September 1999.

Appeal by respondent father from orders dated 8 May 2000 by Judge Charlie E. Brown in Rowan County District Court. Heard in the Court of Appeals 10 September 2003.

J. Stephen Gray for petitioner-appellee.

Katharine Chester for respondent-appellant.

BRYANT, Judge.

Kevin Andre Rankin (respondent) appeals an "order as to grounds for termination of parental rights" and an "order for the termination of parental rights" dated 8 May 2000 terminating respondent's parental rights to his now five-year-old son (the minor child).

On 27 September 1999, Amy Lynne Bradshaw (petitioner), the mother of the minor child, petitioned the district court to terminate respondent's parental rights based on N.C. Gen. Stat. § 7B-1111(a)(1) (neglect), § 7B-1111(a)(6) (incapability to provide proper care and supervision due to substance abuse), and § 7B-1111(a)(7) (willful abandonment). An adjudication and dispositional hearing was scheduled for 27 and 28 March 2000, at which petitioner, her mother, and respondent testified. Certain words during their testimony are not recorded in the transcript of the hearing because they were inaudible. In addition, respondent's March 27 testimony is missing completely from the transcript, as the tape that was supposed to record the afternoon session of the hearing was apparently not turned on, and only his March 28 testimony is available for review.

The trial court entered an "order as to grounds for termination of parental rights" finding in pertinent part:[1]

3. The minor child was born in Salisbury, Rowan County, North Carolina, and his date of birth is May 6, 1998.

4. . . . [R]espondent is currently incarcerated in the Department of Corrections at Mountain View Correctional Facility, where he is serving a sentence as a[] Habitual Felon[] of not less than eighty months, and not more than one hundred [and] five months. . . . [R]espondent's earliest release date is March 2004.

1. These findings are supported by the testimony available in the transcript.

5. . . . [R]espondent is employed on the maintenance crew at Mountain View Correctional Institute, where he works five days per week, and he is paid money as a result of this job. . . . [R]espondent has at his disposal income in the amount of $5.00 per week.

. . . .

7. . . . [R]espondent testified that he has failed to provide any financial aide [sic], at any time to . . . petitioner, for the use, benefit, and support of [the minor child] since the birth of the minor child.

8. . . . [R]espondent testified that he is using the income he receives as a result of working inside the prison system for his own personal cosmetics and his day[-]to[-]day toiletries.

9. . . . [R]espondent acknowledged, by way of his testimony, that he has seen the minor child . . . [on] no more than six occasions, and at all times while . . . respondent was in the Rowan County Detention Center awaiting trial for the charges for which he is currently serving time. . . . [R]espondent has been in the Department of Corrections serving time on his current sentence[] since March 1998.

. . . .

14. . . . [R]espondent admitted that he has been addicted to drugs.

. . . .

16. . . . [R]espondent has largely been unemployed for the two years prior to his incarceration, except for two weeks when he worked for a temporary agency in 1997.

17. . . . [R]espondent has a history of assaulting . . . petitioner prior to and during her pregnancy.

. . . .

25. . . . [R]espondent testified that [in] approximately September 1999, he called . . . petitioner by telephone, and during that telephone call, he asked about the minor child . . . .

26. . . . [R]espondent admits that the last letter he sent to . . . petitioner was in 1998. Correspondence received by . . . petitioner from . . . respondent after his incarceration focused on the rela-

tionship between . . . petitioner and . . . respondent[] and did not address issues concerning the minor child. In addition to the correspondence concerning the parties' relationship, the letters may have included drawings of Mickey Mouse and Minnie Mouse, which . . . respondent indicates were for the sole purpose of entertaining the minor child.

27. The [trial] court could not find as a fact when . . . respondent sent the last correspondence to . . . petitioner, in that[] respondent did not recall. All the believable evidence was that the correspondence was infrequent.

28. . . . [T]he family of . . . respondent has not contacted . . . petitioner to inquire about the minor child . . . although . . . respondent has a number of family members that reside in Salisbury. . . .

29. Acknowledging that . . . respondent has been incarcerated continually since the minor child's birth, nevertheless, the [trial] court finds that . . . respondent has willfully conducted himself in a way that indicated a desire to relinquish his rights [to] the minor child . . . .

30. . . . [R]espondent has withheld his care, love and affection to the minor child, and his failure to provide care, love and affection to the minor child has been willful.

Based on these findings, the trial court concluded that grounds for termination of parental rights existed under N.C. Gen. Stat. § 7B-1111(a)(1) (neglect) and (7) (willful abandonment). Further concluding that it was in the minor child's best interest, the trial court, through its "order for the termination of parental rights," thereafter terminated respondent's parental rights.

The issues are whether: (I) respondent was prejudiced, for purposes of receiving meaningful appellate review, by the inadequate recording of the proceedings and (II) the trial court's findings support its conclusion of neglect and willful abandonment.

I

[1] Respondent argues that the missing testimony in the transcript prejudiced him in that it foreclosed meaningful appellate review in this case and therefore warrants remand for a new hearing. We disagree.

As this Court has recently held:

> 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." Mere failure to comply with this statute standing alone is, however, not by itself grounds for a new hearing. 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.
>
> 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. 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." 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."

In re Clark, 159 N.C. App. 75, 80, 582 S.E.2d 657, 660 (2003) (citations omitted).

As in *Clark*, respondent in this case has made no attempt to reconstruct the evidence and makes only general allegations of prejudice in his brief to this Court. Moreover, a review of the transcript indicates that much of the missing testimony was clearly referenced and repeated by the witnesses, including respondent, when the hearing continued on 28 March 2000. In light of respondent's failure to give any indication of the specific prejudice to him resulting from the missing testimony, this assignment of error is therefore overruled. *See id.*

II

[2] Respondent next contends the trial court's findings do not support a conclusion of neglect or willful abandonment.

A neglected juvenile, one of the grounds listed in section 7B-1111(a) for the termination of parental rights, *see* N.C.G.S. § 7B-1111(a)(1) (2001), is defined in part as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent," N.C.G.S. § 7B-101(15) (2001). Because "[n]eglect may be manifested in ways less tangible than failure to provide physical

necessities[,] . . . the trial judge may [also] consider . . . a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship." *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982).

In this case, the trial court's findings reflect that respondent was already incarcerated at the time of the minor child's birth in 1998 and was therefore physically unable to be part of the child's life unless petitioner brought the minor child to respondent for visitation. Such visits occurred at most six times and while the minor child was still a newborn. Apart from this situation, which was beyond respondent's control, the undisputed findings of the trial court clearly show that respondent neither provided support for the minor child nor sought any personal contact with or attempted to convey love and affection for the minor child. *See id.*; N.C.G.S. § 7B-101(15). Respondent never inquired after the minor child in his infrequent correspondence with petitioner. *See In re Graham*, 63 N.C. App. 146, 151, 303 S.E.2d 624, 627 (1983) ("[t]he fact that the respondent was incarcerated for a good portion of this period does not provide any justification for his all but total failure to communicate with or even inquire about his children") (citing *In re Burney*, 57 N.C. App. 203, 291 S.E.2d 177 (1982)). Even though the trial court found that respondent claimed to have drawn pictures of Disney characters on some of those letters for the purpose of entertaining the minor child, respondent admitted having sent his last letter to petitioner sometime in 1998. The trial court also noted only one telephone call by respondent to petitioner, in September 1999, during which he claims to have asked about the minor child. *See id.* (holding that "[o]ne communication in a two[-]year period does not evidence the 'personal contact, love, and affection that inheres in the parental relationship' ") (citation omitted). Furthermore, even though respondent was able to earn a small income in prison, he failed to provide any financial aid to petitioner in support of the minor child. *See In re Yocum*, 158 N.C. App. 198, 204, 580 S.E.2d 399, 403 (2003) ("respondent neglected the minor child's welfare, in that he never paid any child support for the minor child and did not send the minor child any gift or other type of acknowledgment on her birthday"). As such, there were sufficient findings to support a conclusion of neglect under the statute. Having found that the trial court's findings support the termination of respondent's parental rights under section 7B-1111(a)(1), we need not reach the issue of whether they were also sufficient for termination under section 7B-1111(a)(7). *See In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127,

133 (1982) (if either of the grounds for termination listed in the trial court's order "is supported by findings of fact . . . the order appealed from should be affirmed").

Affirmed.

Judges MARTIN and GEER concur.

SANDY MUSH PROPERTIES, INC. PLAINTIFF (HANSON AGGREGATES SOUTHEAST, INC., FORMER PLAINTIFF) v. RUTHERFORD COUNTY, BY AND THROUGH THE RUTHERFORD COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. COA02-1587

(Filed 21 October 2003)

Zoning— building moratorium—public notice requirement—police power

The trial court erred by denying summary judgment for plaintiffs, and by granting summary judgment for defendant county, on a claim for an injunction against enforcement of a moratorium against operation of new or expanded heavy industry within 2,000 feet of structures including schools. The public hearing at which the moratorium was passed took place without sufficient public notice; defendant cannot avoid the requirements of N.C.G.S. § 153A-323 simply because the ordinance stated it was enacted pursuant to the county's general police powers.

Appeal by plaintiff from an order entered 3 September 2002 by Judge W. Douglas Albright in Rutherford County Superior Court. Heard in the Court of Appeals 11 September 2003.

Bazzle & Carr, P.A., by Eugene M. Carr, III, for plaintiff-appellant.

Sigmon, Clark, Mackie, Hutton, Hanvey, & Ferrell, P.A., by Warren A. Hutton and Forrest A. Ferrell; Nanney, Dalton & Miller, L.L.P., by Walter H. Dalton and Elizabeth Thomas Miller, for defendant-appellee.

HUNTER, Judge.

Sandy Mush Properties, Inc. ("plaintiff") appeals an order denying its Motion for Summary Judgment and Motion to Amend Complaint; and granting Rutherford County's ("the County"), by and through the County Board of Commissioners ("the Board") (collectively "defendants"), Motion for Summary Judgment. For the reasons stated herein, we reverse.

On 21 June 2001, defendants ran a legal advertisement in *The Daily Courier*, a newspaper of general circulation in the County, noticing a public hearing to be held on 2 July 2001. The hearing was in reference to a proposed Polluting Industries Development Ordinance ("PIDO") that prohibited the operation of a new or expanded heavy industry within 2,000 feet of a church, school, residence or other structures.

At the time of the notice's publication, Hanson Aggregates Southeast, Inc. ("Hanson") had an option to lease a tract of land in the County from plaintiff that consisted of approximately 180 acres ("the Property") that was within 2,000 feet of a school boundary. On 26 June 2001, Hanson applied to the County Building Department for a building permit to operate a crushed stone quarry on the Property. The request was denied. Hanson was informed that it needed to obtain approval from the County Health Department for a septic tank and submit a set of building plans for the proposed site that were stamped by a North Carolina licensed engineer.

On 2 July 2001, the Board conducted a public hearing on the proposed PIDO. Hanson attended the hearing and spoke in opposition to the proposed ordinance. At the close of the hearing, a County Commissioner moved that an ordinance imposing a 120-day moratorium to prohibit the initiation of heavy industry in the County school zones be adopted, during which time the County Planning Commission could study a land use ordinance which would regulate future construction of heavy industry within school zones.[1] The motion was approved.

On 28 August 2001, the County Planning Commission recommended that the proposed PIDO not be adopted by the Board. Thereafter, Hanson renewed its application for a building permit on 31 August 2001. The application included a copy of building plans

1. The land use ordinance that was studied during the 120-day moratorium would later be known as the School Zone Protective Ordinance.

that had been stamped by a North Carolina licensed engineer. Nevertheless, the County Building Department denied the permit based upon the moratorium.

On 12 September 2001, Hanson filed a complaint against defendants requesting that they be enjoined from enforcing the moratorium because defendants had violated statutory procedures by not publishing adequate notice of the public hearing at which the moratorium was passed. Hanson's complaint also requested a Writ of Mandamus requiring defendants to issue it a building permit. Following a 28 September 2001 hearing on this matter, the trial court concluded that the moratorium "was not an exercise of the [County's] police power and was therefore invalid." Thus, defendants were enjoined from enforcing the moratorium and were ordered to issue Hanson the building permit; however, the court's order provided that its "findings of fact and conclusions of law concerning the injunction [were] not binding on any future court hearing this matter."

During that same time, the Board met and considered the School Zone Protective Ordinance ("SZPO") on 4 September 2001, which prohibited the construction or operation of any heavy industry in areas identical to those listed in the moratorium. The Board unanimously voted to adopt the SZPO pursuant to the County's general police powers under Section 153A-121 of the North Carolina General Statutes. Thereafter, Hanson filed an Amended Verified Complaint and Petition for Mandamus. Defendants answered and counterclaimed that Hanson should be enjoined from operating a crushed rock quarry on the Property because it would be in violation of the SZPO. Following Hanson's reply to the counterclaim, defendants filed a Motion for Summary Judgment on 21 June 2002.

On 2 July 2002, it was announced that Hanson had terminated its lease with plaintiff and that plaintiff was willing to be substituted for Hanson in the action, ratifying all claims by Hanson. An order approving substitution of the parties was entered on 8 August 2002. Prior to the entry of the order, however, plaintiff filed a Motion to Amend (Hanson's Amended Verified) Complaint to add another claim on 30 July 2002, as well as its own Motion for Summary Judgment. Defendants filed an objection to the Motion to Amend Complaint.

The parties' motions were heard on 12 August 2002. The trial court subsequently denied both of plaintiff's motions and granted defendants' Motion for Summary Judgment. Finally, the court dis-

missed plaintiff's claims and dissolved the Writ of Mandamus and preliminary injunction issued as a result of the 28 September 2001 hearing. Plaintiff appeals.

Plaintiff assigns error to the trial court's denial of its Motion for Summary Judgment and grant of defendants' Motion for Summary Judgment. Specifically, plaintiff contends that the public hearing at which the moratorium was passed, ultimately resulting in the denial of its building permit, took place without sufficient notice pursuant to Section 153A-323 of our statutes. We agree.

Generally, "notice and public hearing are not mandated for the adoption of ordinances." *Vulcan Materials Co. v. Iredell County*, 103 N.C. App. 779, 782, 407 S.E.2d 283, 285 (1991). However, our statutes and case law recognize an exception for the adoption of any ordinance authorized by Article 18 of Chapter 153A. *Id.* "Article 18 governs zoning, subdivision regulation, building inspection (including issuance of building permits), and community development." *Id.* at 782, 407 S.E.2d at 286. When the adoption of an ordinance authorized under this article is at issue, the county board of commissioners is required to "hold a public hearing on the ordinance . . . [and] shall cause notice of the hearing to be published once a week for two successive calendar weeks." N.C. Gen. Stat. § 153A-323 (2001). Failure to adhere to the notice requirements of Section 153A-323 will result in any subsequently enacted ordinance covered by Article 18 being invalid as demonstrated by this Court's holding in *Vulcan*.

In *Vulcan*, the plaintiff challenged a local ordinance imposing a 60-day moratorium on the issuance of building permits pending the enactment of a zoning ordinance. The plaintiff asserted that the moratorium violated Section 153A-323 and its requirements of notice to the public and a public hearing prior to the moratorium's adoption. The trial court granted summary judgment in favor of the plaintiff and ordered that the requested building permit be granted. On appeal by the defendants, the *Vulcan* Court determined that no specific authority existed for the imposition of a moratorium on the issuance of building permits pending zoning. Nevertheless, it concluded that the defendants' moratorium was within the purview of Article 18 because both zoning and ordinances imposing moratoriums that deal specifically with the issuance of building permits are governed by Article 18. Thus, the defendants' failure to hold a public hearing or give notice, as required under Section 153A-323, invalidated the moratorium. *Vulcan*, 103 N.C. App. at 782, 407 S.E.2d at 286.

The present case is analogous to *Vulcan*. As in *Vulcan*, this case involves an ordinance imposing a moratorium that effectively denied plaintiff the issuance of a building permit pending enactment of the SZPO. Since the moratorium "deal[t] specifically with the issuance of building permits, [it] is . . . covered by Article 18[,]" and its adoption had to comply with the notice requirements of Section 153A-323. *Id.* Yet, only one advertisement noticing the public hearing at which the moratorium was adopted appeared in the local paper approximately ten days prior to the hearing, despite Section 153A-323's requirement that "[t]he board shall cause notice of the hearing to be published once a week for two successive calendar weeks." N.C. Gen. Stat. § 153A-323. The moratorium was therefore invalid.

It should be noted that defendants argue that any notice of a public hearing was unnecessary because the moratorium was allowable under the County's police power pursuant to Section 153A-121 of our statutes and *PNE AOA Media, L.L.C. v. Jackson Cty.*, 146 N.C. App. 470, 554 S.E.2d 657 (2001). Section 153A-121, entitled "General ordinance-making power[,]" provides, *inter alia*, that as an exercise of a county's general police power, it "may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county[.]" N.C. Gen. Stat. § 153A-121(a) (2001). Based on this statute, the defendant in *PNE* argued that it did not have to publish notice or advertise that it was considering adoption of a moratorium that would prohibit PNE from being issued a billboard permit that conflicted with the Jackson County zoning code. On appeal, the *PNE* Court concluded that the general police powers of Section 153A-121 did not require notice in that situation, particularly since the ordinance stated it was enacted pursuant to Section 153A-121(a). *PNE*, 146 N.C. App. at 478-79, 554 S.E.2d at 662-63.

Like *PNE*, defendants also contend that no notice was required because the moratorium prohibiting the issuance of plaintiff's building permit stated it was enacted pursuant to Section 153A-121. However, defendants' reliance on our holding in *PNE* is misplaced. *PNE* involved the adoption of a moratorium prohibiting the issuance of a *billboard* permit. Ordinances imposing moratoriums of that nature are not governed by Article 18 of Chapter 153A; therefore, the defendant in *PNE* properly acted under Section 153-121's general police power. In the case *sub judice*, defendants clearly adopted an ordinance that imposed a moratorium on the issuance of *build-*

ing permits, which are governed by Article 18 of Chapter 153A. Defendants cannot now avoid the notice requirements of Section 153A-323 simply because the moratorium stated it was "enacted pursuant to and by virtue of the general police powers granted Rutherford County pursuant to N.C.G.S. 153A-121."

Accordingly, we reverse the trial court's denial of plaintiff's summary judgment motion and its grant of summary judgment in favor of defendants. Reversal on this issue renders the need to address plaintiff's remaining assignment of error unnecessary.

Reversed.

Judges McGEE and CALABRIA concur.

JOHNNY E. BREWER, PLAINTIFF-APPELLANT v. CABARRUS PLASTICS, INC., DEFENDANT-APPELLEE

No. COA00-364-2

(Filed 21 October 2003)

1. **Evidence— prior testimony—unavailability of witness—sufficiency of evidence**

The trial court did not err by denying the admission of former trial testimony in the retrial of an employment discrimination claim. The trial court found that plaintiff presented no evidence of the unavailability of the witness other than the statements of counsel and an unverified motion to use the transcript of prior testimony. N.C.G.S. § 8C-1, Rule 804(b)(1).

2. **Employer and Employee— discriminatory discipline—not submitted to jury**

The trial court erred in an employment discrimination claim by not submitting to the jury the claim of discriminatory discipline. Although the jury found that plaintiff's termination was not the result of racial discrimination, the issue of discriminatory discipline was not submitted, and plaintiff was entitled to nominal damages upon a finding of discriminatory discipline even if there was no evidence of actual damages.

This matter was originally heard in the Court of Appeals on 22 February 2001, on appeal by plaintiff from judgment entered 18 May 1999 and orders entered 14 May and 17 July 1999 by Judge W. Erwin Spainhour in Superior Court, Cabarrus County. An opinion by a divided panel of this Court was filed on 4 September 2001. Defendant appealed as a matter of right to the Supreme Court of North Carolina. Our Supreme Court reversed for the reasons stated in the dissenting opinion and remanded to the Court of Appeals for consideration of plaintiff's remaining issues, in a decision filed 2 May 2003.

Julie H. Fosbinder; and Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Frank H. Lancaster, for defendant-appellee.

McGEE, Judge.

Following our Court's decision to award plaintiff a new trial on his employment discrimination claim in *Brewer v. Cabarrus Plastics, Inc.*, 146 N.C. App. 82, 551 S.E.2d 902 (2001) (*Brewer II*), defendant appealed as a matter of right to the Supreme Court of North Carolina based upon Judge Walker's dissent. *See* N.C. Gen. Stat. § 7A-30(2) (2001). The Supreme Court adopted Judge Walker's dissenting opinion *per curiam* in reversing this Court's decision. In adopting Judge Walker's dissent, the Supreme Court found that the jury instructions, when taken as a whole, presented to the jury the appropriate standards of liability in a pretext case. *Id.* at 89, 551 S.E.2d at 907. The Supreme Court remanded the case to our Court for consideration of plaintiff's remaining issues not addressed in our prior opinion. A complete statement of the facts in this case is set forth in our earliest opinion in this matter in *Brewer v. Cabarrus Plastics, Inc.*, 130 N.C. App. 681, 504 S.E.2d 580 (1998), *disc. review denied*, 350 N.C. 91, 527 S.E.2d 662 (1999) (*Brewer I*).

I.

[1] Plaintiff argues the trial court in his second trial erred in not admitting the transcript of the testimony of a witness from the first trial of this matter. Plaintiff contends that the efforts of plaintiff's counsel to procure the testimony of the witness fully satisfied the "unavailability" requirement of N.C. Gen. Stat. § 8C-1, Rule 804.

"Admission of evidence is '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). Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision "only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

N.C. Gen. Stat. § 8C-1, Rule 804(b)(1) (2001) states that former testimony may be admitted into evidence as an exception to the hearsay rule if the witness is unavailable and the

> [t]estimony [was] given as a witness at another hearing of the same or different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

" 'Unavailability as a witness' includes situations in which the declarant . . . [i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) (2001). The proponent of the evidence bears the burden of establishing the unavailability of the witness. *State v. Artis*, 325 N.C. 278, 304, 384 S.E.2d 470, 484 (1989), *sentence vacated and remanded on other grounds, Artis v. North Carolina*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

The trial court in the case before us specifically found that plaintiff presented no evidence of the unavailability of the witness "other than the statements of counsel and the unverified motion for permission to use the transcript of [the witness's] prior testimony." Plaintiff stated in his unverified Rule 804(a)(5) motion that the witness had been contacted and stated that she would be unable to testify at trial. However, the motion did not prove the matters alleged therein and did not constitute evidence of the unavailability of the witness. *See Chow v. Crowell*, 15 N.C. App. 733, 736, 190 S.E.2d 647, 649 (1972). Plaintiff attached to the motion the letters written to contact the witness and the letters demonstrate efforts to contact the witness, but do not prove the unavailability of the witness. The record shows that plaintiff's counsel also stated to the trial court that the

witness had been contacted and was unavailable to testify. However, plaintiff's counsel presented no evidence to the trial court of the unavailability of the witness. Additionally, in his brief, plaintiff fails to point this Court to any evidence showing that the witness was unavailable and has failed to meet his burden of proving the unavailability of the witness.

The record contains a signed affidavit of plaintiff's counsel dated 21 May 1999 stating that defense counsel had been informed prior to trial that if the witness was unwilling to appear in person to testify, plaintiff would seek to use the witness's prior trial testimony. However, plaintiff's Rule 804(a)(5) motion was dated 10 May 1999 and the trial court denied the motion in an order entered 14 May 1999. Since the record shows that the affidavit of plaintiff's counsel was not filed until 21 May 1999, it was not before the trial court for consideration at the time the trial court denied the Rule 804(a)(5) motion.

After reviewing the record, we agree with the trial court that plaintiff failed to offer evidence establishing the unavailability of the witness. Accordingly, the trial court did not abuse its discretion in denying the admission of former trial testimony of a witness. This assignment of error is overruled.

II.

[2] Plaintiff argues the trial court erred in refusing to allow the jury to consider the issue of whether defendant discriminated against plaintiff by disciplining him. Plaintiff contends that there was ample evidence from which a reasonable jury could conclude that plaintiff's discipline was discriminatory.

The trial court "must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings." *Harrison v. McLear*, 49 N.C. App. 121, 123, 270 S.E.2d 577, 578 (1980). In the present case, the trial court submitted to the jury plaintiff's employment termination discrimination claim. However, the resolution of this claim by the jury did not resolve plaintiff's alleged discriminatory discipline claim. The jury found that plaintiff's employment termination was not the result of racial discrimination but the issue of discriminatory discipline was never submitted to the jury. Thus, the trial court's submission to the jury of only the termination claim did not resolve all of the claims in the case.

An examination of the trial transcript shows that the trial court did not submit the issue of discriminatory discipline to the jury because it felt there was no evidence presented of actual damages suffered by plaintiff. The United States Supreme Court has determined that the denial of a constitutional right "should be actionable for nominal damages without proof of actual injury." *Carey v. Piphus*, 435 U.S. 247, 266-67, 55 L. Ed. 2d 252, 267 (1978) (holding that if civil rights plaintiffs failed to prove actual damages, they would only be entitled to recover nominal damages in the amount of one dollar). The Fourth Circuit Court of Appeals has stated that a claimant is entitled to an award of nominal damages when a claimant establishes the violation of a constitutional right but cannot prove actual injury. *Norwood v. Bain*, 166 F.3d 243, 245 (4th Cir.) (en banc), *cert. denied*, 527 U.S. 1005, 144 L. Ed. 2d 239 (1999); *Price v. City of Charlotte, North Carolina*, 93 F.3d 1241, 1257 (4th Cir. 1996), *cert. denied*, 520 U.S. 1116, 137 L. Ed. 2d 328 (1997) (police officers awarded one dollar in nominal damages for unconstitutional promotion practices where there was insufficient evidence of actual damages). In order to recover more than nominal damages, actual injury must be proven by sufficient evidence. *Price*, 93 F.3d at 1250.

In the present case, plaintiff has presented sufficient evidence to permit a jury to determine whether defendant disciplined plaintiff for discriminatory reasons. While plaintiff may not have presented sufficient evidence to obtain an award of compensatory damages, plaintiff was entitled to recover nominal damages upon a finding by the jury that defendant discriminated against plaintiff in its disciplinary actions. Accordingly, the trial court erred in failing to submit to the jury plaintiff's claim of discriminatory discipline and he is entitled to a new trial on that issue.

No error in part; new trial in part as to claim for discriminatory discipline.

Judges WYNN and MARTIN concur.

STATE OF NORTH CAROLINA v. BRANDON BUFORD DAVIS

No. COA02-1136

(Filed 21 October 2003)

1. Evidence— actual money seized during arrest—drugs

The trial court did not err in a possession with intent to sell or deliver cocaine and misdemeanor possession of marijuana case by denying defendant's motion requesting that the State produce the actual money seized from defendant during his arrest, because: (1) N.C.G.S. § 15-11.1(a) permits the introduction of substitute evidence at trial as long as it does not prejudice defendant; (2) the absence of the actual bills neither inhibited the jury nor prejudiced defendant in this case when the jury got to see the whole picture by listening to the witnesses on each side; and (3) the jury considered the evidence that defendant claims would exonerate him regarding the money and rejected it.

2. Drugs— possession with intent to sell or deliver cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession with intent to sell or deliver cocaine at the close of all evidence, because: (1) the amount of cocaine found on defendant far exceeded the amount a typical user would possess for personal use; (2) the cocaine was packaged separately and an officer indicated that drug dealers often keep cocaine in individual packages so that it is readily available for sale; and (3) the drugs were found in close proximity to the money that was also seized.

Appeal by defendant from judgment entered 8 February 2002 by Judge Steve A. Balog in Guilford County Superior Court. Heard in the Court of Appeals 8 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General Fred Lamar, for the State.

Robert T. Newman, Sr., for defendant appellant.

McCULLOUGH, Judge.

Defendant Brandon B. Davis was tried before a jury at the 4 February 2002 Session of the Guilford County Superior Court after

being charged with possession with intent to sell or deliver cocaine and misdemeanor possession of marijuana. The State's evidence showed the following: Brandon B. Davis was a passenger in a car that was stopped by Officer Rodney Trent Briles of the Greensboro Police Department on 1 February 2001. Officer Briles testified that the vehicle was stopped for displaying expired tags. The vehicle had four passengers including defendant who was in the front passenger seat. While Officer Briles was running the tags through his computer, defendant got out of the car and began to flee. Officer Briles called for assistance, and Officer James Bernard Wilde apprehended the fleeing defendant. Officer Wilde testified that he found 9.2 grams of marijuana, 18.6 grams of cocaine, and $2,641.68 on defendant. Officer Wilde further stated that he took the money from defendant and had his supervisor notify someone in the vice/narcotics division to seize the money federally.

Corporal Alan Sylvester Wallace worked for the vice/narcotics division at the time of the arrest and was responsible for determining whether or not there was probable cause to seize money pursuant to a drug arrest. After consulting with a U.S. Drug Enforcement Agency (DEA) official, Corporal Wallace decided that the $2,641.68 should be seized.

Defendant was arrested and booked by Officer Wilde. On 8 February 2002, the jury found defendant guilty of possession with intent to sell or deliver cocaine and misdemeanor possession of marijuana. The Honorable Steve A. Balog sentenced defendant to six to eight months in prison on 8 February 2002. Defendant appeals.

On appeal, defendant argues that the trial court erred by (I) denying defendant's motion that the State produce the actual money seized from defendant during his arrest; and (II) denying defendant's motion to dismiss at the end of the State's evidence because of insufficient evidence. For the reasons set forth herein, we are not persuaded by defendant's arguments and conclude that he received a trial free from reversible error.

At the outset, we note that recent court decisions have stressed the importance of cooperation among law enforcement agencies. For instance, this Court has stated, "American law enforcement is predicated on cooperation and mutual assistance." *State v. Hill*, 153 N.C. App. 716, 720, 570 S.E.2d 768, 771 (2002). "[R]outine inter-governmental cooperation between state and federal law enforcement

agencies is not contrary to our statutory mechanism to safeguard seized property." *Id.* at 722, 570 S.E.2d at 772.

The legislature has also spoken to this issue. N.C. Gen. Stat. § 90-95.2 (2001) allows state and local agencies to assist each other in enforcing the drug laws, while N.C. Gen. Stat. § 90-113.5 (2001) requires state and local officials to cooperate with federal agencies. We find that the actions taken by law enforcement officers in this case were consistent with these principles.

I. Failure to Produce the Actual Money

[1] Defendant claims that the trial court erred by not forcing the State to produce the actual money seized from defendant during his arrest. Defendant further argues that this violated his rights because the money was not made available at trial for use in his defense. We do not agree.

N.C. Gen. Stat. § 15-11.1(a) (2001) directs that when a state or local law enforcement officer seizes property, the property shall be retained as evidence until either the district attorney releases the property or a court orders its return pursuant to a motion after a hearing. However, the statute also permits the introduction of substitute evidence at trial as long as it does not prejudice the defendant.

> Notwithstanding any other provision of law, photographs or other identification or analyses made of the property may be introduced at the time of the trial provided that the court determines that the introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.

Id.

In this case, the State's failure to present the actual money did not prejudice defendant because the jury was able to consider substitute evidence. The jury heard from Officer Wilde, the State's witness, who testified that he found $2,641.68 in cash, three bags of cocaine, and one bag of marijuana on defendant's person. In contrast, Cecilia Beatrice Davis, defendant's mother, testified that the money had special markings on it and had originally belonged to her. Davis further asserted that the money was generated from the sale of defendant's automobile, rather than the sale of drugs.

The absence of the actual bills neither inhibited the jury, nor prejudiced defendant in this case. The jury got to see the whole picture

by listening to the witnesses on each side. More importantly, through testimony, the jury considered the evidence that defendant claims would exonerate him and rejected it. Therefore, the failure to produce the actual money did not prejudice defendant.

II. Motion to Dismiss for Insufficient Evidence

[2] Defendant also contends that there was insufficient evidence to convict him of possession with intent to sell or deliver cocaine. To withstand defendant's motion to dismiss, the State must "present substantial evidence that defendant (i) had either actual or constructive possession of the cocaine and (ii) possessed the cocaine with the intent to sell." *State v. Alston*, 91 N.C. App. 707, 709-10, 373 S.E.2d 306, 309 (1988). In making this determination, the evidence is viewed in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.* at 710, 373 S.E.2d at 309.

Based on the evidence presented, the jury was reasonable in concluding that defendant intended to sell or deliver cocaine. First, the amount of cocaine found on defendant, approximately 20 grams, far exceeds the amount a typical user would possess for personal use. Second, the cocaine was packaged separately, and testimony from Corporal Wallace indicated that drug dealers often keep cocaine in individual packages so it is readily available for sale. Finally, the drugs were found in close proximity to the money. The cash was located in defendant's pocket, while the drugs were hidden in defendant's boots. We find that there was sufficient evidence to convict defendant of possession with intent to sell or deliver cocaine.

We have reviewed defendant's remaining arguments and find them to be unpersuasive. Upon a careful examination of the record, the transcript, and the arguments presented by the parties, we conclude that defendant received a fair trial, free from reversible error.

No error.

Chief Judge EAGLES and Judge STEELMAN concur.

DONNA W. WOOD, ADMINISTRATRIX OF THE ESTATE OF TIMOTHY JOE WOOD, DECEASED, PLAINTIFF v. MONIQUE NICOLE WELDON, DEFENDANT, AND UNNAMED DEFENDANTS

No. COA02-1311

(Filed 21 October 2003)

1. Workers' Compensation— lien—reduction by trial court—applicability of statutory amendment

The Court of Appeals rejected a workers' compensation insurance carrier's argument concerning a statutory amendment of the superior court's discretion to determine the amount of the carriers' lien. Defendant did not raise this argument in the trial court; moreover, the amendment's effective date included this judgment. N.C.G.S. § 97-10.2.

2. Workers' Compensation— lien—reduction—discretion of court

The trial court did not abuse its discretion by not completely extinguishing a workers' compensation lien. There is no mathematical formula or set list of factors for the trial court to consider in making its determination, and it cannot be said that the lien reduction in this case was manifestly unsupported by reason.

Appeal by plaintiff and defendant from order entered 25 March 2002 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 20 August 2003.

C. Murphy Archibald; Murphy & Chapman, P.A., by Jenny L. Sharpe, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bryan T. Simpson and Tracey L. Jones, for defendant-appellant.

MARTIN, Judge.

Defendant Interstate Insurance Company/Harbor Specialty Insurance Company appeals from an order reducing its workers' compensation lien on the proceeds of a settlement received by plaintiff Donna W. Wood as damages for the wrongful death of her husband, Timothy Joe Wood. Plaintiff cross-appeals, contending the trial court should have extinguished defendant's lien altogether.

The record discloses that Timothy Joe Wood, a tow truck operator employed by Bowles Automotive, Inc. ("Bowles"), was struck and killed by a vehicle driven by Monique Nicole Weldon on 1 April 1999 while he was providing assistance to a disabled vehicle in the course of his employment. Defendant was the workers' compensation insurance carrier for Bowles. Following Wood's death, defendant paid plaintiff and her son, Wood's only child, workers' compensation benefits and funeral expenses. Mrs. Wood received an uncommuted lump sum settlement and her son received ongoing weekly benefits.

Weldon was prosecuted and pled guilty to involuntary manslaughter, driving while intoxicated, and hit and run. In June 2000, plaintiff initiated a civil action for wrongful death against Weldon. Weldon, who was uninsured, failed to answer the complaint or otherwise appear in the matter and her default was entered by the Clerk of Superior Court on 22 October 2001. Thereafter, plaintiff reached a settlement with Bowles' uninsured motorist insurance carriers for $305,000. As a condition of the settlement, a portion of the settlement proceeds, $78,955, was placed in escrow pending a resolution of defendant's claimed workers' compensation lien.

Plaintiff then moved for default judgment against Weldon and for an order pursuant to G.S. § 97-10.2(j) extinguishing or reducing defendant's claimed workers' compensation lien on the proceeds of the settlement. On 25 March 2002, the trial court entered a default judgment against Weldon in the amount of $1,500,000 in compensatory damages and $200,000 in punitive damages. The court also entered an order in which it found that (1) the total amount of workers' compensation benefits, accrued and prospective, to which plaintiff and her son would be entitled to receive from defendant is $118,432, minus costs and attorneys' fees; (2) the amount of the settlement between plaintiff and the uninsured motorist insurance carriers was $305,000, of which she received $121,259.93 after payment of costs and attorneys' fees; (3) that a condition of such settlement required that $78,955 be placed in escrow pending the court's consideration of plaintiff's motion for extinguishment or reduction of the workers' compensation lien; (4) the sums paid by defendant and the uninsured motorist carriers are the only sums available to compensate plaintiff and her son for Wood's death; and (5) these sums combined would be substantially less than the amount plaintiff is entitled to recover of Weldon pursuant to the default judgment. The court reduced defendant's workers' compensation lien from $78,955 to $20,000. Both parties appeal.

I. Defendant's appeal

[1] Defendant contends the trial court exceeded its authority in reducing the lien because G.S. § 97-10.2 as it existed at the time of Timothy Wood's death in April 1999, provided that a superior court judge could reduce the workers' compensation lien granted by the statute upon the proceeds of a third party payment to the injured employee, only when the judgment obtained against the third party is insufficient to compensate the carrier's subrogation interest. Defendant acknowledges that G.S. § 97-10.2(j) was amended in June 1999 to grant the superior court discretion to determine the amount of the workers' compensation carrier's lien without a finding that the judgment obtained by the injured employee against the third party is insufficient to satisfy the carrier's subrogation interest. However, defendant argues the amendment cannot be applied to this case since Timothy Wood was killed prior to its effective date. Therefore, since the judgment obtained against Weldon was more than defendant's lien, defendant asserts the superior court had no discretion to reduce the lien. We reject defendant's argument for two reasons.

First, our examination of the transcript of the hearing on plaintiff's motion to reduce or extinguish the lien reveals that defendant did not raise this argument in the trial court, arguing only that it would be inequitable to reduce the lien. It is a well-established rule of appellate procedure that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make." N.C. R. App. P. 10(b)(1). As has been said many times, "the law does not permit parties to swap horses between courts in order to get a better mount," *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934), meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court. *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002). Second, the amendment to G.S. § 97-10.2(j) was effective 18 June 1999 and was made applicable to judgments or settlements entered on or after that date. S.L. 1999-94, s.2.

II. Plaintiff's appeal

[2] Plaintiff also appeals from the trial court's order reducing defendant's lien, maintaining the trial court abused its discretion in failing to extinguish the lien altogether. G.S. § 97-10.2(j), as amended in June 1999 and applicable to this case, provides:

> (j) Notwithstanding any other subsection in this section . . . in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge . . . to determine the subrogation amount. . . . [T]he judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C. Gen. Stat. § 97-10.2(j) (2001). There is no mathematical formula or set list of factors for the trial court to consider in making its determination, *In re Biddix*, 138 N.C. App. 500, 502, 530 S.E.2d 70, 71, *disc. review denied*, 352 N.C. 674, 545 S.E.2d 418 (2000); the statute plainly affords the trial court discretion to determine the appropriate amount of defendant's lien. The exercise of discretion requires that the court "make a reasoned choice, a judicial value judgment, which is factually supported." *Allen v. Rupard*, 100 N.C. App. 490, 495, 397 S.E.2d 330, 333 (1990).

In this case, after making findings of fact, the trial court concluded that "[t]aking into account the facts available to the Court through testimony, evidence presented and the Court file, and taking into account all arguments of plaintiff's attorneys and all arguments of the attorneys of the worker's [sic] compensation carrier" it was appropriate to reduce the workers' compensation lien. We cannot say that the reduction of the lien to $20,000 was manifestly unsupported by reason or so arbitrary that it could not possibly have been the result of a rational decision, *see Frost v. Mazda Motor of Am.*, 353 N.C. 188, 540 S.E.2d 324 (2000) (defining abuse of discretion standard), thus we discern no abuse of discretion.

Affirmed.

Judges McCULLOUGH and LEVINSON concur.

LERLEAN COTTON, PLAINTIFF v. JOSEPH JONES, DEFENDANT

No. COA02-1595

(Filed 21 October 2003)

Process and Service— personal jurisdiction—service by publication—invalid

Personal jurisdiction was not obtained through service by publication, and a child custody and support order was reversed, where there was no affidavit in the record showing the circumstances warranting the use of service by publication, or showing plaintiff's due diligence in attempting to locate defendant. The trial court's finding that plaintiff had made diligent efforts to locate defendant was not supported and did not cure plaintiff's failure to strictly comply with the statute permitting service by publication. N.C.G.S. § 1A-1, Rule 4(j1).

Appeal by defendant from an order entered 20 August 2002 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 18 September 2003.

Lerlean Cotton, plaintiff-appellee, pro se.

Timothy M. Stokes for defendant-appellant.

HUNTER, Judge.

Joseph Jones ("defendant") appeals from an order dated 20 August 2002 denying his "Motion for Relief from Judgment or Order" and requiring him to comply with a child support and custody order filed 9 July 2001. We conclude the requirements for service by publication were not met and no personal jurisdiction was obtained over the defendant. Therefore, the order denying relief from judgment is reversed and the underlying child support and custody order is vacated.

On 1 April 2001, Lerlean Cotton ("plaintiff") filed a complaint against defendant seeking custody of her two children and an order for defendant to pay child support. The complaint alleged that defendant had stated he did not want to support or be held responsible for his children. The complaint also alleged that both parties were residents of Mecklenburg County, North Carolina, that the children had resided with plaintiff since their birth, and that Mecklenburg

County District Court had both personal and subject matter jurisdiction over the matter. On 2 April 2001, a civil summons was issued to defendant stating his name but no address. The word "unknown" appeared in the section designated for an address. There is no indication in the record of any attempt to serve defendant by mail at his last known address. Although the judge believed plaintiff had made diligent efforts to locate defendant, plaintiff failed to file with the trial court an affidavit required under N.C. Gen. Stat. § 1A-1, Rule 4(j1), showing the circumstances warranting her use of service by publication and any information regarding the location of defendant. Instead, Notice of Service of Process by Publication was published in the *Mecklenburg County Times* on 13 April, 20 April, and 27 April 2001. On 9 July 2001, following a hearing[1] at which defendant was not present, the trial court entered an order granting custody to plaintiff, requiring defendant to pay child support, and denying defendant visitation. The order stated defendant was not present but that he had been served with notice of publication. A subsequent order amended the child support portion of the 9 July 2001 order to note that the 9 July 2001 order replaced a previous order entered in the State of Georgia.

On 15 May 2002, defendant filed a motion for relief from judgment or order. The motion alleged that the trial court lacked jurisdiction over defendant, as plaintiff had made no attempts to locate defendant prior to service by publication and had failed to file the required affidavit under Rule 4(j1) of the North Carolina Rules of Civil Procedure. On 20 August 2002, the trial court entered an order denying defendant's motion for relief from the judgment or order. In that order, the trial court found plaintiff had been questioned in open court at the 9 July 2001 hearing about her efforts to locate defendant and "satisfied the [trial] [c]ourt that she had made diligent efforts to locate [defendant]. . . ." Based on this finding the trial court concluded it had personal jurisdiction over defendant.

Defendant contends that the trial court erred in failing to grant his motion for relief from judgment or order made under Rule 60 of the North Carolina Rules of Civil Procedure, *see* N.C. Gen. Stat. § 1A-1, Rule 60 (2001), because service by publication was invalid and, as a result, the trial court obtained no personal jurisdiction over him. Thus, the dispositive issue is whether the service of defendant by publication was valid.

1. The record on appeal in this case contains no transcript of this hearing, nor any other record of the evidence or testimony presented.

Rule 60(b)(4) of the Rules of Civil Procedure provides that a trial court may grant relief from a judgment or order if "[t]he judgment is void." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4). "A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void." *Fountain v. Patrick*, 44 N.C. App. 584, 586, 261 S.E.2d 514, 516 (1980) (citing *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974)). "Service of process by publication is in derogation of the common law. Therefore, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute." *Id.* Rule 4(j1) permits service by publication on a party that cannot, through due diligence, otherwise be served. *See* N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2001). Under this rule: "Upon completion of such service [by publication] there shall be filed with the [trial] court an affidavit showing the publication and mailing . . . , the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served." *Id.* Failure to file an affidavit showing the circumstances warranting the use of service by publication is reversible error. *Edwards v. Edwards*, 13 N.C. App. 166, 169-70, 185 S.E.2d 20, 22 (1971). Furthermore, in *In re Phillips*, 18 N.C. App. 65, 196 S.E.2d 59 (1973), this Court held that where the record contained only an affidavit showing the notice of service by publication was duly published in a qualified newspaper, but that no affidavit was filed showing the circumstances warranting use of service by publication, and the trial court simply made a finding that personal service was " 'impractical,' " the trial court's order must be vacated. *Id.* at 70, 196 S.E.2d at 61-62.

In this case, as in *Phillips*, the record contains an affidavit from the newspaper attesting to the publication of the notice of service by publication. There is, however, no affidavit showing the circumstances warranting a use of service by publication, or showing plaintiff's due diligence in attempting to locate defendant. In the underlying child custody and support order dated 9 July 2001, the trial court found only that defendant was served with notice of publication. There was no finding that plaintiff had exercised due diligence in her attempts to locate defendant. The trial court, in subsequently denying defendant's motion for relief from judgment or order, found plaintiff had satisfied the trial court that she had made diligent efforts to locate defendant. There is nothing, however, in the trial court's original order, or elsewhere in the record, to support this finding and it does not cure plaintiff's failure to strictly comply with

the statute permitting service by publication. Further, there is nothing in the record on appeal to support plaintiff's log from the Mecklenburg County Sheriff's Department which she included in her brief to this Court to prove she exercised due diligence in attempting to locate defendant.

As service by publication on defendant was invalid, the trial court did not have personal jurisdiction over defendant. *See County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 160-61, 323 S.E.2d 458, 463 (1984) (where there was no affidavit showing circumstances warranting use of service by publication or alleging facts showing due diligence, no *in personam* jurisdiction was established over the defendant). Thus, as the trial court had no personal jurisdiction over defendant, the 9 July 2001 child custody and support order is void, and the trial court erred in denying defendant's Rule 60(b) motion for relief from judgment or order. *See id.* Accordingly, we are required to reverse the 20 August 2002 order denying defendant relief from judgment or order, and vacate the underlying 9 July 2002 child custody and support order. *See id.*

Reversed and vacated.

Judges McGEE and CALABRIA concur.

IN RE THE MATTER OF: WILLIAM BROOKS HIGGINS

No. COA02-1265

(Filed 21 October 2003)

Abatement; Mental Illness— appeal—denial of incompetence adjudication—death of respondent

A petition to declare a respondent incompetent does not survive the death of the respondent under N.C.G.S. § 28A-18-1. An appeal from an order dismissing a petition for an adjudication of incompetence abated and was dismissed.

Appeal by petitioner from order dismissing petition for adjudication of incompetence entered 13 November 2000 by Judge James U. Downs in Yancey County Superior Court. Heard in the Court of Appeals 15 September 2003.

Wade Hall for petitioner-appellant.

Donny J. Laws for respondent-appellee.

EAGLES, Chief Judge.

This is an appeal from an order dismissing a N.C. Gen. Stat. § 35A-1105 petition for adjudication of incompetence. Petitioner sought to have her brother, the respondent, declared incompetent.

At the time of the hearing, the respondent, William Brooks Higgins, was a seventy-six year old man who resided by himself in Yancey County. Petitioner is the respondent's sister, Linda Waldrep. Petitioner visited respondent at his home in late January or early February 2000 and decided that her brother did not need to be living by himself. Petitioner opined that respondent appeared dirty, undernourished and in poor health and that the house was "a wreck." Petitioner took respondent to her home and attempted to care for him there, but because she worked full time, was unable to provide adequate attention to respondent's care. Petitioner had respondent, a veteran, admitted to the Asheville VA Medical Center on 10 February 2000. The staff of the medical center did not address competency on the day they admitted respondent, but did note that his mental status exam revealed orientation "only to person" and severe deficits in short term memory.

At some point in February 2000, while respondent was in the hospital, petitioner and Estel Higgins, the respondent's brother, each obtained a power of attorney for respondent. This led to a dispute over who was authorized to manage respondent's care and financial affairs. On 3 March 2000, petitioner filed a petition to have respondent declared incompetent, in Buncombe County. On 17 March 2000, Estel Higgins sought to intervene and moved to have the venue changed to Yancey County. On 29 March 2000, the matter was transferred to Yancey County for a hearing before the Yancey County Clerk of Superior Court.

In July 2000, the clerk conducted the hearing and dismissed the petition because he did not find by clear, cogent and convincing evidence that respondent was incompetent. Petitioner then appealed to have the matter reheard in Superior Court. Respondent filed a motion to dismiss and petitioner filed a motion for summary judgment before the Superior Court, both were denied. The matter was then heard by the Superior Court in a bench trial. On 13 November 2000, the Superior Court concluded that "Respondent is not incompetent and

declines to find that the Respondent is incompetent" and dismissed the petition. Petitioner appeals this decision. During the pendency of this appeal, respondent died on 26 December 2002.

Petitioner argues on appeal that: (1) the trial court erred in allowing evidence to be presented by individuals other than the petitioner and respondent, (2) the trial court erred in denying her motion for summary judgment, and (3) the trial court erred in dismissing the petition for adjudication of incompetence. However, the dispositive issue is whether, when the trial court dismisses a petition for adjudication of incompetence, the action abates upon the death of the respondent during the pendency of the petitioner's appeal. We conclude that it does.

We note that the respondent died during the pendency of this appeal. "No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives." N.C.R. App. P. 38(a). Consequently, we must determine whether the cause of action survived respondent's death. The survival of causes of action is governed by N.C. Gen. Stat. § 28A-18-1:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.
>
> (b) The following rights of action in favor of a decedent do not survive:
>
> (1) Causes of action for libel and for slander, except slander of title;
>
> (2) Causes of action for false imprisonment;
>
> (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

N.C. Gen. Stat. § 28A-18-1 (2001). Here, the first two exceptions clearly do not apply. However, the third exception does apply.

The third exception provides that a cause of action does not survive a party's death where the relief sought could not be enjoyed or granting it would be nugatory after death. (Nugatory meaning "[o]f no force or effect; useless; invalid." Black's Law Dictionary 1093 (7th ed. 1999)). In deciding whether the relief could not be enjoyed or grant-

ing it would be nugatory, this court has looked at the purpose or the desired end result of a proceeding. In *Elmore v. Elmore*, 67 N.C. App. 661, 313 S.E.2d 904 (1984), this Court found that a divorce action did not survive the death of a party because the main purpose of a divorce, the dissolving of the marital state, was accomplished by the death of a party. Therefore, we examine the main purpose of incompetency proceedings for adults to determine whether the death of the respondent obviates that purpose.

Chapter 35A of the North Carolina General Statutes governs incompetency proceedings. An incompetent adult is "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen. Stat. § 35A-1101(7) (2001). When an adult is adjudicated incompetent, a guardian is appointed. N.C. Gen. Stat. § 35A-1120 (2001). The guardian is to help the incompetent individual exercise their rights, including the management of their property and personal affairs, and to replace the individual's authority to make decisions when the individual does not have adequate capacity to make those decisions. N.C. Gen. Stat. § 35A-1201(a) (2001). As the guardian helps the individual exercise their rights and makes decisions that the individual would otherwise make, a guardian is essential only while the individual is still alive. After the individual dies, there is no longer a need for a guardian to help the individual. Thus, the result that the petition seeks to accomplish is no longer necessary after a respondent dies.

This is a cause of action where granting the relief sought would be nugatory after the death of the respondent. We do not address the issue of whether there is an appeal of right from the denial of a petition to declare a person incompetent. *See* N.C. Gen. Stat. § 35A-1115. We conclude that a petition to declare a respondent incompetent does not survive the death of the respondent under N.C. Gen. Stat. § 28A-18-1. Thus, the appeal abated upon the 26 December 2002 death of the respondent. The appeal has become moot and is accordingly dismissed.

Appeal dismissed.

Judges McCULLOUGH and STEELMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CARVER v. TAYLOR No. 02-1416	Mecklenburg (01CVS21567)	Affirmed
COBLE v. BLACK & DECKER No. 02-1721	Ind. Comm. (I.C.696875)	Affirmed
DODSON v. MUSICK No. 02-1712	Mecklenburg (00CVS1795)	Affirmed
HAILEY v. TYSON FOODS No. 02-1475	Ind. Comm. (I.C.848677)	Affirmed
IN RE MARRIAGE OF EVERLY No. 02-1353	Buncombe (01CVD2338)	Affirmed
IN RE MINOR No. 03-368	Mecklenburg (02J367)	Affirmed
IN RE ROBINSON No. 03-177	Forsyth (01J430)	Affirmed
IN RE S.D. No. 02-858	Madison (00J38)	Affirmed
JIMMY CONNOR CONSTR. CO. v. SUMMIT COS., LLC No. 02-1367	Orange (00CVS109)	Affirmed
McALLISTER v. DEDICATED SERVS., INC. No. 02-1476	Pender (99CVS407)	No error
MEEKS v. CRAWFORD No. 02-1045	Lenoir (96CVS629)	No error
MOON v. MOON No. 02-1506	Richmond (98CVD389)	Affirmed
SPEIGHT v. CRISOSTOMO No. 02-1680	Wilson (01CVS1468)	Appeal dismissed
STATE v. ALBRITTON No. 02-1271	Carteret (00CRS6383) (01CRS3120) (01CRS3121) (01CRS3122) (01CRS3123) (01CRS3124) (01CRS3125) (01CRS3126) (01CRS3127) (01CRS3128) (01CRS3131) (01CRS3132) (01CRS3133)	No error

	(01CRS3137) (01CRS3138) (01CRS3139)	
STATE v. BONSTEEL No. 02-254	Haywood (95CRS4258) (95CRS4259)	Vacated and remanded
STATE v. CLIETT No. 02-1315	Gaston (00CRS28205) (00CRS67793)	No error
STATE v. DAVIS No. 02-1497	Nash (00CRS52378) (00CRS52379) (00CRS52380)	Affirmed
STATE v. DUGGINS No. 03-86	Forsyth (96CRS25753) (96CRS25754) (96CRS36724) (96CRS36725) (96CRS36727) (96CRS36728) (96CRS36734) (96CRS36735)	Affirmed
STATE v. HOLEMAN No. 02-1544	Durham (01CRS40242)	Affirmed
STATE v. McLAURIN No. 03-363	Rowan (01CRS59519)	Affirmed
STATE v. MILLER No. 02-1413	Onslow (01CRS57478) (01CRS57479)	No error in part, reversed in part, remanded for resentencing
STATE v. MURRAY No. 02-1540	Wake (01CRS57896) (01CRS57897) (01CRS57898) (01CRS57899) (01CRS57900)	No error
STATE v. RAYFORD No. 02-1645	Cumberland (00CRS18681) (00CRS18682) (00CRS18683)	No error
STATE v. SMITH No. 03-255	Rowan (01CRS8813) (01CRS8814) (01CRS51251) (01CRS51252)	No error, remanded for correction of clerical error in the judgment

	(02CRS1632) (02CRS1638) (02CRS1643) (02CRS1644) (02CRS1645) (02CRS1646) (02CRS1647) (02CRS1648) (02CRS1650) (02CRS1652) (02CRS1654)	
STATE v. STEELE No. 02-937	Guilford (99CRS110849)	No prejudicial error
STATE v. TERRELL No. 03-89	Pender (02IFS1710)	No error
STATE v. THOMPSON No. 02-1597	Forsyth (01CRS62133)	No error
STATE v. WEST No. 02-1727	Haywood (01CRS52722) (02CRS259)	No error
STATE v. WILLIAMSON No. 02-1688	Alamance (01CRS57549)	No error
STATE v. WORTHEY No. 02-1614	Guilford (98CRS96818) (98CRS96819) (98CRS96821) (98CRS96822) (98CRS96823) (98CRS96824) (98CRS96825) (98CRS96826) (98CRS99731)	No error
STATE EX REL. ORR v. WILSON No. 03-264	Forsyth (02CVD2690)	Affirmed
TJARKS v. UNIVERSAL RX SOLUTIONS, INC. No. 02-1390	Forsyth (01CVS5929)	Affirmed
UNDERWOOD v. BOYER No. 02-1471	Buncombe (99CVS3626)	Reversed and remanded

APPENDIXES

ORDER ADOPTING AMENDMENTS TO RULE 3.1 OF THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS SUPPLEMENTAL TO THE RULES OF CIVIL PROCEDURE

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES IN SUPERIOR COURT CIVIL ACTIONS

ORDER ADOPTING AMENDMENTS TO THE RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

Order Adopting Amendments to Rule 3.1 of the General Rules Of Practice For The Superior and District Courts Supplemental To The Rules of Civil Procedure

WHEREAS, section § 7A-32 of the North Carolina General Statutes provides that the Supreme Court has the power to supervise and control the proceedings of any courts of the General Court of Justice, and

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-32, Rule 3.1 of the General Rules Of Practice For The Superior And District Courts Supplemental To Rules Of Civil Procedure is hereby amended to read as in the following pages. These amended Rules shall be effective on the 4th of March, 2004.

Adopted by the Court in conference the 4th day of March, 2004. The Appellate Division Reporter shall publish Rule 3.1 of the General Rules Of Practice For The Superior and District Courts Supplemental to Rules of Civil Procedure in its entirety, as amended through this action, at the earliest practicable date.

I. Beverly Lake, C.J.
For the Court

Rule 3.1 Guidelines for Resolving Scheduling Conflicts

(a) In resolving scheduling conflicts when an attorney has conflicting engagements in different courts, the following priorities should ordinarily prevail:

1. Appellate courts should prevail over trial courts.

2. Any of the trial court matters listed in this subdivision, regardless of trial division, should prevail over any trial court matter not listed in this subdivision, regardless of trial division; there is no priority among the matters listed in this subdivision:

— any trial or hearing in a capital case;

— the trial in any case designated pursuant to Rules 2.1 of these Rules;

— the trial in a civil action that has been peremptorily set as the first case for trial at a session of superior court;

— the trial of a criminal case in superior court, when the defendant is in jail or when the defendant is charged with a Class A through E felony and the trial is reasonably expected to last for more than one week;

— *the trial in an action or proceeding in district court in* which any of the following is contested:

— termination of parental rights,

— child custody,

— adjudication of abuse, neglect or dependency or disposition following adjudication

— interim or final equitable distribution

— alimony or post-separation support

3. When none of the above priorities applies, priority shall be as follows: superior court, district court, magistrate's court.

(b) When an attorney learns of a scheduling conflict between matters in the same priority category, the attorney shall promptly give written notice to opposing counsel, the clerk of all courts and the appropriate judges in all cases, stating

therein the circumstances relevant to resolution of the conflict under these guidelines. When the attorney learns of the conflict before the date on which the matters are scheduled to be heard, the appropriate judges are Senior Resident Superior Court Judges for matters pending in the Superior Court Division and Chief District Court Judges for matters pending in the District Court Division; otherwise the appropriate judges are the judges presiding over those matters. The appropriate judges should promptly confer, resolve the conflict, and notify counsel of the resolution.

(c) In resolving scheduling conflicts between court proceedings ~~matters~~ in the same priority category the presiding judges should give consideration to the following:

— the comparative age of the cases;

— the order in which the trial dates were set by published calendar, order or notice;

— the complexity of the cases;

— the estimated trial time;

— the number of attorneys and parties involved;

— whether the trial involves a jury;

— the difficulty or ease of rescheduling;

— the availability of witnesses, especially a child witness, an expert

witness or a witness who must travel a long distance;

— whether the trial in one of the cases had already started when the other was scheduled to begin.

(d) When settlement proceedings have been ordered in superior or district court cases, only trials, hearings upon dispositive motions, and hearings upon motions scheduled for counties with less than one court session per month shall have precedence over settlement proceedings.

(e) When a mediator, other neutral, or attorney learns of a scheduling conflict between a court proceeding and a settlement proceeding, the mediator, other neutral, unrepresented parties or attorneys shall **promptly** give written notice to the appropriate judges and request them to resolve the conflict; stating therein the circumstances relevant to a determination under (d) above.

(f) Nothing in these guidelines is intended to prevent courts from voluntarily yielding a favorable scheduling position, and judges of all courts are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts.

Order Adopting Amendments to the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions

WHEREAS, section § 7A-38.1 of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 4th of March, 2004.

Adopted by the Court in conference the 4th day of March, 2004. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

I. Beverly Lake, C.J.
For the Court

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise

his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

~~B~~.C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) Order by Senior Resident Superior Court Judge. The Senior Resident Superior Court Judge of any judicial district may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in a civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) Motion to authorize the use of other settlement procedures. The parties may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the Court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

(3) **Timing of the order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C.(4) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(4) **Content of order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an AOC form.

(5) **Motion for court ordered mediated settlement conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) **Motion to dispense with mediated settlement conference.** A party may move the Senior Resident Superior Court Judge to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) **Order by local rule.** In judicial districts in which a system of scheduling orders or scheduling confer-

ences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts may, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Scheduling orders or notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) **Scheduling conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) **Application of Rule 1.C.** The provisions of Rule 1.C.(2), (5) and (6) shall apply to Rule 1.D. except for the time limitations set out therein.

(5) **Deadline for completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) **Selection of mediator.** The parties may select and nominate, or the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) **Use of other settlement procedures.** The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

RULE 2. SELECTION OF MEDIATOR

A. **SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES.** The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

B. **NOMINATION AND COURT APPROVAL OF A NON-CERTIFIED MEDIATOR.** The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the par-

ties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an AOC form.

C. **APPOINTMENT OF MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules. Only mediators who agree to mediate indigent cases without pay shall be appointed.

The Dispute Resolution Commission shall furnish for the consideration of Senior Resident Superior Court Judge(s) a list of those certified superior court mediators who request appointments in said district. Said list shall con-

tain the mediators' names, addresses and telephone numbers and shall be provided in writing or on the Commission's web site.

D. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.

E. **DISQUALIFICATION OF MEDIATOR.** Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set

a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at

the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance company representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) **Scheduling.** Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically ~~or stenographically~~ recorded. If an agreement is upon all issues, a ~~A~~ consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within fourteen (14) days or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within fourteen (14) days or before the expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when.*

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward dispo-

sition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES. If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a resident or presiding Superior Court Judge, may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by

substantial evidence and conclusions of law. (See also Rule 7.G. and the Comment to Rule 7.G.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting results of conference.**

(a) The mediator shall report to the court on an AOC form within 10 days of the conference whether or not an agreement was reached by the parties. ~~If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the person designated to file such consent judgment or dismissals.~~ The mediator's report shall also inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues is reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dis-

missal(s) with the court as required by Rule 4.C.(1). If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and holding the conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(6) **Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125 that is due upon appointment.

C. **CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within

that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B.

D. INDIGENT CASES. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been ~~*agreed upon and*~~ scheduled by ~~*the parties and*~~ the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement~~, *payment of a postponement fee to the mediator*~~, and ~~*consent of*~~ a finding of good cause by the mediator ~~*and the opposing attorney*~~.

(3) ~~If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed~~

~~within three (3) business days of the scheduled date, the fee shall be $250.~~ Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be $250. The p~~P~~ostponement fee~~s~~ shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.E.

~~Though MSC Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.~~

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8 MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Dispute Resolution Commission, or have completed a 16 hour sup-

plemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's

good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and either a four year college degree or four years of management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of management or administrative experience in a professional, business, or governmental entity.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and re-certification and all certified Superior Court mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7; and,

I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking only certification as Superior Court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(5) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A. and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause,

the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party,

(2) **Arbitration (Rule 12).** Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When proceeding is conducted.** Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) **Authority and duties of neutrals.**

(a) **Authority of neutrals.**

(i) **Control of proceeding.** The neutral evaluator, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the proceeding. The neutral evaluator, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s) In the absence of agreement, ~~the~~ such neutral shall select the date for the proceeding.

(b) Duties of neutrals.

(i) The neutral evaluator, arbitrator, or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G. S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) Disclosure. ~~The~~ Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) Reporting results of the proceeding. The neutral evaluator, arbitrator, or presiding officer shall report the result of the proceeding to the court ~~in writing in accordance with the provisions of Rules 11 and 12~~, ~~herein,~~ on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) Scheduling and holding the proceeding. It is the duty of the neutral evaluator, arbitrator, or presiding officer to schedule

the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(3) **Extensions of time.** A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where procedure is conducted.** The neutral evaluator, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No delay of other proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

(6) **Inadmissibility of settlement proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any such agreements, and except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(7) **No record made.** There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) **Ex parte communication prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) **Duties of the parties.**

(a) **Attendance.** All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules, and ordered by the court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

(b) Finalizing agreement. ~~If an agreement is reached in the proceeding, the parties to the agreement shall reduce its terms to writing, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.~~

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration, or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within fourteen (14) days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration, or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within fourteen (14) days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when.*

(c) **Payment of neutral's fee.** The parties shall pay the neutral's fee as provided by Rule 10.C.(12).

(10) **Selection of neutrals in other settlement procedures.** The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification.** Any party may move a Resident or Presiding Superior Court Judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) **Compensation of the neutral.** A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) **Sanctions for failure to attend other settlement procedures.** If any person required to attend a set-

tlement procedure fails to attend without good cause, a Resident or Presiding Judge may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall

not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) **Evaluator's opening statement.** At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the Parties.

(2) **Oral report to parties by evaluator.** In addition to the written report to the Court required under these rules at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opin-

ions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

(3) **Report of evaluator to court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form.~~, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties and the name of the person designated to file judgments or dismissals concluding the action.~~ The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended, and the names of any party, attorney, or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

I. ~~FINALIZING AGREEMENT.~~ ~~If before the conclusion of the neutral evaluation conference and the evaluator's report to the Court the parties are able to reach a settlement of their claims, the parties shall reduce the agreement to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate.~~

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the Senior Resident Superior Court Judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

(1) **Arbitrator's Canon of Ethics.** Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) **Pre-hearing exchange of information.** At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify.

(b) Copies of documents or exhibits they expect to offer into evidence.

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(2) **Exchanged documents considered authenticated.** Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) **Copies of exhibits admissible.** Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) **Witnesses.** Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) **Subpoenas.** Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(4) **Law of evidence used as guide.** The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) **Authority of arbitrator to govern hearings.** Arbitrators shall have the authority of a trial Judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the Senior Resident Superior Court Judge.

(6) **Conduct of hearing.** The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) **No Record of hearing made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) **Parties must be present at hearings; Representation.** Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) **Hearing concluded.** The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) **Filing the award.** ~~The award shall be in writing, signed by the arbitrator and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post hearing briefs, whichever is later. An award form, which shall be an AOC form, shall be used by the arbitrator as its report to the court and may be used to record its award.~~ The arbitrator shall file a written award signed by the arbitrator and filed with the Clerk of

Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be an AOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

(2) Findings; Conclusions; Opinions. No findings of fact and conclusions of law or opinions supporting an award are required.

(3) Scope of award. The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) Costs. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) Copies of award to parties. The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) Trial de *novo* as of right. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court,

and service of the demand on all parties, on an AOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) **No reference to arbitration in presence of jury.** A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) **Termination of action before judgment.** Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) **Judgment entered on award.** If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial *de novo* within 30 days after the award is served, the Senior Resident Superior Court Judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) **Written agreement.** The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel, and shall be filed with the Clerk of Superior Court and the Senior Resident Superior Court Judge prior to the filing of the arbitrator's decision.

(2) **Entry of judgment on a binding decision.** The arbitrator shall file the decision with the Clerk of Superior Court and it shall become a judgment in the same manner as set out in G.S. 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These

jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL.

Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be

stipulated by both parties or approved by the presiding officer.

G. **JURY CHARGE**. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. **DELIBERATION AND VERDICT.** In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

I. **JURY QUESTIONNING.** In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. ~~SETTLEMENT OF THE CASE.~~ ~~In the event that the parties settle the case in the course of the summary trial, the presiding officer shall direct the parties to immediately prepare and sign a memorandum of settlement which shall be filed with the Clerk of Superior Court.~~ **REPORT OF PRESIDING OFFICER.** The presiding officer shall file a written report no later than ten (10) days after the verdict. The report shall be signed by the presiding officer and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Court Judge. The presiding officer's report shall inform the court of the absence of any party, attorney, or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING.

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS.

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 16. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, section § 7A-38.4 of the North Carolina General Statutes establishes a program in district court to provide for settlement procedures in equitable distribution and other family financial cases, and

WHEREAS, N.C.G.S. § 7A-38.4A(o) provides for this Court to implement section 7A-38.4A by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 4th of March, 2004.

Adopted by the Court in conference the 4th day of March, 2004. The Appellate Division Reporter shall publish the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases in their entirety, as amended through this action, at the earliest practicable date.

I. Beverly Lake, C.J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) **Equitable Distribution Scheduling Conference**. At the scheduling conference mandated by G.S. 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement

proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as nonbinding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through

arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discus-

sion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a certified family financial mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where mediated settlement conferences are authorized to be held a list of those certified family financial mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and phone numbers and shall be provided in writing or on the Commission's web site.

C. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county and the office of the Chief District Court Judge or Trial Court Administrator in such county or, in a single county district, in the office of the Chief District Court Judge or said judge's designee.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to

a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(b) Attorneys. At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) Scheduling. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. ~~FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL.~~ FINALIZING AGREEMENT.

(1) The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the

conclusion of the conference unless the parties have reduced their agreement to writing, have signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.

~~Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.~~

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed memorandum of agreement, agreement, consent judgment or voluntary dismissals to the mediator and all parties at the conference and shall file their consent judgment or voluntary dismissal with the court within thirty (30) days or before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing, sign it along with their counsel and file the consent judgment or voluntary dismissal(s) with the court within thirty (30) days or before the expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when.*

C. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

DRC Comments to Rule 4.

DRC Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be

followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of Conference.**

(a) The mediator shall report to the ~~C~~court, ~~or its designee, using~~ on an A.O.C. form~~,~~ within 10 days of the conference whether or not an agreement was reached by the parties. ~~If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indicating the disposition of the case, the person who informed the mediator that settlement had been reached, and the person who will present final documents to the court.~~

~~If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the person designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.~~

The mediator's report shall inform the court of the absence of any party or attorney known by the mediator to be absent from the mediated settlement conference without permission. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to

provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.B.2. If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) Informational Brochure. Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) Evaluation Forms. At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment and shall be paid if the case settles prior to the mediated settlement conference or if the court approves the substitution of a mediator selected by the parties for a court appointed mediator.

C. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. INABILITY TO PAY. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule~~ing~~ or not proceed~~ing~~ with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific

date, a party may not unilaterally postpone the conference ~~*without good cause*~~.

(2) A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement~~, *payment to the mediator of a postponement fee as provided below or as agreed when the mediator is selected,*~~ and ~~*consent of*~~ a finding of good cause by the mediator ~~*and the opposing attorney*~~.

(3) ~~*In cases in which the court appoints the mediator, if a settlement conference is postponed without good cause*~~ ~~within seven (7) *business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed without good cause within three (3) business days of the scheduled date, the fee shall be $250.*~~ Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be $250. The p~~P~~ostponement fee~~s~~ shall be paid by the party requesting the postponement unless otherwise agreed to ~~*by*~~ between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.

Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determination of indigency or the inability to pay a full share, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the court.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.C.

If a party is found by the Court to have failed to attend a family financial settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.E.

~~Though FFS Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.~~

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. FFS Rule 7.F. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family

financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be an Advanced Practitioner member of the Association for Conflict Resolution who is subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution; or

2. Be an attorney and/or judge for at least five years who is either:

(a) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code. The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000; or

(b) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

and who has completed either:

(c) a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9; or

(d) a 16 hour supplemental family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, after having been certified as a Superior Court mediator by that Commission.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission; and have observed with the permission of the parties as a neutral observer two mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative

Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.

C. Be a member in good standing of the State Bar of one of the United States as required by Rule 8.A. or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience.

D. Have observed with the permission of the parties two mediated settlement conferences as a neutral observer which involve custody or family financial issues and which are conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified family financial mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them. Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation

training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Certification of mediators who have been certified as family financial mediators by the Dispute Resolution Commission prior to the adoption of these Rules may not be revoked or not renewed solely because they do not meet the experience and training requirements in Rule 8.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to Rule 8.A.2.(c) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of sixteen hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office

of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Judicial Settlement Conference** (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) **Other Settlement Procedures** described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that

is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) **Extensions of Time.** A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) **Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding conducted under this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. No settlement agreement reached at a settlement proceeding conducted pursuant to these Rules shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any of these agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement. ~~If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.~~

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement conference, or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within thirty (30) days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference, or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the General Statutes, and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the Court within thirty (30) days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when.*

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures. If any person required to attend a settlement proceeding fails to attend without good cause, the

Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not lim-

ited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) **Disclosure.** The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) **Reporting Results of the Proceeding.** The neutral evaluator, settlement judge, or other neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11, and 12 ~~and 13~~ herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) **Scheduling and Holding the Proceeding.** It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. **NATURE OF NEUTRAL EVALUATION.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. **WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. **PRE-CONFERENCE SUBMISSIONS.** No later than twenty (20) days prior to the date established for the neutral evalua-

tion conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) Report of Evaluator to Court. Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not any agreement was reached by the parties~~,~~. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state ~~and~~ the name of the person(s) designated to file the consent judgments or voluntary dismissals ~~concluding the action~~ with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. **Settlement Judge**. A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. **Conducting the Conference**. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. **Confidential Nature of the Conference.** Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. **Report of Judge.** Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state and the name of the person(s) designated to file the consent judgments or voluntary dismissals concluding the action with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

A. The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

C. The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

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APPEAL AND ERROR—Continued

context of the questioning and the likely responses were ascertainable from the record. **State v. Owens, 494.**

Motion to dismiss appeal—timeliness of filing brief—Plaintiff maternal grandparents' motion to dismiss defendant mother's appeal in a child custody case is allowed because defendant's brief as an appellant was untimely filed. **Simmons v. Arriola, 671.**

Preservation of issues—denial of motion to suppress—no objection at trial—The denial of a first-degree murder defendant's motion to suppress evidence seized from his home was not preserved for appeal because defendant did not object to the evidence when it was offered at trial. **State v. Crutchfield, 528.**

Preservation of issues—directed verdict and j.n.o.v.—issues not raised—The trial court did not err by denying plaintiff's motion for judgment n.o.v. in an action arising from the allegedly fraudulent transfer of property. Plaintiffs are procedurally precluded from making the evidentiary showing necessary to set aside the jury verdict for defendant because they did not raise at trial the issues upon which they now rely. **Tiber Holding Corp. v. DiLoreto, 583.**

Preservation of issues—failure to object—double jeopardy—Although defendant contends the trial court erred by entering judgment against defendant for both first-degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury based on the fact that his double jeopardy rights were allegedly violated, defendant waived appellate review of this issue because he failed to move to dismiss the kidnapping charge on double jeopardy grounds. **State v. Smith, 107.**

Preservation of issues—failure to present argument—Although plaintiff contends the trial court erred by denying plaintiff's motion to enforce the parties' settlement agreement regarding payment for building materials and release of a mechanic's lien based on the fact that it allegedly undermines the purpose of alternative dispute resolution and court-ordered mediated settlement conferences, this assignment of error is dismissed where defendant's brief simply stated general legal principles. **McClure Lumber Co. v. Helmsman Constr., Inc., 190.**

Preservation of issues—failure to state specific grounds for review—Although plaintiff contends the trial court's order leaves open numerous unresolved issues in an action to enforce provisions of a mediated settlement agreement, the only issue properly before the Court of Appeals is whether the trial court properly denied plaintiff's motion to enforce the settlement agreement based on the record evidence. **McClure Lumber Co. v. Helmsman Constr., Inc., 190.**

Supreme Court order—application of statute by implication—The statute which prohibits a parent who has abandoned a child from taking by intestate succession (N.C.G.S. § 31A-2) was implicitly applied to a case in a North Carolina Supreme Court order which remanded for findings of fact on issues raised by the statute. **In re Estate of Lunsford, 125.**

PENALTIES, FINES, AND FORFEITURES—Continued

project settlements, including payments not made directly to the State, are paid because of a civil penalty against the violator, are punitive in nature, and still belong to the public schools. **N.C. School Bds. Ass'n v. Moore, 253.**

Penalties for late payment of license fees—not remitted to public schools—Payments collected by certain state agencies for the late payment of occupational license fees do not belong to the public schools because they are intended to compensate the collecting agency for additional operating expenses incurred in collecting money due or compelling performance of a license requirement. The payments are remedial rather than punitive in nature. **N.C. School Bds. Ass'n v. Moore, 253.**

Payment for late returns to university libraries—not remitted to public schools—Payments collected by the Consolidated University of North Carolina campuses for loss, damage, or late return of library materials are remedial and do not belong to the public schools. The payments are intended to insure the availability of library materials and to compensate the universities for replacing materials, and were enacted pursuant to a constitutional provision that is separate from the public schools provision. **N.C. School Bds. Ass'n v. Moore, 253.**

Penalties for late unemployment insurance payments—not remitted to public schools—Amounts collected by the Employment Security Commission for late payments to the Unemployment Insurance Fund are in the nature of additional taxes and are thus remedial rather than punitive, so that those payments do not belong to the public schools. **N.C. School Bds. Ass'n v. Moore, 253.**

Penalties for university traffic and parking violations—not remitted to public schools—Amounts collected by the Consolidated University of North Carolina campuses for traffic and parking violations belong to the public schools when they are characterized as infractions, prosecuted by the local district attorney, and any resulting penalties are imposed and collected by the district court. Other payments do not belong to the schools because they are denominated civil penalties, enforced by civil actions in the nature of debt, intended as compensation for the expense of establishing and maintaining parking and transportation services, and enacted pursuant to an equal constitutional provision. **N.C. School Bds. Ass'n v. Moore, 253.**

Penalties paid by schools—not remitted to public schools—Payments made by local public school systems to various state agencies as fines or civil penalties may not be used by the public schools. Otherwise, the offending unit would be unjustly enriched by its own wrongdoing. **N.C. School Bds. Ass'n v. Moore, 253.**

Remittance to schools—principles for determining—The North Carolina Supreme Court has articulated principles for determining whether monetary payments to the State are remedial or punitive, in order to determine whether they would fall under the constitutional provision requiring that revenue from civil penalties be used for public schools. These monies must be fines for the breach of criminal laws or the clear proceeds of payments intended to penalize the wrongdoer rather than to compensate a particular party; they must be paid to the State or a department of the State; and the label attached to the payment does not determine its nature. **N.C. School Bds. Ass'n v. Moore, 253.**

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