

NORTH CAROLINA
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CASES
ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CAROLINA POWER & LIGHT COMPANY, PETITIONER v.
THE CITY OF ASHEVILLE, RESPONDENT

No. COA02-1518

(Filed 4 November 2003)

1. Cities and Towns— annexation—non-urban areas

The trial court did not err case by concluding that respondent city's annexation of Non-Urban Areas 1 and 4 met the requirements of N.C.G.S. § 160A-48(d)(2), because: (1) N.C.G.S. § 160A-48(d)(2) does not require a non-urban area to touch the pre-annexation city limits of an annexing municipality; and (2) N.C.G.S. § 160A-48(d)(2) permits the annexation of non-urban areas completely enveloped by land developed for urban purposes.

2. Cities and Towns— annexation—industrial use

The trial court did not err in an annexation case by affirming respondent city's classification of the four tracts within PIN 1056 as industrial under N.C.G.S. § 160A-48(c)(3), because witnesses provided testimony that could support a finding that each tract was used in support of a power plant.

Judge TYSON dissenting.

Appeal by petitioner from judgment entered 18 February 2002 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 9 September 2003.

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Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Larry McDevitt and Craig D. Justus, for petitioner-appellant.

Robert W. Oast, Jr. and William F. Slawter, for respondent-appellee.

LEVINSON, Judge.

Petitioner appeals from a judgment affirming City of Asheville Annexation Ordinance No. 2708. We affirm.

I.

On 13 June 2000, the City of Asheville (hereinafter "City") adopted Ordinance No. 2708, "An Ordinance to Extend the Corporate Limits of the City of Asheville, North Carolina, Under the Authority Granted by Part 3, Article 4A, Chapter 160A of the General Statutes of North Carolina" (hereinafter "Annexation Ordinance"). This ordinance annexed into the City an area south of Asheville, which is referred to as the "Long Shoals Area." The City determined that this area qualified for annexation pursuant to N.C.G.S. § 160A-48(c)(3) and (d).

Appellant, Carolina Power & Light (CP&L), owns most of the Long Shoals Area, including land associated with its electricity generating facility and the power plant's man-made cooling pond (Lake Julian). CP&L contested the annexation in superior court pursuant to N.C.G.S. § 160A-50, and made two arguments at trial which are relevant to the present appeal.

CP&L's first argument dealt with two separate tracts referred to as "Non-Urban Area 1" and "Non-Urban Area 4." Non-Urban Areas 1 and 4 are adjacent along at least sixty percent of their external borders with land the City classified pursuant to G.S. § 160A-48(c)(3) as "developed for urban purposes." Neither Non-Urban Area 1 nor 4 is contiguous along its external boundary with the pre-annexation City limits. The City classified both properties as adjacent non-urban areas pursuant to G.S. § 160A-48(d)(2). At trial, CP&L argued that G.S. § 160A-48(d)(2) requires a non-urban area to share a border with both the municipal boundary and the boundary of an area developed for urban purposes. Because neither Non-Urban Area 1 nor 4 shares an external boundary with the pre-annexation City limits, CP&L insisted that classification as a non-urban area was inappropriate.

CP&L's second argument pertained to four tracts (Tracts 1-4) of land located within a larger tract. The larger tract is listed by the

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Buncombe County Tax Office as PIN No. 9644.11-66-1056 (PIN 1056). The City classified more than five hundred acres of PIN 1056, including the four disputed tracts, as being in industrial use. At trial, CP&L contended that the City's classification of the four tracts was erroneous because those tracts are not used "in support of" CP&L's power generating facilities.

Following a bench trial, judgment was entered for the City. The trial court found, in pertinent part:

13. Five Non-Urban Areas were identified in the Long Shoals Area.

....

15. The Plan as amended by the Annexation Ordinance reflects that each Non-Urban Area meets the 60% contiguity requirement [of G.S. § 160A-48(d)(2)]. . . .

16. As to Non-Urban Areas 1 and 4, CP&L does not dispute that the boundaries of those areas are adjacent or contiguous along 60% of their length with urbanized areas within the Long Shoals Area.

17. CP&L contends, and the Plan shows, that the external boundaries of Non-Urban Areas 1 and 4 are at no point contiguous with or adjacent to the existing City limits. CP&L further contends that the City incorrectly applied N.C.G.S. [§] 160A-48(d)(2) with respect to Non-Urban Areas 1 and 4 because the statute requires that the boundaries of Non-Urban Areas be contiguous with both the existing City limits and one or more urbanized areas within the annexation areas.

18. For reasons set out in the Conclusions of Law below, the Court has determined as a matter of law that CP&L's contentions on this issue are without merit, and that Non-Urban Areas 1 and 4 both satisfy the boundary contiguity requirement of N.C.G.S. [§] 160A-48(d)(2) because they are contiguous for more than 60% of their length with an area or areas developed for urban purposes.

19. In light of the foregoing, it is unnecessary for the Court to make any findings as to the issues raised by CP&L regarding the classifications and sizes of the lots and tracts within Non-Urban Areas 1 and 4. Nevertheless, the Court has considered the evidence presented as to Non-Urban Areas 1 and 4, and finds that:

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- (a) Even though some use is made of one or more of the properties within those areas, the uses do not affect the overall character of the areas as not developed for urban purposes, and are not inconsistent with the designation of those areas as non-urban areas within the meaning of N.C.G.S. [§] 160A-48(d);
- (b) Non-Urban Areas 1 and 4 both lie between two or more areas within the Long Shoals Area that are developed for urban purposes;
- (c) Non-Urban Area 1 is completely surrounded by areas within the Long Shoals Area that are developed for urban purposes, with respect to which no issue has been raised;
- (d) Non-Urban Area 4 is surrounded on three sides by areas within the Long Shoals Area that are developed for urban purposes, with respect to which no issue has been raised.

....

20. CP&L owns several tracts of land within the Long Shoals Area, including [a] tract[] identified at the time of the adoption of the Annexation Ordinance by PIN[] . . . 9644.11-66-1056 . . . [This] tract[] will be referred to herein by the last four digits of [its] PIN[].

21. PIN 1056 is owned by CP&L, consists of 622.85 acres, and is the property upon which is located the Power Plant and most of Lake Julian. This property was classified [by the City] as being in industrial use, which CP&L does not dispute. 71.59 acres of this property was included as a portion of Non-Urban Area 1, including part of the dam and spillway for Lake Julian, and a power transmission line.

....

23. Within PIN 1056, CP&L identified 4 tracts of land (Tracts 1-4) that it contends are not used "in support of" its power-generating facilities. . . .

24. . . . The sizes of the tracts . . . are set out below:

Tract 1—4.4 acres

Tract 2—14.34 acres

Tract 3— 9.96 acres

Tract 4—9.87 acres

....

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28. Tract 1 identified by CP&L within PIN 1056 is located on a peninsula jutting into Lake Julian. Tracts 2, 3, and 4 are on the periphery of areas in active use by the Power Plant. The accessibility of all of these tracts is limited. There was no evidence suggesting that the tracts, or any one of them, was suitable for use other than in support of the primary use of the property—the generation of electrical power.

....

30. . . . The tracts are relatively small, isolated on the periphery of the combined CP&L property, and are essentially fragmentary remnants of the much larger Lake Julian/Power Plant facility.

31. The Court finds that these . . . tracts are used in support of the CP&L operation . . . Even if the tracts are not in active use, they are so small as to be incidental to the primary use, such that the City is not required to consider that acreage as not being in use for commercial, industrial, governmental or institutional purposes, and therefore is not required to include that acreage in computing the degree of subdivision in the Long Shoals Area.

The trial court made the following conclusions of law:

4. With respect to the statutory qualifications in N.C.G.S. [§] 160A-48 for annexation for cities of over 5,000 population, the Court makes the following specific conclusions as to the issues raised at trial:

Non-Urban Areas 1 and 4

(b) Non-Urban Areas 1 and 4 are contiguous along 60% or more of their external boundaries with one or more areas within the Long Shoals Area that are developed for urban purposes within the meaning of N.C.G.S. 160A-48(c)(3);

....

(d) There is no requirement in the law for the external boundaries of a non-urban area that meets the contiguity requirement of N.C.G.S. [§] 160A-48(d)(2) and acreage limitation of N.C.G.S. [§] 160A-48(d) to be contiguous with the boundary of the existing city.

(e) The inclusion of Non-Urban Areas 1 and 4 within the Long Shoals Area is consistent with the purpose of N.C.G.S.

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[§] 160A-48 so as “to permit [the City] to extend [its] corporate limits to include all nearby areas developed for urban purposes and . . . to include areas not yet developed for urban purposes but constituting necessary land connections . . . between two or more areas developed for urban purposes. . . .”

....

CP&L Tracts

(i) As to the four tracts (Tracts 1-4) within PIN 1056 contended by CP&L to be undeveloped and not used in support of the industrial power plant use, the evidence does not support CP&L's contentions.

....

(k) [T]he Court concludes that . . . the use classification[] assigned to PIN[] 1056, including the [four] tracts, [is] in fact correct. . . .

From the judgment affirming the annexation, CP&L appeals, contending: (1) the trial court erroneously affirmed the City's application of G.S. § 160A-48(d) to Non-Urban Areas 1 and 4, and (2) the trial court erroneously affirmed the City's classification of the four tracts within PIN 1056 as industrial pursuant to G.S. § 160A-48(c)(3). Moreover, CP&L argues that Non-Urban Areas 1 and 4 and the four disputed tracts within PIN 1056, when properly classified, must be added to the denominator of the subdivision test located in G.S. § 160A-48(c)(3). Because including this acreage in the subdivision test will allegedly disqualify the entire annexation, CP&L urges us to void the Annexation Ordinance.

II.

The standard of review is as follows: “On appeal, the findings of fact made [by the trial court] are binding . . . if supported by the evidence, even though there [may] be evidence to the contrary. Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.” *Food Town Stores, Inc. v. Salisbury*, 300 N.C. 21, 25-26, 265 S.E.2d 123, 126-27 (1980) (internal citations omitted). Statutory interpretation presents a question of law and is reviewed *de novo* by this Court. *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997).

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III.

The present dispute involves several provisions of N.C.G.S. § 160A-48 (2001), which addresses the character of an area to be annexed. N.C.G.S. § 160A-48(a) (2001) provides:

A municipal governing board may extend the municipal corporate limits to include any area

- (1) Which meets the general standards of subsection (b), and
- (2) Every part of which meets the requirements of either subsection (c) or subsection (d).

N.C.G.S. § 160A-48(b) (2001) sets the following requirements:

The total area to be annexed must meet the following standards:

- (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun. . . .
- (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary. . . .

Pursuant to N.C.G.S. § 160A-48(c) (2001), an area must "be developed for urban purposes" as a precondition to annexation. An area developed for urban purposes is defined as any area which meets any one of the five standards enumerated in G.S. § 160A-48(c). The present case deals only with the third standard, which qualifies an area as "developed for urban purposes" where:

[The area is] so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts three acres or less in size. . . .

The Supreme Court has held that subsection (c)(3) contains two mandatory tests for determining the availability for annexation:

- (1) *the use test*—that not less than 60% of the lots and tracts in the area must be in actual use, other than for agriculture, and (2) *the subdivision test*—not less than 60% of the acreage which is in

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residential use, if any, and is vacant must consist of lots and tracts of five [now three] acres or less in size.

Lithium Corp. of America, Inc. v. Bessemer City, 261 N.C. 532, 538, 135 S.E.2d 574, 578 (1964) (emphasis added). The subdivision test is at issue in the instant case; the use test is not.

Acreage in use for an industrial purpose is excluded from the subdivision test; a 1998 amendment to G.S. § 160A-48(c)(3) defines “use for a commercial, industrial, institutional, or governmental purpose” as follows:

For purposes of this section, a lot or tract shall not be considered in use for a commercial, industrial, institutional, or governmental purpose if the lot or tract is used only temporarily, occasionally, or on an incidental or insubstantial basis in relation to the size and character of the lot or tract. For purposes of this section, acreage in use for commercial, industrial, institutional, or governmental purposes shall include acreage actually occupied by buildings or other man-made structures together with all areas that are reasonably necessary and appurtenant to such facilities for purposes of parking, storage, ingress and egress, utilities, buffering, and other ancillary services and facilities. . . .

Additionally, a municipality may annex an area that is not “developed for urban purposes” if the area meets the requirements set forth in N.C.G.S. § 160A-48(d) (2001), which provides in relevant part:

In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area . . .

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes. For purposes of this subsection, “necessary land connec-

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tion” means an area that does not exceed twenty-five percent (25%) of the total area to be annexed.

An annexation ordinance may be challenged in superior court on the basis that the provisions of G.S. § 160A-48 have not been met. N.C.G.S. § 160A-50(f)(3) (2001).

Judicial review of an annexation ordinance is limited to determining whether the annexation proceedings substantially comply with the requirements of the applicable annexation statute. Absolute and literal compliance with the statute is unnecessary because it would result in defeating the purpose of the statute in situations where no one has been or could be misled. Mere adverse effect upon financial interests of a property owner is not grounds for attacking annexation proceedings. The party challenging the ordinance has the burden of showing error.

Barnhardt v. Kannapolis, 116 N.C. App. 215, 217, 447 S.E.2d 471, 473 (1994) (internal citations omitted).

IV.

[1] We turn first to whether the trial court erred in concluding that the City’s annexation of Non-Urban Areas 1 and 4 met the requirements of G.S. § 160A-48(d)(2). CP&L contends that G.S. § 160A-48(d)(2) requires a non-urban area to touch the pre-annexation city limits of an annexing municipality. We disagree.

A.

“Where the language of a statute is clear and unambiguous, there is no room for judicial construction[,] and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 575, 573 S.E.2d 118, 121 (2002) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)). “[T]he intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish.” *Stevenson v. Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). “[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant.” *Porsh Builders, Inc. v. Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). “It is presumed that the legislature intended each portion [of a statute] to

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be given full effect and did not intend any provision to be mere surplusage.” *Id.*

G.S. § 160A-48(d)(2) provides that a non-urban area may be annexed if it is “adjacent, on at least sixty percent (60%) of its external boundary, to *any combination* of the municipal boundary *and* the boundary of an area or areas developed for urban purposes as defined in subsection (c).” (emphasis added).

CP&L properly notes that “[o]rdinarily, when the conjunctive ‘and’ connects words, phrases or clauses of a statutory sentence, they are to be considered jointly.” *Lithium Corp.*, 261 N.C. at 535, 135 S.E.2d at 577. However G.S. § 160A-48(d)(2) does not use the word “and” alone; the statute also includes other words which bear on its meaning. *See Builders, Inc.*, 302 N.C. at 556, 276 S.E.2d at 447 (holding that statutes must be read so as to give effect to all statutory language).

Notably, the statute uses the word “combination,” such that in order to be annexed, a non-urban area must touch a “*combination of* the municipal boundary *and* the boundary of an area or areas developed for urban purposes[.]” (emphasis added). “Combination” means “the act of combining or the state of being combined.” AMERICAN HERITAGE COLLEGE DICTIONARY 277 (3d ed. 1997). Thus, in order to make the calculation required by G.S. § 160A-48(d)(2), the amount of border which the non-urban area shares with the municipality must be *combined with* the amount of border that the non-urban area shares with an area or areas developed for urban purposes.

Moreover, the statute explicitly makes allowance for “*any combination[.]*” (emphasis added). “Any” is defined as meaning “one, some, every or all without specification.” AMERICAN HERITAGE COLLEGE DICTIONARY at 61. Accordingly, the plain language of the statute includes all possible combinations which make the following equation work: the amount of border which the non-urban area shares with the municipality *combined with* the amount of border that the non-urban area shares with an area or areas developed for urban purposes *equals* sixty percent of the border of the non-urban area. One workable combination exists where a non-urban area touches, on at least sixty percent of its external border, *only* an area or areas developed for urban purposes.

Examination of G.S. § 160A-48(b) illustrates that the General Assembly considered what areas must touch a municipal boundary and knew how to codify such a requirement:

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The total area to be annexed must meet the following standards:

- (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun. . . .
- (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary. . . .

In light of the wording of subsection (b), the General Assembly's choice of words in subsection (d) was not accidental.

B.

CP&L contends that permitting the City to annex non-adjacent non-urban areas is inconsistent with the purpose section of G.S. § 160A-48(d), which states:

The purpose of this subsection is to permit municipal governing boards to extend corporate limits . . . where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections . . . between two or more areas developed for urban purposes. For purposes of this subsection, "necessary land connection" means an area that does not exceed twenty-five percent (25%) of the total area to be annexed.

CP&L argues that the phrase "between two or more areas developed for urban purposes" requires that there be two separate areas developed for urban purposes, as defined in subsection (c)(3), between which the non-urban area must be located. We disagree.

In 1998 the General Assembly amended the unnumbered paragraph of subsection (d) to include the definition of "necessary land connection." Significantly, the Legislature chose to define "necessary land connection" to be a part of the total area to be annexed: "For purposes of this subsection, 'necessary land connection' means an area that does not exceed twenty-five percent (25%) of the total area to be annexed." G.S. § 160A-48(d). Thus, the statute seems to contemplate that necessary land connections will be sub-areas of a larger annexation area.

Likewise, at least one opinion predating the 1998 amendment held that land annexed under subsection (d) could permissibly be a "sub-area" of the entire area to be annexed. *See Southern Glove Mfg. Co. v. Newton*, 75 N.C. App. 574, 578, 331 S.E.2d 180, 183 ("[T]he sub-

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area allowed by G.S. 160A-48(d)(2) is one of those described by the unnumbered paragraph as a ‘necessary land connection.’ ”), *disc. review denied*, 314 N.C. 669, 336 S.E.2d 401 (1985); *see also Wallace v. Chapel Hill*, 93 N.C. App. 422, 430, 378 S.E.2d 225, 230 (1989) (non-urban property qualifies as a necessary land connection if such area meets the criteria set forth in (d)(1) or (d)(2)).

C.

CP&L also argues that permitting the City to annex non-adjacent non-urban areas is contrary to North Carolina appellate law. In support of its argument, CP&L cites numerous cases upholding annexation ordinances where undeveloped land abutted pre-annexation city limits: *In re Annexation Ordinance Adopted by the City of Jacksonville*, 255 N.C. 633, 643, 122 S.E.2d 690, 698 (1961); *The Little Red Schoolhouse, Ltd. v. Greensboro*, 71 N.C. App. 332, 338, 322 S.E.2d 195, 198 (1984); *Southern Glove Mfg.*, 75 N.C. App. at 578; 331 S.E.2d at 183; *Wallace*, 93 N.C. App. at 430, 378 S.E.2d at 230; *Chapel Hill Country Club, Inc. v. Chapel Hill*, 97 N.C. App. 171, 388 S.E.2d 168 (1990); and *Bali v. Kings Mountain*, 134 N.C. App. 277, 517 S.E.2d 208 (1999). However, none of these cases hold that a non-urban area must share a border with an annexing municipality.

CP&L also cites cases requiring a minimum level of urbanization for an entire annexation area; however, these cases do not preclude the annexation of the Long Shoals Area. In *Thrash v. Asheville*, 327 N.C. 251, 393 S.E.2d 842 (1990), the Supreme Court disallowed an annexation based on a recorded plat map showing that the land in question was subdivided because no evidence existed of any lots or streets on the actual property. The Court held that classifying such property as subdivided was inconsistent with the annexation statute, which requires “actual, minimum urbanization.” *Id.* at 257, 393 S.E.2d at 846. In the case of *In re: Annexation Ordinance Adopted by the City of Charlotte*, 284 N.C. 442, 202 S.E.2d 143 (1974), the City of Charlotte divided an entire area to be annexed into “study” areas and applied population credits in each separate study area rather than to the area as a whole. Because doing so allowed Charlotte to annex areas that it otherwise could not, the Supreme Court held that the use of “study areas” was inconsistent with legislative intent. *Id.* at 457, 202 S.E.2d at 152. Both of these cases address the classification of areas as developed for urban purposes pursuant to G.S. § 160A-48(c), rather than the permissibility of including intervening undeveloped

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lands pursuant to G.S. § 160A-48(d). They are, therefore, not controlling in the present appeal.

Where the Supreme Court has addressed the annexation of intervening undeveloped lands, its language has been consistent with an interpretation of G.S. § 160A-48(d)(2) which permits the annexation of non-urban areas completely enveloped by land developed for urban purposes:

Cities with 5,000 or more people may annex an outlying urban area pursuant to G.S. 160A-48(c) and the *intervening undeveloped lands* pursuant to G.S. 160A-48(d) so long as the entire area meets the requirements of G.S. 160A-48(b).

....

Thus, combining the holding in this case involving subsections (c) and (d) with the holding in *In re Annexation Ordinance . . .* involving subsection (c) the following principles emerge. The urban area that a city seeks to qualify for annexation under one of the urban purposes tests set forth in G.S. 160A-48(c)(1)-(3) must be considered as a whole; i.e., as one area and may not be divided into sub-areas or study areas. This requirement, however, does not preclude annexation of *intervening undeveloped land* pursuant to G.S. 160A-48(d). Finally, the entire area to be annexed must meet the requirements of G.S. 160A-48(b).

In re: Annexation Ordinance Adopted by the City of Albemarle, 300 N.C. 337, 341-42, 266 S.E.2d 661, 663-64 (1980) (emphasis added). In emphasizing that the annexed area be considered as a whole and sanctioning the annexation of "intervening undeveloped land," the Supreme Court seemingly contemplated the necessity of annexing non-urban land located between two or more pieces of land developed for urban purposes, even where the non-urban land does not actually touch the municipality. *Id.*

D.

In the present case, the trial court affirmed the annexation of Non-Urban Areas 1 and 4, ruling that G.S. § 160A-48(d)(2) does not require the external boundaries of a non-urban area to be contiguous with the boundary of a municipality. We conclude that the trial court interpreted G.S. § 160A-48(d)(2) correctly. The assignments of error with respect to the classification of Non-Urban Areas 1 and 4 are, therefore, overruled.

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V.

[2] We turn next to whether the City properly classified four tracts located within PIN 1056 as developed for industrial use. CP&L contends that the trial court erred in affirming the classification because the four tracts are not used “in support of” CP&L’s power generating facilities. We do not agree.

G.S. § 160A-48(c)(3) prohibits an industrial classification where a “lot or tract is used only temporarily, occasionally, or on an incidental or insubstantial basis in relation to the size and character of the lot or tract.” Subsection (c)(3) continues:

[A]creage in use for . . . industrial . . . purposes shall include acreage actually occupied by buildings or other man-made structures together with all areas that are reasonably necessary and appurtenant to such facilities for purposes of parking, storage, ingress and egress, utilities, buffering, and other ancillary services and facilities. . . .

The Supreme Court has held that a town could not classify 13.747 acres as being in industrial use where the only development on the property was a 1.4 acre parking lot: “There is no evidence that the twelve acres of land in question were being used either directly or indirectly for industrial purposes. All of the evidence tends to show that it was not being *used* for any purpose.” *Southern Ry. Co. v. Hook*, 261 N.C. 517, 520, 135 S.E.2d 562, 565 (1964).

This Court has distinguished *Hook* from a case where “the [disputed] sub-tracts . . . [were] contiguous to, and actually portions of, larger tracts used for commercial, industrial and institutional purposes.” *Huyck Corp. v. Wake Forest*, 86 N.C. App. 13, 20, 356 S.E.2d 599, 604 (1987), *aff’d per curiam*, 321 N.C. 589-90, 364 S.E.2d 139-40 (1988). In *Huyck*, this Court held that relatively small pieces of property could be classified with a larger whole where there was competent evidence to suggest that “each tract, as identified by the tax maps and records, contain[ed] improvements used by the industry, business, or institution occupying the land so that each tract, as a whole, may [have been] said to be in use for the specified purpose.” *Id.* at 21, 356 S.E.2d at 604.

In the present case, the City classified all of PIN 1056, including the four disputed tracts, as being in commercial use. At trial, CP&L offered the testimony of Luther Smith, an expert land planner; James Baldwin, a retired land management employee of CP&L; and Lloyd

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Yates, vice-president for fossil generation at CP&L. Each witness testified on direct examination that the four disputed tracts were not used in support of the CP&L power generating plant.

However, on cross examination, the witnesses provided testimony that could support a finding that each tract was used in support of the power plant. Specifically, there was testimony that tracts 1 and 2 serve as a buffer for Lake Julian, and that tracts 3 and 4 serve as buffers for ash ponds located on the property. Moreover, testimony from all three witnesses indicated that Tract 3 is traversed by a roadway and a natural gas line, and that coal comes into the plant via rail cars at Tract 3.

CP&L bore the burden of proving at trial that the City's classification did not comply with the annexation statute. *Knight v. Wilmington*, 73 N.C. App. 254, 256, 326 S.E.2d 376, 378 (1985). While CP&L offered witnesses who disagreed with the classification of the four tracts, these same witnesses provided information on cross-examination which tended to support the City's classification. Accordingly, the trial judge made findings of fact which are supported by the evidence, though such evidence may have also supported contrary findings. We will not disturb a trial court's findings of fact where competent evidence exists to support them. *Food Town Stores, Inc.*, 300 N.C. at 25-26, 265 S.E.2d at 126; *Barnhardt*, 116 N.C. App. at 217, 447 S.E.2d at 473. The assignments of error with respect to the classification of the four disputed tracts within PIN 1056 are, therefore, overruled.

Affirmed.

Judge WYNN 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 trial court erred in concluding the City's annexation of Non-Urban Areas 1 and 4 met the requirements of N.C. Gen. Stat. § 160A-48(d)(2).

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II. N.C. Gen. Stat. § 160A-48(d)(2)

"The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). "If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). N.C. Gen. Stat. § 160A-48(d)(2) (2001) clearly and unambiguously requires that at least sixty percent of the "external boundary" of a non-urban area must adjoin at least two boundaries: (1) the "municipal boundary" and (2) the "boundary of an area or areas developed for urban purposes," in order to be annexed.

CP&L contends that the City's purported annexation of the Long Shoals Area fails to comply with the requirements of N.C. Gen. Stat. § 160A-48(d)(2) and asserts that neither Non-Urban Areas 1 nor 4 are "adjacent" or "connect" to the existing municipal boundary. The parties stipulated that neither external boundary of Non-Urban Areas 1 nor 4 touch Asheville's existing municipal boundary at any point.

N.C. Gen. Stat. § 160A-48(d)(2) (2001) states:

- (d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area . . .
 - (2) Is adjacent, on at least sixty percent (60%) of its external boundary, to *any combination* of municipal boundary *and* the boundary of an area or areas developed for urban purposes as defined in subsection (c). The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute *necessary land connections* between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.

(emphasis supplied). The statute clearly requires that in order for a municipality to annex non-urban land, at least sixty percent of the external boundary of the land to be annexed must be adjacent to *any combination* of the municipal boundary *and* the boundary of an "area or areas developed for urban purposes," not either boundary standing alone. N.C. Gen. Stat. § 160A-48(d)(2) (2001).

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Requiring annexed land to adjoin the existing municipal boundary promotes sequential and orderly growth. Otherwise, without non-urban areas serving as “necessary land connections,” spot annexation of non-urban lands will be attempted that are far removed from the municipal’s boundary. *Id.* Allowing isolated parcels to be annexed will frustrate the extension of municipal utility lines and will cause confusion. Governmental services, such as garbage removal, post office delivery, fire, police, and other emergency personnel must attempt to determine where jurisdiction of the municipal boundary to isolated annexed parcels begins and ends while responding to addresses. *See Hughes v. Town of Oak Island*, 158 N.C. App. 175, 580 S.E.2d 704, 708-09 (2003). The majority’s interpretation allows municipalities to hopscotch over undeveloped non-urban areas and annex non-qualifying land areas solely for revenue enhancement. This interpretation is contrary to the plain language of the statute and case law, and does not promote orderly extension of municipal borders. The majority’s interpretation also violates the policy that land which is urban should be municipal. Non-urban land which does not touch a city’s boundary or which is not a “necessary land connection” from the municipal boundary to urban areas should remain non-municipal until that area meets the requirements of the statute.

The term “combination,” as used in the statute, is defined as “something resulting from combining two or more things.” *The American Heritage Dictionary*, 4th edition, (2000). “Combine” is defined as to “become united” or to “bring into a state of unity.” *Id.* The plain meaning of the statute’s language clearly requires that the non-urban area’s boundary “unite” with the municipal boundary *and* the boundary of the urban area or areas. All of one thing and none of another is not “any combination.” N.C. Gen. Stat. § 160A-48(d)(2) (2001). The majority’s interpretation constitutes “violence to the legislative language.” *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 473-74, 480 S.E.2d 681, 684 (1997).

The majority’s opinion states that “[o]ne workable combination exists where a non-urban area touches, on at least sixty percent of its external border, *only* an area or areas developed for urban purposes.” It holds that the requirements of N.C. Gen. Stat. § 160A-48(d)(2) are met, where a non-urban area’s boundary does not adjoin the city limits at any point, but is adjacent on at least sixty percent of that area’s external boundary to an urban area. I disagree. The majority’s interpretation disregards the plain meaning of the term “combination” and the General Assembly’s use of the conjunctive term “and.” *See Grassy*

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Creek Neighborhood Alliance, Inc. v. City of Winston-Salem, 142 N.C. App. 290, 542 S.E.2d 296 (2001) (quoting 73 Am. Jur. 2d, *Statutes* § 241 (1974)). If either prong alone would satisfy the statute, the General Assembly would have used the disjunctive term “or.” *Id.* As the majority opinion states, “the General Assembly’s choice of words in subsection (d) was not accidental.”

Annexing a non-urban area whose external boundary adjoins sixty percent of an area developed for urban purposes and zero percent of the municipal boundary violates the plain language of the statute. “Any combination,” as used in the statute, requires that at least sixty percent of the non-urban area’s external boundary must be adjacent to a “combination” of the municipal’s boundary *and* the urban area’s boundary. As long as this “combination” of both prongs of the statute totals sixty percent, the statute’s requirements are met.

III. Precedents

In *In re Annexation Ordinance*, the petitioners argued that the 15.5 acre undeveloped tract of land did not meet the requirements of N.C. Gen. Stat. § 160-453.16(b) and (c), now N.C. Gen. Stat. § 160A-48(b) and (c). 255 N.C. 633, 642-43, 122 S.E.2d 690, 698 (1961). Our Supreme Court disagreed and held that the 15.5 acre tract met the statutory requirements. *Id.* The Court further held that even if the land to be annexed did not meet the requirements of those statutes, it met the requirements of N.C. Gen. Stat. § 160-453.16(d), now N.C. Gen. Stat. § 160A-48(d)(2). *Id.* The Court interpreted the “any combination” language of N.C. Gen. Stat. § 160A-48(d)(2) and stated, “[a] casual examination of the annexation map shows that more than 60% of the external boundary of the 15.5 acre tract is adjacent to the city limits *and* the Forest Hills Development.” *Id.* (emphasis supplied).

In *The Little Red School House, Ltd. v. City of Greensboro*, petitioners opposed annexation and argued that its subdivided land did not meet the requirements of N.C. Gen. Stat. § 160A-48(c) and N.C. Gen. Stat. § 160A-48(d). 71 N.C. App. 332, 337-38, 322 S.E.2d 195, 198 (1984). This Court held that subareas M-1 and M-3 were areas developed for urban purposes and met the requirements of N.C. Gen. Stat. § 160A-48(c). *Id.* at 338, 322 S.E.2d at 198. We further held that sub-area M-2 was a non-urban area of land which did not meet the requirements of N.C. Gen. Stat. § 160A-48(c), but did meet the requirements of N.C. Gen. Stat. § 160A-48(d)(2). *Id.* We explained that even though subarea M-2 was not an “area developed for urban purposes,”

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it met the requirements of N.C. Gen. Stat. § 160A-48(d)(2) “having 74.9% of its external boundary adjacent to the boundaries of the municipality *and* subareas M-1 and M-3.” *Id.* (emphasis supplied).

In *Wallace v. Town of Chapel Hill*, petitioners argued that the town was without authority to annex the non-urban portion of their land for failure to meet the requirements of N.C. Gen Stat. § 160A-48(d)(2). 93 N.C. App. 422, 429, 378 S.E.2d 225, 229 (1989). This Court held that the non-urban land met the requirements of the statute and stated “[t]he Town presented evidence that the non-urban property met the criteria of (d)(2) in that the non-urban property was adjacent on at least sixty percent of its external boundary to a *combination* of the Town’s boundary *and* the boundary of the area developed for urban purposes.” *Id.* at 430, 378 S.E.2d at 230 (emphasis added).

This Court has also held proposed “shoestring” annexations by municipalities are invalid under North Carolina’s annexation statutes. *Amick v. Town of Stallings*, 95 N.C. App. 64, 71, 382 S.E.2d 221, 225-26 (1989), *disc. rev. denied*, 326 N.C. 587, 391 S.E.2d 40 (1990). A “shoestring” annexation is when a municipality uses a narrow corridor to connect the municipality to an outlying, noncontiguous area it desires to annex. *Id.* This Court held that the use of “shoestring” corridors to connect a municipality to outlying, noncontiguous territory contravenes the contiguous boundary requirements set forth in the annexation statutes. *Id.* (quoting *Hawks v. Town of Valdese*, 299 N.C. 1, 12-13, 261 S.E.2d 90, 97 (1980)). We held that “such a ‘crazy-quilt’ boundary is not consistent with ‘sound urban development’ of a municipality ‘capable of providing essential governmental services to residents within compact borders’” *Id.* (quoting *Hawks*, 299 N.C. at 12, 261 S.E.2d at 97).

N.C. Gen. Stat. § 160A-48(d)(2) was originally enacted in 1959 and has not been substantially changed since enactment. No case law supports the majority’s interpretation of this statute. All prior cases clearly show that in order for a municipality to annex non-urban land, that land must adjoin sixty percent of its external boundary to “any combination” of the municipal boundary *and* the boundary of land developed for urban purposes. Either boundary standing alone is insufficient. Case law also holds “shoestring” annexations, where narrow corridors of land that touch the municipal’s boundary are annexed and which are used for the sole purpose of complying with the statutory contiguity standards so that outlying, noncontiguous lands can be annexed are invalid. The majority’s interpretation of the

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statute allows municipalities to annex non-urban land without any physical, sequential, or urban nexus to the municipality. This interpretation is clearly contrary to the plain and unambiguous words used in the statute.

IV. Conclusion

The City erroneously classified both areas as adjacent non-urban areas eligible to be annexed pursuant to N.C. Gen. Stat. § 160A-48(d)(2). It is stipulated that neither external boundary of Non-Urban Areas 1 nor 4 touch the City's existing municipal boundary at any point. The plain language of the statute and all prior case law is clear that at least sixty percent of non-urban area boundaries must adjoin *both* the existing municipal boundary *and* the boundary of an area or areas developed for urban purposes. I would hold that the trial court erred in concluding that the City's annexation of Non-Urban Areas 1 and 4 met the requirements of N.C. Gen. Stat. § 160A-48(d)(2). I respectfully dissent.

CELESTE G. BROUGHTON, PLAINTIFF v. McCLATCHY NEWSPAPERS, INC.;
THE NEWS AND OBSERVER PUBLISHING CO.; ET AL., DEFENDANTS

No. COA02-1034

(Filed 4 November 2003)

1. Pleadings— motion to strike untimely answer—no entry of default

There was no abuse of discretion in the denial of plaintiff's motion to strike defendant's untimely answer in a libel action where default was never entered.

2. Libel and Slander— libel per se—statements with more than one interpretation

To be libelous on their face, statements must be subject to one interpretation only, and that interpretation must be defamatory. The trial court here did not err by denying plaintiff's motion for summary judgment (and properly granted defendant's) on plaintiff's claim for libel per se based on a newspaper article because the statements complained of by plaintiff did not meet that requirement.

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3. Privacy— invasion of—newspaper writer—interviews and public records

Defendant's conduct in gathering information for a newspaper article did not rise to the level of invasion of privacy, and the trial court did not err by denying summary judgment for plaintiff or by granting it for defendant. There was no evidence of physical or sensory intrusion or prying into confidential personal records.

4. Libel and Slander— slander—newspaper article—true statements

Summary judgment was correctly granted for defendants and denied for plaintiff on a slander claim arising from a newspaper article where the pertinent statements were true. Moreover, plaintiff did not show damages.

5. Fraud— newspaper reporter—representations—no reliance by plaintiff

Plaintiff's claim for fraud and misrepresentation against a newspaper and a reporter lacked the essential element of reliance, and summary judgment was correctly granted against plaintiff and for defendant.

6. Trespass— unannounced visit by reporter—entry not unauthorized

The trial court properly granted summary judgment for defendants on a trespass claim (and properly denied summary judgment for plaintiff) arising from a newspaper article where plaintiff complained that defendant reporter came to her house unannounced but did not show that the reporter's entry was unauthorized.

7. Torts, Other— obstruction of justice—no impedance of lawsuit—summary judgment

There was no evidence that plaintiff's case was prevented, obstructed, or hindered by defendant reporter's newspaper article about her domestic action, and summary judgment was properly granted for defendants on plaintiff's claim for obstruction of justice.

8. Civil Procedure— summary judgment—motions for amended judgment or new trial

The provisions of Rule 52 of the North Carolina Rules of Civil Procedure under which a party may move for amended or addi-

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tional findings and an amended judgment are not applicable to summary judgment. The trial court's decision on a Rule 59 request for a new trial is not reviewable absent an abuse of discretion, which was not shown in this case.

Appeal by plaintiff from orders entered 23 October 1997 by Judge Orlando F. Hudson, Jr.; 21 October 1998 by Judge Robert Farmer; 18 December 1998 by Judge B. Craig Ellis; 20 April 1999 by Judge E. Lynn Johnson; 11 August 1999 by Judge Howard E. Manning, Jr.; 8 June 2001 by Judge Howard E. Manning, Jr.; and 3 July 2001 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 18 August 2003.

Celeste G. Broughton, pro se.

Everett Gaskins Hancock & Stevens, LLP, by Hugh Stevens and C. Amanda Martin, for defendants-appellees.

STEELMAN, Judge.

This appeal arises from a lawsuit initiated by plaintiff, Celeste G. Broughton, against defendants, McClatchy Newspaper, Inc., The News and Observer Publishing Company, Frank A. Daniels, Jr., individually and as president of the News and Observer Publishing Company and as publisher of the News and Observer (N&O), Anders Gyllenhaal, individually and as editor of the N&O, and Sarah Avery, individually and as a staff writer for the N&O. This action was dismissed by Judge Howard E. Manning, Jr. For the reasons discussed herein, we affirm.

Plaintiff and Robert Broughton were married on 5 December 1964. The Broughtons separated on 25 November 1968. Since that time, they have been involved in litigation. In 1995, defendant Sarah Avery (Avery) became interested in the Broughtons' protracted litigation. Avery researched court files and conducted interviews for an article to be published in the N&O. On 3 December 1995, the article was published in the N&O. It was titled "Lawsuit in Superior Court Latest Volley in Broughtons' War," and included references to the Broughtons' marriage, plaintiff's financial status, and ongoing and past litigation. On 2 December 1996, plaintiff filed a complaint alleging libel *per se*, invasion of privacy, fraud and misrepresentation, slander of title, and obstruction of justice.

On 4 February 1997 defendants filed a motion for a more definite statement, a motion to strike portions of plaintiff's complaint, and a

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provisional answer. The trial court granted both of defendants' motions on 21 April 1997 and directed plaintiff to file and serve an "amended complaint" on or before 19 May 1997. On 12 May 1997, plaintiff obtained an *ex parte* order granting an extension of time to serve her "amended complaint" until 3 June 1997. Plaintiff filed a document designated as an "amended complaint" on 3 June 1997. Defendants filed an answer to the amended complaint on 3 July 1997. On 7 July 1997, plaintiff moved to strike defendants' answer and for entry of default. Both of these motions were denied by Judge Orlando F. Hudson, Jr. on 23 October 1997.

Following contentious discovery, all parties moved for summary judgment. Judge Howard E. Manning, Jr. denied plaintiff's motion for summary judgment on 11 August 1999. He granted defendants' motion for summary judgment on 8 June 2001 in an order that set forth, in detail, the rationale of the court's ruling.

On 18 June 2001, plaintiff filed a motion under Rules 52 and 59(a)(7) requesting that the trial court reconsider its 8 June 2001 decision. The motion alleged that the trial court's order, which granted defendants' motion for summary judgment, contained errors of law and fact. On 3 July 2001, Judge Manning denied the motions under Rules 52 and 59(a)(7). Plaintiff's motion for reconsideration was allowed, but the trial court declined to change its decision. Plaintiff appeals all of these orders, but does not discuss the 21 October 1998 order by Judge Robert Farmer, the 18 December 1998 order by Judge B. Craig Ellis, or the 20 April 1999 order by Judge E. Lynn Johnson in her brief. Assignments of error as to these orders are deemed abandoned and are not addressed further. *See* N.C. R. App. P. 28(b)(6). Plaintiff sets forth four assignments of error.

[1] In her first assignment of error, plaintiff argues that the trial court erred by denying her motion to strike defendants' answer and motion for entry of default. She contends that because defendants' answer was not filed in a timely manner, the trial court was required to enter default. We disagree.

Plaintiff filed her complaint on 2 December 1996. Defendants moved for a more definite statement on 4 February 1997. The trial court's 5 May 1997 order granted defendants' motion and directed that plaintiff serve an "amended complaint" upon defendants. "If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement." N.C.R. Civ. P. 12(a)(1)(b). Plaintiff served her

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amended complaint by mail on 3 June 1997. Defendants, therefore, had until 26 June 1997 to file a response. *See* N.C.R. Civ. P. 6(e). Defendants did not file an answer to the amended complaint until 3 July 1997.

Plaintiff presented an affidavit and a proposed order entering default to the Clerk of Superior Court of Wake County on 2 July 1997. The clerk did not enter default against defendants. Defendants filed an answer to the amended complaint on 3 July 1997. Plaintiff moved to strike the answer and for entry of default on 7 July 1997. Defendants responded to plaintiff's motions, contending that under Rule 15(a), they were allowed 30 days to answer an "amended pleading."

Rule 15(a) provides that "[a] party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders." N.C.R. Civ. P. 15(a). However, Rule 15 applies to amended and supplemental pleadings in general. Rule 12(a)(1)(b) specifically applies to responses to a more definite statement. N.C.R. Civ. P. 12(a)(1)(b). When a more generally applicable statute conflicts with a more specific, special statute, the "special statute is viewed as an exception to the provisions of the general statute[.]" *Domestic Electric Service, Inc. v. City of Rocky Mount*, 20 N.C. App. 347, 350, 201 S.E.2d 508, 510, *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974). Accordingly, we conclude that the specific requirements of Rule 12(a)(1)(b) control where in conflict with the general requirements of Rule 15(a).

Plaintiff moved to strike defendants' answer pursuant to Rule 55, which provides:

When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk *shall* enter his default.

N.C.R. Civ. P. 55(a) (Emphasis added).

Default judgments are disfavored in the law, and therefore any doubts should be resolved in favor of allowing the case to proceed on the merits. *North Carolina Nat'l Bank v. McKee*, 63 N.C. App. 58, 303 S.E.2d 842 (1983). In *Peebles v. Moore*, 302 N.C. 351, 275 S.E.2d 833 (1981), the defendant filed an untimely answer. After the answer was filed, the clerk entered a default against the defendant. The trial

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court refused to set aside the entry of default. Our Supreme Court reversed, holding that once an answer has been filed, default may not be entered, even though the answer was late. The court further stated that:

We believe that the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise. . . . Without considering the questions of just cause, excusable neglect or waiver, we conclude that justice will be served by vacating the entry of default and permitting the parties to litigate the joined issues.

Id. at 356, 275 S.E.2d at 836.

In the instant case, unlike *Peebles*, there was never an entry of default. Clearly, defendants' answer was not timely filed. However, when an answer is filed before default is entered, the clerk is no longer authorized to enter default against defendants. *See Peebles, supra; Fieldcrest Cannon Employees Credit Union v. Mabes*, 116 N.C. App. 351, 447 S.E.2d 510 (1994).

A motion to strike an answer is addressed to the sound discretion of the trial court and its ruling will not be disturbed absent an abuse of discretion. *Byrd v. Mortenson*, 308 N.C. 536, 302 S.E.2d 809 (1983). Defendants had previously filed a provisional answer to plaintiff's complaint on 4 February 1997. It is clear from the record that defendants believed that since plaintiff filed an "amended complaint," they had 30 days to file a response. Defendants did, in fact, file an answer, albeit late by several days. Further, there was no showing that plaintiff was prejudiced by the late answer. The denial of plaintiff's motion to strike was not an abuse of discretion.

It is preferable for matters to be resolved on their merits rather than upon a procedural defect. *Hardison v. Williams*, 21 N.C. App. 670, 205 S.E.2d 551 (1974). The interests of justice in this case were served by the trial court's denial of plaintiff's motion to strike. *See Peebles, supra*. This assignment of error is without merit.

[2] In plaintiff's second and third assignments of error, she argues that the trial court erred in denying her motion for summary judgment and granting defendants' motion for summary judgment concerning her claims for libel *per se*, invasion of privacy, slander of title, fraud and misrepresentation, trespass and obstruction of justice. We disagree.

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Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The moving party bears the burden of demonstrating the lack of triable issues of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to present specific facts showing triable issues of material fact. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). On appeal from summary judgment, “we review the record in the light most favorable to the non-moving party.” *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001), *aff’d*, 355 N.C. 485, 562 S.E.2d 422 (2002) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)).

Where a plaintiff cannot prove an essential element of her claim, summary judgment is proper. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 432 S.E.2d 428 (1993), *rev. denied*, 335 N.C. 770, 442 S.E.2d 517 (1994). Summary judgment can be appropriate in libel cases. See *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 435, 291 S.E.2d 852, 857 (1982), *appeal dismissed*, 307 N.C. 459, 298 S.E.2d 385 (1983).

Whether a publication is deemed libelous *per se* is a question of law to be decided by the court. *Ellis v. Northern Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127, 130, *reh’g denied*, 326 N.C. 488, 392 S.E.2d 89 (1990). “[D]efamatory words to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.” *Flake v. Greensboro News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1937).

Plaintiff alleged in her complaint that the actions by defendants constituted libel *per se*. There are no allegations of any other type of libel. Libel *per se* is “a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person’s trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.” *Phillips v. Winston-Salem/Forsyth County*

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Bd. of Educ., 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994), *disc. rev. denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). The first three types of libel *per se* are not applicable to this case.

Paragraph 17 of plaintiff's complaint reads as follows:

Such publications (Exhibits A, B and C)—each separately and also taken as a whole—were intended to convey and did convey to the community at large the impression that plaintiff was mean-spirited, greedy, and buffoonishly litigious, and that no one—especially lawyers and judges—should take her legal allegations or other activities seriously. By such publication, defendants meant and intended to mean:

Plaintiff then enumerated in seventy-eight separately numbered subparagraphs what she interpreted defendants meant and intended to mean in the newspaper articles. The articles complained of were: (1) the original story which ran on 3 December 1995 (Exhibit A); (2) three letters to the editor which discussed the original story; and (3) an article dated 10 December 1996 reporting that plaintiff had sued defendants in the instant action.

The original story (Exhibit A) was titled, "Lawsuit in Superior Court latest volley in Broughtons' war." The fourth paragraph states: "Convinced that her husband would use his power and influence to ruin her, [plaintiff] took to the courts to fight for what she said was rightfully due her and her children—a just division of the property he controlled during their marriage. She is still fighting." The article then states that plaintiff is known by her first name only at the Wake County Courthouse because she has been a party to at least "two dozen lawsuits, complaints and criminal actions involving her lawyers, her ex-husband's lawyers, state and federal judges, district attorneys, The News and Observer and the Internal Revenue Service." The article comments on plaintiff's \$4.2 million-dollar lawsuit against Robert Broughton, their marriage and subsequent divorce, plaintiff's attempts to obtain money for her children's educations from Robert Broughton, affidavits filed in lawsuits between the parties, how plaintiff began to act *pro se* because she could no longer afford to hire attorneys, and Robert Broughton's estrangement from his children.

Plaintiff has misconstrued the article and read into it interpretations that are simply not there. Her complaint refers to what defendants "meant and intended to mean" in the article. This is not the test for libel *per se*. In *Renwick v. News & Observer Pub. Co.*, 310 N.C.

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312, 318, 312 S.E.2d 405, 409, *reh'g denied*, 310 N.C. 749, 315 S.E.2d 704, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984), our Supreme Court stated:

The principle of common sense requires that courts shall understand them as other people would. The question always is how would ordinary men naturally understand the publication. . . . The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make them libelous.

In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The article must be defamatory on its face "within the four corners thereof."

(Quoting *Flake v. Greensboro News Co.*, 212 N.C. at 786-87, 195 S.E. at 60). Here, plaintiff complains only of insinuations and innuendos by alleging what defendants intended to mean.

In opposition to defendants' motion for summary judgment, plaintiff submitted the affidavits of three persons, together with her own affidavit, that stated how they perceived the article made plaintiff appear. Regardless of whether a libel case is resolved upon a motion for summary judgment or by a jury trial, the trial court is required to make a threshold determination of whether the statement is libelous on its face. *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 312 S.E.2d 405 (1984); *Robinson v. Nationwide Ins. Co.*, 273 N.C. 391, 159 S.E.2d 896 (1968); *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). In order to be libelous on its face, the statements must be subject to only one interpretation, which must be defamatory. *Martin Marietta Corp. v. Wake Stone Corp.*, 111 N.C. App. 269, 432 S.E.2d 428 (1993). The statements complained of by plaintiff are not susceptible of only one defamatory meaning as a matter of law. The trial court correctly determined that "as a matter of law, the article is not libelous *per se*." Consequently, we hold that the trial court did not err, but properly granted defendant's summary judgment motion and properly denied plaintiff's summary judgment motion on the libel *per se* issue.

[3] In addition to her claim for libel, plaintiff asserts a claim for invasion of privacy. There are four types of invasion of privacy actions: "(1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or soli-

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tude or into his private affairs; (3) public disclosure of embarrassing private facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye." *Renwick*, 310 at 322, 312 S.E.2d at 411.

Plaintiff has not alleged a claim for appropriation of her name or likeness. North Carolina does not recognize a cause of action for the invasion of privacy by disclosure of private facts. *Burgess v. Busby*, 142 N.C. App. 393, 544 S.E.2d 4, *reh'g denied*, 355 N.C. 224, 559 S.E.2d 554 (2001) (citing *Hall v. Post*, 323 N.C. 259, 372 S.E.2d 711 (1988), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988)). Neither does North Carolina recognize a cause of action for false light in the public eye invasion of privacy. *Renwick, supra*. Thus, the only possible invasion of privacy claim that can be brought by plaintiff is one for intrusion.

Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion. *Burgess v. Busby, supra*; See also *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76 (2002), *rev. denied, appeal dismissed*, 357 N.C. 66, 579 S.E.2d 576 (2003).

We have held that "‘intrusion’ as an invasion of privacy is [a tort that] . . . does not depend upon any publicity given a plaintiff or his affairs but generally consists of an intentional physical or sensory interference with, or prying into, a person’s solitude or seclusion or his private affairs." *Hall v. Post*, 85 N.C. App. 610, 615, 355 S.E.2d 819, 823 (1987). Specific examples of intrusion include "physically invading a person’s home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another."

Burgess, 142 N.C. App. at 405-06, 544 S.E.2d at 11 (citing *Hall v. Post*, 85 N.C. App. 610, 615, 355 S.E.2d 819, 823 (1987), *reversed on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988)). The conduct required to support this claim must be so egregious as to be "highly offensive to a reasonable person." *Smith v. Jack Eckerd Corp.*, 101 N.C. App. 566, 568, 400 S.E.2d 99, 100 (1991).

The allegations in paragraph 17 of plaintiff’s complaint pertaining to intrusion of privacy are as follows:

17. (40) False and defamatory allegation about the most private and personal matters of plaintiff’s family’s life is acceptable for

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publication, even over her explicit protest, although plaintiff is not a public figure and the defendants and their said publications clearly convey that the matters published were deliberately contrived to be tedious, unnewsworthy trivia and grossly invade plaintiff's and her sons' privacy.

35. Plaintiff repeatedly asked Avery not to publish any article about the plaintiff or the case, as any article would be an unwarranted invasion of her family's privacy and also would inevitably jeopardize the outcome of the case Wake County 88 CVS 6157.

58. Since the matters written about were private, plaintiff is not a public figure, the public is not interested in those matters, the account of the matters was incomplete and accordingly inaccurate (if not outright falsehoods), the publication unlawfully invaded plaintiff's privacy.

63. Even if all the individual statements in subject article were true, the article would yet be libelous, slanderous of title, invasive of privacy and obstruct just resolution of the referred "lawsuit in superior court", since article omits relevant information about the plaintiff and other matters it purports to accurately report. [Sic].

In this case, defendants investigated *public* records and conducted interviews of persons to acquire information for the article. There can be no invasion of privacy claim based upon the use of public records as to which plaintiff had no expectation of privacy. *Burgess*, 142 N.C. App. at 406, 544 S.E.2d at 11. There was no evidence of physical or sensory intrusion or of prying into confidential personal records. The conduct of defendants in the gathering of information for its articles does not rise to a level that would support a claim for invasion of privacy by intrusion. Accordingly, we hold that the trial court properly denied plaintiff's summary judgment motion and granted defendants' motion for summary judgment as to the claim for invasion of privacy.

[4] Plaintiff also contends that defendants committed slander of title. The elements of slander of title are: (1) the uttering of slanderous words in regard to the title of someone's property; (2) the falsity of the words; (3) malice; and (4) special damages. *Mccimore v. Cothren*, 109 N.C. App. 650, 655-56, 428 S.E.2d 470, 473, *rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993) (citing *Allen v. Duvall*, 63 N.C. App. 342, 345, 304 S.E.2d 789, 791 (1983), *rev'd on other grounds*, 311 N.C. 245, 316 S.E.2d 267 (1984)).

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The article of 3 December 1995 contains the following statements concerning plaintiff's residence:

The house sits on a hill, looking down through a forest of tall oaks at the grand old-money homes to the left and right. . . .

Celeste Broughton long ago put the house on the hill in a trust for her children, saying in court papers that it would be the only nest-egg they would ever have. And while the three acres span some of the most desirable real estate in Raleigh—easily worth several times the \$400,000 tax value—the 3,500 square foot house shows signs of age. A gray mildew climbs the six columns that establish its grand front.

Still, she refuses to sell the house and subdivide the land. It's the principle of the matter. Why, she demands, should she sacrifice the only home her children have ever known because they are owed what she considers a legal and binding debt?

The materials presented to the trial court upon the summary judgment hearing reveal that the title to the property is in fact held in trust for plaintiff's children. This statement was not false. The evidence further showed that the remaining allegations pertaining to plaintiff's real property were not false. In addition, plaintiff has not shown any damages. In the absence of an essential element of the cause of action, summary judgment is proper. *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996). We therefore hold that the trial court correctly granted summary judgment in favor of defendants and denied plaintiff's motion for summary judgment on this claim.

[5] Plaintiff further contends that defendants committed fraud and misrepresentation by telling her that the article would be "sympathetic" to her interests. To establish a claim for fraud, plaintiff must show that: (1) defendants made a representation of a material past or existing fact; (2) the representation was false; (3) defendants knew the representation was false or made it recklessly without regard to its truth or falsity; (4) the representation was made with the intention that it would be relied upon; (5) plaintiff did rely on it and that her reliance was reasonable; and (6) plaintiff suffered damages because of her reliance. *Blanchfield v. Soden*, 95 N.C. App. 191, 194, 381 S.E.2d 863, 864, *rev. denied*, 325 N.C. 704, 388 S.E.2d 448 (1989).

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In plaintiff's deposition, however, she stated that:

I've made it a policy all—for the last many, many years to never talk to anyone who works with *The News and Observer*, to avoid them socially, have nothing to do with them, to not even go near them in the grocery store. . . . I've learned that people—especially people who work for *The News and Observer*—lie glibly.

Based on plaintiff's own statements, she did not rely on any statements that might have been made by defendants. Because an essential element is missing from plaintiff's claim, summary judgment was proper. *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996). The trial court properly denied plaintiff's motion and granted defendants' motion for summary judgment as to this claim.

[6] Plaintiff contends that defendant Avery trespassed on her property when she came to plaintiff's residence unannounced. The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass. *Kuykendall v. Turner*, 61 N.C. App. 638, 642, 301 S.E.2d 715, 718 (1983).

Plaintiff alleged that defendant Avery trespassed when the following happened:

36. A day or so after that conversation, Avery appeared unannounced at plaintiff's residence and stated that she had come solely for a "social visit". Plaintiff had never seen the woman before in her life.

37. Plaintiff feared the N&O's often demonstrated proclivity and reputation for vindictively destroying people and, consequently, plaintiff did not want to appear rude by refusing to "socially" visit with Avery.

38. As a result of that fear, plaintiff talked for some time "socially" with Avery on plaintiff's front porch.

39. After having made the fraudulent misrepresentation that she was "socially" visiting, Avery later, in her article of December 3, 1995, rewarded plaintiff's hospitality by cruelly invading plaintiff's privacy, including writing viciously unflattering description of plaintiff's residence and alleging the property has a high market value. [sic].

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Plaintiff has not shown or alleged that Avery's entry onto her land was unauthorized. To the contrary, the evidence was that plaintiff engaged in "social" conversation with Avery and did not ask her to leave the property. Thus, the trial court properly granted summary judgment for defendants and denied summary judgment for plaintiff on the trespass claim.

[7] Plaintiff next contends that the trial court erred in dismissing her claim for obstruction of justice. For example, paragraph 70 of the amended complaint states that "[p]laintiff has suffered obstruction of a just resolution of pending court actions, Case number 88 CVS 6157 (Wake County)."

"Obstruction of justice is a common law offense in North Carolina." *Burgess*, 142 N.C. App. at 408, 544 S.E.2d at 12. "[I]t is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice. *Id.* at 408-09, 544 S.E.2d at 12-13. However, plaintiff presented no evidence that her case, 88 CVS 6157, was in some way judicially prevented, obstructed, impeded or hindered by the acts of defendants. There is no evidence as to the disposition of that action or any showing that the newspaper articles adversely impacted that case.

As to each of plaintiff's claims, the trial court properly granted summary judgment in favor of defendants and properly denied plaintiff's motion for summary judgment. These assignments of error are without merit.

[8] In her fourth and final assignment of error, plaintiff argues that the trial court erred in denying her motions under Rules 52 and 59(a)(7), filed following the trial court's granting of defendants' motion for summary judgment. We disagree.

Rule 52 provides that a party may move for the trial court to amend its findings, make additional findings or amend its judgment. N.C.R. Civ. P. 52. However, these provisions are not applicable to an order granting summary judgment.

A trial judge is not required to make finding of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. [Sic]. Rule 52(a)(2) does not apply to the decision on a summary judgment motion because, if findings of fact are necessary to resolve an issue, summary judgment is improper.

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Mosley v. National Finance Co., 36 N.C. App. 109, 111, 243 S.E.2d 145, 147 (1978) (citations omitted). In this case, the trial court did not enter findings of fact and conclusions of law, but rather carefully and in detail stated the legal basis for each of its rulings.

Rule 59(a)(7) provides that a party may request a new trial based upon “[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law.” N.C.R. Civ. P. 59(a)(7). The trial court’s decision on a Rule 59 motion is not reviewable on appeal absent manifest abuse of discretion. *Thomas v. Dixson*, 88 N.C. App. 337, 363 S.E.2d 209 (1988). Plaintiff has not shown an abuse of discretion. As discussed above, the trial court did not err in denying plaintiff’s motion for summary judgment or granting defendants’ motion for summary judgment. This assignment of error is without merit.

AFFIRMED.

Chief Judge EAGLES and Judge TYSON concur.

KALEEL BUILDERS, INC. PLAINTIFF V. KENT ASHBY, D/B/A SUPERIOR EXTERIORS; LAKE BUILDERS, INC.; LW CORP.; BOB’S HEATING & AIR CONDITIONING COMPANY, INC.; AND DON DUFFY, ARCHITECT, DEFENDANTS

No. COA02-1616

(Filed 4 November 2003)

1. Indemnity— negligent construction claim—express contract—contract implied-in-fact—contract implied-in-law—subcontractors

The trial court did not err in a case arising out of the alleged negligent construction of a house by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff general contractor’s claim for indemnity against defendant subcontractors, because: (1) plaintiff’s complaint alleges no express contractual right, neither written nor oral, of indemnity in the agreements between the parties; (2) plaintiff’s allegations do not allege a right to indemnification implied-in-fact when plaintiff’s complaint alleges breach of contract and breach of warranty by a number of independent subcontractors; and (3) plaintiff has not stated a claim for an equitable right under the implied-in-law theory of indemnity when

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North Carolina law requires there be an underlying injury sounding in tort, and plaintiff failed to allege tortious conduct from which indemnity is sought.

2. Contribution— negligent construction claim—subcontractors—failure to allege tort theory

The trial court did not err in a case arising out of the alleged negligent construction of a house by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff general contractor's claim for contribution against defendant subcontractors, because: (1) there is no negligence claim where all the rights and remedies have been set forth in the contractual relationship; and (2) plaintiff's failure to allege a cause of action in tort means the contribution theory of recovery fails as a matter of law.

3. Statutes of Limitation and Repose— negligent construction claim—breach of contract—breach of warranty

The trial court did not err in a case arising out of the alleged negligent construction of a house by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff general contractor's claims for breach of contract and breach of warranty against defendant subcontractors, because those claims were barred by the pertinent statute of limitations. N.C.G.S. § 1-52(1).

4. Contribution— negligent construction claim—architect

A de novo review revealed that the trial court did not err in a case arising out of the alleged negligent construction of a house by granting summary judgment in favor of defendant architect on the issue of contribution, because: (1) there is no issue of fact as to whether the architect and plaintiff are joint tortfeasors; and (2) the only tort alleged and supported by the facts is between the general contractor and the architect, which is barred by the statute of limitations.

5. Indemnity— negligent construction claim—architect

A de novo review revealed that the trial court did not err in a case arising out of the alleged negligent construction of a house by granting summary judgment in favor of defendant architect on the issue of indemnity, because: (1) plaintiff has neither pled, alleged, nor provided facts to create any issue of fact as to whether there is an express contract or a contract implied-in-fact with the architect when there was no contractual privity between these two parties; and (2) the only tort alleged and supported

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by the facts is between the general contractor and the architect, which is barred by the statute of limitations.

Appeal by Kaleel Builders, Inc., from the following orders by Judge Richard D. Boner in Mecklenburg County Superior Court filed 16 July 2002, dismissal of claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001) of the North Carolina Rules of Civil Procedure against Bob's Heating and Air Conditioning Company, Inc., LW Corp., and Kent Ashby d/b/a Superior Exteriors; order filed 12 September 2002, dismissal of claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), against Lake Builders, Inc.; and order filed 19 September 2002, grant of summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, for defendant Don Duffy, Architect. Heard in the Court of Appeals 10 September 2003.

Jones, Hewson & Woolard, by Lawrence J. Goldman, for plaintiff appellant.

McAngus, Goudelock & Courie, P.L.L.C., by Charles D. Cheney and Jeffrey D. Keister, for Kent Ashby, d/b/a Superior Exteriors defendant appellee.

Pharr & Boynton, P.L.L.C., by Mark D. Boynton, for Lake Builders, Inc., defendant appellee.

Moreau, Marks & Gavigan, P.L.L.C., by Daniel C. Marks, for LW Corp. defendant appellee.

Giordano, Gordon & Burns, P.L.L.C., by Marc R. Gordon, for Bob's Heating & Air Conditioning Company, Inc., defendant appellee.

Hamilton, Gaskins, Fay & Moon, P.L.L.C., by David B. Hamilton and David G. Redding, for Don Duffy, Architect defendant appellee.

McCULLOUGH, Judge.

This case arises out of a dispute between general contractor, Kaleel Builders, Inc. ("plaintiff"), and various subcontractors and an architect (when referred to collectively "defendants"). The trial court dismissed the claims against subcontractors Kent Ashby, d/b/a Superior Builders, Inc. ("Ashby"), Lake Builders, Inc. ("Lake Builders"), LW Corp., and Bob's Heating & Air Conditioning Company, Inc. ("Bob's Heating"), and granted summary judgment in favor of architect, Don Duffy ("Mr. Duffy").

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The underlying facts of the case are as follows: Plaintiff was hired by Pier Giorgio and Paula A. Andretta ("Andrettas") to construct a residence in Mecklenburg County, North Carolina. During construction of the home, plaintiff entered into the following agreements: with Ashby, to provide all labor and materials for the application of the hard coat stucco exterior; with Lake Builders, to perform framing on the residence; with LW Corp., to provide all the labor and materials for the installation of the roofing system to the residence; and with Bob's Heating, to provide the design and all labor and materials for the HVAC/mechanical installation to the residence. The Andrettas contracted directly with Mr. Duffy to provide architectural services on the residence.

In the fall of 1996, construction of the residence was halted. The Andrettas filed a demand for arbitration against plaintiff for allegedly defective construction including the work of the defendant subcontractors and the design/construction supervision of Mr. Duffy. Plaintiff's complaint, filed on 18 July 2001, seeking indemnification or, in the alternative, contribution was dismissed as to the subcontractors on the basis that the action was not commenced within the applicable period of limitations on the breach of contract and breach of warranty claims, and failed to state a cause of action on the negligence claims. Summary judgment on the negligence claim was granted in favor of Mr. Duffy. We affirm the lower court's order granting dismissal of the claims against the subcontractors and summary judgment in favor of Mr. Duffy.

Dismissal of the Subcontractors

Plaintiff argues that dismissal of the claims against the subcontractors was error as the trial court failed to recognize plaintiff's theory of indemnity or, alternatively, contribution. Defendants argue, and the trial court found, that the facts of this case preclude the plaintiff's use of indemnification and contribution as prayers for relief, and that the remaining claims of breach of warranty and breach of contract are time barred by N.C. Gen. Stat. § 1-52(1) (2001). Furthermore, defendant argues all other allegations fail to state any remediable claims that sound in tort. We agree with defendants' argument pursuant to the reasoning herein.

Upon our review of the trial court's order granting a Rule 12(b)(6) dismissal, we read all allegations in the light most favorable to plaintiff. *See Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 349 S.E.2d 82 (1986); *disc. review denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). However, a complaint is without merit if:

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(1) the complaint on its face reveals that no law supports the plaintiffs' 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 plaintiffs' claim.

Harrold v. Dowd, 149 N.C. App. 777, 780, 561 S.E.2d 914, 916 (2002). A statute of limitations defense is properly asserted in a motion to dismiss under Rule 12(b)(6), and is proper grounds for the trial court to find a complaint is without merit. *Horton v. Carolina Medicorp, Inc.*, 119 N.C. App. 777, 779, 460 S.E.2d 567, 568 (1995), *rev'd on other grounds*, 344 N.C. 133, 472 S.E.2d 778 (1996).

I. Indemnification

[1] In its complaint, plaintiff argues that it is entitled to indemnity for damages which may be awarded to the Andrettas in pending arbitration against plaintiff. In determining whether plaintiff has stated a claim of indemnity for which relief can be granted, we first review a general summary of a party's right to indemnity in North Carolina. Upon this review, we believe the trial court properly dismissed plaintiff's claim of a right to indemnity.

In North Carolina, a party's rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law. *See McDonald v. Scarboro*, 91 N.C. App. 13, 370 S.E.2d 680, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988); 41 Am. Jur. 2d *Bases for Indemnity* § 2 (1995) at 348. While an indemnity clause specifically set out in a contract as part of the bargained-for exchange is clear under traditional contract principles, the two variations of implied rights to indemnity discussed in North Carolina cases require some background before applying them to the instant case.

A right of indemnity implied-in-fact stems from the existence of a binding contract between two parties that necessarily implies the right. The implication is derived from the relationship between the parties, circumstances of the parties' conduct, and that the creation of the indemnitor indemnitee relationship is derivative of the contracting parties' intended agreement. *See McDonald*, 91 N.C. App. 13, 370 S.E.2d 680; *see also, Terry's Floor Fashions, Inc. v. Georgia-Pacific Corp.*, 36 U.C.C. Rep. Serv. 2d (Callaghan) 680, at *18 (E.D.N.C. 1998), *summary judgment granted*, 39 U.C.C. Rep. Serv. 2d (1999). In *McDonald*, defendant Scarboro broke his contract with

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plaintiff McDonald to work for codefendant McCary, based on McCary's oral promise to provide an attorney if Scarboro was sued for breach of contract. In that case, this Court found there to be sufficient evidence of an implied-in-fact contract for indemnity when Scarboro testified at trial and in a deposition that McCary had orally agreed to provide an attorney in the event he was sued by plaintiff for breach of contract. Furthermore, Scarboro was an employee of McCary, and the creation of the indemnitor indemnitee relationship was at the essence of their intent to formulate their contractual master-servant relationship.

While contractual indemnity implied-in-law is a rather discrete legal fiction, North Carolina appellate courts have been consistent as to the elements required which warrant a right of indemnity on this theory. Specifically, the indemnity implied-in-law arises from an underlying tort, where a passive tort-feasor pays the judgment owed by an active tort-feasor to the injured third party. The Supreme Court set this out clearly:

The old-time judges said that the duty imposed by law upon the actively negligent tort-feasor to reimburse the passively negligent tort-feasor for the damages paid by him to the victim of their joint tort was based on an implied contract, meaning a contract implied in law from the circumstance that the passively negligent tort-feasor had discharged an obligation for which the actively negligent tort-feasor was primarily liable. And this is all the courts mean today when they declare that the right of the passively negligent tort-feasor to indemnify from the actively negligent tort-feasor rests upon an implied contract. There is, of course, in such case no contract implied in fact. This is necessarily so because contracts implied in fact are true contracts based on consent.

Hunsucker v. Chair Co., 237 N.C. 559, 563-64, 75 S.E.2d 768, 771 (1953) (citing *Queen v. DeHart*, 209 N.C. 414, 184 S.E. 7 (1935)); *Montgomery v. Lewis*, 187 N.C. 577, 122 S.E. 374 (1924); see also *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956); and *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

A. Express Contract

Plaintiff's complaint alleges no express contractual right, neither written nor oral, of indemnity in the agreements between plaintiff and subcontractors. We next read its claims liberally to see if plain-

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tiff sufficiently alleges an implied-in-fact or implied-in-law right to indemnity.

B. Contract implied-in-fact

In its analysis of the contract implied-in-fact theory of indemnity, the Eastern District of North Carolina, in an unpublished order, *Terry's Floor Fashions*, 36 U.C.C. Rep. Serv. 2d (Callaghan) 680, at *18, offers an instructive analysis of the common law of indemnity in North Carolina. Additionally, in *American Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d 173, 175-76 (Tex. App. 1989), the Texas Court of Appeals held that Texas common law indemnity cases in which there was no underlying tort, recognized an implied-in-fact right of indemnification when a surety or an agency relationship existed between the plaintiff and defendant. Because that court found no such relationship, it affirmed the lower court's grant of summary judgment. While we are neither bound by, nor do we adopt, Texas Law or *Terry's Floor Fashions* interpretation thereof, we find the law of these cases instructive.

In *American Alloy* and *Terry's Floor Fashions*, both courts held that the plaintiffs in those cases were free to negotiate a provision in their contracts to protect themselves from foreseeable future liabilities, and that they had failed to do this. See *American Alloy*, 777 S.W.2d at 175, and *Terry's Floor Fashions*, 36 U.C.C. Rep. Serv. 2d (Callaghan) 680, at *24 (E.D.N.C.).

When deciding whether a contract implied-in-fact existed between plaintiff and subcontractors that would support a potential right to indemnity under that theory, we look to their relationship and its surrounding circumstances. See *McDonald*, 91 N.C. App. 13, 370 S.E.2d 680. Unlike the facts in *McDonald*, the party here praying for indemnity is in neither a master-servant nor agency-type relationship with the subcontractors. Also unlike *McDonald*, plaintiff has not alleged any circumstances tending to show the existence of an indemnification agreement, either written or oral. No matter how liberally we read plaintiff's complaint, we see nothing suggesting more than a number of independent contractor relationships with plaintiff. Furthermore, there is nothing in the allegations that suggests establishing an indemnitor indemnitee relationship was at the essence or intent of the agreement between plaintiff and the subcontractors.

While we refrain from adopting the limited Texas rule that an implied-in-fact right to indemnity must stem from a surety or an

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agency relationship, we hold that plaintiff's allegations in this case do not allege a right to indemnification implied-in-fact in North Carolina. Read liberally, plaintiff's complaint alleges breach of contract and breach of warranty by a number of independent subcontractors. For this Court to read a right of indemnity implied-in-fact into such bald allegations would be to do so in every general and subcontractor agreement, thus infringing upon this state's long standing and coveted principle of freedom of contract.

C. Contract implied-in-law

At this point in our opinion, we preview what is set out in greater detail below concerning plaintiff's allegations of negligence by the subcontractors in performing their contractual duties. Finding no liberal reading of plaintiff's allegations from which we can recognize a right to indemnity under the theory of contract implied-in-law, we hold plaintiff has stated no allegations in tort for which relief can be granted.

There exists in North Carolina a common law right to indemnification for a passively negligent tort-feasor from an actively negligent tort-feasor, for injuries caused to third parties. *See Edwards v. Hamill*, 262 N.C. 528, 138 S.E.2d 151 (1964). This action for indemnity is usually brought by means of a third party complaint, and is maintained in equity. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E.2d 182, 187 (1982). In *Edwards*, our Supreme Court stated:

Primary and secondary liability between defendants exists only when: (1) they are jointly and severally liable to the plaintiff; and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former.

Edwards, 262 N.C. at 531, 138 S.E.2d at 153 (citations omitted) (emphasis added). For indemnification implied-in-law, more an equitable remedy than an action in and of itself, North Carolina law requires there be an underlying injury sounding in tort. The party seeking indemnity must have imputed or derivative liability for the tortious conduct from which indemnity is sought. Plaintiff has alleged nothing that this Court can recognize to make out such a case in equity.

Reading plaintiff's alleged facts as true, they state the following: construction on the Andrettas' house stopped in the fall of 1996 due

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to indecision in construction matters; the Andrettas later sought arbitration against plaintiff for alleged defective construction; and the construction complained of includes the work of defendant subcontractors. However, there is no *prima facie* tort case made out to allege negligence not otherwise covered by contractual obligations between the parties. On that basis alone, without determining whether there is sufficient allegations in the complaint of imputed or derivative liability, we hold that plaintiff has not stated a claim for an equitable right under the implied-in-law theory of indemnity.

II. Negligence and Contribution

[2] In its complaint, plaintiff alleges negligence as a cause of action against each of the named subcontractors. Specifically, the complaint alleges, per subcontractor, negligence in fulfilling its duties and the quality of the services contracted for by plaintiff. Pursuant to this claim in tort, plaintiff seeks contribution.

Plaintiff's complaint acknowledges the contractual relationships between the parties. In accord with the Supreme Court's and our analysis in prior cases, we acknowledge no negligence claim where all rights and remedies have been set forth in the contractual relationship.

North Carolina case law on this issue is clear and long standing. In a previous holding upon facts nearly identical to those *sub judice*, the Supreme Court stated the well-established law: "Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *Ports Authority v. Roofing Co.*, 294 N.C. 73, 81, 240 S.E.2d 345 (1978), rejected in part on other grounds, *Trustees of Rowan Tech. v. Hammond Assoc., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). *Ports Authority* sets out four categorical exceptions to this rule, none of which are applicable to the facts pled by plaintiff.¹ See also *Spillman v. American Homes*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741-42 (1992), where this Court held:

1. (1) The injury, proximately caused by the promisor's negligent act or omission in the performance of his contract, was an injury to the person or property of someone other than the promisee. *Pinnix v. Toomey*, 242 N.C. 358, 87 S.E.2d 893 (1955) (Where severe property damage not covered by the contract was caused by the negligence of plumber subcontractor).

(2) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was to property of the promisee other than the property which was the subject of the contract, or was a personal injury to the promisee.

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[A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

Id. (citations omitted).

Because plaintiff has alleged no cause of action in tort, plaintiff's contribution theory of recovery fails as a matter of law. The right of contribution in North Carolina is governed by N.C. Gen. Stat. § 1B-1 (2001), part of the *Uniform Contribution Among Tort-Feasors Act* (*UCATA*), stating:

Except as otherwise provided in this Article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

Under this statute, there is no right to contribution from one who is not a joint tort-feasor. Therefore, by clear language of the statute, plaintiff is not entitled to contribution for a claim sounding only in contract. *See Holland v. Edgerton*, 85 N.C. App. 567, 355 S.E.2d 514 (1987). Without a tort, there can be no tort-feasor; and without a tort-feasor, there can be no right to contribution under the UCATA. Thus, as a matter of law, plaintiff states no claim that could entitle it to any future right to contribution from defendant subcontractors and the trial court's dismissal was proper.

III. Breach of Contract and Breach of Warranty

[3] Plaintiff's complaint alleges both breach of contract and breach of warranty against subcontractors. Any claims from a breach of contract are governed by N.C. Gen. Stat. § 1-52(1) (2001), a three-year statute of limitations. A cause of action based upon breach of a con-

(3) The injury, proximately caused by the promisor's negligent, or wilful, act or omission in the performance of his contract, was loss of or damage to the promisee's property, which was the subject of the contract, the promisor being charged by law, as a matter of public policy, with the duty to use care in the safeguarding of the property from harm, as in the case of a common carrier, an innkeeper or other bailee.

(4) The injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor. *Ports Authority*, 294 N.C. at 82, 240 S.E.2d at 350-51.

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tract accrues on the date of the breach, at which time the three years begin to run. *Miller v. Randolph*, 124 N.C. App. 779, 780, 478 S.E.2d 668, 670 (1996). The statute of limitations for breach of warranty is also three years, accruing at breach. *Haywood Street Redevelopment Corp. v. Peterson Co.*, 120 N.C. App. 832, 836, 463 S.E.2d 564, 566 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996).

Plaintiff alleges in its complaint that all construction stopped in the fall of 1996. Any breach of contract or warranty by subcontractors which arose out of its contract with plaintiff was on or before that time. Plaintiff's complaint was not filed until 18 July 2001, nearly five years after any breach by the subcontractors could have occurred and nearly two years after the statute of limitations had run. Alternatively, to the extent plaintiff could argue under the Uniform Commercial Code ("UCC"), which it has not, the triggering date for the statute of limitations for any goods or services provided by a subcontractor is still in or before the fall of 1996. Because the governing statute under the UCC is N.C. Gen. Stat. § 25-2-725, with an applicable limitation period of four years, plaintiff's 18 July 2001 complaint is still time barred.

Therefore, after a liberal reading of the alleged facts of plaintiff's complaint, we conclude that any breach of contract and breach of warranty claim is barred by the statute of limitations.

Summary Judgment for the Architect

In review of the trial court's grant of summary judgment in favor of the architect, Mr. Duffy, we review *de novo* whether the trial court properly concluded that Mr. Duffy showed, through pleading and affidavits, "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." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001)).

Plaintiff seeks indemnity, or in the alternative, contribution from Mr. Duffy. Unlike the subcontractors, Mr. Duffy was in a contractual relationship with the Andrettas. Therefore, the only claim plaintiff may have, and the only claim sought against Mr. Duffy, is in the tort of negligence. While we do not recognize a claim in tort where an underlying contract governs the rights and duties between parties, *see Ports Authority*, 294 N.C. 73, 240 S.E.2d 345, this Court has recognized a cause of action in negligence brought by a general contractor or subcontractor against an architect seeking direct damages:

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[W]e hold that an architect in the absence of privity of contract may be sued by a general contractor or the subcontractors working on a construction project for economic loss foreseeably resulting from breach of an architect's common law duty of due care in the performance of his contract with the owner. It is true that neither the general contractor nor the subcontractors could maintain a cause of action against the architects grounded on negligent performance of the architects' contract with New Hanover County.

Davidson and Jones, Inc. v. County of New Hanover, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584, cert. denied, 298 N.C. 295, 259 S.E.2d 911 (1979). In that case, we reversed the lower court's grant of summary judgment.

The stipulated period when construction on the Andretta house stopped was in the fall of 1996. The statute of limitations for a claim in negligence is three years under N.C. Gen. Stat. § 1-52(5) (2001), and plaintiff brought this action on 21 July 2001. Plaintiff does not allege in theory or in fact, that discovery of Mr. Duffy's alleged negligence was sometime after the stop date of the construction. We therefore need not consider the potential claim that a later discovery of the negligence tolled the statute, preserving a direct claim for damages in negligence.

Plaintiff alleges that its claim in negligence survives the statute of limitations because its theory of recovery is in either indemnity or contribution. We find there to be no issue of fact which would allow recovery under either of these theories, and for the reasons below affirm the trial court's grant of summary judgment.

I. Contribution

[4] As discussed above in this opinion, contribution is a statutory right of relief in North Carolina, governed by the *Uniform Contribution Among Tort-Feasors Act*, N.C. Gen. Stat. § 1B-1 (2001). The right is applicable only between joint tort-feasors. *Roseboro Ford, Inc. v. Bass*, 77 N.C. App. 363, 335 S.E.2d 214 (1985). Our Supreme Court has defined joint tort-feasors as parties whose negligent or wrongful acts are united in time or circumstance such that the two separate acts concur to cause a single injury to a third party. *State Farm Mut. Auto Ins. Co. v. Holland*, 324 N.C. 466, 470, 380 S.E.2d 100, 103 (1989). Therefore, in reading plaintiff's pleadings and supporting affidavits liberally, we must find at least some issue of fact

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as to whether plaintiff and Mr. Duffy jointly caused a tortious injury to the Andrettas.

Mr. Duffy is in contractual privity with the Andrettas; plaintiff is in contractual privity with the Andrettas. Therefore, as to the subject matter of the contract and performance thereunder in these two relationships, the contract governs, and we recognize no injuries sounding in tort flowing from either Mr. Duffy or plaintiff to the Andrettas. The contract provides the grounds for relief. *See Ports Authority*, 294 N.C. 73, 240 S.E.2d 345, and the discussion above. The only negligence claim alleged here is the discrete form of negligence flowing from an architect directly to a general contractor which this Court recognized in *Davidson and Jones, Inc.* This direct action provides a form of relief when contractual privity is otherwise lacking.

Therefore, we find no issue of fact as to whether Mr. Duffy and plaintiff are joint tortfeasors, and plaintiff therefore has no statutory right to contribution from Mr. Duffy. There is only one tort alleged and supported by the facts before us, that between general contractor plaintiff and architect Mr. Duffy. This direct action, however, is clearly barred by the statute of limitations. Thus, the trial court properly granted summary judgment on the issue of contribution.

II. Indemnification

[5] Applying our analysis as to the bases for indemnification in North Carolina, we hold plaintiff has neither pled, alleged or provided facts to create any issue of fact as to whether there is an express contract or a contract implied-in-fact with Mr. Duffy as there is no contractual privity between the two. Thus, those routes to a right of indemnity have been foreclosed.

Plaintiff has alleged, and supported with good case law, a discrete common law tort between a general contractor and an architect specifically applicable where there is no contractual relationship between the two. *See Davidson and Jones, Inc.*, 41 N.C. App. 661, 255 S.E.2d 580. However, plaintiff has not alleged any tort flowing to the Andrettas from either he or Mr. Duffy. North Carolina recognizes an implied-in-law right to indemnity when a passive party is made liable for an active party's tortious conduct flowing to and injuring a third party. *Edwards*, 262 N.C. at 531, 138 S.E.2d at 153. But again, as was made clear in our contribution analysis above, there is only one tort recognized by our Court which has been raised by plaintiff's factual allegations and that tort flows *directly* from an architect to a general contractor. Mr. Duffy is accountable to the Andrettas in his contract

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with them, as is plaintiff. *See Ports Authority*, 294 N.C. 73, 240 S.E.2d 345. Therefore, the parties do not fit the active-passive tort-feasor framework required to support an equitable right to indemnity implied-in-law as the Andrettas have no claim in tort against either plaintiff or Mr. Duffy.

The only tortious conduct alleged does not even flow to the Andrettas, but to plaintiff as a general contractor. The statute of limitations, however, has run on this claim and plaintiff is barred from relief.

Plaintiff had legally recognizable claims in contract against the subcontractors, and in tort against Mr. Duffy. These were direct claims, and it is undisputed that the three-year statute of limitations has run on them. Plaintiff has failed to allege facts or circumstances which would provide relief under the theories of contribution or indemnity. Therefore, after reading the briefs, the record, and all facts and allegations in the light most favorable to plaintiff, we agree with the trial court's dismissal of plaintiff's claims against the subcontractors, and grant of summary judgment in favor of Mr. Duffy. We thus affirm.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

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No. COA01-183

(Filed 4 November 2003)

Venue— purchase of store assets—assignment of lease—action affecting interest in real property

Plaintiff purchaser's action seeking specific performance and damages arising from defendant seller's breach of an agreement for the purchase of the assets of a convenience store that included an assignment of a sublease of the real property on which the convenience store was located affected an interest in real property and was required by N.C.G.S. § 1-76(1) to be brought in the county in which the real property was located;

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therefore, the trial court erred by denying defendant's motion to remove the action to such county.

Chief Judge EAGLES dissenting.

Appeal by defendant from order entered 13 December 2000 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 7 January 2002.

Ward and Smith, P.A., by Kenneth R. Wooten, for plaintiff appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for defendant appellant.

McCULLOUGH, Judge.

Plaintiff Fox Holdings, Inc., filed its complaint 2 August 2000 in Craven County where it allegedly maintains its principal place of business. In its complaint, plaintiff alleges that it had entered into an Asset Purchase Agreement with defendant Wheatly Oil Co., Inc., on 12 May 1999. This agreement dealt with the purchase by plaintiff of defendant's five convenience stores and the land on which they are located. Also included in the purchase agreement was the machinery, furniture, fixtures and equipment, personal property leases, intangibles, agreements, motor vehicles and inventory related or used in operating the stores.

On 9 September 1999, plaintiff alleges that a second amendment to the contract was made that dealt specifically with an additional convenience store. This additional convenience store was known as "Store #3," and was located in Carteret County. Plaintiff was to acquire this store from defendant as per the following provisions:

2. The Agreement is hereby amended to add thereto the following provisions related to Store #3:
 - (a) Purchase and Sale of Assets. Upon the terms and subject to the conditions set forth herein, Seller shall sell, convey, transfer and deliver to Purchaser, and Purchaser shall purchase and accept on the Supplemental Closing Date (as defined below), all of Seller's right[,] title and interest in the following assets related to Store #3 (collectively, the 'Store #3 Assets'): (i) the Sublease; (ii) all Personal Property Leases; (iii) all machinery, furniture, fixtures,

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improvements and equipment, including any maintenance or service contracts thereon; (iv) any agreements, contracts, deposits or commitments; (v) all store inventory, opened or unopened, and all fuel inventory; and (vi) all of assets of Seller used or useful in the operation of Store #3.

- (b) **Purchase Price.** In consideration of and in exchange for the assignment and transfer by the Seller of the Store #3 Assets, the Purchaser agrees to pay to Seller the supplemental purchase price (the 'Supplemental Purchase Price') which shall be Two Hundred and Fifty Thousand and 00/100 Dollars (\$250,000), plus an amount equal to the Seller's cost for all fuel inventory on the Supplemental Closing Date and retail price for all store inventory on such date, reduced by the Seller's historical gross profit margin of 33-percent (33%).

....

- (f) **Exclusive Rights.** Upon the consummation of the transaction contemplated herein, Purchaser shall have the sole and full benefit of operating Store #3 exclusive of any rights Seller might have, including Purchaser's right to receive all income and profits from Store #3 and liability for all costs and expenses in connection with the operation thereof.

....

- (h) **Option to Operate Location.** Prior to the Supplemental Closing, Purchaser shall have the right to elect to purchase Seller's inventory at Store #3 (in accordance with paragraph (b) above) and operate Store #3 until such time as the Sublease expires, is terminated, or the Supplemental Closing takes place. In such event, Purchaser shall (i) pay to Seller an amount equal to Seller's monthly cost of leasing and operating Store #3, which amount shall be due and payable on the date Purchaser elects to operate Store #3 and each month thereafter, and (ii) be entitled to receive all income from the operation of Store #3 and be responsible for all liabilities in connection therewith, subject to the applicable provisions of the Agreement. In the event Purchaser elects to operate Store #3 under this paragraph (h) Purchaser

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shall continue to have the right to acquire the Store #3 Assets in accordance with the terms of this Second Amendment. In the event that Purchaser does not elect to operate Store #3 under this paragraph (h) on or before December 31, 2000, this Second Amendment shall automatically terminate and the parties shall have no further rights or obligations hereunder.

The closing date of the original agreement was extended by this amendment to 17 September 1999, with time being of the essence.

As the amendment notes, Store #3 was located on property that was subject to a sublease. Defendant operated Store #3 pursuant to a sublease agreement with Southern Outdoor Advertising, Inc. This sublease agreement began on 15 November 1984 and was to end 14 November 2014. The owner of the land on which the store is located is Atlantic & North Carolina Railroad. Neither Southern nor Atlantic are parties to this suit. Defendant was to assign this sublease to plaintiff pursuant to this agreement. In the alternative, plaintiff could elect to operate the store pursuant to paragraph 2(h) above. Plaintiff could have purchased the inventory and operated the store, without an assignment of the sublease, for the remaining period of the sublease. According to plaintiff, when the sublease was up, defendant would then convey the sublease.

Closing apparently occurred on 23 September 1999. According to plaintiff's allegations, defendant "has failed and refused to make Store Number 3 available for acquisition and/or operation." Plaintiff alleges that, while it has performed all of its obligations as to the agreement, defendant is in breach of the agreement.

Plaintiff makes five claims for relief in its complaint. First, plaintiff alleges that defendant has not made Store #3 available as per the agreement, thereby breaching the contract. Plaintiff alleges that it is "entitled to the issuance of a Preliminary Injunction commanding [defendant] to make Store Number Three available to [plaintiff] for operation as required by the parties' contract, including but not limited to the execution of an assignment or other conveyance of [defendant's] lease thereof In the alternative, Plaintiff is entitled to recover damages in excess of the sum of Ten Thousand and No/100 Dollars (\$10,000.00)." Plaintiff's second and third claims deal with the monetary damage suffered by plaintiff as a result of the failure of defendant to convey its interests in compliance with the Asset Purchase Agreement (essentially the money defendant is making

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while still in possession of the store). The fourth claim is for unfair and deceptive trade practices, and the fifth claim is for a breach of warranty due to environmental problems with the store sites.

Plaintiff's complaint prayed for the following relief:

1. That the Court enter a preliminary injunction commanding [defendant] to make Store Number 3 available to [plaintiff] for operation as required by the parties' contract, *including but not limited to the execution of an assignment or other conveyance of [defendant's] lease thereof*, in a form to be provided by [plaintiff] and consistent with the parties' agreement, to issue a permanent injunction consistent with the above, and prohibiting such further actions by [defendant] as would interfere with [plaintiff's] contract or, in the alternative, [plaintiff] is entitled to recover damages in excess of the sum of Ten Thousand and No/100 Dollars (\$10,000.00).
2. That the Court enter a decree granting [plaintiff] *specific performance of its contract with [defendant], including but not limited to an order commanding [defendant] to assign or otherwise convey its lease to the realty described above*.

(Emphasis added.) Plaintiff also prayed for various money damages stemming from the non-conveyance of Store #3.

Defendant filed its motion to remove this action from Craven County to Carteret County, the county in which Store #3 is located, on 5 September 2000. The trial court denied this motion on 13 December 2000. It is from this order that defendant appeals.

Defendant's sole assignment of error is that the trial court erred by denying its motion for change of venue pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(3), in that proper venue would lie in Carteret County pursuant to N.C. Gen. Stat. § 1-76.

I.

Denial of a motion for change of venue as a matter of right under N.C. Gen. Stat. § 1-76, although interlocutory, is directly appealable. *See Pierce v. Associated Rest and Nursing Care, Inc.*, 90 N.C. App. 210, 368 S.E.2d 41 (1988).

N.C. Gen. Stat. § 1-76 (1999) provides:

Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situ-

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ated, subject to the power of the court to change the place of trial in the cases provided by law:

- (1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

Id. The Court in *Pierce* found:

Pursuant to this statute, an action must be tried in the county where the property is located when the judgment to which a plaintiff would be entitled upon the allegations of the complaint will affect the title to land. *Thompson v. Horrell*, 272 N.C. 503, 158 S.E.2d 633 (1968). In determining whether the judgment sought by plaintiff would affect title to land, the court is limited to considering only the allegations of the complaint. *McCravy Stone Service v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985), *disc. rev. denied*, 315 N.C. 588, 341 S.E.2d 26 (1986).

Pierce, 90 N.C. App. at 212, 368 S.E.2d at 42.

Defendant contends that because plaintiff seeks the specific enforcement of the Asset Purchase Agreement, which would require defendant to convey its sublease in Store #3 and all personal property accompanying the store, this action affects an interest in real property and must be tried in Carteret County. Plaintiff contends that this is an *in personam* claim and the interest in real property is merely incidentally affected.

The Supreme Court decision in *Rose's Stores v. Tarrytown Center*, 270 N.C. 201, 154 S.E.2d 320 (1967) is the seminal case in this area. That case held:

“Title to realty must be directly affected by the judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein, or because the judgment that may be rendered may settle the rights of the parties by way of estoppel. It is the principal object involved in the action which determines the question, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone *in personam* against the parties, the action will be held local.”

Id. at 206, 154 S.E.2d at 323 (quoting 92 C.J.S., *Venue* § 23, pp. 723-24).

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In the *Rose's* case, the parties' relationship was one of lessor and lessee. The dispute involved the lessee suing to enjoin the lessor from building on adjacent property, which would interfere with the lessee's rights guaranteed under the lease. The Court had to resolve the dispute by interpreting the lease. Because of this, the *Rose's* Court held that N.C. Gen. Stat. § 1-76 did not apply because an interest in the property was not directly affected, but only incidentally involved. The Court said:

The judgment plaintiff seeks by its complaint would not alter the terms of the lease, nor would it require notice to third parties. The only result, should plaintiff prevail, would be the personal enforcement of rights granted under a contract of lease. This is a personal right and does not run with the land. *Whatever the outcome of this action, the title to the land would not be affected. The defendants would still be owners, with their title unimpaired by this suit.* The complaint sounds of breach of contract and not for "recovery of real property, or of an estate or interest therein, or for the determination of any form of such right or interest, and for injuries to real property." G.S. 1-76.

Rose's, 270 N.C. at 206, 154 S.E.2d at 323 (emphasis added).

We note that a sublease is "an estate or interest" in real property. See *Snow v. Yates*, 99 N.C. App. 317, 392 S.E.2d 767 (1990); *Sample v. Motor Co.*, 23 N.C. App. 742, 209 S.E.2d 524 (1974).

It appears to this Court that the "principal object" of plaintiff's complaint is to have the Asset Purchase Agreement specifically enforced. In its own words, plaintiff's prayed that it was entitled to "an order commanding [defendant] to assign or otherwise convey its lease to the realty described." Such a declaration by the courts would certainly affect the interest in the real property at stake. Moreover, it seems to fail the *Rose's* outcome test in that it cannot be said that "[w]hatever the outcome of this action, the title to the land would not be affected. The defendants would still be owners, with their title unimpaired by this suit." *Rose's*, 270 N.C. at 206, 154 S.E.2d at 323; see also *McCrary*, 77 N.C. App. 796, 336 S.E.2d 103. If plaintiff prevails and is granted specific performance of the Asset Purchase Agreement, then it will be the rightful owner of the interest. If plaintiff loses, then defendant remains the rightful owner. Resolution of this case, then, will ultimately affect the interest in the sublease. It seems clear to this Court, in light of these facts, that local venue,

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Carteret County, is proper for this action. However, prior case law by this Court appears, at first blush, to be in disagreement.

There appear to be two cases at odds with each other on how this Court should address the case *sub judice*: *Snow*, 99 N.C. App. 317, 392 S.E.2d 767; and *Bishop v. Lattimore*, 137 N.C. App. 339, 530 S.E.2d 554 (2000).

In *Snow*, the plaintiff contended, much as the current plaintiff does, that N.C. Gen. Stat. § 1-76 was inapplicable because the judgment to which he was entitled, specific performance, operated *in personam* and therefore does not directly affect title to the land. Plaintiff brought a declaratory action to the trial court to determine the existence or non-existence of a lease. This Court, in *Snow*, disagreed.

Snow stated that “[w]hen a party brings an action that ‘seeks to terminate [a vested estate or interest in real property] and will require the Court to determine the respective rights of the parties with respect to the leasehold interest,’ the action falls within the purview of N.C.G.S. § 1-76.” *Snow*, 99 N.C. App. at 320-21, 392 S.E.2d at 769 (quoting *Sample*, 23 N.C. App. at 743, 209 S.E.2d at 525). This Court found that “the ‘principal object’ of plaintiff’s cause of action is a determination of leasehold estate or interest in real property. . . . Our focus is on the effect of the potential judgment on the estate or interest and not on the manner in which the parties achieve the effect.” *Id.* at 321, 392 S.E.2d at 769 (emphasis added). The Court continued, “[d]ispute over the existence of a lease substantively differs from a case in which the parties request the court to sort out their obligations either pursuant to a continuing lease or after they terminate the lease.” *Id.*

As to the argument by plaintiff that the judgment would operate *in personam* and thus not directly affect the interest in the real property, the *Snow* Court held that

it is irrelevant that judgment will operate *in personam* if judgment also directly affects title to the property. According to the criteria in our Supreme Court’s *Rose’s Stores* decision, an action will be transitory only if judgment operates “alone” *in personam* against the parties and not directly on an estate or title. Therefore, we determine that the court was correct in ordering removal to local venue.

Id. at 321, 392 S.E.2d at 769-70.

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The decision in *Snow* appears to be contradicted by this Court in *Bishop*, 137 N.C. App. 339, 530 S.E.2d 554.

Bishop dealt with a suit to enforce a settlement agreement between the parties involved. The enforcement of the agreement would have required, among other things, the assignment of a lease as collateral for payments mandated by the agreement. *Id.* at 344, 530 S.E.2d at 558. The property affected by this suit was located in Mecklenburg County. Plaintiff initially filed this suit in Mecklenburg County.

Defendant made a motion to change the venue from Mecklenburg County to Wake County, where other prior litigation between the parties was pending. The Wake County suit which resulted in the settlement agreement at issue in *Bishop* alleged misconduct on the part of two shareholders of the corporation which owned the underlying real estate. This suit was settled pursuant to the above-referenced agreement. The trial court granted the motion to change venue and plaintiff appealed. Plaintiff argued that, if the trial court ordered specific enforcement of the agreement, it would require the transfer of an interest in real property arguing that N.C. Gen. Stat. § 1-76(1) applied and the cause must be tried in Mecklenburg County.

Bishop held that N.C. Gen. Stat. § 1-76 did not mandate that the cause be heard in Mecklenburg County and affirmed the trial court's granting of defendant's motion to change venue. In doing so, the Court said that "plaintiff's argument is focused on a breach of the settlement agreement. Any effect that his claim has on real property is simply incidental rather than direct." *Bishop*, 137 N.C. App. at 345, 530 S.E.2d at 559.

The settlement agreement included the following terms:

1. Park House Realty, Inc. ("Park House") will redeem all of the stock of George F. Lattimore, Jr. ("Lattimore") in Park House, upon the following terms:

- (a) \$50,000.00 payable to Lattimore at closing; provided that Lattimore shall have the option to defer receipt of some part or all of said amount until January 1, 1998; and
- (b) \$5,000.00 per month principal and interest for a period of 20 years, beginning November 1, 1997, evidenced by the promissory note of Park House in favor of Lattimore or holder[.]

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- (c) The foregoing obligations of Park House will be secured by a collateral assignment of Park House's interests as tenant under ground lease for Hamilton House apartments, and a collateral assignment of the rents from Hamilton House apartments.
2. Closing hereunder, including execution of all settlement documents, will take place on or before September 30, 1997 (the "Closing Date").
-
4. All claims, cross-claims and counterclaims in the Suit will be dismissed with prejudice.
5. All parties to the Suit will execute a mutual general release of all claims. Without limiting the foregoing, it is expressly agreed that Lattimore will release any and all claims, whether or not presently encompassed in the Suit, against the Estate of George S. Goodyear and its Executor, the George S. Goodyear Family Trust and its Trustee, the George S. Goodyear Marital Trust and its Trustee, the Estate of William J. Darnell and its Executor; Mrs. Elizabeth Darnell in her individual capacity; Mrs. Dorris Goodyear in her individual capacity; William I. Darnell, Park House and its officers and directors.
-
7. The parties acknowledge that all of their agreements reached in mediation, and every part of every agreement so reached, are set out in this memorandum.

Bishop, 137 N.C. App. at 341-42, 530 S.E.2d at 557.

Bishop sought to enforce this agreement by filing suit in Mecklenburg County. It is apparent that the *principal objective* of the suit in *Bishop* was not resolving a dispute over an interest in real property and any such effect would have been merely incidental to the enforcement of the agreement set forth above. Thus, in the present case, the plaintiff's reliance on *Bishop* is misplaced.

In addition, the Court relied on the fact that specific performance is an equitable remedy that acts *in personam*. *Id.* *Rose's Stores* says that:

"Specific performance of a contract for the sale of land is an equitable remedy and is often granted under the equity practice

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when the parties are within the jurisdiction of the court, although the land itself is not within the jurisdiction, since equity acts *in personam* and can compel a conveyance through its control over the person. To carry out the idea of a decree acting *in personam*, it may be necessary to consider a suit for specific performance as being transitory instead of local”

Rose's, 270 N.C. at 204, 154 S.E.2d at 322 (quoting McIntosh, Vol. 1 § 779, p. 416).

The *Rose's* Court and the *Bishop* Court did not finish the quote from the McIntosh treatise, however. What followed seems to address the issue before us:

To carry out the idea of a decree acting in personam, it may be necessary to consider a suit for specific performance as being transitory instead of local, *but it has been held, when the land is in this state, that this action should be considered local as coming under the statute requiring actions involving an interest in land to be brought in the county where the land is situate.*

McIntosh, Vol. 1 § 779, pp. 416-17 (citing *Vaughan v. Fallin*, 183 N.C. 318, 111 S.E. 513 (1922)); *Councill v. Bailey*, 154 N.C. 54, 69 S.E. 760 (1910). McIntosh was attempting to explain that only where land is in another state does this question of personal jurisdiction arise, and it becomes necessary for a court to compel the execution of a conveyance by decree *in personam*. See also *Rose's Stores, Inc. v. Bradley Lumber Co.*, 105 N.C. App. 91, 411 S.E.2d 638 (1992); *Mort. Corp. v. Development Corp.*, 2 N.C. App. 138, 162 S.E.2d 623 (1968); *Lamb v. Staples*, 234 N.C. 166, 66 S.E.2d 660 (1951); *White v. Rankin*, 206 N.C. 104, 173 S.E. 282 (1934); *Warren v. Herrington*, 171 N.C. 165, 88 S.E. 139 (1916).

The suit below has as its principal objective the determination of an interest in real property, and therefore local venue, Carteret County, is proper. This being so, the denial of defendant's motion to change venue was error.

Reversed and remanded.

Judge CAMPBELL concurred prior to 31 December 2002.

Chief Judge EAGLES dissents.

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EAGLES, Chief Judge, dissenting.

I respectfully dissent. In light of this Court's decision in *Bishop v. Lattimore*, 137 N.C. App. 339, 530 S.E.2d 554 (2000), I vote to affirm the trial court.

To determine whether an action is removable as a matter of right to the county where the land is situated

[t]he test is this: If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action.

Thompson v. Horrell, 272 N.C. 503, 504-05, 158 S.E.2d 633, 634-35 (1968). Title to real property must be *directly* affected by a judgment

"to render the action local, and an action is not necessarily local because it *incidentally* involves the title to land or a right or interest therein, . . . *It is the principal object involved in the action which determines the question*, and if title is *principally* involved or if the judgment or decree operates *directly and primarily* on the estate or title, and not alone *in personam* against the parties, the action will be held local." 92 C.J.S., *Venue*, § 26, pp. 723, 724.

Rose's Stores v. Tarrytown Center, 270 N.C. 201, 206, 154 S.E.2d 320, 323 (1967) (emphasis added).

In its complaint, plaintiff sought specific performance of the Asset Purchase Agreement, monetary damages for defendant's alleged breach of the Asset Purchase Agreement, monetary damages for defendant's alleged interference with plaintiff's contracts, monetary damages for defendant's alleged unfair and deceptive trade practices, and monetary damages for defendant's alleged breach of warranty. First, we note that if the trial court were to grant plaintiff's request for monetary damages only, the judgment would not affect title or interest in any land. This Court has held that actions in which the principal object of recovery is monetary damages are not local actions within the meaning of G.S. § 1-76(1). See *Wise v. Isenhour*, 9 N.C. App. 237, 240, 175 S.E.2d 772, 774 (1970).

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Additionally, we note that if the trial court were to grant plaintiff's request for specific performance of the Asset Purchase Agreement, the trial court would have to require defendant to convey, transfer, and deliver to plaintiff (i) its sublease to Store #3, "(ii) all Personal Property Leases; (iii) all machinery, furniture, fixtures, improvements and equipment, including any maintenance or service contracts thereon; (iv) any agreements, contracts, deposits or commitments; (v) all store inventory, opened or unopened, and all fuel inventory; and (vi) all of assets of [defendant] used or useful in the operation of Store #3." Here, I believe that "[a]ny effect that [plaintiff's] claim has on real property is simply incidental rather than direct." *Bishop*, 137 N.C. App. 339, 345, 530 S.E.2d 554, 559.

In *Bishop*, this Court, quoting our Supreme Court in *Rose's*, 270 N.C. 201, 204, 154 S.E.2d 320, 322, stated that "'[t]o carry out the idea of a decree acting *in personam*, it may be necessary to consider a suit for specific performance as being transitory instead of local[.]'" 137 N.C. App. at 345, 530 S.E.2d at 559. In denying the plaintiff's claim that his action must be tried in the county where the affected property is located, this Court held that the plaintiff's claim for specific performance of a settlement agreement, which incidentally involved a transfer of rental property, did not directly affect an interest in land requiring the action be removed as a matter of right under G.S. § 1-76. *Id.* *Bishop* is analogous to the present case. "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).

I believe that the majority's reliance on *Snow v. Yates*, 99 N.C. App. 317, 392 S.E.2d 767 (1990), is misplaced. Unlike the instant case, the plaintiff and the defendants in *Snow* were lessee and lessors respectively. *Id.* In initiating his claim, the plaintiff brought a declaratory action to determine the existence or non-existence of a lease. *Id.* Unlike our present case, the principal object involved in *Snow* was title or interest in real property, and the trial court's determination would *directly and primarily* affect the parties' title or interest in that property. *Id.*

Accordingly, I conclude that plaintiff's principal objective in this action was not resolving a dispute over an interest in real property, but rather, plaintiff's principal objective was the resolution of the Asset Purchase Agreement—which incidentally affected title or inter-

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est in Store #3. For the foregoing reasons, I would hold that plaintiff's claims are transitory and not removable as a matter of right to the county in which the land incidentally affected is situated.

STATE OF NORTH CAROLINA v. NORMAN JONES

No. COA02-1404

(Filed 4 November 2003)

1. Criminal Law— unlawful plea agreement—appellate review

The trial court erred in a possession with intent to sell and deliver cocaine case by allowing defendant to specifically condition his plea agreement on appellate review of the denial of his habeas corpus motion, his motion to suppress, his motion to dismiss the habitual felon charge as being double jeopardy based on alleged unlawful detention maintained in his previously denied habeas corpus motion, and the case is vacated and remanded because: (1) defendant only has a right of appeal for his motion to suppress; (2) the Court of Appeals is without authority to review either by right or by certiorari the trial court's denial of defendant's motion for a writ of habeas corpus, his motion to dismiss based on his claim of unlawful detention maintained in his habeas corpus motion, or his assertion on appeal that he was denied a probable cause hearing; and (3) where a defendant's bargain violates the law, the appellate court should vacate the judgment and remand the case to the trial court where defendant may withdraw his guilty plea and proceed to trial on the criminal charges or withdraw his plea and attempt to negotiate another plea agreement that does not violate the law.

2. Sentencing— habitual felon—lack of subject matter jurisdiction—possession of cocaine

The trial court lacked subject matter jurisdiction over defendant's habitual felon indictment supported by the prior offense of possession of cocaine, because: (1) N.C.G.S. § 90-95(d)(2) plainly states the crime of possession of cocaine is a misdemeanor that is punishable as a felony; and (2) where a crime is defined as one class but defendant is sentenced in another class, the definitional classification controls.

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Appeal by defendant from judgment entered 24 May 2002 by Judge William Z. Wood, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 26 August 2003.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders, Aaron Edward Carlos, and Constance E. Widenhouse, for defendant-appellant.

CALABRIA, Judge.

Norman Jones (“defendant”) pled guilty to possession with intent to sell and deliver cocaine and to attaining the status of habitual felon. Defendant’s plea was specifically conditioned upon his “right to appeal the denial of his habeas corpus motion, his motion to suppress evidence, and his motion to dismiss the habitual felon charge as being double jeopardy based on defendant’s claim of unlawful detention maintained in his previously denied habeas corpus motion.”

Although defendant specifically conditioned his entire plea agreement on appellate review, we find defendant’s right to appeal is limited to the motion to suppress evidence and does not provide for review of the other motions. Since defendant is entitled to the benefit of his bargain, we vacate his guilty plea and remand the case to the trial court. However, pursuant to our jurisdiction under N.C. Gen. Stat. § 15A-979 to review defendant’s motion to suppress, we may also review the trial court’s jurisdiction. We find the trial court lacked jurisdiction over the habitual felon indictment because it was facially invalid. Accordingly, we also vacate defendant’s guilty plea based on the habitual felon indictment.

[1] The preliminary issue in this case is whether this Court has the authority to hear defendant’s appeal. Although defendant and the State agreed he could appeal the delineated issues, “[j]urisdiction cannot be conferred by consent where it does not otherwise exist. . . .” *Wiggins v. Insurance Co.*, 3 N.C. App. 476, 478, 165 S.E.2d 54, 56 (1969). The jurisdiction of the Court of Appeals is limited to that which “the General Assembly may prescribe.” N.C. Const. Art. IV, § 12 (2). “In North Carolina, a defendant’s right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings.” *State v.*

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Pimental, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. rev. denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

A defendant who pleads guilty has a right of appeal limited to the following:

1. Whether the sentence “is supported by the evidence.” This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
2. Whether the sentence “[r]esults from an incorrect finding of the defendant’s prior record level under G.S. 15A-1340.14 or the defendant’s prior conviction level under G.S. 15A-1340.21.” N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);
3. Whether the sentence “[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
4. Whether the sentence “[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(3) (2001);
5. Whether the trial court improperly denied defendant’s motion to suppress. N.C. Gen. Stat. §§ 15A-979(b)(2001), 15A-1444(e) (2001);
6. Whether the trial court improperly denied defendant’s motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

Accordingly, in the case at bar, defendant has a right of appeal for his motion to suppress. N.C. Gen. Stat. §§ 15A-979(b), 15A-1444(e). Defendant does not have a right of appeal for the denial of his habeas corpus motion or for his motion to dismiss “based on defendant’s claim of unlawful detention maintained in his previously denied habeas corpus motion.” Defendant also sought review of an issue raised for the first time on appeal: that his constitutional and statutory rights were violated because a probable cause hearing was never held, and he did not waive his right to such a hearing. Since this issue does not fall within the statutory provisions, defendant also lacks an appeal of right on the probable cause hearing issue.

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Where a defendant has no appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e). However, our appellate rules limit our ability to grant petitions for writ of certiorari to cases where: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) the trial court denied defendant's motion for appropriate relief. N.C.R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21. *State v. Nance*, 155 N.C. App. 773, 574 S.E.2d 692 (2003); *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002). Accordingly, we are without authority to review either by right or by certiorari the trial court's denial of defendant's motion for a writ of habeas corpus, his motion to dismiss which was based on his claim of unlawful detention maintained in his habeas corpus motion, or his assertion on appeal that he was denied a probable cause hearing.

Therefore, our first question is how to address defendant's appeal of right for the motion to suppress. Defendant pled guilty on the condition that he would have appellate review of his writ of habeas corpus, motion to suppress, and motion to dismiss. Defendant is entitled to appeal only the motion to suppress. Moreover, this Court lacks the authority to consider defendant's remaining assignments of error pursuant to a writ of certiorari. A North Carolina Supreme Court case provides guidance. The Court held that a defendant who pleads guilty is "entitled to receive the benefit of his bargain." *State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998). Where a defendant's bargain violates the law, the appellate court should vacate the judgment and remand the case to the trial court where defendant "may withdraw his guilty plea and proceed to trial on the criminal charges . . . [or] withdraw his plea and attempt to negotiate another plea agreement that does not violate [State law]." *Id.* Accordingly, since defendant bargained for review of three motions and our Court may review only one, we will not address the substantive issues raised by the motion to suppress. Rather, pursuant to *Wall*, we vacate the plea and remand the case to the trial court, placing defendant back in the position he was in before he struck his bargain: he may proceed to trial or attempt to negotiate another plea agreement.

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[2] However, before doing so, we address a jurisdictional flaw in the habitual felon indictment.¹ We may consider this flaw because “[e]very court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction” *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986). Moreover, “the jurisdiction of the Court of Appeals is derivative; therefore, if the court from which the appeal is taken had no jurisdiction, the Court of Appeals cannot acquire jurisdiction by appeal.” *Wiggins*, 3 N.C. App. at 478, 465 S.E.2d at 56. Although our power to consider jurisdiction is limited to those cases properly pending before the Court, we may consider the issue here because defendant has a right to appeal his motion to suppress. *See State v. Absher*, 329 N.C. 264, 265 & n.1, 404 S.E.2d 848, 849 & n.1 (1991) (stating, “[w]hile it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division.”) Moreover, we recently held jurisdiction is essential to a court’s authority to rule on a motion to suppress and therefore considered an attack to the trial court’s jurisdiction, based on the fact defendant had not been indicted at the time of the hearing, pursuant to our review of the motion to suppress under N.C. Gen. Stat. § 15A-979.² *State v. Wolfe*, 158 N.C. App. 539, 540, 581 S.E.2d 117, 118 (2003). Accordingly, we determine it is proper

1. At the outset, we note that in addition to our authority to consider the flaw as part-and-parcel of the motion to suppress as explained in the body of the opinion, we also recognize this Court could properly consider defendant’s jurisdictional arguments through a motion for appropriate relief. N.C. Gen. Stat. § 15A-1415(b)(2) (2001). Such a motion may be brought in the appellate court when defendant has either a properly pending appeal or a petition for writ of certiorari with the Court. *State v. Waters*, 122 N.C. App. 504, 470 S.E.2d 545 (1996). Moreover, the motion can be raised by this Court *sua sponte*. N.C. Gen. Stat. § 15A-1420(d) (2001). Accordingly, since defendant has an appeal of his motion to suppress properly pending, this Court could address the jurisdictional defect on its own motion for appropriate relief. *See also State v. Hawkins*, 110 N.C. App. 837, 839, 431 S.E.2d 503, 505 (1993), *overruled on other grounds by State v. Cheek*, 339 N.C. 725, 453 S.E.2d 862 (1995), (this Court held a defendant who pled guilty could not raise the issue of lack of jurisdiction due to a defective indictment on appeal from the judgment, but this Court could address it upon review of the trial court’s denial of his motion for appropriate relief).

2. We recognize this Court previously held a defendant’s right to appeal his motion to suppress did not include a right to appeal his motion to dismiss for lack of jurisdiction. *State v. Flowers*, 128 N.C. App. 697, 497 S.E.2d 94 (1998). Accordingly, although *Flowers* provides a defendant who pled guilty may not appeal the denial of his motion to dismiss for lack of jurisdiction, *Wolfe* provides a defendant may nevertheless raise his jurisdictional concerns by attacking the trial court’s authority to rule on the motion to suppress.

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for this Court to address subject matter jurisdiction concerns in the case at bar.³

Defendant argued the habitual felon indictment⁴ was facially invalid because the indictment was supported by a prior offense that is a misdemeanor, not a felony. Therefore, defendant asserts, “[t]he indictment] fail[s] to give the trial court subject matter jurisdiction over the matter. . . .” *State v. Bullock*, 154 N.C. App. 234, 244, 574 S.E.2d 17, 23 (2002), *writ of supersedeas and disc. rev. denied*, 357 N.C. 64, 579 S.E.2d 396, *cert. denied*, — U.S. —, — L. Ed. 2d — (2003). As with any challenge to subject matter jurisdiction, “a challenge to the sufficiency of an indictment may be made for the first time on appeal.” *Id.*; *Wood v. Guilford Cty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002).

In support of the habitual felon indictment, the State presented defendant’s 1991 conviction for possession of cocaine. The essential question is whether this crime is a felony for habitual felon purposes. Our habitual felon law states “[f]or the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State. . . .” N.C. Gen. Stat. § 14-7.1 (2001). Accordingly, the question for this Court is whether, under the laws of North Carolina, possession of cocaine is a misdemeanor or a felony.

The State asserts this conviction may properly support the indictment because possession of cocaine is a felony under North Carolina law. Our Controlled Substances Act provides that possession of cocaine “shall be punishable as a Class I felony.” N.C. Gen. Stat. § 90-95(d)(2) (2001).⁵ Moreover, in defining a felony, our law provides “[a] felony is a crime which: . . . [i]s or may be punishable by imprisonment in the State’s prison” N.C. Gen. Stat. § 14-1 (2001). Defendant was, in fact, punished as a Class I felon and sen-

3. Judicial economy and justice support our decision to address this issue pursuant to our jurisdiction over defendant’s motion to suppress. To end our analysis before addressing the flaw, we would senselessly postpone an issue which we may properly address now. If this Court were to ignore the jurisdictional flaw, injustice would result since defendant would be subjected to a court that lacks jurisdiction due to an invalid indictment.

4. Although the motion to suppress relates to the underlying felony, since the habitual felon indictment is inextricably linked to this felony by the fact defendant pled guilty to both in the same plea agreement and the fact the charge would subject the defendant to an increased punishment, we may address the jurisdiction of the trial court over either indictment pursuant to N.C. Gen. Stat. § 15A-979(b).

5. We note this portion of the Act has not changed since defendant’s commission of the offense in 1991.

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tenced to five years in State prison. Therefore, the State asserts, defendant's prior possession of cocaine is a prior felony for habitual felon purposes.

Defendant, on the other hand, asserts possession of cocaine is a misdemeanor under N.C. Gen. Stat. § 90-95 and therefore cannot be utilized to support the habitual felon indictment. Defendant committed the offense on 2 August 1991. Under North Carolina law in effect at that time, "any person who violates G.S. 90-95(a)(3) [possession of a controlled substance] with respect to: . . . [a] controlled substance classified in Schedule II, III, or IV shall be guilty of a misdemeanor. . . ." N.C. Gen. Stat. § 90-95(d)(2) (1991). According to N.C. Gen. Stat. § 90-90(a) 4., cocaine is a Schedule II controlled substance. N.C. Gen. Stat. § 90-90(a) 4. (1991). Therefore, he argues, possession of cocaine is a misdemeanor.⁶

With these arguments in mind, we turn to our established rules of statutory construction. "A cardinal principle governing statutory interpretation is that courts should always give effect to the intent of the legislature." *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996). However, "'[c]riminal statutes are to be strictly construed against the State.'" " *State v. Hearst*, 356 N.C. 132, 136-37, 567 S.E.2d 124, 128 (2002) (quoting *State v. Raines*, 319 N.C. 258, 263, 354 S.E.2d 486, 489 (1987) (citation omitted)). "Statutory interpretation properly begins with an examination of the plain words of the statute.' "*State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (quoting *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "When the language of a statute is clear and unambiguous, there is not room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.' "*Id.*, (quoting *State v. Jarman*, 140 N.C. App. 198, 205, 535 S.E.2d 875, 880 (2000) (citation omitted)). Finally, "where two statutory provisions conflict, one of which is specific or 'particular' and the other 'general,' the more specific statute controls in resolving any apparent conflict." *Furr v. Noland*, 103 N.C. App. 279, 281, 404 S.E.2d 885, 886 (1991).

In the case at bar, the specific statute defining the crime of possession of cocaine plainly states it is a misdemeanor that is punishable as a felony. N.C. Gen. Stat. § 90-95(d)(2). Although felonies are

6. Our current law also provides that cocaine is a Schedule II controlled substance, possession of which constitutes a misdemeanor. See N.C. Gen. Stat. §§ 90-90(1) d., 90-95(d)(2) (2001).

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broadly defined in N.C. Gen. Stat. § 14-1 to include any crime punishable in State prison, we cannot interpret this general statute as overcoming the plain language of the specific statute defining the crime. Moreover, we have previously held that where a crime is defined as one Class but defendant is sentenced at another Class, the definitional classification controls. *State v. Vaughn*, 130 N.C. App. 456, 460, 503 S.E.2d 110, 112-13 (1998) (holding a defendant was convicted of a prior Class H felony, but was sentenced for a Class C felony due to increased punishment as a habitual felon, is nevertheless considered to have been convicted of a prior Class H felony for calculating his prior record level). Accordingly, although possession of cocaine may be punished as a felony, the statute plainly defines it is a misdemeanor.⁷ Parenthetically, we note the legislature may alter this result by stating defendant “shall be guilty of” a felony and not merely punished as a felon. See N.C. Gen. Stat. § 90-95(e)(9) (2001) (directing that where defendant possesses cocaine “on the premises of a penal institution or local confinement facility,” that he “shall be guilty of a Class H felony”). However, at the present time, the plain language of the statute states possession of cocaine is a misdemeanor, punishable as a felony; therefore it cannot be considered a felony to support a habitual felon indictment.

Since the habitual felon indictment was insufficient, the indictment did not convey subject matter jurisdiction on the trial court, and this Court “must arrest judgment.” *Bullock*, 154 N.C. App. at 244, 574 S.E.2d at 23. “[T]he legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below. . . .” *Id.*, 154 N.C. App. at 245, 574 S.E.2d at 24 (quoting *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966)). Accordingly, we vacate the guilty plea based on the habitual felon indictment.

In conclusion, we vacate and remand the guilty plea for possession with intent to sell and deliver cocaine. This places defendant back in the position he was in before striking the illegal bargain to appeal issues not properly presented to the Court on appeal from his guilty plea. We also vacate the guilty plea for attaining the status of habitual felon because the indictment was facially invalid and failed to confer subject matter jurisdiction.

7. Our Court previously noted “N.C. Gen. Stat. § 90-95(d)(2) (Cum. Supp. 1998) clearly states that the possession of any amount of cocaine is a felony.” *State v. Chavis*, 134 N.C. App. 546, 555, 518 S.E.2d 241, 248 (1999). While we find the statute clear, it states possession of cocaine is a misdemeanor that is punishable as a felony but does not state it is a felony. Since the only analysis in *Chavis* is the language of the statute, which does not state, as asserted, that “possession of any amount of cocaine is a felony,” we find we are bound by the language of the statute.

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Vacated and remanded.

Judges WYNN and HUDSON concur.

STATE OF NORTH CAROLINA v. CARLTON CORTEZ JOHNSON

No. COA02-1631

(Filed 4 November 2003)

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

The short-form murder indictment used to charge defendant with first-degree murder was constitutional.

2. Identification of Defendants— photographic identification—motion to suppress

The trial court did not err in a double first-degree murder, second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and larceny case by denying defendant's motion to suppress evidence of a witness's photo identification of defendant as the shooter, because: (1) no suggestive comments were made and this was not an instance in which the police simply showed a single photo to identify defendant; (2) the witness observed defendant firing a shotgun during the commission of the crime and gave an accurate description of defendant at the crime scene following the shooting; (3) the witness's photo identification of defendant occurred on the same day as the shooting; and (4) the accuracy of the identification was bolstered by the fact that defendant was subsequently identified as the shooter from a separate photographic lineup by one of the victims.

3. Search and Seizure— arrest—protective sweep of home—reasonableness

The trial court did not err in a double first-degree murder, second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and larceny case by denying defendant's motion to suppress evidence seized as a result of a protective sweep of defendant's house following his arrest, because: (1) a reasonably prudent offi-

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cer knowing that defendant was a suspect in very recent multiple homicides in a case involving drugs and that the weapon or weapons used might still be in the home would have believed a protective sweep was necessary in order to make sure that another individual the officers saw in the house or any other individual who may have been hiding in the house did not pose a danger to those on the arrest scene; and (2) the police officers limited their sweep to securing defendant's home and observed only those items left in plain view.

4. Jury— panels—calling jurors in order assigned rather than randomly

Although defendant contends the trial court erred in a double first-degree murder, second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and larceny case by dividing prospective jurors into panels and then calling prospective jurors from each panel in the order in which they were assigned rather than randomly from the jury venire as a whole, this assignment of error is dismissed because: (1) defendant waived his right to appeal under N.C.G.S. § 15A-1214(a) based on his failure to follow the procedures mandated in N.C.G.S. § 15A-1211(c) for challenging the entire jury panel; and (2) although defendant asserted plain error, he failed to show that absent the violation of N.C.G.S. § 15A-1214(a) a different result probably would have been reached or that the process of selecting a jury led to a miscarriage of justice or denied defendant a fair trial.

5. Jury— impanelment of wrong alternate juror—motion for mistrial

The trial court did not err in a double first-degree murder, second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and larceny case by failing to declare a mistrial after it was discovered that the jury had been impaneled with the wrong individual sitting as an alternate juror even though the error was not discovered until after opening statements had been presented, because: (1) the trial court re-impaneled the jury with the correct alternate seated and allowed the parties to present the opening statements to the re-impaneled jury; and (2) it is within the trial court's discretion to re-impanel a jury in order to make sure defendant's right to a jury trial is protected.

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6. Constitutional Law— effective assistance of counsel—concessions in opening statements

The trial court in a double first-degree murder, second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and larceny case did not fail to make an adequate inquiry of defendant as to whether he intelligently and knowingly consented to his attorney's concessions in opening statements that defendant caused the deaths of three people, because although the better practice would be for defense counsel to make a record of a defendant's consent to concessions or admissions of guilt prior to making those concessions, on the unique facts of this case the trial court's inquiry was adequate to establish that defendant had previously consented to his counsel's concession.

Appeal by defendant from judgments entered 8 March 2002 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 18 September 2003.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Norma S. Harrell, for the State.

Margaret Creasy Ciardella for defendant-appellant.

HUNTER, Judge.

Carlton Cortez Johnson ("defendant") appeals from judgments dated 8 March 2002 entered consistent with a jury verdict finding him guilty of two counts of first degree murder, one count of second degree murder, one count of assault with a deadly weapon with intent to kill inflicting serious injury, one count of robbery with a dangerous weapon, and one count of larceny. We conclude there was no reversible error at trial.

The State presented evidence tending to show defendant shot and killed three men, wounded another, and stole drugs and money at a house used for the sale and consumption of illegal drugs. Terry McClelland ("McClelland") was present at the scene and had spent the day with the men who were shot. McClelland was in the bathroom at the time the incident began, but overheard the first shooting and hid in a closet from where he witnessed defendant shoot the remaining three men with a shotgun.

After defendant fled the scene, McClelland called the police. McClelland did not initially give police the name of the shooter but

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described him as a black male with dreadlocks and "bug eyes." McClelland then fell asleep in a police cruiser. After waking up, McClelland talked with Stephanie Croom ("Croom"), a female friend, telling her that the shooter was an individual named "Cortez" with whom McClelland had gone to school. McClelland was taken to the police station and was initially shown a six-person photographic lineup, including defendant's brother, but was unable to identify anyone. After this, McClelland was shown approximately sixty more photos on a computer of people matching the description he had given to police. Eventually, based on the name he had given, McClelland was shown a photograph of defendant. The photograph was folded in such a way to hide defendant's name. McClelland was asked if he recognized the photograph and upon seeing it stated "that's him" and began crying and shaking. Deva Hill, one of the victims of the shooting, subsequently identified defendant as the shooter from a photographic lineup, and Croom also identified defendant from a photograph.

Based on McClelland's identification, the police obtained an arrest warrant for defendant. The police went to defendant's residence where defendant answered the door. Defendant was immediately pulled outside, placed on the ground, and arrested. A second individual was seen inside the residence, and the police performed a protective sweep of the residence in which they detained the second individual. During this sweep, the police observed a shotgun at the foot of a bed, a revolver by a couch, money, and a bag of marijuana. A search warrant eventually arrived and these and other items were seized. Prior to trial, defendant moved to suppress both McClelland's identification and items found during the protective sweep of defendant's residence after his arrest, and this motion was denied.

During jury selection in open court, the trial court divided the jury panel into six separate panels of twelve jurors each. The trial court then called each prospective juror from the respective panels to the box in the order in which they were placed into the panel until a jury was selected. Defendant did not object to this method of jury selection. After the jury was selected and impaneled, the parties gave opening statements. In his opening statement, defendant, through his counsel, conceded that he had caused the deaths of three people and wounded a fourth, but that he was guilty of less than first degree murder as there was no premeditation or deliberation. Following this opening statement, it was discovered that the jury had been impaneled with an incorrect alternate juror. The trial court re-impaneled the jury, with the correct alternate, and permitted the parties to repeat

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their opening statements. Prior to repeating opening statements, however, the trial court inquired of defendant if he had consented to his counsel's concessions in the original opening statement, and defendant replied that he had.

The issues are whether: (I) the short-form first degree murder indictment is constitutional; (II) (A) the identification procedure used to identify defendant was impermissibly suggestive, and (B) the search of defendant's house was a lawful protective sweep; (III) the trial court's division of jurors into separate panels violated the statutory requirement of random jury selection and constituted plain error; (IV) the trial court erred by re-impaneling the jury after discovering the wrong alternate juror had been seated; and (V) the trial court made an adequate inquiry as to defendant's consent to his attorney's concessions.

I.

[1] Defendant first contends that the use of the short-form murder indictment violates his due process rights under the Fourteenth Amendment to the United States Constitution. Defendant raises this issue in order to preserve it for later review while acknowledging that the North Carolina Supreme Court has upheld the constitutionality of the short-form murder indictment. *See State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842 (2001). As such, we reject defendant's argument on this issue.

II.

Defendant also argues that the trial court erred in denying his motion to suppress evidence (A) of the photo identification of him as the shooter by McClelland, and (B) evidence seized as a result of the protective sweep of defendant's house following his arrest.

A.

[2] Whether a pretrial identification procedure is impermissibly suggestive depends on the totality of the circumstances and requires a two-part analysis. *State v. Rogers*, 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002). "First, the Court must determine whether the identification procedures were impermissibly suggestive. Second, if the procedures were impermissibly suggestive, the Court must then determine whether the procedures created a substantial likelihood of irreparable misidentification." *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 698 (2001) (citations omitted). "The test under the first inquiry is 'whether the totality of the circumstances reveals a pretrial proce-

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dure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice.' " *Id.* (quoting *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984)). In analyzing whether identification procedures are impermissibly suggestive, North Carolina courts look to various factors including: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty shown by the witness, and the time between the offense and the identification." *Rogers*, 355 N.C. at 432, 562 S.E.2d at 868 (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 53 L. Ed. 2d 140, 154 (1977)).

Although, the use of a single photograph to identify a defendant has been criticized by our Courts, see *State v. Al-Bayyinah*, 356 N.C. 150, 156-57, 567 S.E.2d 120, 123-24 (2002), this case does not present that question. Here, McClelland was provided initially with a six-photo lineup, which included defendant's brother. McClelland was unable to make any identification from this lineup. Subsequently, McClelland viewed approximately sixty more photographs on a computer of individuals within the parameters of the description he gave to the police. McClelland was then shown a photograph, based on the name he provided, of defendant. The photograph was folded so defendant's name was not visible and McClelland was asked only if he recognized the photograph. No suggestive comments were made and this was not an instance in which the police simply showed the witness a single photograph.

In this case, applying the factors outlined in *Rogers*, the surrounding circumstances also revealed that McClellan observed defendant firing the shotgun during the commission of the crime and gave an accurate description of defendant at the crime scene following the shooting. Upon being shown the photograph of defendant, McClelland was certain of his identification stating "that's him" and began crying and shaking. McClelland's identification occurred on the same day as the shooting. Furthermore, the accuracy of the identification is bolstered by the fact that defendant was subsequently identified as the shooter from a separate photographic lineup by one of the victims. As such, the identification procedure used in this case was not impermissibly suggestive.

B.

[3] Defendant also contends evidence seized following his arrest based upon a protective sweep of his house should have been suppressed by the trial court.

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[Warrantless p]rotective sweeps of a residence performed by law enforcement officers in conjunction with an in-home arrest are reasonable if there are “articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.”

State v. Bullin, 150 N.C. App. 631, 640, 564 S.E.2d 576, 583 (2002) (quoting *Maryland v. Buie*, 494 U.S. 325, 334, 108 L. Ed. 2d 276, 286 (1990)).

In this case, defendant was arrested as he came to the door of his house and was pulled outside by police officers. As this was occurring, at least one officer observed another individual inside the house.¹ Knowing that defendant was a suspect in a very recent multiple homicide in a case involving drugs and that the weapon or weapons used might still be in the home, a reasonably prudent officer, under these facts, would have believed a protective sweep was necessary in order to make sure that the individual in the house, or any other individual who may have been hiding in the house, did not pose a danger to those on the arrest scene. The police officers limited their sweep to securing defendant’s home and observed only those items left in plain view. On these facts, the protective sweep of defendant’s home following his arrest was not unreasonable, and the trial court did not err in denying the motion to suppress.

III.

[4] Defendant next assigns error to the trial court’s dividing prospective jurors into panels and then calling prospective jurors from each panel in the order in which they were assigned, rather than randomly from the jury venire as a whole.

N.C. Gen. Stat. § 15A-1214(a) provides an unambiguous procedure for the selection of jurors in a criminal case. See N.C. Gen. Stat. § 15A-1214(a) (2001). It requires that “[t]he clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called.” *Id.* The jury selection method used in this case, by dividing the jury panel up into separate panels and calling the prospective jurors such that both parties knew exactly which prospective juror was next to be called is clearly in violation of Section 15A-1214(a).

1. This individual was, in fact, detained in the house.

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Defendant, however, concedes that he failed to object to the method of jury selection. Nevertheless, “[w]hen a trial court acts contrary to a statutory mandate, the right to appeal the [trial] court’s action is preserved, notwithstanding the failure of the appealing party to object at trial.” *State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994). Section 15A-1214(a), requiring a random jury selection process, is unquestionably a statutory mandate and, as such, defendant’s right to appeal the statutory violation would normally be preserved, even absent an objection. In failing to object at all, however, defendant also did not follow the procedures outlined in Section 15A-1211(c) for challenging the jury panel. Section 15A-1211(c) provides that either the State or a defendant may challenge the jury panel and that a challenge to the jury panel:

- (1) May be made only on the ground that the jurors were not selected or drawn according to law.
- (2) Must be in writing.
- (3) Must specify the facts constituting the ground of challenge.
- (4) Must be made and decided before any juror is examined.

N.C. Gen. Stat. § 15A-1211(c) (2001). Although Section 15A-1211(c), by its language, would appear to only apply to challenges to the selection of an entire jury panel, *see id.*, and not the method in which individual jurors are called and selected, which is governed by Section 15A-1214, our Supreme Court has held that failure to follow the procedures mandated in Section 15A-1211(c) for challenging the entire jury panel waives appellate review of assignments of error under Section 15A-1214(a). *See, e.g., State v. Wiley*, 355 N.C. 592, 606-07, 565 S.E.2d 22, 34-35 (2002); *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856 (2001); *State v. Golphin*, 352 N.C. 364, 411-12, 533 S.E.2d 168, 202 (2000). As we are bound by the precedent set by our Supreme Court, we are required to hold that defendant has thus waived his right to appeal this issue. *See State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000). Furthermore, although defendant has asserted plain error he has failed to show that absent the violation of Section 15A-1214(a) a different result probably would have been reached, or that the process of selecting a jury led to a miscarriage of justice or denied defendant a fair trial. *See State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (when asserting plain error, defendant bears the burden of showing absent error a different result probably would have been reached, or that error was so

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fundamental that it resulted in a miscarriage of justice or denial of a fair trial).

IV.

[5] Defendant further argues that the trial court erred in failing to declare a mistrial after it was discovered that the jury had been impaneled with the wrong individual sitting as an alternate juror. The incorrect alternate had actually been removed through a peremptory challenge by defendant. The error was not discovered until after opening statements had been presented. Rather than declare a mistrial, the trial court instead re-impaneled the jury with the correct alternate seated and allowed the parties to present the opening statements to the re-impaneled jury.

A trial court has the discretion, even after impanelment of a jury, to reopen examination of a juror and excuse that juror upon challenge, whether for cause or peremptory as a product of its “power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State may receive a fair trial before an impartial jury.” *State v. Kirkman*, 293 N.C. 447, 453-54, 238 S.E.2d 456, 460 (1977) (quoting *State v. McKenna*, 289 N.C. 668, 679, 224 S.E.2d 537, 545 (1976)). This discretion is not terminated at the impanelment of the jury. *Id.* Therefore, when appropriate, it is within the trial court’s discretion to re-impanel a jury in order to make sure defendant’s right to a jury trial is protected. *See id.* Thus, in this case the trial court did not err in re-impaneling the jury to insure the correct jury was impaneled.

V.

[6] Defendant finally contends that the trial court failed to make an adequate inquiry of him as to whether he intelligently and knowingly consented to his attorney’s concessions in opening statements that defendant caused the deaths of three people.

Where counsel for a defendant concedes his client’s guilt to the offense charged or a lesser included offense without his client’s consent, it is ineffective assistance of counsel *per se*. *See State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985). In order to ensure that a defendant has consented to his counsel’s concessions of guilt, a trial court must make an inquiry “adequate to establish that defendant consented to the admissions made later by counsel during trial.” *State v. Berry*, 356 N.C. 490, 514, 573 S.E.2d 132, 148 (2002). The North Carolina Supreme Court has, however, “urged ‘both the bar

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and the trial bench to be diligent in making a full record of a defendant's consent when a *Harbison* issue arises at trial.' " *Id.* (quoting *State v. House*, 340 N.C. 187, 197, 456 S.E.2d 292, 297 (1995)).

In this case, during his opening statement to the first impaneled jury, defendant through his counsel conceded that he "caused the deaths of three people and wounded another," but had not done so with premeditation or deliberation, but was instead in a highly intoxicated state having gone to the house with the intention to buy more drugs, that things went terribly wrong and defendant "erupted in a spontaneous manner when he committed these crimes." In concluding his opening statement, defendant's counsel requested the jury to "come back with a verdict of guilty of less than first degree murder."

Following defendant's statement, it was revealed that the trial court had impaneled the jury with an incorrect alternate. Prior to permitting the parties to again present opening statements to the properly impaneled jury, the State noted the propriety of a *Harbison* inquiry regarding defendant's opening statement. Defendant's counsel stated that defendant was prepared to admit that he had consented to tell the jurors he was present at the crime and fired the shots, but that he did so while intoxicated and in a manner constituting less than first degree murder. The trial court then addressed defendant directly:

THE COURT: . . . [Y]ou have heard what [defense counsel] just said. Have ya'll previously discussed that before he made his opening statements?

THE DEFENDANT: Yes, sir, we did.

THE COURT: And did he have your permission and authority to make that opening statement to the jury?

THE DEFENDANT: Yes, sir, he did.

THE COURT: You consent to that now?

THE DEFENDANT: Yes, sir.

Although the better practice would be for defense counsel to make a record of a defendant's consent to concessions or admissions of guilt prior to making those concessions, *see id.*, on the unique facts of this case we conclude that the trial court's inquiry was adequate to establish that defendant had previously consented to his counsel's

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concession that he was present and had fired the shots that killed three people and wounded a fourth.

Accordingly, we conclude there was no reversible error.

No error.

Judges McGEE and CALABRIA concur.

JOE F. SENNER, PLAINTIFF v. LISA SENNER, DEFENDANT

No. COA02-1427

(Filed 4 November 2003)

1. Child Support, Custody, and Visitation— temporary custody determination—passage of time—not converted to final—best interest of child applied

A child custody determination was a temporary order to which the best interest of the child standard applied rather than substantial change of circumstances standard. The original order remained temporary despite a twenty month delay from the first order to the filing for modification because the parties were attempting to negotiate an agreement during that period, and the order itself stated that it was entered without prejudice to either party. Moreover, there was a substantial change of circumstances in the marital status of the parties, the living circumstances and visitation experience of the parties, and plaintiff's interference with defendant's relationship with her sons.

2. Child Custody, Support, and Visitation— child living with abuser—implied detrimental effect

The implied detrimental effect of a minor child living with his abuser is not too speculative to be considered, and there was sufficient evidence in a custody modification proceeding to show that contact with the abusive child was detrimental to the other children in the family.

3. Child Custody, Support, and Visitation— extramarital affairs—children doing well—weight of evidence

There was no abuse of discretion in a child custody action where plaintiff asserted that the court did not properly weigh

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defendant's extramarital affairs and that the children were thriving with plaintiff. The weight of the evidence in child custody actions is within the province of the trial court.

4. Child Custody, Support, and Visitation— home state of children—implicit in evidence

There was no error in the denial of a modification of a child custody order where there was no explicit finding that North Carolina is the children's home state. The original order had made such a finding, and the court here found facts which would have supported that conclusion. However, the best practice is for findings to expressly address jurisdiction.

5. Child Custody, Support, and Visitation— evidence in another state—no objection or motion to continue at hearing

There was no abuse of discretion in a proceeding to modify a child custody action in the denial of plaintiff's motion for a stay of the original action or a new trial. Although plaintiff contended that almost all of the evidence was in Texas and was not presented, or both, the court found that plaintiff had presented evidence and had made no objection or motion to continue regarding his ability to present evidence from Texas.

Judge CALABRIA concurring.

Appeal by plaintiff from order entered 24 June 2002 by Judge Jennifer M. Green in District Court, Wake County. Heard in the Court of Appeals 26 August 2003.

Kurtz & Blum, PLLC, by Paula K. McGrann, for plaintiff-appellant.

Lynne M. Garnett, for defendant-appellee.

WYNN, Judge.

Plaintiff-father, Joe F. Senner, appeals the 24 June 2002 order awarding primary custody of his two minor children to their defendant-mother, Lisa Senner. We uphold the trial court's order finding that the best interest of the children supported awarding primary custody to Ms. Senner.

Plaintiff and defendant married in 1992; had two children during their marriage; moved in 1998 from Texas to North Carolina; and separated on 5 December 1999 when defendant moved out of the marital

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home. On 10 December 1999, plaintiff filed a complaint, which included a claim for custody of the children. One week later, plaintiff moved back to Texas with the children.

Under temporary consent orders dated 7 January 2000 and 10 March 2000, the trial court awarded (without prejudice to either party) primary custody of the children to plaintiff and weekend visitation rights to defendant. On 7 November 2001, defendant moved to modify custody alleging a substantial change in circumstances had occurred since entry of the March 2000 temporary consent order. By order dated 24 June 2002 *nunc pro tunc* 25 April 2002, the trial court concluded, *inter alia*, “It is in the best interests of the minor children that Defendant be awarded their primary custody.” Plaintiff appeals.

On appeal, plaintiff asserts the trial court erroneously: (I) modified the March 2000 custody order under the best interest standard; (II) failed to find North Carolina was the home state for the children; and (III) denied plaintiff’s Rule 59 and 60 motions to amend or grant relief.

[1] Plaintiff first asserts the trial court erred by considering the March 2000 custody order a temporary order under which the standard for determining custody would be the best interest of the children. Instead, plaintiff argues, the trial court should have found the March 2000 custody order to be a final order requiring the trial court to apply a substantial change of circumstances test in determining the issue of custody. To support this contention, plaintiff relies upon *LaValley v. LaValley*, 151 N.C. App. 290, 564 S.E.2d 913 (2002) for the proposition that the twenty-month delay from the March 2000 order until defendant filed her motion to modify in November 2001 was unreasonable; and, since the matter had not been set for hearing within a reasonable time, the “temporary consent order” was converted into a final order. We disagree.

An initial custody determination requires a custody award to such person “as will best promote the interest and welfare of the child.” N.C. Gen. Stat. § 50-13.2 (2001). Subsequent modification of a custody order requires a “showing of changed circumstances. . . .” N.C. Gen. Stat. § 50-13.7 (2001). Generally, “[i]f a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the

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child test without requiring either party to show a substantial change in circumstances." *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002).

Under two recent cases, this Court held that an order is temporary if either (1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues. *Id.*; *Lamond v. Mahoney*, 159 N.C. App. 400, 403, 583 S.E.2d 656, 659 (2003) (citing *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000)).

In the case at bar, the order stated that it was entered "without prejudice to either party." Thus, under *LaValley*, this language was "sufficient to support a determination the Order was temporary." *LaValley*, 151 N.C. App. at 292, 564 S.E.2d at 915.

Nonetheless, *LaValley* and *Brewer* further provide that where neither party sets the matter for a hearing within a reasonable time, the "temporary" order is converted into a final order. *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000); *LaValley*, 151 N.C. App. at 292-93, 564 S.E.2d at 915. In *LaValley*, this Court explained the reasonableness of the time "must be addressed on a case-by-case basis" but held that under the facts present in *LaValley*, twenty-three months was unreasonable. *LaValley*, 151 N.C. App. at 293 n.6, 564 S.E.2d at 915 n.6. In *Brewer*, this Court held "that a year between hearings is too long 'in a case where there are no unresolved issues. . . .'" *Lamond*, 159 N.C. App. 400, at 403-04, 583 S.E.2d at 659 (quoting *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546).

In this case, while plaintiff asserts the twenty-month period between the March 2000 order and the November 2001 filing for modification thereof was not reasonable, the record shows evidence that during that period of time, the parties were negotiating a new arrangement where she would move to Texas and the parties would share joint custody of the children on an alternating two-week basis. When those negotiations broke down, defendant sought a modification of the temporary custody order. In light of these facts, we hold that plaintiff has failed to show that the delay of twenty months in filing the motion for change of custody was unreasonable. Accordingly, we uphold the trial court's determination that the March 2000 temporary order did not convert into a permanent order.

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Moreover, even assuming for the sake of argument, that the March 2000 order did convert into a final order requiring the trial court to apply the change of circumstances standard, we note that the trial court ruled alternatively that “a substantial change in circumstances has occurred since entry of the [March 2000] Consent Order for Custody which justifies a modification of that Order.” Specifically, the trial court found as fact the following circumstances had changed since the March 2000 order: defendant has remarried and plaintiff is engaged to be married; defendant lives with her new husband; defendant had moved into a home with his fiancée, her two children, his oldest son, A.J. and the parties’ sons, Dylan and Matthew; plaintiff interfered with defendant’s relationship with her sons, by denying her visitation and telephone contact, failing to keep her updated as to their school activities and events, refusing to list defendant with the children’s school and daycare thereby denying her access to the children’s records, and lying about events in the children’s lives. Plaintiff does not assert that these findings are not supported by competent evidence and accordingly, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal”).

Moreover, again laboring under the assumption that the March 2000 temporary consent order converted into a final order, plaintiff asserts the trial court did not place the burden on defendant to prove a substantial change in circumstances. We disagree. Evidence supporting the findings was brought forth by defendant, and the trial court stated that based on the evidence and findings, a substantial change in circumstances occurred. The burden was placed on defendant, and the trial court found defendant met her burden. Therefore, even if the March 2000 order had converted into a final order, the trial court nevertheless found a substantial change in circumstances occurred, as required for custody modification. Thus, while we uphold the trial court’s determination that the March 2002 order was a temporary order under which the standard of the best interest of the children applied, we further note that in this case, the order would withstand the greater burden of showing a change of circumstances even if it had converted into a permanent order.

[2] Plaintiff next asserts that there was insufficient evidence to show that contact between his minor son A.J. was detrimental to the minor children. The record shows that A.J. reportedly sexually abused one

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of the younger children during the marriage of the parties, was removed from the residence, and returned to live with plaintiff and the children after the parties separated.

"In a custody proceeding, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Rosero v. Blake*, 193 N.C. 193, 209, 581 S.E.2d 41, 51 (2003) (quoting *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003)). The court found a history of abuse between A.J. and one of the minor children. This finding is amply supported by defendant's exhibits containing the initial report of abuse. The trial court further found as fact the plaintiff did not recognize the seriousness of the abusive incidents, its impact on his younger child, or the impact on that child of living with his abuser. Plaintiff's testimony supports this finding.¹ "The court need not wait for any adverse effects on the child to manifest themselves before the court can alter custody." *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000). We find the trial court's findings of fact are supported by the evidence and the implied detrimental effect of the minor child living with his abuser is not too speculative to be considered in support of the conclusion that a substantial change in circumstances had occurred since the March 2000 order.

[3] Plaintiff also asserts the court did not properly weigh defendant's extramarital affairs and the fact the children were thriving with plaintiff. However, in child custody determinations the weight of the evidence is within the province of the trial court, this Court's review is limited to abuse of discretion, and we find none. *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974).

[4] Plaintiff next asserts the trial court erred in failing to make a finding of fact that North Carolina is the children's home state. The June 2002 order does not contain an explicit finding that North Carolina is the home state, however, the court made findings of fact which support the conclusion that North Carolina is the home state. *Foley v. Foley*, 156 N.C. App. 409, 413, 576 S.E.2d 383, 386 (2003) (a trial court

1. Plaintiff testified that he believed that defendant's emotional abuse of A.J. during the summer of 1998 when he lived with them caused A.J. to molest his step-brother, and that he was not as concerned about the event as defendant was, who demanded that A.J. be sent back to live with his mother following defendant's discovery of the abuse. Plaintiff testified that since defendant was no longer present to emotionally abuse A.J. he was not concerned about having A.J. live with him, although he admitted he would not let A.J. be alone with his step-brother.

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must make specific findings of fact to justify jurisdiction). Moreover, the June 2002 order was a modification of the March 2000 order, which expressly found North Carolina was the home state of the minor children. Once a child custody determination is made, the State "has exclusive, continuing jurisdiction" unless: (1) neither parent has a significant connection with the State and substantial evidence is no longer available in the State; or (2) neither the child nor his parents reside in the State. N.C. Gen. Stat. § 50A-202(a) (2001). Since none of the events have occurred that would divest jurisdiction, the trial court properly had jurisdiction over this case. Therefore, although the best practice is for the findings of fact to expressly address jurisdiction, we find no error where the findings of fact are sufficient to support jurisdiction.

[5] Finally, plaintiff moved, pursuant to Rule 59 and 60 of the North Carolina Rules of Civil Procedure, for the trial court to stay the June 2002 order or grant a new trial on the basis that "[a]lmost all of the evidence regarding the best interests of the children including recent events and concerning current status of the children is in Texas and/ or was not presented to this court." The trial court denied this motion finding plaintiff had presented evidence in the form of both testimony of witnesses and exhibits at the hearing in April 2002, and made no objection or motion to continue with regard to his ability to present evidence from Texas. Review of plaintiff's motions is strictly for abuse of discretion, requiring this court to find "'there was a substantial miscarriage of justice or that the decision is manifestly unsupported by reason.'" *Hooper v. Pizzagalli Construction Co.*, 112 N.C. App. 400, 407-08, 436 S.E.2d 145, 150 (1993) (rule 60); *Ollo v. Mills*, 136 N.C. App. 618, 624, 525 S.E.2d 213, 217 (2000) (Rule 59). Since we find the trial court's decision to deny plaintiff's motions was not manifestly unsupported by reason, we overrule this assignment of error.

In conclusion, we find that the trial court properly awarded custody to defendant under the best interest of the children standard. Moreover, even if the March 2000 temporary order had converted into a final order because of an unreasonable delay in filing the motion for change of custody, we would still hold that the trial court alternatively, albeit unnecessarily, found a substantial change in circumstances occurred. Since the trial court's findings of fact are amply supported by the evidence, they are conclusive on appeal. Accordingly, the order of the trial court is,

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Affirmed.

Judge HUDSON concurs.

Judge CALABRIA concurs in the result in a separate opinion.

CALABRIA, Judge, concurring.

Although I concur in the result, I write separately because I find the March 2000 custody order converted into a permanent order.

The majority correctly set forth North Carolina law, however I find it helpful to review the pertinent precedents. Under *LaValley*, a temporary order converts into a permanent order when “neither party request[s] the calendaring of the matter for a hearing within a reasonable time after the entry of the Order.” *LaValley v. LaValley*, 151 N.C. App. 290, 292-93, 564 S.E.2d 913, 915 (2002). Although reasonableness must be determined on a case-by-case basis, twenty-three months was found to be unreasonable in *LaValley*. *Id.*, 151 N.C. App. at 293 & n.6, 564 S.E.2d at 915 & n.6. Moreover, we have previously held “that a year between hearings is too long ‘in a case where there are no unresolved issues. . . .’” *Lamond v. Mahoney*, 159 N.C. App. 400, 404, 583 S.E.2d 656, 659 (2003) (quoting *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000)).

The majority explains the delay from March 2000 until November 2001, twenty months, was reasonable because

the record shows evidence that during that period of time, the parties were negotiating a new arrangement where [plaintiff] would move to Texas and the parties would share joint custody of the children on an alternating two-week basis. When those negotiations broke down, defendant sought a modification of the temporary order.²

I disagree with the majority that the parties’ negotiations, comprising only seven months of the twenty-month period, were sufficient to extend the “reasonable time” within which a party may delay seeking a permanent order. In March 2000, the parties entered a con-

2. Defendant sought a “modification” of the March 2000 order believing that order was a permanent order and constituted the initial custody determination. However, since the majority determines the order remained temporary, defendant was, under that analysis, seeking an initial custody determination under N.C. Gen. Stat. § 50-13.2 and not a modification pursuant to N.C. Gen. Stat. § 50-13.7.

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sent order leaving “no unresolved issues.” This Court previously held that where there are no unresolved issues, a year between hearings is too long. *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546. In the case at bar, the parties waited twenty months. Although the parties unsuccessfully attempted to negotiate a different arrangement, these discussions occurred during only seven months of the twenty-month period. Moreover, the parties lived with the arrangement for nine months, then negotiated a new order for seven months, and then again abided by the order for an additional four months before defendant asked the court to modify the March 2000 order. I simply cannot find that attempting to negotiate a new order in the middle of twenty months of compliance successfully tolls the “reasonable time” requirement and prevents a temporary order from converting into a permanent order. Rather, I find the parties failed to calendar the matter for a hearing within a reasonable time following entry of the March 2000 temporary order, and therefore the order converted into a permanent custody order. Since the trial court properly applied the substantial change in circumstances test required for modification of a permanent custody order, I concur with affirming the order of the court.

I also concur in the result that the trial court did not err in failing to make a finding of fact that North Carolina is the children’s home state. The majority correctly states that findings of fact which support a conclusion that a given state is the home state under the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”) although not preferred, are sufficient. However, the majority then goes on to support its conclusion as follows:

Moreover, the June 2002 order was a modification of the March 2000 order, which expressly found North Carolina was the home state of the minor children. Once a child custody determination is made, the State “has exclusive, continuing jurisdiction” unless: (1) neither parent has a significant connection with the State and substantial evidence is no longer available in the State; or (2) neither the child nor his parents reside in the State. N.C. Gen. Stat. § 50A-202(a) (2001). Since none of the events have occurred that would divest jurisdiction, the trial court properly had jurisdiction over this case.

Although the majority states the June 2002 order was a modification of the March 2000 order, the majority concludes the June 2002 order was not a modification under N.C. Gen. Stat. § 50-13.7 requiring a substantial change in circumstances. Despite this error in terminology,

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the majority's analysis is supported by the fact that continuing, exclusive jurisdiction attaches when a court makes a "child-custody determination," which is defined to include "a permanent, temporary, initial, and modification order." N.C. Gen. Stat. § 50A-102(3) (2001). Accordingly, although the majority determined the March 2000 order was a temporary order, I agree the court nevertheless maintained continuing, exclusive jurisdiction thereafter.

I concur with the majority on all remaining issues.

DAVID R. MOORE AND CATHY MOORE, PLAINTIFFS v. F. DOUGLAS BIDDY
CONSTRUCTION, INC., DEFENDANT

No. COA02-1529

(Filed 4 November 2003)

1. Judgments— entry of default—set aside—no abuse of discretion

Plaintiff failed to show that the trial court abused its discretion in setting aside an entry of default in a synthetic stucco action. There was good cause in confusion about the attorney who would represent defendant, and no prejudice to plaintiff because a dismissed prior action had included discovery and the assertion of defenses.

2. Statutes of Limitation and Repose— substantial completion of house—occupation by owner

Plaintiffs' synthetic stucco action was barred by the statute of repose where plaintiffs did not bring the first action until more than six years after the house was occupied. The six-year statute of repose of N.C.G.S. § 1-50(a)(5)(a) begins to run upon "substantial completion"; a house is substantially completed when it can be used for its intended purpose as a residence.

3. Statutes of Limitation and Repose— statute of repose—equitable estoppel exception

Defendant was not equitably estopped from asserting the statute of repose as a defense in a synthetic stucco action through furnishing materials and failing to follow the manufacturer's specifications or Building Code requirements. Plaintiff's affidavits failed to show that defendant's actions constituted fraudu-

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lent or willful or wanton conduct, which would prevent the assertion of the defense under N.C.G.S. § 1-50(a)(5)(e).

4. Discovery— extension of time—conflicting time statements

Defendant's response to a request for admissions was timely where the court granted an extension of time for filing the answer, the court separately granted "an additional thirty days" for answering the request for admissions, and the clerk entered the date for the answer on the order concerning admissions. The date was mere surplusage because granting it precedence over the "additional thirty days" would render that order useless.

Appeal by plaintiffs from judgment entered 6 May 2002 by Judge Orlando F. Hudson, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 9 September 2003.

J. Reed Johnston, Jr., Robert C. Cone, L. Charles Grimes, and Amanda L. Fields, for plaintiffs-appellants.

Dean & Gibson, LLP, by Christopher J. Culp, for defendant-appellee.

TYSON, Judge.

David R. Moore and Cathy Moore ("plaintiffs") appeal from order granting F. Douglas Biddy Construction, Inc.'s ("defendant") motion for summary judgment. We affirm.

I. Background

On 4 June 1992, plaintiffs and defendant entered into a written contract for the construction of a house to be built in Elon, North Carolina ("the house"). The Alamance County Building Inspections Department issued a Certificate of Occupancy in June 1993. Plaintiffs moved into the house in August 1993.

Defendant used an exterior insulation and finish system ("EIFS") commonly known as "synthetic stucco." In 1997, plaintiffs noticed defects along the interior wall, which included buckling, bending, and rotting of wood. Water had leaked through the exterior wall around the window frame. Plaintiff reported this damage to defendant who made repairs to the wall and window. Damage from water intrusion continued and in September 2000 plaintiffs hired Sydes Construction Company to remove the EIFS siding and replace it with conventional stucco. While replacing the EIFS, plaintiffs became aware that none

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of the windows or doors in the house had been flashed. As a result, water had intruded causing the wooden structures around the doors, windows, and elsewhere in the house to rot resulting in structural damage and termite infestation.

Plaintiffs originally filed an unverified complaint on 15 October 1999 and voluntarily dismissed without prejudice on 14 September 2000. Plaintiffs refiled this action 7 June 2001 pursuant to N.C.R. Civ. P. 41(a). Defendant had received plaintiffs' "Request for Admissions" [sic] along with service of the refiled complaint on 13 June 2001. Among other things, plaintiffs' Request for Admission Number Six requested that defendant admit "[t]hat this lawsuit has been brought within the applicable period of the relevant Statute of Limitations and Statute of Repose." Defendant moved for, and was granted, an extension of "an additional 30 days . . . to respond to plaintiffs' discovery requests." Defendant filed responses to plaintiffs' Requests for Admission on 31 August 2001. Defendant failed to timely file an Answer.

Entry of default was entered against defendant on 15 August 2001. The trial court granted defendant's motion to set aside the entry of default on 16 January 2002. Defendant moved for partial summary judgment on the grounds that plaintiffs' claims were barred by the statute of repose. On 6 May 2002, the trial court granted this motion and entered summary judgment in favor of defendant. Plaintiffs appealed.

II. Issues

Plaintiffs contend that the trial court erred by granting: (1) defendant's motion to set aside entry of default; (2) summary judgment for defendant when this action was timely filed under the statute of repose; and (3) summary judgment when defendant was barred from asserting the statute of repose as a defense.

III. Entry of Default

[1] Rule 55(d) of the North Carolina Rules of Civil Procedure gives the trial court discretion to set aside an entry of default for "good cause." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2001). "A trial court's determination of 'good cause' to set aside an entry of default will not be disturbed on appeal absent an abuse of discretion." *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000).

Defendant informed the court of confusion regarding the attorney who would represent defendant. On the day the entry of default was

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entered, defendant's attorney had informed plaintiffs' counsel that representation had been secured and defendant was prepared to file an answer. Defendant asserted that setting aside the entry of default would not prejudice plaintiffs since discovery had taken place during the dismissed 1999 action. Defendant also argued that plaintiffs knew that defendant would assert the statute of repose as a defense as it had previously done in 1999.

The court found that defendant showed "good cause" to set aside the entry of default. Entry of default is generally disfavored and any doubts concerning such entry "should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." *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). Plaintiff failed to show the trial court abused its discretion in setting aside the entry of default. This assignment of error is overruled.

IV. Statute of ReposeA. Action Must Be Brought Within Six Years

[2] Plaintiffs argue that the statute of repose did not bar their claim. N.C. Gen. Stat. § 1-50(a)(5)(a) (2001) establishes the repose period for claims to recover damages to real property.

No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

"Substantial completion" is defined as "that degree of completion of a project . . . upon attainment of which the owner can use the same for the purpose for which it was intended." N.C. Gen. Stat. § 1-50(a)(5)(c) (2001). A house is substantially completed when it can be used for its intended purposes as a residence. *Bryant v. Don Galloway Homes, Inc.*, 147 N.C. App. 655, 659, 556 S.E.2d 597, 601 (2001).

In *Bryant*, our court considered an EIFS case with virtually identical facts to the case at bar. *Id.* We held that the trial court properly granted summary judgment for defendant when the plaintiff filed the action after residing in the house for six years, and more than six years after the certificate of compliance was issued, even though defendant had made subsequent repairs. *Id.* at 660, 556 S.E.2d at 602.

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This Court stated that “to allow the statute of repose to toll or start running anew each time a repair is made would subject a defendant to potential open-ended liability for an indefinite period of time, defeating the very purpose of statutes of repose” *Id.* at 660, 556 S.E.2d at 601.

Statutes of repose are conditions precedent which must be specifically pled. *Id.* at 657, 556 S.E.2d at 600. Our Rules of Civil Procedure require that “[i]n pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred.” N.C. Gen. Stat. § 1A-1, Rule 9(c) (2001). Plaintiffs have the burden of proving that their cause of action was brought within the period of the applicable statute of repose. *Tipton & Young Construction Co. v. Blue Ridge Structure Co.*, 116 N.C. App. 115, 118, 446 S.E.2d 603, 605 (1994), *aff’d*, 340 N.C. 257, 456 S.E.2d 308 (1995).

Here, plaintiffs’ unverified complaint alleged that their action was timely filed within the limits prescribed by the statute of repose. Plaintiffs have not met their burden of proving this allegation. Alamance County issued a Certificate of Occupancy for the house in June 1993. Plaintiffs moved into the house in August 1993. Plaintiffs did not bring the first action against defendant until 15 October 1999, more than six years after the house was substantially completed and occupied as a residence. Plaintiffs’ action was barred by the statute of repose. This assignment of error is overruled.

B. Equitable Estoppel Bars the Defense

[3] In the alternative, plaintiffs contend that defendant was equitably estopped from asserting the statute of repose as a defense. When considering matters of equity, “the 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, Inc. v. McClure*, 308 N.C. 393, 419, 302 S.E.2d 754, 769 (1983) (Justice Martin dissenting, joined by Justices Copeland and Exum).

N.C. Gen. Stat. § 1-50(a)(5)(e) provides an exception to the statute of repose and forbids a party from asserting this defense when that party engaged in fraudulent or willful or wanton conduct. “Wilful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct. Negligence . . .

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connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. . . . Conduct is wanton when [done] in conscious and intentional disregard of and indifference to the rights and safety of others." *Cacha v. Montaco, Inc.*, 147 N.C. App. 21, 30-31, 554 S.E.2d 388, 394 (2001), *disc. rev. denied*, 355 N.C. 284, 560 S.E.2d 797 (2002) (citations omitted).

In their unverified complaint, plaintiffs' ninth claim for relief alleges willful and wanton conduct by defendant. Plaintiffs' complaint did not allege or plead fraud. Defendant argues that the trial court properly granted summary judgment because plaintiffs failed to produce any evidence to satisfy their burden regarding their allegation of willful and wanton conduct. 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) (2001). Summary judgment is appropriate when the moving party establishes that the opposing party cannot produce evidence to support an essential element of the claim, cannot survive an affirmative defense, or that 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 which shows plaintiff's ability to establish a *prima facie* case. *Id.* All inferences of fact are construed in favor of the nonmoving party. *Id.*

Plaintiffs' complaint alleges that defendant's furnishing of materials and failure to follow manufacturer's specifications or Building Code requirements constitute more than ordinary negligence. We have held that "violation of the Code, standing alone, has been held by this Court to be insufficient 'to reach the somewhat elevated level of gross negligence.'" *Cacha*, 147 N.C. App. at 33, 554 S.E.2d at 395 (quoting *Bashford v. N.C. Licensing Bd. for General Contractors*, 107 N.C. App. 462, 467, 420 S.E.2d 466, 469 (1992)).

Plaintiffs offered an affidavit as evidence indicating that defendant made false representations of material facts. In David Moore's affidavit ("Moore"), he stated that in 1997 defendant promised that all windows and doors were inspected and properly flashed. Defendant assured plaintiffs that they should not experience any further prob-

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lems. Moore stated in his affidavit that plaintiffs subsequently discovered that none of the windows or doors in the entire house had been flashed. Plaintiffs also offered Walter Strand's affidavit. Mr. Strand, a licensed professional engineer, performed an EIFS evaluation. His inspection showed that probing of the joints around doors and windows did not reveal the presence of any sealant, as required by the manufacturer. Instead, the EIFS was terminated around doors and windows by butting the EIFS laminate to the wood window and door frames. The report also noted the omission of or inadequate flashing throughout the house. Plaintiffs did not offer evidence regarding defendant's knowledge or experience with EIFS.

In granting summary judgment, the trial court considered these affidavits, along with other evidence. According to *A.E.P. Industries*, the trial court is in the best position to determine whether defendant should be equitably estopped from asserting the statute of repose as a defense. 308 N.C. at 419, 302 S.E.2d at 769. Plaintiffs' affidavits allege that defendant should be equitably estopped from asserting the statute of repose as a defense, but failed to show that defendant's actions constituted a "conscious and intentional disregard of . . . the rights and safety of others." *Cacha*, 147 N.C. App. at 31, 554 S.E.2d at 394. Plaintiffs failed to produce evidence to raise a genuine issue of material fact to survive summary judgment. The trial court did not abuse its discretion in granting summary judgment. Defendant was not barred from asserting the statute of repose as a defense. This assignment of error is overruled.

C. Requests for Admission

[4] Plaintiffs argue that defendant's untimely response to their Requests for Admission constituted an admission of all matters set forth in the requests and conclusively established that plaintiffs' claims were brought prior to the expiration of the statute of repose. The North Carolina Rules of Civil Procedure state that once a party has been served with written requests for admission:

[t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . a defendant shall not be required to serve answers or objections before the expiration of 60 days after service of the summons and complaint upon him.

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N.C. Gen. Stat. § 1A-1, Rule 36(a) (2001) (“Rule 36(a)”). Our Rules also allow parties to make a motion for extension of time. “[T]he court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed” N.C. Gen. Stat. § 1A-1, Rule 6(b) (2001).

Here, defendant was served the complaint together with the Requests for Admission on 13 June 2001. Rule 36(a) provided defendant sixty days from this date to respond or until 13 August 2001. On 13 July 2001, the court granted defendant’s timely motion for extension of time giving him “an additional 30 days” to respond. Defendant prepared the order which stated defendant “is given an additional 30 days, or to August 27, 2001 within which to respond to plaintiffs’ discovery requests.” The clerk crossed out “27” and wrote in “13” making the order read “or to August 13, 2001.”

By changing this date, the clerk created an inconsistency on the face of the order. Under Rule 36(a) and prior to filing the motion for extension of time, defendant was allowed sixty days, or until 13 August 2001 to respond to plaintiffs’ requests for admission. The order reflects the court’s intent to grant defendant’s motion for extension of time and to allow defendant “an additional 30 days” to respond.

“A judgment must be construed in light of the situation of the court, what was before it, and the accompanying circumstances. Judgments should be liberally construed so as to make them serviceable instead of useless.” *Watkins v. Smith*, 40 N.C. App. 506, 510, 253 S.E.2d 354, 356-57 (1979). In accordance with N.C.R. Civ. P. 6(b), Defendant had filed a motion for extension of time to answer plaintiffs’ complaint on 6 July 2001. The trial court granted this motion on 9 July 2001, giving defendant until 13 August 2001 to answer. On 13 July 2001, four days after receiving an extension of time to answer plaintiffs’ complaint, defendant filed a *separate and distinct motion* for extension of time to respond to plaintiffs’ requests for admission. By filing a separate motion, defendant sought and was granted an additional thirty days beyond 13 August 2001, the date on which responses were originally due under Rule 36(a).

The change of date to “August 13, 2001” was mere surplusage. Giving that date precedence over the “additional 30 days” ordered by the court would create a nullity, rendering the order “useless.”

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Watkins, 40 N.C. App. at 510, 253 S.E.2d at 356-57; *see also State v. Freeman*, 314 N.C. 432, 435-36, 333 S.E.2d 743, 745-46 (1985) (holding that language in an indictment following the words “committing a felony” is “mere harmless surplusage and may properly be disregarded in passing upon its validity.”); *Hodges v. Hodges*, 257 N.C. 774, 780, 127 S.E.2d 567, 572 (1962) (trial court made a “finding of fact” that “plaintiff failed to show by clear, cogent and convincing evidence” The Supreme Court held that “clear, cogent and convincing evidence” was mere surplusage because it is unnecessary and “no other conclusion was logically possible”); *Bailey v. Gooding*, 60 N.C. App. 459, 462, 299 S.E.2d 267, 271 (1983) (trial court applied the correct test in Rule 55(d) of “good cause,” so that the reference to “Rule 60(b)” in the order “was surplusage and does not require reversal of the order denying defendants’ motion to set aside entry of default.”).

The court’s order granted defendant an extension of “an additional 30 days” from the original sixty days he had under Rule 36(a) and allowed defendant to file his responses by 13 September 2001. Defendant timely filed his responses on 31 August 2001. Defendant’s response denied plaintiffs’ Request for Admission Number Six: “[t]hat this lawsuit has been brought within the applicable period of the relevant Statute of Limitations and Statute of Repose.” Defendant timely filed his response and was not barred from asserting the statute of repose as a defense. This assignment of error is overruled.

V. Conclusion

Plaintiffs did not file their action until more than six years after the house was substantially completed and are barred by the statute of repose. Defendant was not estopped from asserting this defense. The trial court did not abuse its discretion in setting aside the entry of default. Summary judgment for defendant is affirmed.

Affirmed.

Judges TIMMONS-GOODSON and LEVINSON concur.

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STATE OF NORTH CAROLINA v. JOHN FRED GAITHER

No. COA02-1477

(Filed 4 November 2003)

1. Robbery— armed—motion to dismiss—sufficiency of evidence—lesser-included offense of common law robbery

The trial court did not err by denying defendant's motion to dismiss the charge of armed robbery, or in the alternative, refusing to instruct the jury on the lesser-included offense of common law robbery, because: (1) there was an unlawful taking of shirts from store premises, defendant showed the security officers that he possessed a gun, and the security officers testified that they believed defendant might use the gun; (2) while defendant's use of intimidation occurred after the taking of property, defendant's effort to avoid apprehension by store and mall security officers is an action continuous with the taking and therefore constitutes a part of the robbery attempt; (3) the fact that only one witness to the incident actually observed the gun in defendant's possession goes to the weight of the evidence; and (4) there was no evidence presented to support an instruction on the lesser-included offense of common law robbery.

2. Evidence— audiotape of 911 call—authentication

The trial court did not err in an armed robbery and possession of a firearm by a convicted felon case by admitting an audiotape of the 911 call into evidence because the audiotape was properly authenticated by the testimony of two witnesses, both of whom were able to identify their own voice and the voices of each other on the tape.

3. Evidence— videotaped news report of gun recovery—illustrative purpose

The trial court did not err in an armed robbery and possession of a firearm by a convicted felon case by admitting a videotaped news report of the gun recovery into evidence, because: (1) the State offered the videotape for the sole purpose of illustrating the testimony of the K-9 officer; and (2) the trial court properly instructed the jury that the videotape was being received into evidence for the limited purpose of illustrating the witnesses' testimony.

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4. Evidence— prior crimes or bad acts—conspiracy to sell and deliver cocaine—authentication

The trial court did not err in an armed robbery and possession of a firearm by a convicted felon case by admitting evidence of defendant's previous conviction for conspiracy to sell and deliver cocaine allegedly without proper authentication of the document, because: (1) N.C.G.S. § 8C-1, Rule 1005 states that the contents of an official record if otherwise admissible may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original; and (2) a witness testified that the document was an exact copy of the original commitment order, that he observed the original document as it was pulled from county records, and witnessed the copy produced and certified by the clerk of court.

5. 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 even though the possession of a firearm occurred more than five years after the previous felony conviction, because N.C.G.S. § 14-415.1 contains no time bar for this charge.

Appeal by defendant from judgment entered 18 March 2002 by Judge Thomas D. Haigwood in New Hanover County Superior Court. Heard in the Court of Appeals 27 August 2003.

Attorney General Roy Cooper, by Assistant Attorney General Tina A. Krasner, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Terri W. Sharp, attorneys for defendant-appellant.

TIMMONS-GOODSON, Judge.

John Fred Gaither (“defendant”) appeals his convictions of armed robbery and possession of a firearm by a convicted felon. For the reasons stated herein, we hold that defendant received a trial free of prejudicial error.

The evidence presented at trial tended to show the following: On 16 January 2002 at approximately 3:30 p.m., Belk department store security officer Tina Holt (“Holt”) and regional loss prevention manager Brian Phillips (“Phillips”) observed defendant on the second

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floor of the store in Wilmington, North Carolina via a security camera. Defendant drew the two employees' attention because he was wearing a large, heavy coat with a drawstring pulled tightly around the waist. Defendant also appeared to nervously look around the store. Holt and Phillips observed defendant conceal inside his coat nine Polo shirts from the boys' clothing department.

After concealing the shirts, defendant zipped his coat and proceeded out of the boys' department to the escalator. As defendant rode the escalator to the first floor, Holt called for assistance from mall security officers, James Allen ("Allen") and Jeffrey Reece ("Reece"), while Phillips called 911. Belk security officer Caroline Short ("Short") was called to the loss prevention office to monitor the situation via security camera while Phillips communicated with the 911 operator. Short eventually took over the communication with the 911 officer from Phillips.

Holt, Allen and Reece attempted to stop defendant at the bottom of the escalator. As they approached defendant, he immediately put his hands in his pockets. Allen asked defendant to remove his hands from his pockets several times, but defendant refused to do so. Holt, Allen and Reece instructed defendant to accompany them to the loss prevention office, but defendant continued to walk toward the store exit. Allen and Reece placed themselves in front of the exit to prevent defendant from leaving.

As Reece stood in front of defendant, he focused on defendant's hands. Defendant removed his hand from his pocket, and Reece saw the barrel of a small handgun with defendant's right index finger on the trigger of the gun. Defendant said, "You don't—you don't want to do that." Reece immediately moved from defendant's path, and said, "Gun. He's got a gun."

Defendant then exited Belk, walked down the sidewalk for approximately thirty feet and then proceeded into the parking lot, running between cars. Allen and Reece pursued defendant, but remained a distance of twenty feet away out of concern for their safety. Defendant's hands remained in his pockets the entire time he was running. Defendant ran toward Independence Boulevard.

Sergeant Brian Pettuce of the Wilmington Police Department was in the vicinity when the 911 dispatch reported that a shoplifting involving a weapon had occurred. He responded to the call and as he drove on Independence Boulevard he observed defendant run into

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the adjacent woods. The sergeant exited his vehicle, drew his weapon, and ordered defendant to come out of the woods and show his hands. Defendant complied with the order and was searched for a weapon. The search revealed no weapon but several Polo shirts were found stuffed inside defendant's coat. He then called for a K-9 unit to respond to the scene to conduct an article search. The K-9 unit recovered a loaded .22-caliber handgun from the woods. The recovery of the handgun was filmed by a local news crew which had responded to police reports of an armed robbery.

As an initial matter, we note that defendant's brief contains arguments supporting only five of the original seven assignments of error on appeal. The two omitted assignments of error are deemed abandoned pursuant to N.C.R. App. R. 28(b)(5) (2002). We therefore limit our review to those assignments of error properly preserved by defendant for appeal.

The issues presented for appeal are whether the trial court erred by (1) denying defendant's motion to dismiss the charge of armed robbery, or in the alternative, refusing to instruct the jury on the lesser-included offense of common law robbery; (2) admitting an audiotape of the 911 call into evidence; (3) admitting a videotaped news report of the gun recovery into evidence; and (4) denying defendant's motion to dismiss the charge of possession of a firearm by a convicted felon.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of armed robbery. Defendant asserts there was insufficient evidence to support the charges. We disagree.

In ruling on a motion to dismiss based on insufficiency of evidence, the trial court must determine whether there is substantial evidence of each element of the offense charged. *See State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). When reviewing the evidence, the trial court must consider even incompetent evidence in the light most favorable to the prosecution, granting the State the benefit of every reasonable inference. *See State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). Any contradictions or discrepancies in the evidence should be resolved by the jury. *See id.*

In the present case, defendant was convicted of armed robbery. By definition armed robbery is committed when "[a]ny person . . .

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who, having in possession or with the . . . threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from . . . any place of business . . ." N.C. Gen. Stat. § 14-87(a). Absent the firearm or dangerous weapon element, the offense constitutes common law robbery. "The mere possession of a firearm during the course of taking property is not a violation of N.C. Gen. Stat. § 14-87(a); the firearm must be used to endanger or threaten the life of a person as that element is the essence of armed robbery." *State v. Thomas*, 85 N.C. App. 319, 321, 354 S.E.2d 891, 893 (1987). "Proof of armed robbery requires that the victim reasonably believed that the defendant possessed, or used or threatened to use a firearm in the perpetration of the crime." *State v. Lee*, 128 N.C. App. 506, 510, 495 S.E.2d 373, 376 (1998). "The State need only prove that the defendant represented that he had a firearm and that circumstances led the victim reasonably to believe that the defendant had a firearm and might use it." *Id.* A defendant's threatened use of his gun is deemed concomitant with and inseparable from his robbery attempt where the evidence shows that (1) the gun was used to facilitate the defendant's escape, and (2) the taking of property coupled with the escape constitutes one continuous transaction. *State v. Cunningham*, 97 N.C. App. 631, 634, 389 S.E.2d 286, 288 (1990). This standard applies even if there is no evidence that defendant used force or intimidation before the taking of property. *Id.*

Viewing the evidence in the light most favorable to the State, there was sufficient evidence presented at trial from which a jury could find that defendant's actions fulfilled all of the elements of armed robbery. First, there was an unlawful taking of the Polo shirts from the store premises. Second, defendant showed the security officers that he possessed a gun. Third, Holt, Allen and Reece testified that they believed defendant might use the gun, and thus were threatened.

The evidence also supports a finding that while defendant's use of intimidation occurred after the taking of property, defendant's effort to avoid apprehension by store and mall security officers is an action continuous with the taking and therefore constitutes a part of the robbery attempt. First, the evidence tends to show that while in the store defendant removed several shirts from a display, concealed them within his coat, and began walking toward the first floor store exits. Then when defendant was approached by three security guards who physically blocked defendant's exit to the street, defendant presented

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a gun and made a threatening statement. The defendant did not testify, nor did he present any witnesses to contradict this evidence. Thus, all of the evidence presented permits a reasonable inference of defendant's guilt sufficient to defeat a motion to dismiss. The fact that only one witness to the incident actually observed the gun in defendant's possession goes to the weight of the evidence. In ruling on a motion to dismiss, the trial court is not permitted to weigh the evidence. Thus, we conclude that in the light most favorable to the State there was sufficient evidence from which the jury could find that defendant committed armed robbery. Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of armed robbery.

Next, we address defendant's argument that the trial court erred in refusing to instruct the jury on the lesser-included offense of common law robbery. The North Carolina Supreme Court has held that:

where the uncontested evidence is positive and unequivocal as to each and every element of armed robbery, and there is no evidence supporting defendant's guilt of a lesser offense, the trial court does not err in failing to instruct the jury on the lesser included offense of common law robbery.

State v. Peacock, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981).

As stated *supra*, there was no evidence presented to support an instruction of the lesser-included offense of common law robbery. The trial court therefore did not err by not instructing the jury on the lesser-included offense of common law robbery.

[2] Defendant next argues that the trial court improperly allowed the State to introduce an audiotape of the telephone call by Phillips and Short to 911 emergency services. We disagree.

Defendant argues that the tape was not properly authenticated and therefore should not have been admitted into evidence. Defendant assigned error to the failure of the trial court to apply the foundational standard for the admission of tape recorded evidence as set out in *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971).

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The seven-prong test established in *Lynch* has been superceded by North Carolina Rule of Evidence 901, which states that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” N.C. Gen. Stat. § 8C-1, Art. 9. The Rule further states that a voice may be identified “whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.” *Id.* See *State v. Stager*, 329 N.C. 278, 315-17, 406 S.E.2d 876, 897-98 (1991); *State v. Martinez*, 149 N.C. App. 553, 559-60, 561 S.E.2d 528, 532 (2002). In *State v. Rourke*, this Court concluded that where two of the parties to a 911 call identified their own voices and the voices of two additional parties to the call on an audiotape, there was sufficient evidence to authenticate the tape as a recording of the 911 call made during the incident in question. 143 N.C. App. 672, 676, 548 S.E.2d 188, 191 (2001). Thus, we hold that the audiotape presented in this case was properly authenticated by the testimony of Phillips and Short, both of whom were able to identify their own voice and the voices of each other on the tape. The trial court therefore did not err in overruling defendant's objection to the admission of the tape into evidence on grounds of authentication.

[3] Defendant next argues that the trial court improperly allowed the State to introduce a video news report of the K-9 unit recovering a gun from the scene where defendant was apprehended. The evidence presented tends to show that a television news crew arrived at the scene after the suspect was apprehended and while the K-9 unit search for the weapon was in progress.

Videotapes are admissible under North Carolina law for both illustrative and substantive purposes. *Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 352 S.E.2d 902, aff'd, 321 N.C. 260, 362 S.E.2d 273 (1987), overruled on other grounds by *Johnson v. Ruark Obstetrics & Assoc.*, 327 N.C. 283, 395 S.E.2d 85 (1990). The North Carolina Rules of Evidence provide that “[a]ny party may introduce a . . . video tape . . . as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness.” N.C. Gen. Stat. § 8-97.

In the present case, the trial transcript reflects that the State offered the videotape for the sole purpose of illustrating the

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testimony of the K-9 officer. Additionally, the trial judge properly instructed the jury that the “videotape was being received into evidence for the limited purpose of illustrating the witnessess's testimony. . . .” Therefore, the trial court did not err in admitting the videotape into evidence.

[4] Defendant's final argument is that the trial court erred in admitting evidence of defendant's previous conviction without properly authenticating the document. We disagree.

The evidence admitted was a Judgment and Commitment of defendant's prior conviction for conspiracy to sell and deliver cocaine. State's witness, Detective Brad Overman (“Overman”) testified that the document was an exact copy of the original commitment order, that he observed the original document as it was pulled from the Sampson County records, and witnessed the copy produced and certified by the Clerk of Court.

North Carolina Rule of Evidence 1005 states that “[t]he contents of an official record . . . if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. N.C. Gen. Stat. § 8C-1, Art. 10. The Judgment and Commitment constitutes a certified official record of defendant's prior conviction per the seal and signature of the Deputy Clerk of Superior Court. The trial record tends to show that Overman testified that the Judgment and Commitment was correct. Therefore, we conclude that the document was properly authenticated.

[5] Defendant also argues that because the possession of a firearm occurred more than five years after the previous felony conviction, this Court's ruling in *State v. Alston* precludes a conviction on this charge. 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998). We disagree. *Alston* is superceded by the current language of N.C. Gen. Stat. § 14-415.1 which contains no time bar for this charge. We therefore overrule defendant's final assignment of error.

For the reasons contained herein, we hold that the trial court did not err.

No error.

Judges HUNTER and ELMORE concur.

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STATE OF NORTH CAROLINA v. RICKY EARL SCOTT

No. COA02-1527

(Filed 4 November 2003)

1. Assault— maiming—partially severed ear not sufficient

A motion to dismiss a maiming charge should have been granted where the victim's ear was not totally severed from her head. N.C.G.S. 14-29.

2. Kidnapping— to facilitate flight—evidence sufficient

A motion to dismiss a kidnapping charge was correctly denied where there was sufficient evidence that defendant kidnapped the victim to facilitate his flight from his assault upon her.

3. Assault— intent to kill—evidence sufficient

There was sufficient evidence of an intent to kill in an assault prosecution where the victim was attacked with a deadly weapon, suffered serious injuries, placed in the trunk of defendant's car, and deprived of medical care for several hours. Defendant's motion to dismiss was correctly denied.

4. Constitutional Law— double jeopardy—kidnapping, maiming, and assault in one incident—different elements

There was no double jeopardy violation in convictions for kidnapping, maiming, and assault arising from the same incident. Each crime requires different elements.

Appeal by defendant from judgments entered 3 February 1999 by Judge Jack A. Thompson in Robeson County Superior Court. Heard in the Court of Appeals 15 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey B. Parsons, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

EAGLES, Chief Judge.

Defendant Ricky Earl Scott was convicted of first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury and maiming without malice. On appeal, defendant brings forth four arguments: (1) that the State failed to prove the elements

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of the maiming charge; (2) that the trial court erred by failing to dismiss the kidnapping charge; (3) that the trial court erred by failing to dismiss the assault charge; and (4) that entering convictions against defendant for kidnapping, assault and maiming violated the constitutional prohibition against double jeopardy. After careful consideration of the record and briefs, we affirm in part and reverse and remand in part.

The evidence tends to show the following. Defendant and Renate Heusmann worked together at Jonathan Reid. Defendant took Heusmann out on a date in late July 1997. At that time, Heusmann was also working a second job as a waitress at John's Restaurant. Heusmann's shift at the restaurant on 2 August 1997 ended around 11 p.m. Near the end of her shift, Heusmann's daughter arrived to pick her up. Heusmann's daughter told her that defendant was waiting for Heusmann in his car outside the restaurant.

Heusmann went outside and talked to defendant in the parking lot. They decided not to go out to a club that night, as they had planned to do, because Heusmann was tired. Defendant told Heusmann that he wanted to talk to her. Defendant drove Heusmann home in his car. On the way to Heusmann's house, defendant stopped and bought some beer. When they arrived at Heusmann's house, she changed clothes. Heusmann and defendant watched a movie and each drank several beers in Heusmann's living room. Heusmann told defendant to leave her house when the movie ended because she was tired.

Heusmann walked defendant out of her house to his car in the driveway. They talked in the driveway briefly, then Heusmann turned around and began to walk towards her house. Defendant grabbed Heusmann and told her that he wanted her so badly that he "could not stand it." Defendant choked Heusmann until she lost consciousness. Heusmann regained consciousness in the trunk of defendant's moving car. Heusmann knew that she was injured but did not know the extent of her injuries. When she woke up, Heusmann began hitting the bottom of the trunk lid. Heusmann passed out several more times, but each time that she awoke, she hit the trunk lid.

Defendant eventually stopped the car and opened the trunk to let Heusmann out. When Heusmann emerged from defendant's car trunk, she saw blood all over her clothes and felt weak. Heusmann asked defendant to take her to the hospital. Defendant refused to take Heusmann to the hospital, saying he would get in trouble with the

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law, unless she explained her injuries to the hospital staff according to his instructions. Defendant told her to tell the hospital staff that she had been attacked by an unknown person on the side of the road while defendant had gone to get gas for his car. Heusmann agreed, but once she was inside the hospital Heusmann told the staff that defendant had caused her injuries. Heusmann's injuries were severe. Her right ear was "cut almost completely off." She had numerous lacerations on her neck, contusions and swelling on her face, and a severe head injury. Defendant was arrested at the hospital.

The investigating detective photographed defendant's car outside the hospital on the day of his arrest, but did not search the car until 4 August 1997 after he obtained a search warrant. When Detective Johnson searched defendant's car, he found a pair of nine inch pliers with dried blood on them. In addition, the detective and crime scene investigator found a knife with dried blood on it in defendant's trunk. The bottom of the trunk contained dried blood and numerous blood stains on the trunk's floor and the spare tire. During their investigation on 3 August 1997 the officers also found blood droppings on Heusmann's driveway and Heusmann's eyeglasses in the grass beside her driveway.

Defendant testified that he went to Heusmann's house where he drank beer and watched two movies with her. After the movies were finished, Heusmann asked him to take her riding. Defendant testified that he and Heusmann rode around Lumberton before his car ran out of gas around 3 a.m. Defendant left Heusmann with his car and walked to the nearest gas station to purchase gas. When defendant returned, Heusmann had been attacked. Defendant drove Heusmann to her house and eventually convinced her to let him take her to the hospital.

The jury found defendant guilty of all charges. Defendant was sentenced to consecutive terms of imprisonment of 100 to 129 months for the kidnapping charge, 100 to 129 months for the assault charge and 29 to 44 months for the maiming charge. Defendant appeals.

[1] Defendant contends that the trial court should have granted his motion to dismiss the maiming charge. Defendant argues that the State is required to show proof that a victim's ear has been completely severed from the body in order to sustain a conviction for maiming. In this case, since Heusmann's ear was not completely removed, defendant argues that the State did not carry its burden of proof. We agree.

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Defendant bases his argument upon *State v. Foy* which applied the maiming statute, G.S. § 14-29. *See State v. Foy*, 130 N.C. App. 466, 503 S.E.2d 399, *disc. rev. denied*, 349 N.C. 234, 512 S.E.2d 756 (1998). G.S. § 14-29 reads as follows:

If any person shall, on purpose and unlawfully, but without malice aforethought, cut, or slit the nose, *bite or cut off the nose, or a lip or an ear*, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be punished as a Class E felon.

G.S. § 14-29 (2001) (emphasis added). The *Foy* case involved an incarcerated defendant who attacked a deputy sheriff while in jail. *Foy*, 130 N.C. App. at 467-68, 503 S.E.2d at 399-400. During the scuffle between deputies and the defendant, the defendant bit one deputy's ear. *Id.* at 468, 503 S.E.2d at 400. The defendant in *Foy* drew blood by biting the deputy's ear and thirteen stitches were required to close the deputy's wound, but "[t]here was no evidence that any part of [the deputy's] ear was actually severed." *Id.* at 468, 503 S.E.2d at 400. This Court, in analyzing the trial court's application of the maiming statute, held that the language of G.S. § 14-29 "suggests that while cutting off a lip or an ear is proscribed conduct, merely cutting or slitting those body parts—without cutting or slitting them off—does not violate the statute." *Id.* at 468-69, 503 S.E.2d at 400 (emphasis in original). The *Foy* court continued:

The trial court erred when it instructed the jury that it could find defendant guilty of violating section 14-29 if it determined that defendant had bitten Deputy Hartsell's ear without biting it off in part or altogether. Defendant's motion to dismiss the maiming charge should have been granted because the State's evidence did not show that he bit off any part of Deputy Hartsell's ear.

Id. at 469, 503 S.E.2d at 400.

Since this Court is reviewing the trial court's denial of a motion to dismiss, we must examine all of the evidence in the light most favorable to the State. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982). Here, both Heusmann and her treating nurse in the emergency room testified regarding Heusmann's injuries after the attack. Heusmann testified that her "ear was about cut off and [she] had slashes on [her] neck." Jennifer Bass, the nurse who treated

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Heusmann in the emergency room, described Heusmann's injuries as follows: "[S]he had multiple lacerations on this side, her ear was almost off." Therefore, the evidence held in the light most favorable to the State, indicates that Heusmann's ear had been partially severed from her head, but was not totally severed. Relying on *Foy*, defendant argues that this evidence is not sufficient to survive his motion to dismiss. We agree.

The *Foy* Court clarified that a mere biting or cutting of a victim's ear, nose, or lip is not sufficient to prove maiming according to G.S. § 14-29. This interpretation of G.S. § 14-29 is consistent with the general definition of maiming, which means "[t]o disable or disfigure, usually by depriving of the use of a limb or bodily member." *The American Heritage Dictionary* 756 (2nd ed. 1985). We hold that maiming of a victim's ear occurs only when a victim's ear is totally severed from the victim's head or a part of a victim's ear is totally severed from the rest of the victim's ear. Here, all the evidence indicates that Heusmann's ear was mostly, but not totally, severed from her head. That evidence is not sufficient to uphold defendant's conviction for maiming. Therefore, we reverse this conviction.

[2] Defendant also contends that the trial court should have granted his motion to dismiss the kidnapping charge. Defendant argues that the State failed to present evidence that defendant kidnapped Heusmann in order to facilitate his flight from the assault. We disagree.

Defendant argues that the instructions to the jury required the jury to conclude that the assault on Heusmann was completed before she was placed in defendant's car. The jury was instructed regarding the kidnapping charge as follows, in pertinent part:

Third, that the Defendant confined and removed that purpose—that person for the purpose of facilitating his flight after committing assault with a deadly weapon with intent to kill, inflicting serious injury.

Fourth, that the confinement and removal was a separate and complete act independent of and apart from assault with a deadly weapon with intent to kill, inflicting serious injury.

Defendant contends that the State did not present sufficient evidence to prove that the assault on Heusmann was complete before she was placed in defendant's car.

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In reviewing denial of a motion to dismiss, we are required to review the evidence in the light most favorable to the State. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652 (1982). Heusmann testified that defendant attacked her in the driveway outside of her home. As a result of that attack, she lost consciousness. When Heusmann regained consciousness, she was confined in the trunk of defendant's moving car and realized she had been injured. The officers investigating Heusmann's kidnapping also found blood on the driveway at her house and Heusmann's eyeglasses in her front yard. Detective Johnson and the crime scene investigator Lieutenant Lovette found a knife covered with dried blood in the trunk of defendant's car, in addition to blood stains and dried blood on the floor of the trunk. All of this evidence, in the light most favorable to the State, indicates that Heusmann was attacked either before she was placed in defendant's trunk or attacked while she was confined in the trunk. None of the testimony indicates that defendant continued to assault Heusmann after she regained consciousness. In addition, Heusmann lost consciousness outside of her home and emerged from defendant's trunk on an unfamiliar roadside. This evidence, that an assault was complete and defendant had removed Heusmann to a different location after that assault, is sufficient evidence to show that defendant kidnapped Heusmann to facilitate his flight from the assault. Accordingly, this assignment of error is overruled.

[3] Defendant further contends that the trial court should have granted his motion to dismiss the assault charge. Defendant argues that the State did not prove that defendant assaulted Heusmann with the intent to kill. We disagree.

In order to sustain an assault conviction under G.S. § 14-32(a), the State must prove (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. *See State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). Here, defendant only contests the element of intent to kill. The "intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988) (citing *State v. Thacker*, 281 N.C. 447, 189 S.E.2d 145 (1972)).

The evidence shows that defendant choked Heusmann in her driveway until she lost consciousness. It was undisputed that a deadly weapon, a knife with a four-inch blade, was found in defendant's car. However, the mere presence of a deadly weapon does not

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indicate intent to kill. "Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972). Heusmann's medical records show that she suffered from a depressed skull fracture on her right temporal bone. Heusmann had numerous other lacerations and contusions on her head and neck area. One laceration extended to Heusmann's platysma, the subcutaneous neck muscle.

Also, there was evidence that tended to show that Heusmann was attacked shortly after 2 a.m. but did not receive medical care until after 6 a.m. The evidence, taken in the light most favorable to the State, tends to show that defendant attacked Heusmann, placed her in his trunk and kept her there unconscious, seriously injured and bleeding for four hours. This evidence, in addition to the use of a deadly weapon and the severity of Heusmann's injuries, is sufficient to show the element of an intent to kill. When the evidence is viewed in the light most favorable to the State, the trial court did not err when it denied defendant's motion to dismiss. This assignment of error is overruled.

[4] Defendant contends that his convictions for maiming, assault and kidnapping violated the constitutional prohibition against double jeopardy. Defendant argues that maiming is a lesser-included offense of assault and kidnapping. Defendant also argues that assault is a lesser-included offense of kidnapping. We disagree.

The North Carolina and United States Constitutions both contain provisions stating that a defendant may not be convicted multiple times or given multiple sentences for committing the same act. See U.S. Const. amend. V and XIV; N.C. Const. art. I, § 19. Here, the crimes for which defendant was convicted required the State to prove different elements for each crime. For example, the maiming offense differed from assault with a deadly weapon inflicting serious injury because the State did not have to show that a deadly weapon was used to prove that a maiming occurred. Similarly, the State did not have to prove that Heusmann's ear was severed or partially severed from her head in order to prove assault with a deadly weapon inflicting serious injury. The State offered evidence of lacerations and contusions to support the assault charge. The State was required to show evidence of confinement of the victim for the purpose of facilitating defendant's flight in order to convict defendant for kidnapping. These elements are not related to the elements necessary to prove assault or maiming. Since "each offense contains distinct elements not found in

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the other, defendant was properly convicted of and punished for each offense." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990). Therefore, this assignment of error is overruled.

For the reasons stated, we affirm defendant's convictions for first-degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury. We reverse defendant's conviction for maiming without malice and remand for resentencing.

Affirmed in part; reversed and remanded in part.

Judges McCULLOUGH and STEELMAN concur.

WANDA JEFFERSON HOOKER, EMPLOYEE, PLAINTIFF v. STOKES-REYNOLDS HOSPITAL/NORTH CAROLINA BAPTIST HOSPITAL, INC., EMPLOYER; SELF-INSURED, DEFENDANTS

No. COA02-1361

(Filed 4 November 2003)

1. Workers' Compensation— misrepresentation—medical history

The Industrial Commission did not err in a workers' compensation case by allegedly failing to make a finding about whether plaintiff employee made misrepresentations regarding her medical history during the interview process when applying for a CNA job with defendant hospital, because the evidence supports the Commission's finding that plaintiff disclosed her prior injury before being hired.

2. Workers' Compensation— misrepresentation defense—medical history

Neither the Industrial Commission nor the Court of Appeals has the authority to adopt a misrepresentation defense regarding an employee's medical history if it is not found in the Workers' Compensation Act.

3. Workers' Compensation— continuing temporary total disability—maximum medical improvement

The Industrial Commission's award in a workers' compensation case of continuing temporary total disability is affirmed,

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because: (1) reaching maximum medical improvement does not affect an employee's right to continue to receive temporary disability benefits; and (2) the hearing and deposition evidence, medical records, and stipulated fact six support the Commission's findings that plaintiff was out of work under medical care due to her injury, that she applied for and received unemployment benefits, and that she made reasonable efforts to obtain employment within her restrictions.

Appeal by defendants from Opinion and Award entered 7 May 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 August 2003.

Maynard & Harris, L.L.P., by Celeste M. Harris, for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Clayton M. Custer, Philip J. Mohr and Alison R. Bost, for defendant-appellants.

HUDSON, Judge.

Defendants Stokes-Reynolds Hospital/North Carolina Baptist Hospital appeal from an opinion and award entered 7 May 2002 by the North Carolina Industrial Commission awarding plaintiff continuing total disability compensation, and temporary partial disability compensation, as well as attorney's fees and costs. We affirm.

Background

The following is a summary of the facts found by the Commission. In May 1995, while working as a truck driver for Direct Trucking of Mount Airy, plaintiff injured her ankle and back in a fall from her truck. She initially sought medical care only for her ankle, which was placed in a cast, and later saw an orthopedic spine specialist, on 15 June 1995. The orthopedist prescribed an anti-inflammatory medication, a self-care spine program and return to work. Plaintiff saw the orthopedist one final time on 17 July 1995 when he released her to work. However, because of the injury to her ankle, plaintiff was not able to return to work as a truck driver. Plaintiff settled her worker's compensation claim, and sought training for other work.

Plaintiff completed a certified nursing assistant ("CNA") class at Surry County Community College, and thereafter, in September 1996,

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applied for a job as a CNA with defendants. Plaintiff was interviewed by Karen Lawrence, the acute care unit manager for defendants. When asked about her physical ability to handle the CNA position, plaintiff told Ms. Lawrence about her fall in 1995.

Defendants then hired plaintiff, who worked without incident until 2 December 1998, when she sustained a back injury while helping a co-worker move a patient. Thereafter, plaintiff went to several physicians who ordered various diagnostic tests for her back, and eventually recommended surgery. On 31 August 1999, plaintiff's surgeon released her to return to work with restrictions on lifting, and a permanent impairment rating of 12.5% to her back.

The parties stipulated that plaintiff had been out of work under medical care between 4 December 1998 and 19 February 1999, and from 28 April 1999 through 7 May 2002. Between 20 February 1999 and 29 April 1999, she worked limited hours. Defendants terminated plaintiff from employment at the end of her leave of absence on 11 June 1999. Plaintiff then applied for and received unemployment benefits beginning 22 August 1999. Plaintiff sought compensation from defendants for her disability, and her claims were heard by Deputy Commissioner Kim L. Cramer, who denied the claims. On appeal, the Full Commission reversed the Deputy Commissioner, and awarded plaintiff compensation for on-going total disability (subject to a credit for unemployment benefits) and for a period of temporary partial disability, medical expenses, costs and attorney's fees. Defendants appeal.

Analysis

On appeal defendants make two arguments. First, they contend that plaintiff misrepresented her physical ability when applying for the CNA job, and urge this Court to adopt the defense of misrepresentation as a complete bar to worker's compensation benefits. Defendants also argue that plaintiff failed to prove she was entitled to ongoing benefits. We affirm the award of the Commission.

The Supreme Court has articulated clearly the standard of appellate review in worker's compensation cases. When reviewing a worker's compensation decision, this Court must first consider whether any challenged findings of fact are supported by evidence in the record, and then determine whether those findings support the conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). This Court does not weigh evidence, but rather only determines "whether the record contains any evidence

tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and quotation marks omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). The Commission is the "sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. This means that the Commission's findings are binding if they are supported by any of the evidence, even if the evidence could also have supported a contrary finding. *Id.* at 115, 630 S.E.2d at 552-53. Finally, in making these determinations, this Court must view the evidence in the light most favorable to plaintiff. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

I.

[1] Here, defendants first contend that plaintiff misrepresented her medical history when applying for the CNA job, and argue that the Commission failed to make a finding about whether plaintiff made misrepresentations during the interview process. The findings of the Commission indicate otherwise. Finding of fact 4 states that during the interview process, Karen Lawrence asked plaintiff about any injuries which might prevent her from performing the duties of a CNA, and "[p]laintiff told Ms. Lawrence about plaintiff's fall as a truck driver." By implication, this finding indicates that the Commission found that plaintiff did not misrepresent her history to Ms. Lawrence.

The evidence before the Commission supports this finding. At the hearing, Lawrence and another nurse employed by defendants testified that plaintiff would not have been hired had they known that the truck accident had included a back injury as well as an ankle injury. Plaintiff testified that she told Lawrence about the truck accident and did not mention her back injury because her back was no longer troubling her at that time; Ms. Lawrence asked her about injuries that might limit her ability to perform the job. This evidence supports the Commission's finding that plaintiff disclosed her prior injury before being hired. We do not concern ourselves with whether the evidence might support some other finding, because this Court's "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. The Commission's finding of fact, in turn, adequately support its related conclusions of law.

Although the heading of argument I of defendants' brief refers to assignments of error 1 and 2, which challenge several findings of fact and all of the conclusions of law, they make no argument in the body

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of the brief regarding any of the individual findings of fact. Thus, we deem assignment of error 2 (challenging findings 12, 16, 17, and conclusions 1 through 5) abandoned. *See* N.C.R. App. P. 28(b)(6). Most of defendants' first argument consists of urging this Court to adopt a new rule of law regarding the effect of a plaintiff's misrepresentations in worker's compensation cases.

[2] Because the Commission did not find any misrepresentation on the part of plaintiff, we need not reach the merits of defendants' contention that this Court should adopt a misrepresentation defense in worker's compensation cases. We do note, however, that neither the Industrial Commission nor this Court has the authority to adopt such a defense, if it is not found in the Worker's Compensation Act. Our Supreme Court "has warned against any inclination toward judicial legislation" in the construction of the Worker's Compensation Act. *Johnson v. Southern Indus. Constructors*, 347 N.C. 530, 536, 495 S.E.2d 356, 359 (1998).

II.

[3] Defendants next argue that the Commission's award should be reversed because plaintiff did not prove her entitlement to on-going benefits. Defendants base their assignment of error on an assertion that temporary total disability (TTD) compensation must end once an injured worker reaches maximum medical improvement (MMI). This assertion is an inaccurate reflection of the law.

Our Supreme Court has recently affirmed this Court's holding in *Knight v. Wal-Mart*, 149 N.C. App. 1, 562 S.E.2d 434 (2002), *affirmed*, 357 N.C. 44, 577 S.E.2d 620 (2003), that reaching MMI does not effect an employee's right to continue to receive temporary disability benefits. In *Knight*, we explained that

The primary significance of the concept of MMI . . . is to delineate when "the healing period" ends and the statutory period begins in cases involving an employee who may be entitled to benefits for a physical impairment listed in N.C. Gen. Stat. § 97-31. In other words, MMI represents the first point in time at which the employee may elect, if the employee so chooses, to receive scheduled benefits for a specific physical impairment under N.C. Gen. Stat. § 97-31 (without regard to any loss of wage-earning capacity). MMI does not represent the point in time at which a loss of wage-earning capacity under N.C. Gen. Stat. § 97-29 or § 97-30 automatically converts from "temporary" to "permanent."

Id. at 16, 562 S.E.2d at 445. Although *Knight* had not been affirmed by the Supreme Court when defendants' brief was written, the issue has now been resolved. Thus, defendants' argument, that plaintiff is no longer eligible for TTD benefits simply because she has reached MMI, is without merit.

Defendants also argue that plaintiff is not entitled to any wage loss benefits because she did not make a reasonable effort to obtain other employment. To prove her entitlement to disability benefits, an injured worker must show: an incapacity following her injury to earn the same wages she had earned before the injury in the same employment; an incapacity after the injury to earn the same wages she had earned before her injury in other employment; and a causal connection between her injury and her incapacity to earn. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

The plaintiff bears the burden of proving her incapacity to earn the same wages as she received before the injury. This burden can be met in one of four ways:

- (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of 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) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted). In the instant case, plaintiff relies on the second of these factors to support her claim for disability benefits. Defendants contend that plaintiff failed to prove that she had made reasonable efforts to obtain employment, and that the Commission failed to make a finding about plaintiff's effort to find work.

Stipulated fact 6 states:

6. Plaintiff has been out of work under medical care during the dates of December 4, 1998-February 19, 1999 and April 28, 1999

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through the present. Between February 20, 1999 and April 29, 1999, she worked limited hours.

In addition, findings 11 and 12 by the Commission indicate that her orthopedist "wrote plaintiff out of work" in April 1999, and released her to return to work with restrictions. In addition, finding 17 states that "[f]ollowing her release to return to work by Dr. Hayes, plaintiff applied for and received unemployment benefits beginning 22 August 1999." These findings are supported by the testimony from plaintiff and Dr. Hayes and, in turn, fully support the Commission's conclusions 2 and 3:

2. Plaintiff is entitled to compensation for her total disability at the rate of \$161.57 per week for the period from 3 December 1998 up through and including 18 February 1999. On 19 February 1999 plaintiff returned to work with defendant-employer on a part-time basis. Subject to a credit for the unemployment benefits paid plaintiff, plaintiff is again entitled to compensation for her total disability from 27 April 1999 and continuing until plaintiff returns to work or further order of the Commission. N.C. Gen. Stat. §97-29.
3. For the period from 19 February 1999 up through and including 26 April 1999, plaintiff was temporarily partially disabled as a result of the compensable specific traumatic incident and is entitled to receive two-thirds of the difference between her pre-injury wage and the wages plaintiff earned working part-time. N.C. Gen. Stat. §97-30.

Further, to be eligible for unemployment benefits, one must conduct at least two in-person contacts with different employers on different days each week. North Carolina Employment Security Commission Regulation § 10.25. Plaintiff testified during the hearing that she complied with these requirements to receive unemployment benefits, and described her additional efforts seeking employment. The hearing and deposition evidence, medical records and stipulated fact 6 support the Commission's findings that plaintiff was out of work under medical care due to her injury, and that she applied for and received unemployment benefits, and made reasonable efforts to obtain employment within her restrictions. These findings, in turn, support the Commission's conclusion that she continues to be entitled to receive TTD benefits. Thus, we reject defendant's arguments.

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CONCLUSION

For the reasons set forth above, we affirm the decision of the Industrial Commission.

Affirmed.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. JERMAINE JACKSON AND DANIEL LAMAR BROWN

No. COA02-1432

(Filed 4 November 2003)

1. Robbery— sufficiency of evidence—discrepancies in evidence

A motion to dismiss an armed robbery charge was correctly denied. Discrepancies in the testimony of a restaurant worker who may have participated in the robbery, his role in the crime, and conflicting testimony by another worker go to credibility and are for the jury to decide.

2. Evidence— robbery victim's feelings—relevant to threat to her life

The admission of a robbery victim's testimony about how she felt when a gun was put to her head was not plain error. She testified that she was intimidated and in fear, which was relevant to whether her life was threatened.

3. Criminal Law— instructions—impeachment of witness with unrelated crimes—testimony on direct examination

An armed robbery defendant was not entitled to a limiting instruction on impeachment with proof of unrelated crimes after he testified on direct examination about his prior crimes and convictions. He was not impeached.

Appeal by defendants from judgments entered 3 July 2002 by Judge Thomas D. Haigwood in Martin County Superior Court. Heard in the Court of Appeals 7 October 2003.

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Attorney General Roy Cooper, by Special Deputy Attorney General George W. Boylan, for the State.

Thomas R. Sallenger, for defendant-appellant Jermaine Jackson.

The Smallwood Law Firm, by Teresa L. Smallwood, for defendant-appellant Daniel Lamar Brown.

TYSON, Judge.

Jermaine Jackson and Daniel Lamar Brown (“defendants”) appeal from a jury verdict finding defendants guilty of robbery with a dangerous weapon. We find no error.

I. Facts

On 11 May 2001, two masked men robbed a Kentucky Fried Chicken (“KFC”) in Williamston, North Carolina. Around 10:20 p.m., employees Prentes Manning (“Manning”), David Ritter (“Ritter”), and Marie Price (“Price”), the store manager, remained in the KFC. Price was working in her office at the back of the store and heard tapping on the drive-thru window. She got up to check the building. As she rounded the corner, she saw two black men standing by the window wearing dark clothes and holding guns. One of the men grabbed Price by the hair, yelled “[d]on’t look bitch,” and turned her around. The man demanded all the money in the store and held a gun to the back of her head. Price was taken into her office and was told to open the store safe. The other man yelled at Manning to get down onto the floor. Price gave one of the men the money by handing it over her shoulder and was told by him to lay on the floor. She removed between \$3,200.00 and \$3,500.00 from the safe. Price heard the door slam as the two men left the building. She got up, went to check on Manning, and attempted to call the police, but the telephone had been snatched from the wall. Price and Manning later reported the incident to the Martin County Sheriff’s Department.

Price testified the two robbers fled from the store on bicycles. She was unable to positively identify either of the robbers and could not identify which robber had put the gun to her head. Price testified that Ritter and Manning quit their jobs at the KFC between ten to fifteen days after the robbery.

Manning testified that he had known defendant Brown all of his life and defendant Jackson for seven or eight years. Manning also tes-

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tified that two or three weeks before the robbery, he had discussed with defendants the possibility of robbing the KFC. The trio also talked the day before the robbery. During the day of the robbery, defendants telephoned Manning and asked him if he would leave the back door unlocked. Manning stated that he was not sure and told them to call Ritter. Manning testified that Ritter did receive a call but that he did not know who it was from.

Manning testified that during the evening of the robbery, he and Ritter were standing outside smoking a cigarette when Price told them to return inside and finish their work. Manning left the rear door unlocked as he reentered the KFC. After Ritter finished his work, Manning let him out the front door and locked it back. The back door remained unlocked. Manning testified he heard Price scream shortly thereafter, went toward her, and saw that she was being held at gunpoint. He testified that defendant Jackson was wearing a mask and defendant Brown was wearing a scarf. One of the defendants put a gun in Manning's face and told him to lay on the floor, apparently to make him a "victim" of the robbery. Defendant Brown kicked Manning two or three times.

Detective Mercer, at the State Bureau of Investigation Office in Greenville, North Carolina, interviewed Manning. Manning told Detective Mercer that defendants had robbed Price and that he recognized their voices and clothing. Manning also agreed to have and record a conversation with defendant Brown. During the conversation, defendant Brown admitted to buying "weed" with the \$1,500.00 taken from the KFC. The transcript of this conversation was read to the jury.

Somers Griffin ("Griffin") appeared on behalf of defendant Brown and testified that she had known Manning all of her life. Griffin testified that Manning told her on the night of the robbery that Wayne Reid and Terry Manning had robbed the KFC. Terris Reddick also testified for defendant Brown and stated that she had picked him up at 9:40 p.m., on the night of the robbery, and they remained at their home all night. Defendant Jackson testified on his own behalf that he and Donnell Bonds had gone to a club in Greenville that night, arrived at 11:30 p.m., and stayed until 4:30 or 5:00 a.m.

The jury convicted both defendants of robbery with a dangerous weapon. Defendants appeal.

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II. Issues

Both Defendants assign and argue as error the trial court's denial of their motions to dismiss the charges of robbery with a dangerous weapon.

All other assignments of error were not argued in defendants' briefs and are waived. N.C.R. App. P. 28(b)(6) (2002).

Defendant Jackson additionally assigns and argues as error: (1) Price's testimony concerning how she felt when the gun was placed to her head and (2) the trial court's failure to grant his requested jury instruction regarding impeachment of a defendant by proof of unrelated crimes.

III. Motion to Dismiss

[1] Defendants contend that the trial court erred in denying their motions to dismiss the charges of robbery with a dangerous weapon and argue the evidence was insufficient to convince a rational trier of fact of defendants' guilt beyond a reasonable doubt.

Our Supreme Court has held that in order to withstand a motion to dismiss, the State must present substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). "The familiar test to be applied upon a motion to dismiss is whether there is substantial evidence of all material elements of the offense, considering all the evidence admitted in the light most favorable to the state and with the state entitled to every reasonable inference therefrom." *State v. Jones*, 47 N.C. App. 554, 559, 268 S.E.2d 6, 10 (1980). A defendant's motion to dismiss should be denied if a reasonable inference of a defendant's guilt may be inferred from the evidence. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). "Once the Court decides a reasonable inference of defendant's guilt may be drawn from the evidence, 'it is for the jurors to decide whether the facts satisfy them beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 435 (1997) (quoting *State v. Murphy*, 342 N.C. 813, 819, 467 S.E.2d 428, 432 (1996)).

The essential elements of robbery with a dangerous weapon are: (1) an unlawful taking of personal property from the person of another; (2) by use of a dangerous weapon; (3) whereby that person's

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life is threatened. *State v. Barden*, 356 N.C. 316, 352-53, 572 S.E.2d 108, 131-32 (2002). Price testified that two black males held her at gunpoint and forced her to give them the money from the KFC where she worked as store manager. State's witness Manning, who was working at the KFC at the time of the robbery, testified that he and defendants had discussed robbing the KFC on numerous occasions including the day of the robbery. Manning also identified defendants as the robbers by the clothing they wore and their voices. Manning recorded a post-robbery conversation with defendant Brown during which defendant Brown admitted buying "weed" with the money from the robbery. Manning made an identification of the voices on the tape at trial.

Defendants argue that because State witness Manning participated in the robbery, his identification of the defendants is suspect and not credible. Defendants further contend that defense witness Griffin's testimony disclosed that Manning's "boys" had robbed the KFC and named Wayne Reid and Terry Manning as the perpetrators of the crime.

Our Supreme Court has held that the credibility of a witness's testimony and the weight to be given that testimony is a matter for the jury, not for the court, to decide. *State v. Upright*, 72 N.C. 94, 100, 323 S.E.2d 479, 484 (1984); *see also State v. Miller*, 270 N.C. 726, 730, 154 S.E.2d 902, 904 (1967). When considering a motion to dismiss, the trial court is concerned "only with the sufficiency of the evidence to carry the case to the jury; it is not concerned with the weight of the evidence." *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983). The discrepancies in Manning's testimony, his role in the crime, and the conflicting testimony given by defense witness Griffin all go to Manning's credibility. The State presented sufficient evidence for the jury to determine which witnesses were credible. The jury has the ultimate responsibility of determining the credibility and the weight they give to Manning's testimony. This assignment of error is overruled as to both defendants.

IV. Victim's State of Mind

[2] Defendant Jackson argues that the trial court erred in allowing Price to testify to how she felt when the gun was placed to her head. Defendant Jackson asserts that he was prejudiced because Price's statements were irrelevant and their sole purpose was to inflame the jurors' emotions against him.

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N.C.R. App. P. 10(b)(1) states that a party must object during the trial to preserve a question for appeal. Defendant Jackson failed to object to the introduction of this evidence and asks this Court to examine the introduction of this evidence for plain error. Plain error is error “so fundamental as to amount to a miscarriage of justice” *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987).

Evidence is relevant if it tends to make the existence of any fact 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). The test of relevancy is whether the proffered evidence tends to shed any light on the subject of the inquiry or has the sole effect of exciting prejudice or sympathy. *State v. Braxton*, 294 N.C. 446, 462, 242 S.E.2d 769, 779 (1978).

Defendant Jackson was charged with robbery with a dangerous weapon. Our Supreme Court has held, in robbery with a dangerous weapon “force or intimidation occasioned by the use of firearms, is the main element of the offense.” *State v. Mull*, 224 N.C. 574, 576, 31 S.E.2d 764, 765 (1944). Price testified: (1) that she considered the gun held to her head to be “mental rape,” (2) that all of her “opinions and rights” were taken from her, and (3) that she was very afraid for her and Manning’s lives while the gun was placed to her head. Her testimony was relevant to show that her life had been threatened and endangered with a firearm. She testified that she was in fear and intimidated proving the “main element of the offense” of robbery with a dangerous weapon. *Id.* Defendant Jackson’s second assignment of error is overruled.

V. Instruction Regarding Impeachment of Defendant by Proof of Unrelated Crimes

[3] Defendant Jackson argues that the trial court erred by failing to instruct the jury regarding N.C.P.I. Crim. 105.40, “Impeachment of the Defendant as a Witness by Proof of Unrelated Crime.” This instruction reads:

When evidence has been received that at an earlier time the defendant was convicted of (a) criminal charge(s), you may consider this evidence for one purpose only. If, considering the nature of the crime(s), you believe that this bears on truthfulness, then you may consider it, together with all other facts and circumstances bearing upon the defendant’s truthfulness, in decid-

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ing whether you will believe or disbelieve his testimony at this trial. It is not evidence of the defendant's guilt in this case. You may not convict him on the present charge because of something he may have done in the past.

N.C.P.I. Crim. 105.40 (March, 1986).

The trial court must give a requested jury instruction when the request is a correct statement of law and is supported by the evidence in the case. *State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976).

The record shows that defendant Jackson took the stand and voluntarily testified upon direct examination concerning his prior crimes and convictions. Defendant Jackson's counsel asked the questions that elicited his responses. Defendant Jackson was not impeached on these prior crimes and convictions. He voluntarily admitted them, presumably to remove the sting before the State impeached him.

This Court, in *State v. Gardner*, explained that a defendant was not entitled to a limiting instruction where he offered this type of evidence. This Court held:

The record on appeal reveals that defendant testified on direct examination that he had been convicted of common law robbery . . . Since evidence of this prior crime was elicited as part of defendant's defense . . . the trial judge was not required to give a limiting instruction. A limiting instruction is required only when evidence of a prior conviction is elicited on cross-examination of a defendant and the defendant requests the instruction. In addition, evidence regarding prior convictions of a defendant is merely a subordinate feature of the case and, absent a request, the court is not required to give limiting instructions.

State v. Gardner, 68 N.C. App. 515, 521-22, 316 S.E.2d 131, 134 (1984), *aff'd*, 315 N.C. 444, 340 S.E.2d 701 (1986) (citing *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978) and *State v. Witherspoon*, 5 N.C. App. 268, 168 S.E.2d 243 (1969)) (internal citations omitted).

Having initially offered this testimony on direct examination, defendant was not entitled to a special instruction limiting consideration of such testimony to his "truthfulness." N.C. Gen. Stat. § 8C-1, Rule 609 (2001). Defendant Jackson's third assignment of error is overruled.

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VI. Conclusion

Defendants fail to show that the trial court erred in denying their motions to dismiss the charges of robbery with a dangerous weapon. Defendant Jackson fails to show that the trial court committed plain error by allowing Price to testify regarding how she felt when the gun was placed to her head and that the trial court erred in denying defendant Jackson's request for a special jury instruction.

No error.

Judges WYNN and LEVINSON concur.

GARLAND JOYNER, EMPLOYEE-PLAINTIFF v. MABREY SMITH MOTOR COMPANY,
EMPLOYER-DEFENDANT AND NON-INSURED, CARRIER-DEFENDANT

No. COA02-1733

(Filed 4 November 2003)

1. Workers' Compensation— sanctions—striking defenses—failure to answer interrogatories

The Industrial Commission did not abuse its discretion in a workers' compensation case by sanctioning defendant employer and striking its defenses based on a failure to comply with an order compelling discovery, because: (1) defendant was warned for a period of three and a half months that it would be subject to sanctions expressly approved under Rule 37 as authorized by Rules 605 and 802 of the Workers' Compensation Rules for its continued noncompliance with the deputy commissioner's order; and (2) defendant merely presents on appeal the defenses expressly barred by the Commission as a result of the sanctions.

2. Workers' Compensation— total disability benefits—findings of fact—conclusions of law

The Industrial Commission's findings of fact and conclusions of law concerning plaintiff's entitlement to total disability benefits from 19 September 2000 in a workers' compensation case were supported by competent evidence, because plaintiff's testimony that his efforts to obtain subsequent employment were thwarted by his medical restrictions resulting from the accident

was supported by the medical records submitted to the Commission.

3. Workers' Compensation— disability—medical expenses

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was entitled to the payment of medical expenses incurred for the treatment of the injuries sustained or further treatment necessary to cure, give relief, or lessen plaintiff's period of disability, because: (1) defendant violated the rules of appellate procedure by failing to include any citations of authority upon which it relies as required by N.C. R. App. P. 28(b)(6); (2) defendant cannot rely on defenses that have previously been found unavailable; and (3) both the medical records and plaintiff's testimony are fully competent to support the Commission's findings that plaintiff suffered a compensable work-related injury by accident, and that finding supports the conclusion of law that plaintiff is entitled to workers' compensation benefits.

4. Appeal and Error— preservation of issues—failure to present argument

Although defendant contends the Industrial Commission erred in a workers' compensation case by its finding of fact that defendant engaged in stubborn and unfounded litigiousness and by its conclusions of law requiring defendant to pay plaintiff's attorney fees and the costs of the action, these assignments of error are abandoned because defendant failed to bring forward any argument for these assignments of error.

Appeal by defendant from an opinion and award entered 16 August 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 October 2003.

Brumbaugh, Mu & King, P.A., by Kenneth W. King, Jr., for plaintiff-appellee.

Bailey & Way, by John E. Way, Jr., for defendant-appellant.

CALABRIA, Judge.

Mabrey Smith Motor Company ("defendant") appeals an opinion and award issued by the North Carolina Industrial Commission ("Commission") awarding Garland Joyner ("plaintiff") total disability benefits, medical expenses, and attorneys' fees for plain-

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tiff's work-related injuries resulting from a motor vehicle accident. We affirm.

On 6 July 1998, plaintiff was employed as a mechanic for defendant. While plaintiff was test-driving a vehicle he repaired, he was struck from behind by another vehicle. Plaintiff sought medical treatment from Carteret General Hospital and was diagnosed with cervical strain. Plaintiff's condition grew worse. He was placed on medical restrictions by his treating physician and missed work periodically due to dizziness, blurred vision, and headaches associated with the accident. On 18 September 2000, plaintiff's wife called defendant and reported plaintiff's inability to work that day because of a headache. The following day, defendant informed plaintiff he was terminated for failing to follow personnel policy by having his wife call, rather than himself, to report that he was ill and unable to work.

On 9 May 2000, plaintiff filed a claim for workers' compensation benefits for injuries "caused [on 6 July 1998] by being rear ended . . ." On 12 July 2000, plaintiff reported to the Commission that the parties failed to reach an agreement regarding compensation because plaintiff was "unable to locate workers' compensation insurance, and employer has neither accepted or denied [the] claim." Plaintiff requested that his claim be assigned for hearing.

On 18 July 2000, plaintiff sent defendant a set of interrogatories. Two months later, after defendant failed to timely respond to the interrogatories, plaintiff wrote to defendant and requested that defendant forward the answers "as soon as possible." Defendant again failed to respond, and the hearing scheduled for 3 October 2000 was converted into a pretrial conference. At the pretrial conference, the parties stipulated to the following: (1) an employer-employee relationship existed between defendant and plaintiff; (2) defendant was non-insured; (3) plaintiff's average weekly wage was \$410.00; and (4) the date of injury was 6 July 1998. An order of continuance, granted by Deputy Commissioner Morgan S. Chapman, mandated that defendant respond to plaintiff's interrogatories "within two weeks or be subject to sanctions."

On 1 November 2000, plaintiff wrote to defendant requesting answers to plaintiff's interrogatories "as soon as possible." When defendant failed to respond to the sought interrogatories, plaintiff wrote defendant again on 12 December 2000 to remind it that the order of continuance required defendant to answer the interrogatories within two weeks. Plaintiff warned defendant that, if its answers

were not received by 19 December 2000, plaintiff would request sanctions. Defendant never responded.

At a hearing held 6 February 2001, Deputy Commissioner George T. Glenn, II, imposed sanctions against defendant “for defendant’s failure to comply with Deputy Commissioner Morgan Chapman’s Order of October 11, 2000” by “striking any defenses that the defendant may have to the claim of plaintiff.” Accordingly, Deputy Commissioner Glenn entered an opinion and award in favor of plaintiff for a work-related injury sustained by plaintiff while in the course and scope of his employment. The hearing was limited to the issue of the workers’ compensation benefits to which plaintiff was entitled as a result of his injuries. The deputy commissioner awarded plaintiff total disability benefits at the rate of \$532.00 per week beginning 19 September 2000 and continuing until plaintiff returned to work “earning the same or greater wages as he was earning at the time of his injury” or the Commission ordered otherwise. Medical expenses, attorneys’ fees and costs were also awarded. The Full Commission affirmed the opinion and award of the deputy commissioner, and defendant appeals. On appeal, defendant contends (I) the Commission should not have sanctioned defendant by striking its defenses; (II) the Commission’s findings of fact and conclusions of law concerning plaintiff’s entitlement to total disability benefits from 19 September 2000 are not supported by competent evidence; and (III) there was insufficient evidence that plaintiff is entitled to the payment of medical expenses.

I. Sanctions

[1] North Carolina General Statute § 97-80(a) (2001) “gives the Commission the power to make rules consistent with the Workers’ Compensation Act for carrying out its provisions.” *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 15-16, 510 S.E.2d 388, 392 (1999). Rule 605(1) of the Workers’ Compensation Rules of the North Carolina Industrial Commission provides that parties may obtain discovery by the use of interrogatories, and where there is a “failure to answer an interrogatory, the party submitting the interrogatories may move the Industrial Commission for an order compelling answer.” Workers’ Comp. R. of N.C. Indus. Comm’n 605(1), 2002 Ann. R. (N.C.) 765. The rule goes on to expressly provide for sanctions for “failure to comply with a Commission order compelling discovery.” Workers’ Comp. R. of N.C. Indus. Comm’n 605(5), 2002 Ann. R. (N.C.) 766.

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Rule 802 of the Workers' Compensation Rules of the North Carolina Industrial Commission provides that "failure to comply" with the Workers' Compensation Rules "may subject the violator to any of the sanctions outlined in Rule 37 of the North Carolina Rules of Civil Procedure . . . against the party or his counsel whose conduct necessitates the order."

Hauser v. Advanced Plastiform, Inc., 133 N.C. App. 378, 387, 514 S.E.2d 545, 551 (1999). Rule 37 expressly allows a court to sanction a party failing to comply with an order by "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)b (2001). "The administration of [discovery] rules, in particular the imposition of sanctions, is within the broad discretion of the trial court. The trial court's decision regarding sanctions will only be overturned on appeal upon showing an abuse of that discretion." *Williams v. N.C. Dep't of Correction*, 120 N.C. App. 356, 359, 462 S.E.2d 545, 547 (1995) (citations omitted).

In the instant case, defendant asserts the hearing officer should not have stricken its defenses. Defendant failed to answer plaintiff's interrogatories sent to it on 18 July 2000 within the appropriate time period and failed to request any extension of time. After defendant was ordered by the Commission to respond to plaintiff's interrogatories within two weeks of the pretrial conference order filed 11 October 2000, defendant again failed to answer plaintiff's interrogatories or request any extension of time. Defendant further chose to ignore plaintiff's letters reminding defendant of its obligation to comply with the order by answering the interrogatories and ultimately warning defendant of plaintiff's impending intent to seek sanctions. Over three and a half months after defendant was warned it would be subject to sanctions, the deputy commissioner imposed sanctions expressly approved under Rule 37 as authorized by Rules 605 and 802 of the Workers' Compensation Rules. Defendant cannot complain when the Commission fulfills its warning and imposes sanctions for continuing noncompliance with the deputy commissioner's order spanning a period of almost three and a half months. We find no abuse of discretion.

Moreover, we note defendant's arguments to this Court fail to assert the Commission abused its discretion in imposing sanctions. Rather, defendant merely presents on appeal the defenses expressly barred by the Commission as a result of the sanctions. These defenses include that the work on the vehicle cannot be considered

part of the scope of his work, that plaintiff's testimony was contradictory, and that plaintiff had not provided medical records to defendant. Having concluded the Commission did not abuse its discretion by striking these defenses, we do not entertain them on appeal.

II. Onset of Disability

[2] Defendant next asserts the conclusions of law made by the Commission regarding the onset of plaintiff's disability are not supported by the findings of fact, and the findings of fact are not supported by the evidence presented at the hearing. Specifically, defendant argues the Commission's conclusion, that plaintiff was entitled to total disability benefits from the date plaintiff was terminated, was not supported by findings of fact or competent evidence because plaintiff came to work the day he was terminated; therefore, defendant argues, plaintiff could not have been unable to work. Defendant additionally argues, in the alternative, that plaintiff was fired only because he violated personnel policy by failing to personally call in sick. We examine these contentions together.

The Commission found as fact that plaintiff had not worked since the date of his termination "as a result of problems associated with his injury by [the] accident on July 6, 1998" and concluded plaintiff was entitled to total disability benefits from that date. We are not persuaded that plaintiff is barred from benefits because defendant alleges plaintiff reported to work the day he was fired, that he disregarded the existing policy requiring employees to personally call in sick, and that such misconduct or fault could have been a constructive refusal to work. To determine entitlement to benefits following an employee's termination in situations analogous to the facts presented by the case at bar, we examine the evidence of the cause of the employee's diminution or loss of wages.

[T]he test is whether the employee's loss of, or diminution in, wages is attributable to the wrongful act resulting in loss of employment, in which case benefits will be barred, or whether such loss or diminution in earning capacity is due to the employee's work-related disability, in which case the employee will be entitled to benefits for such disability.

Seagraves v. Austin Co. of Greensboro, 123 N.C. App. 228, 234, 472 S.E.2d 397, 401 (1996). In the instant case, plaintiff expressly testified that his efforts to obtain subsequent employment were thwarted by

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his medical restrictions resulting from the accident and no one would consider him because of those restrictions. Although further competent evidence is not required, *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), we note plaintiff's testimony is fully supported by the medical records submitted to the Commission. Whether we would have reached a different result on the evidence is irrelevant, and more importantly, beyond the scope of our review. *Id.* Under our holding in *Seagraves*, we find there was competent evidence to support the findings and conclusions of the Commission.

III. Medical Expenses

[3] Finally, defendant argues there was insufficient evidence to find plaintiff is entitled to the payment of medical expenses incurred for the treatment of the injuries sustained or further treatment necessary to cure, give relief, or lessen plaintiff's period of disability. This argument fails for multiple reasons. First, defendant violated our rules of appellate procedure by failing to include any citations of authority upon which it relies. N.C. R. App. P. 28(b)(6) (2003). Second, we need not revisit defendant's recapitulation of defenses previously considered and found unavailable. Third, both the medical records and plaintiff's testimony are fully competent to support the Commission's findings that plaintiff suffered a compensable work-related injury by accident, and that finding supports the conclusion of law that plaintiff is entitled to workers' compensation benefits.

[4] Defendant has brought forward no argument for its assignments of error concerning the Commission's findings of fact that it "engaged in stubborn and unfounded litigiousness during the course of defending this claim" or the Commission's conclusions of law requiring defendant to pay plaintiff's attorneys' fees and the costs of the action. We deem these assignments of error abandoned. N.C. R. App. P. 28(b)(6) (2003). The opinion and award of the Commission is affirmed.

Affirmed.

Judges McGEE and HUNTER concur.

WILLIAM BREWSTER CO. v. TOWN OF HUNTERSVILLE

[161 N.C. App. 132 (2003)]

WILLIAM BREWSTER COMPANY, INC., PETITIONER V. THE TOWN OF HUNTERSVILLE, THE TOWN OF HUNTERSVILLE BOARD OF COMMISSIONERS; THE HONORABLE KIM PHILLIPS, MAYOR OF THE TOWN OF HUNTERSVILLE, IN HER OFFICIAL CAPACITY; AND JILL SWAIN, TIM BRESLIN, SARAH MCAULAY, BRIAN SISSON AND JEFF PUGLIESE, MEMBERS OF THE TOWN OF HUNTERSVILLE BOARD OF COMMISSIONERS, IN THEIR OFFICIAL CAPACITIES, RESPONDENTS

No. COA02-1264

(Filed 4 November 2003)

Zoning— sketch plan—compliance with zoning and subdivision ordinances

The trial court erred by determining that respondent town board's decision to deny petitioner's sketch plan proposing 145 single-family detached houses constructed on the pertinent property was supported by competent, material, and substantial evidence and thus the trial court's decision was arbitrary and capricious, because: (1) plaintiff presented competent, material, and substantial evidence that it met the requirements of the pertinent zoning and subdivision ordinances, thus establishing a *prima facie* case of entitlement to approval; and (2) the town board did not present substantial evidence *contra*.

Appeal by petitioner from judgment entered 28 June 2002 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 August 2003.

Kennedy Covington Lobdell & Hickman, L.L.P., by John H. Carmichael, for petitioner-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Anthony Fox, and Parham, Helms, Harris, Blythe & Morton, by Robert B. Blythe, for respondents-appellees.

MARTIN, Judge.

On 16 July 2001, the William Brewster Company, Inc. (hereinafter "Brewster") submitted to the Town of Huntersville (hereinafter "Huntersville") an application and subdivision sketch plan for approval of a subdivision, a 58.51 acre tract of land, located in Mecklenburg County. The property, to be known as "Riverdale," was zoned as an Open Space District.

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The sketch plan proposed 145 single-family detached houses constructed on the property at a gross density of 2.48 houses per acre. Although the planning director noted that he would prefer to see a lower density for the property, he nonetheless recommended approval since the sketch plan met the technical requirements of the Subdivision Ordinance.

On 18 December 2001, the Town Planning Board met to hear the recommendation of the Planning Director and discuss the proposed development. The Board expressed concern that the proposed development, in which the lot sizes were approximately 6,000 square feet, was not consistent with the surrounding development of Cashion Woods, a new subdivision in the preliminary plat stage of development with 20,000 square foot lots. In addition, the Board questioned whether the rural open space provided was consistent with the provisions of the Zoning Ordinance. The Planning Board voted seven to one to recommend denial of the sketch plan because the proposed area did not conform with neighboring development and because the proposed area was not consistent with the intent of the Open Space zoning district. In addition, the entrance to the proposed subdivision was located on Beatties Ford Road, which already had traffic capacity problems and water quality issues.

The Town Board met on 22 January 2002 and heard extensive testimony regarding the proposed sketch plan. The Planning Director informed the Town Board that the Planning Board had recommended denial of the sketch plan. He explained that although the subdivision complied with the density standards under the Zoning Ordinance, he preferred a lower density in light of the surrounding developments. Because changes had been made to the sketch plan since the 18 December 2001 meeting of the Planning Board, the Town Board unanimously agreed to defer the decision until the 18 February 2002 meeting.

At the 18 February 2002 meeting, after hearing testimony, the Town Board unanimously voted to deny approval of the sketch plan. The findings of fact upon which denial was based included:

- (1) The Zoning Ordinance did not state that the Town Board of Commissioners must approve a proposed subdivision sketch plan;
- (2) The property did not comply with the requirements of the Huntersville Subdivision Ordinance, Sections 6.200.1, Consistency and 6.200.2, Conformity;

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(3) "There are no adopted public plans and/or policies within more than 1.2 miles of the proposed Riverdale subdivision" where 90 percent of the lots are as narrow as 61 feet.

(4) The Riverdale subdivision does not comply with the Huntersville Zoning Ordinance, Item 3.2.1, which requires a minimum lot size of 20,000 square feet and a minimum lot width of 90 feet.

(5) The subdivision sketch plan overpopulated and violated the historical and rural character of the Beatties Ford Road area.

On 4 March 2002, the Town Board voted to affirm the denial of the Riverdale subdivision, excluding the violation of Item 3.2.1 of the Zoning Ordinance as support for denial.

On 15 March 2002 Brewster petitioned the Mecklenburg County Superior Court for writs of certiorari and mandamus alleging, *inter alia*, that the Town Board's decision to deny the application was not supported by competent, material and substantial evidence, that the decision was arbitrary and capricious and that it was erroneous. After a hearing, the superior court entered an order in which it determined that the Town Board's decision was supported by competent, material and substantial evidence in the whole record, was not arbitrary and capricious and was without error of law. Brewster appeals.

Petitioner first alleges the trial court erred in determining that the Town Board's decision to deny the sketch plan was supported by competent, material and substantial evidence and was not arbitrary and capricious. We agree.

In reviewing a superior court order entered upon review of a zoning decision by a municipality, the appellate court must determine "not whether the evidence before the superior court supported that court's order[,] but whether the evidence before the Town Council supported the Council's action." *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, 80 N.C. App. 438, 440, 342 S.E.2d 545, 547 (1986). When a petitioner alleges that the decision was not supported by substantial evidence or was arbitrary and capricious, the reviewing court applies the whole record test. *Tate Terrace Realty Investors v. Currituck County*, 127 N.C. App. 212, 218, 488 S.E.2d 845, 849 (1997). The court must examine all competent evidence to determine if the record supports the board's findings and conclusions. *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 26, 539 S.E.2d 18, 22

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(2000). “[A] decision may be reversed as arbitrary and capricious only where the petitioner establishes that the decision was whimsical, made patently in bad faith, indicates a lack of fair and careful consideration or ‘fail[s] to indicate any course of reasoning and the exercise of judgment’” *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjustment*, 132 N.C. App. 465, 468-69, 513 S.E.2d 70, 73 (1999) (citation omitted).

In its order, the superior court recited that it had used the whole record test to determine that the findings of fact and the decision made by the Town Board are supported by competent, material and substantial evidence. Thus, the trial court exercised the proper standard of review.

The Huntersville Subdivision Ordinance, Section 3.300, states: “[T]he Town Board may approve the request, deny the request, or approve the request with conditions relating to the intent and standards of this ordinance.” Further, nothing in the Subdivision Ordinance requires the Town Board to approve a plan recommended for approval by the Planning Director. Therefore, the Town Board had discretion to deny the application if conditions of either the Subdivision Ordinance or the Zoning Ordinance were not met.

Petitioner claims that by producing competent, material and substantial evidence of the requirements of the Zoning and Subdivision Ordinances, they have established a *prima facie* case of entitlement and thus, the application should be approved as a matter of right. *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). On the other hand, an application may be denied if there are “findings contra which are supported by competent, material, and substantial evidence appearing in the record” *Id.* “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977).

Petitioner met the technical requirements of the Open Space District as required by the Huntersville Zoning Ordinance, Section 3.2.1, as follows:

- (1) There was frontage on a public street for all lots,
- (2) The proposed density of 2.48 dwelling units per acre was less than the maximum density requirement of 2.5 dwelling units per acre, and

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- (3) The subdivision exceeded the qualified open space requirement of 15%.

In addition, the open space district did not require a minimum lot size and the subdivision complied with all Surface Water Improvement and Management (S.W.I.M) stream buffers and watershed requirements. However, Section 3.2.1(d)(8) of the Zoning Ordinance required all major subdivisions to meet the requirements of the Huntersville Subdivision Ordinance.

In the 18 February 2002 meeting, the Town Board concluded Riverdale did not comply with the consistency and conformity requirements of the Huntersville Subdivision Ordinance. Section 6.200.1 requires consistency of the proposed subdivision with the most recently adopted public plans and policies for the area. Public plans and policies are final planning documents on file in the offices of the Town of Huntersville. In its findings of fact, the Town Council determined that there were no adopted public plans or policies within 1.2 miles of the Riverdale subdivision. Although the lot sizes were much smaller and the proposed density was higher than in the surrounding areas, without adopted public plans and policies for these areas, denial of the subdivision for lack of consistency was not based on competent, material and substantial evidence.

Petitioner further asserts that it met the requirements for conformity. Section 6.200.2 of the Subdivision Ordinance, requires that “[i]n areas with established development, new subdivisions should be planned to protect and enhance the stability, environment, health and character of neighboring areas.” The findings of fact determined that Riverdale, with lot sizes much smaller than the 10,000 square foot lots in the Beatties Ford Road area, did not conform with the established area. However, most of the discussion in the town board meetings centered on conformity with Cashion Woods, not Beatties Ford Road. Cashion Woods, a subdivision in the preliminary stages of development, does not meet the requirement for conformity with “established development.” The only specific discussion of lot sizes in the Beatties Ford Road area was during the 22 January 2002 meeting of the Town Board when Frank Jacobus, representing Brewster, noted that of the homes located on Beatties Ford Road nearest to Riverdale, six or seven were mobile homes on older, larger lots, with square footage between 800 and 1,400 square feet. Although relevant, this evidence alone is not adequate to support a conclusion that Riverdale does not conform to the surrounding areas. The findings further found that the Riverdale subdivision “overpopulates and violates the historical and

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rural character of the Beatties Ford Road area." There is no evidence contained in the record to support this conclusion.

Brewster presented competent, material and substantial evidence that they met the requirements of the Zoning and Subdivision Ordinances; thus, they established a *prima facie* case of entitlement to approval. Because the Town Board did not present substantial evidence *contra*, the Town Board's decision to deny the subdivision sketch plan was not supported by competent, material and substantial evidence, *See Clark v. City of Asheboro*, 136 N.C. App. 114, 524 S.E.2d 46 (1999), *Woodhouse v. Bd. of Comm'r's of Town of Nags Head*, 299 N.C. 211, 261 S.E.2d 882 (1980), and was arbitrary and capricious. The decision of the Superior Court must be reversed, and this matter remanded for entry of an order requiring the town to approve petitioner's application.

Reversed.

Judges McCULLOUGH and LEVINSON concur.

CHARLES SEMON, PLAINTIFF v. MARCHETA SEMON, DEFENDANT

No. COA03-45

(Filed 4 November 2003)

1. Arbitration and Mediation; Divorce—equitable distribution—appeal for judicial modification—waiver

Plaintiff waived the right to contend that an equitable distribution arbitration award was imperfect by not applying for judicial modification. N.C.G.S. § 50-55.

2. Arbitration and Mediation; Divorce—equitable distribution—award—grounds for modifying

The grounds for modifying an equitable distribution arbitration award set out in N.C.G.S. § 50-55 were not present where plaintiff did not argue miscalculation or mistake, contend that the arbitrator was ruling on a matter not submitted or that the award could not be corrected without affecting the merits, or argue that the award was imperfect in form.

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3. Arbitration and Mediation; Divorce—equitable distribution—correction modification—statutory factors—not present

Plaintiff did not present any of the three statutory factors for modifying or correcting an equitable distribution arbitration award where he argued that the arbitrator used an incorrect methodology for valuing the marital share of a 401(k) account, that the arbitrator erred by finding that all of the loss in a stock market account was the result of passive market conditions, and that the arbitrator erred in the date chosen for valuing the stock account.

Appeal by plaintiff from order entered 8 October 2002 by Judge William C. Lawton in Wake County District Court. Heard in the Court of Appeals 15 October 2003.

Robert A. Miller, P.A., by Robert A. Miller, for plaintiff-appellant.

Smith Debnam Narron Wyche Saintsing & Myers, L.L.P., by John W. Narron and Cynthia V. McAlister, for defendant-appellee.

TYSON, Judge.

Charles Semon (“plaintiff”) appeals from a consent order entered 8 October 2002 confirming an arbitration award entered 11 September 2002.

I. Background

Plaintiff and Marcheta Semon (“defendant”) were married on 21 December 1985. In 1998, plaintiff’s father died and left him an estate worth several hundred thousand dollars, \$75,000.00 of which was deposited into a Charles Schwab account on 30 December 1998 in both plaintiff’s and defendant’s names. Plaintiff became extremely depressed after the death of his father and attempted suicide in early March 1999. Immediately prior to this suicide attempt, plaintiff attempted to liquidate the funds held in the Charles Schwab account and transfer them to his first cousin, whom he considered a brother. Defendant, after talking to plaintiff’s physician and an attorney, transferred all the funds in the parties’ joint accounts into accounts in her sole name. Defendant also countermanded the liquidation of the funds in the Charles Schwab account and prevented the transfer of the funds to plaintiff’s cousin.

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Several weeks after plaintiff's suicide attempt, plaintiff returned home. Plaintiff was prescribed numerous medications and testified that he remained in a "drugged state" for approximately fifteen months from the time he was released from the hospital until the end of the marriage. Defendant testified that the parties made joint decisions about investing the money plaintiff had received from his father's estate.

On 10 July 2000, plaintiff and defendant separated. Following the separation, all accounts remained in defendant's sole name. Plaintiff requested that defendant return his property but she refused. On 28 December 2000, defendant sold 1,000 shares of WorldCom stock from the Charles Schwab account at \$14.50 per share for a loss of \$38.675 per share. Defendant testified that the sole purpose of this sale was to claim a large capital gains loss on the parties' joint 2000 tax return. Defendant was unaware of the \$3,000.00 limit on capital losses for stock sales. One week later, defendant bought 725 shares of WorldCom stock at \$19.25 per share. Thereafter, defendant conducted no further transactions in the Charles Schwab account.

On 12 April 2001, plaintiff filed his equitable distribution inventory affidavit. Numerous values were listed as unknown on this affidavit on the grounds that defendant had placed all accounts in her sole name and would not provide plaintiff information pertaining to the values. On 19 June 2001, defendant filed her equitable distribution inventory affidavit that included specific values for the items plaintiff listed as "unknown" on his affidavit.

The parties entered into numerous stipulations during a pre-trial conference on 3 June 2002. The parties stipulated that the Chevrolet Silverado truck, listed on Schedule B of the pre-trial order, was worth \$28,000.00 and should be distributed to defendant, but disagreed on its classification. The parties also stipulated that they disagreed regarding the value, classification, and distribution of the Charles Schwab account.

At the arbitration proceeding, the arbitrator found both the Charles Schwab account and the Chevrolet Silverado to be plaintiff's separate property. Plaintiff also offered into evidence all of his account statements with regards to his MCI 401(k) account from the date of separation to the hearing. This evidence showed that: (1) at the date of separation the balance was \$21,106.00; (2) plaintiff made contributions totaling \$16,690.00 after separation; and (3) on the last available statement the total amount was only \$26,120.00, substan-

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tially less than the \$37,797.00 that was in the account after plaintiff's contributions. Plaintiff also produced evidence to show that the investment portion of the Charles Schwab account, placed into defendant's sole name, had drastically declined from \$134,965.00 to \$16,375.00 since the date of separation. Plaintiff also showed that the cash portion of the account had declined from \$20,489.00 to \$6,046.00.

II. Issues

The issues in this appeal are whether the arbitrator erred in: (1) distributing the Chevrolet Silverado truck to plaintiff; (2) utilizing a mathematically incorrect methodology for valuing the marital share of plaintiff's MCI 401(k) account; (3) finding that all the loss in the Charles Schwab account was the result of passive market conditions; and (4) valuing the plaintiff's Charles Schwab account as of the date of division rather than the date of separation.

III. Modification and Correction of an Arbitration Award

[1] N.C. Gen. Stat. § 50-55 (2001) of The Family Law Arbitration Act sets forth the procedures for the modification and correction of an arbitration award:

(a) Upon application made within 90 days after delivery of a copy of an award to an applicant, the court shall modify or correct the award where at least one of the following occurs: (1) There is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them, and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

N.C. Gen. Stat. § 50-55 requires an application to modify or correct an arbitrator's award must be made within ninety days after the delivery of a copy of the award to the applicant. This Court has held that a party who fails to seek judicial modification of an arbitrator's award, pursuant to N.C. Gen. Stat. § 1-567.14, whose provisions are virtually identical to N.C. Gen. Stat. § 50-55, waives their right to contend that the award was imperfect. *Crutchley v. Crutchley*, 53 N.C. App. 732, 738, 281 S.E.2d 744, 747-48 (1981), *rev'd on other grounds*, 306 N.C. 518, 293 S.E.2d 793 (1982).

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Here, plaintiff never applied for judicial modification of the arbitration award pursuant to N.C. Gen. Stat. § 50-55. Plaintiff was the party who successfully moved for the original arbitration award to be confirmed by the court. Plaintiff attempts to appeal to this Court for a modification of that award. Since plaintiff failed to meet the requirements of N.C. Gen. Stat. § 50-55, his right to contend that the award is imperfect under the provisions of this statute is waived and the order of the trial court confirming the award is affirmed. *Id.*

IV. Judicial Review of an Arbitration Award

[2] Presuming this appeal is properly before this Court, we hold that plaintiff failed to establish any of the specific grounds for modifying an award under N.C. Gen. Stat. § 50-55.

The purpose of arbitration is to settle matters in controversy and avoid litigation. It is well established that parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. Ordinarily, an award is not vitiated or rendered subject to impeachment because of a mistake or error of the arbitrators as to the law or facts. The general rule is that errors of law or fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made.

Fashion Exhibitors v. Gunter, 41 N.C. App. 407, 410-11, 255 S.E.2d 414, 417-18 (1979) (internal citations omitted). “[J]udicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute.” *Id.*, (citing 6 C.J.S., Arbitration, § 162, p. 427).

As noted earlier, in order to modify or correct an arbitration award under N.C. Gen. Stat. § 50-55, one of three factors must be shown:

- (1) There is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them, and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

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Our Supreme Court has interpreted the legislative intent of N.C. Gen. Stat. § 1-567.14, whose provisions are virtually identical to N.C. Gen. Stat. § 50-55, in *Cyclone Roofing Co. v. LaFave Co.* and held that:

[O]nly awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators['] exceeding their authority shall be modified or corrected by the reviewing courts. . . . If an arbitrator makes a mistake, either as to law or fact [unless it is an evident mistake in the description of any person, thing or property referred to in the award], it is the misfortune of the party. . . . There is no right of appeal and the Court has no power to revise the decisions of "judges who are of the parties' own choosing."

312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984) (internal citations omitted). The Court explained that:

[a]n award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration instead of ending would tend to increase litigation.

Id. This Court has held that:

[I]n providing that awards could be modified or corrected for "evident miscalculation of figures", we think our legislature had reference only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court. G.S. 1-567.14(a)(1) is not an avenue for litigants to persuade courts to review the evidence and then reach a different result because it might be interpreted differently. Such an interpretation of the statute would completely frustrate the underlying purposes of the arbitration process.

Gunter, 41 N.C. App. at 413, 255 S.E.2d at 419.

Plaintiff argues that the arbitrator erred in distributing the Chevrolet Silverado truck to defendant. However, plaintiff fails to argue that any of the three factors under N.C. Gen. Stat. § 50-55 are present to support a modification or correction of the arbitration award. Plaintiff does not argue that the award was a miscalculation of figures or an evident mistake in the description of the Chevrolet

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Silverado. Plaintiff does not argue that the arbitrator ruled on a matter not submitted to him or that the award could be corrected without affecting the merits of the decision. Further, plaintiff does not argue that the award was imperfect in form. Without any of these factors present, this Court has no authority to modify or correct the award of the arbitrator.

[3] Plaintiff argues in his remaining assignments of error that: (1) the arbitrator utilized a mathematically incorrect methodology for valuing the marital share of plaintiff's MCI 401(k) account, (2) the arbitrator erred in finding that all the loss in value of the Charles Schwab account, titled in the name of defendant, was the result of passive market conditions, and (3) the arbitrator erred in valuing the plaintiff's Charles Schwab account as of the date of the division rather than the date of separation.

Again, plaintiff fails to argue any of the three factors required by N.C. Gen. Stat. § 50-55 are present. Plaintiff fails to argue that the arbitrator's methodology is an "evident miscalculation of figures" that is "patently clear to a reviewing court." *Id.* Plaintiff merely argues that the arbitrator should have used a different methodology in valuing the MCI 401(k) account and Charles Schwab account and determining the amount of loss in the Charles Schwab account. Plaintiff fails to show what formula should have been used by the arbitrator to value the accounts. Plaintiff is unable to determine exactly the correct value of the accounts. This Court, in construing a statute virtually identical to N.C. Gen. Stat. § 50-55(a)(1), stated that N.C. Gen. Stat. § 1-567.14(a)(1) "is not an avenue for litigants to persuade courts to review the evidence and then reach a different result because it might be interpreted differently." *Id.* Plaintiff's assignments of error are overruled.

V. Conclusion

Plaintiff failed to follow the statutory requirements for modifying or correcting an arbitration award pursuant to N.C. Gen. Stat. § 50-55 and has waived his right to contend the award is imperfect. Plaintiff has also failed to show that any of the three factors needed to modify or correct an award under N.C. Gen. Stat. § 50-55 were present. The arbitrator's award as confirmed by the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

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[161 N.C. App. 144 (2003)]

STATE OF NORTH CAROLINA v. DON RAY REYNOLDS

No. COA03-18

(Filed 4 November 2003)

1. Search and Seizure— traffic stop—probable cause

An officer had probable cause to stop a marijuana defendant's car where the officer observed defendant speeding and not using a turn signal when changing lanes.

2. Evidence— traffic stop—marijuana discovered—acquittal of traffic offense—not admissible

A marijuana defendant arrested after a traffic stop was not entitled to present evidence of his acquittals on the traffic violations. The court made specific findings to support its conclusion that the officer had an independent, reasonable, and articulable basis for the traffic stop, and evidence of acquittal is not determinative to finding probable cause for the stop.

3. Criminal Law— entrapment instruction not given—evidence of predisposition

The trial court did not err in a prosecution for possession of marijuana with intent to sell and deliver by not instructing the jury on entrapment. The State presented evidence tending to show that defendant was predisposed to commit the crime in that an informant testified about buying drugs from defendant before becoming an informant.

4. Sentencing— restitution—undercover marijuana purchase

There was no error in requiring a marijuana defendant to pay thirty dollars in restitution for the money used for an earlier marijuana purchase for which he was not charged. The first purchase was part of an ongoing investigation leading to defendant's conviction for the second offense.

5. Sentencing— further active jail time—avoided by fine

There was no error in a marijuana sentence which allowed the defendant to avoid a portion of his active jail time by paying a fine.

Appeal by defendant from judgment entered 17 September 2002 by Judge A. Moses Massey in Rockingham County Superior Court. Heard in the Court of Appeals 15 October 2003.

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Attorney General Roy Cooper, by Special Deputy Attorney General John R. Corne, for the State.

Bryan Gates, for defendant-appellant.

TYSON, Judge.

A jury convicted Don Ray Reynolds (“defendant”) of possession with the intent to sell and deliver marijuana on 17 September 2002.

I. Facts

On 16 September 2001, Reidsville Police Department Detective Cathy Owens (“Detective Owens”) arranged for a confidential informant to purchase marijuana from defendant. The informant had purchased marijuana from defendant prior to becoming an informant in August, 2001. Detective Owens monitored the sale on 16 September 2001 but did not arrest or charge defendant.

On 18 November 2001, Detective Owens asked the informant to again contact defendant and seek to purchase marijuana. The informant called defendant from a phone at the Reidsville Police Station and requested to purchase two ounces of marijuana. Detective Owens wanted to determine if defendant could obtain that quantity of marijuana. Defendant told the informant that he did not have two ounces but would try to obtain it by the following day. The informant called defendant the next evening. Defendant told the informant that he could obtain the marijuana and set a meeting at 6:30 p.m. at a Food Lion parking lot where they had previously met.

Reidsville Police Department Sergeant Jason Purguson (“Sergeant Purguson”) supervised the operation after Detective Owens informed him that the informant and defendant had arranged a transaction. Sergeant Purguson told Officer Jimmy Hutchens (“Officer Hutchens”) about the operation, gave him a description of defendant’s vehicle, and asked him to patrol the area. Sergeant Purguson and Detective Owens staked out the Food Lion parking lot and observed defendant drive his vehicle enter the parking lot. Officer Hutchens drove by the Food Lion and saw defendant exit the parking lot onto Highway 14 at a high rate of speed. Officer Hutchens followed defendant’s car. He testified that defendant changed lanes without signaling and began traveling about 70 to 75 miles-per-hour in a 55 miles-per-hour speed zone.

Officer Hutchens stopped defendant based on these traffic violations and asked for his license and registration. Officer Hutchens tes-

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tified that he detected the odor of marijuana coming from inside the car and asked defendant to step out of the vehicle. When Officer Hutchens told defendant that he could smell marijuana, defendant told him that a bag of marijuana was located in the driver's side door. Officer Hutchens located the bag of marijuana. He continued to search defendant's vehicle and found two additional bags of marijuana between the driver's seat and console, two postal scales, and plastic bags. Officer Hutchens then placed defendant under arrest.

Defendant moved to suppress the evidence seized during Officer Hutchens' search. He filed an affidavit: (1) denying that he was speeding; (2) denying that he admitted to having marijuana; and (3) denying that he granted Officer Hutchens permission to search his car. The court denied defendant's motion and concluded that Officer Hutchens had an "independent, reasonable, and articulable basis for the traffic stop and detention of the Defendant."

A jury convicted defendant of possession with the intent to sell and deliver marijuana. He was sentenced to a minimum of six months and a maximum of eight months imprisonment. The court suspended his sentence and entered judgment placing defendant on supervised probation for forty-eight months. Defendant was also ordered to serve an active term of sixty days in jail and pay \$2,430.00 in fines and restitution with a requirement that five hundred dollars be paid before release from jail. The judgment included restitution of thirty dollars, to reimburse the cost of the controlled buy that occurred on 16 September 2001. Defendant appealed.

II. Issues

Defendant contends the trial court erred by: (1) denying his motion to suppress; (2) denying his request to instruct the jury on entrapment; (3) requiring defendant to provide restitution for conduct other than the offense of the conviction; and (4) requiring defendant, an indigent, who was sentenced to the maximum allowable split sentence, to pay five hundred dollars before being released from jail.

III. Motion to Suppress

Defendant asserts the trial court should have granted his motion to suppress the evidence, seized in the traffic stop, and argues that no probable cause existed for the stop. "Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether it's [sic] findings are supported by competent evidence, and

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in turn, whether the findings support the trial court's ultimate conclusion." *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829 (2002) (citation omitted).

A. Probable Cause

[1] Defendant argues that this Court should repudiate precedent that permits minor traffic violations to be used as a pretext for stopping cars to search for drugs. "A traffic stop made on the basis of a readily observed traffic violation such as speeding or running a red light is governed by probable cause." *State v. Wilson*, 155 N.C. App. 89, 94, 574 S.E.2d 93, 97 (2002), *disc. rev. denied*, 356 N.C. 693, 579 S.E.2d 98 (2003) (citations omitted). "Probable cause is 'a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity.' *Id.* at 94, 574 S.E.2d at 97-98 (quoting *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167, *disc. rev. denied*, 350 N.C. 847, 539 S.E.2d 5 (1999)). Our Supreme Court has held that "police action related to probable cause should be judged in objective terms, not subjective terms. Provided objective circumstances justify the action taken, any 'ulterior motive' of the officer is immaterial." *State v. McClendon*, 350 N.C. 630, 635, 517 S.E.2d 128, 131 (1999). In *McClendon*, the Court concluded that police officers had probable cause and were justified in stopping the defendant's vehicle due to a speeding violation, despite the subsequent investigation for illegal drugs. *Id.* at 636, 517 S.E.2d at 132.

Here, Officer Hutchens observed defendant commit two traffic offenses, including exceeding the posted speed limit and failure to use a signal, when changing lanes. Officer Hutchens had probable cause to stop defendant's vehicle. This assignment of error is overruled.

B. Evidence of Acquittal

[2] Defendant contends that he was entitled to present evidence of his acquittal regarding the alleged traffic violations. He argues that depriving him of the opportunity to show his acquittal effectively strips him of his presumption of innocence. In order to be convicted of the crime charged, the State must prove its case "beyond a reasonable doubt." *State v. Graham*, 145 N.C. App. 483, 485, 549 S.E.2d 908, 910 (2001). This standard clearly imposes a higher burden of proof than the "suspicion" and "fair probability" required to show probable cause. *Wilson*, 155 N.C. App. at 94, 574 S.E.2d at 97.

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The trial court is not required to receive evidence of defendant's acquittal on the traffic offenses in order to find probable cause for the traffic stop. The findings of fact and conclusions of law will be upheld as long as the "findings support the trial court's ultimate conclusion." *Allison*, 148 N.C. App. at 704, 559 S.E.2d at 829. Here, the court made specific findings to support its conclusion that the officer had an "independent, reasonable, and articulable basis for the traffic stop and detention of the Defendant." We have affirmed this conclusion of law. Evidence of the acquittal is not determinative to finding probable cause for the stop. This assignment of error is overruled.

IV. Entrapment

[3] Defendant assigns error to the trial court's failure to instruct the jury on entrapment. To be entitled to an entrapment instruction, the defendant must "present credible evidence tending to support a defense of entrapment before a trial court may submit the question to a jury." *State v. Thompson*, 141 N.C. App. 698, 706, 543 S.E.2d 160, 165, *disc. rev. denied*, 353 N.C. 396, 548 S.E.2d 157 (2001). A defendant has the burden of showing that:

- (1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant. The defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials.

Id.

Here, the State presented evidence tending to show that defendant was predisposed to commit the crime. The informant testified that defendant had sold drugs to the informant on two separate occasions before becoming a confidential informant. The informant had met defendant several years prior to the crime charged and had purchased marijuana at that time as a result of defendant's actions not those of law enforcement officers. Defendant was predisposed to sell marijuana and has failed to meet his burden showing "persuasion, trickery or fraud." *Id.* This assignment of error is overruled.

V. Restitution

[4] Defendant contends the trial court erred by requiring him to pay thirty dollars in restitution for the money used to purchase marijuana

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on 16 September 2001. Defendant did not object to his sentence following the sentencing phase of his trial. N.C.R. App. P. 10(b)(1) (2003) permits appellate review of issues that “by rule or law are deemed preserved.” We review this assignment of error under N.C. Gen. Stat. § 15A-1446(d)(18) which allows for review of sentencing errors where there was no objection at trial.

“A defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant.” N.C. Gen. Stat. § 15A-1343(d) (2001). N.C. Gen. Stat. § 90-95.3(a) allows courts to require defendants to make restitution to law enforcement agencies for undercover purchases. This statute states that “[w]hen any person is convicted of an offense under this Article, the court may order him to make restitution to any law-enforcement agency for reasonable expenditures made in purchasing controlled substances from him or his agent as part of an investigation leading to his conviction.” N.C. Gen. Stat. § 90-95.3(a) (2001).

Defendant was not charged with or arrested for the sale that took place on 16 September 2001. In sentencing defendant for the 19 November 2001 offense, the court ordered defendant to pay the sum of thirty dollars, the amount used to purchase the marijuana from defendant in September, as restitution to the Reidsville Police Department Drug Fund. The purchase in September was part of an ongoing “investigation leading to his conviction” for an offense committed 19 November 2001. N.C. Gen. Stat. § 90-95.3 (2001). The money defendant was ordered to pay is a “loss . . . arising out of the offense or offenses committed by the defendant.” N.C. Gen. Stat. § 15A-1343(d) (2001). This assignment of error is overruled.

VI. Fines

[5] Defendant argues the trial court erred by requiring him to pay five hundred dollars as a condition of his release from jail. The court’s order states that “defendant [to remain] in custody until \$500 paid or service of full sentence. Defendant to be returned to Rockingham County Jail upon completion of split sentence unless \$500 paid.” He contends the court’s sentence requires him to serve a sentence beyond what N.C. Gen. Stat. § 15A-1351(a) allows. This statute provides that “the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, may not exceed six months or one fourth the maximum

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sentence of imprisonment imposed for the offense." N.C. Gen. Stat. § 15A-1851(a) (2001).

Here, the court's sentence afforded defendant an opportunity to avoid active jail time by paying the fine. There is no evidence in the record that defendant has served more than sixty days confinement, much less that his imprisonment exceeded six months. Defendant has failed to show error in the court's sentence. This assignment of error is overruled.

VII. Conclusion

The trial court properly denied defendant's motion to suppress and his request for a jury instruction on entrapment. We also find no error in the trial court's order requiring defendant to pay thirty dollars in restitution and a five hundred dollar fine as a condition to his release from jail.

No Error.

Judges MCCULLOUGH and BRYANT concur.

IN THE MATTER OF DREMONTA EUGENE RIKARD, DOB 5/20/1987

No. COA02-1581

No. COA02-1628

(Filed 4 November 2003)

1. Juveniles— adjudication order—notice of appeal—amendment—disposition—absence of jurisdiction

Trial courts in which a juvenile was adjudicated delinquent and to which his case was transferred for disposition were divested of jurisdiction to amend the adjudication order or to proceed to disposition when no disposition had been entered within 60 days after entry of the adjudication order and the juvenile filed notice of appeal of the adjudication order pursuant to N.C.G.S. § 7B-2602.

2. Juveniles— adjudication order—sufficiency of oral findings

The 10 August 2001 juvenile adjudication order is remanded for correction of the written order to include the required finding

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beyond a reasonable doubt that the acts alleged in the petition were true, which the court stated orally.

3. Juveniles— adjudication order—motion to dismiss—sufficiency of evidence

Although a juvenile contends the trial court erred in its adjudication finding the juvenile to be delinquent by failing to grant juvenile's motion to dismiss based on alleged insufficient evidence, this assignment of error is overruled because the juvenile did not renew his motion to dismiss after presenting evidence as required by N.C. R. App. P. 10(b)(3).

Appeal by juvenile from orders entered 10 August 2001 by Judge Jonathan L. Jones in Catawba County District Court and 25 January 2002 by Judge Charlie E. Brown in Rowan County District Court. Heard in the Court of Appeals 18 September 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Leslie C. Rawls, for juvenile-appellant.

CALABRIA, Judge.

Dremonda Eugene Rikard ("juvenile") appeals the 10 August 2001 adjudication order entered by Judge Jonathan L. Jones in Catawba County District Court adjudicating him a delinquent juvenile. Juvenile also appeals the 25 January 2002 disposition order entered by Judge Charlie E. Brown in Rowan County District Court ordering probation and enrollment in an outpatient treatment program. Because we find juvenile failed to preserve appellate review of his motion to dismiss, we affirm the adjudication order on this basis. We reverse and remand the adjudication order for correction of the written order to reflect the trial court's oral findings. Since we find the trial courts exceeded their statutory authority, we vacate the courts' amended adjudication order and the disposition order since both were entered during the pendency of the appeal.

On 19 February 2001, a petition was filed alleging juvenile violated N.C. Gen. Stat. § 14-202.2, indecent liberties between children. At a 6 August 2001 hearing, the court orally found "beyond reasonable doubt that the acts alleged in the petition are true." Juvenile was adjudicated a delinquent juvenile and the court ordered the case transferred to Rowan County, where juvenile resided, for disposition. The

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adjudication order, filed 10 August 2001, not only lacked the court's oral finding of fact that the State had proven the case beyond a reasonable doubt, but also lacked any findings of fact regarding the acts alleged in the petition. On 10 October 2001, juvenile filed a notice of appeal.

On 16 November 2001, a Rowan County District Court judge examined the 10 August 2001 order. The court was unable to hold a disposition hearing since there was "no delinquent act to dispose of" since the 10 August 2001 order lacked the requisite written findings stating the acts alleged in the petition had been proven beyond a reasonable doubt. The case was transferred back to Catawba County to include the requisite written findings in an amended adjudication order. Thereafter, on 11 December 2001, the court in Catawba County entered an amended juvenile adjudication order finding beyond a reasonable doubt "the juvenile did commit the acts alleged in the petition, Indecent Liberties Between Minors . . ." and adjudicating him a delinquent juvenile. The case was transferred back to Rowan County for disposition. The disposition hearing was held 25 January 2002, and the court ordered juvenile to serve twelve months probation and during the probationary period to enroll in an outpatient youthful sex offenders treatment program.

Juvenile appeals asserting: (I) the Rowan County court lacked jurisdiction to transfer the case back to Catawba County for a modification of its findings of fact, and the Rowan County court lacked jurisdiction to enter a disposition order since the adjudication order was on appeal; (II) the Catawba County court erred in its adjudication by failing to grant juvenile's motion to dismiss for insufficiency of the evidence.

I. Jurisdiction after appeal

[1] When no disposition was entered within sixty days of juvenile's adjudication as delinquent, juvenile appealed the adjudication. However, neither the trial court in Rowan County nor the court in Catawba County ceased action on juvenile's case. After his appeal, they transferred the case between them, entered an amended adjudication order making necessary findings of fact, held a disposition hearing and entered a disposition order. Juvenile asserts that as of 10 October 2001, when he filed his appeal, the trial courts were divested of jurisdiction. We agree.

Our statutory law provides juveniles with a right to appeal any final orders of the court. N.C. Gen. Stat. § 7B-2602 (2001). An adjudi-

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cation order may be appealed "if no disposition is made within 60 days after entry of the order. . . ." *Id.* "[W]ritten notice of appeal may be given within 70 days after such entry." *Id.* Pending disposition of the appeal, the statute directs the trial court to release the juvenile, with or without conditions, unless the court delineates, in writing, compelling reasons justifying the entry of "a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State." N.C. Gen. Stat. § 7B-2605 (2001). Following "the affirmation of the order of adjudication or disposition of the court by the Court of Appeals . . . the court shall have the authority to modify or alter the original order. . . ." N.C. Gen. Stat. § 7B-2606 (2001). Accordingly, nothing in the statute permits the trial court to modify the order or proceed to disposition during the pendency of the appeal of an adjudicatory order.

Nevertheless, the State asserts this Court's holding in *In re Huber*, 57 N.C. App. 453, 291 S.E.2d 916 (1982) is controlling. In *Huber*, during the pendency of an appeal, a district court ordered the removal of a neglected child from her mother's custody. *Huber*, 57 N.C. App. at 455-56, 291 S.E.2d at 918. The controlling statute, nearly identical to the statute in the case at bar, permitted the district court to issue "temporary orders affecting the custody or placement of the juvenile as the judge determines to be in the best interest of the juvenile or the state." *Id.*, 57 N.C. App. at 459, 291 S.E.2d at 920 (citing N.C. Gen. Stat. § 7A-668 (1980)). Accordingly, this Court upheld the district court's custody order. *Id.*

In both *Huber* and the case at bar, the statute provided for action by the district court to affect the juvenile's custody or placement. The difference between *Huber* and the case at bar is manifest. In *Huber* the court acted pursuant to statutory authority; in the case at bar, the court exceeded its authority. The trial courts here transferred the case between them, entered an amended adjudication order and also entered a disposition order. The State argues that even if the other orders were improper, the disposition order required probation, which, they assert, is a derivative of custody, and therefore that order was proper under the statute. We disagree. Even assuming *arguendo* that the statutory language "custody or placement" includes an order for probation, the disposition order relied on the other invalid orders of the trial court, and the disposition order did not comply with the statutory directive requiring compelling reasons in writing from the court justifying its actions and applying best interests analysis. Accordingly, we find the

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trial court's orders, entered after juvenile appealed, exceeded its statutory authority under N.C. Gen. Stat. § 7B-2605, and therefore must be vacated.

II. The Original Adjudication Order

[2] Our analysis of the trial courts' actions exceeding their jurisdiction squarely raises the issue of the effect of the 10 August 2001 written adjudication order that did not contain the required findings of fact. Our statute requires that “[i]f the court finds that the allegations in the petition have been proven as provided in G.S. 7B-2409, the court shall so state.” N.C. Gen. Stat. § 7B-2411 (2001). Moreover, “[t]his Court has held that use of the language ‘shall’ is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error.” *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001). The question presented here is whether a trial court's oral findings suffice even though they are omitted from the written order. We hold oral findings suffice, but the written order must be corrected so the record reflects the finding.

Our statute requires a judge to “state” the finding that the allegations in the petition have been proven beyond a reasonable doubt in order to adjudicate a child as a delinquent. N.C. Gen. Stat. § 7B-2411. There is no requirement that the finding must be in writing. We implied in *Eades* that “any order, written or oral” making the required finding would suffice. *Eades*, 143 N.C. App. at 713, 547 S.E.2d at 148. Moreover, we have previously held a court's failure to make the finding orally at the time of the hearing is not error where the finding was included in the written order. *In re Mitchell*, 87 N.C. App. 164, 166, 359 S.E.2d 809, 811 (1987). Finally, our statute expressly requires “[t]he dispositional order shall be in writing” N.C. Gen. Stat. § 7B-2512 (2001). Accordingly, the legislature required the necessary findings be in writing for the dispositional order but not the adjudicatory order. However, since it is incumbent that the record reflect this finding, we remand for entry of an amended written order including the court's oral finding that “beyond [a] reasonable doubt that the acts alleged in the petition are true.” See *Eades*, 143 N.C. App. at 713, 547 S.E.2d at 148 (requiring a compliant adjudication be evident in the record).

[3] Since we have found the adjudication order may be corrected to include the oral finding, we must address whether or not the order should be vacated because the Catawba County court erred in failing

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to dismiss the adjudication order due to insufficient evidence. *See In re Walker*, 83 N.C. App. 46, 348 S.E.2d 823 (1986) (addressing juvenile's assignment of error that the evidence was insufficient after determining the court failed to make the required finding of fact that the allegations in the petition have been proven). The court denied juvenile's motion to dismiss, for insufficiency of the evidence, submitted at the close of the State's evidence, and juvenile proceeded to present evidence. Juvenile did not renew his motion at the close of all the evidence. “[J]uveniles ‘may challenge the sufficiency of the evidence by moving to dismiss the juvenile petition.’” *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (quoting *In re Davis*, 126 N.C. App. 64, 65-66, 483 S.E.2d 440, 441 (1997)). “If a defendant makes [a motion to dismiss for insufficient evidence] after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal . . . is waived.” N.C.R. App. P. 10(b)(3) (2003). “Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.” *Id.* Since juvenile did not renew his motion to dismiss, this assignment of error is overruled.

Accordingly, we hold the trial court orders entered following the 10 August 2001 adjudication order were entered without jurisdiction and must be vacated. The 10 August 2001 adjudication order is reversed and remanded for correction of the written order to include the required finding which the court stated orally. The 10 August 2001 adjudication order is otherwise affirmed.

Vacated in part, reversed and remanded in part, affirmed in part.

Judges McGEE and HUNTER concur.

1. Since the State did not hold a dispositional hearing within 60 days of the 10 August 2001 adjudication order, the juvenile had a right to appeal this order. To remand the order without considering its validity would be inconsistent with juvenile's appeal of the adjudication order. Accordingly, we properly consider juvenile's assignment of error with respect to the 10 August 2001 adjudication order.

BATTLE RIDGE COS. v. N.C. DEPT' OF TRANSP.

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

**BATTLE RIDGE COMPANIES, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION, DEFENDANT**

No. COA02-973

(Filed 4 November 2003)

Immunity— sovereign—highway construction—additional compensation

A highway construction contractor's claims against the Department of Transportation seeking additional compensation based upon an "extra work" theory or a Department-caused work delay theory or, alternatively, based upon breach of an implied warranty of plans and specifications arose "under the contract" within the meaning of N.C.G.S. § 136-29 and were thus not barred by the doctrine of sovereign immunity.

Appeal by plaintiff from judgment entered 21 December 2001 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 10 June 2003.

Smith, Currie & Hancock, L.L.P., by Harry R. Bivens, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Herrin, for defendant-appellee.

HUDSON, Judge.

On 24 September 1994, plaintiff Battle Ridge Companies ("Battle Ridge") and defendant North Carolina Department of Transportation entered into a written contract whereby Battle Ridge was to perform construction work consisting of widening and relocating a portion of U.S. Highway 421 from east of the Blue Ridge Parkway to east of state road 1361 near Deep Gap, Watauga County, North Carolina ("the Project").

Battle Ridge completed work on the project on 20 August 1997. Battle Ridge was assessed liquidated damages, totaling \$233,850.00, as a result of the untimely project completion. Upon completion of the project, Battle Ridge sought remission of the assessed liquidated damages as well as additional compensation of \$2,457,591.61 by filing a verified claim with the State Highway Administrator. The State Highway Administrator denied Battle Ridge's claim in its entirety.

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On 7 August 1999, Battle Ridge filed a complaint in the superior court in Wake County bringing forth five claims for relief. Under each claim for relief, Battle Ridge alleged a breach of contract under the terms of the contract and, alternatively, breach of an implied warranty of the contract. On 30 November 2001, the Department moved to dismiss the complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(6), and 12(h)(3), arguing that sovereign immunity bars plaintiff's action. The matter was heard before Judge Orlando Hudson, Jr. on 7 December 2001, and on 17 December 2001, Judge Hudson dismissed Battle Ridge's complaint on those grounds. Plaintiff appeals.

Analysis

Our courts have held that the defense of sovereign immunity is a Rule 12(b)(1) defense. *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328, 293 S.E.2d 182, 184 (1982). Our courts have also held that the defense of sovereign immunity is a matter of personal jurisdiction that would fall under Rule 12(b)(2). See *Zimmer v. North Carolina Dept. of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116 (1987). Here, the Department moved to dismiss plaintiff's complaint based upon sovereign immunity under Rules 12(b)(1), 12(b)(2) and 12(b)(6).

It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit. *Smith v. Hefner*, 235 N.C. 1, 6, 68 S.E.2d 783, 787 (1951). By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute. *Id.* Waiver of sovereign immunity may not be lightly inferred and statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed. *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983).

In *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), our Supreme Court held that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the state implicitly consents to be sued for damages on the contract in the event it breaches the contract. *Id.* at 310, 222 S.E.2d at 418.

Moreover, the General Assembly enacted N.C. Gen. Stat. § 136-29 to provide a statutory ground that allows a contractor to bring suit

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against the Department of Transportation. *See In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 790-91, 309 S.E.2d 183, 185-86 (1983). That statute, which by its mandate is a part of every contract for State highway construction between the Department of Transportation and a contractor, provides as follows:

(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 for the amount the contractor claims is due. The claim shall be submitted within 60 days after the contractor receives his final statement from the Department and shall state the factual basis for the claim.

The State Highway Administrator shall investigate a submitted claim within 90 days of receiving the claim or within any longer time period agreed to by the State Highway Administrator and the contractor. The contractor may appear before the State Highway Administrator, either in person or through counsel, to present facts and arguments in support of his claim. The State Highway Administrator may allow, deny, or compromise the claim, in whole or in part. The State Highway Administrator shall give the contractor a written statement of the State Highway Administrator's decision on the contractor's claim.

(b) A contractor who is dissatisfied with the State Highway Administrator's decision on the contractor's claim may commence a contested case on the claim under Chapter 150B of the General Statutes. The contested case shall be commenced within 60 days of receiving the State Highway Administrator's written statement of the decision.

(c) As to any portion of a claim that is denied by the State Highway Administrator, the contractor may, in lieu of the procedures set forth in subsection (b) of this section, within six months of receipt of the State Highway Administrator's final decision, institute a civil action for the sum he claims to be entitled to under the contract by filing a verified complaint and the issuance of a summons in the Superior Court of Wake County or in the superior court of any county where the work under the contract was performed. The procedure shall be the same as in all civil actions except that all issues shall be tried by the judge, without a jury.

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(d) The provisions of this section shall be part of every contract for State highway construction between the Department of Transportation and a contractor. A provision in a contract that conflicts with this section is invalid.

G.S. § 136-29 (2001). We believe this statute clearly waives the Department's sovereign immunity. Thus, if Battle Ridge has fully complied with the terms of G.S. § 136-29, and the claims arise "under the contract," then the court's dismissal was improper.

In *Teer Co. v. Highway Commission*, 265 N.C. 1, 143 S.E.2d 247 (1965), a contractor who performed work under contract with the State Highway Commission (now the Department of Transportation), filed suit under G.S. § 136-29 seeking additional compensation from the Commission after the completion of the subject work of the contract. In deciding whether the contractor was entitled to seek such additional compensation, our Supreme Court, referring to G.S. § 136-29, noted that "recovery, if any, must be within the terms and framework of the provisions of the contract . . . and not otherwise." *Id.* at 16, 143 S.E.2d at 258. In a later appeal, this Court dismissed the contractor's *quantum meruit* claims because they did not arise under the terms and framework of the contract. *Teer Co. v. Highway Comm.*, 4 N.C. App. 126, 166 S.E.2d 705 (1969).

In *Davidson and Jones, Inc. v. N. C. Dept. of Administration*, 315 N.C. 144, 337 S.E.2d 463 (1985), our Supreme Court, interpreting a provision of Chapter 143 of our General Statutes with nearly identical language to G.S. § 136-29, noted that:

We interpret the statute as requiring simply that the contractor's claim arise out of a breach of the contract or some provision thereof so as to entitle the contractor to some relief.

Id. at 149, 337 S.E.2d at 466. Thus, our Supreme Court held that the contractor, who like the plaintiff here was seeking additional compensation for duration-related costs incurred as the direct result of an unexpected overrun exceeding 400 percent in the amount of rock to be excavated under a construction contract with the state department of administration, had a remedy for breach of contract even in the absence of a specific contractual term allowing such relief. *Id.* While we recognize that Chapter 143 specifically excludes applicability to the Department of Transportation in the construction of roads, we can see no reason why the interpretation of the phrase "under the contract" should or would be any different under the two statutes.

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Turning to Battle Ridge's claims for breach of warranty, this Court has previously held that where a contractor has complied with plans and specifications prepared by the owner, the contractor will not be liable for consequences in defects in those plans and specifications. *See Gilbert Engineering Co. v. City of Asheville*, 74 N.C. App. 350, 362-63, 328 S.E.2d 849, 857, *disc. review denied*, 314 N.C. 329, 333 S.E.2d 485 (1985). Indeed, we have held that the plans and specifications constitute "positive representations upon which [a contractor is] justified in relying." *Lowder, Inc. v. Highway Comm.*, 26 N.C. App. 622, 638, 217 S.E.2d 682, 692, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975). In *Lowder*, therefore, we recognized that "a contracting agency which furnishes inaccurate information as a basis for bids may be liable on a breach of warranty theory," and that "[i]t is simply unfair to bar recovery to contractors who are misled by inaccurate plans and submit bids lower than they might otherwise have submitted." *Id.* at 638-39, 217 S.E.2d at 693. Thus, a claim for relief based upon a breach of an implied warranty of plans and specifications arises under the contract and, if sufficiently pled, will withstand a 12(b)(6) motion to dismiss on grounds of immunity.

In ruling on a motion to dismiss brought under Rule 12(b)(6), "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Additionally, "a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Id.* at 671, 355 S.E.2d at 840 (citations omitted).

Applying that standard here, we find that plaintiff's complaint expressly brings forth five claims for relief. Count I of each claim alleges that Battle Ridge is entitled to an adjustment in compensation either under an "extra work" theory or under a Department-caused work delay theory. Alternatively, Count II of each claim alleges breach of an implied warranty of plans and specifications for which Battle Ridge is entitled to compensation. Based upon *Teer*, *Lowder*, and *Davidson*, we hold these claims to be cognizable causes of action under North Carolina law, which were sufficiently plead to withstand a 12(b)(6) motion to dismiss. Thus, we reverse the superior court and remand for further proceedings.

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[161 N.C. App. 161 (2003)]

Reversed and remanded.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. DANIEL EUGENE PRATT, DEFENDANT

No. COA02-1364

(Filed 4 November 2003)

1. Constitutional Law— effective assistance of counsel—failure to move to dismiss

The failure to request dismissal of an armed robbery charge was not ineffective assistance of counsel where defendant was unable to show that the request would have brought a different result. There was sufficient evidence to support a finding that defendant used a boxcutter, even though he denied it, and he admitted committing common law robbery. Although the victim testified that he did not feel that his life was threatened, that testimony merely rebuts the presumption that his life was threatened (which rose from the use of a dangerous weapon) and leaves the dangerous character of the weapon to the jury.

2. Constitutional Law— effective assistance of counsel—failure to request instruction—inconsistent statements by victim

The failure to request an instruction on inconsistent statements by an armed robbery victim was not an ineffective assistance of counsel that prejudiced defendant. The trial court questioned the victim and an officer about the inconsistent statements, and instructed the jurors that they could consider inconsistent statements when determining a witness's credibility. The suggested instructions would have added little.

Appeal by defendant from judgment entered 6 September 2001 by Judge Judson D. DeRamus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 20 August 2003.

Attorney General Roy Cooper, by Assistant Attorney General Mary Penny Thompson, for the State.

Brian Michael Aus for defendant appellant.

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[161 N.C. App. 161 (2003)]

TIMMONS-GOODSON, Judge.

Daniel Eugene Pratt (“defendant”) appeals his conviction of robbery with a dangerous weapon. For the reasons stated herein, we hold that defendant received a trial free of prejudicial error.

The pertinent facts of the instant appeal are as follows. At approximately 5:00 p.m. on or about 14 March 2001, while Travis Lawrence (“Lawrence”) waited for a church bus on Lansing Drive in Winston-Salem, North Carolina, defendant approached and asked Lawrence for his cell phone. Lawrence refused. Defendant then pulled a toboggan over his face and said, “This is a robbery.” Defendant “pulled [the hat] back up” and informed Lawrence that he was “just kidding.” Thereafter, defendant grabbed Lawrence and placed him in a headlock. Lawrence testified that while he was in the headlock, defendant removed twenty dollars (\$20.00) from his wallet. Lawrence further testified that he was subsequently released from defendant’s grasp and walked away from defendant.

Approaching Lawrence from the rear, defendant assaulted Lawrence a second time. Defendant grabbed Lawrence’s neck and took his “necklace.” Lawrence attempted to remove defendant’s hand, but in doing so cut his hand on an object defendant held against his neck. Lawrence testified that the object appeared to be a box cutter.

Lawrence subsequently contacted the police to file a report. Officer D.P. McClure responded to the call and testified at trial that Lawrence’s initial report was “a little different” than his testimony. While Lawrence testified at trial that defendant removed money from his wallet before defendant took his “necklace,” Officer McClure testified that Lawrence initially reported that defendant removed the money after taking the “necklace.”

At trial defendant admitted that his actions constituted common law robbery, but denied that he was armed with a box cutter during the commission of the offense. At the close of the evidence, counsel for defendant did not challenge the sufficiency of the evidence nor request a specific instruction on Lawrence’s inconsistent statements. The jury found defendant guilty of robbery with a dangerous weapon.

The issue presented by this appeal is whether defendant was denied effective assistance of counsel when his counsel failed to (1) move the trial court to dismiss the charge of robbery with a danger-

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ous weapon; and, (2) request a jury instruction regarding Lawrence's inconsistent statements.

A successful ineffective assistance of counsel claim requires the satisfaction of a two-prong test. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002). The defendant must first show that counsel's performance fell below an "objective standard of reasonableness." *Gainey*, 355 N.C. at 112, 558 S.E.2d at 488. Second, the defendant must also show that the error committed was so egregious 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 (1984). Relief should be granted only when counsel's assistance is so lacking that the trial becomes a "farce and mockery of justice." *State v. Montford*, 137 N.C. App. 495, 502, 529 S.E.2d 247, 252 (2000) (quoting *State v. Pennell*, 54 N.C. App. 252, 261, 283 S.E.2d 397, 403 (1981)).

[1] Defendant first argues that he was denied effective assistance of counsel by his counsel's failure to move the court to dismiss the charge of robbery with a dangerous weapon. Defendant asserts that there was insufficient evidence to support the charge. We disagree.

When ruling on a motion to dismiss for insufficiency of the evidence, the trial court must consider the evidence in the light most favorable to the nonmoving party. See *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). Therefore, a trial court must deny a motion to dismiss if there is substantial evidence, either direct or circumstantial, that the defendant committed the offense charged. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). Substantial evidence must not be speculative, but must amount to enough evidence that a "reasonable mind might accept [it] as adequate to support a conclusion." See *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994). The State must provide substantial evidence in support of all of the elements of the crime charged. See *Alexander*, 337 N.C. at 187, 446 S.E.2d at 86.

For the offense of robbery with a dangerous weapon, the State must prove "(1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened." *State v. Wiggins*, 334 N.C. 18, 35, 431 S.E.2d 755, 765 (1993). Defendant admitted that he committed common law robbery, but argues that there is insufficient evidence to support the elements of armed robbery that require

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use or threatened use of a dangerous weapon and endangerment or threatened endangerment of life as a result. We disagree.

Here, Lawrence described in his testimony that he saw an object that he said appeared to be a box cutter and he presented the police with injuries that he alleged were caused by the box cutter. The evidence taken in the light most favorable to the State clearly supports a finding that a reasonable mind might accept as adequate evidence that the defendant used a box cutter during the robbery. *See Wiggins*, 334 N.C. at 35, 431 S.E.2d at 765.

North Carolina has recognized box cutters to be dangerous weapons as a matter of law. *State v. Wiggins*, 78 N.C. App. 405, 337 S.E.2d 198 (1985); *State v. Torain*, 316 N.C. 111, 120, 340 S.E.2d 465, 471 (1986). When a dangerous weapon is used in a robbery, the law presumes that the victim's life was threatened. *Wiggins*, 78 N.C. App. at 408, 337 S.E.2d at 199-200. Here, because there is enough evidence from which the jury could find that a box cutter was used in the robbery, and that the box cutter was a dangerous weapon, the trial court could have properly presumed that Lawrence's life was endangered. *See Wiggins*, 78 N.C. App. at 408, 337 S.E.2d at 199-200.

Defendant argues that Lawrence's testimony that he did not feel his life was threatened effectively rebuts the presumption that his life was in fact threatened. *See Wiggins*, 78 N.C. App. at 408, 337 S.E.2d at 199-200. Although the presumption is rebuttable, defendant is in no better position because having rebutted the presumption, the dangerous character of the weapon then becomes a fact to be determined by the jury. *See State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978). Defendant's conviction of robbery with a dangerous weapon indicates that although Lawrence did not believe his life was threatened, the jury found to the contrary.

Defendant is unable to demonstrate that his counsel's failure to move to dismiss after the close of the State's evidence was so egregious that the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698. The defendant admitted to the first element of robbery with a dangerous weapon and the State provided sufficient evidence concerning the remaining elements. For the reasons stated above, we conclude that the failure of counsel to request dismissal of the charge of robbery with a dangerous weapon is insufficient to support a claim of ineffective assistance of counsel.

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[2] Defendant next argues that the failure of trial counsel to request a jury instruction on Lawrence's inconsistent statements violated the objectively reasonable standard under *Strickland* and prejudiced defendant as a result. See *Strickland*, 466 U.S. 668, 80 L. Ed. 2d 674.

A successful ineffective assistance of counsel claim based on a failure to request a jury instruction requires the defendant to prove that without the requested jury instruction there was plain error in the charge. *State v. Swann*, 322 N.C. 666, 688, 370 S.E.2d 533, 545 (1988). Plain error is defined as " '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.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983); (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (emphasis and citations omitted)). To determine whether it was plain error for trial counsel to fail to request a jury instruction regarding inconsistent statements, this Court may look to whether trial counsel questioned the witnesses about said statements and whether the trial court provided instructions on witness credibility. See *Swann*, 322 N.C. at 681, 688, 370 S.E.2d at 541, 545.

In the case *sub judice*, trial counsel questioned both Lawrence and Officer McClure about the alleged inconsistent statements. The trial court also instructed the jurors that they may take inconsistent statements into consideration when determining witness credibility. Thus, because "the suggested instructions would have added little to the jury's awareness of the importance of deciding whom to believe," we reject defendant's argument that the failure of trial counsel to request a jury instruction on inconsistent statements prejudiced defendant. *Id.* We are unable to conclude that defendant was denied effective assistance of counsel on his jury instruction claim.

Accordingly, we uphold defendant's conviction for robbery with a dangerous weapon.

No Error.

Judges HUNTER and ELMORE concur.

NUTEK CUSTOM HOSIERY, INC. v. ROEBUCK

[161 N.C. App. 166 (2003)]

**NUTEK CUSTOM HOSIERY, INC., PLAINTIFF v. JUDY ROEBUCK D/B/A
ROEBUCK HOSIERY, DEFENDANT**

No. COA02-1503

(Filed 4 November 2003)

Corporations— corporate president—personal liability for purchase of goods and services

A defendant in a contract action entered into the contract for her own benefit and could not use the corporation of which she was president and majority owner as a shield. Although there was evidence to the contrary, there was evidence supporting the trial court's finding of fact that defendant personally contracted for the goods and services at issue.

Appeal by defendant from judgment entered 28 May 2002 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 27 August 2003.

Sigmon, Clark Mackie, Hutton, Hanvey & Ferrell, P.A., by Warren A. Hutton, for plaintiff appellee.

LeCroy Ayers & Willcox, PLLC, by M. Alan LeCroy, for defendant appellant.

TIMMONS-GOODSON, Judge.

Judy Roebuck d/b/a Roebuck Hosiery ("defendant") appeals from a judgment of the trial court granting damages resulting from a breach of contract, the interest thereon, and attorney's fees to Nutek Custom Hosiery, Inc. ("plaintiff"). For the reasons stated below, we affirm the judgment of the trial court.

The pertinent facts of the instant appeal are as follows. Plaintiff is a hosiery company owned by Quince Lee Spencer ("Spencer"). Defendant is the majority owner of the hosiery company, Roebuck Sports, Inc. ("Sports").

Sports incorporated on 3 August 1981 and administratively dissolved on 1 April 1998. Defendant has acted as Sports' registered agent since 1994. Defendant became president of Sports in 1998.

In October of 1999, defendant requested Spencer's help in obtaining yarn to fulfill her business obligations. Defendant and Spencer testified that they knew each other personally before the onset of this

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litigation. Spencer further testified that he had knowledge of defendant's current financial difficulties and agreed to procure yarn for her at no additional cost. Defendant requested that plaintiff provide additional services. Plaintiff complied and charged defendant commercially reasonable rates for said services. Defendant failed to pay either plaintiff or Spencer the invoiced amount of \$10,066.75 for the yarn and services.

Plaintiff filed a complaint alleging that defendant purchased goods and services from plaintiff and failed to pay for said goods and services. The matter came on for hearing before the trial court on 23 May 2002, at which time the trial court entered the following pertinent findings of fact:

6. In 1999, the Defendant contracted with the Plaintiff through Plaintiff's President, Quince Spencer.
7. The Defendant told Mr. Spencer that she needed him to obtain yarn for a new business venture because she could not obtain credit to purchase yarn herself.
8. Mr. Spencer, through Nutek Custom Hosiery, Inc., did comply with the request of the Defendant as a favor.
9. Invoices were submitted to the Defendant for payment.
....
13. Roebuck Sports, Inc. operated in Valdese, North Carolina.
14. The building Roebuck Sports, Inc. occupied and equipment used by Roebuck Sports, Inc. were sold.
....
16. The checks which the Defendant produced showing payment to the Plaintiff in the name of Roebuck Sports, Inc. showed addresses of Valdese, North Carolina as well as an[sic] Hickory, North Carolina address where the "new business" was located.
17. The Defendant used Wilson Hosiery Mill, Inc. invoices and/or delivery tickets in order to save money. Wilson Hosiery Mill, Inc. was the name of Roebuck Sports, Inc. prior to its change of name.
....
18. Quince Spencer did personally loan certain money to Roebuck Sports, Inc. and the Defendant in the past, and at such

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time the Defendant personally signed, and as President of Roebuck Sports, Inc. signed as guarantors.

19. Roebuck Sports, [Inc.] has not been made a party to this matter. . . .

20. \$10,066.75 is due and owing the Plaintiff upon the terms [of the invoice].

After concluding as a matter of law that defendant breached her contract with plaintiff, the trial court entered judgment in favor of plaintiff for the principal sum claimed and interest thereon, and reasonable attorney's fees. Defendant appeals this judgment.

Defendant argues that the trial court erred by: (1) failing to dismiss this action for failure to join Roebuck Sports, Inc., as a necessary party; and (2) finding as fact that defendant acted on her own behalf in contracting with plaintiff for the goods and services invoiced. For the reasons stated hereafter, we affirm the judgment of the trial court.

The dispositive issue on appeal is whether the trial court's finding of fact that defendant acted on her own behalf in contracting with plaintiff was supported by competent evidence in the record.

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). Findings of fact and conclusions of law allow meaningful review by the appellate courts. *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979). Findings of fact are conclusive if supported by competent evidence, irrespective of 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 (1976).

Corporate officers and directors are generally not liable for the debts of their corporation. N.C. Gen. Stat. § 55B-9(b) (2001). When a corporate officer acts as an agent for the corporation and enters into a contract with a third party, providing notice that he is acting as the agent for the corporation, the corporate officer is not personally liable for corporation obligations arising from said contract. See *Baker v. Rushing*, 104 N.C. App. 240, 248, 409 S.E.2d 108, 112-13 (1991). However, if the corporate officer enters into a contract allegedly for the benefit of the corporation, but fails to inform the third party of his agency status, or if the corporate officer enters into

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a contract with a third party for the officer's own benefit, the corporate officer may not use the corporation name as a shield to personal liability. *See generally id.*, *Embree Construction Group v. Rafcor, Inc.*, 330 N.C. 487, 499-500, 411 S.E.2d 916, 924 (1992).

The court found as fact that defendant acted in her personal capacity when contracting with plaintiff. There is competent evidence in the record to support said finding. *See Hollerbach*, 90 N.C. App. at 387, 368 S.E.2d at 415. First, defendant informed plaintiff that the yarn was needed for a "new business" venture. Second, defendant sought Spencer out because Spencer had personally loaned money to defendant and Sports in the past. Third, defendant's name was listed on the invoice as the party to whom the products and services were sold. At no time did defendant sign or indicate that she was doing business in a representative capacity.

The trial court made findings of fact that defendant used Wilson Hosiery Mill, Inc. invoices and/or delivery tickets in order to save money. Although Sports' place of business was in Valdese, North Carolina, three of the four checks in the record showed Sports' address as Hickory, North Carolina, the location of defendant's "new business."

The record also reveals that plaintiff and defendant were friends prior to the agreement. Plaintiff and defendant testified that plaintiff charged defendant only the purchase price of the yarn and a reasonable fee for the additional services defendant requested. Plaintiff did this as a "favor" for defendant. We hold that defendant entered into the contract with plaintiff for her own benefit and she will not be permitted to use the corporation as a shield to her personal liability. Although we note that there is evidence to the contrary, we conclude that there is competent evidence in the record to support the court's finding of fact that defendant personally contracted with plaintiff for the goods and services at issue. Thus, the assignment of error is overruled.

Having found competent evidence in support of the determination of the trial court that defendant was personally liable, it is unnecessary to address defendant's remaining assignment of error regarding joinder of Sports as a necessary party.

Affirm.

Judges HUNTER and ELMORE concur.

SUMMERLIN v. NORFOLK S. RY. CO.

[161 N.C. App. 170 (2003)]

CASWELL LEE SUMMERLIN, JR., PLAINTIFF v. NORFOLK SOUTHERN RAILWAY COMPANY, DEFENDANT

No. COA02-1679

(Filed 4 November 2003)

Railroads— grade crossing—summary judgment

The trial court did not err by granting defendant railroad company's motion for summary judgment and concluding as a matter of law that defendant was not required to provide plaintiff a private grade crossing across its right-of-way and railroad lines which divide plaintiff's property, because plaintiff's property is not enclosed as required by N.C.G.S. § 136-194.

Appeal by plaintiff from judgment entered 1 August 2002 by Judge William C. Griffin, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 7 October 2003.

Carter, Archie, Hassell & Singleton, L.L.P., by Ranee Singleton, for plaintiff-appellant.

Rodman, Holscher, Francisco & Peck, P.A., by R. Brantley Peck, Jr., for defendant-appellee.

TYSON, Judge.

Caswell Lee Summerlin, Jr. ("plaintiff") seeks to compel Norfolk Southern Railroad Company ("defendant") to construct and maintain a grade crossing across defendant's railroad on plaintiff's land. The trial court granted defendant's motion for summary judgment. We affirm.

I. Background

In 1906, the Raleigh and Pamlico Sound Railroad Company conveyed to defendant all rights and lines of railroad, including existing lines and those under construction, extending from Raleigh and connecting Wake, Johnston, Nash, Wilson, Greene, Pitt, Craven, and Beaufort Counties.

In 1994, Nettie Horrell conveyed a tract of land ("Summerlin Tract") by a non-warranty deed to Southland Enterprises of Eastern North Carolina, Inc. ("Southland"). Plaintiff was Southland's president and executed a general warranty deed in that capacity granting him individually the Summerlin Tract in 1994.

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[161 N.C. App. 170 (2003)]

All deeds in plaintiff's chain of title gave notice that defendant owned a 100-foot right-of-way, over and through the Summerlin Tract, splitting the tract into two parcels. The southeastern portion of the Summerlin Tract abuts U.S. Highway 17 North. The northwestern portion does not touch any public road or highway. At the time of conveyance to plaintiff, no existing crossing or private road connected the eastern and western portions of the Summerlin Tract. On 11 April 2001, defendant denied plaintiff's request for a new private grade crossing and suggested plaintiff gain ingress and egress from adjacent property owners. Weyerhaeuser Company ("Weyerhaeuser") owned a gated, private road that adjoined the northwestern portion of plaintiff's property. On 26 June 2002, Weyerhaeuser granted plaintiff a limited, non-transferable, permissive use license to utilize the road for access.

Plaintiff filed suit to obtain a private grade crossing over defendant's right-of-way and railroad lines on the Summerlin Tract to connect the tracts and provide him with direct access to the western portion of the property. Defendant moved for summary judgment on 2 July 2002 and attached an affidavit which states in part, "[s]aid tract claimed by plaintiff is not fenced nor enclosed." The trial court granted defendant's motion. Plaintiff appealed.

II. Issue

The sole issue is whether the trial court erred by granting summary judgment and concluding as a matter of law that defendant was not required to provide plaintiff a private grade crossing across its right-of-way and railroad lines.

III. N.C. Gen. Stat. § 136-194

"An entry of summary judgment by the trial court is fully reviewable by this Court." *Roten v. Critcher*, 135 N.C. App. 469, 472, 521 S.E.2d 140, 143 (1999). 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) (2001). Plaintiff contends that N.C. Gen. Stat. § 136-194 requires defendant to construct and maintain a private grade crossing connecting the eastern and western portions of the Summerlin Tract as a matter of law.

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N.C. Gen. Stat. § 136-194 (2001), entitled “Cattle guards and private crossings,” states that “[e]very company owning, operating or constructing any railroad passing through and over the enclosed land of any person shall, at its own expense . . . make and keep in constant repair crossings to any private road thereupon.” This statute was originally enacted in 1883, prior to defendant’s acquisition of the railroad right-of-way. 1883 N.C. Sess. Laws c. 394, § 1-2 (1883). Generally, “a railroad company cannot be compelled to construct private crossings at its own expense for the benefit of landowners adjacent to the tracts, so long as the railroad held its right-of-way and laid its tracks prior to enactment of a statute.” *Harris v. Southern Railway Co.*, 100 N.C. App. 373, 378, 396 S.E.2d 623, 626 (1990). Our Court has held that N.C. Gen. Stat. § 136-194, previously codified as N.C. Gen. Stat. § 62-226 (1990), “applies only to completely enclosed land and contemplates that the statute be utilized only for actions involving cattle guards or crossings.” *Id.* at 377, 396 S.E.2d at 625.

North Carolina courts have refused to grant private individuals the right to direct a railroad where to locate its crossings. *Id.* at 378, 396 S.E.2d at 626. Our Supreme Court has recognized that a railroad does not have the right to obstruct an existing road. *Tate v. R.R.*, 168 N.C. 523, 525, 84 S.E. 808, 809 (1915). Defendant holds a right-of-way across plaintiff’s property and has an affirmative duty to maintain its railroad. See *Hartman v. Walkertown Shopping Center*, 113 N.C. App. 632, 637, 439 S.E.2d 787, 791 (1994).

When the Summerlin Tract was conveyed to plaintiff, he took the property with record notice that no road or crossing existed to connect and provide access between the divided portions of the property. Plaintiff’s affidavit asserted that “my property is completely enclosed by the lands of others . . .” Evidence before the trial court showed plaintiff’s land is “not fenced nor enclosed.” See *Shepard v. R.R.*, 140 N.C. 391, 53 S.E. 137 (1906).

Plaintiff used Weyerhaeuser’s private road on an adjoining tract to gain access to the western portion of his property. When Weyerhaeuser gated this road, plaintiff was offered a key to gain access to the private road. He now seeks to compel defendant to provide a crossing for plaintiff’s sole benefit at no cost to plaintiff. Defendant does not have a duty to construct or allow a private crossing for plaintiff’s sole access to the western portion of the Summerlin Tract. This assignment of error is overruled.

IN RE APPEAL OF PHILLIPS

[161 N.C. App. 173 (2003)]

IV. Conclusion

Plaintiff's property is not enclosed as required by N.C. Gen. Stat. § 136-194. Defendant is not legally required to construct, finance, or allow a private grade crossing to connect portions of the Summerlin Tract divided by defendant's right-of-way. *Harris*, 100 N.C. App. at 378, 396 S.E.2d at 626. The trial court properly granted defendant's motion for summary judgment.

Affirmed.

Judges WYNN and LEVINSON concur.

IN THE MATTER OF: APPEAL OF WILLIAM TED PHILLIPS ET AL. FROM THE DECISION OF THE GRAHAM COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING REAL PROPERTY VALUATION FOR TAX YEAR 2001

No. COA03-46

(Filed 4 November 2003)

Taxation— property tax—furnishing documents—prehearing order

The Property Tax Commission did not abuse its discretion by dismissing taxpayer's appeal concerning a county board's valuation of real property for the 2001 tax year, because: (1) the taxpayer was provided ample notice of the consequences of a failure to comply with the Commission's rules; and (2) the taxpayer failed to comply with 17 N.C.A.C. 11 .0213, requiring parties to furnish documents to the Commission at least ten days prior to the hearing, and 17 N.C.A.C. 11 .0214, requiring the parties to enter into a prehearing order and to submit copies thereof to the Commission.

Appeal by taxpayers William Ted Phillips, Berniece Lloyd, and James Leonard Phillips from order dated 10 July 2002 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 15 October 2003.

IN RE APPEAL OF PHILLIPS

[161 N.C. App. 173 (2003)]

McKinney & Tallant, P.A., by Zeyland G. McKinney, Jr. for taxpayer-appellants.

Parker Poe Adams & Bernstein, by Charles C. Meeker and Cynthia L. Wittmer, for county-appellee.

BRYANT, Judge.

William Ted Phillips et al. (taxpayer) appeals an order of the North Carolina Property Tax Commission (the Commission) dated 10 July 2002 dismissing taxpayer's appeal to the Commission.

On 29 May 2001, taxpayer appealed to the Commission for review of a decision by the Graham County Board of Equalization and Review concerning the valuation of real property for the 2001 tax year. This appeal was scheduled to be heard on 16 May 2002. In a letter dated 11 June 2001, the Secretary of the Commission instructed taxpayer on the procedures to be followed for purposes of his appeal, including the requirement to furnish certain documents at least ten days prior to the hearing date and to prepare a pre-hearing order containing the parties' stipulations. The letter warned that failure to comply with these procedures could result in dismissal of the appeal. On 9 January 2002, taxpayer submitted his answers to Graham County's interrogatories. Between 27 February and 11 April 2002, Graham County's counsel contacted taxpayer's attorney twice by letter, requesting taxpayer to forward his lists of witnesses, exhibits, and issues, as required by the Commission's rules, and offering to prepare the pre-hearing order if taxpayer so preferred. The February letter also cautioned that "the Commission strictly enforces its pre-hearing requirements." When taxpayer failed to respond to these letters or to the two telephone messages left by the County's counsel, Graham County filed a motion to dismiss on 13 May 2002, three days before the hearing, based on taxpayer's failure to comply with the Commission's rules. That same day, taxpayer faxed the County's counsel a list of exhibits and witness names.

In its 10 July 2002 order, the Commission found that:

1. On April 25, 2002, the Secretary to the Commission mailed a Notification of Hearing before the Commission to . . . [t]axpayer. This notice of hearing included instructions for the exchange of documentary evidence and the preparation of a Pre-Hearing Order with the Graham County Attorney.

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2. . . . Taxpayer did not enter into a pre-hearing order with the Graham County Attorney prior to the hearing date[] and did not exchange documentary evidence, as required by the rules of the Commission.

3. . . . Taxpayer did not furnish the Commission six copies of the documentary evidence at least ten (10) days prior to the date of hearing, as required by the rules of the Commission.

4. Counsel for Graham County had sent copies of the County's documentary evidence to [t]axpayer's counsel and attempted to contact [t]axpayer's counsel in order to conduct a Pre-Hearing Conference and enter into a Pre-Hearing Order.

Based on these findings, the Commission concluded that taxpayer had failed to comply with 17 NCAC 11 .0213 and .0214 and, pursuant to the holding in *In re Appeal of Fayetteville Hotel Assoc.*, 117 N.C. App. 285, 450 S.E.2d 568 (1994), *aff'd*, 342 N.C. 405, 464 S.E.2d 298 (1995) (per curiam), dismissed taxpayer's appeal.

The sole issue before this Court is whether the Commission abused its discretion in dismissing taxpayer's appeal.

The rules for appeals to the Commission are codified in title 17, chapter 11 of the North Carolina Administrative Code. The relevant sections for purposes of this appeal are .0213 and .0214, which provide:

.0213 COMMISSION TO BE FURNISHED DOCUMENTS PRIOR TO HEARING

(a) At least ten days prior to the date of the hearing, each party to the appeal shall furnish to the secretary of the Commission six copies of all documents to be introduced at the hearing, including maps, pictures, property record cards and briefs. This requirement may be modified by the Commission if it is shown that compliance would cause an undue hardship on one or both of the parties.

(b) In the absence of an agreement to the contrary, a copy of each such document shall also be furnished or made available to the opposing party at the same time.

.0214 PARTIES TO ENTER INTO PRE-HEARING ORDER

Parties shall enter into a pre-hearing order before the appeal is set for hearing. This order will include stipulations as to par-

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ties, exhibits, witnesses, issues, and any other matters which can be stipulated by the parties. The secretary of the Commission will furnish a sample order to all appellants. The Commission urges that the parties stipulate all uncontroverted essential facts and agree upon the qualifications of expert witnesses in the order. The appellant shall forward six copies of the executed order to the secretary at least 10 days prior to the date of hearing.

17 NCAC 11 .0213, .0214 (June 1982).

In *Fayetteville*, this Court held that dismissal of an appeal to the Commission for failure to follow the above noted rules was an appropriate sanction where: (1) the taxpayer-hotel had been mailed a notification by the Secretary of the Commission with instructions for the exchange of documentary evidence and the preparation of a pre-hearing order; (2) the respondent had attempted to contact the taxpayer twelve days before the date of hearing; and (3) the taxpayer nevertheless failed to submit its documents until the day before the hearing and did not enter into a pre-hearing order. *Fayetteville*, 117 N.C. App. at 287-88, 450 S.E.2d at 570. Taxpayer argues that his case is distinguishable from *Fayetteville* because he submitted answers to interrogatories from which Graham County could have ascertained the issues on appeal and also presented his witness and exhibit lists three days prior to the hearing date. This is a distinction without a difference. For one, section .0213 requires that each party, as well as the Commission, be given at least ten days prior to the hearing to adequately prepare in light of the other side's documentary evidence. See 17 NCAC 11 .0213. Thus, there is little difference in whether a party submits some information three days prior to the hearing or all of the information one day before the hearing. Moreover, the rules are designed to create a level playing field prior to the hearing, which includes presentation of the issues to the other side. See 17 NCAC 11 .0214. A party is not meant to have to search for potential issues that may be contained in answers to interrogatories. Finally, taxpayer makes no attempt to explain his failure to enter into a pre-hearing order and submit copies thereof to the Commission as required by section .0214. Based on these circumstances and considering the ample notice taxpayer was provided of the consequences of a failure to comply with the rules, we conclude that the Commission did not abuse its discretion in dismissing taxpayer's appeal.

STURDIVANT v. ANDREWS

[161 N.C. App. 177 (2003)]

Affirmed.

Judges McCULLOUGH and TYSON concur.

VELVET STURDIVANT, ADMINISTRATRIX OF THE ESTATE OF JACQUELINE ELIZABETH POLK, PLAINTIFF v. JESSE LEE ANDREWS AND LEMONS BACKHOE LOADER SERVICE, INC., AND RICKY LENORD POLK, DEFENDANTS

No. COA02-1455

(Filed 4 November 2003)

Statutes of Limitation and Repose— uninsured motorist claim—underlying action

An action against an uninsured motorist carrier is subject to the statute of limitations for the insured's tort action against the uninsured motorist. In this case, the company was served with a copy of the summons and complaint of the underlying wrongful death action well after the two-year statute of limitations had run.

Appeal by plaintiff from order dated 9 August 2002 by Judge W. Erwin Spainhour in Anson County Superior Court. Heard in the Court of Appeals 28 August 2003.

Henry T. Drake for plaintiff-appellant.

Caudle & Spears, P.A., by Michael J. Selle and Eric Allen Rogers, for unnamed defendant-appellee Atlantic Indemnity Company.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for defendant-appellees Jesse Lee Andrews and Lemons Backhoe Loader Service, Inc.

BRYANT, Judge.

Velvet Sturdivant (plaintiff) appeals an order dated 9 August 2002 dismissing unnamed defendant Atlantic Insurance Company (Atlantic), which had issued an uninsured motorist (UM) insurance policy to plaintiff, from plaintiff's wrongful death action against named defendants Ricky Lenord Polk (Polk), Lemons Backhoe Service, and Jesse Lee Andrews (Andrews).

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[161 N.C. App. 177 (2003)]

Plaintiff is the administratrix of the estate of her deceased daughter, Jacqueline Elizabeth Polk. On 12 April 2000, Jacqueline was a passenger in a car owned and driven by Polk (no relation). The car collided with a loaded timber truck owned by Lemons Backhoe Service and driven by its agent, Andrews. Jacqueline died as a result of the collision. At the time of the accident, Polk and his car were uninsured.

On 8 December 2000, plaintiff instituted a wrongful death action against Polk, Lemons Backhoe Service, and Andrews. On 12 June 2002, plaintiff's counsel sent a regular first-class letter to Atlantic, providing notice of the action against defendants and indicating plaintiff's intention to seek from Atlantic \$50,000.00 coverage under plaintiff's UM policy. On 28 June 2002, Atlantic, as an unnamed defendant and on behalf of Polk, moved to dismiss plaintiff's complaint based on lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, and expiration of the statute of limitations. On 3 July 2002 (more than two years after the accident), plaintiff's counsel served Atlantic through certified mail a copy of the summons and complaint issued by plaintiff against the named defendants. In an order dated 9 August 2002, the trial court granted Atlantic's motion and dismissed with prejudice plaintiff's claim against Atlantic.

The dispositive issue is whether an action against a UM carrier is subject to the statute of limitations for the insured's tort action against the uninsured motorist.

The appeal in this case is interlocutory and therefore not immediately appealable. *See Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998) ("An order is interlocutory if it does not determine the entire controversy between all of the parties."). We nevertheless elect to grant certiorari under Rule 21 of the North Carolina Rules of Appellate Procedure to review this matter on the merits. *See N.C.R. App. P. 21.*

"An insurance policy is a contract[] and is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions." *Poultry Corp. v. Ins. Co.*, 34 N.C. App. 224, 226, 237 S.E.2d 564, 566 (1977). The statute of limitations for bringing a contract action is three years. N.C.G.S. § 1-52(1) (2001). In comparison, the statute of limitations for a wrongful death action is two years. N.C.G.S. § 1-53(4) (2001).

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Recently, the North Carolina Supreme Court asserted in dictum:

In the situation where a tortfeasor has no liability insurance coverage, the injured insured's UM carrier generally would be the only insurance provider exposed to liability for the insured's claim for damages. As such, it follows that the UM provider need be made a party to the suit and be served with a copy of the summons and complaint within the statute of limitations governing the underlying tort.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 577, 573 S.E.2d 118, 122 (2002) (holding that an insured's mere failure to notify an *underinsured* motorist [UIM] carrier within the statute of limitations for the underlying tort does not preclude recovery for UIM benefits because the tortfeasor remains principally responsible to defend the tort claim and the UIM carrier is responsible for the insured's injuries only when the limits of the tortfeasor's liability coverage have been exhausted).

Although dicta, the Court's reasoning is consistent with N.C. Gen. Stat. § 20-279.21(b)(3)(a). Under the statute, after an insured has served an uninsured motorist carrier with a copy of a summons, complaint, or other process, the carrier becomes a party to an action between the insured and the UM and is permitted to defend the suit in its own name or the name of the uninsured motorist. N.C.G.S. § 20-279.21(b)(3)(a) (2001). In requiring the UM carrier to be included in the underlying tort action, the legislature intended to subject the insured's action against the carrier to the statute of limitations for the tort claim. Cf. *Pennington*, 356 N.C. at 576-77, 573 S.E.2d at 122 (finding that an insured does not need to notify a *UIM carrier* within the statute of limitations for the tort claim against a UIM because N.C. Gen. Stat. § 20-279.21(b)(4) does not specify the form, substance, or manner of the notice to be given to a UIM carrier and does not require such an insurer to become a party in the tort action).

The Court's reasoning in *Pennington* is also consistent with this Court's earlier ruling in *Thomas v. Washington*, 136 N.C. App. 750, 525 S.E.2d 839 (2000). In *Thomas*, this Court concluded that an insured's action against a UM carrier was time-barred because the insured failed to properly serve the carrier within the three-year statute of limitations for the underlying negligence action against the uninsured motorist. *Id.* at 756, 525 S.E.2d at 843.

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[161 N.C. App. 177 (2003)]

In the instant case, plaintiff's daughter died as a result of an accident on 12 April 2000. Atlantic, plaintiff's UM carrier, was served with a copy of the summons and complaint of the underlying wrongful death action on 3 July 2002, well after the two-year statute of limitations for the action had run. *See Thomas*, 136 N.C. App. at 754, 525 S.E.2d at 842 (stating that the applicable statute of limitations begins to run on the date of accident for actions against both the tortfeasor and the UM carrier). Consequently, Atlantic cannot be made a defendant, and the trial court properly dismissed plaintiff's action against Atlantic.

Affirmed.

Judges McGEE and GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ALLEY v. ALLEY No. 02-594	Wake (97CVD9763)	Affirmed in part, reversed in part, and remanded
BEATENHEAD v. LINCOLN CTY. No. 02-1610	Lincoln (01CVS784)	Affirmed
CHAPMAN v. CHAPMAN No. 02-1293	Wake (96CVD6082)	Affirmed
CROWDER v. PRESTON TRUCKING CO. No. 02-1250	Ind. Comm. (986270)	Affirmed in part and remanded in part
DOLLAR v. DOLLAR No. 02-1406	Wake (98CVD11385)	Affirmed
GREENFIELD MISSIONARY BAPTIST CHURCH v. HAWKINS No. 02-1578	Granville (01CVD336) (02CVS96)	Vacated
GREENFIELD MISSIONARY BAPTIST CHURCH v. JACKSON No. 02-1376	Granville (01CVD336) (02CVS96)	Dismissed
IN RE APPEAL OF TAYLOR/ TRANSYLVANIA TREE FARMS No. 02-1411	Prop. Tax Comm. (00PTC244)	Affirmed
IN RE RIGGSBY No. 02-1654	Orange (02J79)	Affirmed
STATE v. BROWN No. 02-1448	Forsyth (01CRS60566) (01CRS60568)	No error
STATE v. CLARK No. 02-1462	Avery (01CRS50348) (01CRS50349) (01CRS50350) (01CRS50351) (01CRS50352)	No error
STATE v. COLEY No. 02-1254	Forsyth (00CRS12460)	No error
STATE v. MENSCH No. 02-1530	Mecklenburg (01CRS4047) (01CRS4049) (01CRS4068) (01CRS4069)	No error

SWINTON v. LA FOGATA CORP. No. 02-1669	Dare (01CVS452)	Affirmed
VISWANATHAN v. CHRYSLER FIN. CO. No. 02-1460	Columbus (01CVS1358)	Affirmed in part; reversed and remanded in part

STATE v. SIMS

[161 N.C. App. 183 (2003)]

STATE OF NORTH CAROLINA v. ANTWAUN KYRAL SIMS

No. COA02-1262

(Filed 18 November 2003)

1. Evidence— rag with victim's blood and defendant's semen—knowledge—active participant in crime

The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning personal property case by admitting into evidence a rag found in the back seat area of the victim's Cadillac and the scientific analysis of that rag which concluded that the rag contained the victim's blood as well as traces of defendant's semen, because: (1) the evidence was not duplicative of the other evidence placing defendant in the Cadillac when it was used to show that defendant used the rag to wipe down the backseat of the car to wipe away the victim's blood, that defendant had knowledge of the kidnapping and helped cover it up, and that defendant was an active participant in the series of events; and (2) the evidence was not unfairly prejudicial when the trial court instructed the jury that the rag was not to be used as evidence of a sexual assault when there was no evidence of sexual assault.

2. Criminal Law— prosecutor's argument—rag contained victim's blood and traces of defendant's semen

The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning personal property case by failing to sustain defendant's objection to the State's reference during its opening and closing arguments to evidence of a rag found in the back seat area of the victim's Cadillac and the scientific analysis of that rag which concluded that the rag contained the victim's blood as well as traces of defendant's semen, because: (1) the State used the evidence only to argue that defendant knew the victim had been kidnapped and that he participated in the events; (2) the trial court instructed the jury not to consider the evidence of the presence of semen on the rag as evidence of sexual assault; and (3) the State referred to the rag merely in a factual manner during opening statements.

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[161 N.C. App. 183 (2003)]

3. Criminal Law—prosecutor’s argument—comparing defendant to an animal—acting in concert theory

Although the trial court erred in a first-degree murder, first-degree kidnapping, and burning personal property case by allowing the State during closing arguments to improperly compare defendant to a hyena and an animal of the African plain and to state that “he who hunts with the pack is responsible for the kill” when the reference went beyond a simple analogy to help explain the theory of acting in concert, the improper statements did not deny defendant due process and entitled him to a new trial because: (1) the State did not misstate the evidence or the law in making its argument; (2) the trial court instructed the jury that closing arguments are not evidence; and (3) there was an abundance of evidence, both physical and testimonial, that defendant was guilty of the crimes charged.

4. Criminal Law—prosecutor’s argument—defendant a devil

The trial court did not commit prejudicial error in a first-degree murder, first-degree kidnapping, and burning personal property case by allowing the State to contend during closing arguments that “if you are going to try the devil, you have to go to hell to get your witnesses,” because: (1) the Court of Appeals and our Supreme Court have already concluded that almost exactly this same statement was not reversible error; and (2) although in some contexts such a statement by the prosecutor may be inappropriate, defendant is not entitled to a new trial given the overwhelming evidence of defendant’s guilt.

Judge WYNN concurring.

Appeal by defendant from judgments entered 24 August 2001 by Judge Jay D. Hockenbury in Superior Court, Onslow County. Heard in the Court of Appeals 19 August 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.

Mary March Exum for defendant-appellant.

McGEE, Judge.

Antwaun Kyral Sims (defendant) was convicted of first-degree murder, first-degree kidnapping, and burning personal property on 24 August 2001. The trial court found defendant to have a prior record

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level II for the latter two offenses. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction, to a minimum term of 100 months and a maximum term of 129 months imprisonment for first-degree kidnapping, and to a minimum term of eight months and a maximum term of ten months imprisonment for burning of personal property. Defendant appeals.

The State's evidence at trial tended to show that defendant was with Chad Williams (Williams) and Chris Bell (Bell) at the traffic circle in Newton Grove, North Carolina on 3 January 2000, when Bell said that the group needed to rob someone to get a car so Bell could leave the state to avoid a probation violation hearing. Defendant agreed to assist Bell. Defendant, Bell, and Williams observed Elleze Kennedy (Ms. Kennedy), an eighty-nine-year old woman, leaving the Hardee's restaurant across from the traffic circle around 7:00 p.m. Ms. Kennedy got into her Cadillac and drove to her home a few blocks away. Defendant, Bell, and Williams ran after Ms. Kennedy's car, cutting across several yards until they reached Ms. Kennedy's home. Bell approached Ms. Kennedy in her driveway with a BB pistol and demanded Ms. Kennedy's keys. Ms. Kennedy began yelling and Bell hit her in the face with the pistol, knocking her to the ground. Bell told defendant and Williams to help him find the keys to Ms. Kennedy's Cadillac. After rifling through Ms. Kennedy's pockets, Williams found the keys on the carport and handed them to defendant who agreed to drive.

Bell told defendant and Williams to move Ms. Kennedy to the back seat of the Cadillac. When defendant and Williams attempted to do so, Ms. Kennedy bit Williams on the hand. Williams hit Ms. Kennedy in the jaw, and with defendant's help, put her in the back seat. Ms. Kennedy kept asking Bell where he was taking her. Bell responded by telling her to shut up and striking her in the face several times with the pistol. Ms. Kennedy, who was now bleeding steadily, ceased struggling.

After driving to Bentonville Battleground, defendant, Bell, and Williams put Ms. Kennedy, who was unconscious at the time, in the trunk of the Cadillac. While driving around, Bell told defendant to turn up the radio so they could not hear Ms. Kennedy in the trunk. Defendant, Bell, and Williams drove to the Chicopee Trailer Park in Benson, North Carolina, arriving at Mark Snead's (Snead) trailer around 8:30 p.m. Defendant, Bell, and Williams told Snead that the Cadillac was a rental car and that the three of them were driving to Florida. Defendant, Bell, and Williams went inside Snead's trailer and

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all smoked marijuana. Defendant, Bell, and Williams later drove to the other side of the trailer park to visit Pop and Giovanni Surles, also telling them that the Cadillac was a rental car.

While at the Chicopee Trailer Park, Williams told defendant and Bell that he was not going to travel in a stolen car to Florida with an abducted woman in the trunk. Williams got out of the Cadillac and began to walk back to Snead's trailer. Defendant and Bell drove away but later returned to Snead's trailer with the music in the Cadillac turned up very loud. Defendant and Bell told Williams that they had let Ms. Kennedy out of the trunk at a McDonald's and that Ms. Kennedy was now talking to the police. Williams then got back in the Cadillac and the three drove to defendant's brother's house. Defendant stated that he wanted to wipe up Ms. Kennedy's blood from the back seat of the Cadillac. Defendant went into his brother's house and returned with a damp rag, which he used to wipe down the backseat and backdoor where Ms. Kennedy had originally been held before she was placed in the trunk.

Defendant drove Williams and Bell to a nearby truck stop where Bell took four dollars from Ms. Kennedy's pocketbook, which he gave to defendant to buy gasoline for the Cadillac. Bell told defendant to leave the car running. Nevertheless, defendant turned the car off. While the car was turned off, Williams heard scuffling in the trunk and confronted defendant and Bell about Ms. Kennedy; however, defendant and Bell laughed, again saying they had dropped Ms. Kennedy off at McDonald's.

As they drove to Fayetteville, Bell threw the BB pistol and Ms. Kennedy's credit cards out of the window of the Cadillac. Defendant, Bell, and Kennedy parked at a motel and were opening the trunk to let Ms. Kennedy out when a police car drove by. They closed the trunk, got back in the Cadillac, and drove to a nearby housing project where defendant and Bell reopened the trunk. Williams testified that it appeared Ms. Kennedy attempted to get out of the trunk but that defendant slammed the trunk back down.

Defendant, Bell, and Williams decided to return to Newton Grove to find the scope from the BB pistol which was lost during the abduction of Ms. Kennedy. Upon arriving at Ms. Kennedy's home, Williams observed blood on the concrete slab, as well as a pair of glasses and a woman's shoe. Bell searched Ms. Kennedy's yard for the scope but did not find it; he picked up the woman's shoe and put it in the Cadillac.

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While discussing what to do with Ms. Kennedy, Bell told Williams that he knew a place to put her, but that defendant knew of an even better place. Defendant, Bell, and Williams drove to a field with some trees, located near defendant's brother's house. The three opened the trunk and Williams saw Ms. Kennedy moving around in the trunk and moaning. Williams asked if they could let her go, but Bell replied, "Man, I ain't trying to leave no witnesses. This lady done seen my face. I ain't trying to leave no witnesses." Bell asked defendant for a lighter to burn Bell's blood-covered jacket. Defendant gave Bell his lighter and Bell set the jacket on fire and threw it into the Cadillac. Bell stayed to watch the fire, but defendant and Williams walked back to defendant's brother's house to watch television. When Bell returned to the house, he first joked that he had let Ms. Kennedy out of the car and that she had driven the Cadillac away; however, he informed defendant and Williams that he had actually just stayed to watch the jacket burn. The three slept at defendant's brother's house. The next morning Bell told defendant to go back to the car and confirm that Ms. Kennedy was dead, and that if she was not, defendant should finish burning the Cadillac. Defendant returned and told Bell and Williams that Ms. Kennedy was dead and that all of the windows in the Cadillac were smoked. Bell did not believe defendant and called Ryan Simmons (Simmons) to come and drive them to the Cadillac. Defendant and Bell wiped the car down to remove any fingerprints, and Williams, responding to an inquiry from Simmons, confirmed the Cadillac was indeed stolen.

Simmons drove defendant, Bell, and Williams to Bell's house for a change of clothes and a few video games, and then drove the three back to defendant's brother's house. Simmons came back to pick up Bell and Williams a couple of days later; however, before leaving, Bell told Williams and defendant to lie if the police questioned them about the murder.

Ms. Kennedy's Cadillac was found by law enforcement the morning after her abduction. Investigators discovered Ms. Kennedy's body in the trunk. They made castings of footprints found in the area of the abandoned Cadillac. The castings were later compared to, and matched, shoes taken from defendant. Investigators identified fibers consistent with Ms. Kennedy's clothing on clothes seized from Williams, and identified Ms. Kennedy's blood on clothes worn by Williams and Bell and on Bell's burned jacket. Investigators recovered a red cloth from the backseat floorboard, which was later identified as the one defendant had used to wipe down the back

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seat of the Cadillac. Tests of the cloth showed traces of defendant's semen and Ms. Kennedy's blood. Police found two hairs in the backseat area of the Cadillac, one of which was later determined to be defendant's and the other Bell's. Police also matched latent fingerprints found on the Cadillac with prints taken from defendant and Bell.

The police concluded that the fire was set intentionally and burned the rear of the front seats and the armrest before it extinguished from a lack of oxygen, leaving soot inside the passenger compartment as well as in the trunk.

Upon investigating the area outside Ms. Kennedy's residence, investigators discovered a large puddle of blood in the driveway, a pair of eyeglasses, a dental partial, a blue button, a walking cane, a partial shoe impression, and blood smear marks on the driveway consistent with a dragging motion.

Forensic pathologist Dr. Falpy Carl Barr (Dr. Barr) testified that he conducted Ms. Kennedy's autopsy on 5 January 2000. Dr. Barr noted blunt force injuries to Ms. Kennedy's face, including an injury to the bridge of her nose, fractures of the small bones on either side of her nose, as well as abrasions above each eyebrow, bruises to her face, neck, and chest area, and injuries to her hands. Dr. Barr testified that Ms. Kennedy was struck multiple times with a weapon, leaving marks consistent with a pellet gun, and that the other bruising to her torso could have been the result of having been kicked. Dr. Barr also testified that Ms. Kennedy's dental bridge was missing and that several teeth were loose. Dr. Barr testified that there was no evidence of sexual assault of Ms. Kennedy. Dr. Barr testified that because of the extent of soot in her trachea and lungs he believed that she was alive and breathing at the time the fire took place in the vehicle; however, because of Ms. Kennedy's elevated carbon monoxide level, Dr. Barr came to the conclusion that Ms. Kennedy died as a result of carbon monoxide poisoning from a fire in the Cadillac.

Williams lied to the police about his involvement, and he claimed that defendant was not present at the initial attack on Ms. Kennedy; however, Williams ultimately confessed to his involvement and inculpated defendant and Bell. Williams pled guilty to first-degree murder, first-degree kidnapping, and assault with a deadly weapon inflicting serious injury. Williams testified at defendant's trial and was awaiting a capital sentencing hearing at the time.

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Defendant presented testimony from several alibi witnesses who said defendant was at the Chicopee Trailer Park all day until dark on 3 January 2000. Dwayne Ricks testified that he gave defendant a ride to the Chicopee Trailer Park on the morning of 3 January 2000. Giovanni Surles testified that he spent the day with defendant at the Chicopee Trailer Park. Bessie Surles testified she saw defendant with Giovanni Surles at the trailer park into the evening. Brenda Surles testified that she saw her son, Giovanni Surles, walking with defendant in the early afternoon and again in the early evening. Yolanda Peacock testified that she left the Chicopee Trailer Park at dark to go to the store to buy cigars for defendant, but that when she returned around 7:00 p.m. defendant was no longer there. Latisha Williams testified she saw defendant at the Chicopee Trailer Park in the afternoon, but that defendant left as it was getting dark. Latisha Williams further testified that Bell and Williams arrived in a Cadillac looking for defendant, and that when she saw the Cadillac again, defendant was in the Cadillac with Bell and Williams. Several of these alibi witnesses also testified that Bell and Williams arrived at the trailer park later in the evening driving a Cadillac and that defendant left with Bell and Williams in the Cadillac. Brenda Surles also testified that it takes about twenty-five to thirty minutes to drive from the Chicopee Trailer Park to the Newton Grove traffic circle.

Defendant also presented testimony of Antowean Darden (Darden) that Bell had approached Darden about renting a car, but Darden denied that he had seen defendant, Bell, or Williams at the Newton Grove traffic circle on the night of 3 January 2000. On cross-examination, Darden admitted that he named defendant, Bell, and Williams as possible suspects in the murder at a law enforcement roadblock on 4 January 2000. Defendant's girlfriend, Krystal Elliot, testified that Williams had called her from jail to tell her that defendant was not with Williams and Bell when they abducted Ms. Kennedy from her home.

Defendant has failed to put forth an argument in support of assignments of error one through six and twelve through twenty-two; pursuant to N.C.R. App. P. 28(b)(6) we deem those assignments of error to be abandoned.

I.

[1] Defendant challenges the admission into evidence of a rag found in the back seat area of the Cadillac and the scientific analysis of this rag, which concluded that the rag contained Ms. Kennedy's blood as

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well as traces of defendant's semen. Defendant also contends that reference in the State's opening and closing arguments to the rag and to the traces of defendant's semen on the rag was error.

Defendant objected at trial to the admission of the rag and its scientific analysis, arguing that under N.C. Gen. Stat. § 8C-1, Rule 403, the probative value of the evidence was substantially outweighed by its prejudicial effect, by its possibility to mislead the jury, and by the cumulativeness of the evidence. Whether to exclude relevant evidence under N.C.G.S. § 8C-1, Rule 403 is in the trial court's discretion; we review the trial court's decision for an abuse of that discretion. *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

Defendant argues that the rag and the analysis indicating the presence of defendant's semen and Ms. Kennedy's blood on the rag were duplicative evidence of defendant's presence in the Cadillac. Defendant contends the probative value of the evidence was minimal because there was testimony by Williams that defendant was in the Cadillac, as well as physical evidence of defendant's fingerprints on the outside of the Cadillac, a head hair from defendant found in the Cadillac, and castings of defendant's footprints found around the Cadillac. We disagree.

Defendant's theory at trial was that although he was in the Cadillac, he joined Bell and Williams only after Ms. Kennedy had been kidnapped, that he was unaware of her kidnapping, and that he simply went along for the ride. Defendant's hair and fingerprints were found in the Cadillac and he stipulated that he was in the vehicle. This evidence is consistent with both defendant's theory that he just went along for the ride and with the State's theory that defendant actively participated. However, Williams' testimony indicated that defendant was an active participant in the events. Defendant attempted to discredit Williams' testimony. Williams testified that defendant went into defendant's brother's house and returned with a damp rag to wipe down the back seat because Ms. Kennedy's blood was on the seat. The fact that a rag, covered with Ms. Kennedy's blood, was found in the Cadillac is evidence that the seat was indeed wiped down with a rag. The traces of defendant's semen on the rag further corroborate Williams' testimony, because defendant's DNA in his semen tends to identify defendant as the person who obtained and used the rag to

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wipe away Ms. Kennedy's blood. Defendant's use of the rag to wipe down the backseat also tends to show defendant had knowledge of the kidnapping and, by helping to cover up the kidnapping, he was an active participant in the series of events. Thus we find there was indeed probative value to the evidence, and that it was not simply duplicative of the other evidence placing defendant in the Cadillac.

Defendant also argues that despite any probative value the evidence may have had, it was substantially outweighed by the prejudice it created because of the inference that a sexual assault of Ms. Kennedy may have occurred due to the presence of semen on the rag. However, as the trial court stated several times, there was no evidence of sexual assault in the record, and the trial court instructed the jury that the rag was not to be used as evidence of a sexual assault given the fact that there was no other evidence that any such sexual assault occurred. Despite the fact that the State, out of the presence of the jury, contested the trial court's admonishment not to argue that the rag was evidence of a sexual assault, the State never made any such argument to the jury. We find that in the present case the probative value of the rag and the scientific analysis of the rag was not substantially outweighed by the danger of undue prejudice or misleading the jury. The trial court did not err in exercising its discretion in admitting the rag and the scientific analysis of the rag, which indicated the presence of defendant's semen.

[2] Defendant also cites as error the trial court's failure to sustain defendant's objection to the State's use of, in its closing argument, the evidence of the rag and the scientific analysis of the rag revealing the presence of defendant's semen and Ms. Kennedy's blood. "The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). In order to show an abuse of discretion, defendant must show that the trial court's failure to sustain defendant's objection " 'could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)). "Trial counsel is allowed wide latitude in argument to the jury and may argue all of the evidence which has been presented as well as reasonable inferences which arise therefrom." *State v. Hyde*, 352 N.C. 37, 56, 530 S.E.2d 281, 294 (2000), cert. denied, 531 U.S. 1114, 148 L. Ed. 2d. 775 (2001) (quoting *State v. Guevara*, 349 N.C. 243, 257, 506 S.E.2d 711, 721 (1998), cert. denied, 526 U.S. 1133, 143 L. Ed. 2d 1013 (1999)).

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As discussed above, the rag and the scientific analysis of the rag were properly admitted into evidence. The State used this evidence in its closing argument to argue only that defendant knew Ms. Kennedy had been kidnapped and that he participated in the events. Additionally, as discussed above, the trial court instructed the jury not to consider the evidence of the presence of semen on the rag as evidence of sexual assault. The trial court did not abuse its discretion by allowing the State in its closing argument to comment on the rag and the scientific analysis of the rag, including the presence of defendant's semen.

Defendant also challenges the trial court's failure to sustain defendant's objection to the mention of the semen in the State's opening statement. The district attorney, in the pertinent portion of the State's opening statement, said as follows:

The evidence will show, members of the jury, that at least five types of evidence will prove that [defendant] and Bell were, in fact, in Ms. Kennedy's car. Number one, you will have fingerprints; two, foot tracks; three, hair; four, you will have blood evidence; five, semen.

Defendant objected to this statement and the trial court overruled the objection. The district attorney continued, "DNA evidence will prove the red washcloth—found in the backseat of Ms. Kennedy's car had [defendant's] semen on it," to which defendant objected and was overruled.

Defendant has not shown how it was error to allow the State to make these statements concerning the rag and the semen found on the rag in its opening statement. Defendant argues that the State promised not to mention the rag in its opening statement; however, the transcript reveals this contention to be incorrect. The State simply stated that as to the rag, the State would refer to it as a factual matter, not in an argumentative fashion, in its opening statement. Since the evidence of the rag and the scientific analysis of the rag was properly admitted by the trial court, it was not improper for the State to refer to the rag in a factual manner as it did during its opening statement. The trial court did not err in overruling defendant's objections to the mention of the rag in the State's opening statement. We overrule defendant's first argument.

II.

[3] Defendant assigns error to the following portion of the State's closing argument:

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He who hunts with the pack is responsible for the kill. Each of you have seen those nature shows: Discovery Channel, Animal Planet. You've seen where a pack of wild dogs or hyenas in a group attack a herd of wildebeests, and they do it as a group.

When they take that wildebeest, one of them might be the one that chases after it and grabs the leg of the wildebeest, slows them down. Another one might be out fending off the wildebeests that are coming and making their counterattacks. You have another that will be the one that actually grasps its jaws about the throat of the wildebeest, ultimately, crushing the throat and taking the very life out of that animal.

He who hunts with the pack is responsible for the kill. Each and every one of those animals are responsible for that kill. Each and every one of those animals will feast on the spoils of that kill. He who hunts with the pack is responsible for the kill.

Just like the predators of the African plane [sic], Chad Williams, [defendant], and Christopher Bell stalked their prey. They chased after their prey. They attacked their prey. Ultimately, they fell their prey.

Just like the predators of the African—

At that point in the State's closing argument defendant objected and asked to approach the bench. After discussion outside the presence of the jury, the trial court overruled defendant's objection that the State was referring to defendant as a hyena and an animal of the African plain; however, the trial court admonished the State to be very careful not to refer to defendant as an animal or to make any such inference. The State then continued its closing argument:

Just like the animals in the African plane [sic], after having felled their victim, they dragged their victim away; and, finally, they killed their victim.

...

You know, in the wild kingdom, there is always an animal, just like human beings—think about it. You get a group of people together; there is always one person that makes the decision. We're going to go to this place. This is the one that decides what to do. You have the leader. . . .

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The same way in the animal world. Its called the alpha male, the dominant male. You all know that. You've seen that.

Chad Williams was not the alpha male. Chad Williams was not and is not the dominant male. Do you know what? It doesn't matter. When you run with the pack, you are responsible for the kill.

[Defendant] ran with the pack. He acted in concert with Christopher Bell and Chad Williams; and as a result, he . . . is guilty of these crimes.

The State argues that the use of the phrase, "he who hunts with the pack is responsible for the kill," is a long accepted explanation of the theory of acting in concert. The State cites *State v. Knotts*, 168 N.C. 173, 187, 83 S.E. 972, 979 (1914), where our Supreme Court used the phrase to help illustrate just such a legal theory. Then, in *State v. Lee*, our Supreme Court again addressed the use of this phraseology stating,

[t]he isolated phraseology "[h]e who hunts with the pack is responsible for the kill," objected to by defendant, was intended as an illustrative statement of the law of conspiracy. It is highly unlikely that the statement was considered by the jury as anything other than an illustration of the law. When considered in the context in which it was used it had no prejudicial effect on the result of the trial and was therefore harmless.

Lee, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970).

In *State v. Cogdell*, 74 N.C. App. 647, 652, 329 S.E.2d 675, 678-79 (1985), this Court confronted the same language in the context of jury instructions. This Court held, basing our decision on *Lee*, 277 N.C. 205, 176 S.E.2d 765, that the defendant's counsel in that case did not act in an incompetent manner by failing to object to the phrase included in the jury instructions; and further held, with little discussion, that it was not reversible error for the trial court to give such an instruction. *Cogdell*, 74 N.C. App. at 652, 329 S.E.2d at 678-79.

As discussed above, in isolation the statement, "he who hunts with the pack is responsible for the kill," has been held not to be reversible error. Further, in at least one case, our Supreme Court has used almost identical language as an explanation for the theory of acting in concert. *Knotts*, 168 N.C. at 187, 83 S.E. at 979. However, the district attorney in the present case went beyond simply making an isolated statement using the "he who hunts with the pack" analogy. In

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the present case, although the district attorney did not specifically call defendant, Williams, and Bell “wild dogs or hyenas” hunting on the “African plain,” the association was sufficiently close to lead to such an inference. This is especially true, given the fact that defendant is African-American, and in light of multiple references to hunting on the “African plain,” even after the trial court warned the district attorney to be careful in his references. The district attorney’s further references to Bell as the “alpha male” and his references to defendant and Williams as followers in the pack, continued this close association with the animal kingdom, moving beyond a simple analogy to help explain the theory of acting in concert.

In the present case, we find these arguments by the district attorney to be improper. However, in order for defendant to be entitled to a new trial, the district attorney’s statements must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State v. McCollum*, 334 N.C. 208, 223-24, 433 S.E.2d 144, 152 (1993), cert. denied, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986)). In *McCollum*, our Supreme Court found that improper statements made during the State’s closing arguments did not deny the defendant due process, stating:

The prosecutor’s arguments here did not manipulate or misstate the evidence, nor did they implicate other specific rights of the accused such as the right to counsel or the right to remain silent. The trial court instructed the jurors that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. Moreover, the weight of the evidence against the defendant . . . submitted to the jury was heavy . . . All of these factors reduced the likelihood that the jury’s decision was influenced by these portions of the prosecutor’s closing argument. Therefore, the prosecutor’s closing argument did not deny the defendant due process.

McCollum, 334 N.C. at 224-25, 433 S.E.2d at 152-53. This analysis is similarly applicable to the present case. The State did not misstate the evidence or the law in making its argument. The trial court similarly instructed the jury that closing arguments are not evidence. In addition, there was an abundance of evidence, both physical and testimonial, that defendant was guilty of the crimes charged. We find that, although improper, the district attorney’s comments did not deny defendant due process entitling him to a new trial. This assignment of error is overruled.

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III.

[4] Defendant also assigns error to the district attorney's statement during closing argument that, "If you are going to try the devil, you have to go to hell to get your witnesses." This assignment of error is without merit. Our Supreme Court, as well as this Court, have held that practically the same exact statement made during the State's closing argument was not reversible error. *See State v. Sidden*, 347 N.C. 218, 229, 491 S.E.2d 225, 230 (1997), cert. denied, 523 U.S. 1097, 140 L. Ed. 2d 797 (1998) (noting that, even though the prosecutor in effect said the defendant qualified as the devil, because of the context of the statement, "the jury could [not] have thought the prosecutor believed the defendant was the devil" but that he was simply a "bad man"); *State v. Willis*, 332 N.C. 151, 171, 420 S.E.2d 158, 167 (1992) (noting that "the district attorney was [not] characterizing [the defendant] as the devil," but merely "used this phrase to illustrate the type of witnesses which were available in a case such as this one"); *State v. Hudson*, 295 N.C. 427, 435-37, 245 S.E.2d 686, 692 (1978) (noting the prosecutor's argument which included a similar statement, was "within the recognized bounds of propriety"); *State v. Joyce*, 104 N.C. App. 558, 573-74, 410 S.E.2d 516, 525 (1991), cert. denied, 331 N.C. 120, 414 S.E.2d 764 (1992) (noting this phraseology has been held not to constitute prejudicial error); *State v. Rozier*, 69 N.C. App. 38, 58, 316 S.E.2d 893, 906, cert. denied, 312 N.C. 88, 321 S.E.2d 907 (1984) ("Taken in context, the prosecutor's metaphor falls short of the direct name-calling, or vituperative hyperbole, which has been found to be reversible error in other cases.") (citations omitted). Despite the fact that in some contexts such a statement by a district attorney may be inappropriate, given the overwhelming evidence of defendant's guilt, defendant has not shown how the district attorney's statement constituted prejudicial error meriting a new trial. This assignment of error is overruled.

No error in part; no prejudicial error in part.

Judge HUDSON concurs.

Judge WYNN concurs with a separate opinion.

WYNN, Judge concurring.

I agree with the majority's holding that no prejudicial error occurred in the proceedings below; however, I write separately

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because I believe the trial court abused its discretion in admitting evidence regarding the presence of semen on a rag.

Under N.C. Gen. Stat. § 8C-1, Rule 403, Defendant objected to the admittance of any evidence regarding the semen and its DNA analysis and to the mentioning of said evidence in the opening and closing statements. Rule 403 allows discretionary exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Defendant contends the probative value of the rag and the analysis indicating the presence of Defendant's semen was minimal, was substantially outweighed by unfair prejudice, and constituted duplicative evidence of his presence in the car. The majority opinion holds that even though Defendant stipulated to his presence in the vehicle, the presence of semen on the rag tended to indicate that Defendant was the person who used the rag to wipe down the back-seat and was therefore an active participant in the kidnapping and murder. Therefore, according to the majority, the admittance of this evidence was not an abuse of discretion. I respectfully disagree.

The pertinent facts indicate Christopher Bell, Chad Williams, and Defendant kidnapped Ms. Kennedy, stole her car, drove the car to a place designated by Bell, caused Ms. Kennedy to bleed by pistol-whipping her, and placed her in the trunk. Sometime thereafter, the State's evidence also tended to show Defendant drove to his brother's home, obtained a rag, and wiped Ms. Kennedy's blood from the back seat.

Scientific analysis revealed the rag contained Ms. Kennedy's blood and semen belonging to either Defendant or Defendant's brother, who was not a party to this crime. The tests did not indicate how long the semen had been present on the rag. No evidence of semen was located on Ms. Kennedy's clothing or her person and there was no evidence of a sexual assault.

The State argued that the presence of Defendant's semen on the rag indicated Defendant wiped up the blood and was therefore an active participant in the kidnapping and murder. However, under these facts, the presentation of any semen evidence was unnecessary as there was more than sufficient evidence of Defendant's presence and active participation in this crime. Indeed, Defendant stipulated to

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his presence in the car. Moreover, other evidence indicates that Defendant drove the car, chose the abandonment location near his brother's home, obtained the rag used to wipe up the blood, and returned to the scene of the crime in order to cover up his fingerprints. The evidence also indicates the three men spent the night of the kidnapping and murder and several days thereafter at Defendant's brother's home. The day after the murder, the three men returned to the abandoned car in order to cover up any evidence of their crime. Under the facts of this case, the probative value of the semen evidence was minimal.

On the other hand, the prejudicial effect of the semen evidence was significant. The presence of semen on the rag indicates sexual activity occurred at some point. However, when such activity, by whom such activity, and with whom such activity occurred is uncertain. No semen was found on Ms. Kennedy's person or clothing and there was no other evidence of sexual assault. The rag belonged to Defendant's brother and was obtained from Defendant's brother's home. The DNA analysis could not exclude Defendant's brother as the source of the semen and the analysis could not indicate how long the semen had been present on the rag. Nevertheless, the State argued several times to the Court that the jury should be allowed to infer the men kidnapped Ms. Kennedy for the purpose of sexual gratification. In the absence of any evidence of sexual assault and given the overwhelming evidence of Defendant's presence in the car and active participation in this crime, the probative value of the semen evidence was substantially outweighed by unfair prejudice and constituted duplicative evidence. Accordingly, I conclude the trial court abused its discretion in admitting the semen evidence and allowing the State to mention said evidence in its opening and closing arguments.

However, the overwhelming evidence of Defendant's presence in the car and active participation in the crime renders the trial court's abuse of discretion non-prejudicial. *See State v. Patterson*, 103 N.C. App. 195, 205-06, 405 S.E.2d 200, 207 (1991) (stating that "under G.S. 15A-1443(a) a defendant must demonstrate that there is a reasonable possibility that had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises). Moreover, the trial court gave a curative instruction limiting jury consideration of the evidence to that of identification of the perpetrator and corroboration of the State's evidence and specifically prohibited the use of such evidence as proof of sexual assault

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of the victim. Accordingly, I would hold the trial court committed non-prejudicial error.

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NORTH CAROLINA UTILITIES COMMISSION, ATTORNEY GENERAL, ROY
COOPER, CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., CAROLINA
INDUSTRIAL GROUPS FOR FAIR UTILITY RATES I AND II, VIRGINIA ELECTRIC
AND POWER COMPANY D/B/A NORTH CAROLINA POWER, NORTH CAROLINA
MUNICIPAL POWER AGENCY NUMBER 1 AND NORTH CAROLINA EASTERN
MUNICIPAL POWER AGENCY, INC., APPELLEES v. CAROLINA POWER & LIGHT
COMPANY, DUKE POWER COMPANY, AND NORTH CAROLINA ELECTRIC MEM-
BERSHIP CORPORATION, APPELLANTS

No. COA02-1737

(Filed 18 November 2003)

Utilities—wholesale electric energy contracts—written notice to Commission not required

The 10 July 2002 order of the Utilities Commission that requires public utilities to provide written notice twenty days prior to the execution of any wholesale electric energy contracts in interstate commerce are vacated and this proceeding is dismissed with prejudice, because the order was preempted by the Federal Power Act and violates the Supremacy Clause of the Constitution when Congress granted the Federal Energy Regulatory Commission exclusive jurisdiction in regulating wholesale sales of electric energy in interstate commerce.

Judge WYNN dissenting.

Appeal by appellants from orders entered 10 July 2002 and 20 August 2002 by the North Carolina Utilities Commission. Heard in the Court of Appeals 16 September 2003.

Public Staff Executive Director Robert P. Gruber and Chief Counsel Antoinette R. Wike, by Gisele L. Rankin, Staff Attorney, for Appellee North Carolina Utilities Commission.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the Attorney General.

West Law Offices, P.C., by James P. West, for Appellee Carolina Utility Customers Association, Inc.

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Bailey & Dixon, L.L.P., by Ralph McDonald, for Appellee Carolina Industrial Groups for Fair Utility Rates II.

Poyner & Spruill LLP, by Michael S. Colo, Thomas R. West, and Pamela A. Scott, for Appellees North Carolina Municipal Power Agency Number 1 and North Carolina Eastern Municipal Power Agency, Inc.

Hunton & Williams, by Edward S. Finley, Jr., for Appellants.

Len S. Anthony, for Appellant Carolina Power & Light and Progress Energy.

William Larry Porter and Kodwo Ghartey-Tagoe, for Appellant Duke Power Company.

Robert B. Schwentker and Thomas K. Austin, for Appellant North Carolina Electric Membership Corporation.

TYSON, Judge.

Carolina Power & Light Company (“CP&L”), Duke Power (“Duke”), and North Carolina Electric Membership Corporation (“NCEMC”) (collectively, “appellants”) appeal from the 10 July 2002 and 20 August 2002 orders of the North Carolina Utilities Commission (the “Commission”). We vacate the 10 July 2002 orders and dismiss.

I. Background

On 17 November 1998, CP&L applied to the Commission for permission to construct two generating plants to produce electric energy that CP&L proposed to wholesale outside its North Carolina retail service area. By order dated 11 March 2002, the Commission initiated Docket No. E-100, Sub 85A, for the purpose of receiving comments on the jurisdictional and substantive issues concerning a public utility with native load priority (“NLP”) signing wholesale contracts for power to be supplied from the same plant as it provided to in-state captive retail ratepayers. NLP obligates the seller to build necessary capacity to continue to be able to serve buyers with such priority. NLP prohibits the interruption of electric energy to wholesale buyers any sooner than interruptions to the seller’s captive retail ratepayers.

These issues were first presented by Public Staff to the Commission in Docket No. E-2, Sub 733. At this hearing, evidence indicated that absent the addition of the generating capacity CP&L was requesting to build, CP&L’s capacity margin would fall to -1.4%

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by 2003. This accelerated need for additional capacity was caused in large part by the NLP wholesale contracts CP&L had entered into with two customers. On 2 November 1999, the Commission granted CP&L's requests to build two new generating plants. As a condition to this grant, CP&L was required to ensure that its retail native load customers would not be disadvantaged.

Subsequently, Public Staff requested the Commission to initiate an investigation. By order dated 17 November 1999, the Commission initiated a generic proceeding in Docket No. E-100, Sub 85. While this docket was pending, CP&L's newly-formed holding company filed an application to engage in a business transaction with Florida Progress Corporation. The Commission approved the proposed merger and issuance of securities. The Commission imposed a number of conditions on CP&L in approving this transaction. Condition 21 required that CP&L not enter into contracts for the wholesale of electric energy and/or capacity at NLP without first giving the Commission and Public Staff written notice twenty days prior to execution of contracts. Subsequent to the issuance of the Commission's order approving the merger with Florida Progress Corporation, Public Staff, CP&L, and NCEMC jointly filed proposed new Condition 20a. This Condition provided that if CP&L gave notice as required by Condition 21 and the Commission did not affirmatively order CP&L not to enter into such contracts, the loads of these wholesale buyers would be considered CP&L's retail native load. CP&L filed a twenty-day advance notice in Docket No. E-2, Sub 798. Numerous objections to the appropriateness of this notice were raised. CP&L responded by arguing that the Commission had no authority to prohibit it from entering into wholesale electric energy contracts or to require notice to the Commission. In response, the Commission issued an order on 11 March 2002, concluding that it should initiate a new proceeding to consider this issue raised by CP&L.

On 10 July 2002, the Commission issued an order concluding that it has jurisdiction and authority under North Carolina law to supervise and control public utilities and to compel that reasonable public utility service be provided. The Commission concluded that it had jurisdiction to review, prior to execution, proposed wholesale electric energy contracts granting NLP supplied from the same plant as provided to retail ratepayers and to take appropriate action to protect reliable service to retail customers in North Carolina. The Commission further concluded that this jurisdiction and authority were not preempted by federal law. Appellants appeal.

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II. ISSUES

The issues are whether: (1) the Commission's efforts to regulate wholesale electric energy contracts in interstate commerce are preempted by federal law; (2) state regulation of these wholesale contracts impermissibly burden interstate commerce; (3) the Commission is authorized under N.C. Gen. Stat. § 62 to require the submission of contracts with wholesale purchasers for review prior to execution; and (4) the Commission erred in failing to provide guidance by which it would assess the reasonableness of the agreements over which it claims jurisdiction.

III. Federal Preemption

Appellants' first assignment of error asserts that the Commission's efforts to regulate wholesale electric energy contracts are preempted by federal law. Appellants argue that the Commission cannot regulate wholesale electric energy transactions because state jurisdiction does not attach at any point between the parties' initial contract discussions and the time the power flows. The Commission argues that N.C. Gen. Stat. § 62 grants the authority to review wholesale electric energy contracts at NLP in order to secure and protect reliable service to retail customers. The Commission further argues that this authority under N.C. Gen. Stat. § 62 is not preempted by federal law.

The threshold question in any preemption analysis is whether Congress intended federal regulation to supersede state law. *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369, 90 L. Ed. 2d 369, 382 (1986). Within constitutional limits, Congress may preempt state authority by explicit terms. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203, 75 L. Ed. 2d 752, 765 (1983). Absent explicit preemption, the intent of Congress to preempt may also be found from a pervasive scheme of federal regulation "to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 1459 (1947). If Congress does not entirely displace state regulation in a specific area, state law is preempted to the extent that it: (1) actually conflicts with federal law; (2) makes compliance with both federal and state law impossible; or (3) where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas*, 461 U.S. at 204, 75 L. Ed. 2d at

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765. Our first step is to determine whether Congress intended the regulations of the Federal Energy Regulatory Commission (“FERC”) (formerly known as the Federal Power Commission (“FPC”)) to displace North Carolina law. This analysis requires an examination of the nature and scope of the authority granted to the FERC by Congress.

In *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Electric Co.*, the United States Supreme Court held that the sale of electric energy at wholesale was a matter of interstate commerce to be regulated by Congress. 273 U.S. 83, 86, 71 L. Ed. 549, 552 (1927). Congress had not regulated wholesale electric energy sales at that time. This decision created a gap in the law, known as the *Attleboro* gap. Congress enacted the Federal Power Act (“FPA”) as Title II of the Public Utility Act in order to fill this gap. Subchapter II, section 824(a), also known as section 201(a), of the FPA provides:

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the *sale of such energy at wholesale in interstate commerce* is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

16 U.S.C. § 824(a) (2001) (emphasis supplied).

Subchapter II, section 824(b), also known as section 201(b), further provides:

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the *sale of electric energy at wholesale in interstate commerce*, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission [FERC] shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of elec-

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tric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

16 U.S.C. § 824(b) (2001) (emphasis supplied). These sections show the clear intent of Congress in enacting the FPA to vest the FERC with exclusive power to regulate wholesale electric energy sales in interstate commerce.

In *United States v. Public Utilities Comm'n of California*, the Supreme Court held that “Congress interpreted [Attleboro] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power.” 345 U.S. 295, 308, 97 L. Ed. 1020, 1033 (1953). The Court stated that subchapter II of the FPA, and *Attleboro*, should be “read together” and that “the latter left no power in the states to regulate licensees’ sales for resale in interstate commerce, while the former established federal jurisdiction over such sales.” *Id.* at 311, 97 L. Ed. at 1035.

In *Federal Power Comm'n v. Southern California Edison Co.*, the United States Supreme Court held that “[section] 201(b) [of the FPA] grants the FPC jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself” 376 U.S. 205, 210, 11 L. Ed. 2d 638, 643 (1964). The United States Supreme Court reasoned:

[O]ur decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

Id. at 215-216, 11 L. Ed. 2d at 646. “[T]he legislative history of Part II of the Power Act demonstrates that Congress believed that *Attleboro* and the related cases compelled it to forego its assumption as to state regulation and displace it with comprehensive federal regulation.” *Id.* at 220, 11 L. Ed. 2d at 649.

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In *Appalachian Power Co. v. Public Service Comm'n of West Virginia*, a case factually similar to at bar, the United States Court of Appeals for the Fourth Circuit addressed whether Congress, after granting FERC authority to regulate the transmission and wholesale contracts of electric energy in interstate commerce, “left open to the states the power to consider the prudence of agreements regarding interstate energy exchanges.” 812 F.2d 898, 902 (4th Cir. 1987). The utility companies submitted their proposed agreement to FERC for approval. *Id.* at 901. The FERC accepted the agreement for filing as a rate schedule but before FERC could make a decision as to whether the terms of the agreement were just and reasonable, the Public Service Commission of West Virginia intervened in the FERC proceedings. *Id.* The Public Service Commission subsequently decided to defer to FERC on the prudence inquiry of the agreement as it believed its authority was preempted. *Id.* However, in a reconsideration of its deferment, the Commission ruled that it retained authority to require utilities to submit agreements for their approval and that their jurisdiction was not preempted. *Id.* The court overruled the state commission and held that Congress did not intend to allow the states to retain this power and that the West Virginia Public Service Commission’s assertion of authority was preempted by the FPA. *Id.* at 899.

The court held that Congress gave the FERC exclusive jurisdiction to consider the merits of wholesale interstate agreements. *Id.* The FERC’s jurisdiction to consider the merits of these contracts “follows from its general power over the ‘transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce.’” *Id.* at 902 (quoting 16 U.S.C. § 824(a)). The court explained, “FERC’s role is to determine whether such rates and charges are just and reasonable and not unduly preferential, discriminatory, or disadvantageous to any party.” *Id.*; see 16 U.S.C. § 824(d), 824(e). The court stated that in order to decide whether to approve wholesale electric energy contracts, the Public Service Commission of West Virginia would have to consider “whether the contract’s terms are reasonable, whether the contract gives any party an undue advantage, and whether the contract is in the public interest of the state.” *Id.* at 903. The court ruled that this prudence inquiry by the state commission was “not different from the FERC inquiry into the justness and reasonableness of the [agreement]” and that the state commission’s inquiry would “duplicate the FERC’s inquiry” and was thus “impermissible because the issue of the [agreement’s] merits falls within the FERC’s exclusive jurisdiction” *Id.* at 903-04.

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The court reasoned that “allowing the states to make the kind of prudence inquiry urged in this case not only would pose the potential for direct conflict with FERC pronouncements but also would impede accomplishment of the purposes of the FPA,” precisely what the federal preemption was designed to prevent. *Id.* at 904. “Lodging exclusive authority in FERC to consider the merits of the [agreement] thus forecloses the potential for differing state pronouncements regarding an agreement involving utilities regulated by various states.” *Id.* at 905.

In *State of Utah v. FERC*, the issue was whether the FERC had exclusive jurisdiction under the FPA regarding wholesale power contracts between two power companies to the exclusion of the Utah Commission. 691 F.2d 444, 446 (10th Cir. 1982). The power companies submitted their proposed contract to FERC first, before submitting the contract to the Utah Public Service Commission even though the Commission had previously issued an order requiring Utah Power to submit for its approval all contracts for the sale of power to any customer or other utility if the applicant intended to use any facility over which the Utah Commission had jurisdiction. *Id.* The United States Court of Appeals for the Tenth Circuit held that the Utah Public Service Commission’s authority was preempted and ruled, “where there is a sale at wholesale of electric energy in interstate commerce the jurisdiction of the FERC is exclusive.” *Id.* at 446. The court stated that “Congress interpreted this ruling as prohibiting state control of wholesale rates for electrical energy in interstate commerce, and so it gave the Federal Power Commission the authority under Part II of the Federal Power Act.” *Id.* at 447. The court reasoned that “it appears that the purpose of the 1935 amendments [to the FPA] was to vest the federal agency with power to regulate sales of electricity such as that presented here.” *Id.* “The authority of the Federal Power Commission was intended to be plenary and extend to all sales in interstate commerce” *Id.*

The Court also explained that the FPA provided remedies for the FERC and state utility commissions if the rates charged under the wholesale contract damaged the public interest. *Id.* at 448. These remedies are found in Subchapter II, section 824e(a) of the FPA:

- (a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues.

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or

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classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

16 U.S.C. § 824e(a) (2001). The court added that “the [FERC] can modify any rate, charge or classification or any rule, regulation, practice or contract affecting such rate if the [FERC] finds it to be unjust, unreasonable, unduly discriminatory or preferential.” *Utah*, 691 F.2d at 448-449. The court further explained that “if the order of the Federal Commission were to carry the matter to a ridiculous extreme like depriving the State of Utah of a large quantity of needed electricity, surely relief would be available.” *Id.*

N.C. Gen. Stat. § 62-42 (2001) gives our State Utilities Commission further remedies should appellants’ service to captive retail ratepayers become inadequate or unreliable. N.C. Gen. Stat. § 62-42 (2001) states:

- (a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds: (1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or (2) That persons are not served who may reasonably be served, or (3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, of any two or more public utilities ought reasonably to be made, or (4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or (5) That any other act is necessary to

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secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity, the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or affected within a reasonable time prescribed in the order.

The Commission argues that state prereview is needed to prevent public utilities from entering into wholesale electric energy contracts on the free market which may fail or become unprofitable, in order to protect local captive retail ratepayers from paying for the effects of failed wholesale electric energy contracts in interstate commerce. Should appellants' services to captive North Carolina ratepayers become "inadequate, insufficient, or unreasonably discriminatory," the Commission can require public utilities to build new structures to provide service that is reasonable and adequate. *Id.* Public utilities must be prepared to analyze and absorb the risks of entering into wholesale contracts in the competitive and free market and avoid looking to local captive retail ratepayers for subsidy. The path to greener grass beyond North Carolina's borders does not lead to a prodigal return home, with hat in hand.

CP&L agreed to give the Commission written notice twenty days prior to the execution of any wholesale electric energy contracts. The Commission's reason to require this prior notice was to ensure that captive retail ratepayers will continue to receive adequate and reliable electric service if this wholesale contract was executed. Under the holdings of *Appalachian Power and Utah*, this prereview of the prudence of agreements is clearly preempted by the provisions of the FPA which state that "FERC's role is to determine whether such rates and charges are just and reasonable and not unduly preferential, discriminatory, or disadvantageous to any party." *Appalachian Power*, 812 F.2d at 902; See 16 U.S.C. § 824(d), 824(e). Allowing the Commission to inquire into the "prudence" of these wholesale electric energy contracts, as state commissions in *Utah* and *Appalachian Power* attempted to do, "not only would pose the potential for direct conflict with FERC pronouncements but also would impede accomplishment of the purposes of the FPA," precisely what federal preemption was designed to prevent. *Id.* at 904. The FERC has the exclusive jurisdiction to make inquiry into and to determine the reasonableness of wholesale electric energy contracts in interstate commerce. *Id.* at 900. Congress has not "left open to the states the power to consider the prudence of agreements regard-

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ing interstate energy exchanges.” *Id.* at 902. The FERC’s jurisdiction over wholesale sales of electric energy in interstate commerce is exclusive and attaches at the point the parties to a wholesale contract begin negotiating.

We hold that the Commission’s order, which requires public utilities to provide written notice twenty days prior to the execution of any wholesale electric energy contracts in interstate commerce directly conflicts with the FERC’s powers and is preempted by the FPA. In light of this holding, we need not reach the appellants’ other assignments of error.

IV. Conclusion

Under the FPA, Congress granted FERC exclusive jurisdiction in regulating wholesale sales of electric energy in interstate commerce. The 10 July 2002 orders of the Commission are preempted by the FPA and violate the Supremacy Clause of the Constitution of the United States. U.S. Const. art. VI.; *See also Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 11 L. Ed. 2d 638 (1964). The 10 July 2002 orders of the Commission are vacated and this proceeding is dismissed with prejudice.

Vacated and dismissed.

Judge LEVINSON concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

FERC regulations under Section 201(a) of the FPA, 16 U.S.C. § 824(a), “extend only to those matters which are not subject to the regulation by the States.” By its terms, the FPA does not govern intrastate generation, production and transmission to retail customers. Thus, the NCUC, in this case, concluded “it has jurisdiction and authority under State law [N.C. Gen. Stat. §§ 62-30 and 62-32] to review, before they are signed, proposed wholesale contracts by a regulated North Carolina public utility granting native load priority to be supplied from the same plant as retail ratepayers and to take appropriate action if necessary to secure and protect reliable service to retail customers in North Carolina.” After reviewing the Commission’s conclusion, the majority held that because “under the FPA, Congress granted FERC exclusive jurisdiction in

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regulating wholesale sales of electric energy in interstate commerce" the "order of the Commission is pre-empted by the FPA and violates the Supremacy Clause of the Constitution of the United States." While I agree that federal law grants FERC exclusive jurisdiction to regulate wholesale sales of electric energy in interstate commerce, I disagree that federal law preempts the State of North Carolina from having any oversight over *proposed contracts* to engage in the sale of energy generated in North Carolina to another state. I respectfully dissent.

In reaching its holding, the majority relies upon federal cases in which the courts addressed attempts by a state public utility commission to exercise authority over activities involving existing contracts for the wholesale sales of electric energy in interstate commerce. However, none of the cases cited by the majority address the pre-review of *proposed* wholesale agreements by a state utility commission. Indeed, in *Appalachian Power Co. v. PSC of West Virginia*, 812 F.2d 898 (4th Cir. 1987), a case heavily relied upon by the majority, the Public Service Commission of West Virginia sought to undertake a prudence inquiry into interstate energy exchanges after FERC approval. In concluding West Virginia's jurisdiction was preempted, the Fourth Circuit determined the state commission's inquiry would duplicate the FERC's inquiry and would pose the potential for direct conflict with FERC pronouncements and would impede accomplishment of the purposes of the FPA. See 812 F.2d at 903-05.

Unlike *PSC of West Virginia*, the NCUC attempts to review *proposed* contracts for the interstate sale of wholesale electricity prior to the execution of the contracts in order to protect the interests of North Carolina electricity retail customers, which is not pre-empted by federal law. Section 201(a) of the FPA, 16 U.S.C. § 824(a), states federal regulation only extends to those matters not subject to state regulation, which includes the interstate wholesale sale of electricity. However, in this case, the NCUC is attempting to assert jurisdiction over non-executed contracts which contemplate the wholesale sale of electricity from plants that would serve interstate wholesale and intrastate retail customers. Ensuring the reliability of service to intrastate retail customers is within the province of state regulation. See N.C. Gen. Stat. § 62-2(a)(3). Whereas, *PSC of West Virginia* precludes state review of contracts after FERC approval, the pre-execution review of such contracts has not been prohibited or preempted.

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[161 N.C. App. 211 (2003)]

Although the majority has rendered a correct recitation of the law governing preemption¹, it should also be noted that “a test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L. Ed.2 d 248, 256-57 (1963). Thus, neither statute nor case law prohibits the NCUC from reviewing contracts prior to its execution to ensure the terms of those contracts provide for adequate, reliable and economic utility service to the citizens and residents of this State. Upon execution of the contract, the FERC can approve or disapprove the agreement or embark upon its own prudence inquiry. Such a procedure neither creates an actual conflict between state and federal law, makes compliance with federal and state law impossible, nor poses an obstacle to the accomplishment of the purposes and objectives of the FPA.

SUSAN NORMAN, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION, DEFENDANT

No. COA02-1053

(Filed 18 November 2003)

1. Highways and Streets— stop sign—placement and maintenance—duty of State

DOT did not owe plaintiff a duty in the placement and maintenance of a stop sign controlling the flow of traffic onto a highway close to a railroad crossing, and the Industrial Commission erred by finding DOT negligent as a matter of law in an action arising from an automobile-train collision at the crossing.

1. As the majority correctly states:

The threshold question in any preemption analysis is whether Congress intended federal regulation to supersede State law. Within constitutional limits, Congress may preempt state authority by explicit terms. Absent explicit preemption, Congress' intent to preempt may also be found from a pervasive scheme of federal regulation to make reasonable the inference that Congress left no room for the States to supplement it. If Congress does not entirely displace state regulation in a specific area, state law is preempted to the extent that it (1) actually conflicts with federal law; (2) makes compliance with both federal and state law impossible; or, (3) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

(citations omitted).

2. Tort Claims Act— railroad crossing accident—contributory negligence

Competent evidence existed to justify the Industrial Commission's conclusion, following an evidentiary hearing and findings, that the plaintiff in a railroad crossing action was not contributorily negligent. While DOT offered evidence that plaintiff should have realized that a train was approaching, reasonable inferences could have been drawn from the evidence that plaintiff's attention was focused on a stop sign to the right of the tracks and that she was slowing to obey that sign. The choice of inferences was for the Commission.

Appeal by defendant from the Decision and Order filed 2 June 1997 and from Decision and Order filed 7 May 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 April 2003.

Daniel J. Park, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for defendant-appellant.

GEER, Judge.

Plaintiff Susan Norman was injured when her car collided with a train at a railroad crossing in the town of Elkin. Defendant, the North Carolina Department of Transportation ("DOT"), has appealed from the North Carolina Industrial Commission's decisions under the State Tort Claims Act granting partial summary judgment to plaintiff on the issue of negligence and, after an evidentiary hearing, concluding that Ms. Norman was not contributorily negligent. Although we affirm the Commission's contributory negligence decision as supported by competent evidence, we reverse the decision granting partial summary judgment because genuine issues of material fact exist as to DOT's negligence. We remand for an evidentiary hearing on the issue of negligence.

Facts

In January 1989, at approximately 3:30 p.m., Ms. Norman, then eighteen years of age, was driving on Standard Street in the town of Elkin to her job at the Chatham Manufacturing Company. Standard Street crosses over railroad tracks, curves to the left, and runs parallel to the tracks for a distance. Standard Street then curves almost

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90 degrees to the left, re-crosses the railroad tracks, and continues a short distance until it intersects with N.C. Highway 268. At the second railroad crossing, there are no crossbars or other mechanized signals. There are, however, pavement markings indicating a railroad crossing.

At issue in this case is a stop sign placed 17 feet north of the second railroad crossing and 90 feet south of Highway 268. The Commission found that this stop sign controls the flow of traffic onto the highway. There is no other stop sign closer to the intersection with Highway 268. After reviewing a photograph of the stop sign and railroad tracks and considering the distance from Highway 268, DOT's Field Support Engineer, Harold Steelman, Jr., testified: "I think [the stop sign] would confuse me." He believed that a driver could be confused as to whether the stop sign regulated traffic crossing the railroad tracks or traffic entering Highway 268.

With respect to the question regarding who erected the stop sign, Mr. Steelman acknowledged that the State had responsibility for erecting any stop sign at the intersection with Highway 268, but asserted that DOT had not put up the stop sign on Standard Street. He pointed out that Standard Street was not in the state highway system.

Shortly after crossing the railroad tracks on Standard Street for the first time, Ms. Norman came to a stop at a traffic light. Phillip Ray Lyles testified in a deposition that he was two cars behind Ms. Norman at that intersection. While sitting at the light, he heard a train horn blow faintly. It sounded as if the train was a substantial distance away. He looked at the track, but did not see any sign of the train. After the stoplight turned green, the car between Ms. Norman and Mr. Lyles turned right and the car in which Mr. Lyles was riding pulled up immediately behind Ms. Norman.

As they continued to travel down Standard Street, Mr. Lyles did not see any sign of a train and did not hear a horn again. As they approached the second crossing of the railroad tracks, he noticed that Ms. Norman's brake lights came on and she slowed down to approximately two to three miles per hour. Almost simultaneously with hearing the train horn blow again, Mr. Lyles saw Ms. Norman's car collide with the train. Prior to the collision, he had never seen the train.

Ms. Norman remembered little that occurred prior to the accident. She testified that while she had previously crossed the tracks,

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she had never seen a train at that crossing. DOT's witness Wayne Atkins confirmed that trains traveled through town only once per week. Ms. Norman further testified that she did not believe that she heard the train whistle because had she heard a whistle, she would not have crossed the tracks. Ms. Norman's car was on the first set of tracks when she was struck by the train.

The police accident report indicated that the train engineer did not see Ms. Norman's car until just before the impact. He said that he had operated his bell and horn west of the first railroad crossing. The police officer interviewed two witnesses, one of whom heard the bell and horn, while the other was not sure.

Procedural History

In January 1992, plaintiff filed a claim against DOT under the State Tort Claims Act, N.C. Gen. Stat. § 143-291 (2001). Under the Tort Claims Act, "jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. N.C. State Ports Authority*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983).

DOT filed a motion to dismiss for failure to state a claim for relief together with three supporting affidavits. Deputy Commissioner Mary Hoag heard defendant's motion to dismiss on 27 August 1996 and entered an order granting defendant's motion to dismiss under Rule 12(b)(6) on the ground that plaintiff's claim "filed herein fails to state a claim upon which relief can be granted."

On appeal, the Full Commission reviewed DOT's three affidavits, various exhibits, the deposition of Phillip Lyles, and the deposition of Mr. Steelman. In an order filed 2 June 1997, the Full Commission reversed the deputy commissioner concluding that "there was a genuine issue as to defendant's negligence and, therefore, defendant's Motion to Dismiss was granted in error." Despite this finding of an issue of fact, the Commission then concluded that "[d]efendant, by and through the named employees herein, was negligent in its placement of, or in its causing to be placed and then maintenance of the stop sign in question," citing N.C. Gen. Stat. § 143-291 *et seq.* The Commission further concluded that "[a]s the proximate result of defendant's negligence, on 16 January 1989, plaintiff was involved in an accident resulting in bodily injuries and other damages." The

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Commission remanded the proceeding to the deputy commissioner for a hearing to determine whether plaintiff was contributorily negligent and, if not, damages.

Following an evidentiary hearing on contributory negligence and damages, Deputy Commissioner Edward Garner, Jr. filed an order on 15 April 1999 finding that plaintiff had been contributorily negligent by driving her vehicle onto the railroad crossing without looking to see whether a train was approaching and determining whether she could cross the tracks safely. In an order filed 7 May 2002, the Full Commission reversed, repeating its prior conclusion that plaintiff was injured as a proximate result of defendant's negligence in placing and maintaining the stop sign and finding that plaintiff was not contributorily negligent. The Commission found that plaintiff had been injured to an extent greater than or equal to \$500,000.00, granted a credit to defendant for \$145,000.00 received in settlement proceeds from other tortfeasors, and awarded \$355,000.00 in damages.

DOT has appealed both the Commission's 2 June 1997 order granting partial summary judgment as to negligence and the Commission's 7 May 2002 order awarding damages. Under N.C. Gen. Stat. § 143-293, either party may appeal a decision of the Commission:

Such appeal shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them.

N.C. Gen. Stat. § 143-293 (2001).

I

[1] DOT first argues that the Commission improperly entered summary judgment for plaintiff on the issues of negligence and proximate causation. We conclude that genuine issues of material fact exist as to the negligence of DOT and therefore remand for an evidentiary hearing on that issue.

Because the Commission considered materials outside of the pleadings, DOT's motion to dismiss pursuant to Rule 12(b)(6) was converted into a motion for summary judgment. *Caswell Realty Assoc. v. Andrews Co.*, 128 N.C. App. 716, 719, 496 S.E.2d 607, 609-10 (1998) ("[A]s matters outside of the pleadings were considered, the motions to dismiss were converted to motions for summary judgment."). When reviewing the Commission's entry of summary judg-

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ment, “instead of addressing the questions which we are usually limited to pursuant to N.C. Gen. Stat. § 143-293, we must determine whether the pleadings, interrogatory answers, affidavits or other materials contained a genuine question of material fact, and whether at least one party was entitled to a judgment as a matter of law.” *Medley v. N.C. Dep’t of Corr.*, 99 N.C. App. 296, 298, 393 S.E.2d 288, 289 (1990), *aff’d on other grounds*, 330 N.C. 837, 412 S.E.2d 654 (1992).

In a Tort Claims Act case, the Commission’s duty in addressing a summary judgment motion is limited to determining the existence of genuine issues of material fact and stops short of resolving such issues without an evidentiary hearing. As stated by our Supreme Court, “generally if a review of the record leads the appellate court to conclude that the trial [tribunal] was resolving material issues of fact rather than deciding whether they existed, the entry of summary judgment is held erroneous.” *Alford v. Shaw*, 327 N.C. 526, 536, 398 S.E.2d 445, 452 (1990).

The Commission’s 2 June 1997 order on its face reveals that it improperly resolved issues of fact regarding DOT’s negligence. In Conclusion of Law No. 2, the Commission expressly concluded that “there was a genuine issue as to defendant’s negligence” Upon reaching that conclusion, it was the duty of the Commission to reverse the deputy commissioner’s order dismissing plaintiff’s claim and remand for a full evidentiary hearing as to DOT’s negligence.

Our review of the evidence before the Commission confirms that genuine issues of material fact exist regarding DOT’s negligence. To prove negligence, a plaintiff must show that: “(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.” *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). In this case, the critical issue is whether the summary judgment evidence established conclusively that DOT owed a duty as to the placement and maintenance of the sign.

In finding DOT negligent as a matter of law, the Commission held that “the improper location of a stop sign controlling ingress to a State Highway is the legal responsibility of the Department of Transportation no matter where the sign is located and no matter who actually places the sign.” Citing N.C. Gen. Stat. § 20-158(a)

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(2001), the Commission found: "Because the stop sign in question controlled the approach to a highway under the control of defendant, and in the absence of other proof, the Full Commission finds that the sign was in fact placed in its location by personnel of defendant or someone acting at the direction of defendant." In addition, the Commission held that "[d]efendant was under a duty to inspect the sign to make certain that it was properly installed."

N.C. Gen. Stat. § 20-158(a) provides:

- (a) The Department of Transportation, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to control vehicles:
- (1) At intersections, by erecting or installing stop signs requiring vehicles to come to a complete stop at the entrance to that portion of the intersection designated as the main traveled or through highway. Stop signs may also be erected at three or more entrances to an intersection.
 - (2) At appropriate places other than intersections, by erecting or installing stop signs requiring vehicles to come to a complete stop.

The Commission erred in holding that this statute gives rise to a duty on the part of DOT.

Although this Court has not considered the effect of this specific statute, it has concluded that analogous statutes authorizing municipalities to erect signs do not, standing alone, give rise to a duty of care. In *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 293 S.E.2d 235 (1982), the plaintiff, who was struck by a train, sued the town, alleging in part that the town was negligent in failing to require adequate safeguards at a known hazardous railroad crossing. The plaintiff argued that N.C. Gen. Stat. § 160A-298(c) (2001), which authorizes a city to require the installation of safety devices at grade crossings, created a duty of care that the town breached. In rejecting this contention, the Court held:

The fact that a city has the *authority* to make certain decisions, however, does not mean that the city is under an *obligation* to do so. The words "authority" and "power" are not synonymous with the word "duty."

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Cooper, 58 N.C. App. at 173, 293 S.E.2d at 236 (emphasis original). The Court explained that the statute allowed a city to exercise its discretion in requiring safety devices, but “[t]here is no mandate of action.” *Id.* The Court therefore held as a matter of law that the town was not negligent in failing to require the installation of automatic signals at the railroad crossing. *Id.* at 174, 293 S.E.2d at 237. *See also Estate of Jiggetts v. City of Gastonia*, 128 N.C. App. 410, 414, 497 S.E.2d 287, 290 (1998) (city “owed plaintiffs no affirmative duty to control traffic” on a city street when N.C. Gen. Stat. § 160A-300 (1994) authorized the city to control traffic, but did not expressly require it to do so); *Wilkerson v. Norfolk Southern Railway Co.*, 151 N.C. App. 332, 342, 566 S.E.2d 104, 111 (2002) (city could not be held liable for delaying the installation of safety devices at a railroad crossing because the city, although authorized to require safety devices, “had no duty to have the warning or safety devices in place”).

Here, N.C. Gen. Stat. § 20-158(a)(1) only “authorize[s]” DOT to erect or install stop signs. While DOT had authority to install a stop sign at the intersection of Standard Street with N.C. Highway 268, this statute did not mandate that it do so. The statute does not, therefore, establish that DOT had a duty to erect or necessarily had responsibility for the stop sign at issue in this case. DOT cannot be held liable for negligence based solely on the failure to erect a properly located sign at the intersection with N.C. Highway 268. DOT must have breached a duty independent of N.C. Gen. Stat. § 20-158(a).

A duty to install a stop sign may arise if the evidence establishes that DOT knew or should have known that the intersection was hazardous. *See Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 101, 576 S.E.2d 345, 352 (2003) (upholding Industrial Commission determination that DOT was negligent in connection with a railroad crossing based on the State’s knowledge, because of earlier accidents and analysis from engineers, that the crossing was hazardous); *Phillips v. N.C. Dep't of Transp.*, 80 N.C. App. 135, 137-38, 341 S.E.2d 339, 341 (1986) (DOT’s “duty to maintain the right-of-way necessarily carried with it the duty to make periodic inspections” and it could be found negligent based on implied notice of a hazardous condition on the right-of-way). In this case, plaintiff offered no evidence that DOT knew or should have known that the intersection of Standard Street and N.C. Highway 268 was hazardous or that any hazardous condition existed on the State right-of-way.

Alternatively, if the evidence established that DOT did erect a stop sign to govern that intersection, then it was obligated to do so in

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conformity with the Manual on Uniform Control Devices for Streets and Highways, published by the United States Department of Transportation. N.C. Gen. Stat. § 136-30(a) (2001) (“All traffic signs and other traffic control devices placed on a highway in the State highway system must conform to the Uniform Manual.”). DOT could, under N.C. Gen. Stat. § 136-30(a), be found negligent based on a failure to comply with the Uniform Manual when erecting the stop sign.

Even though the evidence would support a finding that the stop sign at issue in this case did not comply with the Uniform Manual, an issue of fact exists whether DOT installed the stop sign. The Commission found that “[b]ecause the stop sign in question controlled the approach to a highway under the control of defendant, and in the absence of other proof, the Full Commission finds that the sign was in fact placed in its location by personnel of defendant or someone acting at the direction of defendant.” DOT, however, offered evidence suggesting that it was not responsible for the installation of the stop sign, but rather that it had been erected by the Town of Elkin. Mr. Steelman testified in his deposition that the stop sign at issue did not have the sticker placed by DOT on those signs that it erects and that DOT’s Division of Traffic Engineers had denied having installed the sign.

In further addressing DOT’s contention that it did not install the stop sign, the Commission asserted, in a statement mislabeled as a finding of fact, that “the improper location of a stop sign controlling ingress to a State Highway is the legal responsibility of the Department of Transportation no matter where the sign is located and no matter who actually places the sign.” This statement is an incorrect conclusion of law. N.C. Gen. Stat. § 136-30(a) provides that the DOT “shall have the power to control all signs within the right-of-way of highways in the State highway system.” *See also Shapiro v. Toyota Motor Co.*, 38 N.C. App. 658, 662, 248 S.E.2d 868, 870 (1978) (when a city street becomes part of the state highway system, DOT becomes responsible for its maintenance including the “control of all signs and structures within the right-of-way”). Thus, unless the stop sign was within the right-of-way of N.C. Highway 268, DOT did not have an obligation to inspect for and remedy the improperly placed stop sign. *See Wilkerson*, 151 N.C. App. at 343, 566 S.E.2d at 111 (“Because we agree with the City that authority is a prerequisite to responsibility, plaintiff’s failure to allege or present evidence of the obstructions being on City property compels us to conclude that . . . the City did

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not have authority over the area, and the City did not have a duty to keep the area clear."); *Phillips*, 80 N.C. App. at 138, 341 S.E.2d at 341 ("[T]he defendant's duty to maintain the right-of-way necessarily carried with it the duty to make periodic inspections . . ."). DOT cannot be held liable for failing to discover the defective sign without a finding that the sign was within the State right-of-way.

Plaintiff argues that the negligence decision may be based on DOT's failure to install safety devices at the railroad crossing. While the Commission found, in its 7 May 2002 decision addressing contributory negligence, that "[d]efendant was negligent in failing to provide the warning signs, markings and traffic signals that were necessary," the other, more detailed findings of fact supporting that general finding discuss only the stop sign. Since the Commission did not base its summary judgment decision on any negligence by DOT as to the railroad crossing, we will not address that argument in the first instance.

The evidence before the Commission does not establish DOT's negligence as a matter of law. DOT offered sufficient evidence to raise issues of fact regarding its responsibility for the stop sign. The evidence was not, however, unequivocal and DOT is not, therefore, entitled to summary judgment on that issue.

Defendants argue alternatively that they are entitled to summary judgment on the issue of proximate cause. We disagree. In *Jordan v. Jones*, 314 N.C. 106, 109, 331 S.E.2d 662, 664 (1985), the plaintiff's decedent was killed when a bus disregarded a stop sign and "stop ahead" sign and collided with the car in which she was a passenger. The driver of the bus and the bus company's safety director testified in their depositions that the stop sign was misplaced, causing the driver to fail to see the sign. Our Supreme Court reversed a grant of summary judgment to DOT, rejecting its argument that any negligence by it in the placement of the stop sign was not the proximate cause of the accident, but rather the cause of the accident was the bus driver's failure to observe the stop sign. The Court held: "The very basis of the defendants' claim against the DOT is that [the bus driver] failed to see the signs at the intersection because of the DOT's negligent failure to install proper signals." *Id.*

Likewise, in this case, plaintiff has offered evidence that the placement of the stop sign was confusing and that the collision was due to her efforts to comply with the improperly located stop sign. The Commission could find that plaintiff's collision was proximately

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caused by the stop sign. The Commission, therefore, properly declined to grant summary judgment with respect to proximate cause.

II

[2] DOT argues that the Commission erred in failing to find that plaintiff was contributorily negligent. When reviewing a decision of the Commission under the Tort Claims Act following an evidentiary hearing, this Court addresses two questions: “(1) whether competent evidence exists to support the Commission’s findings of fact, and (2) whether the Commission’s findings of fact justify its conclusions of law and decision.” *Simmons v. N.C. Dep’t of Transp.*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). With respect to findings of fact, “the existence of contrary evidence is irrelevant if there was also competent evidence to support the Full Commission’s findings.” *Smith*, 156 N.C. App. at 98, 576 S.E.2d at 350. Since contributory negligence is a mixed question of law and fact, this Court must also determine whether the Commission’s findings of fact support its conclusion that plaintiff was not contributorily negligent. *Id.* at 97, 576 S.E.2d at 349. We hold that competent evidence exists to support the Commission’s findings, which in turn justify its conclusion that Ms. Norman was not contributorily negligent.

With respect to the issue of contributory negligence, the Commission first found that “the location of the stop sign was confusing” and that the misplacement of the stop sign “resulted in plaintiff being hit by an oncoming train when she slowed to obey the stop sign that was just beyond the railroad crossing.” The Commission further found:

Defendant alleges contributory negligence by plaintiff due to her being familiar with this railroad crossing from “cruising” on weekend nights. The evidence indicates that trains only traveled along these rails during the weekdays. There was testimony that other witnesses heard a faint train whistle blow, but plaintiff never heard the train whistle. Plaintiff was not contributorily negligent, in that she was trying to obey the negligently placed stop sign which caused her to brake as she crossed the railroad tracks and be hit by the train. Plaintiff was distracted while trying to obey the negligently placed stop sign that was supposed to control an intersection with a state maintained highway in which defendant has the duty to provide for safe ingress and egress.

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A review of the record reveals that each of the factual findings related to contributory negligence is supported by competent evidence.

The finding that the placement of the stop sign was confusing is supported by testimony from Mr. Steelman, a Field Support Engineer with DOT: "I think it would confuse me." When viewing a photograph of the railroad crossing where the accident occurred, Mr. Steelman testified that he could not tell whether the stop sign at issue controlled traffic crossing the tracks or traffic entering the highway.

Ms. Norman testified that while she had crossed the tracks before, she had never before encountered a train. DOT's witness Wayne Atkins confirmed that trains traveled through the Town of Elkin only once a week and only during the daytime. Ms. Norman's testimony at the hearing suggested that, even as of that date, she still did not understand the stop sign to be directing her to stop later on at the highway, as DOT has argued, rather than at the stop sign itself.

With respect to the question whether Ms. Norman should have heard or seen the train, Phillip Lyles, a passenger in the car immediately behind Ms. Norman's car, testified that when he heard the train's horn, it sounded as if it was a substantial distance away and that he did not see the train or hear it again until it collided with Ms. Norman's car. Ms. Norman testified that had she heard the train's whistle, she would not have crossed the railroad tracks.

Defendant argues that because of Ms. Norman's loss of memory, the evidence does not support a finding that she was trying, when hit, to obey the improperly placed stop sign. That inference may, however, be drawn from the testimony. Carl McCann, a witness for DOT, testified that a person attempting to obey that stop sign would start slowing down and braking some distance prior to the stop sign. Mr. Lyles, who was watching Ms. Norman's car, saw her brake lights come on, the car slow down, and then the brake lights come on a second time. According to Mr. Lyles, Ms. Norman was traveling only two to three miles per hour immediately prior to the collision. This testimony is sufficient to support the Commission's inference that Ms. Norman had slowed down in an attempt to obey the stop sign.

Defendant argues that these findings of fact, even if supported by evidence, are insufficient to justify the conclusion that plaintiff was not contributorily negligent. Defendant first contends that plaintiff was obligated to stop prior to the railroad tracks, citing N.C. Gen.

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Stat. § 20-142.1 (2001). Under § 20-142.1(a)(3) and (4), a person is required to stop not less than 15 feet from the nearest rail of the railroad whenever a train approaching within 1,500 feet of the crossing emits a signal audible from that distance and the train is an immediate hazard because of its speed or nearness to the crossing or when an approaching train is “plainly visible and is in hazardous proximity to the crossing.” The evidence was, however, conflicting as to whether the train issued a signal audible from 1,500 feet of the highway crossing and whether the approaching train was plainly visible.

The statute also provides that a “[v]iolation of this section shall not constitute negligence per se.” N.C. Gen. Stat. § 20-142.1(d). 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.” *Carr v. Murrows Transfer, Inc.*, 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964).

The Commission concluded, citing *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997), *aff'd per curiam*, 347 N.C. 666, 496 S.E.2d 379 (1998), that Ms. Norman was not contributorily negligent. *Nourse* relied upon the well-established principle that a plaintiff who does not discover an obvious hazard is not contributorily negligent as a matter of law if “there is some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition” *Id.* at 241, 488 S.E.2d at 613 (internal quotation marks omitted). See also *Newton v. New Hanover County Bd. of Educ.*, 342 N.C. 554, 564, 467 S.E.2d 58, 65 (1996) (quoting *Walker v. Randolph Co.*, 251 N.C. 805, 810, 112 S.E.2d 551, 554 (1960)) (A plaintiff’s failure to discover and avoid a visible defect “is not applicable where there is ‘some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition.’ ”).

The Commission’s findings that Ms. Norman did not hear the train whistle and, therefore, was not aware that the train was approaching and that she failed to see the train because she was distracted by the misplaced stop sign are sufficient to invoke this doctrine. While DOT offered evidence suggesting that Ms. Norman should have realized that a train was approaching, reasonable inferences can also be

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drawn from the evidence, as the Commission did, that Ms. Norman's attention was focused on the stop sign to the right side of the tracks and that she was slowing to obey that stop sign. The decision regarding which inference to draw was for the Commission and may not be overturned on appeal. "Inferences from circumstances when reasonably drawn are permissible and that other reasonable inferences could have been drawn is no indication of error; deciding which permissible inference to draw from evidentiary circumstances is as much within the fact finder's province as is deciding which of two contradictory witnesses to believe." *Snow v. Dick & Kirkman, Inc.*, 74 N.C. App. 263, 267, 328 S.E.2d 29, 32 (citing *Blalock v. City of Durham*, 244 N.C. 208, 92 S.E.2d 758 (1956)), *disc. review denied*, 314 N.C. 118, 332 S.E.2d 484 (1985).

We conclude that the Commission's findings of fact as to the defense of contributory negligence are supported by competent evidence and that those findings in turn support its conclusion that plaintiff was not contributorily negligent. The case must, however, be remanded for a trial as to DOT's negligence. Because of our disposition of the negligence issue, we need not consider appellant's remaining arguments.

Affirmed in part. Reversed and remanded in part.

Judges TIMMONS-GOODSON and BRYANT concur.



STATE OF NORTH CAROLINA v. GERARDO COLEMAN

No. COA02-1644

(Filed 18 November 2003)

1. Jury— deliberations—jury's note—juror not following law

The trial court did not err in an armed robbery and felony murder case by failing to make further inquiry on the second day of jury deliberation after receiving a note from the jury alleging that one juror was not following the law and requesting that the juror at issue be replaced, because: (1) the trial court informed the jury that the juror could not be replaced and instructed the jury as to its duty to follow the law; (2) defendant did not object to the trial court's instruction to the jury regarding the jury's note,

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did not request a mistrial, and did not ask the court to make an inquiry; (3) defendant opposed the State's suggestion that an alternate juror be seated to replace the challenged juror; and (4) it was within the discretion of the trial court to determine whether an inquiry was necessitated by the note from the jury, and there was no obligation to investigate further based on the ambiguity of the note's allegation and the corrective measure taken by the trial court in its subsequent instruction.

2. Constitutional Law— right to be present at trial—bailiff sent to admonish absent juror

The trial court did not violate defendant's right to be present at his capital trial when it sent a bailiff to admonish an absent juror not to discuss the case with anyone while court was in recess, because: (1) while a bailiff may not attempt to instruct jurors as to the law, a simple reminder to the jurors that they are to abide by the court's earlier instructions should not be considered an instruction as to law; (2) the communications did not relate to defendant's guilt or innocence, nor would defendant's presence be helpful to his defense; and (3) it is assumed the bailiff limited her instruction to the juror as directed by the trial court.

3. Homicide— felony murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felony murder based on armed robbery, because: (1) felony murder based on armed robbery does not depend on whether the intent to commit the taking of property was formed before or after the killing; and (2) based on the evidence, a reasonable juror could infer that the killing and the robbery were part of a single transaction.

4. Homicide— first-degree murder—failure to instruct on lesser-included offense of involuntary manslaughter

The trial court did not err by denying defendant's request to instruct on involuntary manslaughter as a lesser-included offense of first-degree murder, because: (1) the trial court instructed on second-degree murder; and (2) the jury's verdict of first-degree murder based on felony murder indicated the jury was not coerced into a verdict when it could have convicted defendant on the lesser charge of second-degree murder.

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5. Constitutional Law— double jeopardy—felony murder—failure to arrest judgment on armed robbery charges

The trial court did not violate defendant's double jeopardy rights by arresting judgment on only the conviction for attempted armed robbery and by entering judgment on the three armed robbery convictions in addition to first-degree murder, because: (1) in this instance where no specific underlying felony was noted in the jury instructions on felony murder, and there are multiple felony convictions which could serve as the underlying felony for purposes of the felony murder conviction, it is in the discretion of the trial court as to which felony will serve as the underlying felony for purposes of sentencing; and (2) armed robbery and attempted armed robbery are both classified as Class D felonies for purposes of sentencing.

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

The short-form indictment used to charge defendant with first-degree murder was sufficient.

Appeal by defendant from judgment dated 10 April 2002 by Judge F. Donald Bridges in Superior Court, Gaston County. Heard in the Court of Appeals 18 September 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

Office of the Appellate Defender, by Assistant Appellate Defender Anne M. Gomez, for defendant-appellant.

McGEE, Judge.

Timothy M. Lollis (Lollis), John D. Mason (Mason), Karl L. Gacusana (Gacusana), R. Chad Melton (Melton), and David C. Gregg (Gregg) were together on the night of 5 September 1999 at an apartment leased by Lollis and Gregg in Belmont, North Carolina. Preston Wells (Wells) telephoned Gregg to say that he would be coming over with his girlfriend, Beth Nelson (Nelson). Gregg called Penny Riggan (Riggan) and told her Wells and Nelson were coming. Gregg was aware that Riggan and Nelson did not like each other.

Riggan arrived at the apartment, followed by Wells and Nelson. Everyone sat in the living room and when Wells left to use the restroom, Riggan started hitting Nelson, causing a knot to develop

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under Nelson's eye. Riggan continued to beat Nelson until Wells returned and broke up the fight. Wells, Nelson, and Riggan left the apartment. Wells called Gregg about twenty minutes later and asked whether the fight had been planned. Gregg informed Wells that there had been no plan.

After leaving the apartment, Nelson told Mary Suzanne Jackson (Jackson), who lived with Gerardo Coleman (defendant), about her altercation with Riggan. Jackson and Nelson agreed to "settle the score" and "rough up Riggan." Jackson brought along a tire iron in the event the "boys wanted to get in on it." Nelson, Jackson, Wells and defendant drove back to the apartment at about 11:00 p.m.

Nelson and Jackson entered the apartment and asked for Riggan. Lollis, Melton, Gregg, Gacusana and Mason were sitting in the living room. Defendant entered the apartment, armed with a shotgun, chambered a round of ammunition and pointed the shotgun at Lollis. Defendant said, "You all ----ed up, you all are going to die tonight." Everyone was ordered to get on the floor, empty their pockets and place their money on the table.

Melton refused to remove his necklace and defendant hit him in the head with the shotgun. Lollis and Melton removed their watches, Gacusana and Mason placed money on the floor and coffee table, and Gregg put his wallet on the coffee table. Jackson snatched off Gacusana's and Melton's chain necklaces. Defendant put the shotgun to Gacusana's face and Gacusana handed over his bracelet. Jackson and Nelson collected the jewelry and money.

Jackson and Nelson began arguing with Gregg about the fight with Riggan. Jackson was standing in front of and to the left of defendant, Riggan was standing in front of and to the right of defendant. Jackson swung the tire iron at Gregg. Gregg rose up, lifted his arms and leg in the air, moved his head back, and leaned back against the wall. Defendant raised his shotgun and fatally shot Gregg in the head. Defendant, Nelson, and Jackson left the apartment and got into Wells's car. Melton fired at the car several times with a shotgun.

Early the following morning, Gaston County police officers took statements from Gacusana, Mason, Melton, and Lollis. The police officers located a tire iron in the front yard of the apartment building and two Federal high-power, twelve-gauge shotgun casings along the road in front of the apartment, which were from a shotgun found in the apartment.

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After locating Wells's car in the parking lot outside Jackson's apartment, the Gaston County police towed the car to the Gaston County Police Department. Gaston County police officers obtained a warrant for Jackson's arrest on the morning of 7 September 2002. In cooperation with the Charlotte-Mecklenberg Police Department, the Gaston County police approached Jackson's apartment. Defendant and Jackson walked out but immediately retreated to the apartment and closed the door. No one responded when police knocked on the door. When a SWAT team arrived an hour later, Jackson and defendant surrendered. Jackson consented to a search of her apartment and police found four unfired shotgun shells, some wet clothing and the chain necklaces stolen from Gacusana and Melton. Forensic analyses found no blood on any clothing. Defendant gave two written, signed statements to the police. In the first statement, defendant denied having anything to do with the robbery and murder. Police Major Johnny Phillips (Major Phillips) untruthfully told defendant that Jackson had told police that defendant had accidentally shot someone. Major Phillips asked defendant to show him how he had held the shotgun and defendant complied by placing one hand slightly below his waist and the other extended out. In his second statement, defendant stated he could not recall pulling the trigger, but that he had walked towards Gregg and Gregg had kicked the shotgun, causing it to go off.

Officer B.F. Harris of the Gaston County Police Department testified that the burn mark on Gregg's head indicated that the shotgun was within inches of Gregg when it was fired. At trial, Lollis, Mason, Gacusana, and Melton identified defendant as the shooter.

Defendant was convicted of three counts of armed robbery and one count of felony murder. The trial court arrested judgment on defendant's conviction for attempted armed robbery in accordance with the doctrine of felony murder. Defendant appeals.

I.

[1] Defendant first assigns error to the trial court's decision on the second day of jury deliberation not to make further inquiry after receiving a note from the jury alleging that one juror was "not following the law." There was no additional elaboration in the jury's note as to juror misconduct except a request that the juror at issue be replaced. In response to the note, the trial court informed the jury that a juror could not be replaced and instructed the jury as to its duty to follow the law.

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The record does not show that defendant objected to the trial court's instruction to the jury regarding the jury's note. At the close of the instruction, defendant stated, "I don't have any objection to what the Court instructed." Defendant failed to request a mistrial or to ask the trial court to make an inquiry. Defendant even opposed the State's suggestion that an alternate juror be seated to replace the challenged juror. Defendant therefore failed to properly preserve this issue for appellate review. Nonetheless, this Court exercises its discretion to consider the merits of defendant's argument pursuant to N.C.R. App. P. 2.

"The determination of the existence and effect of jury misconduct is primarily for the trial court whose decision will be given great weight on appeal." *State v. Bonney*, 329 N.C. 61, 83, 405 S.E.2d 145, 158 (1991). An inquiry by the trial court is generally only required where there is an indication that some prejudicial conduct has taken place. *State v. Barnes*, 345 N.C. 184, 226, 481 S.E.2d 44, 67, *cert. denied*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *cert. denied*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998). To warrant an investigation, "the circumstances must be such as not merely to put suspicion on the verdict, because there was an opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion" it is a decision left to the trial court's discretion. *State v. Aldridge*, 139 N.C. App. 706, 713, 534 S.E.2d 629, 634, *disc. denied*, 353 N.C. 269, 546 S.E.2d 114 (2000) (quoting *State v. Johnson*, 295 N.C. 227, 234-35, 244 S.E.2d 391, 396 (1978)); *see also, State v. Murillo*, 349 N.C. 573, 599-600, 509 S.E.2d 752, 767 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999) (there is no absolute affirmative duty to investigate juror misconduct absent a report of prejudicial conduct). The trial court's ruling on juror misconduct will only be reversed upon clear abuse of discretion. *Aldridge*, 139 N.C. App. at 713, 534 S.E.2d at 634 (trial court did not abuse its discretion in failing to further inquire into jury misconduct where the allegation was based on one anonymous telephone call).

In the case before us, it was within the discretion of the trial court to determine whether an inquiry was necessitated by the note from the jury. Based on the ambiguity of the note's allegation and the corrective measure taken by the trial court in its subsequent instruction, there was no obligation to investigate further. Accordingly, we overrule defendant's assignment of error.

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II.

[2] The second day of jury deliberations began at 9:30 a.m. and by 12:30 p.m., a juror had informed the trial court that, due to a personal problem, she would be unable to return to the courtroom until later that afternoon. The trial court so informed the parties and released them for lunch, after admonishing the jurors not to discuss the case with anyone. The State and defendant stated they had no preference as to whether the trial judge similarly personally admonished the absent juror or had the bailiff remind the juror. The trial court had the bailiff do so. The record fails to indicate whether defendant, defendant's counsel, or the court reporter was present for the admonitions given by the bailiff. Defendant argues that the trial court violated his right to be present at his capital trial, when it sent a bailiff to admonish the juror.

Under the Confrontation Clause in Article I, Section 23 of the North Carolina Constitution, an accused is guaranteed the right to be present at each and every stage of his capital trial and this right extends to "all times during the trial when anything is said or done which materially affects defendant as to the charge against him." *State v. Chapman*, 342 N.C. 330, 337-38, 464 S.E.2d 661, 665 (1995), cert. denied, 518 U.S. 1023, 135 L. Ed. 2d 1077 (1996); see also, U.S. Const. amend. IV. However,

while a bailiff certainly may not attempt to instruct jurors as to the law, a simple reminder by the bailiff to the jurors that they are to abide by the court's earlier instructions should not be considered an instruction as to law. Communications such as these do not relate to defendant's guilt or innocence. The subject matter of these communications in no way implicates defendant's confrontation rights, nor would defendant's presence have been useful to his defense.

State v. Gay, 334 N.C. 467, 482, 434 S.E.2d 840, 848 (1993) (no reversible error where the trial court had the bailiff instruct the jury to continue to abide by his earlier instructions during a break). In the case before us, the trial court had previously admonished the jury on several occasions not to discuss the case with each other or with anyone else.

Defendant alleges that because no record exists as to the bailiff's conversation with the absent juror, this Court is unable to conduct a proper review of the issue. Our Supreme Court stated in *May* that

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where a bailiff was instructed to inform the jury they could recess, "without anything in the record to show something else happened, we will assume the bailiff followed the court's instructions." *State v. May*, 334 N.C. 609, 615, 434 S.E.2d 180, 183 (1993), *cert. denied*, 510 U.S. 1198, 127 L. Ed. 2d 661 (1994) (assuming bailiff followed trial court's instruction to inform jury they were free to leave for a break), *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001) (assuming the clerk limited any conversation to administrative and logistical matters). Although the better practice is for the trial court to issue admonitions itself, as our Supreme Court stated in *May*, "[i]t would impose a heavy burden on our courts if a court reporter were required to accompany a bailiff every time he is with a jury in order to make a record of what was said." *May*, 334 N.C. at 615, 434 S.E.2d at 183.

Because we assume the bailiff limited her instruction to the juror as directed by the trial court and such communications do not relate to defendant's guilt or innocence, nor would they be helpful to his defense, we find no violation of defendant's constitutional rights. These assignments of error are overruled.

III.

[3] Defendant next argues that the trial court erred by failing to grant defendant's motion to dismiss the felony murder charge. Defendant argues that the State presented insufficient evidence that Gregg's death occurred in the perpetration or attempted perpetration of a felony.

"A murder which shall be . . . committed in the perpetration or attempted perpetration of any . . . robbery . . . shall be deemed to be murder in the first degree." N.C. Gen. Stat. § 14-17 (2001). "In felony murder, the killing may, but need not, be intentional. There must, however, be an unbroken chain of events leading from the attempted felony 'to the act causing death, so that the homicide is part of a series of events forming one continuous transaction.'" *State v. Gibbs*, 335 N.C. 1, 51-52, 436 S.E.2d 321, 350 (1993), *cert. denied*, 512 U.S. 1246, 129 L. Ed. 2d 881 (1994) (quoting *State v. Shrader*, 290 N.C. 253, 261, 225 S.E.2d 522, 528 (1976)). "The evidence is sufficient to support a charge of felony murder based on the underlying offense of armed robbery where the jury may reasonably infer that the killing and the taking of the victim's property were part of one continuous chain of events." *State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1992). Felony murder based on armed robbery does not depend on whether

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the intent to commit the taking of property was formed before or after the killing. *Id.*

When considering a motion to dismiss on the grounds of insufficiency of the State's evidence, the trial court must determine whether there is substantial evidence of each element of the offense and that defendant committed that offense. *State v. Irwin*, 304 N.C. 93, 97, 282 S.E.2d 439, 443 (1981). All evidence is to be considered in the light most favorable to the State and all reasonable inferences are to be drawn therefrom. *Id.* at 98, 282 S.E.2d at 443. Where there is a reasonable inference of defendant's guilt from the evidence, the jury must decide whether that evidence "convinces them beyond a reasonable doubt of defendant's guilt." *Id.*

The evidence presented by the State in this case showed that defendant entered the apartment armed with a loaded shotgun, chambered a round of ammunition, verbally threatened the occupants with death, hit Melton in the head to coerce surrender of his property, aimed the shotgun at the occupants, and shot Gregg in the head at close range while Gregg was involved in a confrontation with one of the robbers. Based on this evidence, a reasonable juror could infer that the killing and the robbery were part of a single transaction, supporting the felony murder charge. The trial court did not err in denying defendant's motion to dismiss. Defendant's assignment of error is overruled.

IV.

[4] During the jury instruction conference, defendant requested that both second degree murder and involuntary manslaughter be submitted to the jury as lesser included offenses of first degree murder, which the trial court denied. Defendant assigns error to the trial court's failure to instruct the jury as to involuntary manslaughter and contends his constitutional rights were violated under the Fourteenth Amendment to the United States Constitution and under Article I, Section 19 of the North Carolina Constitution, as well as North Carolina common and statutory law.

The trial court instructed the jury it could find defendant guilty of (1) first degree murder, based on both the theory of felony murder and/or premeditated murder, (2) second degree murder, or (3) not guilty. The jury convicted defendant of first degree murder based on felony murder but not on the grounds of premeditation and deliberation.

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The law is well settled that “‘a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts.’” *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (quoting *State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979)). However, the trial court is not required to “submit lesser included degrees of a crime to the jury ‘when the State’s evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime.’” *Id.* (quoting *Drumgold*, 297 N.C. at 271, 254 S.E.2d at 533) (emphasis in original).

In instances where a trial court has submitted to the jury the possible verdicts of first degree murder based on premeditation and deliberation, second degree murder, and not guilty, our Supreme Court has

adopted the rule that . . . a verdict of first-degree murder based on premeditation and deliberation renders harmless the trial court’s improper failure to submit voluntary or involuntary manslaughter.

State v. Price, 344 N.C. 583, 590, 476 S.E.2d 317, 321 (1996). The Court further stated that

“A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of [the defendant’s] guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have harmed the defendant.”

Id. at 590-91, 476 S.E.2d at 321 (quoting *State v. Judge*, 308 N.C. 658, 664-65, 303 S.E.2d 817, 821-22 (1983)). As noted in *Price*, this rationale is rooted in the United States Supreme Court’s concern in *Keeble v. United States*, 412 U.S. 205, 36 L. Ed. 2d 844 (1973), that a jury should not be coerced into a verdict because there was no lesser included offense submitted to the jury which better fit the evidence. *Id.*; see also, *Schad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555, reh’g denied, 501 U.S. 1277, 115 L. Ed. 2d 1109 (1991).

We find that the reasoning of our Supreme Court in *Price* applicable in the case before us. The jury’s verdict of first degree murder based on felony murder indicates the jury was not coerced, since they could have convicted defendant on the lesser charge of second degree murder. Therefore, the failure to instruct the jury on involun-

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tary manslaughter did not harm defendant. Defendant's assignment of error is without merit.

V.

[5] Defendant asserts that the trial court erred in arresting judgment on only the conviction for attempted armed robbery and in entering judgment on the three armed robbery convictions, in addition to first degree murder.

In accordance with the state and federal prohibitions against double jeopardy, our Supreme Court firmly established that "a defendant may not be punished both for felony murder and for the underlying, 'predicate' felony, even in a single prosecution." *State v. Gardner*, 315 N.C. 444, 460, 340 S.E.2d 701, 712 (1986). The underlying felony supporting the felony murder conviction effectively merges into the first degree murder conviction and any judgment on the underlying felony must be arrested. *State v. Barlowe*, 337 N.C. 371, 446 S.E.2d 352 (1994).

Defendant failed to object at trial to the trial court's decision to arrest judgment on only the attempted armed robbery verdict.

By failing to move in the trial court to arrest judgment on either conviction or otherwise to object to the convictions or sentences on double jeopardy grounds, defendant has waived his right to raise this issue on appeal.

State v. McLaughlin, 321 N.C. 267, 272, 362 S.E.2d 280, 283 (1987). Although the issue was not properly preserved, we consider the merits of defendant's argument pursuant to N.C.R. App. P. 2.

Defendant contends that the trial court's instructions on felony murder failed to specify which armed robbery or attempted armed robbery served as the underlying felony for a possible felony murder conviction. Defendant thus argues that because the jury could have used any of the armed robbery convictions or the attempted armed robbery conviction as the basis for finding him guilty of felony murder, the trial court should have arrested judgment on all the convictions that could have served as the basis for the felony murder conviction.

We agree with defendant that the trial court's instructions to the jury were ambiguous as to what underlying felony formed the basis of the felony murder charge. Furthermore, we cannot determine if the jury was unanimous in which felony served as the underlying felony

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for purposes of the felony murder verdict. A similar concern arose in *State v. Lothrop*, 356 N.C. 420, 571 S.E.2d 583 (2002), where the defendant argued that the trial court should have required that the jury be unanimous as to whether the deadly weapon in a first degree sexual assault case was the knife or the defendant's hands. In *Lothrop*, disjunctive instructions to the jury had permitted the jury to choose between two alternative instrumentalities as the deadly weapon inflicting serious injury. Our Supreme Court reversed this Court and adopted the dissenting opinion of Judge Timmons-Goodson which noted:

The instructions clearly required the jury to find that defendant assaulted the victim using a deadly weapon, thereby inflicting serious injury. Accordingly, there was no ambiguity as to whether or not the jury unanimously found each necessary element for the crime of assault with a deadly weapon inflicting serious injury Because the instructions in the instant case allowed the jury to convict defendant of a single wrong by alternative means . . . the instructions were not fatally ambiguous.

State v. Lothrop, 148 N.C. App. 435, 447, 559 S.E.2d 807, 814 (2002) (Timmons-Goodson, J., dissenting).

The reasoning of *Lothrop* is relevant to our inquiry in the case before us. Only one underlying felony is required to support a felony murder conviction, and in this case, the jury convicted defendant of four separate felonies which could have served as the underlying felony. As in *Lothrop*, "because the instructions in the instant case allowed the jury to convict defendant of a single wrong by alternative means . . . the instructions were not fatally ambiguous." *Id.*

The remaining question is whether the trial court has the discretion to select which felony conviction serves as the underlying felony for purposes of the merger rule as it applies to felony murder. In *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986), the defendant was convicted of first degree rape, first degree sexual offense, and first degree kidnapping. The defendant was separately sentenced for each offense; on appeal, the defendant argued that this was a double jeopardy violation because the defendant's rape or sexual assault conviction is a necessary element of first degree kidnapping. In remanding the case for a new sentencing hearing, our Supreme Court instructed the trial court that it "may arrest judgment on the first degree kidnapping conviction and resentence defendant for second degree kidnapping or it may arrest judgment on one of the sexual assault

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convictions." *Id.* at 24, 340 S.E.2d at 41. The Supreme Court thereby stated the trial court in *Freeland* had discretion in sentencing to: (1) arrest judgment on either of the sexual assault verdicts because one must serve as an element of first degree kidnapping in order for the verdict to stand or (2) to sentence defendant for second degree kidnapping which does not require the element that the person either was not released in a safe place or had been seriously injured or assaulted. N.C. Gen. Stat. § 14-39 (2001).

Applying *Freeland* to the case before us, there are several factors that show in this instance where no specific underlying felony was noted in the jury instructions on felony murder, and where there are multiple felony convictions which could serve as the underlying felony for purposes of the felony murder conviction, it is in the discretion of the trial court as to which felony will serve as the underlying felony for purposes of sentencing. This is a rare circumstance where armed robbery and attempted armed robbery are both classified as Class D felonies for purposes of sentencing. *See*, N.C. Gen. Stat. § 14-87 (2001). Accordingly, the trial court did not err in arresting judgment on defendant's attempted armed robbery conviction and in sentencing defendant for three armed robbery convictions. This assignment of error is overruled.

VI.

[6] In defendant's final assignment of error, he argues that the trial court erred in entering judgment and sentencing him to life imprisonment without parole because the indictment was insufficient to sustain the first degree murder verdict and sentence. He maintains the trial court violated his federal and State constitutional rights under U.S. Const. amends. V, VI, XIV and N.C. Const. art. I, §§ 19, 22, and 23.

This issue has been decided by our Supreme Court which has consistently held that the "short-form indictment is sufficient to charge a defendant with first-degree murder." *State v. Barden*, 356 N.C. 316, 384, 572 S.E.2d 108, 150 (2002), cert. denied, — U.S. —, 155 L. Ed. 2d 1074 (2003). "The short-form murder indictment authorized by N.C. Gen. Stat. § 15-144 (2001) gives a defendant notice that he is charged with first-degree murder and that the maximum penalty to which he could be subject is death." *State v. Smith*, 152 N.C. App. 29, 34, 566 S.E.2d 793, 797, cert. denied, 356 N.C. 311, 571 S.E.2d 208 (2002). This Court is bound by the decisions of our Supreme Court; therefore, these assignments of error are overruled.

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Defendant has failed to present any argument in support of his remaining assignments of error and they are thus deemed abandoned. N.C.R. App. P. 28(b)(6).

This Court notes that on the "Judgment/Order or Other Disposition" form completed by the trial court, the verdict for the attempted armed robbery of Timothy Lollis, file number 99CRS31141 was marked as "not guilty," which is contrary to the verdict issued by the jury. This case is therefore remanded to correct a clerical error on the form.

No error in trial. Remand for correction of clerical error.

Judges HUNTER and CALABRIA concur.

KEITH COX AND LINDA COX, PLAINTIFFS v. BRUCE C. STEFFES, M.D. AND VILLAGE SURGICAL ASSOCIATES, P.A., DEFENDANTS

No. COA02-972

(Filed 18 November 2003)

1. Appeal and Error— technical violations—appeal not dismissed

An appeal was heard despite plaintiffs' failure to comply with all of the requirements of the Rules of Appellate Procedure concerning the transcript of proceedings and notice of appeal. Although plaintiff should have exercised greater care to comply with the Appellate Rules, there was no compelling reason to overturn the trial court's finding of substantial compliance.

2. Medical Malpractice— standard of care—motion for jnov—consideration of all evidence

The trial court erred by granting defendants' motion for judgment n.o.v. in a medical malpractice action. Although defendant contended that plaintiff's expert doctor was not competent to testify about the standard of care in Fayetteville, defendant's expert supplied evidence of a national standard of care, and the trial court was not limited to plaintiffs' evidence.

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3. Civil Procedure— motion for new trial—failure to seek ruling

Defendants' failure to seek a ruling on their motion for a new trial resulted in the remand of a medical malpractice action for entry of judgment on a jury verdict for plaintiff.

Appeal by plaintiffs from order entered 23 October 2001 by Judge John R. Jolly, Jr. and appeal by defendants from order entered 20 February 2002 by Judge Gary E. Trawick in Robeson County Superior Court. Heard in the Court of Appeals 14 May 2003.

The Law Offices of William S. Britt, by William S. Britt, for plaintiffs.

Harris, Creech, Ward and Blackerby, P.A., by Thomas E. Harris and W. Gregory Merritt, for defendants.

GEER, Judge.

Plaintiffs Keith and Linda Cox appeal from the trial court's order granting defendants' motion for judgment notwithstanding the verdict. In setting aside the jury verdict in favor of plaintiffs, the trial court erred by considering only plaintiffs' evidence and not the entire body of evidence submitted to the jury. Based on our review of the record, we conclude that the jury was presented with sufficient evidence to support its verdict and, therefore, we reverse.

This medical malpractice case arose out of Mr. Cox's treatment for chronic gastroesophageal reflux and esophagitis. On 7 April 1994, defendant Bruce C. Steffes, M.D. performed a laparoscopic Nissen fundoplication procedure on Mr. Cox at the Cape Fear Valley Medical Center ("Cape Fear"). The purpose of the surgery was to eliminate the reflux of stomach acid from the stomach into the esophagus.

Shortly after the surgery, Mr. Cox began experiencing severe abdominal pain when eating or sipping water, nausea, sweating, an increased heart rate, and increased blood pressure on standing. He was readmitted to Cape Fear on 12 April and 18 April 1994 with no alleviation of his symptoms. By the time Mr. Cox was admitted at Duke University Medical Center on 10 May 1994, a month after the surgery, he had lost 30 pounds. At Duke, the surgeon first inserted a feeding tube and then later, once Mr. Cox was strong enough, performed corrective surgery.

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This case was tried before a jury during the 30 July 2001 civil session of the Robeson County Superior Court with the Honorable John R. Jolly, Jr. presiding. At trial, plaintiffs relied upon the expert testimony of Dr. Joseph C. Donnelly, Jr., a physician board-certified in both general and thoracic surgery. Dr. Donnelly, who is now retired, estimated that he had performed between 50 to 75 (and maybe 100) Nissen fundoplication surgeries.

After conducting voir dire, defendants objected to Dr. Donnelly's testifying as to the standard of care on the grounds that he could not comply with the requirements of N.C. Gen. Stat. § 90-21.12 (2001) and Rule 702(b) of the Rules of Evidence. The trial judge overruled defendants' objection although he indicated that he would revisit his ruling at the directed verdict stage because of concern regarding whether plaintiffs' expert testimony met the requirements of Rule 702.

Defendants moved for a directed verdict at the close of plaintiffs' evidence. After again noting concerns about compliance with Rule 702(b), the trial court took the motion "under advisement" and announced that he would rule at the end of the case. He explained to plaintiffs, "I want to give you an opportunity to show your whole case and I want to hear their defense." Defendants then proceeded to present evidence, including the testimony of expert witness Dr. John McGuire.

Although defendants renewed their motion for a directed verdict at the close of all of the evidence, the trial court chose to defer ruling on that motion and submit the case to the jury. On 7 August 2001, the jury returned a verdict in favor of Mr. Cox in the amount of \$300,000.00 and in favor of plaintiff Linda Cox for \$75,000.00 for loss of consortium.

Defendants moved pursuant to Rules 50 and 59 for judgment notwithstanding the verdict ("JNOV") and in the alternative for a new trial, arguing primarily that plaintiffs' sole expert witness, Dr. Donnelly, was not qualified to testify as to the standard of care in Fayetteville or similar communities. The trial court granted defendants' JNOV motion in an order filed on 23 October 2001.

I

[1] As a preliminary matter, we address defendants' cross-appeal from the trial court's order filed 20 February 2002 denying their motion to dismiss plaintiffs' appeal and defendants' motion to dismiss

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filed in this Court. We affirm the trial court's order and deny defendants' motion to dismiss.

Plaintiffs initially filed their malpractice claims in an action with file number 97 CVS 1138. After voluntarily dismissing that action, plaintiffs subsequently refiled their claims in this case with file number 99 CVS 2564.

Defendants served plaintiffs with a copy of the trial court's JNOV order on 22 October 2001. On 30 October 2001, plaintiffs served and filed a notice of appeal "from the Order of Judgment Notwithstanding the Verdict entered by Judge Jolly on the 12th day of October, 2001." Plaintiffs' notice of appeal inadvertently listed 99 CVS 1138 as the file number rather than 99 CVS 2564. On 3 January 2002, defendants moved to dismiss the appeal on the grounds that plaintiffs had failed to file a proper notice of appeal and had failed to comply with all of the requirements under Rule 7 of the Rules of Appellate Procedure regarding obtaining a transcription of the trial proceedings.

With respect to the transcription arrangements, the trial court found that on 5 November 2001, six days after the notice of appeal, plaintiffs sent a letter to the court reporter requesting certain portions of the transcript. The letter did not comply with Rule 7 because it did not contain a statement of the issues that plaintiffs intended to raise on appeal, it was not filed with the trial court, and it was not served upon opposing counsel. With respect to the statement of issues, we note that the notice of appeal in this case had already identified the sole issue that plaintiffs were addressing on appeal. The court reporter notified counsel for defendants of the transcript request in a letter dated 17 December 2001. It appears from the record that the court reporter delivered the requested portions of the transcript to plaintiffs within the time limitations specified by Rule 7. The court reporter did not, however, provide defense counsel with a copy at that time, did not certify to the clerk of court that the copies had been delivered, and did not send a copy of the certification to the Court of Appeals.

The trial court found with respect to the notice of appeal that plaintiffs' error was inadvertent and with respect to the transcript that plaintiffs were in "substantial compliance" with Rule 7 of the Rules of Appellate Procedure. The court ordered plaintiffs to file a corrected notice of appeal within two days of the court's entry of the order in open court with the filing to relate back to the original date. The court further ordered plaintiffs to comply strictly with

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Rule 7 and to serve and file a new request to the court reporter for transcription of the proceedings. On 29 January 2002, plaintiffs filed a second notice of appeal using the correct file number. Defendants do not contend that plaintiffs have committed any violations of the Rules of Appellate Procedure following the trial court's 20 February 2002 order.

"This Court has held that when a litigant exercises 'substantial compliance' with the appellate rules, the appeal may not be dismissed for a technical violation of the rules." *Spencer v. Spencer*, 156 N.C. App. 1, 8, 575 S.E.2d 780, 785 (2003). In *Ferguson v. Williams*, 101 N.C. App. 265, 275, 399 S.E.2d 389, 395, *disc. review denied*, 328 N.C. 571, 403 S.E.2d 510 (1991), this Court stated:

[D]efendants brought a motion to dismiss plaintiff's appeal pursuant to Rules 7 and 25 of the North Carolina Rules of Appellate Procedure. Rule 7(a)(1) requires an appellant in a civil case to make a formal request for a copy of the trial transcript within ten days of filing notice of appeal. In their motion, defendants asserted plaintiff failed to comply with this rule. Judge John held a hearing and denied defendants' motion, finding that plaintiff had "substantially complied" with the rule. We decline to disturb this finding on appeal.

Although plaintiffs' counsel should have exercised greater care to comply with the Appellate Rules, we, like the *Ferguson* Court, find no compelling reason to overturn the trial court's finding of substantial compliance in this case. *See also Pollock v. Parnell*, 126 N.C. App. 358, 361-62, 484 S.E.2d 864, 865-66 (1997) (appellant substantially complied with Rule 7 when he made a timely request for transcription even though he did not file a copy of the request with the trial court and when he obtained the transcript within 60 days).

With respect to the notice of appeal, we find that it was served and filed with the clerk's office within the required time limitations, but, due to a clerical error by plaintiffs' counsel as to the case number, was not filed in the proper folder. To the extent that this error casts any doubt on our jurisdiction, we exercise our discretion and grant *certiorari* to review plaintiffs' claims on their merits pursuant to N.C.R. App. P. 21. *See Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner.").

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II

[2] Plaintiffs' appeal presents the question whether the trial court properly granted defendants' motion for JNOV. The parties agree and the transcript of the hearing on defendants' motion indicates that the basis for the trial court's order was its belief that the testimony of Dr. Donnelly was incompetent and that without Dr. Donnelly's testimony, plaintiffs failed to present evidence sufficient to meet their burden of proof. While plaintiffs argue that the testimony of Dr. McGuire, offered by defendants, cured any inadequacies in plaintiffs' proof, the trial court apparently believed, and defendants contend on appeal, that the trial court was limited to considering only plaintiffs' evidence in deciding whether to set aside the jury's verdict. That approach was, however, incorrect.

In *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 539 S.E.2d 331 (2000), this Court set out the proper procedure for considering a motion for JNOV in circumstances such as those of this case:

When a motion is made for directed verdict at the close of the plaintiff's evidence, the trial court may either rule on the motion or reserve its ruling on the motion. By offering evidence, however, a defendant waives its motion for directed verdict made at the close of plaintiff's evidence. Accordingly, if a defendant offers evidence after making a motion for directed verdict, "any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by the defendant at the close of all the evidence, and the judge's ruling must be based upon the evidence of both plaintiff and defendant."

Id. at 136-37, 539 S.E.2d at 332 (emphasis added; citations omitted) (quoting *Overman v. Gibson Products Co.*, 30 N.C. App. 516, 520, 227 S.E.2d 159, 162 (1976)). Under *Stallings*, the trial court in this case was free to defer ruling on defendants' motion for a directed verdict made at the close of plaintiffs' evidence. When, however, defendants then chose to present evidence, they waived any argument that their motion for a directed verdict should have been granted and the trial court was then required to base its ruling on defendants' motion for JNOV "upon the evidence of both plaintiff[s] and defendant[s]." *Overman*, 30 N.C. App. at 520, 227 S.E.2d at 162.

In *Bishop v. Roanoke Chowan Hospital, Inc.*, 31 N.C. App. 383, 229 S.E.2d 313 (1976), this Court applied these principles in holding

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that a JNOV motion should not have been granted when, as in this case, subsequent witnesses cured any deficiencies in plaintiff's expert witness' testimony. In *Bishop*, plaintiff's expert witness was allowed to answer, over defendants' objection, a hypothetical question that included facts that were not then in evidence. Although subsequent witnesses ultimately supplied the missing facts, the trial court granted defendants' motion for JNOV. In reversing that decision, this Court rejected defendants' contention—virtually identical to the argument made here—that the trial court's order was proper because the expert's testimony, critical to plaintiff's claim, was inadmissible. This Court stressed that in determining the correctness of a motion for JNOV, “[a]ll relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force” *Id.* at 385, 229 S.E.2d at 314 (emphasis added; quoting *Dixon v. Edwards*, 265 N.C. 470, 476, 144 S.E.2d 408, 412-13 (1965)).

Applying *Stallings* and *Bishop* to this case, we note first that since defendants have not cross-assigned error to the trial court's decision to admit the testimony of Dr. Donnelly, the admissibility of that testimony is not before us. *See also Dixon*, 265 N.C. at 476, 144 S.E.2d at 413 (in reviewing a motion for judgment as of nonsuit, the Court was not required to determine the competency of the evidence submitted to the jury); *Bishop*, 31 N.C. App. at 385, 229 S.E.2d at 314 (“Nor do we, on this appeal, find it necessary to determine the competency of the testimony of the [expert].”). Instead, the question before this Court is whether the evidence submitted to the jury, when considered in its entirety and in the light most favorable to plaintiffs, was sufficient under N.C. Gen. Stat. § 90-21.12 for the jury to find that defendants' care of Mr. Cox “was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.” *See Alexander v. Alexander*, 152 N.C. App. 169, 170, 567 S.E.2d 211, 213 (2002) (citation omitted) (on appeal, the standard of review for a JNOV is “whether the evidence was sufficient to go to the jury”).

The standard is high for the party seeking a JNOV: “*the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's prima facie case.*” *Id.* (emphasis original). The evidence supporting plaintiffs' claims must be taken as true, all conflicts and inconsistencies in the evidence must be resolved in plain-

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tiffs' favor, and plaintiffs must receive the benefit of every reasonable inference. *Id.* at 171, 567 S.E.2d at 213.

On appeal, defendants have questioned only Dr. Donnelly's ability to testify as to the standard of care in "the same or similar communities." Dr. Donnelly specifically testified that he was familiar with the standard of care for board-certified physicians such as Dr. Steffes practicing in Fayetteville or a similar community in 1994 with respect to post-operative care after a Nissen fundoplication procedure. As support for this assertion, Dr. Donnelly testified that he had, prior to trial, received written information regarding the Fayetteville area from plaintiffs' counsel and had reviewed it again prior to testifying before the jury. With respect to his knowledge of communities similar to Fayetteville, he explained that he was board-certified in general surgery (like Dr. Steffes) and had practiced at a Level 2 hospital in Reading, Pennsylvania. Dr. Donnelly expressed his belief that Cape Fear was also a Level 2 hospital; Dr. McGuire confirmed that fact. Dr. McGuire also confirmed that the standard of care at his Level 2 hospital in Asheville was the same as the standard of care at Cape Fear. In addition, Dr. Donnelly's and Dr. McGuire's testimony together supported the conclusion that the Reading hospital's size was comparable to that of Cape Fear. Dr. Donnelly also more specifically expressed his view that Reading was similar to Fayetteville with respect to board-certified physicians, sophisticated lab services, x-ray departments, anesthesia services, hospital certification, and access to specialists.

Equally importantly, Dr. McGuire testified that the standard of care at issue in this case was in fact the same across the nation. As to post-operative care, Dr. McGuire first testified, "I think it is universally accepted the standard of care." He then agreed more specifically that with respect to post-operative care "the standard of care applicable for that would be the same across the US in 1994 for any board-certified surgeon[.]"

Dr. Donnelly's and Dr. McGuire's testimony regarding Level 2 hospitals was sufficient to establish that Dr. Donnelly's knowledge of practices in Reading, Pennsylvania qualified him to testify as to the standard in communities similar to Fayetteville. In *Coffman v. W. Earl Roberson, M.D., P.A.*, 153 N.C. App. 618, 624-25, 571 S.E.2d 255, 259 (2002), *disc. review denied*, 356 N.C. 668, 577 S.E.2d 111 (2003), this Court held that a doctor's testimony regarding standard of care was sufficient when the doctor testified generally that he was familiar with the standard of care in communities similar to Wilmington,

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that he based his opinion on Internet research regarding the hospital, and that he knew the hospital was a sophisticated, training hospital. *See also Leatherwood v. Ehlinger*, 151 N.C. App. 15, 22-23, 564 S.E.2d 883, 888 (2002) (reversing directed verdict when plaintiffs' expert specifically testified that he had knowledge of the standards of care in Asheville and similar communities because of his practice in communities of a size similar to Asheville and because he had attended rounds as a medical student in the Asheville hospital at issue), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003).

Even if this evidence is disregarded, Dr. McGuire's testimony established that the standard of care with respect to post-operative care by board-certified general surgeons, under the circumstances of this case, is the same for all communities. This Court stated in *Haney v. Alexander*, 71 N.C. App. 731, 736, 323 S.E.2d 430, 434 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985): "Where the standard of care is the same across the country, an expert witness familiar with that standard may testify despite his lack of familiarity with the defendant's community." Given Dr. McGuire's testimony, Dr. Donnelly's testimony, which defense counsel characterized on cross-examination as testimony regarding the national standard, was sufficient to support the jury's verdict. *See also Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 656-57, 535 S.E.2d 55, 67 (2000) (noting that this Court has rejected any argument that testimony regarding a nationwide standard is always insufficient under N.C. Gen. Stat. § 90-21.12), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 2 (2001).

Defendants rely upon *Henry v. Southeastern OB-GYN Assoc., P.A.*, 145 N.C. App. 208, 550 S.E.2d 245, *aff'd per curiam*, 354 N.C. 570, 557 S.E.2d 530 (2001), for the proposition that the trial court erred in allowing plaintiff's expert to testify as to the national standard of care.¹ In *Henry*, however, "there [was] no evidence that the national standard of care is the standard practiced in Wilmington." *Id.* at 210, 550 S.E.2d at 247. Likewise, in the recent decision in *Smith v. Whitmer*, 159 N.C. App. 192, 197, 582 S.E.2d 669, 673 (2003), this Court affirmed a grant of summary judgment when plaintiff's expert witness could only testify to a national standard of care, but "there was no evidence that a national standard of care is the same standard

1. It is unclear whether *Henry* is controlling authority. In the Court of Appeals, there were three separate opinions, with one judge concurring only in the result and another judge dissenting. There was, therefore, no majority opinion. The Supreme Court's *per curiam* decision simply stated "[a]ffirmed" without specifying which opinion was the basis for that affirmance. 354 N.C. at 570, 557 S.E.2d at 530.

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of care practiced in defendants' community." By contrast, in this case defendants' expert witness confirmed that the standard of care was "universally accepted" and "would be the same across the US in 1994 for any board-certified surgeon[.]" Dr. McGuire supplied the evidence lacking in *Henry* and *Smith*. We therefore reverse the trial court's order granting defendants' motion for JNOV.

[3] As a final matter, we note that defendants also moved pursuant to Rule 59 of the Rules of Civil Procedure for a new trial. Although the trial court indicated orally in the course of the hearing on defendants' post-trial motions that it was "not inclined" to grant defendants' motion for a conditional new trial, the record on appeal contains no order reflecting any decision by the court as to that motion.

Under Rule 50(c)(1) of the Rules of Civil Procedure, if a motion for JNOV is granted, "the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial." It was defendants' obligation to ensure that they obtained a ruling on their motion for a conditional new trial:

A party gaining judgment notwithstanding the verdict should also ask for a ruling pursuant to G.S. 1A-1, Rule 50(c)(1), on the motion for a new trial if he wishes to allege any error in the trial or to preserve any question other than the sufficiency of the evidence for appellate review.

Beal v. K. H. Stephenson Supply Co., 36 N.C. App. 505, 510, 244 S.E.2d 463, 466 (1978). Because defendants failed to seek a ruling on their motion for a new trial and did not make any cross-assignments of error as to the trial, we reverse and remand for entry of judgment on the verdict.

Reversed in part and remanded for entry of judgment on the verdict; affirmed in part.

Judges MARTIN and HUNTER concur.

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[161 N.C. App. 247 (2003)]

STATE OF NORTH CAROLINA v. LARRY WINTON DOYLE, JR.

No. COA03-94

(Filed 18 November 2003)

1. Homicide— felony murder—motorist’s death during flight from robbery—driving at the speed limit—not a break in circumstances

Defendant’s driving at the speed limit for a time between an armed robbery and the beginning of a high speed chase did not separate the subsequent death of a motorist from the robbery and flight. Escape need not be accomplished at high speeds; defendant presented no evidence that he was diverted from his chosen route and his motion to dismiss a first-degree felony murder charge was correctly denied.

2. Homicide— felony murder—motorist’s death during high speed chase—insulating negligence—use of stop sticks foreseeable

Defendant’s requested special instructions on insulating negligence were correctly denied in a felony murder prosecution for the death of a motorist which occurred as defendant avoided stop sticks (devices used by police to puncture automobile tires) while fleeing from an armed robbery. The use of stop sticks was reasonably foreseeable.

3. Homicide— felony murder—short-form indictment—constitutionality

The use of a short form indictment for first-degree felony murder was not error.

4. Constitutional Law— effective assistance of counsel—failure to renew motion to continue

A defendant charged with multiple crimes including assault, armed robbery, and felony murder was not denied effective assistance of counsel because his counsel did not renew a pretrial motion to continue. There was no evidence that counsel’s failure to renew the motion or the lack of additional time prejudiced defendant’s case.

Appeal by defendant from judgment entered 9 August 2002 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 29 October 2003.

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Attorney General Roy Cooper, by Assistant Attorney General Newton G. Pritchett, Jr., for the State.

Marilyn G. Ozer, for defendant-appellant.

TYSON, Judge.

Larry Winton Doyle, Jr. (“defendant”) was charged with one count of first-degree felony murder based upon robbery with a dangerous weapon, two counts of assault with a deadly weapon inflicting serious injury, one count of felony speeding to elude law enforcement, one count of kidnapping, one count of larceny of a motor vehicle, one count of reckless driving, one count of driving while license revoked, one count of driving while intoxicated, and one count of speeding in excess of 15 m.p.h. The State dismissed the charges of speeding in excess of 15 m.p.h., reckless driving, larceny of a motor vehicle, driving while license revoked, driving while intoxicated, kidnapping, and one count of assault with a deadly weapon inflicting serious injury. Defendant pled guilty to felony speeding to elude law enforcement. The jury found defendant guilty of first-degree felony murder based upon the felony of robbery with a dangerous weapon. The jury found defendant not guilty on the remaining count of assault with a deadly weapon inflicting serious injury. Defendant was sentenced to life imprisonment without possibility of parole for first-degree felony murder and six to eight months for felony speeding to elude law enforcement. Defendant appeals.

I. Background

Defendant met Kathy Thompson (“Thompson”) when she applied for employment at the restaurant where defendant worked as assistant manager. Defendant and Thompson left Augusta, Georgia in early April 2002, in order for Thompson to avoid going to jail for violating her probation. Defendant and Thompson traveled by bus to Asheville, North Carolina and stayed in motels for several days. On 12 April 2002, defendant purchased a knife. On the morning of 14 April 2002, defendant and Thompson ate at the Olive Garden Restaurant, consumed beer and wine, and left without paying the check. As they were sitting on the curb outside of the mall, they decided to steal a vehicle.

Patricia Cocke (“Cocke”) was unloading her shopping cart into her Ford Expedition at the Wal-Mart on Tunnel Road when the defendant grabbed her from behind, held the knife he had purchased

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two days earlier against her, and demanded her car keys. Cocke told defendant that the keys were in her purse. Cocke removed the keys from her purse and handed them to defendant. As defendant pushed Cocke away, the knife cut Cocke's hand, which later required eighteen stitches to close the wound. Cocke began screaming that her car was being stolen.

Mary Elizabeth Burns ("Burns") was looking for a parking space, and observed Cocke running towards her screaming, holding her bloody hand. Burns stopped to allow Cocke into her vehicle. Burns heard defendant screaming at her to get out of his way so that he could leave in Cocke's vehicle. Defendant rammed the back right door of Burns' car to move it out of his way. Burns moved her car to allow defendant to leave. Defendant picked up Thompson from the curb where she was sitting with their luggage. The defendant and Thompson proceeded on Interstate 40 West ("Interstate") towards Tennessee.

Officer Scott Hawkins ("Officer Hawkins") was traveling to work around 4:13 p.m., when he received a call about the carjacking of Cocke's vehicle from Wal-Mart's parking lot on Tunnel Road. Around 4:22 p.m., Hawkins spotted the Ford Expedition described in the call, pulled in behind it, but did not activate his lights or siren. The defendant continued to drive at or below the speed limit. Approximately four minutes later, law enforcement back-up vehicles arrived. Blue lights and sirens were activated. Defendant accelerated speed and began leading the police on a high speed chase along the Interstate. As defendant and the pursuing officers approached Exit 24, stop sticks were placed on the Interstate to end the chase. Defendant swerved right to avoid hitting the stop sticks and collided into a Saturn vehicle that had also swerved right to avoid the stop sticks. The passenger in the Saturn vehicle was killed instantly. After the accident, defendant exited the Ford Expedition, jumped the guardrail and ran, but was captured by police officers. Officer Hawkins testified that the time lapse between the robbery of Cocke's vehicle and the fatal collision was approximately thirty minutes.

II. Issues

The issues in this case are whether the trial court erred: (1) in denying defendant's motion to dismiss the charge of first-degree felony murder; (2) in refusing to instruct the jury on the defendant's requested special jury instruction on insulating acts of negligence; (3) by trying defendant and entering judgment for first-degree murder by

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use of the “short-form” indictment; and (4) whether defendant’s counsel provided ineffective assistance of counsel. All remaining assignments of error not argued are waived. N.C.R. App. P. 28(b)(6) (2002).

III. Motion to Dismiss

[1] Defendant assigns as error the denial of his motion to dismiss the charge of first-degree felony murder. Defendant argues that his conviction must be vacated because a break in time, place, and causal relationship occurred between the victim’s death and the alleged underlying felony of robbery with a dangerous weapon. We disagree.

“In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.” *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998). Substantial evidence is that amount of relevant evidence necessary to persuade a rational mind to accept a conclusion. *State v. Frogge*, 351 N.C. 576, 584, 528 S.E.2d 893, 899, cert. denied, 531 U.S. 994, 148 L. Ed. 2d 459 (2000). Whether substantial evidence exists is not a question of weight, but is a test of the sufficiency of the evidence. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). The evidence is viewed in the light most advantageous to the State, after drawing all reasonable inferences. *Id.* “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).

A murder is a felony murder when it is “committed in the perpetration or attempted perpetration of any . . . robbery . . . committed or attempted with the use of a deadly weapon” N.C. Gen. Stat. § 14-17 (2001). “[A] killing is committed in the perpetration of armed robbery when there is no break in the chain of events between the taking of the victim’s property and the force causing the victim’s death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction.” *State v. Braxton*, 344 N.C. 702, 713, 477 S.E.2d 172, 178 (1996) (quoting *State v. Handy*, 331 N.C. 515, 529, 419 S.E.2d 545, 552 (1990)). Our courts have held that “escape is ordinarily within the *res gestae* of the felony and that a killing committed during escape or flight is ordinarily within the felony-murder rule.” *State v. Squire*, 292 N.C. 494, 512, 234 S.E.2d 563, 573 (1977).

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Defendant argues the killing did not occur during escape or flight from the armed robbery and asserts that he had reached a place of safety by driving on the Interstate at the posted speed limit and before the high-speed chase ended in the death of the victim.

The evidence showed that at approximately 4:00 p.m., defendant robbed Cocke at knife point, stole her vehicle, rammed Burn's car to aid in his escape, and drove at a high speed out of the parking lot toward the Interstate. At approximately 4:13 p.m., Officer Hawkins received a radio dispatch about an armed robbery of a Ford Expedition from Wal-Mart's parking lot. Officer Hawkins spotted defendant driving the stolen Ford Expedition at the posted speed limit at approximately 4:22 p.m. The State contends that defendant was driving the speed limit on the Interstate in order to blend in and avoid attention. The State argues that defendant had not slowed down because he had reached a safe haven. Defendant admitted that he knew he could not out run the police and decided to drive the speed limit to escape toward the Tennessee state line, hoping not to attract attention to himself. Defendant maintained his course of action even when Officer Hawkins pulled in behind him. Once other officers joined Officer Hawkins and activated their lights and sirens, defendant accelerated, leading police on a high speed chase that ended in the victim's death.

Presuming, as defendant argues, that he was initially obeying all traffic laws on the Interstate, defendant was still fleeing to escape from and to avoid arrest for armed robbery. Escape need not be accomplished at high speeds but can be accomplished by driving at or below the speed limit. Approximately ten minutes had elapsed between the time the "be on the lookout" call about the armed robbery was dispatched, until the time Officer Hawkins spotted defendant driving the stolen Ford Expedition. Approximately thirty minutes elapsed between the time of the armed robbery and the collision which killed the passenger in the Saturn.

Defendant presented no evidence that he was diverted or stopped from his chosen route from the site of the robbery to the Tennessee border prior to the collision. The State presented sufficient evidence to show "no break in the chain of events between the taking of the victim's property and the force causing the victim's death, so that the taking and the homicide are part of the same series of events, forming one continuous transaction." *Braxton*, 344 N.C. at 713, 477 S.E.2d at 178. Defendant's assignment of error is overruled.

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IV. Jury Instruction on Insulating Acts of Negligence

[2] Defendant contends that the trial court erred by denying defendant's requested special instruction to the jury on insulating acts of negligence. We disagree.

Defendant submitted to the trial court the following written request:

Second, that while committing robbery with a dangerous weapon, the defendant killed the victim. A killing is committed in the perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the killing is part of a series of incidents which form one continuous transaction; however[,] the conduct of another person may result in a break in this chain of events.

And Third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred. The defendant's act need not to have been the only cause, nor the last or nearest cause. It is sufficient if it concurred with some other cause acting at the time which, in combination with it, caused the death of the victim. However, a natural and continuous sequence of causation may be interrupted or broken by the conduct of a second person. This occurs when a second person's conduct was not reasonably foreseeable by the defendant and causes its own natural and continuous sequence which interrupts, breaks, displaces or supersedes the consequences of the defendant's conduct. Under such circumstances, the conduct of the second person not reasonably foreseeable by the defendant would be the sole proximate cause of the killing.

The burden is not on the defendant to prove that his conduct was insulated by that of another. Rather, the burden is on the State to prove beyond a reasonable doubt that the defendant's act was a proximate cause of the victim's death.

The State also requested the trial court to instruct the jury regarding a continuous transaction and proximate cause. The court's instruction to the jury read as follows:

Second, that while committing or attempting to commit robbery with a dangerous weapon, the defendant killed the victim. A

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killing is committed in the perpetration or attempted perpetration of a felony for purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the killing is part of a series of incidents which form one continuous transaction.

And third, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred. The defendant's act need not have been the only cause, nor the last or nearest cause. It is sufficient if it combined with some other cause acting at the time which, in combination with it, caused the death of the victim.

The trial court is required to frame its instructions with the particularity that is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged. *State v. Weddington*, 329 N.C. 202, 210, 404 S.E.2d 671, 677 (1991). To warrant a conviction for homicide, the State must establish that the act of the accused was a proximate cause of the death. See *State v. Minton*, 234 N.C. 716, 68 S.E.2d 844 (1952). Defendant's actions need not be the sole and only proximate cause of the victim's death to be found criminally liable. *State v. Hollingsworth*, 77 N.C. App. 36, 39, 334 S.E.2d 463, 465 (1985). A showing that the defendant's actions were one of the proximate causes is sufficient. *Id.* To insulate the defendant from criminal liability, the negligence of another must be such as to break the causal chain of defendant's actions. See *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000).

The evidence shows that the patrolman's deployment of stop sticks did not entirely break the chain of events. Defendant's actions of robbing Cocke and leading the police on a high speed chase along the Interstate was a proximate cause of the collision and victim's death. The trial court's instructions were adequate to inform the jury on the issue of proximate cause and on the issue of continuous transaction.

Presuming, without deciding, that a third party's acts must be reasonably foreseeable to a criminal defendant, the evidence clearly shows that the deployment of the stop sticks by the patrolman was reasonably foreseeable to a defendant who refused to stop after police activated their lights and sirens and who accelerated and led the police on a high speed chase along the Interstate towards the Tennessee border. Defendant testified that he was aware from watch-

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ing television and movies that stop sticks are deployed to apprehend criminals who are fleeing from pursuing police officers. This testimony tends to show defendant did or could foresee that the police officers might use this tactic to apprehend him. The trial court did not err by refusing defendant's requested jury instruction. Defendant's assignment of error is overruled.

V. Short-Form Indictment

[3] Defendant was tried and convicted for first-degree murder under a "short-form" indictment allowed by N.C. Gen. Stat. § 15-144 (2002). Defendant contends that the trial court erred by allowing trial and entering judgment against defendant since the "short-form" indictment only alleged the elements of second-degree murder.

Defendant concedes that our Supreme Court ruled against his position in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Further, this Court has "reviewed over fifty additional decisions in which this issue has been raised and rejected by our Supreme Court and this Court in the last three years. These decisions consistently hold that the short form murder indictment is constitutional." *State v. Amerson*, 158 N.C. App. 543, 581 S.E.2d 832 (citing *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 437-38 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *Wallace*, 351 N.C. at 504-08, 528 S.E.2d at 341-43). Defendant's assignment of error is overruled.

VI. Ineffective Assistance of Counsel

[4] Defendant contends that his trial counsel provided defendant with ineffective assistance of counsel by not renewing a pretrial motion to continue.

State v. Braswell sets out a two-part test to resolve issues of ineffective assistance of counsel. 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

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Id. (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)). The defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

When a motion for continuance is denied, a defendant must show that "he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993). The defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). Ineffective assistance of counsel claims are "not intended to promote judicial second-guessing on questions of strategy . . ." *State v. Adams*, 156 N.C. App. 318, 325-26, 576 S.E.2d 377, 383 (2003) (quoting *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978)).

No evidence shows that counsel's failure to renew this motion or that the lack of additional time prejudiced defendant's case. The record reflects that defendant's counsel was prepared to cross examine the State's witnesses and conduct direct examination of the defendant's witnesses. Defense counsel successfully challenged the introduction of several statements made by defendant while in police custody. The record further shows that defendant was initially charged with twelve crimes and that defense counsel successfully secured dismissal of seven of the twelve charges. Defense counsel also successfully argued to the jury that defendant was not guilty of assault with a deadly weapon inflicting serious injury to Cocke. The jury found defendant not guilty on this charge. The defendant has failed to show that defense counsel's actions were deficient or that this deficiency was prejudicial to the defense in his case. Defendant's assignment of error is overruled.

VII. Conclusion

Defendant failed to show that the trial court erred in denying his motion to dismiss the first-degree felony murder charge and in denying his requested jury instructions. Defendant failed to present any new arguments or authority in support of his contention that the "short-form" indictment was unconstitutional. Defendant failed to show that defense counsel provided ineffective assistance of counsel.

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No error.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. JERRY LATHAM CARRIGAN, DEFENDANT

No. COA02-1577

(Filed 18 November 2003)

1. Evidence— hearsay—residual exception—notice

The trial court did not err in a first-degree rape, first-degree sexual offense, taking indecent liberties with a child, incest, and crime against nature case by denying defendant's motion to introduce the out-of-court statements of the minor victim's now deceased cousin, because: (1) defendant did not give proper notice of its intention to offer the hearsay testimony when the State had no notification of defendant's intent to use the statements of the deceased declarant and the prosecution had no reason to prepare to rebut the statements; and (2) even if defendant had given proper notice, the testimony of the witnesses concerning the cousin's statements lacked sufficient guarantees of trustworthiness. N.C.G.S. § 8C-1, Rules 803(24), 804(b)(5).

2. Criminal Law— instructions—referring to minor child as victim

The trial court did not commit plain error in a first-degree rape, first-degree sexual offense, taking indecent liberties with a child, incest, and crime against nature case by referring to the minor child as the "victim" forty times in its jury charge, because: (1) North Carolina trial courts have found that the use of the word "victim" in jury instructions does not rise to the level of plain error; (2) the word "victim" is used in North Carolina pattern jury instructions for first-degree rape and first-degree sexual offense charges; and (3) in view of the evidence in this case, it cannot be said that the outcome of defendant's trial would have been any different had the word "victim" not been used in the trial court's instructions.

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3. Sexual Offenses— first-degree—failure to require unanimous verdict for specific sexual act

The trial court did not commit plain error by failing to require a unanimous verdict regarding the specific sexual act it found as the predicate act for the verdict of guilty of first-degree sexual offense because N.C.G.S. § 14-27.4(a)(1) does not require all twelve jurors to agree as to which act defendant committed, but rather that he committed a sexual act.

4. Criminal Law— motion for mistrial—failure to show substantial and irreparable prejudice

The trial court did not abuse its discretion in a first-degree rape, first-degree sexual offense, taking indecent liberties with a child, incest, and crime against nature case by denying defendant's motion for a mistrial, nor did it commit plain error by failing to inquire of the jury if it could ignore improperly admitted evidence from the minor victim stating during direct examination that a family member now knew it was true about what happened to a person named Kathy, because: (1) defendant's objection to the statement was sustained and the trial court instructed the jury not to consider the remark; (2) there was no testimony as to Kathy's identity nor any indication given as to what had happened to her; and (3) the record does not disclose that the isolated testimony substantially and irreparably prejudiced defendant.

Appeal by defendant from judgment entered 30 November 2001 by Judge W. Robert Bell in Cleveland County Superior Court. Heard in the Court of Appeals 17 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General Diane G. Miller, for the State.

Miles & Montgomery, by Mark Montgomery, for defendant.

MARTIN, Judge.

Defendant appeals from a judgment ordering his imprisonment for a minimum term of 240 months and a maximum term of 297 months. The judgment was entered upon his conviction by a jury of first degree rape, first degree sexual offense, taking indecent liberties with a child, incest, and crime against nature.

The State's evidence at trial tended to show that on 22 January 2000, eleven-year-old A.L., and her nine-year-old sister, C.L., went to

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the home of defendant, their maternal grandfather, to spend the weekend. After spending Saturday night at defendant's home, defendant took the girls to the home of his mother, Evelyn Smith ("Smith") on Sunday, 23 January 2000. When they arrived, their cousins, Joannie Appleman and Melissa Appleman Wease, were already there.

A.L. testified that about 8:00 or 9:00 on Sunday evening, defendant took A.L. to the grocery store to buy spaghetti for dinner. Some time later, he asked A.L. to accompany him to the store again but took her, instead, to his house. A.L. went inside and was watching television when defendant called her to his bedroom and asked her to try on a pair of red panties. When she refused, he grabbed her, threw her on the bed, forced some white pills down her throat and twisted a sheet around her neck. When A.L. resisted, defendant tightened the sheet so that she was unable to resist or scream. According to A.L.'s testimony, defendant pulled down her pants, forced her legs apart and inserted his fingers into her vagina before inserting his penis. A.L. testified that it felt like he was ripping her apart. Next, defendant got beside her on the bed, forced her mouth open and put his penis into her mouth so deep that she blacked out. When she woke up, she was partially clothed on defendant's bed, with the sheet still around her neck. When she stood up to get dressed, she felt dizzy and sore. On the way back to Smith's, defendant told A.L. that if she told anyone, he would hurt her family.

After arriving back at Smith's house, A.L. went into the bathroom and found blood on her panties. She told C.L., Joannie and Melissa that defendant had raped her. Melissa and Joannie told Diane, defendant's wife, who checked A.L. and told her she looked fine. A.L. called her mother, Tammy Lewis, ("Lewis") about 3:00 a.m. Monday morning, but because defendant was standing nearby, A.L. told her mother only that she was sick and wanted to come home. Defendant then spoke with Lewis and told her A.L. would be fine by the morning. After defendant hung up, he and Smith unplugged and hid the telephone.

The next morning, C.L. found the telephone, called her mother, asked her to come get them, and told her that defendant had raped A.L. When Mrs. Lewis arrived, A.L. was sitting in the living room and needed help to walk out to the van. They went directly to the emergency room at Gaston Memorial Hospital.

At the hospital, A.L. was examined and interviewed by doctors, nurses and policemen. She had clusters of small red areas around her

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neck consistent with where she described defendant had choked her with the sheet. In addition, there were scratches and bruises on the front of her neck. A toxicology test showed the presence of two drugs, a barbiturate and benzodiazepine, a sedating drug. The gynecological exam revealed abrasions on both sides of her labia minora and a small laceration of the posterior fourchette, the area around the vagina. There were additional lacerations on her hymenal ring and bruising on her external genitalia. These injuries, which appeared to be eighteen to twenty hours old, were consistent with A.L.'s account of the events, but could also have been caused by a straddle injury.

Defendant presented evidence tending to show that Lewis had given A.L. some pills for stomach problems before she went to defendant's house. On the night in question, A.L., C.L., and their cousins were playing on the bed in their bedroom when the bed collapsed. Smith called her son-in-law, Frank Appleman, who came and fixed the bed.

Defendant brings forward in his brief five of the fourteen assignments of error contained in the record on appeal. Those assignments of error not presented for review and discussed in the brief are deemed to have been abandoned. N.C.R. App. P. 28(a). We have carefully considered his arguments in support of the assignments of error brought forward in the brief and conclude that defendant received a fair trial, free of prejudicial error.

I.

[1] Defendant first contends the trial court erred in denying the defendant's motion to introduce the out-of-court statements of A.L.'s cousin, Joannie Appleman. On the first day of the trial, 27 November 2001, defendant gave the State written and oral notice that he intended to offer the hearsay testimony of Joanie Appleman, now deceased, under Rule 803(24) of the North Carolina Rules of Evidence. The State objected to the evidence, stating that it was unprepared to respond to the testimony. Because defendant was not certain if he was going to offer the evidence, the trial court delayed its ruling.

Later in the trial, during a *voir dire* hearing, Melissa Appleman Wease testified that on the weekend of 23 January 2000, she and her sister, Joannie, were at Smith's trailer when her cousins, A.L. and C.L. came to visit. On the night of 23 January 2000, Joannie told Melissa that earlier, she and A.L. had been jumping on a bed in Smith's house

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when the bed broke and A.L. straddled the footboard. Although Melissa remembered that A.L. told her she had been raped by the defendant, Melissa did not remember talking to the investigators or social services workers who had interviewed her.

Defendant's mother, Evelyn Smith, testified during the *voir dire* hearing that on 23 January 2000, that Joannie told her that A.L. "broke the bed down," "went across the footboard" and hurt "her private." Smith called her son-in-law, Frank Appleman, to fix the bed that same day. Smith, who has diabetes, admitted that her blood sugar was not stable, causing her confusion and memory problems. Although Smith spoke with investigators and social workers shortly after the incident, she, too, failed to mention the incident to them.

Frank Appleman, Joannie's father, testified at the hearing that he received a call from Smith one Sunday in January 2000, asking him to come fix a broken bed. When Mr. Appleman asked Joannie what had happened to the bed, she told him the bed fell down when she and A.L. were playing on it, and A.L. hurt herself, but "not bad." During his testimony, Appleman could not remember A.L.'s name.

The State objected to the evidence because (1) proper notice was not served, (2) there was no guarantee of trustworthiness, and (3) without the opportunity to secure witnesses to contradict the testimony, the interest of justice could not be served. The trial court sustained the State's objection, finding the defendant failed to give proper notice and that even if the notice requirement was proper, there were insufficient guarantees of trustworthiness in the testimony of the witnesses. Defendant assigns error to the ruling.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). Although hearsay is generally not admissible, N.C. Gen. Stat. § 8C-1, Rule 802 (2001), there are exceptions to such inadmissibility, including the "residual" exceptions provided by Rule 803(24), where the availability of the declarant is immaterial, and by Rule 804(b)(5), where the declarant is unavailable. The "residual exceptions" provided by Rules 803(24) and 804(b)(5) are virtually identical, and our Supreme Court has adopted identical six-part guidelines for the admission of testimony offered under either of these exceptions. *State v. Triplett*, 316 N.C. 1, 7, 340 S.E.2d 736, 740 (1986). A hearsay statement may be admitted into evidence under the residual exceptions if (1) proper notice is given to the adverse party of his intent to offer the evidence and of its particulars, (2) the statement is not cov-

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ered by any other hearsay exceptions, (3) the statement possesses an “equivalent circumstantial guarantee of trustworthiness,” (4) the statement is offered as evidence of a material fact, (5) the evidence is more probative than prejudicial on the point for which it is offered, and (6) the general interest of justice is best served by admitting the evidence. *Id.* at 9, 340 S.E.2d at 741. In order to meet the notice requirement, written notice of the intention to offer the statement, as well as “the particulars of it, including the name and the address of the declarant,” must be given to the “adverse party sufficiently in advance of offering the statement.” *Id.* at 12, 340 S.E.2d at 743. The notice requirement does not require a fixed amount of time and is usually viewed somewhat “flexibly, in light of the policy of providing a party with a fair opportunity to meet the proffered evidence.” *Id.* at 11-12, 340 S.E.2d at 743. On appeal, the ruling of the trial court will be reversed only if the findings are not supported by competent evidence or if the law was applied erroneously. *State v. Holden*, 106 N.C. App. 244, 251, 416 S.E.2d 415, 419-20 (1992), *disc. review denied*, 332 N.C. 669, 424 S.E.2d 413 (1992).

Although some North Carolina cases have found notice given on the first day or two of trial to be sufficient notice for purposes of the first requirement, in such cases notice was effectively given earlier, through oral notice or through discovery. See *Triplett*, 316 N.C. at 13, 340 S.E.2d at 743 (although written notice was given the day trial began, the prosecutor informed the defense three weeks earlier of its intent to introduce the statements); *State v. Agubata*, 92 N.C. App. 651, 375 S.E.2d 702 (1989) (letter written to prosecutor advising her of defendant’s intent to introduce evidence under 803(24) was sufficient notice); *State v. Bullock*, 95 N.C. App. 524, 528, 383 S.E.2d 431, 433 (1989) (State disclosed its intent to use statements as well as their substance in a request for discovery two months prior to trial); *State v. Nichols*, 321 N.C. 616, 623, 365 S.E.2d 561, 565 (1988) (defendant had a copy of the statement well in advance of trial and knew the identity of the declarant on the first day of trial, five weeks prior to the introduction of the evidence).

It is undisputed that Joannie’s statements are hearsay and that she is unavailable as a witness. Although there is ambiguity in the record as to whether the State received notice one or two days prior to the issue being heard, it is clear during pretrial motions on the day before the beginning of the trial, counsel did not inform the court or the State of his intent to use the statements made by Joannie, even though he had learned of them the previous Friday. Because the State

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had no notification of defendant's intent to use the statements of the deceased declarant, the prosecution had no reason to prepare to rebut the statements. Therefore, the State did not have a fair opportunity to respond to the hearsay statements, and the trial court correctly found that the defendant did not give proper notice of its intention to offer hearsay testimony.

The trial court also found that even if defendant had given proper notice, the testimony of the witnesses concerning Joannie's statements lacked sufficient guarantees of trustworthiness. In making this finding, the trial court specifically relied on the testimony of Smith, Melissa Wease, and Frank Appleman and incorporated that testimony "as part of the findings of fact." The testimony of these witnesses included (1) Melissa Wease's admission that she had told no one that Joannie had told her A.L. was injured from jumping on the bed and falling the night of 23 January 2000; (2) Smith's testimony that she did not remember with whom she spoke and that she had not told investigators of the accident during interviews just after the incident; and (3) Appleman's inability to recall A.L.'s name, and his testimony that he had not mentioned the incident to anyone previously. In weighing the trustworthiness of hearsay testimony, the trial court must consider: "(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *Triplet*, 316 N.C. at 10-11, 340 S.E.2d at 742. In addition, the court should consider the "nature and character of the statement and the relationship of the parties." *Id.* at 11, 340 S.E.2d at 742. The trial court's findings are supported by the evidence and support its denial of defendant's proffer of the hearsay testimony of Joannie Appleman. Therefore, we overrule this assignment of error.

II.

[2] By his next assignment of error, defendant contends that the trial court committed plain error by referring to A.L. as the "victim" forty times in its charge to the jury. Defendant failed to object at trial to the use of the word "victim" in the instructions to the jury and therefore has waived review of this assignment of error unless it is found to be plain error. N.C.R. App. P. 10(b)(2). Where plain error is claimed, the Court must examine the whole record to determine if the "claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, . . . or

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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).

North Carolina trial courts have found that the use of the word "victim" in jury instructions does not rise to the level of plain error. *State v. Henderson*, 155 N.C. App. 719, 722, 574 S.E.2d 700, 703 (2003), *disc. review denied*, 357 N.C. 64, 579 S.E.2d 569 (2003); *State v. Hatfield*, 128 N.C. App. 294, 299, 495 S.E.2d 163, 165-66 (1998), *disc. review denied*, 348 N.C. 75, 505 S.E.2d 881 (1998), *cert. denied*, 525 U.S. 887, 142 L. Ed. 2d 165 (1998). In addition, the word "victim" is used in North Carolina pattern jury instructions for first degree rape and first degree sexual offense charges. *State v. Richardson*, 112 N.C. App. 58, 67, 434 S.E.2d 657, 663 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994). Moreover, in view of the evidence in this case, we cannot say that had the word "victim" not been used in the trial court's instruction, there is a probability the outcome of the defendant's trial would have been any different. This assignment of error is overruled.

III.

[3] Defendant next argues the trial court committed plain error by not requiring a unanimous verdict regarding the specific sexual act it found as the predicate act for the verdict of guilty of first degree sexual offense. Because the defendant did not make a timely objection, the standard of review is plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

N.C. Gen. Stat. § 14-27.4(a)(1) (2001) states that a person is guilty of a first degree sexual offense "if the person engages in a sexual act with a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim." The trial court instructed the jurors that they must first find that defendant engaged in a sexual act. They were told that a sexual act could be fellatio or it could be by penetrating, however slight, with any object, the genital opening of a person's body. The State's evidence tended to show that defendant engaged in both of the acts described in the jury instruction as sexual acts. The jury was also required to reach a unanimous verdict as to each charge. The statute does not require all twelve jurors to agree as to which act the defendant committed, only that he committed a sexual act. See *State v. Youngs*, 141 N.C. App. 220, 230, 540 S.E.2d 794, 802 (2000), *disc. review denied*, 353 N.C. 397, 547 S.E.2d 430 (2001); *State v. Hartness*,

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326 N.C. 561, 565, 391 S.E.2d 177, 179 (1990). This assignment of error is overruled.

IV.

[4] Finally defendant argues by two assignments of error that the trial court erred in denying defendant's motion for a mistrial, and committed plain error by not inquiring of the jury if it could ignore improperly admitted testimony. Whether to grant a motion for mistrial is in the sole discretion of the trial judge, *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982), and absent an abuse of discretion the decision should not be overturned on appeal. *State v. Craig*, 308 N.C. 446, 454, 302 S.E.2d 740, 745, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). The trial court may declare a mistrial when conduct inside or outside the courtroom results in "substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2001).

During her direct examination, A.L. stated: "Melissa said, 'Now I know it's true about what happened to Kathy.'" Defendant's objection to the statement was sustained and the trial court instructed the jury not to consider the remark. There was no testimony as to "Kathy's" identity nor any indication given as to what had happened to her. During her cross-examination, defendant's counsel asked A.L., "Who came in next?" A.L. responded, "And, then I came out of the bathroom and laid on the bed, and then that's when Melissa said that, that's why Kathy was saying all that." Defendant objected and the court instructed the witness: "Tell him what happened next." Again, there was no testimony identifying "Kathy" or what she had said. The record does not disclose that this isolated testimony "substantially and irreparably" prejudiced defendant and thus, a mistrial was not required.

No error.

Judges BRYANT and GEER concur.

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[161 N.C. App. 265 (2003)]

STATE OF NORTH CAROLINA v. CARNELL JAMAR GANTT

No. COA03-19

(Filed 18 November 2003)

1. Sexual Offenses— short-form indictment—second-degree sexual offense

The use of a short-form indictment for charging second-degree sexual offense was constitutional.

2. Confessions and Incriminating Statements— drive to magistrate's office—comments by officer—not an interrogation

A defendant's statement to an officer during the drive to the magistrate's office was not the result of a custodial interrogation. The exchange between the officer and the unruly defendant was not the functional equivalent of questioning.

3. Evidence— video of incriminating statement—unruly defendant inside patrol car—bag over head—not prejudicial

A video of an incriminating statement was admissible in a second-degree sexual offense prosecution where the video was taken inside a patrol car; defendant was drunk, suicidal, and banging his head against the protective shield behind the front seat; officers had placed a bag over defendant's head because of the head banging and defendant's spitting at officers; the court allowed only the portions of the tape showing defendant's statement; and the main concern at trial seemed to be prejudice to the State. The danger of unfair prejudice did not outweigh the probative value.

4. Sentencing— rejection of plea bargain—court's comment—not prejudicial

There was no plain error in sentencing defendant for second-degree sexual offense in the court's comment about defendant rejecting an offered plea bargain. Although those comments cannot be approved, it cannot be said that defendant was prejudiced by a sentence between the requested minimum and maximum of the presumptive range under the facts of the case.

Appeal by defendant from judgment dated 4 June 2002 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 15 October 2003.

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*Attorney General Roy Cooper, by Assistant Attorney General
Meredith Jo Alcoke, for the State.*

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

BRYANT, Judge.

Carnell Jamar Gant (defendant) appeals a judgment dated 4 June 2002 entered consistent with a jury verdict finding him guilty of second-degree sexual offense.

On 25 June 2001, defendant was indicted for second-degree sexual offense for having “unlawfully and willfully . . . engage[d] in a sexual offense with Charnessa Edwina Watson, by force and against her will.” At trial, Charnessa Watson (Watson) testified that she and defendant, who was her boyfriend at the time, were sharing an apartment. On 11 May 2001, defendant started drinking beer in the afternoon and, by midnight, had consumed approximately twelve beers. Defendant and Watson joined a few other residents from their apartment complex for a social gathering in front of the building that night, during the course of which defendant became “[v]ery vulgar, rude.” At one point, defendant told Watson he should throw a can of beer at her. Then at approximately 4:00 a.m. on 12 May 2001, defendant pushed Watson out of her chair, causing her to fall to the ground. Watson went to her apartment, where she lay crying on the living room couch. While she was pretending to be asleep on the couch, defendant entered the apartment twice to get beer from the refrigerator. Around 5:00 a.m., defendant came back to the apartment and tried to wake up Watson. Watson told defendant she “didn’t want to be bothered.” Defendant nevertheless began making romantic advances, and when Watson pushed him away, he started to wrestle with her. Watson told defendant “[r]epeatedly” to leave her alone. When the wrestling escalated to the point of defendant choking Watson, she screamed. During this struggle, the wraparound skirt Watson had been wearing was torn off, exposing her underwear. Defendant accused Watson of cheating and subsequently forced his hand inside her vagina. Watson continued “[k]icking, punching, [and] biting” defendant to get him to stop. Defendant withdrew his hand after a minute or two and bit Watson in her left thigh and the right corner of her mouth. Defendant then went to the kitchen to get a broom and “came towards [Watson] with the end of the broom,” “aiming it” at her “[m]id-section below.” Watson pushed the broom handle

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away from herself. A neighbor who had heard the noise coming from Watson's apartment came and knocked on the front door. This caused defendant to "stop[] with the broom" and open the door. The neighbor walked past defendant to Watson's room where she gathered some clothes for Watson. As the neighbor and Watson attempted to leave the apartment, defendant stepped between them, but Watson pushed him aside and went to her neighbor's apartment. After trying to calm Watson down, the neighbor "left to go call the police but the police [were] already there."

Officer Danny Carter testified that the police found defendant in a bedroom closet in Watson's apartment. Officer Carter and another police officer had to struggle to get defendant, who was resisting, out of the closet and into handcuffs. Defendant did not receive any *Miranda* warnings at this time. Once defendant was handcuffed, Officer Carter also put leg irons on defendant and placed him in the backseat of the patrol car. Because defendant was spitting at the police officers and banging his head against the protective window separating the front and back seats of the vehicle, a bag was placed over defendant's head. Officer Carter further testified that during the ride to the magistrate's office, he turned on the vehicle's video camera that was placed with a view of defendant. While the camera was in operation, defendant told Officer Carter he had placed four fingers in Watson's vagina. This statement was recorded by the video camera, and the videotape was introduced into evidence and played for the jury over defendant's objection. Prior to Officer Carter's testimony, defendant had moved to exclude the statement he made in the patrol car on the basis that his Fifth Amendment rights had been violated. The trial court concluded defendant's statement was unsolicited and voluntary and therefore deemed the evidence admissible.

Watson was taken to a hospital where a registered nurse, Ethlyn Csontos, examined her. The nurse discovered bite wounds on Watson's left inner thigh and mouth. An examination of Watson's vaginal area revealed no injuries.

The issues on appeal are whether: (I) the short-form indictment issued against defendant is unconstitutional; (II) defendant's incriminating statement in the patrol car was obtained in violation of his *Miranda* rights; (III) inclusion of the videotape into evidence violated North Carolina Rules of Evidence 401 and 403; and (IV) the trial court penalized defendant for exercising his right to trial.

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I

[1] Defendant first contends that the short-form indictment charging him with second-degree sexual offense was unconstitutional because it failed to allege all the elements of the offense and establish the trial court's jurisdiction to adjudicate the matter. In his brief to this Court, defendant acknowledges the binding precedent set by our Supreme Court, which has already determined this issue and held the use of short-form indictments to be constitutional. *See State v. Wallace*, 351 N.C. 481, 508, 528 S.E.2d 326, 343 (2000). As defendant only presents the issue for preservation purposes, we note this assignment of error and overrule it. *See State v. Brothers*, 151 N.C. App. 71, 79, 564 S.E.2d 603, 609 (2002), *appeal dismissed and disc. review denied*, 356 N.C. 681, 577 S.E.2d 895 (2003).

II

[2] Defendant also argues his statement to Officer Carter during the drive to the magistrate's office was inadmissible because it resulted from a custodial interrogation in the absence of a waiver of his *Miranda* rights.

Prior to being placed in the patrol car, defendant was not read his *Miranda* rights. The police video that captured defendant's statement shows defendant severely disturbed, repeatedly and forcefully throwing his head against the protective glass of the patrol car and engaging in suicidal talk. At one point during the ride, the following exchange between defendant and Officer Carter occurred:

Defendant: I didn't do nothing.

Officer Carter: She says differently.

For a few seconds thereafter, defendant again talked about killing himself, which was followed by:

Officer Carter: You broke into the lady's apartment. You were hiding in her closet.

Defendant: I got four fingers in her pussy.

Miranda protections apply only where an accused is subjected to custodial interrogation. *See State v. Young*, 317 N.C. 396, 407, 346 S.E.2d 626, 633 (1986). In this case, there is no question defendant was in custody at the time of his statement. The key inquiry therefore becomes whether defendant was "interrogated" by Officer Carter.

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Interrogation has been defined as not only express questioning by the police but also includes “any words or actions on the part of law enforcement officials which they ‘should know are reasonably likely to elicit an incriminating response from the suspect.’” *Id.* (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980) (footnotes omitted)). With respect to these other words or actions, also referred to as the functional equivalent of questioning, the focus is on the perceptions of the suspect rather than the intent of the law enforcement officials. *Innis*, 446 U.S. at 301, 64 L. Ed. 2d at 308. Yet because “the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.” *Id.* at 301-02, 64 L. Ed. 2d at 308 (emphasis omitted).

In this case, Officer Carter did not question defendant. Instead, defendant, in the midst of his suicidal threats and self-destructive behavior, blurted out that he had not done anything. Officer Carter then commented that the victim had said otherwise. This comment and the two sentences that followed did not constitute the functional equivalent of questioning because the officer’s remarks did not call for a response from defendant and therefore cannot be deemed as reasonably likely to elicit an incriminating response from defendant. Moreover, it is not certain from the above exchange and defendant’s state of mind as portrayed on the videotape that defendant’s admission was in fact responsive to the officer’s comments.

This analysis comports with our Supreme Court’s holding in *Young* affirming the admissibility of a defendant’s incriminating statement to a law enforcement officer after the officer commented that he believed the victim based on the evidence and the fact that defendant had lied to him. *See Young*, 317 N.C. at 406, 408, 346 S.E.2d at 632-33. The officer’s comment had been made in response to the defendant’s question why the officer believed the victim’s story and not his. *Id.* As defendant in the present case was therefore not “interrogated,” the failure to inform him of his *Miranda* rights did not render defendant’s statement inadmissible and the trial court properly allowed it into evidence. *See also State v. Smith*, 160 N.C. App. 107, 117, 584 S.E.2d 830, 836 (2003) (where the defendant’s properly admitted incriminating statement was made after the police officer responded to a question by defendant).

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III

[3] Next, defendant argues, as he did at trial, that the videotape should have been excluded from the evidence because it was not only irrelevant but unduly prejudicial. We disagree.

Rule 401 defines relevant evidence as such “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C.G.S. § 8C-1, Rule 401 (2001). Rule 403 restricts the admission of relevant evidence by stating that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” N.C.G.S. § 8C-1, Rule 403 (2001).

As there is no stronger evidence than a party’s own admission, the videotape, which captured defendant’s incriminating statement, was clearly relevant to the issue of defendant’s guilt. Although defendant argues in his brief to this Court that the trial court could have opted to only play the admittedly relevant *audio* portion of the videotape, defendant did not make such a request to the trial court and therefore is bound by plain error review.¹ See *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (plain error is “‘fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done’”) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis omitted). Defendant, however, has not met his burden of showing prejudice, either under Rule 403 or under the standard for plain error. First, the trial court only allowed those portions of the videotape that included defendant’s statement regarding the alleged incident and omitted extraneous portions merely showing defendant’s self-destructive behavior in the patrol car. Further, as to the admitted portion, the trial court specifically instructed the jury “not to concern [it]self as to why [defendant] had [a] bag over his head.” Finally, prior to this instruction, the main concern at the trial level appears to have been that the State, not defendant, could be prejudiced by the image of defendant with a bag over his head. Under these circumstances, we cannot say that a dan-

1. The transcript shows that defendant’s comment to the trial court to possibly sever the audio portion from the video was merely a suggestion in an effort to accommodate the State’s concerns and not the basis of any objection to the videotape by defendant. See N.C.R. App. P. 10(b)(1) (“[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make”).

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ger of unfair prejudice substantially outweighed the probative value of the evidence, *see N.C.G.S. § 8C-1, Rule 403; State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 783 (1995) (holding that in light of the trial court's limiting instruction, the probative value of certain testimony to show motive was not substantially outweighed by the danger of unfair prejudice), or that admission of the video segment constituted fundamental error. Accordingly, the videotape was properly admitted into evidence.

IV

[4] Finally, defendant assigns error with respect to his sentencing. Specifically, defendant contends the trial court committed plain error by allowing defendant's decision to not plead guilty and to pursue a jury trial influence its sentence.

Although a sentence within the statutory limit will be presumed regular and valid, such a presumption is not conclusive. *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "If the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *Id.* A defendant has the right to plead not guilty, and "he should not and cannot be punished for exercising that right." *Id.* at 712-13, 239 S.E.2d at 465. Thus, "[w]here it can be reasonably inferred the sentence imposed on a defendant was based, even in part, on the defendant's insistence on a jury trial, the defendant is entitled to a new sentencing hearing." *State v. Peterson*, 154 N.C. App. 515, 517, 571 S.E.2d 883, 885 (2002).

During the sentencing phase of this case, the State argued for the trial court to "sentence [defendant] to the highest end on a Class C, record Level 3" and requested the imposition of a 116-month sentence, "the far end of the presumptive [range]." As support, the State pointed to the "dramatic escalation of violence" by defendant, who had assaulted Watson on prior occasions, and "continued to make her a victim." Defendant's counsel asked for a mitigated sentence, stating:

[T]he offense he's been convicted of is certainly far beyond anything he's ever experienced as a Level 3. The absolute[] minimum sentence is 70 months. That is ample . . . deterrence. I understand that it would probably be a long shot to think the mitigated range[,] but certainly if a message needs to be sent, . . . that's enough time to send that kind of message.

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The trial court then made the following statements in pronouncing defendant's sentence:

At the beginning of the trial I gave you one opportunity where you could have exposed yourself probably to about 70 months but you chose not to take advantage of that. I'm going to sentence you to a minimum of 96 and a maximum of 125 months in the North Carolina Department of Corrections. That's a 125[-]month sentence; however, if you have good behavior and don't get in any trouble while you're in the Department of Corrections, you're only looking at seven years versus more than ten years. If you get in trouble while you're in the Department of Corrections, you'll have to serve that entire 125[-]month sentence[,] which is ten years and five months.

These statements do not rise to the level of the statements our Courts have held to be improper considerations of a defendant's exercise of his right to a jury trial. *See Boone*, 293 N.C. at 712, 239 S.E.2d at 465 (where the trial court expressly stated that it would be *compelled* to give the defendant an active sentence due to the fact that he had pled not guilty and the jury had returned a verdict of guilty as charged); *see also State v. Cannon*, 326 N.C. 37, 38, 387 S.E.2d 450, 451 (1990) (where "the trial judge told counsel in no uncertain terms that if defendants were convicted he would give them the maximum sentence"); *Peterson*, 154 N.C. App. at 516-17, 571 S.E.2d at 884 (where the trial court stated the defendant tried to be a "con artist" with the jury, "rolled the dice in a high stakes game with the jury, and it's very apparent that [he] lost that gamble," and the evidence of guilt was "such that any rational person would never have rolled the dice and asked for a jury trial"); *State v. Pavone*, 104 N.C. App. 442, 446, 410 S.E.2d 1, 3 (1991) (where during sentencing the trial court noted the prior chance to enter into a plea agreement and told the defendant "that having moved through the jury process and having been convicted, it is a matter in which [he was] in a different posture"). This case is more akin to *State v. Johnson*, in which our Supreme Court held that because, in contrast to *Boone*, "the record reveal[ed] no such express indication of improper motivation," the defendant was not entitled to a new sentencing hearing. *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987). Although we disapprove of the trial court's reference to defendant's failure to enter a plea agreement, "we cannot, under the facts of this case, say that defendant was prejudiced or that defendant was more severely punished because he exercised his constitutional right to trial by jury." *State v. Bright*, 301

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N.C. 243, 262, 271 S.E.2d 368, 380 (1980). Based on the evidence in this case and defendant's history of previous assaults on the victim, indicating a "dramatic escalation of violence," the State argued for a 116-month sentence, "the far end of the presumptive [range]." More significantly, however, defense counsel conceded during sentencing that a minimum sentence of seventy months "would probably be a long shot." As it does not appear that defendant was prejudiced by the trial court's imposition of a sentence that fell between the requested minimum and maximum of the presumptive range, he is not entitled to a new sentencing hearing.

No error.

Judges McCULLOUGH and TYSON concur.

ATLANTIC CONTRACTING AND MATERIAL COMPANY, INC. PLAINTIFF v.
CHARLES N. ADCOCK, INDIVIDUALLY, D/B/A ADCOCK'S CONSTRUCTION
COMPANY, DEFENDANT

No. COA02-1087

(Filed 18 November 2003)

**1. Bailments— construction equipment parked on property—
degree of control**

Summary judgment should not have been granted for defendant on a bailment claim arising from an arrangement by which road construction equipment was parked on defendant's property for a time after a project was finished. The critical question is the degree of control over the equipment by defendant, and here there was a genuine issue of fact.

**2. Bailments— stored equipment—breach of agreement—
summary judgment**

Summary judgment should not have been granted for defendant on the issue of breach of a bailment contract where there was evidence that the equipment stored on defendant's property had been damaged, defendant's employee admitted moving it, and defendant admitted that no one else could have moved it.

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3. Bailments— indemnification clause—not exculpatory

The trial court erred to the extent that it based summary judgment for defendant in a bailment claim on an indemnification clause in the parties' agreement. The clause was not an exculpatory agreement because it lacked the necessary explicit language, and indemnity applies to third parties.

4. Damages and Remedies— punitive damages—summary judgment

Summary judgment was correctly granted for defendant on a punitive damages claim in a bailment action. The evidence may rise to negligence, but falls short of fraud, malice, or willful or wanton conduct.

Appeal by plaintiff from judgment entered 13 March 2002 by Judge James C. Spencer, Jr. in Granville County Superior Court. Heard in the Court of Appeals 21 May 2003.

John H. Pike, for plaintiff-appellant.

Edmundson & Burnette, L.L.P., by J. Thomas Burnette, for defendant-appellee.

GEER, Judge.

Plaintiff Atlantic Contracting and Material Co., Inc. ("Atlantic") appeals from the trial court's grant of defendant Charles N. Adcock's motion for summary judgment as to Atlantic's claims for breach of bailment, unfair and deceptive trade practices, and punitive damages. We conclude that genuine issues of material fact exist as to whether the parties entered into a bailment relationship and the trial court erred in granting summary judgment as to Atlantic's first claim for relief for breach of bailment. The trial court properly granted summary judgment as to Atlantic's claims for unfair and deceptive trade practices and punitive damages. We thus affirm in part and reverse in part.

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

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S.E.2d 210 (2001). As stated by this Court, “[t]he moving party bears the burden of establishing the lack of a triable issue of fact. The motion must be denied where the non-moving party shows an actual dispute as to one or more material issues.” *Johnson v. Trustees of Durham Tech. Cnty. Coll.*, 139 N.C. App. 676, 681, 535 S.E.2d 357, 361 (citations omitted), *app. dismissed and disc. review denied*, 353 N.C. 265, 546 S.E.2d 101 (2000). The non-movant may not “rest upon the allegations of its pleading to create an issue of fact, even though the evidence must be interpreted in a light favorable to the non-movant.” *Smiley’s Plumbing Co., Inc. v. PFP One, Inc.*, 155 N.C. App. 754, 761, 575 S.E.2d 66, 70, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 698 (2003).

In 1998, Atlantic was hired to place new concrete pavement on the northbound lane of I-85 near Oxford, North Carolina. Upon completion of the contract, Atlantic needed a location to store its paving equipment. Adcock owned a 12 1/2 acre lot on Highway 96. John Madden, Atlantic’s President, drafted a document entitled a “Lease Agreement” that provided:

Conditions of the rental are as follows:

1. For and in the consideration of \$1.00 and more, Charles N. Adcock Jr. and Adcock’s Construction Co. agree to lease property located on Route 96, Granville County, at Adcock’s Equipment Shop to Atlantic Contracting & Material Co., Inc. for the purpose of storing Atlantic’s equipment as removed from the project site at I-85, Oxford, North Carolina.
2. The term of this lease shall commence immediately and continue for an indefinite period.

Atlantic and Adcock signed this agreement (“the Agreement”) on 28 October 1998. Madden testified in his deposition that Atlantic exchanged concrete aggregate left over from the I-85 project and worth over \$8,000.00 “in return for the use of the property . . .”

Atlantic moved its paving equipment to Adcock’s property in the fall of 1998. Adcock’s property did not have a fence around it, but at some unspecified time he built a locked gate across the driveway onto the lot.

According to Madden, Atlantic did not go back to Adcock’s property until 2000 when Madden sent a representative of his company, Dennis Barlow, to retrieve the paving equipment. Although Adcock

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stated during his deposition that once and a while “that company would come get whatever they wanted[,]” Madden testified that Atlantic had no other jobs in North Carolina between 1998 and 2000. Dennis Barlow submitted an affidavit in which he stated that he returned to Adcock’s lot on 26 July 2000. He found that Atlantic’s equipment had been moved more than 100 yards from its original location to a low-lying area near a stream bed. Barlow’s affidavit asserts that the equipment could not have been moved without the use of heavy equipment. According to Barlow, he spoke with Adcock’s employee Dennis Bridges on 27 July 2000, who told him that Adcock had directed him to use Adcock’s heavy equipment to move Atlantic’s property. The paving equipment was badly damaged and required substantial repair.

Atlantic filed a claim against Adcock for breach of bailment on the grounds that defendant “maliciously, intentionally, and/or grossly negligently damaged” plaintiff’s paving equipment and materials. Atlantic also claimed that Adcock committed unfair and deceptive trade practices that damaged plaintiff in an amount in excess of \$10,000.00. Finally, Atlantic requested punitive damages. After filing both an answer and an amended answer, defendant moved for summary judgment. Atlantic appeals from the trial court’s order granting that motion.

I

[1] With respect to Atlantic’s claim for breach of bailment, the first question presented by this appeal is whether the parties entered into a bailment relationship. Atlantic, as the purported bailor, had the burden of establishing the existence of a bailor-bailee relationship. *Flexon Fabrics, Inc. v. Wicker Pick-up and Delivery Service, Inc.*, 39 N.C. App. 443, 447, 250 S.E.2d 723, 725 (1979). Nevertheless, “[r]egardless of who has the burden of proof at trial, upon a motion for summary judgment the burden is on the moving party to establish that there is no genuine issue of fact remaining for trial and that he is entitled to judgment as a matter of law.” *Marlowe v. Piner*, 119 N.C. App. 125, 127, 458 S.E.2d 220, 222 (1995). Further, “[u]ntil the moving party makes a conclusive showing, the non-moving party has no burden to produce evidence.” *Id.* at 128, 458 S.E.2d at 222.

In arguing that the trial court properly granted summary judgment, defendant relies solely on the parties’ assertion in the Agreement that they were entering into a “lease.” Courts are not, however, bound by the description that the parties have given a rela-

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tionship, but rather must independently determine the “essential character” of that relationship. *Szabo Food Service, Inc. v. Valentine's, Inc.*, 285 N.C. 452, 461, 206 S.E.2d 242, 249 (1974). “The construction put upon the contract by the parties is entitled to consideration in determining its true meaning, but they cannot, by giving a name to it, change its legal effect.” *Id.* (quoting *Guy v. Bullard*, 178 N.C. 228, 230, 100 S.E.2d 328, 329 (1919)).

This Court has previously held that “[a] bailment is created upon the delivery of possession of goods and the acceptance of their delivery by the bailee.” *Flexon Fabrics*, 39 N.C. App. at 447, 250 S.E.2d at 726. “Delivery” is defined as the bailor’s “relinquishing exclusive possession, custody, and control to the bailee” *Id.*

Our Supreme Court distinguished a bailment from a license or lease in *Freeman v. Myers Auto. Serv. Co.*, 226 N.C. 736, 40 S.E.2d 365 (1946):

To constitute a bailment the bailee must have assumed the custody and possession of the property for another, and if there was only permission given, though for a reward, to park at any convenient place in the lot, without any assumption of dominion over the property or custody of it in any respect, the status created was a mere license. *If a designated place on the lot was assigned to the owner of the car the status was that of a lease*, but the status of bailment was not created under either circumstance. A bailment is not created unless there is a delivery to and an acceptance of possession of the article by the bailee.

Id. at 737, 40 S.E.2d at 366 (emphasis added). In concluding that the plaintiff had failed to establish that parking her car in a lot pursuant to a monthly contract constituted a bailment as opposed to a license, the Court relied upon evidence that the defendant gave the plaintiff permission generally to occupy space in its parking lot, that the plaintiff customarily took her keys with her, and that when she wanted to take her car from the lot, she would look for it herself. *Id.* at 737-38, 40 S.E.2d at 366-67.

Here, the parties entered into the Agreement “for the purpose of storing Atlantic’s equipment as removed from the project site at I-85, Oxford, North Carolina.” The record contains no evidence that the parties agreed upon a specific location at Adcock’s lot where the equipment would be stored or that Atlantic had exclusive possession and control of a portion of Adcock’s premises. See 8A Am. Jur. 2d

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Bailments § 19 (1997) (“However, unlike a bailor, a tenant has exclusive possession and control of the portion of the other party’s premises where the goods are kept for the duration of the term of the lease.”). In fact, defendant offered evidence that Adcock felt free to move the equipment from its initial location to another spot a significant distance away. Under *Freeman*, a jury could find that the relationship of Adcock and Atlantic was not necessarily landlord and tenant. This conclusion does not, however, resolve whether the record contains sufficient evidence to support a jury finding that a bailment relationship existed.

The delivery of personal property for “storage” purposes, as provided in the Agreement, may give rise to a bailment. See, e.g., *AB Recur Finans v. Nordstern Ins. Co. of N. Am.*, 130 F. Supp. 2d 596, 599 (S.D.N.Y. 2001) (quoting 9 N.Y. Jur. 2d *Bailments and Chattel Leases* § 4) (“The acceptance of custody of personal property by a warehouse for safekeeping or storage is a bailment.’ ”); 8A Am. Jur. 2d *Bailments* § 5 (1997) (transactions constituting bailments include “the delivery and acceptance of custody of personal property for safekeeping, transportation, or storage.”). While the agreed upon purpose of storage standing alone is not enough to establish a bailment, it would support a finding, as required for a bailment, that Atlantic delivered its equipment to Adcock and that Adcock accepted that equipment with an intention of looking after that equipment.

Nevertheless, as one court has noted, “[c]ourts’ willingness to find a bailment ordinarily depends on how much control defendant exercised over plaintiff’s property.” *Herrington v. Verrilli*, 151 F. Supp. 2d 449, 458 (S.D.N.Y. 2001). In *Herrington*, the court found no bailment because the plaintiff and the defendant shared possession and control: the plaintiff had a key to the premises where his property was stored, the plaintiff was able to bring and remove parts without any involvement by the defendant, and the defendant had not undertaken any special duty to look after the plaintiff’s property. *Id.* at 459.

The critical question here is the degree of control exercised by Adcock over Atlantic’s equipment. If Atlantic was free to come and go as it wished and could remove equipment without the cooperation of Adcock, then there was no bailment. See 78 Am. Jur. 2d *Warehouses* § 18 (2002) (no bailment arises if “the owner’s control and dominion over the goods is dependent in no degree upon the co-operation of the warehouseman, and access thereto is in no way subject to the latter’s control”).

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In this case, Atlantic's evidence that once they delivered the equipment to Adcock's lot for storage, they did not return until they desired to remove the equipment suggests a relinquishment of exclusive possession. In addition, Atlantic's evidence that Adcock had a locked gate on the road to his property would support a finding that Atlantic's access to its equipment was dependent upon the cooperation of Adcock or his employees. Adcock exercised control over the equipment while it was in his possession by moving it more than 100 yards to a location that he preferred. This evidence is sufficient to give rise to a genuine issue of material fact as to the existence of a bailment, especially in the absence of any evidence from defendant Adcock that Atlantic could access its equipment without the permission and cooperation of Adcock.

[2] Since a jury could find that a bailment existed, the next question presented by this appeal is whether Atlantic offered sufficient evidence that Adcock failed to meet his obligation as a bailee "to exercise due care to protect the subject of the bailment from negligent loss, damage, or destruction." *Strang v. Hollowell*, 97 N.C. App. 316, 318, 387 S.E.2d 664, 665-66 (1990). Atlantic presented evidence that its equipment was damaged when its employee arrived to retrieve it and that an employee of Adcock admitted that Adcock had directed him to move the equipment using heavy equipment. Adcock admitted in his deposition that no one else had been on his property with equipment that could have moved Atlantic's property. Atlantic has, therefore, offered sufficient evidence to permit a jury to find a breach of a bailment contract.

II

[3] Adcock has argued that despite any breach of a bailment contract, it cannot be held liable because of a clause in the Agreement providing,

Indemnity: Atlantic shall indemnify, hold harmless Adcock, its agents, servants, successors and assigns from and against all losses, damages, injuries, claims, demands, and all expenses, including legal expenses of any nature whatsoever arising out of the use of said property, with regards to Atlantic equipment only.

Adcock contends that this clause represents an exculpatory clause that insulates it from liability for any damage to Atlantic's equipment. Atlantic's President Madden contends that this clause was intended only to provide for indemnification to Adcock for any liability

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that arose to a third party as a result of its equipment. We agree with Atlantic.

As this Court has previously noted, although “there has been some confusion to the contrary, the law with respect to exculpatory clauses is different from that with respect to indemnification clauses.” *Candid Camera Video World, Inc. v. Mathews*, 76 N.C. App. 634, 636, 334 S.E.2d 94, 95 (1985), *disc. review denied*, 315 N.C. 390, 338 S.E.2d 879 (1986). Specifically, “[t]here is a distinction between contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts.” *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965).

When construing a contract, “[w]here the contractual language is clear and unambiguous, the Court must interpret the contract as written.” *Kirkpatrick & Assoc., Inc. v. The Wickes Corp.*, 53 N.C. App. 306, 308, 280 S.E.2d 632, 634 (1981). In addition, “[c]ontracts exempting persons from liability for negligence are not favored by the law and are strictly construed against the party claiming such exemption.” *Jordan v. Eastern Transit & Storage Co.*, 266 N.C. 156, 161, 146 S.E.2d 43, 48 (1966). A clause will not be construed as exculpatory “in the absence of explicit language clearly indicating that such was the intent of the parties.” *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952).

The Agreement does not contain the necessary explicit language. The clause at issue was specifically titled “Indemnity.” In addition, “[t]he ‘hold harmless’ language of [the] clause . . . indicates that this is an indemnification clause.” *Candid Camera*, 76 N.C. App. at 636, 334 S.E.2d at 96. The legal effect of indemnity clauses is well-established: “Indemnity contracts are entered into to save one party harmless from some loss or obligation which it has incurred or may incur to a third party.” *Kirkpatrick & Assoc.*, 53 N.C. App. at 308, 280 S.E.2d at 634 (emphasis added). The plain language of the contract thus indicates that Adcock was only to be indemnified—or held harmless—from any loss or obligation that it incurred to a third party as a result of the Atlantic equipment being stored on Adcock’s property. The trial court erred to the extent it based its summary judgment decision on the parties’ indemnification clause.¹

1. Because the parties did not include an exculpatory clause in their contract, we need not consider whether an exculpatory clause would be enforceable under the circumstances of this case.

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III

Atlantic has not argued in its brief any basis for reversing the trial court's grant of summary judgment as to its claim for unfair and deceptive trade practices. Atlantic has, therefore, abandoned any appeal as to that claim.

[4] With respect to its claim for punitive damages, a claim for breach of the bailment relationship is a tort claim. *Strang*, 97 N.C. App. at 318, 387 S.E.2d at 666 ("While [the bailment] obligation arises from the relationship created by the contract of bailment, breach of this contractual duty results in a tort."). Upon proof that the defendant is liable for compensatory damages for breach of the bailment relationship and that this breach was accompanied by fraud, malice, or willful or wanton conduct, a plaintiff would be entitled to recover punitive damages. N.C. Gen. Stat. § 1D-15(a) (2001). A plaintiff must prove his or her entitlement to punitive damages by clear and convincing evidence. N.C. Gen. Stat. § 1D-15(b) (2001).

Based on our review of the record, we find that Atlantic has not forecast sufficient evidence of fraud, malice, or willful or wanton conduct to defeat summary judgment. Atlantic has pointed to no conduct that would amount to fraud or suggest malice. At most, Atlantic has offered evidence that Adcock directed that Atlantic's property be moved to another location using heavy equipment. This evidence may rise to the level of negligence, but standing alone falls short of giving rise to a reasonable inference that Adcock engaged in a "conscious and intentional disregard of and indifference to the rights and safety of others . . ." N.C. Gen. Stat. § 1D-5(7) (2001) (defining "[w]illful or wanton conduct").

We therefore reverse the trial court's grant of summary judgment with respect to Atlantic's first claim for relief for breach of bailment, but affirm as to Atlantic's second claim for relief for unfair and deceptive trade practices and its third claim for relief for punitive damages.

Affirmed in part and reversed in part.

Judges MARTIN and HUNTER concur.

BROWN v. MILLSAP

[161 N.C. App. 282 (2003)]

FANNY LEE BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SCOTTIE NOBLES,
A MINOR, PLAINTIFFS v. FLOYD TRAVIS MILLSAP, DEFENDANT

No. COA02-1596

(Filed 18 November 2003)

Costs— attorney fees—personal injury—court costs—prejudgment interest

The trial court erred in a personal injury action by determining that plaintiff was not entitled to recover attorney fees under N.C.G.S. § 6-21.1 based on its conclusion that the judgment exceeded \$10,000 after including the costs and prejudgment interest in its calculation of the judgment, and the case is remanded for a new hearing, because: (1) damages and costs are legally separate items; and (2) damages, as used in N.C.G.S. § 6-21.1, applies only to the compensatory damage amounts when determining whether the judgment amount is equal to or less than \$10,000.

Judge TYSON dissenting.

Appeal by plaintiff from judgment entered 28 September 2002, *nunc pro tunc* for 19 September 2002, by Judge Wiley F. Bowen, Superior Court, Columbus County. Heard in the Court of Appeals 7 October 2003.

T. Craig Wright for plaintiff-appellant.

Russ, Worth, Cheatwood & Hancox, by Philip H. Cheatwood, for defendant-appellee.

WYNN, Judge.

This appeal arises from the trial court's determination that Plaintiff, Scottie Nobles, was not entitled to recover attorneys' fees under N.C. Gen. Stat. § 6-21.1 (2001) because the judgment obtained exceeded \$10,000.00. Plaintiff contends the trial court erroneously included the costs and prejudgment interest in its calculation of the "judgment obtained." For the reasons stated in *Sowell v. Clark*, 151 N.C. App. 723, 567 S.E.2d 200 (2002), we agree with Plaintiff.

The underlying facts show that Plaintiff brought a personal injury action and obtained a jury verdict of \$9,500.00. Thereafter, Plaintiff moved the trial court to award court costs in the amount of \$435.00 and reasonable attorney's fees, pursuant to N.C. Gen. Stat. § 6-21.1, in

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the amount of \$3,500.00. After granting Plaintiff's motion for court costs and awarding prejudgment interest, the trial court concluded that it lacked authority to award plaintiff reasonable attorney's fees because the jury verdict plus court costs and prejudgment interest exceeded \$10,000.00. Plaintiff appeals.

On appeal, Plaintiff contends the trial court erred by adding court costs of \$435.00 and prejudgment interest of \$669.76 to the jury's verdict of \$9,500.00 to find that the judgment obtained exceeded the \$10,000.00 limit for awarding attorney's fees under N.C. Gen. Stat. § 6-21.1. We agree.

Under N.C. Gen. Stat. § 6-21.1 (2001), in certain personal injury suits "where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee . . . said attorney's fee to be taxed as a part of the court costs." In *Sowell v. Clark*, 151 N.C. App. 723, 567 S.E.2d 200 (2002), this Court stated:

Damages and costs are legally separate items. Damages comprise compensation for injuries through the negligence of another. Costs are the expenses a party incurs for prosecuting or defending an action.

Thus, this Court considered only the amount of the jury's verdict for damages in determining whether the "judgment for recovery of damages" exceeded \$10,000. *See also Boykin v. Morrison*, 148 N.C. App. 98, 557 S.E.2d 583 (2001) (stating "we hold that the word 'damages' as used in G.S. § 6-21.1 applies only to the compensatory damage amounts when determining whether the judgment amount is equal to or less than \$10,000); Purdy v. Brown, 56 N.C. App. 792, 290 S.E.2d 397, *rev'd on other grounds*, 307 N.C. 93, 296 S.E.2d 459 (1982) (employing jury verdict amount in determination that judgment for recovery of damages was below amount specified in N.C. Gen. Stat. § 6-21.1, which at that time was \$5,000). Accordingly, we conclude the trial court erroneously concluded it "must add to the jury verdict the costs reasonably expended by the plaintiff . . . and [the] prejudgment interest" in order "to determine if the judgment finally obtained for recovery of damages is \$10,000 or less."

Remanded for a new hearing.

Judge LEVINSON concurs.

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Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

I respectfully dissent from the majority's opinion.

I. Issue

The sole issue before this Court is whether the court erred by concluding that it lacked authority under N.C. Gen. Stat. § 6-21.1 to award reasonable attorney's fees to plaintiff.

II. N.C. Gen. Stat. § 6-21.1

Plaintiff contends the trial court erred by adding court costs of \$435.00 and prejudgment interest of \$669.76 to the jury's verdict of \$9,500.00 to determine if the \$10,000.00 amount of N.C. Gen. Stat. § 6-21.1 was exceeded.

"The general rule in this State is that, in the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding." *Boykin v. Morrison*, 148 N.C. App. 98, 104, 557 S.E.2d 583, 586 (2001) (quoting *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972)) (citations omitted). N.C. Gen. Stat. § 6-21.1 is an exception to this general rule. *Id.* The statute provides:

In any personal injury or property damage suit . . . instituted in a court of record, where the *judgment for recovery of damages is ten thousand dollars (\$10,000) or less*, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (2001) (emphasis supplied).

Our Supreme Court has held that:

The obvious purpose of this statute is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations.

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Hicks v. Albertson, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1973). “This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.” *Id.* Once the court determines that the “judgment for recovery of damages” is \$10,000.00 or less, the decision to award a party reasonable attorney’s fees rests within the judge’s discretion. N.C. Gen. Stat. § 6-21.1 (2001). Attorney’s fees are not automatically awarded. *Id.*

Here, the jury returned a verdict for compensatory damages in the amount of \$9,500.00. The trial court entered a judgment in favor of plaintiff for the amount of \$9,500.00 plus prejudgment interest pursuant to N.C. Gen. Stat. § 24-5 (2001). The court, upon plaintiff’s motion and in its discretion, additionally awarded plaintiff \$435.00 in court costs. The trial court added both the court costs and the prejudgment interest to the jury’s verdict of \$9,500.00 to determine if the “judgment for recovery of damages” was \$10,000.00 or less under the terms of N.C. Gen. Stat. § 6-21.1.

The trial court found that “the court must add to the jury verdict the costs reasonably expended by the plaintiff in such lawsuit which are to be taxed against the defendant and must also add thereto prejudgment interest at 8% per annum applied to the jury’s verdict.” The trial court found, after adding court costs and prejudgment interest, that the “judgment for recovery of damages” equaled \$10,604.76. The trial court reasoned that since the “judgment for recovery of damages” exceeded the sum of \$10,000.00, the court lacked authority under N.C. Gen. Stat. § 6-21.1 to consider plaintiff’s motion for attorney’s fees and denied plaintiff’s motion without a hearing on the merits.

Court costs are not automatically awarded to or added to a successful party’s claim. N.C. Gen. Stat. § 6-20 (2001) states that “costs may be allowed or not, in the discretion of the court, unless otherwise provided by law.” “[C]osts . . . are entirely creatures of legislation, and without this they do not exist.” *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (quoting *Clerk’s Office v. Commissioners*, 121 N.C. 29, 30, 27 S.E. 1003 (1897)). “The court’s power to tax costs is entirely dependent upon statutory authorization.” *State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 658 (1972) (citing *City of Charlotte*, 281 N.C. at 691, 190 S.E.2d at 185). “An award of costs is an exercise of statutory authority; if the statute is misinterpreted, the judgment is erroneous.” *City of Charlotte*, 281 N.C. at

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691, 190 S.E.2d at 185 (quoting *Morris, Solicitor v. Shinn*, 262 N.C. 88, 89, 136 S.E.2d 244, 245 (1964)).

Prejudgment interest, however, is automatically awarded to the prevailing party's claim. N.C. Gen. Stat. § 24-5 (2001) states:

(b) [i]n an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied. Any other portion of a money judgment in an action other than contract, except the costs, bears interest from the date of entry of judgment until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

Under this statute, the trial court has no discretion whether to award prejudgment interest to the prevailing party's award. *Id.*

The majority's opinion relies on *Sowell v. Clark* to support their holding that the trial court erred in adding prejudgment interest and court costs to the jury verdict. 151 N.C. App. 723, 567 S.E.2d 200 (2002). That case is distinguishable from the facts at bar. In *Sowell*, the jury awarded plaintiff damages in the amount of \$4,950.00. *Id.* at 725, 567 S.E.2d at 201. The trial court then awarded plaintiff \$6,180.23 in court costs and prejudgment interest. *Id.* at 728, 567 S.E.2d at 203. I agree with the holding in *Sowell*, that costs and damages are "legally separate items." *Id.* Prejudgment interest and costs are also legally separate items.

N.C. Gen. Stat. § 24-5 (2001) states that the "portion of a money judgment designated by the fact finder as compensatory damages bears interest . . ." Our Supreme Court has held that "the probable intent of the prejudgment interest statute [N.C. Gen. Stat. § 24-5] is threefold: (1) to *compensate* plaintiffs for loss of the use of their money, (2) to prevent unjust enrichment of the defendant by having money he should not have, and (3) to promote settlement." *Brown v. Flowe*, 349 N.C. 520, 524, 507 S.E.2d 894, 896 (1998) (emphasis supplied); *See Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984) (interpreting the 1983 version of N.C. Gen. Stat. § 24-5). Prejudgment interest is automatically added to a successful party's award for damages to *compensate* the prevailing party. It must also be added to the jury's verdict to determine the final amount of the "judgment for recovery of damages" under N.C. Gen. Stat. § 6-21.1. *See Boykin*, 148 N.C. App. at 106, 557 S.E.2d at 587 ("We hold that

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the word ‘damages’ as used in G.S. § 6-21.1 applies only to the compensatory damage amounts when determining whether the judgment amount is equal to or less than \$10,000.”). If the automatic addition of prejudgment interest causes the “judgment for recovery of damages” to exceed the \$10,000.00 maximum amount under N.C. Gen. Stat. § 6-21.1, the court is without authority to hear a party’s motion for attorney’s fees.

The addition of prejudgment interest in *Sowell*, unlike at bar, would *not* have caused the “judgment for recovery of damages” to exceed the \$10,000.00 statutory maximum. The trial court’s error in *Sowell* in not adding the prejudgment interest as part of the “judgment for recovery of damages” was harmless.

Since statutory authority and case law hold court costs to be discretionary, the trial court at bar erred in adding the court costs of \$435.00 to the jury award of \$9,500.00 to determine whether the \$10,000.00 maximum was exceeded. Prejudgment interest is automatically added to plaintiff’s award to compensate a prevailing party. The trial court was required to add the amount of \$669.76 to the jury’s award of \$9,500.00 to determine whether the \$10,000.00 statutory maximum was exceeded. Although the trial court erred by adding discretionary court costs to the jury’s verdict, this error is harmless. The addition of \$669.76 in prejudgment interest to the jury’s award of \$9,500.00, less \$435.00 court costs, equals \$10,169.76, which exceeds the statutory maximum. Unlike *Sowell*, the automatic addition of prejudgment interest causes the “judgment for recovery of damages” to exceed the statutory maximum of \$10,000.00.

III. Conclusion

The trial court erred by adding discretionary court costs of \$435.00 to the jury’s award of \$9,500.00 with interest to determine whether plaintiff was entitled to be heard on its motion for attorney’s fees under N.C. Gen. Stat. § 6-21.1. This error is harmless because the trial court was required to automatically add prejudgment interest of \$669.76 to the jury’s verdict of \$9,500.00. The “judgment for recovery of damages” exceeded the statutory maximum of \$10,000.00. I would affirm the trial court’s ruling. I respectfully dissent.

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[161 N.C. App. 288 (2003)]

STATE OF NORTH CAROLINA v. WILLIE ROBERTSON, DEFENDANT

No. COA02-1730

(Filed 18 November 2003)

1. Criminal Law— competency to stand trial—length of observation

A competency examination in which defendant was observed for 1 hour and 40 minutes did not violate N.C.G.S. § 15A-1001 or due process. The plain language of the statute does not establish a minimum period of observation, and the court made 16 findings of fact based on the opinion of an expert forensic psychiatrist and its own observations. The evidence was more than sufficient to support those findings.

2. Sentencing— failure to object at trial—appellate review

The issue of whether a sentence was improperly enhanced was properly before the Court of Appeals despite defendant's failure to object at trial. N.C.G.S. § 15A-1446(d)(18) (2001).

3. Sentencing— aggravating factor—use of element of offense

The trial court did not violate N.C.G.S. § 15A-1340.16(d) when sentencing an inmate for malicious conduct for spitting at guards by finding in aggravation that defendant intended to hinder the lawful exercise of a governmental function. The fact that defendant knowingly spit at a guard does not implicitly presume that he intended to hinder the guard in his duties, so that additional evidence would be required to prove the intent necessary for a finding of this aggravating factor.

4. Sentencing— aggravating factor—violated pledge of good conduct at trial—contempt conviction—separate incident

Neither double jeopardy nor N.C.G.S. § 15A-1340.16(d) was violated by the enhancement of a sentence for malicious conduct by a prisoner for defendant's violation of his assurance of good behavior. Defendant had already been convicted for contempt for his conduct in court (overturning tables and cursing); however, the incident on which the enhancement was based (feigning a heart attack) was a separate, later incident.

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[161 N.C. App. 288 (2003)]

Appeal by defendant from judgments entered 8 August 2002 by Judge W. Douglas Albright in Warren County Superior Court. Heard in the Court of Appeals 15 October 2003.

*Roy A. Cooper, III, Attorney General, by James A. Wellons,
Special Deputy Attorney General, for the State.*

William B. Gibson, for defendant-appellant.

MARTIN, Judge.

Defendant Willie Robertson was indicted for two counts of malicious conduct by a prisoner arising out of an incident in which he is alleged, while an inmate in the custody of the North Carolina Department of Correction, to have knowingly and willfully spit in the face of two prison guards on 12 December 2001 at the Warren Correction Institute. He was also indicted for an additional count of malicious conduct by a prisoner and for assault on a government employee arising out of another incident on 20 January 2002 in which he is alleged to have knowingly and willfully spit in the face of a guard and pushed her while she was attempting to escort him to the recreation area.

The cases were joined for trial, which commenced on 5 August 2002. On the first day of trial, defendant became agitated and violent when he was denied a request for a new attorney. The defendant turned over the defense counsel's table, shattering the plate glass top, and then shouted several epithets at the court as he was escorted out of the courtroom.

On the second day of trial, it was brought to the trial court's attention that an evaluation as to the defendant's capacity to proceed, which had been previously ordered by another judge on 6 May 2002, had never been conducted. The trial court ordered that defendant be immediately sent to Dorothea Dix Hospital for an evaluation as to his capacity to proceed to trial. He was examined by Dr. Carla deBeck, a forensic psychiatrist, for one hour and forty minutes. At a hearing the following day, Dr. deBeck testified that defendant had borderline intelligence and suffered from a personality disorder and possible paranoia but was capable of proceeding to trial. Based upon her testimony, the trial court found defendant was capable of proceeding.

Defense counsel reported to the court that defendant had given his assurance that he would behave in an appropriate manner and would not cause any further disruption if he were permitted to return

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to the courtroom. Defendant then apologized to the trial court for the disturbance he had caused and the jury was returned to the courtroom. Later that day, however, after the State had presented its case, the defendant fell to the floor upon returning from a recess, as though he had fainted. Emergency personnel were called and defendant was transported to the hospital after complaining of chest pain. No medical infirmities were found at the scene or later at the hospital. The emergency personnel who responded testified that defendant had told them, on the previous occasion when they were treating him after he overturned the defense counsel's table, "Y'all will probably be right back, because I'm going to go ahead and pass out."

The jury found defendant not guilty of one count of malicious conduct by a prisoner, but guilty as to the other two counts and guilty of assault on a government employee. The trial court then conducted a contempt hearing and found defendant guilty of criminal contempt for his conduct in overturning the table and shouting epithets at the court on the first day of his trial.

The court sentenced the defendant to thirty days incarceration for contempt, to be served at the expiration of the sentence defendant was currently serving. The court then found, as factors in aggravation of defendant's sentences as to both counts of malicious conduct by a prisoner, that the offenses were committed to hinder the lawful exercise of a governmental function, and that defendant had breached his assurance of good behavior by faking a heart problem and "falling out" on the floor on the third day of trial. The court found no mitigating factors and sentenced defendant in the aggravated range to a minimum of 49 months and a maximum of 59 months for each count of malicious conduct by a prisoner. He was also sentenced to a term of 150 days for assault on a government employee, all of the sentences to be served consecutively. Defendant appeals from these judgments.

I.

[1] In his first assignment of error, the defendant argues that the competency determination in this case violated G.S. §§ 15A-1001 *et seq.* and the defendant's constitutional right to due process of law. There is no indication in the record that defendant objected at trial to the court's ruling that he had capacity to proceed; thus, defendant has failed to preserve this argument for review. N.C. Gen. Stat. § 15A-1446(a) (2001); N.C. R. App. P. 10(b)(1). We elect, how-

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ever, to address his arguments in the exercise of our discretion under N.C. R. App. P. 2.

G.S. § 15A-1001 provides that the State may not proceed against a criminal defendant if he or she is mentally incapacitated. N.C. Gen. Stat. § 15A-1001 (2001). When a defendant's capacity to proceed is questioned by either party or the court, the trial court must conduct a hearing and "may order the defendant to a State facility for the mentally ill for observation and treatment for the period, not to exceed 60 days, necessary to determine the defendant's capacity to proceed." N.C. Gen. Stat. § 15A-1002 (2001).

Defendant argues that G.S. §§ 15A-1001 *et seq.* were violated in this case because the original competency evaluation ordered on 6 May 2002 was not carried out, but instead a "hasty" one hour and forty minute evaluation was conducted on the second day of his trial. Defendant specifically contends that G.S. § 15A-1002(b)(2), which states that commitment to a State facility for the mentally ill for purposes of evaluation shall not exceed a period of 60 days, implicitly contemplates a period of observation greater than one hour and forty minutes. We are not persuaded by his argument.

"If the language used [in a statute] is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). It is clear that the plain language of G.S. § 15A-1002 does not establish a minimum period of observation for competency evaluations. To the contrary, G.S. § 15A-1002 places the issue of competency within the trial court's discretion. *In re Robinson*, 151 N.C. App. 733, 736, 567 S.E.2d 227, 228 (2002). Defendant stipulated that Dr. deBeck was an expert forensic psychiatrist; it is within her field of expertise to determine the extent of the examination required to reach an opinion as to defendant's capacity to proceed. His argument that her examination was insufficient to comply with the requirements set forth in G.S. §§ 15A-1001 *et seq.* based solely upon the length of its duration is clearly without merit.

Defendant also argues that the one hour and forty minute observation period used to make a competency evaluation by Dr. Carla deBeck was insufficient to comport with the constitutional requirement of due process. It is a violation of due process to try and convict a person of a criminal offense while he or she is mentally incompetent. *Pate v. Robinson*, 383 U.S. 375, 385 (1966). In this case, the trial

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court made a determination that the defendant had sufficient mental capacity to stand trial. A trial court's determination that a defendant is competent to stand trial is conclusive if supported by the evidence. *In re Robinson*, 151 N.C. App. at 736, 567 S.E.2d at 228. The trial court made sixteen findings of fact, basing its conclusion on the expert opinion of Dr. Carla deBeck and the court's own observations. The evidence is more than sufficient to support the trial court's findings. Accordingly, the defendant's argument that the competency determination in this case was in violation of due process is also without merit.

II.

[2] The defendant next argues the trial court improperly enhanced the defendant's sentences for the two convictions of malicious conduct by a prisoner because it used evidence necessary to prove an element of the offense to enhance the sentence in violation of G.S. § 15A-1340.16(d) and, in addition, violated the Double Jeopardy Clause of the United States Constitution by punishing the defendant for contempt by reason of his courtroom conduct and using the same conduct to enhance his sentence. We find no merit in either argument.

Defendant acknowledges that he failed to object at trial to the findings in aggravation but nevertheless urges us to exercise our authority under N.C. R. App. P., Rule 2 to consider the issue. We need not employ Rule 2 to reach the issue of whether a sentencing determination "was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law" because such issues may be the subject of appellate review "even though no objection, exception or motion has been made in the trial division." N.C. Gen. Stat. § 15A-1446(d)(18) (2001). Thus, despite the defendant's failure to object to the sentence at trial, the issue is properly before this Court.

[3] There are five essential elements required to prove a defendant's guilt of the offense of malicious conduct by a prisoner:

- (1) the defendant threw, emitted, or caused to be used as a projectile a bodily fluid or excrement at the victim;
- (2) the victim was a State or local government employee;
- (3) the victim was in the performance of his or her State or local government duties at the time the fluid or excrement was released;

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- (4) the defendant acted knowingly and willfully; and
- (5) the defendant was in the custody of the Department of Correction, the Department of Juvenile Justice and Delinquency Prevention, any law enforcement officer, or any local confinement facility (as defined in G.S. 153A-217, or G.S. 153A-230.1), including persons pending trial, appellate review, or presentence diagnostic evaluation, at the time of the incident.

N.C. Gen. Stat. § 14-258.4 (2001). The trial court found, as a factor in aggravation of punishment, that “[t]he offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws.” *See* N.C. Gen. Stat. § 15A-1340.16(d)(5) (2001).

N.C. Gen. Stat. § 15A-1340.16(d) (2001) provides that “[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation” In *State v. Corbett*, the State relied upon evidence tending to show that the defendant took advantage of a position of trust in order to prove the element of force in a sexual assault case. 154 N.C. App. 713, 717, 573 S.E.2d 210, 214 (2002). This Court held that it was a violation of G.S. § 15A-1340.16(d) to subsequently use the same evidence to prove as an aggravating factor that defendant “took advantage of a position of trust.” *Id.*

However, the underlying offense in this case is a general intent crime while the aggravating factor involves the finding of specific intent. Thus, the aggravating factor found by the trial court required evidence of an element not present in the underlying offense—the defendant’s intent to hinder the prison guard’s lawful exercise of governmental functions. *See State v. Sellers*, 155 N.C. App. 51, 57, 574 S.E.2d 101, 105-6 (2002) (use of a firearm as an element of the crime does prohibit the court from finding as an aggravating factor that defendant used a weapon that “would normally be hazardous to the lives of more than one person”). The mere fact that a defendant knowingly and willfully spit at a prison guard while he or she was in the performance of his or her duties does not implicitly presume that the defendant intended to hinder the duties of the guard. Additional evidence would be required to prove this specific intent and as such, the trial court did not violate G.S. § 15A-1340.16(d) when it found as an aggravating factor that defendant intended to hinder the lawful exercise of a governmental function when he committed the crime of malicious conduct by a prisoner.

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[4] Next, defendant argues the trial court improperly enhanced his sentence when it found as a non-statutory aggravating factor in each of the judgments for malicious conduct by a prisoner that “the defendant breached his assurance of good behavior.” N.C. Gen. Stat. § 15A-1340.16(d)(20) (2001) provides that the trial court may make additional written findings of factors in aggravation. The defendant argues that this finding violates the Double Jeopardy Clause of the U.S. Constitution because he had already been convicted of contempt of court for overturning a table and shouting expletives at the court. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003). However, the defendant is not being punished twice for the same offense in this case. The aggravating factor found by the trial court relates to the defendant’s behavior at trial when he breached his assurance of good behavior by feigning a heart problem and is entirely separate from the earlier incident for which he was found in contempt. Thus, the trial court did not violate the defendant’s rights against being twice put in jeopardy for the same conduct when it enhanced defendant’s sentence for breaching his assurance of good behavior.

The defendant also contends that this finding in aggravation was in violation of G.S. § 15A-1340.16(d), discussed *supra*, because the evidence necessary for its proof was also necessary for the defendant’s conviction for criminal contempt. This argument is without merit since the evidence necessary to prove the defendant’s breach of his assurance of good behavior is completely separate and distinct from the evidence necessary to prove the behavior that prompted the court to hold the defendant in contempt. Defendant’s assignments of error are overruled.

No error.

Judges STEELMAN and LEVINSON concur.

CUNNINGHAM v. SAMS

[161 N.C. App. 295 (2003)]

J. CALVIN CUNNINGHAM AND LORI WATSON BERGER, PLAINTIFFS v.
CYNTHIA B. SAMS, DEFENDANT

No. COA02-1623

(Filed 18 November 2003)

1. Appeal and Error— appealability—order disqualifying counsel—substantial right

An order disqualifying counsel is immediately appealable because it affects a substantial right.

2. Attorneys— disqualification—material witness

Plaintiff attorneys stated with sufficient specificity why defense counsel was a necessary and material witness in their action to recover fees for their representation of a former client in a domestic case, and the trial court did not abuse its discretion in disqualifying defense counsel from representing the former client in the trial of this action, where the only issue remaining in the case was the reasonableness of plaintiffs' fees, and plaintiffs' motion to disqualify stated that defense counsel had been present in numerous conferences and hearings in the domestic case in which plaintiffs represented the client and that they intended to call him as a witness as to the amount and nature of the work they performed for the client. Rule of Professional Conduct 3.7.

3. Civil Procedure— findings—not requested, not required

An order disqualifying counsel was not vacated for lack of findings where neither party requested findings of fact or conclusions of law.

4. Attorneys— attorney to be called as witness—disqualification beyond trial

The trial court abused its discretion by extending beyond the trial the disqualification of an attorney who was to be a witness at the trial.

5. Attorneys— attorney to be called as witness—disqualification of firm

The trial court abused its discretion in disqualifying counsel's entire firm in an action in which the attorney was to be called as a witness.

CUNNINGHAM v. SAMS

[161 N.C. App. 295 (2003)]

Appeal by defendant from order entered 2 July 2002 by Judge Mark S. Culler, District Court, Davidson County. Heard in the Court of Appeals 14 October 2003.

Hahn & Chastain, P.A., by William J. O'Malley, for defendant.

Cunningham & Crump, PLLC, by R. Flint Crump, and The Causey Law Offices, by Lori Watson Berger, for plaintiffs.

WYNN, Judge.

This appeal relates to the companion appeal in *Robinson & Lawing v. Sams*, — N.C. App. —, — S.E.2d — (2003) (COA03-76) (filed 18 November 2003). As in *Robinson*, the plaintiff attorneys in this case, J. Calvin Cunningham and Lori Watson Berger, represented Cynthia Sams in a domestic action that ultimately was resolved under the representation of Ms. Sams' current attorney, William J. O'Malley.¹ In this case, the trial court disqualified Mr. O'Malley from representing Ms. Sams at trial and in any other matters concerning this action. After reviewing the trial court's order in this case, we affirm the disqualification of Mr. O'Malley from representing Ms. Sams at trial; reverse the disqualification of Mr. O'Malley from representing Ms. Sams in matters other than as a trial advocate; and, reverse the disqualification of Mr. O'Malley's firm from representing Ms. Sams at trial.

The matter arose when Mr. Cunningham and Ms. Berger brought legal proceedings against Ms. Sams to recover their unpaid legal fees. The trial court entered partial summary judgment in favor of Mr. Cunningham and Ms. Berger leaving only the issue of the "reasonableness of the time for which Ms. Sams was billed by Mr. Cunningham and Ms. Berger."

Under The North Carolina State Bar's Revised Rule of Professional Conduct 3.7, Mr. Cunningham and Ms. Berger moved to have Mr. O'Malley disqualified as Ms. Sams's attorney because they intended to call him as a witness during the jury trial on the reasonableness of attorney fees. They contended that disqualification was required because Mr. O'Malley had referred Ms. Sams to them, and throughout Ms. Sams's domestic case, Mr. O'Malley was present for

1. As stated in *Robinson*, Robinson & Lawing, L.L.P., a law firm, represented Ms. Sams, in a domestic action from October 1997 to July 1998. Thereafter, from July 1998 to October 2000, several different attorneys represented Ms. Sams, including Russ Kornegay, J. Calvin Cunningham, Lori Watson Berger, and the Causey Law firm. From November 2000 until July 16, 2001, William J. O'Malley represented Ms. Sams in her domestic action. Mr. O'Malley married Ms. Sams in August 2001.

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hearings and was involved in discussions about how to proceed in the domestic case. After an order was entered disqualifying Mr. O'Malley and his firm, Hahn & Chastain, P.A., from any further representation in any capacity in the matter, Ms. Sams appealed.

On appeal, Ms. Sams contends the trial court abused its discretion in disqualifying Mr. O'Malley because Mr. Cunningham and Ms. Berger failed to state with specificity why Mr. O'Malley was a necessary and material witness and what facts they intended to elicit from Mr. O'Malley. "Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992).²

[2] In its order disqualifying counsel, the trial court found:

1. That it is likely that Ms. Sams's counsel, William J. O'Malley, will be a necessary witness at the trial of this matter; and
2. That the expected testimony of Mr. O'Malley will not relate to: (1) an uncontested issue, or (2) the nature and value of legal services rendered in this matter. Nor will Mr. O'Malley's disqualification work substantial hardship on Ms. Sams.

Based upon these findings, the trial court disqualified Mr. O'Malley and his firm from representing Ms. Sams in any capacity in the matter.

Revised Rule of Professional Conduct 3.7 states:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;

[1] 2. Although interlocutory, an order disqualifying counsel is immediately appealable because it affects a substantial right. *See Goldston v. American Motors Corp.*, 326 N.C. 723, 726-27, 392 S.E.2d 735, 736-37 (1990); *see also Travco Hotels*, 332 N.C. at 292, 420 S.E.2d at 429 (stating "the granting of a motion to disqualify counsel, unlike a denial of the motion, has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client's choice. Neither deprivation can be adequately addressed by a later appeal of a final judgment adverse to the client").

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(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

In this case, after summary judgment, the only issue remaining was the reasonableness of Plaintiff's fees. In its verified motion to disqualify counsel, Mr. Cunningham and Ms. Berger argued Mr. O'Malley was a material and necessary witness as to the amount and nature of work performed by Mr. Cunningham and Ms. Berger for Ms. Sams. They alleged Mr. O'Malley

was present at numerous conferences between [Mr. Cunningham, Ms. Berger] and Ms. Sams, numerous hearings where Mr. Cunningham and Ms. Berger represented Ms. Sams and, upon information and belief, took part in discussions with Ms. Sams regarding Mr. Cunningham and Ms. Berger' services all prior to his beginning representation of Ms. Sams (now O'Malley) in this matter. As a result, Mr. O'Malley is uniquely aware of at least some portions of the work performed by Mr. Cunningham and Ms. Berger on behalf of Ms. O'Malley, the reasonableness and appropriateness of which is the only issue left for trial in this matter.

Rather than simply stating 'we intend to call him as a witness,' the motion to disqualify counsel specifically states the factual issues upon which defense counsel would testify. Accordingly, we conclude Mr. Cunningham and Ms. Berger stated with specificity why defense counsel was a necessary witness.

[3] Ms. Sams also argues the trial court's order should be reversed because of its failure to render findings of fact. Pursuant to N.C. Gen. Stat. § 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 and as provided by Rule 41(b)." *See also Allen v. Wachovia Bank & Trust Co., N.A.*, 35 N.C. App. 267, 269, 241 S.E.2d 123, 125 (1978) (stating "absent a request for findings of fact to support his decision on a motion, the judge is not required to find facts . . . and it is presumed that the Judge, upon proper evidence, found facts to support his judgment"). Our review of the transcript indicates neither

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party requested the trial court render findings of fact or conclusions of law. Accordingly, we hold that the trial court was not required to make findings of fact in this matter.

[4] Nonetheless, Ms. Sams argues that even if the order allowing disqualification from trial representation was proper, the trial court abused its discretion in disqualifying Mr. O’Malley from representing Ms. Sams in matters outside of the trial. We agree.

Revised Rule of Professional Conduct 3.7(a) states in pertinent part that “*a lawyer shall not act as advocate at a trial* in which the lawyer is likely to be a necessary witness.” (emphasis supplied) Thus, it appears that even though an attorney may be prohibited from being an advocate during trial, the attorney may, nevertheless, represent his client in other capacities, such as drafting documents and researching legal issues. However, the comments to Rule 3.7 make it clear that if “the combination of [being an advocate and a witness] involves an improper conflict of interest with respect to the client [as] determined by Rule 1.7 or 1.9,” the representation becomes improper. Rule 1.7, which prohibits a lawyer from representing a client if the representation will be or is likely to be adverse to another client, and Rule 1.9, which prohibits a lawyer who formerly represented a client in a matter from representing another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client, are inapposite to the facts of this case.

Moreover, as an example, the comments indicate that “if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer’s firm, the representation is improper.” However, “determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved.”

In this case, Mr. Cunningham and Ms. Berger did not present any argument in their motion to disqualify counsel or in their brief as to why defense counsel should be prohibited from representing Ms. Sams in other capacities. Moreover, Ms. Sams’ response to Plaintiff’s motion to disqualify counsel stated that defense counsel did not have any different or additional knowledge of any facts related to the case than the parties; that defense counsel was not aware of any statement made by Ms. Sams against her interest; and, that Mr. Cunningham and Ms. Berger never sought and never received any specific legal advice from defense counsel. Ms. Sams also stated that “she does not believe there is any conflict of interest We conclude that the trial court

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abused its discretion in extending the scope of the disqualification to legal representation beyond the trial of this matter.

[5] Finally, Ms. Sams argues the trial court abused its discretion in disqualifying Mr. O'Malley's law firm from representing Ms. Sams at trial. We agree. Under Rule 3.7(b), "a lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9." As stated earlier, Rules 1.7 and 1.9 are inapposite to the facts of this case. Accordingly, the trial court, likewise, abused its discretion in disqualifying defense counsel's entire firm from representing Ms. Sams at trial as it appears a conflict of interest under Rule 1.7 or 1.9 does not exist.

In sum, we uphold the trial court's order disqualifying Mr. O'Malley from representing Ms. Sams at trial; however, we reverse the trial court's order disqualifying Mr. O'Malley from representing Ms. Sams in any other capacity in this matter. We further reverse the trial court's order disqualifying Mr. O'Malley's law firm from representing Ms. Sams at trial and in any other capacity.

Affirmed in part, reversed in part.

Judges TIMMONS-GOODSON and ELMORE concur.

ROBERT TAYLOR AND SERINA A. TAYLOR, PLAINTIFFS v. L.R. GORE, NELSON SOLES, SOLES AND WALKER, P.A., BAY CIRCLE REALTY, AND WILMA MURPHY, DEFENDANTS

No. COA03-219

(Filed 18 November 2003)

1. Agency— real estate seller—liable for agent's acts

A real estate seller was liable as the principal for the actions of the agent, even though the claims arose from the delivery of a survey to plaintiffs.

2. Fraud— real estate sale—fraudulent misrepresentation—negligent misrepresentation—summary judgment

Summary judgment was properly granted for defendant seller and defendant real estate agent on a fraudulent misrepresenta-

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tion claim arising from a real estate sale based upon defendants' representation to the buyers that none of the property was in a flood zone where defendants' affidavits that they did not know the property was in a flood zone negated the element of intent to deceive, and plaintiffs did not produce conflicting evidence. Furthermore, summary judgment was also properly entered for defendants on plaintiffs' negligent misrepresentation claim where defendants' affidavits showed that they relied upon a survey of the property which stated that the property was not in a flood zone.

3. Contracts—real property sales—mistake of fact—flood zone

The trial court incorrectly granted defendant Gore's motion for summary judgment on a mistake of fact claim rising from the sale of land in a flood zone. Plaintiff's allegation of mistake of fact based on the representations of the seller and his agents was sufficient to state a claim, and there were genuine issues of material fact such as whether the mistake was unilateral or mutual and whether it affected the essence of the contract.

Appeal by plaintiffs from orders entered 16 September 2002 and 17 September 2002 by Judge Wiley F. Bowen in Columbus County Superior Court. Heard in the Court of Appeals 9 October 2003.

Jeffcoat, Pike & Nappier, L.L.C., by Joel T. Gibson, III, for plaintiffs-appellants.

Hedrick & Morton, L.L.P., by B. Danforth Morton, for defendants-appellees Bay Circle Realty and Wilma Murphy.

William E. Wood, for defendant-appellee L.R. Gore.

CALABRIA, Judge.

Robert Taylor and Serina A. Taylor ("plaintiffs") appeal the 16 and 17 September 2002 orders granting summary judgment for defendants Bay Circle Realty, Wilma Murphy ("Murphy") and L.R. Gore ("Gore") (collectively "defendants"). Plaintiffs assert defendants failed to show there is no genuine issue of material fact, and therefore the trial court erred in granting their motions for summary judgment. We affirm the summary judgment for defendants Bay Circle Realty and Murphy, and reverse as to defendant Gore.

In April 1999, plaintiffs purchased a 15.26 acre plot of land from Gore. Murphy, on behalf of Bay Circle Realty, served as Gore's real

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estate agent. Prior to the sale, Murphy gave plaintiffs a survey of the property that stated "SUBJECT PROPERTY IS NOT IN A FEDERAL (HUD) DESIGNATED FLOOD HAZARD AREA." In July 2001, plaintiffs sought to develop the land and discovered it was not suitable because a portion of the property was, in fact, located in a flood zone.

In February 2002, plaintiffs filed suit against defendants. Plaintiffs alleged the contract was based on a mistake of fact that the property was not located in a flood zone, and since this mistake is substantial and affects the essence of the contract, the contract should be rescinded. Plaintiffs further alleged defendants Murphy and Bay Circle Realty breached their duty to communicate truthful information by providing plaintiffs with an incorrect survey indicating the property was not in a flood zone, and by failing to advise plaintiffs to acquire their own survey because of the hazards of relying on any survey supplied by a seller. Finally, plaintiffs alleged defendants failed to disclose that the property was in a flood zone and misrepresented that it was not in a flood zone.¹

Defendants moved for, and obtained, summary judgment by relying on affidavits of Murphy and Gore stating that prior to the sale they did not know, nor was it suggested, that the property was in a flood zone, and had they known they would have communicated the information to plaintiffs. Plaintiffs moved to set aside the judgment, which the court denied. Plaintiffs appeal asserting defendants were not entitled to summary judgment because lack of actual knowledge does not establish a lack of a genuine issue of material fact for either the misrepresentation claims or the mutual mistake claim.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The evidence is considered in the light most favorable to the non-moving party, and the moving party bears the burden of establishing no triable issue of material fact remains. *Bunn Lake Prop. Owner's Ass'n, Inc. v. Setzer*, 149 N.C. App. 289, 295, 560 S.E.2d 576, 580 (2002).

1. Plaintiffs' claims against surveyors, defendants Nelson R. Soles and Soles and Walker, P.A., for breach of duty of care were voluntarily dismissed without prejudice on 2 December 2002.

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I. Misrepresentation Claims

[1] First, we note that Gore, as Murphy's principal, is liable for Murphy's actions. *MacKay v. McIntosh*, 270 N.C. 69, 72-73, 153 S.E.2d 800, 803 (1967) ("[a principal] is bound by the agent's material representations of fact to the same extent as if he had made them himself."). Accordingly, although the claims stem from Murphy's delivery of the survey to plaintiffs, Gore is liable for Murphy's actions and representations. Therefore, we address these defendants jointly.

[2] To prove a claim of fraudulent misrepresentation, "the party asserting it must show (i) false representation or concealment of a material fact, (ii) reasonably calculated to deceive, (iii) made with intent to deceive, (iv) which does in fact deceive, (v) resulting in damage to the injured party." *Deans v. Layton*, 89 N.C. App. 358, 366-67, 366 S.E.2d 560, 565-66 (1988). "A defendant cannot 'be liable for concealing [or falsely representing] a fact of which it was unaware.'" *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 594, 394 S.E.2d 643, 647 (1990) (quoting *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 190, 374 S.E.2d 135, 137 (1988)). "If a defendant presents evidence that it did not know of the fact in issue, 'the burden shifts to plaintiff to prove that defendant knew or had reason to know' the fact." *Id.*, (quoting *Ramsey*, 92 N.C. App. at 191, 374 S.E.2d at 137). Plaintiffs' claim fails because defendants' affidavits negate the element of "intent to deceive" by providing "[i]f part of the property is in a special flood zone, this information was not known to me nor was the possibility that any part of the property was located in a special flood zone even suggested to me. . . ." Plaintiffs did not produce conflicting evidence and failed to meet their burden of showing defendants "knew or had reason to know" the survey was incorrect.

To prove a claim of negligent misrepresentation, plaintiffs must show: (1) "in the course of a business or other transaction in which an individual has a pecuniary interest," (2) defendants "supplie[d] false information for the guidance of others[,]'" (3) "without exercising reasonable care in obtaining or communicating the information." *Everts v. Parkinson*, 147 N.C. App. 315, 328, 555 S.E.2d 667, 676 (2001) (quoting *Fulton v. Vickery*, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358 (1985)). Defendants' affidavits demonstrate they relied on the validity of the survey, believing it accurately stated the property was not in a flood zone. Plaintiffs did not allege such reliance was unreasonable. Moreover, we have previously held a seller's agent not liable because she had "no reason to question [the

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surveyor's] affirmative representation and make her own independent investigation when [the surveyor's] expertise was specifically in the area of conducting surveys and when he was paid to specifically conduct such survey." *Clouse v. Gordon*, 115 N.C. App. 500, 509, 445 S.E.2d 428, 433 (1994). We apply this same rule to the seller. Accordingly, we hold the trial court properly granted defendants' motion for summary judgment on the basis of misrepresentation.

II. Mistake Claim

[3] Plaintiffs also assert the trial court erred in granting defendant Gore's motion for summary judgment of plaintiffs' claim that the contract was based on a substantial mistake of fact affecting the essence of the contract. We agree.

"[I]t is well established that the existence of a mutual mistake as to a material fact comprising the essence of the agreement will provide grounds to rescind a contract." *N.C. Monroe Constr. Co. v. State*, 155 N.C. App. 320, 330, 574 S.E.2d 482, 489 (2002), *disc. rev. denied*, 357 N.C. 165, 580 S.E.2d 370 (2003) (quoting *Lancaster v. Lancaster*, 138 N.C. App. 459, 465, 530 S.E.2d 82, 86 (2000)). It is also established that "[t]he mistake of one party is sufficient to avoid a contract when the other party had reason to know of the mistake or caused the mistake." *Creech v. Melnik*, 347 N.C. 520, 528, 495 S.E.2d 907, 912 (1998) (quoting *Howell v. Waters*, 82 N.C. App. 481, 487-88, 347 S.E.2d 65, 69 (1986)). Accordingly, despite defendant Gore's assertion to the contrary, plaintiffs may assert a claim of mutual mistake as well as a claim of unilateral mistake because Gore supplied the flawed survey.

We note there are genuine issues of material fact regarding the claim of mistake, including, *inter alia*, whether the mistake was mutual or unilateral and whether the mistake affected the essence of the contract. Despite these issues, we consider that "[North Carolina] Supreme Court decisions have raised questions regarding application of the doctrine of mutual mistake to executed real estate contracts." *Howell*, 82 N.C. App. at 489, 347 S.E.2d at 70 (citing *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975); *Financial Services v. Capitol Funds*, 288 N.C. 122, 217 S.E.2d 551 (1975)). However, the Supreme Court recognized "certain mistakes will justify the rescission of an executed real estate contract; [and, this Court reasoned,] a mistake induced by a misrepresentation is as persuasive a case for rescission as any." *Id.*, 82 N.C. App. at 491, 347 S.E.2d at 71. Accordingly, this Court held "dispositive" the distinction that the mis-

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take in *Hinson* and *Financial Services* was premised upon mistaken assumptions of the parties, and the mistake in *Howell* was based upon misrepresentation by the seller. *Id.* Therefore, although some uncertainty exists regarding the applicability of mistake to real estate contracts because “we jealously guard the stability of real estate transactions,” precedent permits plaintiffs’ claim against defendant Gore because it is based upon a mistake caused by a misrepresentation and not a mutual mistaken assumption. *Financial Services*, 288 N.C. at 139, 217 S.E.2d at 562.

Defendant Gore asserts he is entitled to summary judgment on the claim of mutual mistake because “[n]owhere in their pleadings have they alleged that there was a mutual mistake.” However, “[t]he most fundamental tenet of modern pleading rules is that the pleadings should give ‘sufficient notice of the claim asserted “to enable the adverse party to answer and prepare for trial . . . and to show the type of case brought.”’” *Holloway v. Wachovia Bank & Trust Co.*, 339 N.C. 338, 347, 452 S.E.2d 233, 238 (1994) (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (citation omitted)). We find plaintiffs’ allegation that the contract “was based on a mistake of fact . . . based on the representations of L.R. Gore and his agents, the land was not in a flood zone” is sufficient to state a claim for mistake. We find no merit in defendant Gore’s argument. Accordingly, Gore failed to establish a lack of a genuine issue of material fact, or that the claim was barred by precedent, or insufficient pleading, and therefore the trial court improperly granted Gore’s motion for summary judgment. We reverse.

In sum, we affirm the order of the trial court granting summary judgment on the misrepresentation claims, but reverse the order of the trial court granting summary judgment for defendant Gore on the claim of mistake.

Affirmed in part, reversed in part.

Judges McGEE and HUNTER concur.

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WILLIAM F. HULSE, GUARDIAN *AD LITEM* FOR IMOGENE FOWLER ECKLIFF AND TIMOTHY ECKLIFF, PLAINTIFFS v. ARROW TRUCKING CO. AND THOMAS RAY FINCHER, DEFENDANTS

No. COA02-1750

(Filed 18 November 2003)

Appeal and Error— appealability—order compelling discovery—interlocutory

An appeal from a discovery order was dismissed as interlocutory where the order concerned a privileged communication between defendant and his attorney (handwritten interrogatory responses used in drafting a formal response), but defendant waived the privilege by testifying about the handwritten answers in his deposition. No substantial right was affected.

Appeal by defendants from an order entered 1 November 2002 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 9 October 2003.

Knox, Brotherton, Knox & Godfrey, by H. Edward Knox, Lisa G. Godfrey, and Frances S. Knox, for plaintiff-appellees.

Davis & Hamrick, L.L.P., by H. Lee Davis, Jr. and Ann C. Rowe, for defendant-appellants.

HUNTER, Judge.

Thomas Fincher (“defendant Fincher”) and Arrow Trucking Company (“defendant Arrow”) (collectively “defendants”) appeal the trial court’s discovery order compelling the production of certain handwritten interrogatory responses. Defendants have failed to demonstrate that a substantial right will be affected should they not be given the immediate right to appeal. Therefore, we dismiss defendants’ appeal as interlocutory.

On 21 May 2001, defendant Fincher was driving one of defendant Arrow’s tractor-trailers when he pulled out from a service station and collided with a vehicle driven by Imogene Eckliff (“Eckliff”). As a result of the collision, Eckliff suffered severe injuries and was ultimately adjudicated incompetent. Thereafter, William F. Hulse, a guardian *ad litem* acting on behalf of Eckliff and her husband, Timothy Eckliff (collectively “plaintiffs”), filed a negligence action against defendants on 14 June 2001. Defendants answered denying

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negligence and, alternatively, alleged Eckliff's contributory negligence as a defense.

Plaintiffs began discovery by serving "Plaintiff's First Set of Interrogatories and Request for Production of Documents" on defendants. On 14 November 2001, defense counsel served on plaintiffs' counsel a document entitled "Defendant, Thomas Ray Fincher's, Answers to Plaintiffs' First Set of Interrogatories and Request for Production of Documents." The document contained defendant Fincher's typed interrogatory responses, two of which were as follows:

31. When you first saw the Plaintiff's vehicle, state the location of all vehicles involved in the occurrence with relation to the location of the accident, the distance between your vehicle and the Plaintiff's vehicle, and the speed of each vehicle.

ANSWER: The investigating officer estimated the original speed of travel for the Defendant as 0 mph. The investigating officer estimated the original speed of travel for the Plaintiff as 50 mph. The estimated speed at impact for the Defendant was 10 mph. The estimated speed at impact for the Plaintiff was 40 mph. My truck was in the inside eastbound lane of travel. The Plaintiff's car was on the other side of [the] trailer.

32. Please describe, with as much specificity as possible, how you contend the collision occurred. Include in your answer the speed, direction and location of each vehicle involved in the occurrence and what actions you took to avoid the occurrence.

ANSWER: Objection. The Defendant objects to this Interrogatory as vague, overly broad, unduly burdensome and not calculated to lead to the discovery of admissible or relevant evidence. Without waiving such objection, the Defendant states that he was traveling at 10-15 mph in a straight line. Upon information and belief the Plaintiff was traveling at an unsafe speed, without keeping a proper lookout and without keeping her vehicle under control and collided with my trailer.

Subsequently, defendant Fincher signed a verification stating that he had sworn, under oath:

That he is a Defendant in the . . . action; that he has read the foregoing [Interrogatories and responses] and knows the contents thereof, that the same are true of his own knowledge except

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those matters therein stated upon information and belief, and as to those he believes them to be true.

The verification was sent by defense counsel several days after the responses on 20 November 2001 to be attached to the typed interrogatory responses.

During a deposition held on 24 July 2002, defendant Fincher was asked about his interrogatory responses. Defendant Fincher testified that defense counsel had sent the interrogatories to him in Texas, where he is a citizen and resident. In turn, he hand-wrote responses to the interrogatories and sent them back to defense counsel by facsimile. Defendant Fincher did not receive back from his counsel any typed version of his responses, but he did receive a typed verification which he signed in the presence of a notary and sent back to defense counsel based on his handwritten responses. Defendant Fincher revealed that he had not seen the typed interrogatory responses until the night before his deposition.

Also, defendant Fincher was asked specifically about the typed response to Interrogatory Number 31 regarding the investigating officer's estimate of the Eckliff vehicle's original speed of travel as fifty miles per hour. Defendant Fincher testified that the response was "not [his] answer" because (1) he never told the officer what he believed the speed of the Eckliff vehicle to be prior to the collision, and (2) he had handwritten that the vehicle's speed was "[f]ifty-five plus." "That was wrote on my Interrogatories that I faxed back[]" to defense counsel. Thereafter, the parties learned that a paralegal for defense counsel had incorrectly recorded defendant's handwritten response to Interrogatory Number 31 on the typed version of discovery.

Following the deposition, plaintiffs formally requested defendant Fincher's handwritten interrogatory responses as a part of "Plaintiff's Second Request for Production of Documents." Defendants responded and objected to plaintiffs' request in that it sought "information protected by the attorney-client privilege and the attorney work product doctrine and [sought] documents which were prepared in anticipation of litigation." Plaintiffs, in turn, filed a motion to compel defendants to provide them with the handwritten responses.

The motion to compel was heard over the course of three trial court appearances on 14, 24, and 30 October 2002. After conducting an *in camera* review, the trial court ordered that the handwritten

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responses to Interrogatories Number 31 and Number 32 be provided directly to counsel for plaintiffs for the following reasons:

- (2) Defendant Thomas Ray Fincher waived his right to claim the attorney-client privilege with respect to his handwritten responses to Interrogatories Nos. 31 and 32 when he testified in his deposition that the typewritten responses to which his verification was attached had, in fact, never been reviewed by him and did not reflect his handwritten responses to Interrogatories Nos. 31 and 32.
- (3) Because of Thomas Ray Fincher's testimony in his deposition that his verified discovery responses did not reflect his true answers, the Plaintiffs do have a "substantial need" for the handwritten document, and there is no alternative means for the Plaintiffs to obtain this document other than from the Defendants.

Defendants appeal.

Plaintiffs have filed a motion to dismiss defendants' appeal of the discovery order as interlocutory and not affecting a substantial right. Generally, "there is no right to appeal from an interlocutory order[,] and "appellate courts do not review discovery orders because of their interlocutory nature." *Stevenson v. Joyner*, 148 N.C. App. 261, 262-63, 558 S.E.2d 215, 217 (2002). However, an interlocutory order may be immediately appealed where delaying the appeal will irreparably impair a substantial right of the party. *See Moose v. Nissan of Statesville*, 115 N.C. App. 423, 444 S.E.2d 694 (1994). Here, defendants argue the trial court's discovery order is immediately appealable because defendant Fincher's handwritten interrogatory responses are protected by the attorney-client privilege. Plaintiffs argue defendants failed to prove an attorney-client privilege existed as to those responses and, assuming they did, any right to claim the privilege was waived when defendant Fincher testified under oath regarding the contents of the responses. We agree with plaintiffs.¹

"It is well settled that communications between an attorney and a client are privileged under proper circumstances." *State v. Bronson*, 333 N.C. 67, 76, 423 S.E.2d 772, 777 (1992) (citation omitted).

1. In their appellate briefs, neither party acknowledges that the trial court's order also compelled discovery of the two handwritten interrogatory responses due to plaintiff's "substantial need" thereby concluding the responses were not protected under the work product doctrine. However, while defendants' appeal could be dismissed as interlocutory on that basis, we do so only on the basis presented to this Court.

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"Although an attorney may assert the privilege when necessary to protect the interests of the client, the privilege belongs solely to the client." *In re Miller*, 357 N.C. 316, 338-39, 584 S.E.2d 772, 788 (2003). The client/claimant of the attorney-client privilege bears the burden of establishing that the privilege exists. *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 32, 541 S.E.2d 782, 791, *cert. denied and disc. review dismissed as moot*, 353 N.C. 371, 547 S.E.2d 809 (2001). Such a burden can be met by establishing:

- (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated, and (5) the client has not waived the privilege.

Id. (citations omitted).

At the time plaintiffs' interrogatories were served on defendants in the case *sub judice*, an attorney-client relationship already existed between defendant Fincher and defense counsel. Defendant Fincher confidentially consulted defense counsel regarding the interrogatories, which related to events surrounding his collision with Eckliff. Since defendant Fincher is a resident and citizen of Texas, defense counsel obtained defendant Fincher's handwritten responses to the interrogatories by facsimile. Those handwritten responses were used in the course of preparing formal responses to plaintiffs' interrogatories. However, while the evidence strongly indicates that defendants met the burden of establishing that the first four elements necessary to prove an attorney-client privilege existed, defendant Fincher clearly waived that privilege with respect to the two handwritten responses in question.

In *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978), our Supreme Court held that the attorney-client privilege which preserves the confidentiality of a normally privileged written communication is deemed to be waived if the holder of that privilege testifies concerning the written communication thereby putting it into evidence before the jury. The Court reasoned that the written communication itself "is the best evidence of what it does and does not contain." *Id.* at 194, 239 S.E.2d at 825 (emphasis added and omitted). During his deposition, plaintiffs' counsel questioned defendant Fincher about the typed response to Interrogatory Number 31, to which defendant Fincher

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testified: "That [wa]s not my answer. . . . I wrote that the speed of the vehicle was traveling above the speed limit [fifty-five plus]." That testimony alone, offered by the client/claimant of the privilege, put the contents of the interrogatory responses into evidence by identifying obvious differences between the handwritten and typed responses. The trial court's subsequent decision to compel discovery of defendant Fincher's handwritten responses only as to Interrogatories Number 31 and Number 32 (after reviewing all the handwritten responses *in camera*), provides the best evidence of defendant Fincher's intended responses to those interrogatories. Thus, while the evidence indicates that defendant Fincher's handwritten responses were privileged, his waiver of that privilege resulted in those interrogatory responses being discoverable.

Accordingly, plaintiffs' "Motion to Dismiss Appeal as Interlocutory and Not Affecting a Substantial Right" is granted.

Appeal dismissed.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. LARRY EUGENE RODGERS

No. COA02-1671

(Filed 18 November 2003)

Search and Seizure— search warrant—motion to suppress cocaine

The trial court did not err by denying defendant's motion to suppress cocaine found in his home as the result of a search warrant, because: (1) the law does not require absolute certainty, but only requires that probable cause exists to believe there are drugs on the premises; and (2) based on a confidential informant's tip and the officer's training and experience, the totality of circumstances provided sufficient probable cause to support issuance of the search warrant for defendant's home.

Appeal by defendant from judgment entered 11 December 2001 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 October 2003.

STATE v. RODGERS

[161 N.C. App. 311 (2003)]

Attorney General Roy A. Cooper, III, by Assistant Attorney General George K. Hurst, for the State.

Noell P. Tin and C. Melissa Owen for defendant-appellant.

HUNTER, Judge.

Larry Rodgers (“defendant”) appeals the denial of a motion to suppress cocaine found in his home as the result of a search warrant. For the reasons stated herein, we affirm.

On 23 June 2000, Detective M. D. Marlow (“Det. Marlow”), of the Charlotte-Mecklenburg Police Department, filed an application for a search warrant for the person and home of defendant. Det. Marlow’s affidavit supporting probable cause for the search warrant provided:

On 6/23/00 I received information from a confidential and reliable informant that the above described subject [black male, approximately five feet, five inches, 170 pounds, and 20-25 years of age] known as Shorty, was in possession of a large quantity of cocaine at his residence located at 3930 Tamerlane Rd. within the past forty[-]eight (48) hours. The confidential informant said that Shorty would be transporting a quantity of cocaine from his residence in a white Chrysler Sedan. The confidential informant said that Shorty would be transporting and delivering the drugs from his residence in the white Chrysler Sedan on 6/23/00. Based upon this information I set up surveillance at 3930 Tamerlane Rd. On 6/23/00 at approximately 1850 hours Shorty along with another subject walked out of 3930 Tamerlane Rd. Shorty then got into the driver’s seat of a white Chrysler Sedan that was parked in the driveway of 3930 Tamerlane Rd. The other subject then got into the passenger seat of the same vehicle. The subjects then headed outbound on Tamerlane Rd. to N. Sharon Amity Rd. The vehicle was stopped off of N. Sharon Amity Rd. by Officer G.P. Brown #1686. The driver of the vehicle known as Shorty along with the other occupant then gave Officer Brown consent to search their persons and the vehicle they occupied. As a result of the search Shorty was found to have a small bag of marijuana in his possession and the other occupant had approximately \$1500.00 in U.S. Currency in his possession.

This applicant has known this informant for one month. During this time this informant has given this applicant information regarding persons involved in drug trafficking in the Charlotte-

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Mecklenburg area which this applicant has verified to be true through his own independent investigation. This informant has given this applicant information that has led to the arrest of individuals in violation of the North Carolina Controlled Substance Act.

Based on this applicant[']s training and experience to wit: This applicant has over 6 years law enforcement experience. This applicant has been to drug schools on the state and federal level. This applicant knows that individuals involved in drug activities frequently possess firearms[,] Beepers, Cellular phones, Currency and Drug transaction records.

Based upon this affidavit, the warrant was issued and, during the search, approximately 488 grams of cocaine were seized. Defendant was subsequently indicted for Possession of Schedule VI Controlled Substance, Trafficking in Cocaine, Maintaining a Place to Keep Controlled Substances, and Possession of Drug Paraphernalia.

Defendant filed a motion to suppress the fruits of the search, which was heard on 13 August 2001. For purposes of the suppression hearing, defendant stipulated to the information in the search warrant application with the exception of the make and model of the vehicle. In an order filed 15 August 2001, the court denied defendant's motion after finding, *inter alia*:

8. That said application for the search warrant contains an affidavit describing certain events that occurred on June 23, 2000, before said search warrant was issued.
9. That the description of events, together with information from a confidential and reliable informant described in said application, constitutes a substantial basis for the conclusion of said Magistrate that probable cause for the search did exist.
10. That the Court finds, determines and concludes that on June 23, 2000, the issuing Magistrate found probable cause from the totality of the circumstances.
11. The . . . affidavit of Detective M.D. Marlow, considered in its entirety, is sufficient, in all regards, to supply and support probable cause for the issuance of said search warrant.

Thereafter, defendant entered into a negotiated plea of guilty to one count of Trafficking in Cocaine. The other charges were dis-

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missed. As a condition of the plea, defendant reserved his right to appeal the denial of his motion to suppress.

Defendant argues the cocaine found in his home should have been suppressed because Det. Marlow's affidavit lacked probable cause to support issuance of a search warrant. We disagree.

"Probable cause to search exists if a person of ordinary caution would be justified in believing that what is sought will be found in the place to be searched." *State v. Barnhardt*, 92 N.C. App. 94, 97, 373 S.E.2d 461, 462 (1988). When relying on an affidavit to establish probable cause to issue a search warrant, we are guided by the following:

Courts have accorded a preference to the warrant process because it provides an orderly procedure involving judicial impartiality whereby "a neutral and detached magistrate" can make "informed and deliberate determinations" on the issue of probable cause. As a result, in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. Further, appellate court review of a magistrate's probable cause decision is not subject to a technical *de novo* review, but is limited to whether "the evidence as a whole provided a substantial basis for a finding of probable cause"

Id. at 96, 373 S.E.2d at 462 (citations omitted). Simply stated, the application for a search warrant must be viewed using the "totality of circumstances test" when determining whether there was sufficient probable cause to issue the warrant. *See State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). Specifically, if these circumstances are established through the use of a reliable confidential informant's tip and supplemented by an officer's credentials and experience, it can amount to a substantial basis for a magistrate's determination that probable cause existed. *See Barnhardt*, 92 N.C. App. at 97, 373 S.E.2d at 462-63.

When considering Det. Marlow's affidavit, the first paragraph recites information he received from a "confidential and reliable informant." The indicia of reliability of an informant's tip "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 independently corroborated by the police." *State v. Collins*, 160 N.C. App. 310, 315, 585 S.E.2d 481, 485 (2003). Det. Marlow stated in his affidavit that he had known the

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informant for one month prior to the incident in question and during that time, the informant had given him reliable information on drug trafficking in the Charlotte-Mecklenburg area which resulted in several arrests. With respect to defendant, the informant gave Det. Marlow defendant's nickname, physical description, and home address, as well as the make and model of the vehicle defendant would be driving to transport the cocaine on 23 June 2000. Based on that information, Det. Marlow set up surveillance of defendant's residence on 23 June 2000 and was able to independently corroborate the informant's tip.

Additionally, the last paragraph of Det. Marlow's affidavit set forth his credentials and experience as to drug activities. This Court has held that "[t]he experience and expertise of the affiant officer may be taken into account in the probable cause determination, so long as the officer can justify his belief to an objective third party." *Barnhardt*, 92 N.C. App. at 97, 373 S.E.2d at 462 (citations omitted). When Det. Marlow subsequently stopped defendant's vehicle and conducted a consensual search of that vehicle and its occupants, he discovered marijuana in defendant's possession and \$1,500.00 in cash in the other occupant's possession. With six years of law enforcement experience and drug school training, Det. Marlow could justify his belief to a reasonable third party that finding marijuana and a large sum of money indicated that defendant was involved in drug activities. Further, not finding the cocaine in the vehicle, as reported by the informant, provided probable cause to believe that it was still in defendant's home.

It should be noted that defendant also argues false information in Det. Marlow's affidavit was used by the trial court to provide a basis for establishing probable cause. Specifically, defendant contends that the affidavit stated that the informant said defendant would be transporting cocaine in a white Chrysler sedan, but the officers actually stopped and searched a white Dodge Dynasty. However, defendant has failed to make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit[.]" *State v. Crawford*, 104 N.C. App. 591, 596-97, 410 S.E.2d 499, 502 (1991) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 672 (1978) (holding that a search warrant issued under those circumstances lacks probable cause if the remaining content of the affidavit is insufficient to establish probable cause)). In reciting the facts at the suppression hearing, defendant's counsel merely stated the

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officers “stopped a vehicle of similar description” to that given by the informant offering no further argument as to the vehicle’s make or model. In the absence of a preliminarily showing of bad faith, the validity of the affidavit must stand.

In conclusion, “[t]he law does not require absolute certainty, it requires only that probable cause exists to believe there are drugs on the premises.” *Crawford*, 104 N.C. App. at 596, 410 S.E.2d at 502 (citation omitted). Based on the informant’s tip and Det. Marlow’s training and experience, we conclude that the “totality of the circumstances” provided there was sufficient probable cause to support issuance of the search warrant for defendant’s home. Thus, the trial court’s denial of defendant’s motion to suppress was proper.

Affirmed.

Judges MCGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. MARCUS JOVAN CLARK

No. COA02-1658

(Filed 18 November 2003)

1. Confessions and Incriminating Statements— noncustodial interrogation—defendant’s age—statutory rape—Miranda warnings not required

The trial court did not err in a statutory rape case by concluding that defendant’s responses to questions asked by the police about his age were not given while in custody and thus did not require Miranda warnings, because: (1) defendant was questioned at home in his living room as part of the investigatory process prior to being charged or arrested; and (2) defendant’s freedom of movement was not restrained to the degree normally associated with a formal arrest and he was made aware that he was not under arrest or in custody.

2. Evidence— hearsay—admission by party-opponent

The trial court did not err in a statutory rape case by concluding that defendant’s responses to questions asked by the police about his age were not inadmissible hearsay because the

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statements were admitted not as statements against penal interest, but instead as an admission of a party-opponent.

3. Constitutional Law— equal protection—statutory rape—marital status

North Carolina's statutory rape law under N.C.G.S. § 14-27.7A(a) does not violate equal protection even though it exempts married couples.

Appeal by defendant from judgment entered 18 September 2002 by Judge J. B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 9 October 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Anne M. Middleton, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

HUNTER, Judge.

Marcus Jovan Clark ("defendant") appeals from a judgment dated 18 September 2002 entered consistent with a jury verdict finding him guilty of statutory rape. Consequently, defendant was sentenced to a minimum term of imprisonment of 144 months and a maximum term of 182 months. As defendant's responses to questions asked by the police about his age were not given while in custody and were admissible as admissions of a party-opponent, and further North Carolina's statutory rape law has been held to not violate equal protection based upon marital status, we conclude there was no error in defendant's trial.

The evidence presented at trial tends to show Mercedes Pettiford ("Pettiford") and defendant had sexual intercourse while she was twelve and thirteen years old between the fall of 1999 and August 2000. This occurred while the two were engaged in a relationship as boyfriend and girlfriend. Defendant had told Pettiford he was sixteen years old and a student at Orange High School. The evidence also shows Pettiford and defendant were not married.

Detective Brett L. Currie ("Detective Currie"), of the Burlington Police Department, testified that he received a report from Pettiford's mother that her daughter had been having sex with a male she reported to be twenty-two years old named Marcus Clark. Detective Currie, dressed in casual slacks and a casual shirt while dis-

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playing a police badge and handcuffs, visited defendant at defendant's house. Detective Currie told defendant that he was not under arrest or in custody and that he needed to talk to defendant about a case he was investigating.

At trial, on direct examination, the State asked Detective Currie if he had requested defendant to provide his age; defendant objected on grounds that the statement was incriminating evidence elicited in violation of defendant's *Miranda* rights and further that defendant's response to the detective's questioning was inadmissible hearsay. On *voir dire*, Detective Currie testified that he visited defendant at defendant's home on 6 July 2001, the conversation lasted approximately one hour, and that he told defendant that he was not under arrest or in custody. The interview occurred in defendant's living room and defendant was not restrained in any way. Defendant gave his date of birth as 29 July 1980 and stated he was twenty years old. Detective Currie had no plans to arrest defendant and did not arrest defendant after the interview. The trial court overruled defendant's objections and allowed Detective Currie to testify about defendant's statements regarding his age before the jury.

Based on his statements to Detective Currie, defendant was charged, under N.C. Gen. Stat. § 14-27.7A(a), with engaging in vaginal intercourse with another person who is thirteen, fourteen, or fifteen years old and defendant was at least six years older than the person, except when the defendant is lawfully married to the person. *See* N.C. Gen. Stat. § 14-27.7A(a) (2001).

The issues are whether: (I) defendant's statements to Detective Currie regarding his age are admissible (A) under *Miranda*, and (B) under the admission of a party-opponent exception to the hearsay rule; and (II) Section 14-27.7A(a) violates equal protection by distinguishing between married and unmarried persons.

At the outset, we note that throughout his brief and during oral arguments before this Court, defendant asserted that this Court should consider his arguments in light of the severity of the sentence mandated for the offense charged, based on the fact that he and the victim were engaged in what defendant describes as a consensual relationship. Defendant was convicted of engaging in vaginal intercourse with a person who is thirteen, fourteen, or fifteen, and defendant was at least six years older than the person, which is classified as a B1 felony. *See* N.C. Gen. Stat. § 14-27.7A(a). Thus, defendant was subject to the same punishment as if he had committed first degree

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forcible rape. *See* N.C. Gen. Stat. § 14-27.2 (2001). Although, this offense does carry a very severe punishment for an offense not requiring proof of force or a lack of consent, this is an issue for the legislature and not the courts. Furthermore, this Court has previously held that the sentencing scheme under Section 14-27.7A, "reflects a rational legislative policy and is not disproportionate to the crime" and is therefore constitutional. *State v. Anthony*, 133 N.C. App. 573, 578, 516 S.E.2d 195, 198 (1999), *aff'd*, 351 N.C. 611, 528 S.E.2d 321 (2000).

I.

Defendant first contends that his statement to Detective Currie about his age was inadmissible as he was entitled to *Miranda* warnings before making an incriminating statement. Defendant further contends that Detective Currie's testimony was inadmissible hearsay.

A.

[1] Defendant argues that he was entitled to *Miranda* warnings prior to answering questions about his age as Detective Currie knew or should have known his question would elicit an incriminating response. Defendant cites *State v. Locklear*, 138 N.C. App. 549, 531 S.E.2d 853 (2000), as controlling in this case. We disagree.

In *Locklear*, the defendant was arrested and charged with statutory rape. *Id.* at 550, 531 S.E.2d at 854. During the booking process, in response to a question from a police officer the defendant gave his age. *Id.* at 550-51, 531 S.E.2d at 854. This Court held that although *Miranda* does not usually apply to the gathering of routine biological information during the booking process, where the police know or should know the requested information is reasonably likely to be incriminating under the circumstances, a defendant is entitled to receive *Miranda* warnings. *Id.* at 551, 531 S.E.2d at 855. In that case, as the defendant was also charged with statutory rape, his age was consequently an essential element of the crime, and thus the defendant was entitled to *Miranda* warnings. *Id.* at 552, 531 S.E.2d at 855.

In *Locklear*, however, there was no question that the defendant was in custody. *See id.* at 551, n.3, 531 S.E.2d at 855, n.3. He had been arrested, charged, and was in the process of being booked. *Id.* at 550, 531 S.E.2d at 854. In the case *sub judice*, defendant was questioned at home in his living room as part of the investigatory process prior to being charged or arrested. *Miranda* only applies to custodial interro-

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gation. *See State v. Buchanan*, 353 N.C. 332, 337-38, 543 S.E.2d 823, 826-27 (2001). Thus, the question in this case is whether defendant was in custody during his questioning by Detective Currie. *See id.* at 337, 543 S.E.2d at 827. A defendant is in custody for purposes of *Miranda* if, based on the totality of the circumstances, there is “a ‘formal arrest or a restraint on freedom of movement to the degree associated with a formal arrest.’” *Id.* at 339, 543 S.E.2d at 828.

Here, defendant was interviewed in his living room and Detective Currie told him that he was not under arrest or in custody and defendant was not restrained in any way. Therefore, defendant’s freedom of movement was not restrained to the degree normally associated with a formal arrest and he was made aware that he was not under arrest or in custody; nor was defendant placed under arrest following the interview. Thus, we conclude defendant was not in custody for purposes of *Miranda* and was therefore not entitled to receive *Miranda* warnings. Accordingly, admission of defendant’s statement regarding his age was not a violation of his right against self-incrimination.

B.

[2] Defendant next contends that his statements about his age were inadmissible hearsay as they do not fit under the statement against penal interest exception to the hearsay rule. The record in this case, however, reveals the statements were admitted not as a statement against penal interest, but instead as an admission of a party-opponent.

Rule 801(d) of the North Carolina Rules of Evidence provides that “[a] statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . his own statement” N.C. Gen. Stat. § 8C-1, Rule 801(d) (2001). As such, defendant’s statements regarding his age to Detective Currie were admissible under an exception to the hearsay rule as admissions by a party-opponent. *See State v. White*, 131 N.C. App. 734, 743, 509 S.E.2d 462, 468 (1998).

II.

[3] Defendant finally asserts that Section 14-27.7A(a) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it exempts married couples. This Court has, however, previously addressed this very issue in *State v. Howard*, 158 N.C. App. 226, 232-33, 580 S.E.2d 725, 730-31 (2003). In that case, this Court held that the exemption for married couples from the statutory rape law did not violate equal protection. *Id.*

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Defendant further argues that the United States Supreme Court's landmark decision in *Lawrence v. Texas*, 538 U.S. 558, 156 L. Ed. 2d 508 (2003), striking down Texas' sodomy law and recognizing the rights of unmarried adults to engage in consensual sex should control this case. Defendant, however, ignores the fact the *Lawrence* Court expressly noted that case did not involve minors or those "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." *Id.* at —, 156 L. Ed. 2d at 525. Therefore, *Lawrence* does not control the case at bar. Thus, we reject defendant's assignment of error on this issue.

No error.

Judges McGEE and CALABRIA concur.

JOHN BARRY JOINES, PLAINTIFF V. JERRY DEAN ANDERSON AND WIFE, JANNEY ELIZABETH ANDERSON AND THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANTS

No. COA02-1479

(Filed 18 November 2003)

Taxation— gift tax—property transfer—parol evidence

The trial court did not err by granting summary judgment in favor of defendant Department of Revenue regarding whether the pertinent property transfers are subject to applicable gift taxes in an action where plaintiff conveyed the property to his uncle by deed in fee simple to protect said property from plaintiff's former wife, because: (1) the deed in question purports to be the final agreement of the parties, and as such, any evidence which contradicts the written agreement is prohibited under the parol evidence doctrine unless the written agreement was created through fraud, undue influence, or mutual mistake; and (2) plaintiff seeks to introduce evidence that the deed in fee simple was in fact a trust making the transfers of the property not subject to gift tax, but plaintiff fails to allege an exception to the parol evidence rule.

Appeal by plaintiff from order entered 16 September 2002 by Judge C. Randy Pool in Polk County District Court. Heard in the Court of Appeals 27 August 2003.

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[161 N.C. App. 321 (2003)]

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

Tomblin & Perry Attorneys, by A. Clyde Tomblin, for plaintiff appellant.

TIMMONS-GOODSON, Judge.

John Barry Joines (“plaintiff”) appeals from an order of the trial court granting summary judgment to the North Carolina Department of Revenue (“defendant”).

The evidence presented at the hearing on summary judgment tended to show the following. Plaintiff transferred real property in fee simple to his uncle, Jerry Dean Anderson (“Jerry”), without reservation rights. There is no question that the conveyance was intended to protect the property from possible equitable distribution proceedings commenced by plaintiff’s now former wife.

At the time of the conveyance, Jerry was married to Janney Elizabeth Anderson (“Janney”) (collectively “the Andersons”). Plaintiff’s transfer of the property to Jerry effectively conveyed the property to Jerry and Janney Anderson as tenants by the entirety under North Carolina law. Plaintiff does not argue that title improperly transferred as tenants by the entirety.

After plaintiff resolved his equitable distribution claim, Jerry attempted to reconvey the property to plaintiff. Janney, fearful of the gift tax consequences associated with the transaction, refused to sign the deed.

Plaintiff filed a civil action requesting that the district court order Janney to execute the deed and declare that she assumed no liability in reconveying the property. The Andersons filed a counterclaim seeking \$704.00 to compensate them for the expenses incident to the transfer of the property. On 17 May 2001, a hearing was conducted on plaintiff’s motion for judgment on the pleadings. The motion was granted in favor of plaintiff. The trial court concluded as a matter of law that gift tax would not attach to either conveyance. The trial court ordered the property reconveyed to plaintiff and directed that plaintiff pay any expenses the Andersons incurred in connection with the property.

The Andersons’ attorney subsequently contacted defendant to verify that gift tax would not attach to either conveyance. Defendant

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informed the Andersons that both the initial transfer to them and the subsequent reconveyance to plaintiff were gifts and would be accordingly taxed. Plaintiff filed a motion entitled Motion to Set Aside Judgment of the trial court and to make The North Carolina Department of Revenue a Party Defendant. A consent order setting aside the 17 May 2001 judgment was entered by the trial court on 13 February 2002.

When this matter came before the trial court for the second time, defendant moved for summary judgment, arguing that the transfer was a gift and taxable as such. Plaintiff filed a motion to re-instate the previous judgment. The trial court granted defendant's motion for summary judgment and denied plaintiff's motion to re-instate the previous judgment. Plaintiff appeals.

Plaintiff argues that the trial court erred by: (1) allowing defendant's motion for summary judgment; (2) ignoring the North Carolina definition of gift; (3) holding that the transaction was not an equitable lien or a straw man purchase; and, (4) failing to reinstate the previous judgment.

The dispositive issue on appeal is whether the trial court erred by granting defendant's motion for summary judgment. We hold that there is no genuine issue of material fact regarding whether such property transfers are subject to applicable gift taxes. Thus, we affirm the trial court's order granting summary judgment to defendant.

The standard of review of a grant of summary judgment is a two prong test. The trial court must first determine "whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact," and, secondly, "whether the moving party is entitled to judgment as a matter of law." *Capital Outdoor v. Tolson*, 159 N.C. App. 55, 58, 582 S.E.2d 717, 720 (2003). The purpose of summary judgment is to "avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 123 (2002). Determining what constitutes a bona fide issue of material fact is seldom an easy task. *Id.*, *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). Our Supreme Court has found that "an issue is genuine if it is supported by substantial evidence," *DeWitt*, 355 N.C. at 681, 565 S.E.2d at 146, "which is that amount of relevant evidence necessary to per-

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suade a reasonable mind to accept a conclusion." *Pennington*, 356 N.C. at 579, 573 S.E.2d at 124. Further, "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." *Pennington*, 356 N.C. at 579, 573 S.E.2d at 124 (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)). As a general rule, summary judgment is a measure to be used cautiously so that no party is deprived of a trial on a disputed factual issue. *Capital Outdoor*, 159 N.C. App. at 59, 582 S.E.2d at 720.

North Carolina gift tax is "levied upon the shares of the respective beneficiaries in all property within the jurisdiction of this State, real, personal and mixed. . . ." N.C. Gen. Stat. § 105-188(a) (2001). Gift tax does not apply to the passage of property in trust "where the power to revest in the donor title to such property is vested in the donor. . ." N.C. Gen. Stat. § 105-188(c) (2001).

Plaintiff argues that he transferred the property in trust to Jerry for plaintiff's benefit. Although plaintiff concedes that the property was transferred in fee simple by written deed, plaintiff asserts that he never intended to make a gift of said property to Jerry and that his oral agreement with Jerry prior to the deed transfer evidences his intent to maintain practical ownership of the property. Thus, plaintiff maintains that the transfers of the property are not subject to gift tax.

Plaintiff would have the court engraft a trust upon his initial conveyance of the property. Plaintiff fails to understand the legal precedent contrary to his position. See *Financial Services v. Capitol Funds*, 288 N.C. 122, 217 S.E.2d 551 (1975); *Lewis v. Boling*, 42 N.C. App. 597, 257 S.E.2d 486 (1979); *Day v. Powers, Sec. of Revenue*, 86 N.C. App. 85, 356 S.E.2d 399 (1987). The deed in question purports to be the final agreement of the parties, and as such, any evidence which contradicts the written agreement is prohibited under the parol evidence doctrine, unless the written agreement was created through fraud, undue influence, or mutual mistake. See *Financial Services*, 288 N.C. at 136, 217 S.E.2d at 560; *Lewis*, 42 N.C. App. at 602-03, 257 S.E.2d at 490.

Plaintiff has failed to allege fraud, undue influence, or mutual mistake in his complaint. Plaintiff in fact asserted that the conveyance was not fraudulent, but voluntary. Thus, parol evidence

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could not be introduced to contradict the written deed. *See Connor v. Ridley*, 248 N.C. 714, 716, 104 S.E.2d 845, 847 (1958); *Rourk v. Brunswick County*, 46 N.C. App. 795, 796, 266 S.E.2d 401, 403 (1980); *Day*, 86 N.C. App. at 87, 356 S.E.2d at 401. Plaintiff is therefore unable to establish that he reserved any right to reconvey property to himself such as to exempt him from gift tax. Thus, there is an insurmountable weakness in plaintiff's claim on this theory.

We must next address whether the deed as written is a gift and taxable accordingly. *Day v. Powers, Sec. of Revenue*, is the controlling authority. 86 N.C. App. 85, 356 S.E.2d 399 (1987). In *Day*, the plaintiff conveyed his real property by deed in fee simple to his son to prevent his fiancée from obtaining rights in the property after their marriage. 86 N.C. App. at 85-87, 356 S.E.2d at 400-01. When the Secretary of Revenue of the State of North Carolina assessed gift taxes against the plaintiff, the plaintiff argued that the property was not a gift, but a trust for his benefit. *Day*, 86 N.C. App. at 86, 356 S.E.2d at 400. This Court concluded that the parol evidence rule prohibited the introduction of evidence to contradict the written deed, and as the plaintiff failed to evidence an exception to the parol evidence rule, this Court required an entry of judgment for the Secretary of Revenue. *Day*, 86 N.C. App. at 87, 356 S.E.2d at 401.

We note the similarity between the facts of *Day* and those alleged here. Plaintiff conveyed the property by deed in fee simple to protect said property from his former wife. Furthermore, plaintiff seeks to introduce evidence that the deed in fee simple was in fact a trust, but fails to allege an exception to the parol evidence rule.

Under controlling precedent cited above, including *Day v. Powers, Sec. of Revenue*, we conclude that the trial court correctly granted summary judgment for defendant. As such, we do not address the merits of plaintiff's remaining assignments of error.

Affirmed.

Judges HUNTER and ELMORE concur.

STATE v. HOLLAND

[161 N.C. App. 326 (2003)]

STATE OF NORTH CAROLINA v. THOMAS BRYANT HOLLAND

No. COA02-1474

(Filed 18 November 2003)

1. Criminal Law— motion to dismiss—credibility of witnesses—not for trial court to weigh

There was no error in the denial of a motion to dismiss charges of armed robbery, first-degree burglary, assault, sexual offense, and other crimes where defendant argued that the only evidence of identity was from codefendants whom defendant contended lacked credibility. The trial court was not permitted to weigh the credibility of the witnesses, and all of the evidence permitted a reasonable inference of defendant's guilt.

2. Criminal Law— request for written instructions—re-read instead

The trial court did not err by not providing written instructions upon the jury's request in a prosecution for armed robbery, first-degree burglary, assault, sexual offense, and other crimes. The fact that the judge re-read the instructions represents compliance with the essence of the jury's request.

3. Criminal Law— flight—visit to friend's house—not sufficient for instruction

The trial court erred by instructing the jury on flight on evidence that defendant went to the home of a friend after the crime. There was no evidence that defendant did so to avoid apprehension; visiting a friend at a residence is not an act that raises a reasonable inference that a defendant was avoiding apprehension. However, this error was harmless in light of the remaining evidence in the case, including the identification of defendant as the perpetrator of the crimes charged.

Appeal by defendant from judgment entered 9 May 2001 by Judge David Q. Labarre in Wake County Superior Court. Heard in the Court of Appeals 27 August 2003.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Ligon & Hinton, by Lemuel W. Hinton, attorney for defendant-appellant.

STATE v. HOLLAND

[161 N.C. App. 326 (2003)]

TIMMONS-GOODSON, Judge.

Thomas Bryant Holland (“defendant”) appeals his convictions of robbery with a dangerous weapon, first-degree burglary, conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, and first-degree sexual offense. For the reasons stated herein, we hold that defendant received a trial free of prejudicial error.

The evidence presented by the State at trial tends to show the following: On 29 September 2000, C.C. was living in Fuquay-Varina, North Carolina. On that evening, C.C. and her boyfriend, James Brooks (“Brooks”), arrived at her home at 9:30 p.m. At approximately 10:00 p.m., Michael Booker (“Booker”) visited the residence, purchased marijuana from C.C. and left. Shortly thereafter, C.C. and Brooks were robbed in the house by two masked men with guns. C.C. recognized one of these two individuals as “Scoop Lover.” Lover, whose given name is Donny McNeil (“McNeil”), had recently visited her residence, accompanied by Booker and Christopher Shaw (“Shaw”), to purchase marijuana.

McNeil and the unidentified male entered the house and at gunpoint demanded money and drugs. C.C. gave McNeil money that she kept in her bedroom. The second, unidentified individual then directed C.C. into her daughter’s bedroom where he sexually assaulted her while threatening her with a gun. While these events transpired, Brooks escaped McNeil’s grasp and ran toward the front door of the house. McNeil and the unidentified individual then fired their guns at Brooks, striking him five times. Brooks escaped the house, ran to a neighbor’s house, and called 911.

The State presented evidence through McNeil, Booker and Shaw’s testimony that defendant participated in the planning and commission of the sexual assault and robbery of C.C. and the felony assault of Brooks.

The issues presented on appeal are whether the trial court erred by (I) denying defendant’s motion to dismiss the charges against him; (II) failing to provide the jury with a written copy of the jury instructions upon their request; and (III) instructing the jury on flight of the defendant.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charges of robbery with a dangerous weapon,

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first-degree burglary, conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with the intent to kill inflicting serious injury, and first-degree sexual offense. Defendant asserts that the State presented insufficient evidence to support these charges. We disagree.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged. *See State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). When reviewing the evidence, the trial court must consider all evidence in the light most favorable to the prosecution, granting the State the benefit of every reasonable inference. *See State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). "The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying the defendant's motion to dismiss." *State v. Malloy*, 309 N.C. 176, 178, 305 S.E.2d 718, 720 (1983).

In the present case, defendant argues that the evidence was insufficient for three reasons: (I) C.C. and Brooks never positively identified defendant at trial; (II) there was no physical evidence linking defendant to the crimes; and (III) co-defendants provided the only positive identification of defendant. Defendant argues that his co-defendants lack the credibility to provide honest testimony. We hold that the co-defendants' testimony identifying defendant as a co-conspirator provides substantial evidence that defendant was the unidentified individual who committed the crimes, and that the evidence was sufficient to support the trial court's denial of the motion to dismiss.

Defendant argues that "the identity evidence was inherently weak, biased, and unreliable." The trial court was required only to determine whether, in the light most favorable to the State, the evidence linked defendant to the crimes. The trial court was not permitted to weigh the credibility of the witnesses. The fact that neither C.C. nor Brooks could positively identify defendant and the lack of physical evidence to link defendant to the crimes does not negate the existence of other evidence that the State presented. The testimony of McNeil, Booker and Shaw viewed in the light most favorable to the State shows that defendant was armed during the commission of the crimes, entered C.C.'s home and robbed her of personal property, sexually assaulted her, and fired his gun at Brooks while Brooks was

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escaping. The defendant did not testify, nor did he present any witnesses to contradict this testimony. Thus, all of the evidence presented permits a reasonable inference of defendant's guilt sufficient to defeat a motion to dismiss. We conclude that the trial court did not err in denying defendant's motion to dismiss.

We also disagree with defendant's contention that the State's evidence raises only a mere suspicion of defendant's identity as the second gunman. We agree that the law requires that when the evidence raises only a suspicion or conjecture as to the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720. However, in the present case, the co-defendants positively identified defendant as the second gunman, which rises to more than a mere suspicion. Therefore, the trial court properly left the determination of the witnesses' credibility to the jury.

[2] Defendant next argues that the trial court erred in not providing written instructions to the jury upon request. During its deliberations, the jury asked the trial court for written instructions on the elements of all of the charges which were submitted for the jury's consideration. The trial court declined to provide written instructions, but orally repeated the instructions to the jury.

A trial court has inherent authority, in its discretion, to submit its instructions on the law to the jury in writing. *State v. McAvoy*, 331 N.C. 583, 591, 417 S.E.2d 489, 494 (1992) citing *State v. Bass*, 53 N.C. App. 40, 45, 280 S.E.2d 7, 10 (1981). When a trial court fails to exercise its discretion in the erroneous belief that it has no discretion as to the question presented, there is error. *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980). However, where the trial court declines to provide written instructions, but repeats the requested instructions for the jury, thereby complying with the essence of the jury's request, there is no prejudicial error. *McAvoy*, 331 N.C. at 591, 417 S.E.2d at 494-95.

In the present case, the jury requested that the judge provide a written description of the charges. The judge replied, "[i]f you're asking about getting a written copy of that description I do not have that for you. If you're talking about me re-charging you on some or all of those charges, I can do that." The jury later asked to be recharged on two specific counts. It is unclear from Judge Labarre's reply whether he believed that he had no discretion to provide written instructions, or whether he was simply stating that he had no written instructions

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available. However, the fact that the judge re-read the instructions for the two charges that the jury specifically requested represents compliance with the essence of the jury's request, and therefore we overrule this assignment of error.

[3] Defendant's final argument asserts that the trial court erred in instructing the jury on flight of the defendant, because the evidence was insufficient to merit such an instruction. We agree.

A trial judge may instruct a jury on a defendant's flight if "there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged." *State v. Thompson*, 328 N.C. 477, 489, 402 S.E.2d 386, 392 (1991) (*quoting State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990)). "Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *Thompson*, 328 N.C. at 490, 402 S.E.2d at 392.

In the present case, the evidence presented, even in the light most favorable to the State, shows that defendant left the crime scene with his accomplices and drove to the home of one of the accomplices. Following this, defendant was driven to a girlfriend's residence. There is no evidence that he went there to avoid apprehension. Visiting a friend at their residence is not an act that, by itself, raises a reasonable inference that defendant was attempting to avoid apprehension. Therefore, it was error for the trial court to instruct the jury on flight. However, in light of the remaining evidence in this case, including the identification of defendant as the perpetrator of the crimes charged, the error in instructing the jury on flight was harmless. Thus, we conclude that defendant received a trial free of prejudicial error.

No error.

Judges HUNTER and ELMORE concur.

STATE v. SNEED

[161 N.C. App. 331 (2003)]

STATE OF NORTH CAROLINA v. COREY TYRONE SNEED, DEFENDANT

No. COA02-1746

(Filed 18 November 2003)

Firearms and Other Weapons— possession of a firearm by a felon—habitual felon—motion to dismiss—prior conviction of possession of cocaine a misdemeanor

The trial court erred by failing to dismiss the charges of possession of a firearm by a felon and being an habitual felon, because both charges were supported by defendant's prior convictions for possession of cocaine which are statutorily defined as misdemeanors.

Appeal by defendant from judgment entered 17 July 2002 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Court of Appeals 28 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Granberry Corbett, for the State.

Daniel Shatz for the defendant-appellant.

WYNNE, Judge.

Defendant, Corey Tyrone Sneed, argues on appeal that the trial court erroneously failed to dismiss the charges of possession of a firearm by a felon indictment and being an habitual felon because both charges were supported by his prior convictions for possession of cocaine, which are statutorily defined as misdemeanors. For reasons given in this Court's recent opinion in *State v. Jones*, 161 N.C. App. 60, — S.E.2d — (2003), we are compelled to agree with Defendant.

The underlying facts tend to show that on the morning of 3 March 2002, a police officer observed Defendant make a U-turn at an intersection, stop and exit his vehicle and begin talking with another individual on the street. After being informed Defendant's license plates were registered to a different car, the officer drove behind the parked car and activated his lights. Upon being detained for driving with fictitious tags, Defendant voluntarily informed the officer a gun was under the driver's seat of his car. After confirming a gun was underneath the driver's seat, the officer contacted dispatch and was informed Defendant was a convicted felon.

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Defendant contended that he carried the gun for the protection of his three businesses—Contra Youth at 13th and Dock Street, Good Times at 907 Castle Street, and Contra Headquarters at 521 South 10th Street. According to Defendant, he had been having trouble at Good Times, a club, which was in a high-crime area. His club had experienced a break-in, had shots fired into it and the adult crowd was often rowdy. Defendant also felt he needed protection going home from the club at 3:00 or 4:00 in the morning with the proceeds. At the time of the police stop, Defendant was coming from Contra Youth Headquarters and was on his way to the Good Times club, which opened at 8:00. Defendant had stopped to pick up his cousin, who worked security at the nightclub.

Defendant was convicted of possession of a firearm by a felon and as having attained habitual felon status, and sentenced to 100-129 months imprisonment. Defendant appeals.

Defendant contends the indictment charging him with possession of a firearm by felon in violation of N.C. Gen. Stat. § 14-415.1 (2001) and as having attained habitual felon status as defined by N.C. Gen. Stat. § 14-7.1 (2001) should have been dismissed because his prior convictions for possession of cocaine were not felony convictions. We agree.

In the indictment charging Defendant with possession of a firearm by felon, the State alleged:

. . . the defendant named above unlawfully, willfully and feloniously did possess a Browning Hi-Power 9mm, which is a handgun, while not at his home or lawful place of business. The defendant had previously been convicted of the felony of Possession of Cocaine, which is a Class I Felony punishable by a maximum sentence of 5 years. This felony was committed on 1-7-94 and the defendant was convicted of the felony on 5-16-95 in New Hanover County Superior Court and received a 5 year sentence.

Under N.C. Gen. Stat. § 14-415.1 (2001), 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 . . .” Therefore, one must have a prior felony conviction to be in violation of this provision.

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In a separate indictment, the State alleged Defendant had attained habitual felon status. The State alleged Defendant had three prior felony convictions on 16 May 1995, 27 July 1992 and 27 June 1990 for possession of cocaine in violation of N.C. Gen. Stat. § 90-95.

In the recent case of *State v. Jones*, 161 N.C. App. 60, — S.E.2d — (2003), this Court, after applying the applicable rules of statutory interpretation, stated:

the specific statute defining the crime of possession of cocaine plainly states it is a misdemeanor that is punishable as a felony. N.C. Gen. Stat. § 90-95(d)(2). Although felonies are broadly defined in N.C. Gen. Stat. § 14-1 to include any crime punishable in State prison, we cannot interpret this general statute as overcoming the plain language of the specific statute defining the crime. Moreover, we have previously held that where a crime is defined as one Class but defendant is sentenced at another Class, the definitional classification controls. *State v. Vaughn*, 130 N.C. App. 456, 460, 503 S.E.2d 110, 112-13 (1998) (holding a defendant was convicted of a prior Class H felony, but was sentenced for a Class C felony due to increased punishment as a habitual felon, is nevertheless considered to have been convicted of a prior Class H felony for calculating his prior record level). Accordingly, although possession of cocaine may be punished as a felony, the statute plainly defines it as a misdemeanor.

See State v. Jones, 161 N.C. App. 60, — S.E.2d — (2003).

Despite the clear language of the statute, the State argues that in *State v. Chavis*, 134 N.C. App. 546, 555, 518 S.E.2d 241, 248 (1999), this Court stated “N.C. Gen. Stat. § 90-95(d)(2) clearly states that the possession of any amount of cocaine is a felony.” In addressing a similar argument in *State v. Jones*, this Court stated that the statute “states possession of cocaine is a misdemeanor that is punishable as a felony but does not state it *is* a felony. Since the only analysis in *Chavis* is the language of the statute, which does not state, as asserted, that ‘possession of any amount of cocaine is a felony,’ we find we are bound by the language of the statute.” *Id.*

Moreover, we note that in this case, the State acknowledged at oral argument that it was within the authority of the General Assembly to establish that a crime could be punishable as a felony and yet be classified as a misdemeanor. Indeed, the statute explicitly states that one who possesses a Schedule II substance (cocaine) shall

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be guilty of a Class 1 misdemeanor. Thereafter, the statute directs that such misdemeanor offense shall be punishable as a Class I felony. Nothing could be clearer. Since the General Assembly made this law, it is not within the province of this Court to employ legal gymnastics to read the clear language differently than what it states. The plain language of the statute makes the crime of cocaine possession a misdemeanor which is punishable as a felony. Thus, to be clear, drug possession of cocaine remains as the General Assembly says it is—punishable as a Class I felony. Thus, neither this opinion nor *State v. Jones* affects prior sentences for possession of cocaine, including the derivative drug “crack.” However, in all other respects the offense is as the General Assembly says it is—a Class 1 misdemeanor.

Following *State v. Jones*, the plain language of the statute, and the applicable rules of statutory interpretation, we are compelled to follow the clear mandate of the General Assembly—possession of a Schedule II controlled substance (cocaine) is a Class 1 misdemeanor. N.C. Gen. Stat. § 90-95(d)(2). Since the General Assembly classifies possession of cocaine as a misdemeanor, it follows that it may not be used as a felony to support convictions for possession of a firearm by a felon and being an habitual felon.

Vacated.

Judges TIMMONS-GOODSON and ELMORE concur.

PATRICIA MEDLIN RUSS, AMY S. ROBINSON, TAMELA BROWN, TERILYN L. STAFFORD, SANDRA SIDES, SAUNDRA POWERS, AND DONNA JEFFREYS, PLAINTIFFS v. WILLIAM F. HEDGEBOCK, JR., D/B/A TRIAD BUSINESS FORMS, DEFENDANT

No. COA02-1615

(Filed 18 November 2003)

Statutes of Limitation and Repose—statute of limitations—improper retroactive extension of time to issue alias and pluries summons

The trial court did not err by granting defendant's motion for summary judgment on the basis of the expiration of the statute of limitations in an action where plaintiffs alleged they had obtained

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[161 N.C. App. 334 (2003)]

a judgment against defendant, that the judgment had not been paid, and that this action was not barred by the statute of limitations, because: (1) the first trial judge did not have the authority to retroactively extend the time to issue the alias and pluries summons under N.C.G.S. § 1A-1, Rule 6(b) when the action was discontinued and plaintiffs failed to obtain an endorsement or issuance of an alias and pluries summons within the ninety-day time period; and (2) a second trial judge did not lack authority to overrule or ignore the first trial judge's order when the first judge's order was a nullity and the statute of limitations was a positive bar to plaintiffs' claims.

Appeal by plaintiffs from judgment entered 28 June 2002 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 13 October 2003.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff-appellants.

Allman Spry Leggett & Crumpler, P.A., by Jeffrey B. Watson, for defendant-appellee.

EAGLES, Chief Judge.

Plaintiffs filed this action 18 January 2002 alleging that they had obtained a judgment against the defendant on 20 January 1992, that the judgment had not been paid and that this action was not barred by the statute of limitations. A summons in this action was issued 18 January 2002 and returned unserved on 21 March 2002. On 14 May 2002, an alias and pluries summons was issued (116 days after the issuance of the original summons) and was returned served on 21 May 2002.

On 17 May 2002, plaintiffs filed a motion asking for a retroactive extension of time for the issuance of the alias and pluries summons to 15 May 2002 (three days after the plaintiffs had already caused the alias and pluries summons to be issued). On 24 May 2002, after a hearing, Judge L. Todd Burke concluded that the plaintiffs had shown excusable neglect in failing to have the alias and pluries summons issued within 90 days of the issuance of the original summons and entered an order retroactively extending the time for the issuance of the alias and pluries summons to and including 15 May 2002. On 23 May 2002, (the day before the hearing before Judge Burke), the defendant filed a motion to dismiss, a motion for summary judgment

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on the basis of the statute of limitations, and an answer to the complaint in which he asserted the statute of limitations as a bar to plaintiffs' claims. On 28 June 2002, Judge Richard L. Doughton granted defendant's 23 May 2002 motion for summary judgment. Plaintiffs appeal from this order.

Plaintiffs argue that the trial court erred in granting defendant's motion for summary judgment because: (1) Judge Burke had the authority to retroactively extend the time to issue the alias and pluries summons pursuant to N.C.R. Civ. P. 6(b) and (2) Judge Doughton lacked the authority to modify, overrule or change Judge Burke's order.

Plaintiffs contend that Rule 6(b) allows the trial court to exercise its discretion to retroactively extend the ninety-day time period provided in N.C.R. Civ. P. 4(d) for issuance of an alias and pluries summons or for an endorsement upon the original summons to effectuate service on defendant and to prevent a discontinuance of the action. We disagree.

Rule 6(b) gives our trial courts the discretion, upon a finding of "excusable neglect," to retroactively extend the time provided in N.C.R. Civ. P. 4(c) for serving a summons after it has become *dormant*. *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). However, this Court held in *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635, *disc. review denied as improvidently allowed*, 332 N.C. 480, 420 S.E.2d 826 (1992), that trial courts do not have discretion pursuant to Rule 6(b) to prevent a discontinuance of an action under N.C.R. Civ. P. 4(e) where there is neither an endorsement of the original summons nor issuance of an alias and pluries summons within ninety days after issuance of the last preceding summons. *Id.* at 78, 411 S.E.2d at 638. While *Lemons* permits the extension of time to serve a dormant summons, *Dozier* controls if the action has become discontinued.

Here because this action was discontinued, we are bound by *Dozier*. Plaintiffs had the original summons issued on 18 January 2002. The summons was returned unserved on 21 March 2002. Plaintiffs had ninety days from 18 January 2002 to have the alias and pluries summons issued under Rule 4(d). Plaintiffs failed to obtain an endorsement or an alias and pluries summons on the defendant within the ninety-day time period. The plaintiffs' attempt to retroactively extend the time period for issuing the alias and pluries summons is not allowed by Rule 6(b). Under Rule 4(e), the alias and

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pluries summons issued on 14 May 2002 resulted in the commencement of an entirely new action, outside of the statutory limitations period. Because discontinuance of the action is mandated under this Court's decision in *Dozier*, the trial court erred in allowing plaintiffs' motion to retroactively extend the time period for issuing an alias and pluries summons. Plaintiffs' assignment of error fails.

Plaintiffs argue that Judge Doughton, in granting defendant's motion for summary judgment, in effect overruled Judge Burke's order retroactively extending the time for the issuance of the alias and pluries summons. Pursuant to N.C.R. Civ. P. 56(c), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). A defendant moving for summary judgment bears the burden of showing that no triable issue of fact exists on the record before the court or that the plaintiff's claim is fatally flawed. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). In deciding whether to grant or deny the motion, the trial court must draw all inferences of fact against the moving party and in favor of the party opposing summary judgment. *Id.* On appeal from a ruling by the trial court on a motion for summary judgment, the question for our determination is whether the court's conclusions of law were correct. *Ellis v. Williams*, 319 N.C. 413, 415, 355 S.E.2d 479, 481 (1987).

Here, the plaintiffs' action had been discontinued because the plaintiffs failed to obtain an endorsement or issue an alias and pluries summons within the time period specified in Rule 4(d). The summons issued on 14 May 2002 began a new action, one that was commenced outside the statute of limitations. On 24 May 2002, the trial court was without jurisdiction to issue an order that retroactively extended the time for issuing an alias and pluries summons in this action. "An order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored." *State v. Sams*, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986) (emphasis in original), citing *Manufacturing Co. v. Union*, 20 N.C. App. 544, 202 S.E.2d 309, cert. denied, 285 N.C. 234, 204 S.E.2d 24 (1974). Judge Doughton was correct in granting summary judgment in the matter because Judge Burke's order was a nullity and the statute of limitations was a positive bar to the plaintiffs' claims.

Affirmed.

Judges ELMORE and GEER concur.

ROBINSON & LAWING, L.L.P., PLAINTIFF v. CYNTHIA B. SAMS, DEFENDANT

No. COA03-76

(Filed 18 November 2003)

1. Appeal and Error— appealability—order disqualifying counsel—substantial right

An order disqualifying counsel is immediately appealable because it affects a substantial right.

2. Attorneys— disqualification—material witness

A disqualification of defendant's counsel was not an abuse of discretion in an action by a prior attorney to recover fees for representation in a domestic action because the evidence showed that defendant's attorney was a necessary and material witness in her case where defendant alleged that plaintiff did not provide any value or benefit for many of the charges claimed for services rendered; the nature and value of plaintiff's legal services were a contested issue; and defendant's deposition testimony indicated that her present attorney may have relevant information regarding the nature and value of plaintiff's legal fees obtained prior to his representation of defendant. Rule of Professional Conduct 3.7.

3. Civil Procedure— findings—not requested, not required

An order disqualifying counsel was not vacated for lack of findings where neither party requested findings of fact or conclusions of law.

Appeal by defendant from order entered 21 August 2002 by Judge William Z. Wood, Jr., Superior Court, Forsyth County. Heard in the Court of Appeals 14 October 2003.

Hahn & Chastain, P.A., by William J. O'Malley, for defendant.

Robinson & Lawing, L.L.P., by James R. Theuer, for plaintiff.

ROBINSON & LAWING, L.L.P. v. SAMS

[161 N.C. App. 338 (2003)]

WYNN, Judge.

Defendant Cynthia B. Sams argues on appeal that the trial court erroneously disqualifed her attorney from representing her because the evidence did not show that her attorney was a necessary and material witness for her case, and the trial court made no findings of fact to support its decision. After careful review, we conclude the trial court did not abuse its discretion.

The pertinent facts indicate Robinson & Lawing, L.L.P., a law firm, represented Ms. Sams in a domestic action from October 1997 to July 1998. Thereafter, from July 1998 to October 2000, several different attorneys represented Ms. Sams, including Russ Kornegay, J. Calvin Cunningham, Lori Watson Berger, and the Causey Law firm.¹ From November 2000 until July 16, 2001, William J. O'Malley represented Ms. Sams in her domestic action.²

This matter arises from an action by Robinson & Lawing to recover legal fees (\$30,229.69 plus interest) from Ms. Sams. During a July 2002 deposition, Ms. Sams stated that she had discussed Robinson & Lawing's representation with Mr. O'Malley prior to his representation in this matter. Based upon those statements, Robinson & Lawing moved to disqualify Ms. Sams' counsel. This appeal followed from the trial court's order disqualifying Mr. O'Malley from representing Ms. Sams.

On appeal, Ms. Sams first contends the trial court erroneously disqualifed her defense counsel because Robinson & Lawing failed to show her defense counsel was a necessary and material witness in her case. We disagree.

"Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal." *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992).³

1. Mr. Cunningham and Ms. Berger filed a separate action against Ms. Sams for attorney fees. An appeal arising out of the disqualification of Mr. O'Malley in that matter presents similar issues as this appeal. *See Cunningham v. Sams*, — N.C. App. —, — S.E.2d — (2003) (COA02-1623) (Filed 18 November 2004)

2. In August 2001, Mr. O'Malley and Ms. Sams married.

[1] 3. Although interlocutory, an order disqualifying counsel is immediately appealable because it affects a substantial right. *See Goldston v. American Motors Corp.*, 326 N.C. 723, 726-27, 392 S.E.2d 735, 736-37 (1990); *see also Travco Hotels*, 332 N.C. at 292,

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[2] In this case, the nature and value of Robinson & Lawing's legal services are a contested issue. Indeed, as an affirmative defense, Ms. Sams alleged "Robinson & Lawing did not provide any value or benefit for many of the charges it claims for services rendered, and Ms. Sams asserts lack of consideration as a defense to the debt."

During Ms. Sams' deposition, her testimony indicated that her attorney, Mr. O'Malley, may have relevant information regarding the nature and value of Robinson & Lawing's legal fees obtained prior to his representation of Ms. Sams in this case. According to Ms. Sams: (1) she became reacquainted with Mr. O'Malley in December 1998; (2) Ms. Sams and Mr. O'Malley married in August 2001; (3) between December 1998 and August 2001, she told Mr. O'Malley that Mr. Grantham, an attorney in Robinson & Lawing's firm, quit and that he had not done a very good job; (4) she showed Mr. O'Malley correspondence between Robinson & Lawing and Ms. Sams; and (5) she asserted attorney-client privilege as to other complaints she made to Mr. O'Malley regarding Robinson & Lawing's provision of legal services.⁴

Shortly after the deposition, Robinson & Lawing moved to disqualify Mr. O'Malley based upon Revised Rule of Professional Conduct 3.7 which in pertinent part states:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.

In its motion, Robinson & Lawing recounted Ms. Sams' deposition testimony, indicated it considered defense counsel a necessary and

420 S.E.2d at 429 (stating "the granting of a motion to disqualify counsel, unlike a denial of the motion, has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client's choice. Neither deprivation can be adequately addressed by a later appeal of a final judgment adverse to the client").

4. Notwithstanding her assertion of privilege, Mr. O'Malley did not file his Notice of Appearance in this matter until January 2002, several months after the Complaint was filed.

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[161 N.C. App. 341 (2003)]

material witness, and stated its intention to call defense counsel as a witness during the trial. The trial court's order disqualifying counsel set a date for defense counsel's deposition, continued the matter for an additional sixty days from the trial date to allow Ms. Sams to retain replacement counsel, and stated that defense counsel could move for reconsideration of the disqualification order after the deposition. Accordingly, on these facts, we conclude the trial court did not abuse its discretion in disqualifying counsel.⁵

[3] Ms. Sams also argues the trial court's order should be vacated for want of findings of fact. Under N.C. Gen. Stat. § 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 and as provided by Rule 41(b)." *See also Allen v. Wachovia Bank & Trust Co., N.A.*, 35 N.C. App. 267, 269, 241 S.E.2d 123, 125 (1978) (stating "absent a request for findings of fact to support his decision on a motion, the judge is not required to find facts . . . and it is presumed that the Judge, upon proper evidence, found facts to support his judgment"). Our review of the transcript indicates neither party requested the trial court render findings of fact or conclusions of law. Accordingly, we find this argument to be without merit.

Affirmed.

Judges TIMMONS-GOODSON and ELMORE concur.

KYLE & ASSOCIATES, INC., PLAINTIFF v. THOMAS MAHAN, AND MICHAEL AUTEN,
DEFENDANTS

No. COA03-131

(Filed 18 November 2003)

Judgments—foreign—certificate of authority—timeliness

The trial court properly denied defendants' motion to strike a foreign judgment where plaintiff corporation received its certificate of authority to do business in North Carolina after defendant raised the issue, but before the North Carolina court considered the matter. The suggestion that the certificate of authority must

⁵ Ms. Sams does not argue any of the exceptions to Rule 3.7 are applicable.

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be obtained prior to the trial in the foreign jurisdiction is not consistent with precedent. N.C.G.S. § 55-15-02(a).

Appeal by defendants from judgment entered 24 September 2002 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 29 October 2003.

Arthurs & Foltz, by Douglas P. Arthurs, for plaintiff appellee.

Brown & Associates, P.L.L.C., by Donald M. Brown, Jr., for defendant appellants.

McCULLOUGH, Judge.

This case arises out of a lawsuit originally filed in South Carolina in which the trial court in Gaston County, North Carolina, subsequently denied defendants' motion for relief from foreign judgment. The pertinent facts are as follows: A corporation organized in South Carolina, Kyle & Associates, Inc. (plaintiff), sued Thomas A. Mahan and Michael Auten (defendants) in South Carolina for money damages stemming from a business relationship. A South Carolina jury returned a verdict in favor of plaintiff and awarded it \$350,000 on 24 June 1999.

After obtaining its judgment in South Carolina, plaintiff filed a notice of filing of foreign judgment in Gaston County and Davie County, North Carolina, and defendants received an affidavit of service. Defendants filed a notice of defenses and a motion for relief from foreign judgment in the Superior Courts of Gaston County and Davie County. At that time, defendants claimed that plaintiff was not authorized to enforce a judgment in the State of North Carolina.

Defendants appealed the judgment in South Carolina, but the decision of the trial court was affirmed. Once the judgment became final on 22 March 2002, plaintiff filed an affidavit of foreign judgment.

On 3 July 2002, the North Carolina Secretary of State's office issued a certificate of authority to plaintiff. During July of 2002, the parties attempted to obtain a hearing date, but both sides were unable to agree to a time. On 7 August 2002, defendant filed a notice to withdraw motion and reserved the right to refile at a later date. Two days later, defendants refiled their motion for relief from judgment. A hearing was held on 24 September 2002 in Gaston County Superior Court, and the Honorable Timothy L. Patti denied defendants' motion to strike the foreign judgment. Defendants appealed.

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On appeal, defendants argue that the trial court erred by denying the motion to strike a foreign judgment because plaintiff did not have a certificate of authority to do business in North Carolina at the time it obtained the foreign judgment. We disagree.

N.C. Gen. Stat. § 55-15-02(a) (2001) provides:

No foreign corporation transacting business in this State without permission obtained through a certificate of authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless the foreign corporation has obtained a certificate of authority prior to trial.

An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

Defendants argue that plaintiff was unable to enforce its judgment in North Carolina because it did not obtain a certificate of authority *before commencing trial in South Carolina*. Plaintiff responds by noting that it obtained a certificate of authority *prior to the hearing in North Carolina*. The question for this Court is whether the certificate of authority must be obtained before the hearing in the foreign jurisdiction or before utilizing the courts of North Carolina.

This Court has previously considered the statutory language at issue in this case and explained: “[A] foreign corporation or its successor or assignee may not maintain any action *in North Carolina* (including an action to enforce a foreign judgment) until the foreign corporation obtains a certificate of authority to do business here.” *Leasecomm Corp. v. Renaissance Auto Care*, 122 N.C. App. 119, 121, 468 S.E.2d 562, 563-64 (1996) (emphasis added).¹ In other words, before a foreign corporation can utilize the courts of North Carolina, that corporation must get a certificate of authority prior to the hearing of the matter in North Carolina. In this case, since plaintiff obtained its certificate of authority on 3 July 2002 before the hearing on 24 September 2002 in North Carolina, we conclude that

1. *Leasecomm* stands for the proposition that a foreign corporation’s failure to obtain a certificate of authority to do business in North Carolina precluded the corporation’s assignee from maintaining an action to enforce the foreign judgment in North Carolina, even though the assignee was authorized to do business in North Carolina. This case does not help defendants because unlike the assignor corporation in *Leasecomm*, plaintiff in this case did receive a certificate of authority prior to the hearing in North Carolina.

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plaintiff complied with the statutory requirements of N.C. Gen. Stat. § 55-15-02(a).

A recent decision of this Court also suggests that a certificate of authority may be obtained at any time before the hearing in North Carolina. In *Harold Lang Jewelers, Inc. v. Johnson*, the trial court dismissed the plaintiff's suit in North Carolina because the plaintiff was a Florida corporation that never obtained a certificate of authority to do business in North Carolina. 156 N.C. App. 187, 188, 576 S.E.2d 360, 361, *disc. review denied*, 357 N.C. 458, 585 S.E.2d 765 (2003). In upholding the decision of the trial court, this Court indicated that plaintiff's suit would not have been dismissed if plaintiff had obtained the certificate of authority before the North Carolina court considered the matter. *Id.* at 192, 576 S.E.2d at 363. We noted that Lang, the plaintiff, "could have obtained the certificate in the year and a half that passed between the filing of the [defendant's] motion and the court's dismissal of the case." *Id.*

In the case at bar, defendants' suggestion that the certificate of authority must be obtained prior to the trial in the foreign jurisdiction is not consistent with the ruling in *Johnson*. In fact, plaintiff in this case, Kyle & Associates, Inc., did exactly what the Court in *Johnson* suggested. It received a certificate of authority after defendant raised the issue, but before the North Carolina court considered the matter.

We have carefully reviewed the other arguments of the parties and find them to be without merit. Therefore, the trial court's denial of defendants' motion to strike a foreign judgment is affirmed.

Affirmed.

Judges TYSON and BRYANT concur.

STATE v. ROGERS

[161 N.C. App. 345 (2003)]

STATE OF NORTH CAROLINA v. RONALD ROGERS, DEFENDANT

No. COA02-1705

(Filed 18 November 2003)

Indigent Defendants— attorney fees—appointed counsel—judgment against defendant—conviction reversed

The trial court erred by entering a judgment against defendant for his appointed counsels' attorney fees arising out of his first trial, because: (1) N.C.G.S. § 7A-455(c) provides that no order for partial payment shall be entered unless the indigent person is convicted; and (2) our Supreme Court's reversal of defendant's conviction based on presumed ineffective assistance of counsel because counsel had insufficient time to prepare a defense means he was not convicted in the initial trial and cannot be held liable for attorney fees.

Appeal by defendant from order and judgment entered 14 June 2002 by Judge Michael E. Beale in Superior Court, Richmond County. Heard in the Court of Appeals 14 October 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Dale Talbert, for the State.

Osborn & Tyndall, P.L.L.C., by J. Kirk Osborn and Amos Granger Tyndall, for the defendant-appellant.

WYNN, Judge.

By this appeal, Defendant, Ronald Rogers, asks this Court to consider whether the trial court erred in entering a judgment against him for attorneys' fees arising out of ineffective representation. After careful review, we vacate the judgment for attorneys' fees.

After a jury trial, Defendant was convicted of first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into occupied property and was subsequently sentenced to death. On appeal, our Supreme Court determined Defendant's appointed counsel, Ira B. Pittman and Joseph G. Davis, III, had insufficient time to prepare for the defense of Defendant's criminal trial and therefore Defendant was entitled to a new trial. *See State v. Rogers*, 352 N.C. 119, 529 S.E.2d 671 (2000). On remand, the trial court appointed the same counsel to represent Defendant; however, Defendant chose to retain private counsel and

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eventually pled guilty to second-degree murder pursuant to a plea agreement.

After Defendant retained private counsel, the trial court entered a judgment against Defendant for his appointed counsels' attorneys' fees from 16 June 2000, the date of the Supreme Court opinion, through the date they withdrew as counsel. After Defendant entered his guilty plea, the trial court informed Defendant and his private counsel that it was "[taking] the issue of judgment for attorney fees from [the appointed counsels'] original appointment under advisement until a hearing at bar." On 14 June 2002, the trial court entered an order and judgment awarding Mr. Pittman, \$45,416.35, and Mr. Davis, \$35,611.10, as attorneys' fees. Defendant appeals.

Defendant contends N.C. Gen. Stat. § 7A-455(c) precludes an order for partial payment of attorneys' fees in this case. Under N.C. Gen. Stat. § 7A-455(c) (2001), "no order for partial payment under subsection (a) . . . or under subsection (b) . . . shall be entered unless the indigent person is convicted." Defendant argues the Supreme Court's reversal of his conviction due to presumed ineffective assistance of counsel means he was not convicted in the initial trial and cannot be held liable for attorneys' fees. We agree.

The defendant argues, and the State recognizes, that the universal practice of the general courts of justice is to not reduce to judgment the money value of legal services provided an indigent person convicted at trial when an appeal is taken that results in a reversal of the conviction. That practice is a reasonable interpretation of the language of N.C. Gen. Stat. § 7A-455(c). See *Barbour v. Scheidt*, 246 N.C. 169, 172, 97 S.E.2d 855, 858 (1957) (stating that "where a defendant appeals . . . it will not be deemed a final conviction unless the judgment of the trial court is upheld by the appellate court"); see also *State v. Alexander*, 76 N.C. 231, 233 (1877) (stating that if an appellate "court should decide there was error [in a trial] and direct a *venire de novo*, the conviction also would be annulled and the defendant stand as if there had been no trial").

In this case, our Supreme Court held Defendant was entitled to a new trial. Accordingly, Defendant cannot be held responsible for appointed counsels' attorneys' fees arising out of the first trial.

Vacated.

Judges TIMMONS-GOODSON and ELMORE concur.

CASES WITHOUT PUBLISHED OPINIONS

BRUGGEMAN v. MEDITRUST CO., LLC. No. 02-1613	New Hanover (98CVS2857)	Affirmed in part, dismissed in part
CARLTON v. COASTAL ENTERS., INC. No. 02-1701	Ind. Comm. (I.C. 988635)	Affirmed
GILREATH v. YELLOW CAB OF CHARLOTTE No. 02-1734	Ind. Comm. (I.C. 917389)	Dismissed
HARRIS v. BARBOUR THREADS, INC. No. 02-1282	Ind. Comm. (I.C. 948387)	Affirmed
HILLSMAN v. N.C. DEPT OF CRIME CONTROL & PUB. SAFETY No. 03-228	Ind. Comm. (TA-16279)	Dismissed
IN RE CARTER No. 03-731	Wayne (02J142)	Affirmed
IN RE DORLAC No. 02-1590	Randolph (01J148)	Affirmed
IN RE DULA No. 02-1314	Caldwell (98J71)	Affirmed
IN RE JONES No. 03-241	Johnston (01J145)	Affirmed
IN RE NEECE No. 03-10	Randolph (00J46)	Affirmed
McNAIR v. SUPERIOR CONSTR. CO. No. 03-188	Ind. Comm. (I.C. 248030)	Dismissed
MORVAN v. CITY OF CHARLOTTE No. 02-1343	Mecklenburg (02CVS6078)	Affirmed
STATE v. ALLEN No. 03-101	Lenoir (01CRS54982) (02CRS3002)	No error in part and vacated in part
STATE v. ALLEN No. 03-13	Person (01CRS5254)	No error
STATE v. BRODIE No. 02-1653	Wake (01CRS36793) (01CRS36795)	No error

STATE v. BROWN No. 03-96	Gaston (02CRS58368)	No error
STATE v. BRYANT No. 02-1618	Craven (00CRS51007) (01CRS3869)	No error
STATE v. BUMGARDNER No. 03-58	Gaston (02CRS56892) (02CRS56894)	Dismissed
STATE v. BURLESON No. 03-360	Avery (02CRS50316)	No error
STATE v. CLAGON No. 02-1627	Washington (01CRS836)	No error
STATE v. CLAYTON No. 02-1554	Catawba (02CRS5281) (02CRS5271)	No error
STATE v. DUQUESNE No. 03-207	Wake (02CRS49806) (02CRS49807) (02CRS49808) (02CRS49809)	No error
STATE v. FARRINGTON No. 03-398	Orange (00CRS55667)	No error
STATE v. FAYE No. 03-312	Wake (00CRS67638)	No error
STATE v. GARDNER No. 03-245	Pitt (01CRS7942) (01CRS7943) (01CRS7944) (02CRS4777) (02CRS5653) (02CRS53344) (02CRS53548) (02CRS53549)	No error
STATE v. GIST No. 03-134	Forsyth (00CRS58510)	No error
STATE v. HARMON No. 02-1743	Johnston (96CRS12315)	No error
STATE v. HARRISON No. 03-114	Union (01CRS51113)	No error
STATE v. HENDRIX No. 03-271	Wake (99CRS27102) (99CRS27103) (99CRS27104)	No error

STATE v. HOLBROOKS No. 03-251	Cabarrus (01CRS18172)	Affirmed
STATE v. HOLDEN No. 03-170	Wake (01CRS82942)	No error
STATE v. HOOD No. 02-1751	Buncombe) (01CRS51586)	No error
STATE v. JEFFERS No. 03-139	Guilford (99CRS30580)	No error
STATE v. JOHNSON No. 03-353	Davidson (00CRS55096) (00CRS55097) (00CRS55098)	Appeal dismissed
STATE v. KAGONYERA No. 03-643	Buncombe (98CRS12702) (00CRS51123) (00CRS63356) (00CRS63425) (00CRS65086)	No error
STATE v. KNIGHT No. 02-1331	Rowan (01CRS57186) (01CRS57187)	No error
STATE v. LINCOLN No. 03-288	Forsyth (02CRS51720)	No error
STATE v. MARLOW No. 03-216	Lenoir (01CRS52776)	No error
STATE v. MAXWELL No. 02-1718	Pitt (01CRS65727)	No error
STATE v. McCLEAVE No. 03-278	Mecklenburg (01CRS49382) (02CRS1960)	No error
STATE v. McDONALD No. 02-1732	Harnett (01CRS8025) (01CRS54035)	No error in part; reversed and re- manded in part
STATE v. McMILLIAN No. 02-1516	Lenoir (02CRS51170)	No error
STATE v. MITCHELL No. 02-1678	Forsyth (01CRS52994)	No error
STATE v. NIXON No. 03-156	New Hanover (01CRS24436) (01CRS28995)	No error

STATE v. O'LEARY No. 02-1033	Craven (98CRS14125) (01CRS7626)	Reversed
STATE v. PHELPS No. 02-1724	Washington (01CRS482)	No error
STATE v. PRITCHARD No. 03-82	Alamance (01CRS53203)	No error
STATE v. RORIE No. 02-1346	Union (01CRS4126) (01CRS4127)	No error
STATE v. RUPEL No. 03-67	Johnston (01CRS51376)	No error
STATE v. SALGERO No. 03-87	Pamlico (97CRS814) (97CRS842) (97CRS843) (97CRS855) (97CRS856)	No error; remanded for correction of a clerical error on the judgment
STATE v. SIMPSON No. 02-1519	Martin (00CRS2205) (01CRS1684) (01CRS2223) (02CRS1134)	No error
STATE v. SPENCER No. 03-138	Guilford (01CRS85982)	No error
STATE v. SPICER No. 03-287	Wilkes (00CRS838)	No error
STATE v. TOWNSEND No. 03-150	Pitt (98CRS27559) (98CRS52111) (98CRS52112) (98CRS52113)	No error
STATE v. VINCENT No. 02-1165	Orange (01CRS51216) (01CRS2111)	No error
STATE v. WALKER No. 03-143	Union (00CRS53080) (00CRS53081) (00CRS53082) (01CRS9983)	No error
STATE v. WELCH No. 03-30	Stokes (94CRS352)	No error at trial. Remanded for CYO benefit hearing

STATE v. WHITE
No. 02-1459

Pitt
(01CRS50406)
(01CRS50409)
(01CRS50412)
(01CRS50420)
(01CRS50421)
(01CRS50422)
(01CRS50423)
(01CRS50424)
(01CRS50425)

No error at trial.
Remanded for
correction of
clerical error

STATE v. WIGGINS
No. 03-408

Robeson
(02CRS10055)

Dismissed

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[161 N.C. App. 352 (2003)]

CHRISTINE JANICE UBERTACCIO, PLAINTIFF v. RICHARD UBERTACCIO, DEFENDANT

No. COA02-1531

(Filed 2 December 2003)

Divorce—equitable distribution—marital property—proceeds from sale of stock

The trial court did not err in an equitable distribution case by concluding plaintiff wife's stock and proceeds therefrom were divisible property and by requiring plaintiff to pay defendant husband fifty-five percent of the proceeds from the sale of 10,000 shares of stock she had received from her employer even though plaintiff was required to remain employed after the date of separation in order for the shares to vest.

Judge LEVINSON concurring in result only.

Judge WYNN dissenting.

Appeal by plaintiff from judgment entered 25 June 2002 by Judge Victoria Roemer in Forsyth County District Court. Heard in the Court of Appeals 9 September 2003.

C.R. "Skip" Long, Jr., for plaintiff-appellant.

Morrow Alexander Tash Kurtz & Porter, by John F. Morrow and Jon B. Kurtz, for defendant-appellee.

TYSON, Judge.

Christine Janice Ubertaccio ("plaintiff") appeals from an equitable distribution judgment filed 25 June 2002. The court required plaintiff to pay defendant fifty-five percent (55%) of the proceeds from the sale of stock she had received from her employer. We affirm.

I. Background

Plaintiff and defendant were married on 3 October 1981, separated on 29 January 2000, and divorced on 19 May 2001. The parties are the parents of two children. Plaintiff filed a complaint seeking equitable distribution of the marital and divisible property on 25 April 2000. Defendant filed an answer and counterclaim also seeking an equitable division of the marital and divisible property. The parties signed an equitable distribution pretrial order on 10 April 2001 and subsequently reached an agreement allocating many of the marital

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assets. The parties did not resolve the classification, valuation, and distribution of stock that plaintiff had received from her employer.

Prior to the parties' separation on 29 January 2000, plaintiff entered into an employment agreement on 10 December 1999, with ASA Corporation ("ASA"), a "spin-off division" from her former employer, Lucent Technologies, Inc. ("Lucent"). As part of the consideration of the employment agreement, plaintiff was eligible to receive 10,000 shares of ASA stock during the year 2000. She received 3,000 shares of ASA stock on 31 May 2000, and the remaining 7,000 shares on 18 July 2000. ASA's Stock Program Plan stated that the plan administrator "may" require employees to execute a covenant not to compete in order for an employee to receive greater than or equal to 8,000 shares. Plaintiff signed the covenant on 1 September 2000. Subsequently, AON Corporation ("AON") purchased ASA and plaintiff obtained 4,298 shares of AON stock in exchange for her ASA stock.

The tax basis of the ASA common stock at conversion was \$16,438.62. The fair market value of the AON stock at conversion was \$39.19 per share, or \$168,483.62. Plaintiff incurred tax liability in the year 2000 on the gain of \$152,000.00. AON withheld 1,954 shares for payment of taxes and issued a stock certificate for 2,344 shares on 2 November 2000. Shortly thereafter, plaintiff sold her 2,344 shares and received net proceeds of \$82,637.00.

The trial court's judgment: (1) found the entire net proceeds from the sale of stock to be divisible and, in the alternative, marital; (2) awarded defendant an unequal distribution of fifty-five percent (55%); and (3) required plaintiff to pay defendant fifty-five percent (55%) of the proceeds from the sale of the stock. Plaintiff appealed.

II. Issues

Plaintiff asserts the trial court erred by: (1) classifying the stock and proceeds received from the sale as divisible, and in the alternative, marital property; (2) failing to apply a coverture formula in valuing the stock for equitable distribution; and (3) failing to make sufficient findings of fact regarding employment, grant, vesting, and maturity dates, as well as the impact of the covenant not to compete.

III. Classification of the Stock

Plaintiff assigns error to the trial court's conclusion that the stock and proceeds therefrom were divisible property and, in the alternative, marital property. The trial court must classify, value, and

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distribute marital property and divisible property in equitable distribution actions. *Fountain v. Fountain*, 148 N.C. App. 329, 332, 559 S.E.2d 25, 29 (2002). Our statutes define “marital property” as “all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned. . . . Marital property includes all vested and nonvested pensions, retirement, and other deferred compensation rights.” N.C. Gen. Stat. § 50-20(b)(1) (2001).

“Divisible property” includes:

[a]ll property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

N.C. Gen. Stat. § 50-20(b)(4)(b) (2001).

“Separate property” is defined as “all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage.” N.C. Gen. Stat. § 50-20(b)(2) (2001).

The party claiming that property is marital has the burden of proving by a preponderance of the evidence that the property was acquired, by either or both spouses, during the marriage and before the date of separation, and is presently owned. *Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1992). Once this burden is met, “the burden shifts to the party claiming the property to be separate to show by a preponderance of the evidence that the property meets the definition of separate property.” *Id.*

Our Court has held that stock options are similar to retirement benefits:

stock options are a salary substitute or a deferred compensation benefit and if received during the marriage and before the date of separation and acquired as a result of the efforts of either spouse during the marriage and before the date of separation, stock options are properly classified as marital property, even if they cannot be exercised until a date after the parties divorce.

Fountain, 148 N.C. App. at 337, 559 S.E.2d at 32. Stock rights are properly classified as divisible property if acquired as a result of a spouse’s efforts during the marriage but not received until after the

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date of separation and before the date of distribution. *Id.* Stock rights are neither marital nor divisible if “received during the marriage before the date of distribution,” but “not in consideration for services rendered during the marriage and before the date of separation.” *Id.* at 338, 559 S.E.2d at 32.

Plaintiff argues that the stock rights were neither granted, vested, nor matured as of the date of separation. Pursuant to her employment agreement, plaintiff was required to successfully complete her evaluation period before she received stock on 31 May 2000, and 18 July 2000. Both dates occurred several months after the parties’ date of separation. ASA’s Stock Program Plan stated that “[t]he Plan Administrator may require the Participant to execute a Covenant Not To Compete in order to receive a grant . . . greater than or equal to 8000 Units.” (emphasis supplied). Plaintiff contends that her covenant not to compete indicates the shares were received after the marriage ended and not in consideration for services rendered during the marriage.

Defendant contends that plaintiff’s employment and stock were acquired as a result of plaintiff’s experience and efforts during the twenty-year marriage and before the date of separation. Plaintiff’s employment agreement, dated 10 December 1999, clearly states, “If you are still an employee in good standing with ASA, and assuming a January start date, you will be eligible to receive a stock grant in 2000 of 10,000 shares.”

Although plaintiff’s shares of stock did not vest until after the date of separation, her employment agreement, executed during the marriage, created her right to those shares. It is uncontested that plaintiff signed the employment agreement in December, 1999 and began working with ASA in January, 2000 while married to defendant and prior to the parties’ date of separation. Plaintiff’s entitlement to receive those shares of stock arose during the existence of the marriage and prior to the parties’ date of separation. She actually received and sold the stock prior to the date of distribution. Plaintiff failed to prove the stock should be classified as separate property. The trial court properly classified the stock, and the proceeds therefrom, as divisible and/or marital property. This assignment of error is overruled.

The dissenting opinion disagrees with the trial court’s classification of the stock as marital property. That opinion contends that plaintiff’s stock grant was conditioned: (1) on her remaining an

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employee in good standing at the end of her six-month evaluation period, and (2) upon signing a covenant not to compete. Plaintiff received the right to the stock in her employment agreement signed on 10 December 1999, during the marriage and before the date of separation. The employment agreement granting plaintiff's right to the stock required only two conditions: (1) plaintiff must begin work in January, and (2) plaintiff must remain an employee for six months. Her execution of the covenant not to compete was not a condition stated in plaintiff's employment agreement. ASA's Stock Program Plan provided that plaintiff's signing of a covenant not to compete was left to the discretion of the plan administrator. Plaintiff did not sign the covenant not to compete until *months after* she received over 8,000 shares. Our Court has held, and we are bound by precedent, "our equitable distribution statutes have been amended to define marital property to include vested and nonvested pensions. N.C. Gen. Stat. § 50-20(b)(1) (1999). Thus, a correct and current reading of our equitable distribution statutes is that marital property includes vested *and* nonvested stock options." *Fountain*, 148 N.C. App. at 337 n.12, 559 S.E.2d at 32 n.12 (emphasis supplied).

The dissenting opinion also disagrees with the trial court's classification of the stock as divisible property, stating that the "conditional stock options" were earned as a result of postseparation actions or activities. At the date of separation, the only "condition" remaining for the stock to vest and issue was plaintiff's continued employment with ASA. This is a normal and expected condition in deferred compensation and stock plans that vest in the future. Plaintiff's stock was not earned from postseparation activities other than continued employment. Plaintiff received the stock right in her employment agreement. The employment agreement and the commencement of plaintiff's employment both occurred while she was married to defendant and created a nonvested interest in the 10,000 shares of stock. These shares vested, were issued, and sold prior to the date of distribution. The trial court properly classified the stock options as divisible property. This assignment of error is overruled.

IV. Valuation of the Stock

Plaintiff also assigns error to the trial court's failure to apply a coverture formula when awarding defendant's share of the proceeds from the sale of the stock. North Carolina has not enacted or adopted any definitive approaches for valuing stock rights. N.C. Gen. Stat. § 50-21(b) (2001) requires marital property to be valued as of the date of the parties' separation and divisible property to be valued as

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of the date of distribution. We apply an abuse of discretion standard and will uphold the trial court's valuation if it "is a sound valuation method, based on competent evidence, and is consistent with section 50-21(b)." *Fountain*, 148 N.C. App. at 339, 559 S.E.2d at 33. When distributing deferred compensation benefits, our statutes require the award to be distributed

using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. *The award shall be based on the vested and nonvested accrued benefit*, as provided by the plan or fund, *calculated as of the date of separation*, and shall not include contributions, years of service, or compensation which may accrue after the date of separation.

N.C. Gen. Stat. § 50-20.1(d) (2001) (emphasis supplied). Although scant case law exists on this new statute, we recently held that the valuation method prescribed by this section is known as the "fixed percentage method." *Gilmore v. Garner*, 157 N.C. App. 664, 670, 580 S.E.2d 15, 20 (2003). When expressed as a fraction, the numerator is "the total period of time the marriage existed (up to the date of separation) simultaneously with the employment which earned the vested pension or retirement rights," with the denominator being "the total amount of time the employee spouse is employed in the job which earned the vested pension or retirement rights." *Id.* (citations omitted).

Plaintiff argues that defendant should receive only a portion of the 10,000 shares, and asserts she worked for ASA only twenty-nine days before separating from defendant. Defendant contends that all 10,000 shares of stock were marital or divisible property, despite the fact plaintiff was required to remain employed after the date of separation in order for the shares to vest. The trial court made specific findings of fact that the stock at issue was earned as a consequence of plaintiff's marital and preseparation activities:

- (10) The Court specifically finds that the AON Corporation stock and proceeds derived therefrom by the plaintiff in the year 2000 (after the date of separation, but before the date of distribution) was acquired as a result of the efforts of plaintiff during the marriage and before the date of separation, said efforts including, but not limited to, bonuses and contractual rights.

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Plaintiff acquired her right to the 10,000 shares by her employment agreement dated 10 December 1999, and began working in January, 2000, while married to defendant and prior to the date of separation. Plaintiff did not pay money for these shares. The employment agreement did not require her to sign a covenant not to compete in order to receive these shares. ASA's Stock Program Plan gave the plan administrator discretion whether to require employees to sign a covenant not to compete. Plaintiff's employment agreement with ASA does not recite that the stock grant will be proportional to her contribution or years of service with ASA. Her benefits did not "accrue" based on the amount of time she was employed with ASA. N.C. Gen. Stat. § 50-20.1(d) (2001). As long as she remained employed with ASA, she would receive 10,000 shares of stock.

Plaintiff was married, living with defendant, and had been employed by Lucent at the time she was offered and accepted employment with ASA. ASA was a "spin-off division" of Lucent. It was reasonable for the trial court to infer that plaintiff's employment with ASA resulted from experience she gained while employed with Lucent during their twenty-year marriage.

On the parties' date of separation, plaintiff owned a nonvested interest in 10,000 shares of ASA stock. Plaintiff's acquired benefit at the date of separation was the entire 10,000 shares of stock. On the date of distribution, these shares had vested, were issued, and had been liquidated. Valuation of the stock at the date of distribution was the converted value of the original 10,000 shares. The trial court's judgment distributed stock that had been issued and sold after all the contingencies had been satisfied. The trial court did not err in awarding defendant a portion of the 10,000 shares of stock since plaintiff acquired her interest in the stock during their marriage. This assignment of error is overruled.

V. Findings of Fact

Plaintiff argues the trial court made insufficient findings of fact, including the failure to make specific findings relating to the classification and valuation of the stock. Plaintiff contends the trial court is required to make more specific findings of fact regarding employment, grant, vesting, and maturity dates, as well as the impact of the covenant not to compete. Defendant contends the trial court's findings of fact sufficiently and clearly indicate the valuation of the stock was unaffected by any of plaintiff's activities after the parties separated.

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"The trial court's findings concerning valuation are binding on this Court if supported by competent evidence." *Fountain*, 148 N.C. App. at 338, 559 S.E.2d 32. Plaintiff presented exhibits, including her employment agreement with ASA and the stock agreements, along with other evidence and testimony. The trial court's judgment recites the dates necessary for the court to make its determination, as well as the evidence it relied upon to support its findings. The judgment also includes findings concerning the grant dates, the circumstances surrounding the substitution of ASA stock for AON stock, the date of separation, and the value of the stock. Substantial evidence supports the trial court's findings of fact.

The dissenting opinion asserts that the trial court made insufficient findings of fact and cites the case of *Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987). Although the issues were similar, we specifically recognized in *Fountain v. Fountain* that North Carolina's equitable distribution statutes were amended after *Hall* was decided. *Fountain*, 148 N.C. App. at 337 n.12, 559 S.E.2d at 32 n. 12 ("Since Hall . . . our equitable distribution statutes have been amended to define marital property to include vested and nonvested pensions."). The dissenting opinion's reliance on *Hall* is misplaced.

The trial court made sufficient findings of fact that are supported by substantial evidence to make a determination regarding the classification, valuation, and distribution of the stock. This assignment of error is overruled.

VI. Conclusion

The trial court properly classified the stock plaintiff received pursuant to her employment agreement as divisible and, in the alternative, marital property. The trial court did not err in valuing the stock and awarding defendant fifty-five percent (55%) of the proceeds from the sale of 10,000 shares of stock. The trial court made sufficient findings of fact relating to these classifications and valuations. The trial court's equitable distribution judgment is affirmed.

Affirmed.

Judge Levinson concurs in the result with a separate opinion.

Judge Wynn dissents in a separate opinion.

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LEVINSON, Judge concurring in result only.

I disagree with the application of equitable distribution principles in the other opinions. Plaintiff's central contention on appeal is that the trial court erroneously classified and/or distributed the "ASA stock options" and its proceeds. Contrary to this contention and the characterizations of my colleagues, the "stock grants" to plaintiff were not stock options, vested or nonvested.

At issue is the following recitation of plaintiff's employment benefits:

As an employee-owned company, we are pleased to offer ASA stock grants to our new employees. If you are still an employee in good standing with ASA, assuming a January start date, you will be eligible to receive a stock grant in 2000 of 10,000 shares.

Plaintiff's "stock grant" was with reference to the ASA Phantom Stock Program (hereinafter "Program") that outlined unique eligibility, terms, conditions and other features. Plaintiff executed two identical ASA Phantom Stock Program Agreements, which incorporated all the terms of the Program. Plaintiff received, contemporaneous with her employment engagement, the right to receive "units" of value which were part of a hybrid form of phantom stock program so long as she remained an employee for a specific duration. According to Section 6 of the Program, the units were

intended to represent the cash equivalent of one Share, although a Unit is not a legal security issued by ASA and, as such, confers no stockholder rights. In addition, no actual Shares shall be issued pursuant to the Plan or the individual Phantom Stock Agreements issued hereunder. The rights of Participants with respect to Units shall be limited to those rights which are specifically enumerated in the Plan and in the individual Phantom Stock Agreements issued to Participants hereunder, and such rights shall be, for all purposes, unsecured contractual creditor's rights against ASA only, having a parity with the right of all other general creditors of ASA.

Section 2(r) provided that each "[u]nit shall mean a contingent right, subject to all of the terms of the Plan and the applicable Phantom Stock Agreement, to receive an amount pursuant to Section 7 (less required withholdings)." Section 7(d) defined the compensation formula as follows: "Amount payable per Participant = (number of Participants' outstanding Units) multiplied by (the dividend per share

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declared by the Board)." "Share" is defined as "one (1) share of Common Stock[.]" Section 5 states, "[a]ll full-time and part-time . . . [e]mployees of the Company who are not eligible to participate in ASA's Stock Grant Program are eligible to receive a grant of Units. . . ." Section 9 describes circumstances under which the total number of units subject to the Program could be adjusted; such adjustments were dependant upon changes in the number of equity shares of common stock.

"A stock option is the right, or option, to buy a certain number of shares of corporate stock within a specified period for a fixed price." Clarence E. Horton, Jr., *Principles of Valuation in North Carolina Equitable Distribution Actions*, Institute of Government at the University of North Carolina at Chapel Hill, April 1993, Special Series No. 10 at 35.

According to *Harvard Business Review* author Brian J. Hall . . . executive stock options are "call options." They give the holder the right, but not the obligation, to purchase a company's shares at a specified price, called the "exercise" or "strike" price. Most often, the exercise price matches the stock price at the time of the grant; these options are granted "at the money." If an exercise price is higher than the stock price, it is granted "out of the money." It is a premium option. If an exercise price is lower than the stock price, it is granted "in the money." It is a discount option.

Equitable Distribution of Stock Options, 17 Equitable Distribution Journal 85 (Aug. 2000).

The trial court's equitable distribution order included the following:

(9) Prior to the separation of the parties on January 29, 2000, the Plaintiff had contracted to be employed by the ASA Corporation. As a part of the employment contract, plaintiff was entitled to receive 10,000 shares of ASA Corporation stock at the end of her probationary period. The ASA Corporation was a spinoff division of her former employer, Lucent Technologies, Inc. After the separation of the parties, the ASA Corporation was purchased by AON Corporation; and, as a result of said purchase, the plaintiff obtained the right to receive 4,298 shares of AON Corporation stock on October 2, 2000. The tax basis of the ASA common stock at the time of exchange was \$16,438.62. The fair market value of

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the AON stock was \$39.19 per share, or \$168,483.62. The plaintiff was therefore required to pay taxes in the year 2000 on the gain of \$152,000. The AON Corporation therefore withheld 1,954 shares for payment of the plaintiff's taxes and issued a stock certificate to the plaintiff for 2,344 shares. Therefore, the plaintiff was credited with having \$76,577.26 withheld by her employer to be applied to her 2000 federal income taxes. Shortly thereafter, the plaintiff sold her 2,344 shares and received \$82,637.00.

(10) The Court specifically finds that the AON Corporation stock and proceeds derived therefrom by the plaintiff in the year 2000 (after the date of separation, but before date of distribution) was acquired as a result of the efforts of plaintiff during the marriage and before the date of separation, said efforts including, but not limited to, bonuses and contractual rights. The Court makes the ultimate finding of fact that said AON Corporation stock and the proceeds derived therefrom by the plaintiff constitute divisible property pursuant to N.C.G.S. [§] 50-20(b)(4).

That the ASA Phantom Stock Program had features which mirror, in some ways, those attendant to stock options, does not make the these phantom "stock grants" into a form of stock options. In addition, the following facts do not make the "grant" of these units into stock options, vested or nonvested: (1) the "units" would not be issued until plaintiff completed the required employment duration; (2) a tax basis was ultimately utilized; (3) plaintiff ultimately received an AON Corporation common stock certificate representing 2,344 shares, each with a \$1.00 par stock value; (4) the AON corporation retained certain shares to satisfy tax obligations as a result of the grant; (5) Section 7 of the Program utilized the term "vest" and outlined "vesting" timelines; and (6) the cash payment to holders of units was tied to the dividends paid to ASA common stock shareholders. Moreover, essential characteristics of stock options—the right to purchase shares at a specific price during a specific duration with reference to a collateral price—are not a part of the interest at issue here. And there is nothing in the Program that references the "exercise" of anything.¹

1. The dissent suggests that because the assignments of error and the parties' briefs call the ASA units "stock options" that we should treat them as such on appeal. This, however, overlooks an obvious problem. The trial court judge did not find that the ASA grant consisted of "stock options." Moreover, it is not at all evident that the trial court was even presented with an argument that these were nonvested stock options such that *Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002), and/or the coverage formula in G.S. § 50-20.1 should apply. As an appellate court, our function is to

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Because there are no stock options in this case, this Court's opinion in *Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002), is not directly implicated.² In addition, the provisions of G.S. § 50-20.1 do not control the classification and distribution of these assets. Contrary to the implication of the decision in *Fountain*, I do not believe that all forms of "salary substitutes" or compensation, the receipt of which is deferred to some point in the future, must be classified and distributed in accordance with the provisions and limitations of G.S. § 50-20.1. See G.S. § 50-20.1(d) (awards pursuant to this statute must be determined using the "coverture fraction"); G.S. § 50-20.1(a) and (b) (limiting the method of distribution for awards made pursuant to this statute). Rather, the clear intent of that statute is to provide for the classification and distribution of only those "other forms of deferred compensation" that are in the nature of pension and retirement benefits. To interpret G.S. § 50-20.1 so broadly as to cover assets such as those at issue in this case would render G.S. § 50-20(b)(4)(b) meaningless.

Because the trial court in this case found that the proceeds from the stock grants were acquired as the result of the efforts of plaintiff during the marriage and before the date of separation, and that the proceeds were received by plaintiff before the date of distribution, the trial court correctly concluded that these assets fall within the plain language of the definition of divisible property set out in G.S. § 50-20(b)(4)(b).³

pass upon assignments of error made by the parties; assignments of error may only be made pursuant to rulings made by the trial court on the basis of the arguments made at trial. N.C. R. App. Proc. 10(b)(1). We must not, therefore, consider arguments which were not presented to the trial court for determination and which are argued for the first time on appeal. *Id.*

2. The lead opinion provides differing characterizations of the ASA units at issue. They are interchangeably described as "ASA common stock" (when there never was any grant of ASA common stock), "stock grants", and "stock options." Adding further confusion, in discussing this Court's holding in *Fountain*, the lead opinion replaces the term "stock options" as utilized in that case with "stock rights." In the present appeal, I emphasize that plaintiff's argument is that the ASA grant involved nonvested stock options and that, pursuant to *Fountain* and the coverage formula in G.S. § 50-20.1, the trial court erred. While the lead opinion's use of different terms suggests its reliance on *Fountain* is particularly suspect, I interpret its holding as resting, in large measure, on the treatment of the ASA units as nonvested stock options and erroneously applying and extending *Fountain*.

3. We cannot review the sufficiency of the evidence to support these findings because the record on appeal does not include a transcript. Therefore, we must accept the findings of the trial court as conclusive on the issue of whether and to what extent the stock grants and proceeds were earned as the result of the efforts of plaintiff during the marriage and before the date of separation.

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In summary, plaintiff's central contention on appeal, that the trial court committed legal error in classifying and/or distributing the "ASA stock options," is erroneous. Second, the trial court's findings of fact are unchallenged and therefore binding on this Court. In my view, the appellate record reveals the trial court judge complied with our equitable distribution statutes in all regards.⁴ I vote to affirm.

WYNN, Judge dissenting.

Preliminary, I point out that in nearly all of the approximately 1600 written opinions that this Court writes each year, each three-judge panel is remarkably able to fashion out a majority opinion in which at least two of the three judges agree. This case presents the rare situation where neither of the three judges on this panel agrees on the reasoning for resolving the issues before us. *But see State v. Alston*, — N.C. App.—, —S.E.2d — (filed 2 December 2003) (COA02-1612). Thus, there is no majority opinion in this case, only a majority agreement as to the result since Judge Levinson writes a second opinion concurring only in the result of Judge Tyson's opinion, and I dissent from both opinions. Accordingly, neither the first, second nor dissenting opinion carries any precedential value. To obtain a definitive opinion on the issues they present, the parties must now make an appeal to the Supreme Court of North Carolina, our State's en banc appellate court.

In this case, less than two months before the parties separated, ASA offered employment, by letter dated 10 December 1999, to Ms. Ubertaccio with a start date of 1 January 2000. Under that offer of employment, Ms. Ubertaccio *could* become eligible to receive a

4. The plaintiff has essentially framed the issue on appeal as whether, as a matter of law, nonvested stock options with contingencies require a District Court Judge to hold that the options are, at least in part, separate property earned as a result of nonmarital efforts. Alternatively, plaintiff asks this Court to hold that nonvested stock options are, as a matter of law, necessarily within the ambit of the coverture formula in G.S. § 50-20.1. Though reaching different results, the other opinions reveal a critical and common fallacy. In general, they have improperly replaced this Court's judgment with that of the District Court and not deferred to the trial court's evaluation of the relative importance of various evidentiary facts surrounding this asset. This is clearly erroneous, especially when one considers the infinite variety of "salary substitutes" that might be found to have no connection (or some) to marital efforts—or a wide variety of assets that may have more than one component—or any number of other assets our District Court Judges must classify and distribute. It cannot be, as the other opinions suggest, that necessarily, as a matter of law, an asset like that at issue in this case must be all marital or all divisible or all separate or must be a certain combination of these.

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10,000 share ASA stock grant⁵ in the year 2000 conditioned on (1) her remaining an employee in good standing at the end of her six-month evaluation period, and (2) upon signing a covenant not to compete (to receive in excess of 8,000 shares).⁶ For the twenty-nine days that Ms. Ubertaccio was employed by ASA before the parties separated on 29 January 2000, Judge Tyson concludes that the conditional stock agreement rendered the stock that she ultimately received upon completing those conditions after the parties separated, marital. On different grounds not presented by either of the parties⁷, Judge Levinson joins Judge Tyson in affirming the unequal award of \$45,100.00 (55%) to Mr. Ubertaccio out of the total stock proceeds of \$82,637.00. I dissent.

As stated in *Fountain v. Fountain*, 148 N.C. App. 329, 337, 559 S.E.2d 25, 32 (2002) (emphasis supplied),

“[S]tock options are a salary substitute or a deferred compensation benefit and *if received during the marriage and before the date of separation and acquired as a result of the efforts*

5. The concurring in the result opinion seeks to make a distinction between “stock grants” and “stock options.” However, under the language of the contract, at best, the company made a “conditional stock offer” to Plaintiff. That language states, “If you are still an employee in good standing with ASA, . . . then you will be eligible to receive a stock grant.” Surely, the contract language does not “grant” any stock to Plaintiff at the time of the signing. Likewise, I disagree with the first opinion’s use of the term “stock rights.” No rights were acquired until Plaintiff completed the conditions for receiving stock grants. Since the stocks were neither rights nor granted, I believe the term “stock options” more accurately reflect the conditional stock offer made to the Plaintiff under the terms of the employment contract.

6. My contention that Plaintiff’s stock rights were conditioned on (1) her remaining an employee in good standing at the end of her six-month evaluation period, and (2) upon signing a covenant not to compete, is supported by the record. The record on appeal contained the letter from ASA offering employment to Plaintiff which states, “Your first six months of employment will be considered an evaluation period.” and “If you are still an employee in good standing with ASA, and assuming a January start date, you will be eligible to receive a stock grant in 2000 of 10,000 shares.” Moreover, the covenant not to compete agreement states explicitly that the covenant was given in consideration of units of stock in excess of 8,000.

7. Neither the trial judge nor the parties to this appeal considered the concurring in the result opinion’s distinction between “stock options” and “stock grants” to be an issue in this matter. Indeed, plaintiff argues that the trial court erred by finding the stock options to be marital property. In response, defendant states in his brief, “The offer of employment by ASA to the Appellant, . . . is clear evidence that Appellant was in receipt of a nonvested interest in the stock options” Moreover, even assuming this was an “obvious issue”, our review does not permit this Court to comb the record and examine it for “obvious” issues. In any event, the contract makes it clear that the plaintiff did not receive “stock grants” at the time of her separation.

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of either spouse during the marriage and before the date of separation, stock options are properly classified as marital property, even if they cannot be exercised until a date after the parties divorce."

Thus, *Fountain* teaches that to be classified as marital, stock options must be (1) received during the marriage, (2) before the date of separation, and (3) acquired as a result of the efforts of either spouse during the marriage and before the date of separation. In short, I would not extend *Fountain* to allow a party to obtain the benefits of a conditional stock offer that are received after separation.

Indeed, the record shows that Plaintiff did not become contractually entitled to receive shares prior to separation. To the contrary, Plaintiff received only an opportunity to receive stock options if she fulfilled the conditions of employment. Before the date of separation, she had received no stock options; rather, the stock options in this case were not received until months after the date of separation when Ms. Ubertaccio completed her evaluation period. Moreover, Ms. Ubertaccio did not execute the Covenant Not to Compete until 1 September 2000, over eight months after the date of separation.⁸ Thus, in light of the fact that the shares of stock were not "received during the marriage and before the date of separation," under *Fountain*, the trial court erred by classifying the conditional stock options as classified as marital property.⁹

Furthermore, the fact that Ms. Ubertaccio continued to work for more than five months and executed a Covenant Not to Compete to obtain stock options, fits within N.C. Gen. Stat. § 50-20(b)(4)(a)'s definition of "post-separation actions or activities." Thus, the trial court erred in determining that the net proceeds of the stock rights were divisible.

Additionally, even assuming that the conditional stock options were properly classified as marital, the record shows that the stock options were acquired partially as a result of services rendered

8. The Covenant Not To Compete states: "In consideration of a grant in excess of 8,000 Units in the ASA Phantom Stock Program, the undersigned employee . . . shall not engage in any prohibited competitive activity." Thus, the agreement not to compete was not required by ASA; rather, it was executed in "consideration of a grant in excess of 8,000" units of stock.

9. The contract between Plaintiff and ASA states, "If you are still an employee in good standing with ASA . . . you will be eligible to receive a stock grant in 2000 of 10,000 shares." (Emphasis added). Obviously, before plaintiff completed the conditions of her employment, she had no "right to those shares."

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before the date of separation, and partially as a result of services rendered beyond the date of separation. Thus, the trial court erred in awarding Mr. Ubertaccio \$45,100.00 of the \$82,637.00 stock proceeds. *See* N.C. Gen. Stat. § 50-20.1(d).

Finally, the trial court failed to make sufficient findings of fact regarding the classification and valuation of the stock options. *See, Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987).¹⁰ Here, the trial made no findings regarding on the dates the stocks were granted, vested or matured. Moreover, no finding of fact was made regarding the effect of the Covenant Not to Compete.

I, therefore, respectfully dissent.

STATE OF NORTH CAROLINA v. WILLARD LAVELL ALSTON

No. COA02-1612

(Filed 2 December 2003)

1. Evidence— hearsay—synopsis of defendant's statement— recorded recollection

A detective's synopsis of defendant's statement was correctly excluded from an assault prosecution where there was no showing that defendant had the required insufficient recollection, that the statement was necessary to refresh the officer's memory, or that the statement was inconsistent with testimony. N.C.G.S. § 8C-1, Rule 803(5).

2. Evidence— defendant's statement—partial statement not used—whole not required

A detective's synopsis of a nontestifying defendant's statement was not required to be admitted as the whole of the part after a detective testified about the same subject matter. The officer's testimony was based on his personal observations and no part of defendant's statement was offered as evidence.

10. I agree that *Hall* was decided before the recent amendments to our equitable distribution statute. Nonetheless, neither the amendments to the statute nor *Fountain* abrogated its holding requiring sufficient findings of fact.

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3. Criminal Law— right to present defense—officer's statement excluded

A nontestifying defendant claiming self-defense was not deprived of the right to present his defense by the proper exclusion of a detective's synopsis of his statement to officers.

4. Homicide— self-defense—lack of evidence—involuntary manslaughter conviction

A defendant is not required to present evidence to be entitled to an instruction on self-defense, but the error in not instructing on self-defense in this voluntary manslaughter prosecution was not prejudicial because defendant was convicted of involuntary manslaughter, which does not involve intent and which is therefore not excused by self-defense.

5. Homicide— manslaughter—sufficiency of evidence

A motion to dismiss a voluntary manslaughter charge (with an involuntary manslaughter conviction) was properly denied where the evidence, in the light most favorable to the State, showed that defendant shot the victim in the back as he was running away and immediately left with no regard to the victim.

6. Criminal Law— verdict sheet and judgment correct—transcript incorrect

A trial transcript was not corrected where it erroneously showed a conviction for voluntary manslaughter rather than involuntary manslaughter, but the verdict sheet and judgment were correct. Those are considered the official record, and a clerical error in the trial transcript will not prejudice defendant.

Judge GEER concurring.

Judge HUNTER dissenting.

Appeal by defendant from judgment entered 4 September 2002 by Judge Clifton W. Everett, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 13 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Angela H. Brown for defendant-appellant.

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EAGLES, Chief Judge.

Defendant Willard Alston was convicted of involuntary manslaughter and sentenced to 25 to 30 months of incarceration. On appeal, defendant argues that the trial court erred by (1) failing to admit a police detective's synopsis of defendant's statement into evidence; (2) failing to instruct the jury on the law of self-defense; and (3) denying defendant's motion to dismiss. Defendant also requests that the trial transcript be corrected to reflect that he was convicted of involuntary manslaughter instead of voluntary manslaughter. After careful consideration of the transcript, record and briefs, we find no prejudicial error.

The evidence presented tends to show the following. Eric "E" Newton dated Muriel "Poo Poo" Horne for approximately three years before his death. Newton had been released from the IMPACT drug rehabilitation program in November 2000 and moved in with his grandfather and uncle. As a condition of his probation, Newton was confined to his home between the hours of 7 p.m. and 7 a.m. during the week and 3 p.m. until 9 a.m. on weekends.

Newton and Horne continued their romantic relationship after Newton returned from the IMPACT program in November 2000 until some time after Christmas 2000. Horne stated that the romantic relationship ended because Newton was violent towards her. Horne continued to see Newton several times each week even after they stopped dating. Horne habitually set her alarm clock for 8 a.m. because Newton normally came to visit her when his house arrest ended in the morning. Horne became romantically involved with defendant in January 2001.

On 10 February 2001, Newton invited Horne to his home to spend the evening. Newton called Horne on the telephone to ensure that Horne was coming to visit him. Horne told Newton during the phone call that she did not have a babysitter for her children and did not know if she would be able to visit him. On the evening of 10 February, Horne dropped off her children at their father's home and went out on a date with defendant. Horne received a message from Newton on her answering machine when she returned from her date with defendant. Newton did not identify himself in the message, but Horne recognized his voice. Newton asked in his message why Horne "lied so much" and sounded upset. On 10 February 2001, defendant stayed overnight at Horne's house.

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Shortly after 9 a.m. on 11 February 2001, Horne and defendant were awakened by Newton who was beating on Horne's front door. Horne had forgotten to set her alarm clock for 8 a.m. before she went to sleep the evening before. Horne got out of bed when she heard Newton hitting the door and put on some clothes. Horne told Newton that she had company and that Newton could not come in. Newton began kicking Horne's front door and knocked the door down. Newton saw defendant sitting on Horne's bed. Defendant was not dressed when Newton entered the house. Newton jumped on defendant and the two men began struggling on Horne's bed. Horne testified that she did not see either of the men holding a gun before they began fighting.

Horne backed away from the bedroom where defendant and Newton were fighting. Horne heard three shots fired in the bedroom. The men continued to struggle, then Newton ran out of Horne's house. Newton said something to Horne as he passed by her, but continued to run out of the house and did not stop. Horne did not know what Newton said to her. Horne did not see any blood on Newton or other evidence of an injury. Defendant got dressed and Horne drove him to a local convenience store. Horne commented that defendant had not been shot. As Horne and defendant left her house, Horne's neighbor, Marvin Rogers asked them if they shot Newton. Defendant replied that everything was alright.

Rogers testified that he was outside on the morning of 11 February walking his puppy. Rogers saw Newton knocking on Horne's door and heard her tell Newton he could not come in because she had company. Rogers observed Newton kick Horne's door down. Rogers heard yelling inside Horne's home, heard three shots and saw Newton run out of Horne's home. Rogers testified that when Newton emerged from Horne's house Newton was "drooped over." When defendant and Horne came out of Horne's house a few minutes later, Rogers asked them, "[y]all shoot that boy?" Defendant replied, "[h]e will be all right." Defendant put on his shirt and left with Horne in Horne's car. When Horne returned home a few minutes later, defendant was not with her. Horne asked Rogers to look for Newton because Newton's van was still parked outside her home. Rogers found Newton dead approximately three houses away from Rogers's home. Newton had gunshot wounds in his right arm and chest area. A medical expert testified that the chest wound was the most probable cause of death.

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Defendant's aunt gave Wilson police officers a handgun on the afternoon of 11 February 2001 and stated that it had been used in the shooting that morning. Later that evening, defendant turned himself in to police at his grandmother's house. Defendant was indicted for voluntary manslaughter. The jury convicted defendant of involuntary manslaughter. He was sentenced to a term of imprisonment from 25 to 30 months. Defendant appeals.

[1] Defendant first argues that the trial court violated defendant's right to present a defense. Specifically, defendant contends that the trial court's refusal to admit a synopsis of defendant's statement given to police officers was reversible error. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." G.S. § 8C-1, Rule 801(c) (2001). Here, defendant's statement regarding the confrontation with Newton given to Officer Hendricks outside of court was clearly hearsay. However, defendant argues that the statement to Hendricks falls within the recorded recollection exception to the hearsay rule, as described in G.S. § 8C-1, Rule 803(5):

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

G.S. § 8C-1, Rule 803(5) (2001).

Use of an earlier recorded statement or memorandum is also appropriate if necessary to refresh the witness's recollection or if the prior statement is used to impeach courtroom testimony that is inconsistent with the earlier statement. *See State v. Demery*, 113 N.C. App. 58, 437 S.E.2d 704 (1993). Here, however, there was no showing that defendant had an insufficient recollection of events to testify as required by Rule 803(5) so that his statement could be used as substantive evidence. In addition, there was no evidence or argument presented during trial that the proffered statement was necessary to refresh the testifying officer's memory or that the statement was inconsistent with the officer's testimony or any other witness's testimony in court. The synopsis of defendant's statement was not admis-

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sible to impeach or corroborate defendant's in-court testimony, because defendant did not testify.

[2] Defendant argues that the State may not admit part of defendant's statement without admitting the whole statement into evidence. *See State v. Davis*, 289 N.C. 500, 223 S.E.2d 296, *vacated on other grounds*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). However, in this case, the State did not offer any part of defendant's statement as evidence. The State's witness, Officer Hendricks, testified regarding the events and observations he made during his investigation. These observations necessarily concerned the same subject matter as the defendant's statement, but were based upon the officer's personal observations and therefore unrelated to the statement.

[3] Defendant contends that the trial court's refusal to admit the officer's synopsis of defendant's statement denied defendant's right to present a defense. This argument is unpersuasive. The trial court does not deprive a criminal defendant of the right to present a defense by requiring that defendant follow the North Carolina Rules of Evidence. Here, nothing in the record or transcript indicates that the trial court prevented defendant from testifying on his own behalf or offering other witnesses or evidence. This assignment of error is overruled.

[4] Defendant further assigns error to the trial court's failure to instruct the jury on the law of self-defense. Defendant argues that the trial court incorrectly reasoned that defendant was not entitled to the instruction because he had not presented evidence. Defendant contends that requiring a defendant to testify or otherwise present evidence before the jury may be instructed on self-defense violates a defendant's right to be free from compulsory self-incrimination. We agree that the reasons given by the trial court for refusing the instruction on self-defense were incorrect. However, in this case, the failure to give the self-defense instruction to the jury did not create prejudicial error.

A defendant does not have to testify or offer evidence in order for the jury to be instructed on the law of self-defense:

A defendant is entitled to an instruction on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm. If, however, there is no evidence from

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which the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to have the jury instructed on self-defense.

State v. Bush, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982) (internal citations omitted). Therefore, if defendant does not present evidence, but based upon the State's evidence, the jury reasonably could find that the defendant in fact reasonably believed it necessary to kill his adversary to protect himself from death, the jury instruction on self-defense should be given. Here, the trial court's reasoning that the self-defense instruction should not be given because defendant failed to present any evidence was erroneous.

However, defendant was not prejudiced by the trial court's error. North Carolina law defines four different types of homicide as follows:

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. . . .

Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury.

State v. Norris, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981) (citations omitted). Here, defendant was indicted for voluntary manslaughter. Voluntary manslaughter is considered an intentional crime in that the act that causes death required some degree of intent. *See State v. Ray*, 299 N.C. 151, 164, 261 S.E.2d 789, 797 (1980). Generally, a defendant may be convicted of voluntary manslaughter if (1) a killing occurs by reason of sudden anger or "heat of passion" that temporarily removes reason and malice or (2) a premeditated and deliberated first-degree murder or second-degree murder for which the defendant has an imperfect right to self-defense. *See Norris*, 303 N.C. at 529, 279 S.E.2d at 572. A defendant has the defense of perfect self-defense to voluntary manslaughter, first-

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degree murder or second-degree murder when all four of the following elements existed at the time of the killing:

- (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
- (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
- (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
- (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

Norris, 303 N.C. at 530, 279 S.E.2d at 572-73. If a defendant was the aggressor or used excessive force, the defendant would have the defense of imperfect self-defense. *Norris*, 303 N.C. at 530, 279 S.E.2d at 572-73. When a defendant is indicted for an intentional first or second-degree murder, after applying the imperfect right of self-defense, the defendant is still guilty of at least voluntary manslaughter. *Norris*, 303 N.C. at 530, 279 S.E.2d at 573. Our Supreme Court has held that self-defense instructions are not appropriate in all cases:

When asserted in response to a charge of intentional homicide such as second degree murder or voluntary manslaughter, a plea of self-defense is a plea of confession and avoidance. By it a defendant admits, for example, that he intentionally shot his assailant but that he did so justifiably to protect himself from death or great bodily harm.

Ray, 299 N.C. at 164, 261 S.E.2d at 797. The *Ray* court went on to explain that a self-defense instruction was appropriate when the defendant had been charged with second-degree murder or voluntary manslaughter, but was not appropriate for involuntary manslaughter. *See id.* Here, the trial court should have granted defendant's request for a jury instruction on the law of self-defense related to the charge of voluntary manslaughter. However, the absence of a self-defense instruction on the voluntary manslaughter charge did not prejudice defendant because he was not convicted of voluntary manslaughter.

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The trial court also instructed the jury on the lesser-included offense of involuntary manslaughter. The State presented evidence tending to show that defendant and Newton struggled in a bedroom with no other witnesses present in the bedroom. Horne testified that she did not observe that either of the men appeared to have a gun before they began fighting. Newton was wearing a coat when he entered Horne's house. Defendant was not wearing any clothes and in bed immediately before the struggle with Newton began. Horne also testified that she kept a gun in the bedroom where defendant and Newton struggled, but that she stored the gun behind the dresser. However, Horne's gun was still in place after the shooting occurred. Horne and Rogers both heard shots fired after the two men began struggling. Newton died from a gunshot wound, while defendant only suffered from scratches on his neck. From all the evidence, a reasonable juror could have concluded that Newton introduced a gun during the struggle with defendant and that defendant at some time handled that gun and shot Newton. Also, viewing all of this evidence, a jury could have reasonably concluded that defendant shot Newton in a criminally negligent or reckless manner during the struggle without forming the intent to assault or to kill Newton. However, self-defense, as an intentional act, could not serve as an excuse for the negligence or recklessness required for a conviction of involuntary manslaughter and no instruction on self-defense was required. Since defendant was convicted of the lesser-included offense of involuntary manslaughter, rather than the charged offense of voluntary manslaughter, the absence of an instruction on self-defense was not prejudicial error. This assignment of error is overruled.

[5] Defendant also assigns error to the trial court's denial of defendant's motion to dismiss at the close of all evidence. Defendant argues that the State failed to prove all elements of voluntary or involuntary manslaughter. Defendant contends that the evidence presented the complete defense of self-defense, which excused any crime committed by defendant. We disagree.

Upon a motion to dismiss, the trial court must view the evidence in the light most favorable to the State. *See State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). In this light, the evidence shows that defendant shot Newton in the back as he was running away from defendant. Defendant left the scene of the shooting immediately, with no regard for an injured Newton. The evidence in the light most favorable to the State does not give rise to a claim of self-defense for the voluntary manslaughter charge. Therefore, it was within the trial

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court's discretion to deny defendant's motion to dismiss. This assignment of error is overruled.

[6] Defendant's final argument is that the trial transcript must be corrected. The transcript incorrectly reflects that defendant was convicted of voluntary manslaughter, while the judgment and verdict sheet correctly indicate that defendant was convicted of involuntary manslaughter. Defendant argues that this discrepancy may cause some prejudice to defendant during his incarceration or in the future when defendant's prior record level is calculated. We disagree. The judgment and commitment sheet are considered the official record of defendant's conviction. The information on the judgment is used for calculating defendant's prior record level or period of incarceration. If the judgment and commitment sheet contains the correct information, as it does here, defendant will suffer no prejudice from any clerical error in the trial transcript. Defendant's request to amend the trial transcript is denied.

For the reasons stated, we find no prejudicial error.

No prejudicial error.

Judge GEER concurs in the result with a separate opinion.

Judge HUNTER dissents.

GEER, Judge, concurring in the result.

I agree with Chief Judge Eagles' opinion regarding the refusal to admit a synopsis of defendant's statement to the police and the trial court's denial of defendant's motion to dismiss. I concur in the result as to the remainder of the opinion. I believe that the record contains insufficient evidence to support submission of the issue of self-defense to the jury and that the trial court therefore properly refused defendant's request for an instruction on that defense. Although I would not reach the issue of the propriety of the involuntary manslaughter instruction, I cannot, in any event, agree with the dissent that submission of that issue constituted prejudicial error.

As our Supreme Court has held, "before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was

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that belief reasonable?" *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). If the evidence results "[in] a negative response to either question, a self-defense instruction should not be given." *Id.* at 161, 297 S.E.2d at 569. *See also State v. Lyons*, 340 N.C. 646, 662, 459 S.E.2d 770, 778 (1995) ("If there is no evidence from which a jury could reasonably find that defendant, in fact, believed it to be necessary to kill his adversary to protect himself from death or great bodily harm, defendant is not entitled to have the jury instructed on self-defense.").

I can find no evidence in the record that would permit a reasonable jury to find that defendant subjectively believed that he would be killed or would suffer great bodily harm if he did not kill the victim, Eric Newton. Given the limited evidence presented at trial, any such finding would be mere conjecture.

We know very little about what occurred during the fight between defendant and Newton. Newton kicked in Muriel Horne's door and dived on defendant, who was naked and sitting on Horne's bed. Horne testified that the two men then began "tussling." As the men were "tussling," Horne backed away from the bedroom and saw nothing further. There is no evidence as to what happened in the bedroom from that point on except that Horne and a neighbor heard three shots fired within minutes after Newton entered the house. Newton ran from the house and was later found dead outside. An autopsy revealed that Newton was shot in the back and through his arm.

After Newton left the house, defendant got partially dressed and Horne drove him to the store. As defendant and Horne were leaving, a neighbor asked whether they had shot Newton and defendant replied, "He will be all right." Defendant had two or three scratch marks on his upper chest, but no other injuries.

There was no evidence that Newton had a weapon at any point. Horne gave a statement, admitted as substantive evidence, that she saw defendant holding a gun, but at trial claimed that she did not see a gun.

Defendant chose not to testify. The record therefore contains no direct evidence whether defendant believed that he needed to kill Newton to protect himself from death or great bodily harm. I agree that a defendant is not required to testify in order to be entitled to an instruction as to self-defense. If, however, he does not testify, the record must still contain other evidence of his state of mind. In the

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absence of such other evidence, the trial court should not include an instruction on self-defense. *State v. Locklear*, 349 N.C. 118, 155, 505 S.E.2d 277, 298 (1998) (“Defendant offered no evidence that at the time of the shooting he believed, reasonably or unreasonably, that it was necessary to kill the victim in order to protect himself from imminent death or great bodily harm. Accordingly, the trial judge did not err by failing to instruct on self-defense.”), cert. denied, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999); *State v. Ross*, 338 N.C. 280, 283-84, 449 S.E.2d 556, 560 (1994) (“Defendant failed to present evidence to support a finding that he in fact formed a belief that it was necessary to kill the victim in order to protect himself from death or great bodily harm Therefore, the trial court did not err in failing to instruct on the State’s burden of proof with regard to self-defense.”).

In this case, in the absence of testimony by defendant as to his state of mind, there simply is not sufficient evidence to permit a jury to find that defendant had the required subjective belief. Newton was furious, but, based on the evidence, unarmed. The two men had a brief fight, with defendant being scratched two to three times. There is no evidence that Newton—who was 5 feet 9 inches tall and weighed 159 pounds—substantially exceeded defendant in size or had any other traits that made the fight a mismatch. While the evidence would support a finding that defendant feared being assaulted, that inference standing alone is not enough to warrant a self-defense instruction in a homicide case. It cannot circumstantially prove that defendant believed he needed to kill Newton or risk death or grave bodily harm.

In *Locklear*, the Supreme Court considered comparable evidence:

Defendant contends the evidence showed the following: that the victim was the aggressor; that defendant and the victim fought; that defendant bested the victim in the fight; that the victim then told defendant to wait, he would be right back; and that the victim then moved toward the shed, where he kept weapons.

349 N.C. at 154, 505 S.E.2d at 298. The Court found this level of evidence insufficient: “we conclude that the trial court did not err in refusing to give a jury instruction on self-defense.” *Id.* The evidence relied upon in this case is not materially different from that of *Locklear*. I am unwilling to hold, as would necessarily be the result here, that a heated fight between two unarmed men over a woman without more necessarily gives rise to a fear of death or grave bodily harm sufficient to justify use of deadly force.

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On appeal, defendant points to Horne's statement that she was afraid of Newton. Horne, however, explained that her fear was based on her prior experience with Newton and there was no evidence that defendant had knowledge of that experience. Nor was there any evidence that Horne and defendant were comparable physically. Without such evidence, Horne's subjective belief cannot substitute for and provide circumstantial evidence of defendant's personal belief.

Defendant argues that the requirement that he produce evidence of his actual state of mind requires him to incriminate himself in violation of the Fifth Amendment. As defendant did not raise this constitutional argument below, he is not allowed to assert it for the first time in this Court. I note, however, that other courts have rejected this argument. *See Williams v. Florida*, 399 U.S. 78, 84, 26 L. Ed. 2d 446, 451 (1970) ("That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination."); *Bowler v. United States*, 480 A.2d 678, 682 n.8 (D.C. App. 1984) (trial court's refusal to instruct on self-defense did not penalize defendant for exercising his Fifth Amendment privilege not to testify: "Under certain circumstances, such as those at bar where indirect evidence of self-defense is insufficient to support an instruction, that fact does not constitute a penalty upon the exercise of fifth amendment rights."); *State v. Kutnyak*, 211 Mont. 155, 173, 685 P.2d 901, 910 (1984) ("The fact that the appellant had to testify or else risk not sufficiently establishing self-defense does not, under these circumstances, create a constitutional denial of his privilege against self-incrimination."); *State v. Seliskar*, 35 Ohio St. 2d 95, 96, 298 N.E.2d 582, 583 (1973) ("If a defendant cannot provide evidence on the issue of self-defense other than his own testimony, then, in order to avail himself of the defense, he must testify. In such event, the choice is that of the defendant, and, once he has decided to rely on self-defense and is required by the circumstances to testify in order to prove that defense, he necessarily must waive his constitutional right to remain silent."); *Compare Williams v. State*, 915 P.2d 371, 377 (Okl. Cr. 1996) (defendant could not, consistent with the Fifth Amendment, be required to testify as a prerequisite to being allowed to present indirect evidence of self-defense such as by cross-examination of the State's witnesses).

The dissent argues that the trial court erred in submitting the issue of involuntary manslaughter to the jury. I do not believe that we should address that issue. Defendant's trial counsel expressed no

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concern about submission of involuntary manslaughter to the jury during the charge conference or after the trial court delivered its jury instructions. When the jury asked to have the instructions for voluntary and involuntary manslaughter re-read, defendant again did not object. The record on appeal contains a list of instructions that were omitted and that were “[e]rroneous[ly]” given; defendant lists only the flight instruction as an “Erroneous Instruction”. Defendant has not assigned error to the submission of involuntary manslaughter to the jury nor has either party briefed the issue. It appears that defendant made a strategic decision—reflected both at trial and on appeal—that it was advantageous to him to allow the jury to consider involuntary manslaughter. I do not believe that this Court should, under these circumstances, address the involuntary manslaughter issue.

In any event, *State v. Ray*, 299 N.C. 151, 152, 261 S.E.2d 789, 791 (1980), recognized the established rule that the erroneous submission of involuntary manslaughter justifies a new trial only upon a showing that the error prejudiced the defendant. In *Ray*, the Supreme Court found prejudice based on the possibility that the jury would have accepted defendant’s plea of self-defense had the trial court not erroneously instructed on involuntary manslaughter. Since I believe that the trial court properly refused to instruct as to self-defense, defendant was not prejudiced by the submission of involuntary manslaughter to the jury. *Id.* at 165-66, 261 S.E.2d at 798 (noting general rule that an erroneous charge on a lesser included offense is error favorable to the defendant when all of the evidence tends to support a greater offense).

HUNTER, Judge, dissenting.

I disagree with Chief Judge Eagles’ conclusion that failure to instruct the jury on the law of self-defense was harmless error in light of the jury’s verdict of guilty of involuntary manslaughter. Accordingly, I respectfully dissent.

State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980), relied on by Chief Judge Eagles, ultimately stands for the proposition that it is prejudicial error to submit the offense of involuntary manslaughter to the jury in a case where the evidence tends to point toward an intentional shooting and where there is a “reasonable possibility” that a jury would find the shooting was done in self-defense and the defendant would thus be acquitted. *Id.* at 164-65, 261 S.E.2d at 797-98. “[T]he crime of involuntary manslaughter involves the commission of an act,

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whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm." *Id.* at 158, 261 S.E.2d at 794. Therefore, it follows that an act undertaken in self-defense involving an intentional assault likely to result in death or bodily harm cannot be involuntary manslaughter. *See id.*

In this case, the trial court instructed the jury that to convict defendant of voluntary manslaughter they must find defendant "killed the victim by an intentional and unlawful act[.]" To convict defendant of involuntary manslaughter, the jury was instructed that they would have to find that defendant "acted in a criminally negligent way" and "this criminally negligent act proximately caused the victim's death." Clearly, the jury found that there was insufficient evidence to support a voluntary manslaughter conviction. Without, however, an instruction informing them that if they found that a killing may in some circumstances be justified, i.e., in self-defense, and result in acquittal, it is highly probable the jury believed they were required to find defendant guilty of at least some form of homicide. Thus, in this case as in *Ray*, the jury's consideration of self-defense, which would result in acquittal, was "short-circuited." *Id.* at 165, 261 S.E.2d at 798.

Furthermore, there is insufficient evidence to support the involuntary manslaughter conviction.¹ The only evidence in this case of an unintentional killing or one caused by criminal negligence is a lack of evidence of exactly what happened during the fight. This, however, simply leads to a myriad of possibilities as to how the victim was shot and ignores the lack of evidence of any act on the part of defendant that would rise to the level of criminal negligence.

Moreover, the actual evidence that is before us alternatively tends to show that, if anything, the shooting was an act *intended* to inflict bodily harm or death. This was not a case of a gun being discharged once as two people scuffled, instead the evidence is that the gun was fired three times and that the victim was shot twice and in two different places on his body: once in the arm and once in the

1. Judge Geer's separate concurring opinion indicates that the issue of whether it was proper to submit the charge of involuntary manslaughter to the jury is not properly before this Court. Defendant, however, moved to dismiss the involuntary manslaughter charge based upon insufficiency of the evidence and assigns as error and argues in his brief to this Court that there was insufficient evidence to support the submission of that charge to the jury. In my analysis, it is the insufficiency of the evidence to prove defendant actually committed the crime of involuntary manslaughter in combination with the failure to instruct the jury on self-defense that results in prejudicial error to defendant.

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chest. Further, the shooting occurred during a fight that started after the victim kicked in a door and attacked defendant. *See, e.g., State v. Maddox*, 159 N.C. App. 127, 132, 583 S.E.2d 601, 604 (2003) (“‘nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred’ ”). This is all evidence pointing toward a shooting intended to cause harm to the victim, possibly in self-defense, and thus, as in Ray, there is no evidence the shooting was anything other than intentional. *See Ray*, 299 N.C. at 164-65, 261 S.E.2d at 798. Therefore, as in Ray, there was insufficient evidence to support the submission of the charge of involuntary manslaughter to the jury. *See id.* at 168, 261 S.E.2d at 799. Accordingly, defendant’s involuntary manslaughter conviction should be reversed.

STATE OF NORTH CAROLINA v. EDDIE DARNELL BALDWIN

No. COA02-1594

(Filed 2 December 2003)

1. Search and Seizure— motion to suppress—drugs—anticipatory search warrant

The trial court did not err in a trafficking in cocaine by possession, trafficking in cocaine by transportation, conspiracy to traffic in cocaine, possession with intent to sell or deliver marijuana, and maintaining a dwelling for the purpose of keeping or selling controlled substances case by denying defendant’s motion to suppress evidence seized pursuant to an anticipatory search warrant, because: (1) although defendant contends findings of fact were required for denying the motion to suppress, there was no dispute regarding the events of the search or the items seized; and (2) the anticipatory search warrant met the three requirements of *State v. Smith*, 124 N.C. App. 565 (1996).

2. Evidence— SBI lab report—stipulation package contained cocaine—plain error analysis

The trial court did not commit plain error in a trafficking in cocaine by possession, trafficking in cocaine by transportation, conspiracy to traffic in cocaine, possession with intent to sell or deliver marijuana, and maintaining a dwelling for the purpose of

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keeping or selling controlled substances case by admitting the State Bureau of Investigation (SBI) lab report and other evidence regarding the nature of the substance in the pertinent package, because defendant's stipulation that the package contained cocaine meant any error in the admission of the evidence as to the nature of the substance in the package did not rise to the level of plain error.

3. Criminal Law— trial court's remarks to jury—verdict not coerced

The trial court did not coerce a verdict in a trafficking in cocaine by possession, trafficking in cocaine by transportation, conspiracy to traffic in cocaine, possession with intent to sell or deliver marijuana, and maintaining a dwelling for the purpose of keeping or selling controlled substances case by its remarks to the jury at the beginning of the court week that allegedly intimated to the jurors that they would be held indefinitely without food until they reached a verdict, because: (1) the trial court's remarks, although ill-advised, were made to the venire as a whole a full two days prior to the jurors' deliberations in defendant's case; (2) the judge gave no indication that he expected the jury to stay until they reached a verdict, he did not mention that the court system would be burdened if they had to retry the case or that he would be irritated with the jury if they could not reach a verdict; (3) there was no suggestion by the trial court during the trial that the jurors would be required to continue their deliberations without food or an evening recess until they reached a verdict and the jurors made no request to recess the deliberations; and (4) defendant has not shown that absent the trial court's remarks, the jury would likely have reached a different verdict.

4. Drugs— trafficking in cocaine by possession—trafficking in cocaine by transportation—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine by possession and trafficking in cocaine by transportation, because: (1) an inference of defendant's knowledge of the presence of cocaine in the pertinent package can be drawn from his capability and intent to control the package by taking it inside his residence, placing it in a car, and then moving it to another car; and (2) surveillance equipment, guns, and plastic bags containing traces of cocaine were found in the residence.

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5. Drugs— possession of marijuana with intent to sell or deliver—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of marijuana with intent to sell or deliver, because: (1) the marijuana, along with surveillance equipment and other drug paraphernalia, was found in a common area of a house that was listed on defendant's driver's license and car registration as his home address; (2) defendant received mail at this address; and (3) although defendant shared the house with at least one other individual, a reasonable inference may be drawn that defendant had the power to control the use and disposition of the substance since it was located in a common area of the residence.

6. Drugs— conspiracy to traffic in cocaine—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to traffic in cocaine, because: (1) defendant admitted to living with another person and also admitted the house had surveillance equipment in place; and (2) defendant signed for the package that contained cocaine, placed it in his car, and then moved it to another car which was subsequently driven away by his roommate.

7. Drugs— maintaining dwelling for purpose of keeping or selling controlled substances—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling controlled substances because despite the fact that occupancy was the only factor shown by the evidence in this case, evidence that defendant received mail at the address for approximately one year, the fact that his driver's license showed the address as his home address, and that his car was registered at the address showed more than temporary occupancy.

8. Drugs— maintaining dwelling for purpose of keeping or selling controlled substances—misdemeanor

The judgment against defendant for maintaining a dwelling for the purpose of keeping or selling controlled substances is remanded to correctly reflect the offense as a misdemeanor.

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Appeal by defendant from judgment entered 15 May 2002 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 16 September 2003.

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

Jeffrey Evan Noecker for defendant appellant.

MARTIN, Judge.

Eddie Darnell Baldwin appeals from judgments entered upon his conviction by a jury of trafficking in cocaine by possession, trafficking in cocaine by transportation, conspiracy to traffick in cocaine, possession with intent to sell or deliver marijuana, and maintaining a dwelling for the purpose of keeping or selling controlled substances.

The evidence at trial tended to show that in July 2001, United States Postal Inspector Charles Thompson was notified by his counterpart in Phoenix, Arizona that a suspect package was being sent through the mail to 1233 Union Grove Church Road, Freemont, North Carolina. After Thompson intercepted the package in Raleigh, drug dogs picked the suspect package out of a line-up with other packages. Once Thompson obtained a federal search warrant to seize and open the package, he found three bricks of cocaine, potpourri, air fresheners and newspapers inside. Although Thompson was not qualified as an expert in chemical or scientific testing, he performed a field test on the substance in the package and determined it was cocaine.

Thompson then contacted law enforcement officers in Wayne County to develop a controlled delivery plan for the package. The package was resealed with an electronic monitoring device inserted inside to alert officers if and when the package was opened. Sergeant Daniel Peters of the Goldsboro Wayne County Drug Squad obtained an anticipatory search warrant of the delivery address. The pertinent part of the warrant stated:

Once the package has been deliver [sic] and accepted by the occupants of the address the search warrant will be served to search for the package and the participants of the crime. This warrant is anticipatory and bases [sic] on the delivery of the Express Mail Package, if for any reason the package is not delivered or is rejected by the occupants of the residence the warrant will not be served.

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After other law enforcement officers were stationed around the house to assist, Thompson approached the house with the package addressed to Sean Smith. A black male came out of the house as Thompson approached and indicated, when asked, that he was Sean Smith. The man took the package and went back inside the house. At trial, Thompson identified the man as defendant, Eddie Baldwin.

Within a few minutes of his receipt of the package, Baldwin came out of the house with the package, placed it in the trunk of a Pontiac Bonneville that was parked in the yard and then returned to the house. About an hour later, defendant again came out of the house, removed the package from the Pontiac and placed it in the back seat of a Toyota Camry, also parked in the yard. Another black male came out of the house and got into the driver's seat of the Toyota. Although there was still no indication from the monitoring device that the package had been opened, officers approached the car. As they approached, the driver took off in the Toyota across a soybean field and wrecked into a ditch. The driver ran into the woods and was never found, but officers were able to retrieve the unopened package from the Toyota.

While officers were in pursuit of the driver of the Toyota, two other officers approached the house and demanded that all occupants come out. After the defendant came out of the house and was placed under arrest, one officer searched the house to make certain there was no one else inside. Other officers then entered and conducted a thorough search of the house, seizing plastic bags with white powder, guns, marijuana, surveillance equipment, and mail.

I.

[1] Defendant argues the trial court erred in denying his motion to suppress evidence seized pursuant to the anticipatory search warrant. First, defendant contends the trial court failed to state any findings of fact in its order denying the motion to suppress. Although the general rule is that the trial court must make findings of fact and conclusions of law after hearing a motion to suppress, findings are not required if there is no material conflict in the evidence at the suppression hearing. *State v. Parks*, 77 N.C. App. 778, 781, 336 S.E.2d 424, 426 (1985), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 904 (1986). In the present case, there was no dispute regarding the events of the search or the items seized. Because the conflict was in the interpretation of the scope of the search war-

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rant and not a conflict in the evidence, the trial court was not required to make findings of fact.

Defendant also contends that the motion to suppress should not have been denied because at the time of the search, the package was not present in the house and, therefore, the search exceeded the scope of the warrant executed. An anticipatory search warrant, by definition, is "not based on present probable cause, but on the expectancy that, at some point in the future probable cause will exist." *State v. Smith*, 124 N.C. App. 565, 571, 478 S.E.2d 237, 241 (1996). In order to eliminate the opportunity for government agents to use their own discretion, the court in *Smith* established three requirements that must be observed before a search is executed pursuant to an anticipatory search warrant:

- (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.

Id. at 577, 478 S.E.2d at 245. In *Smith*, the Court opined that once the anticipatory search warrant met these three requirements, the nexus between "the criminal act, the evidence to be seized and the identity of the place to be searched" was assured. *Id.* When a warrant is executed after the triggering event occurs, probable cause has been established. *State v. Phillips*, 160 N.C. App. 549, 586 S.E.2d 540 (2003). Once there is probable cause that a crime has been committed and the evidence of that crime likely will be found during the search, the object of the search warrant does not need to be present. *Smith*, 124 N.C. App. at 571, 478 S.E.2d at 241; see *U.S. v. Becerra*, 97 F.3d 669 (2nd Cir. 1996) (holding an anticipatory search warrant, whose triggering event is the delivery of a package, is not invalidated because the package is taken off the premises).

Defendant concedes that the anticipatory search warrant met the first two prongs of the requirement. The warrant clearly established explicit triggering events on its face which were definable and preordained. Although defendant argues that the State did not meet the requirements of *Smith* since the package was no longer in the house when the search occurred, the third prong of *Smith* requires only

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that the package arrive at the location specified on the warrant. It is undisputed that the package was delivered, accepted, and taken into the house by the defendant; therefore the third prong of *Smith* was met. Since the anticipatory search warrant met the three requirements of *Smith*, once the package arrived, the nexus between the package and the residence was established. Even though the package was no longer on the premises, delivery of the package linked the house to criminal activity inside, giving rise to probable cause for the search. In addition, since the warrant specifically allowed the officers to search the premises of 1233 Union Grove Church Road to find and seize cocaine generally and to identify the participants of the crime, the officers' thorough search of the premises was within the scope of the warrant. Therefore, we hold the trial court correctly denied defendant's motion to suppress evidence seized pursuant to the anticipatory search warrant.

II.

[2] Defendant next contends the trial court committed plain error in admitting the State Bureau of Investigation (SBI) lab report and other evidence regarding the nature of the substance in the package. Plain error 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.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

N.C. Gen. Stat. § 90-95(g) (2001) provides that an SBI laboratory report is admissible in a criminal proceeding without further authentication as evidence of the nature, quality, and amount of the substance analyzed if (1) the State notifies the defendant of its intent to admit the report into evidence at least 15 days prior to trial and provides a copy of the report to the defendant, and (2) the defendant fails to notify the State at least five days before trial that he objects to the introduction of the report into evidence. The record in the present case is unclear as to whether the State notified defendant, as required, of its intent to admit the report. There is reference in the transcript, albeit vague, that the State filed a Notice of Intention to Introduce Evidence at Trial on 9 November 2001, well in advance of the May 2002 trial, but that reference does not indicate what evidence the State intended to introduce at trial. Defendant contends that had the nature of the substance not been improperly admitted, the jury's verdict as to trafficking in cocaine by possession would have

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been different. However, during the trial, the defendant stipulated that "the cocaine is the cocaine, that it weighs what it weighs." Having stipulated that the package contained cocaine, any error in the admission of the evidence as to the nature of the substance contained in the package cannot rise to the level of plain error.

III.

[3] Defendant also assigns error to certain remarks made by the trial court to the jury, contending such remarks had the effect of coercing a verdict. Because defendant failed to object at trial he has waived review of this assignment of error unless it is found to be plain error. N.C.R. App. P. 10(b)(2). "A plain error is one 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.'" *State v. Fowler*, 157 N.C. App. 564, 566, 579 S.E.2d 499, 501 (2003) (citation omitted). Moreover, plain error has been applied only to jury instructions and questions involving the admission of evidence. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), cert. denied, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003).

In order to determine if a trial court's conduct is coercive, this Court must consider, looking at the totality of the circumstances, the following factors: whether the court suggested to the jury that they would be held until they reached a verdict, whether the jury believed the court was irritated with them for not reaching a verdict, and whether the court told the jury it would be burdensome to retry the case if they did not reach a verdict. *State v. Beaver*, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988).

In the trial court's initial remarks to the prospective jurors on the first day of the court session, he explained generally the schedule he would follow for the week. His remarks included the following statement:

[T]here's typically one exception to my five o'clock rule, and that is if you're out deliberating on a case you'll deliberate, and deliberate, and deliberate, until you finish. You decide that. It won't end at five o'clock. And we'll stay here until you finish. Now I had a jury in Charlotte once that they were deliberating about a quarter to nine p.m. and they sent a message out saying that can we go get pizza? And I sent a message back in, yes, as soon as you finish deliberating. So it will be that way. Now obviously I won't send you out at a quarter to five on a case, we'll try to manage the

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time better, but when you go out to make a decision I'll keep you out there until you make your decision so there won't be any constraints, time constraints on you as far as the court is concerned, but I don't want you to think that okay, it's getting five o'clock, we can't decide today, we'll come back tomorrow, it's not going to work that way either.

The judge continued with other explanation concerning the trial process. At the conclusion of his remarks, the jurors were excused until the afternoon while the court considered preliminary matters relating to the case. A jury was selected for defendant's trial on Monday afternoon, 13 May 2002; the trial began and lasted for approximately two days. After a lunch recess from approximately 12:30 p.m. until approximately 2:00 p.m. on Wednesday, 15 May 2002, the jury received the case and retired to deliberate at approximately 4:00 p.m. The jury reached a verdict shortly after 7:00 p.m. Defendant argues that the trial court's remarks at the beginning of the court week, coupled with the timing of the jury deliberations, intimated to the jurors that they would be held indefinitely without food until it reached a verdict.

The trial court's remarks were made to the entire jury pool in explanation of the schedule the jurors could expect to follow during the week. Without reaching the question whether the plain error doctrine applies to these remarks, under the circumstances of this case we do not believe the trial court's remarks, ill-advised though they may have been, afford defendant a new trial. The remarks were made to the venire as a whole a full two days prior to the jurors' deliberations in defendant's case. Moreover, at the end of court on Tuesday, the trial court informed the jurors, "I anticipate that you may get this case sometime tomorrow, and then you'll have all the time you feel like you need to make a decision so don't rush to judgment . . ." On Wednesday afternoon, during jury instructions, the judge gave no indication that he expected the jury to stay until they reached a verdict, he did not mention that the court system would be burdened if they had to retry the case or that he would be irritated with the jury if they could not reach a verdict. During their deliberations, the jurors requested, shortly after 6:00 p.m., to review certain evidence; in responding to that request, there was no suggestion by the trial court that they would be required to continue their deliberations without food or an evening recess until they reached a verdict and the jurors made no request to recess the deliberations. Finally, defendant has not shown that absent the trial court's remarks, the

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jury would likely have reached a different verdict. This assignment of error is overruled.

IV.

[4] Next, defendant argues the trial court erred in denying his motion to dismiss. In determining whether to grant a motion to dismiss, the court must determine, in the light most favorable to the State, if there is substantial evidence of each essential element of the offense charged. *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (citation omitted). The evidence can be direct or circumstantial, but must give rise to a reasonable inference of guilt in order to withstand the motion to dismiss. *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

Trafficking in cocaine by possession and trafficking in cocaine by transportation, in violation of N.C. Gen. Stat. § 90-95(h)(3) (2001), require the State to prove that the substance was knowingly possessed and transported. *State v. Munoz*, 141 N.C. App. 675, 684, 541 S.E.2d 218, 224, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001). Possession can be actual or constructive. *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985). When the defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession. *State v. Butler*, 356 N.C. 141, 146, 567 S.E.2d 137, 140 (2002).

Defendant asserts the State failed to prove he knew there was cocaine in the package. Although the package was addressed to someone else, defendant identified himself as the addressee and signed for the package using the name of the addressee. An inference of defendant’s knowledge of the presence of the cocaine can be drawn from his capability and intent to control the package by taking it inside, placing it in the Pontiac and then moving it to the Toyota. In addition, surveillance equipment, guns, and plastic bags containing traces of cocaine were found in the residence. Considering the sum of the evidence in the light most favorable to the State, we conclude there was sufficient evidence from which a jury could reasonably infer that the defendant knowingly possessed cocaine.

[5] Defendant also asserts that there was not substantial evidence to support his conviction for possession of marijuana with intent to sell

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or deliver. Under N.C. Gen. Stat. § 90-95(a), the State is required to prove two elements: (1) the defendant possessed marijuana and (2) he intended to sell or deliver it. *State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985). "Although it is not necessary to show that an accused has exclusive possession of the premises where contraband is found, where possession of the premises is nonexclusive, constructive possession of the contraband materials may not be inferred without other incriminating evidence." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 588-89 (1984). However, the presence of material normally used for the packaging of narcotics gives rise to an inference of an intent to sell or deliver. *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974).

In this case, the marijuana, along with surveillance equipment and other drug paraphernalia, was found in a common area of a house that was listed on defendant's driver's license and car registration as his home address. He also received mail at the address. Although the evidence tends to show that defendant shared the house with at least one other individual, considering the totality of the circumstances, a reasonable inference may be drawn that defendant had the power to control the use and disposition of the substance since it was located in a common area of his residence. Therefore, sufficient evidence of constructive possession was presented.

Defendant relies on *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265, *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977), where this Court found that the possession of 215.5 grams of marijuana, without more, was insufficient to raise an inference of intent to distribute. Here, however, police found 414.5 grams of marijuana, almost double the amount found in *Wiggins* and more than a normal amount for individual use. In addition, police found surveillance equipment, guns, and a bag with what appeared to be a cutting agent for cocaine, items that are normally used by those who deal in illicit drugs. Based on the evidence presented, we hold there was sufficient evidence as to each element of the crime to overcome defendant's motion to dismiss the charge of possession of marijuana with intent to sell and deliver.

[6] Defendant further argues the State did not present substantial evidence of a conspiracy. A conspiracy is an agreement between two or more people to commit an unlawful act or to do a lawful act in an unlawful manner. *State v. Massey*, 76 N.C. App. 660, 661-62, 334 S.E.2d 71, 72 (1985). Proof of an express agreement is not required;

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evidence showing a “mutual, implied understanding will suffice to withstand defendant’s motion to dismiss.” *State v. Worthington*, 84 N.C. App. 150, 162, 352 S.E.2d 695, 703, *disc. review denied*, 319 N.C. 677, 356 S.E.2d 785 (1987).

During his testimony, defendant admitted to living with another person, Ismail Sabur, and also admitted the house had surveillance equipment in place. Defendant signed for the package that contained cocaine, placed it in his car, then moved it to another car which was subsequently driven away by Sabur. From this evidence, a jury could infer an agreement between Sabur and defendant.

[7] Defendant also maintains there was not sufficient evidence to prove he violated N.C. Gen. Stat. § 90-108(a)(7) by knowingly keeping or maintaining a dwelling house for the purpose of keeping or selling a controlled substance. Factors which may be taken into consideration in determining whether a person keeps or maintains a dwelling include ownership of the property, occupancy of the property, repairs to the property, payment of utilities, payment of repairs, and payment of rent. *State v. Frazier*, 142 N.C. App. 361, 365, 542 S.E.2d 682, 686 (2001). Since none of the factors is dispositive, the determination will depend on the totality of the circumstances. *Id.*

Despite the fact that occupancy was the only factor shown by the evidence in this case, the defendant received mail at the address for approximately one year, his driver’s license showed the address as his home address, and his car was registered at the address. Taken together, this evidence shows more than temporary occupancy and points instead to defendant’s maintaining the house. This assignment of error is overruled.

V.

[8] Finally, the defendant argues the trial court erred in entering judgment against the defendant for the felony of maintaining a dwelling although the jury returned a verdict of guilty of knowingly maintaining a dwelling, a Class I misdemeanor. N.C. Gen. Stat. § 90-108(a)(7) (2001). Although the judgment form referenced the correct statute, it incorrectly referenced the charge as a felony. The judgment must be corrected to reflect the offense as a misdemeanor.

Defendant’s remaining assignments of error were not brought forward in the brief and are therefore deemed abandoned. N.C. R. App. P. 28(a).

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No error in trial; remanded for correction of judgment.

Judges BRYANT and GEER concur.

JAMES AND MAE GOODRICH, PARENTS, CONSTANCE C. GOODRICH, WIFE, DANIELLE ROHDE, ANDREW HANNER AND ALLEN HANNER, MINOR STEPCHILDREN, BY THEIR GUARDIAN AD LITEM GALE EDWARDS, OF DOUGLAS A. GOODRICH, DECEASED, EMPLOYEE, PLAINTIFFS v. R.L. DRESSER, INC., EMPLOYER, KEY RISK INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA02-1584

(Filed 2 December 2003)

1. Workers' Compensation— death benefits—stepchildren—substantial dependency

The Industrial Commission did not err in a workers' compensation case by awarding decedent employee's death benefits to his three stepchildren under N.C.G.S. § 97-39 because as compared to all other sources of income, all three minor stepchildren were substantially dependent on decedent's contributions to the household at the time of his death.

2. Workers' Compensation— death benefits—estranged wife

The Industrial Commission erred in a workers' compensation case by failing to award decedent employee's death benefits to his estranged wife under N.C.G.S. § 97-39, because: (1) the wife can qualify as a widow if she is actually dependent on decedent whether or not she was living with him; (2) decedent provided the great majority of financial support to the household of his estranged wife and her children even after their separation; and (3) the Commission's findings indicate that all members of decedent's household were dependent on decedent's income for support.

Appeal by plaintiffs and defendants from opinion and award entered 27 June 2002 by the Industrial Commission. Heard in the Court of Appeals 10 September 2003.

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Michael A. Ellis, for plaintiff-appellant Constance C. Goodrich.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Justin D. Robertson and Hedrick & Morton, L.L.P., by Jerry L. Wilkins, Jr., for plaintiff-appellants James and Mae Goodrich.

Whitley, Jenkins & Riddle, by J. Christopher Brantley and Gene A. Riddle, for plaintiff-appellees Danielle Rohde, Andrew Hanner and Allen Hanner.

Lewis & Roberts, P.L.L.C., by Richard M. Lewis and Jeffery A. Misenheimer, for defendant-appellants.

HUDSON, Judge.

Plaintiffs James and Mae Goodrich, plaintiff Constance C. Goodrich and defendants R. L. Dresser, Inc., and Key Risk Insurance Co., appeal an opinion and award entered 27 June 2002 by the North Carolina Industrial Commission that awarded death benefits to the minor stepchildren of decedent-employee Douglas A. Goodrich and denied any benefits to decedent's widow or his parents. For the reasons discussed below, we remand to the Full Commission for additional findings and conclusions, and revision of the award.

BACKGROUND

Douglas A. Goodrich ("decedent"), an employee of defendant R. L. Dresser, Inc., suffered an admittedly compensable injury arising out of his employment, resulting in his death on 9 November 1999. At the time of his death, decedent was married to Constance C. Goodrich ("Ms. Goodrich"), and was the step-father of Ms. Goodrich's three biological children from previous marriages, Danielle Rohde, Andrew Hanner and Allen Hanner ("the step-children"). James and Mae Goodrich ("the parents") were the decedent's parents. Ms. Goodrich and the step-children were living apart from decedent at the time of his death, and decedent had filed for divorce from Ms. Goodrich a few days before his death. These plaintiffs disagreed over which of them were entitled to the death benefits.

Deputy Commissioner Morgan S. Chapman heard the case 2 November 2000. Defendant-employer did not contest causation or compensability. Rather, the issue in this "dependency" hearing was to whom benefits would be paid. Decedent's parents claimed the benefits as next of kin, asserting that Ms. Goodrich did not qualify as a "widow" under N.C. Gen Stat. § 97-39, and that the stepchildren

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were not "children" because they were not substantially dependent on decedent, as required by N.C. Gen. Stat. § 97-38. Deputy Commissioner Chapman issued an opinion and award 22 March 2001 in which she found that neither the wife nor the stepchildren were dependent on decedent for support. Finding no persons wholly or partially dependent on decedent, the deputy commissioner awarded the benefits to decedent's parents as next-of-kin, under N.C. Gen. Stat. § 97-38. Ms. Goodrich and the stepchildren gave notice of appeal to the Full Commission.

In an opinion and award filed 27 June 2002, the Full Commission affirmed the opinion and award denying benefits to Ms. Goodrich, but reversed as to the step-children, concluding that they qualified as "children" because they were substantially dependent on decedent and awarding them the benefits, to the exclusion of decedent's parents. Below are some of the findings of fact by the Full Commission, which have not been challenged on appeal:

2. On 22 April 1995 decedent married Ms. Constance Carver Hanner, thereafter Constance C. Goodrich. At the time of the marriage, Ms. Constance C. Goodrich had three children from previous relationships. Each of the children's fathers is no longer living, and Ms. Constance C. Goodrich was receiving social security benefits from the fathers' accounts for the support of the children. No children were born to the marriage between Ms. Constance C. Goodrich and decedent, and decedent had no natural children of his own.
3. Ms. Constance C. Goodrich and decedent were separated in August 1999. Also in August 1999 Ms. Constance C. Goodrich began an adulterous relationship with Mr. Steve Herring, who had performed work at the residence where she and decedent lived. Evidence supports a finding that there was an altercation between decedent and Ms. Constance C. Goodrich following his discovery of her affair. Thereafter, decedent moved out of the family residence, leaving Ms. Constance C. Goodrich and decedent's three stepchildren remaining. The title of the mobile home was in decedent's name.
4. Following the couple's separation, and prior to decedent's death, the [monthly] household expenses for his three minor stepchildren totaled approximately \$1,890.53. This total consisted of the following: house payment, \$432.00; land payment, \$163.53; car payment, \$420.00; phone bill, \$50.00; electric bill,

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\$150.00; water bill, \$25.00; groceries, \$500.00; and gasoline, \$100.00. The credible evidence of record supports a finding that during this period, decedent paid for all of these household expenses for the residence of his three stepchildren. Additionally, during this period, decedent provided funds for the purchase of his three stepchildren's' [sic] clothes, school fees, and vacations. Furthermore, decedent also funded expenses associated with a credit card and made furniture payments for the residence of his three stepchildren.

5. There is no evidence of record that any of decedent's three minor stepchildren earned any income of their own.

6. Ms. Constance C. Goodrich's income for 1998 was \$667.00, and for 1999 was \$1,730.00. Ms. Constance C. Goodrich also received social security payments as the result of the deceased father of each of the stepchildren. For Andrew Hanner and Allen Hanner, she received \$116.00 per month for each child. For Daniel [sic] Rohde, she received \$532.00. The total social security benefits received by Ms. Constance C. Goodrich each month was \$764.00.

7. Total household expenses for the residence of the three stepchildren prior to decedent's death, and following his separation from Ms. Constance C. Goodrich were approximately \$31,000.00. When this total is divided by four, represented by Ms. Constance C. Goodrich and the three stepchildren, \$7,758.00 per year is allocated for each of the minor stepchildren.

12. Constance Goodrich does not qualify as a widow under the Worker's Compensation Act in that she was not living with decedent at the time of his injury, she was not living apart from him for justifiable cause, and she was not dependent upon him for support.

Following additional detailed findings about the decedent's contributions to the household expenses of the stepchildren, the Commission concluded that all three minor stepchildren were substantially dependent on decedent and thus conclusively presumed to be wholly dependent on him at the time of his death under N.C. Gen. Stat. § 97-38. The Commission further concluded that Ms. Goodrich was not a widow under the terms of N.C. Gen. Stat. § 97-2 because she was not living with him, was not living apart from him for justifiable cause, and was not dependent upon decedent for support.

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STANDARD OF REVIEW

The scope of our review of a decision of the Industrial Commission has been clearly delineated by our Supreme Court: "(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Further, in our review we "do 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," without regard to whether there was evidence that would have supported contrary findings. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation and quotation marks omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). In doing so, we are required to view the evidence in the light most favorable to the plaintiff. *Id.*

ANALYSIS

The Deputy Commissioner and Full Commission faced the task of determining who was statutorily entitled to receive compensation under the terms of the Workers Compensation Act following decedent's death. The Act specifies that widow and children, as defined, are conclusively presumed to have been wholly dependent on decedent. N.C. Gen Stat. § 97-39. The essential provisions of the Act read as follows:

A widow, a widower and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. . . . If there is more than one person wholly dependent, the death benefit shall be divided among them, the persons partly dependent, if any, shall receive no part thereof. If there is no one wholly dependent, and more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

N.C. Gen. Stat. § 97-39 (1999). The Act also defines the terms "widow" and "child":

(12) Child, Grandchild, Brother, Sister.—The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegiti-

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mate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. . . . "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under 18 years of age.

(14) Widow.—The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

N.C. Gen. Stat. § 97-2 (1999).

Section 97-38 of the Act provides a framework for making such determinations:

(1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.

(2) If there is no person wholly dependent, then any person partially dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive a weekly payment of compensation computed as hereinabove provided, but such weekly payment shall be the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident.

(3) If there is no person wholly dependent, and the person or all persons partially dependent is or are within the classes of persons defined as "next of kin" in G.S. 97-40, whether or not such persons or such classes of persons are of kin to the deceased employee in equal degree, and all so elect, he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional payment provided for partial dependents in (2) above; provided, that the election herein provided may be exercised on behalf of any infant partial dependent by a duly qualified guardian; provided, further, that the Industrial Commission may, in its discretion, permit a parent or person standing in loco par-

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entis to such infant to exercise such option in its behalf, the award to be payable only to a duly qualified guardian except as in this Article otherwise provided; and provided, further, that if such election is exercised by or on behalf of more than one person, then they shall take the commuted amount in equal shares.

N.C. Gen. Stat. § 97-38 (1999).

This Court has previously interpreted these sections as follows:

It intends that death benefits will be first payable to those who were "wholly" dependent upon the deceased worker for financial support. If any claimant, or more than one claimant, is determined to be "wholly" dependent all death benefits are paid to that individual or individuals. If no claimant is found "wholly dependent" then benefits are paid to any claimant determined "partially dependent" to the exclusion of all others. If no person is either "wholly" or "partially" dependent, death benefits are paid to deceased's "next of kin."

Winstead v. Derreberry, 73 N.C. App. 39, 326 S.E.2d 66, 69 (1985).

The Deputy Commissioner and Full Commission, then, considered whether Ms. Goodrich qualified as a widow, and whether her three minor children qualified as decedent's "children." If so, they are entitled to compensation to the exclusion of all others, including decedent's next-of-kin. The Full Commission made findings of fact and concluded that, under the Act, decedent's three minor stepchildren were his children, but that Ms. Goodrich was not decedent's widow; thus, the children were awarded compensation while Ms. Goodrich was not.

The evidence tending to show that decedent supported the household comes entirely from Ms. Goodrich's testimony and evidence. The children did not present any evidence of their own, relying instead on their mother's presentation. We also note that appellants James and Mae Goodrich, R. L. Dresser and Constance C. Goodrich failed to designate, as required by the rules, which assignments of error (and thus, which particular findings and conclusions) they bring forward on appeal. N.C.R. App. P. 10. Therefore, none are properly before us for review. However, we exercise our discretion under Rule 2, and consider the merits of the issue. N.C.R. App. P. 2.

GOODRICH v. R.L. DRESSER, INC.

{161 N.C. App. 394 (2003)}

[1] This Court has previously considered the circumstances under which stepchildren may qualify as children under N.C. Gen. Stat. § 97-39. Stepchildren “who [are] substantially but not legally dependent upon a stepparent can receive death benefits under the [Worker’s Compensation] Act.” *Winstead*, 73 N.C. App. at 37, 326 S.E.2d at 68. The *Winstead* court did “not purport to establish a minimum percentage or to require mathematical certainty to determine substantial dependency of a stepchild.” *Id.* at 42, 326 S.E.2d at 71. Rather, we determine substantial dependency under the facts of each case by considering the amount and consistency of support a stepchild receives from “(1) the deceased stepparent, (2) the natural parent married to the stepparent, (3) the estranged natural parent, whether such support is voluntary or required by law, (4) the income of the stepchild, and (5) any other funds regularly received for the support of the stepchild.” *Id.*

Ms. Goodrich presented evidence that she earned only minimal amounts of money during 1998 and 1999, that the household received just over \$9,000.00 from social security benefits to the children, and that the great majority of the household’s income came from decedent. The evidence, including testimony, tax returns, bank records and other documentary exhibits, supports the Commission’s finding that the household received a large proportion of their support from decedent, both before and after the separation. As far as we can determine, there is no bright-line that qualifies as “substantial.” As such, we conclude that whether a specific child’s dependency is “substantial” is largely in the discretion of the Commission. The evidence here supports the findings that, as compared to all other sources of income, all three minor stepchildren were substantially dependent on decedent’s contributions to the household at the time of his death.

However, having found that evidence in the record supports the findings of fact related to the stepchildren, we must consider whether these findings in turn support the Commission’s conclusions of law, both as to them and as to the wife. The Commission found the stepchildren substantially dependent on decedent, and thus concluded that they were conclusively presumed to have been wholly dependent on decedent’s income, as children pursuant to N.C. Gen. Stat § 97-39. Thus, they were entitled to the benefits provided by N.C. Gen. Stat. § 97-38. This conclusion is fully supported by the Commission’s findings.

Thus, because the evidence in the record supports the Commission’s findings of fact, because those findings in turn support

the Commission's conclusions of law, and because the Commission correctly applied the law, we reject appellants' arguments and conclude that the Commission properly awarded compensation to Danielle Rohde, and to Allen and Andrew Hanner.

II.

[2] However, the evidence in the record of decedent's financial support of Ms. Goodrich is nearly identical to that relied on by the Commission in making its findings regarding the stepchildren. The Commission made findings that Ms. Goodrich earned \$667.00 in 1998 and \$1730.00 in 1999, and that decedent provided \$28,496.00 of the household's income in 1998. The Commission found that the total household expenses for Ms. Goodrich and the three stepchildren between the separation in 28 August 1998 and decedent's death 9 November 1999 were approximately \$31,000.00. Each of these findings is supported by evidence in the record. The Commission made no findings about any other source of income or support for Ms. Goodrich.

The Commission's finding 12, that Ms. Goodrich was not a widow under N.C. Gen. Stat. § 97-39, is actually a mixed finding of fact and conclusion of law. A person can qualify as a widow in one of three ways: "*the decedent's wife (1) living with or (2) dependent for support on him at the time of his death; or (3) living apart for justifiable cause or by reason of his desertion at such time.*" N.C. Gen. Stat. § 97-39 (1999) (emphasis added). We believe that by using the word "or" before method two, the General Assembly intended that the wife can qualify as widow if she is actually dependent on decedent whether or not living with him. In method three she qualifies if she is living apart for justifiable cause or desertion, whether or not dependent. Here, the evidence and the Commission's findings reflect that Ms. Goodrich was living apart from decedent at the time of his death. However, the evidence indicates that decedent provided the great majority of financial support to the household of Ms. Goodrich and her children, even after the separation. The parents urge us to conclude otherwise, contending that the evidence was not sufficiently reliable. This Court does not weigh the credibility of the evidence, that being exclusively the role of the Commission. But, to the extent paragraph 12 finds as fact that Ms. Goodrich was not dependent upon decedent, it is not supported by any evidence in the record. Further, none of the Commission's other findings support the conclusion that Ms. Goodrich was not financially dependent on decedent, and was not a widow as defined by N.C. Gen. Stat. § 97-2(14).

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Instead, the Commission's findings indicate that all members of decedent's household were dependent on decedent's income for support. Ms. Goodrich earned only a minimal amount of money (less than \$3000) in the two years prior to decedent's death. The record indicates that Ms. Goodrich's household after the separation may have received some small, irregular support payments from her relatives or from Steve Herring, but there are no findings about any other regular sources of support for Ms. Goodrich.

Further, nothing in the record supports the Commission's finding that Ms. Goodrich "is not a responsible person and is not competent to manage money." To the contrary, all of the evidence indicates that before decedent's death, she paid all of the bills and took care of other business pursuant to a general power of attorney from decedent, and after his death, she continued to pay the bills and manage the household.

In sum, we conclude that there is no evidence in the record to support either the finding that Ms. Goodrich is not a responsible person and is not competent to handle money, or the finding that she was not dependent on decedent at the time of his death. In turn, the findings do not support the conclusion that she was not the widow of decedent because of having actually been dependent on him for support. Thus, we reverse the Commission's conclusions and award as to Ms. Goodrich and remand for findings and conclusions, consistent with this opinion.

CONCLUSION

For the reasons set forth above, we affirm the decision of the Industrial Commission as to Danielle Rohde, Andrew Hanner and Allen Hanner, and reverse the Commission's decision denying compensation to Ms. Goodrich. We remand for further findings of fact and conclusions of law consistent with this opinion, and accordingly, for recalculation of the award.

Affirmed in part, reversed and remanded in part.

Judges TIMMONS-GOODSON and ELMORE concur.

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[161 N.C. App. 404 (2003)]

BRIGITTE G. HELMS, PLAINTIFF v. PAUL SCHULTZE, DEFENDANT

No. COA02-1439

(Filed 2 December 2003)

1. Child Support, Custody, and Visitation— support—prior consent order—income of new spouse—not considered

The income of plaintiff's new husband was properly excluded as irrelevant in a post-majority support action because the plain language of the consent order obligated only the parties.

2. Child Support, Custody, and Visitation— support—post-majority—college enrollment—findings

The court's finding in a post-majority child support action that one of the children was enrolled in college classes at the time of trial was supported by the evidence.

3. Child Support, Custody, and Visitation— support—psychological and medical expenses—prior consent order

The court did not abuse its discretion in a post-majority support action by ordering defendant to reimburse plaintiff for medical, psychological, and psychiatric expenses which defendant had refused to pay in violation of the plain language of the parties' consent order.

4. Child Support, Custody, and Visitation— support—post-majority—college expenses—ability to pay—methodology

The trial court's methodology for determining the parties' ability to pay college expenses in a post-majority child support action was not unsupported by reason and was not an abuse of discretion.

Appeal by defendant from judgment entered 20 March 2002 by Judge Joseph J. Williams in Union County District Court. Heard in the Court of Appeals 8 September 2003.

Baucom, Claytor, Benton, Morgan and Wood, P.A., by Richard F. Kronk, for defendant-appellant.

Perry, Bundy, Plyler & Long, L.L.P., by H. Ligon Bundy, for plaintiff-appellee.

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[161 N.C. App. 404 (2003)]

ELMORE, Judge.

Paul Schultze (defendant) appeals from a judgment requiring him to pay his ex-wife Brigitte G. Helms (plaintiff) the principal amount of \$76,758.48 as reimbursement for plaintiff's overpayment of certain college and medical expenses incurred by their two sons, which expenses were anticipated and deemed the responsibility of the parties by a previous court order entered several years earlier in connection with the parties' divorce. For the reasons discussed herein, we affirm.

Plaintiff and defendant were married on 27 November 1976. Two children were born of their marriage: Greg, born 13 November 1977, and Pierre, born 30 April 1979. While living in Connecticut, the parties separated. Thereafter, on 19 December 1988, the Connecticut Superior Court entered an order (the Connecticut Order) which addressed, *inter alia*, the parties' responsibilities concerning payment of (1) future college expenses for the then-minor children, and (2) the children's present and future medical expenses. Regarding future college expenses, the Connecticut Order provided as follows:

And that, to the extent that they are reasonably financially able, the parties shall be solely responsible for the education of the parties' minor children and shall pay any and all expenses incurred by the children during their attendance at a junior college, a four (4) year college, or their respective equivalents.

And that, in the event that the parties are in dispute as to each party's ability to pay for the children's college education, the matter shall be submitted to and determined by the [Connecticut Superior Court]. In making its determination, the Court shall consider the assets, liabilities, and income of both the Plaintiff and the Defendant, and the contributions being made by the parties toward the children's support.

....

And that, the parties['] obligation with respect to [payment of the children's college expenses] shall continue with respect to the children despite the children's attaining majority.

....

With respect to the children's medical expenses, the Connecticut Order provided:

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And that, [defendant] represents that his employer provides him with a group hospital and medical plan and that the children are presently covered by such a plan. [Defendant] shall, at his expense and at no cost to [plaintiff], maintain such hospital and medical plan, or the equivalent thereof, with respect to the children, so long as he is obligated to support such children, as provided in this decree.

And that, in addition to the foregoing obligation of [defendant], the [defendant] shall pay, for the benefit of the children, all unreimbursed reasonable medical, optical, surgical, hospital, psychiatric, psychological, and nursing expenses, the cost of prescriptive drugs[] . . . so long as he is obligated to support the children . . . as provided in this decree; provided, however, that no psychiatric, psychological, orthodontia expense, or elective surgery or treatment shall be incurred without the prior consent of [defendant], which consent shall not be unreasonably withheld.

....

And that, should the children need any elective surgery, psychiatric or psychological care, [plaintiff] shall notify [defendant] of such need, and [defendant] shall have the right to select a qualified professional in the same field as the professionals selected by [plaintiff] to examine the children and determine whether or not such treatment is reasonably necessary. If it is determined that it is reasonably necessary, then the [defendant] shall provide and pay for the reasonable cost of the same. If the [plaintiff's] professional and the one selected by [defendant] shall not agree that the same is reasonably necessary, or as to the reasonable cost or expense thereof, this issue shall be submitted to the [Connecticut Superior Court] for a determination.

....

And that, all of [defendant's] obligations hereunder for the benefit of the minor children shall terminate when [defendant] is no longer obligated to support or educate the children under the orders of this decree or [defendant's] death, whichever is earlier.

....

Subsequent to the parties' divorce and entry of the Connecticut Order, plaintiff and the two children moved to North Carolina in 1989.

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Plaintiff remarried in 1995. Plaintiff testified that Greg entered the University of North Carolina at Wilmington in 1996 and was still enrolled at the time of trial, and Pierre attended Cape Fear Community College from 1997 through 2000.

Plaintiff testified that in 1997 a dispute arose between plaintiff and defendant concerning their respective obligations to pay expenses incurred by Greg and Pierre while the children were in college. Plaintiff commenced the present litigation in October 1998 by filing a complaint alleging that, pursuant to the Connecticut Order, (1) defendant was liable for a greater share of the children's college-related expenses than defendant had previously paid; and (2) defendant was obligated to reimburse plaintiff for certain medical expenses plaintiff paid, including expenses incurred by Pierre for psychological and psychiatric treatment. The parties have stipulated that plaintiff properly obtained service on defendant, a German citizen who in 1998 resided in Sofia, Bulgaria, and that the Superior Court for the State of North Carolina, County of Union, had jurisdiction over the parties and the subject matter herein. On 9 December 1998, plaintiff obtained an entry of default against defendant. On 18 January 2000, defendant's motion to set aside the entry of default was denied, and the matter was set for trial to determine the amount of plaintiff's damages.

Following a bench trial at which both parties presented evidence, the trial court entered a judgment on 20 March 2002 awarding plaintiff damages in the amount of \$76,758.48 plus interest. In determining the total judgment amount, the trial court made the following pertinent findings of fact:

26. This Court has been called upon to determine the ability of the plaintiff and the defendant to pay the children's expenses while they were obtaining their college education. The [Connecticut Order] entered into by the parties in 1988 requires the Court to consider the assets, liabilities, and incomes of both the plaintiff and the defendant, and the contributions being made by them towards their children's support in determining each party's ability to pay the children's expenses. In making this determination, the Court has considered the plaintiff's estate and indebtedness, referred to above, and that the plaintiff should have earned the sum of \$30,664.50 per year during the time that the children were in college. The Court has further considered the estate of the defendant, and the fact that the defendant has become debt free while his children were in college, and has also

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considered the defendant's income during the time that the children were in college. The Court also considered all of the children's expenses that either party had paid under the [Connecticut Order] during the time that the children were in college. The Court also considered that of the parties' combined income and income potential, the defendant earned approximately 69% of that amount while the children were in college.

27. The Court finds, in its discretion, that the defendant should have paid \$132,118.15 of the children's expenses (not including medical and psychological expenses), but paid \$66,710.90. Therefore, the defendant underpaid the sum of \$65,407.25, which the plaintiff has paid.

28. The Court further finds that the defendant was solely responsible under the [Connecticut Order] for paying the children's medical expenses while they were enrolled in college, and that the defendant should have paid for Pierre's psychological expenses. Plaintiff has paid the sum of \$11,351.23 of the children's medical and psychological expenses, which was the defendant's obligation.

28. [sic] Based on the above, the Court finds that the defendant owes plaintiff the sum of \$76,758.48, which the defendant should have paid, but the plaintiff paid for the children's expenses.

....

From the judgment entered 20 March 2002, defendant now appeals.

[1] By his first assignment of error, defendant argues the trial court abused its discretion by refusing to admit into evidence the following exhibits: number 31, a 1998 net worth statement listing the total assets of plaintiff and her husband; and numbers 38, 39, and 40, the federal income tax returns filed by plaintiff and her husband in 1997, 1998, and 1999, respectively. Defendant contends this evidence showing the income and estate of plaintiff's husband is relevant because the trial court, in determining plaintiff's appropriate share of the children's college and medical expenses, should have considered plaintiff's access to these assets. We disagree.

At the outset, we note that the parties' respective obligations to pay their children's college and medical expenses are established by the Connecticut Order, which we have examined and find to be in the nature of a consent order for post-majority support. Although entered

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in Connecticut, the parties have stipulated that the North Carolina trial court properly exercised its jurisdiction by interpreting the Connecticut Order in order to determine the amount of plaintiff's damages. The appellate courts of both states have held that a consent order establishing a parent's obligation to support his or her children past the age of majority is valid and must be enforced according to contract principles, and that the courts may not modify the obligation set forth therein. *See Harding v. Harding*, 46 N.C. App. 62, 64, 264 S.E.2d 131, 132 (1980); *see also Miner v. Miner*, 48 Conn. App. 409, 417-18, 709 A.2d 605, 609-10 (1998). “[I]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.” *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999), *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999). “It is well-established law that, when a contract is plain and unambiguous on its face, it will be interpreted by the courts as a matter of law,” *First Citizens Bank & Tr. Co. v. 4325 Park Rd. Assocs.*, 133 N.C. App. 153, 156, 515 S.E.2d 51, 54 (1999), *disc. review denied*, 350 N.C. 829, 539 S.E.2d 284 (1999), and “the court’s only duty is to determine the legal effect of the language used and to enforce the agreement as written,” *Atlantic and East Carolina Ry. Co. v. Southern Outdoor Adver.*, 129 N.C. App. 612, 617, 501 S.E.2d 87, 90 (1998) (citations omitted).

The Connecticut Order provides that “to the extent that they are reasonably financially able, the *parties* shall be *solely responsible* for the education of the parties’ minor children and shall pay any and all expenses incurred by the children” while they are enrolled in college. The Connecticut Order further states that if the parties cannot agree on their respective support obligations, the court “shall consider the assets, liabilities, and income of *both the Plaintiff and the Defendant*, and the contributions being made by the parties toward the children’s support” in making this determination. We conclude that by its plain and unambiguous language, the Connecticut Order (1) obligates only the *parties* to pay for their children’s expenses, and (2) mandates that only the *parties’* income, assets, and liabilities be considered in resolving the present dispute. Because plaintiff’s husband is not a party to this action, the trial court properly excluded as irrelevant the challenged evidence of plaintiff’s husband’s income and assets. *See N.C. Gen. Stat. § 8C-1, Rules 401 and 402 (2001)*. The record indicates substantial evidence of plaintiff’s separate income and assets during the relevant time period was tendered to, and properly considered by, the trial court. This assignment of error is without merit.

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[2] Defendant next excepts to the trial court's finding that Greg was enrolled in college at the time of the trial below, arguing that this finding was not supported by the evidence. However, the transcript reveals the following testimony by plaintiff:

Q: [Defendant] testified a few minutes ago—if I understood his testimony to be that Greg had not signed up for classes by the deadline. Do you know anything about that? Is Greg enrolled in school now?

A: Yes. He is in school.

Q: In classes?

A: Yeah.

....

In a bench trial, the trial court's findings of fact are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding. *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003). Defendant's second assignment of error is overruled.

[3] By his third assignment of error, defendant contends the trial court abused its discretion by ordering him to reimburse plaintiff the full \$11,351.23 which the trial court found plaintiff expended for the children's medical, psychological, and psychiatric expenses. Defendant argues he should not be assessed the total cost of these expenses because in some instances plaintiff neither made sure the children used the insurance cards defendant provided to them when obtaining treatment, nor sent copies of the children's medical bills to defendant for processing by his insurance company. We find no merit in this assignment of error.

The Connecticut Order required defendant to maintain the children on his health insurance plan while they were in college. By its clear and unambiguous language, the Connecticut Order also required plaintiff to pay "all unreimbursed reasonable medical, . . . psychiatric, [and] psychological[] . . . expenses" for the children, provided that "no psychiatric, psychological[] . . . treatment shall be incurred" without defendant's prior consent, "which consent shall not be unreasonably withheld." The Connecticut Order also provided that, should either child need psychological or psychiatric care, plaintiff must notify defendant, who is then entitled to seek a second opinion for determination of whether such treatment is reasonably nec-

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essary. Finally, the Connecticut Order prohibited either party from preventing or interfering with the processing of any insurance reimbursement claim.

The bulk of the medical expenses for which defendant was ordered to reimburse plaintiff were incurred for Pierre's psychological and psychiatric treatment. Regarding these expenses, the trial court found as follows:

16. [Pierre] has been arrested and convicted of possession of marijuana on at least three occasions[.]. . . In October of 1999, he entered a treatment center. He has also been treated by a psychologist for his problems, who referred him to a psychiatrist. The plaintiff discussed with the defendant Pierre's need for treatment, and the defendant disagreed that he needed treatment. In July, 1999, the Court ordered Pierre to obtain a substance abuse assessment, and he has been ordered to obtain treatment as a condition of probation. . . . [Defendant] has disagreed with Pierre's psychological treatment, but [defendant] has never sought a second opinion as to whether or not Pierre needed treatment.

17. The Court finds that Pierre's psychological treatment was reasonably necessary, and that the expenses incurred by the plaintiff for Pierre's treatment and counseling was reasonably necessary, and that defendant was unreasonable in withholding his consent to psychological treatment. The plaintiff has paid \$8590 for psychological treatment services for Pierre before he withdrew from college. The plaintiff has also paid \$2761.23 for both children's medical bills, while they have been attending college.

. . .

Because defendant has not challenged findings of fact numbers 16 and 17, the findings contained therein are deemed to be supported by competent evidence and are conclusive on appeal. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). We are thus bound by the trial court's findings as to the amounts paid by plaintiff, the reasonableness of Pierre's psychological and psychiatric treatment, and defendant's failure to seek a second opinion as to whether this treatment for Pierre was appropriate. The record evidence indicates defendant simply refused to pay Pierre's psychological and psychiatric expenses because defendant

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disputed the appropriateness of this treatment, in violation of the Connecticut Order's plain language.

Likewise, by refusing to reimburse plaintiff for both children's other medical expenses which were not paid by defendant's insurance carrier, defendant violated the Connecticut Order's clear and unambiguous terms. The trial court found that "[o]n many occasions, the plaintiff has not known the defendant's location in order to send medical bills to him. For this reason, many of the children's medical bills were never submitted to the medical insurance carrier for payment." This finding was supported by record evidence tending to show that during the relevant time period, defendant was self-employed as a consultant and that he temporarily lived and worked in various European and Asian countries.

Where the trial court conducts a bench trial and is the finder of fact, the trial court's decision will not be upset on appeal absent an abuse of discretion. Under this standard of review, we defer to the trial court's discretion and will reverse its ruling "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). Because we are unable to conclude that the trial court abused its discretion by ordering defendant to comply with the Connecticut Order and reimburse plaintiff for the total amount of the disputed medical, psychological, and psychiatric expenses, this assignment of error is overruled.

[4] By his final assignment of error, defendant contends the trial court abused its discretion by the methodology it employed to determine the parties' respective abilities to pay the children's college-related expenses. We disagree.

With respect to the children's expenses while attending college, the trial court concluded that "the plaintiff has paid \$65,407.25 . . . that the defendant should have paid under the [Connecticut Order], and the defendant owes plaintiff that sum." In support of its conclusion, the trial court made, *inter alia*, the following findings:

26. This Court has been called upon to determine the ability of the plaintiff and the defendant to pay the children's expenses while they were obtaining their college education. The [Connecticut Order] . . . requires the Court to consider the assets, liabilities, and incomes of both the plaintiff and the defendant, and the contributions made by them towards their children's

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support in determining each party's ability to pay the children's expenses. In making this determination, the Court has considered the plaintiff's estate and indebtedness, . . . and that the plaintiff should have earned the sum of \$30,664.50 per year during the time that the children were in college. The Court has further considered the estate of the defendant, and the fact that the defendant has become debt free while his children were in college, and has also considered the defendant's income during the time the children were in college. The Court also considered all of the children's expenses that either party had paid under the [Connecticut Order] during the time that the children were in college. The Court also considered that of the parties' combined income and income potential, the defendant earned approximately 69% of that amount while the children were in college.

27. The Court finds, in its discretion, that the defendant should have paid \$132,118.15 of the children's expenses (not including medical and psychological expenses), but paid \$66,710.90. Therefore, the defendant underpaid the sum of \$65,407.25, which the plaintiff has paid.

....

Our review of the record reveals that over the three days it took to try this matter, the parties introduced numerous documents detailing their respective incomes, assets, and liabilities during the relevant time period. As discussed above, the trial court properly denied defendant's request to put on evidence regarding the income and assets of plaintiff's husband. The trial court made detailed findings as to each parties' average yearly income, assets, and liabilities during the relevant time period, including a finding that an average yearly income of \$30,664.50 should be imputed to plaintiff because she was voluntarily underemployed while the children were in college. The trial court then combined defendant's average yearly income with plaintiff's imputed income and determined that defendant earned 69% of the parties' total income while the children were in college.

The parties likewise introduced evidence of hundreds of expenditures each claimed to have made on behalf of Greg and Pierre while they were in college. In its detailed and comprehensive findings, the trial court disallowed some of each parties' claimed expenditures and found that plaintiff spent \$124,764.68 for expenses the children incurred while enrolled, while defendant paid \$66,710.90. The trial

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court then added these figures to obtain a total sum for both parties' college expenditures of \$191,475.58. The trial court determined what portion of this amount defendant *should* have paid by taking 69% of this amount, or \$132,118.15, and subtracting from it the amount it found defendant *actually* paid, or \$66,710.90, for a total amount owed to plaintiff of \$65,407.25.

The trial court's award of damages at a bench trial is a matter within its sound discretion, and will not be disturbed on appeal absent an abuse of discretion. *Mullins v. Friend*, 116 N.C. App. 676, 684, 449 S.E.2d 227, 232 (1994). "[I]n order to reverse the trial court's decision for abuse of discretion, we must find that the decision was unsupported by reason and could not have been the result of a competent inquiry." *Hamby v. Hamby*, 143 N.C. App. 635, 638, 547 S.E.2d 110, 112, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 39 (2001). Because we cannot conclude that the trial court's methodology in determining the parties' respective abilities to pay the children's college-related expenses "was unsupported by reason and could not have been the result of a competent inquiry," this assignment of error is without merit.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

DWIGHT M. FITZGERALD, PLAINTIFF v. KATHERINE T. FITZGERALD, DEFENDANT

No. COA02-1500

(Filed 2 December 2003)

1. Divorce—equitable distribution—profit sharing plan

Defendant's interest in a profit-sharing plan should have been classified, valued, and divided in an equitable distribution action even though it was not included in the pre-trial order. The existence of the plan was not disclosed until the hearing.

2. Divorce—equitable distribution—value of marital home—findings

An equitable distribution action was remanded for evidence and findings on the fair market value of the marital home at the

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date of separation, and for consideration of any post-separation increase in value as a distributional factor.

3. Divorce— equitable distribution—valuation of surgical practice

The valuation of a surgical practice for an equitable distribution was remanded where the trial court did not identify the evidence on which it based its valuation or the method it used to reach its figure.

4. Divorce— alimony—standard of living—findings

The trial court's findings supporting an alimony award were sufficient where plaintiff argued that the court erred by not making findings regarding the standard of living to which the parties were accustomed during the marriage, but the court made the ultimate finding that defendant needed the awarded amount to pay her current expenses and anticipated needs.

5. Divorce— alimony—duration and manner of payment—findings

An alimony order was remanded for further findings explaining the reasoning for the duration and manner of payment of the award. N.C.G.S. § 50-16.3(A)(c)

6. Divorce— equitable distribution—post-separation mortgage payments—ultimate finding

The trial court's finding in an equitable distribution action supported an unequal distribution where there was evidence to support the ultimate finding that defendant benefitted by increased equity in the marital home resulting from plaintiff's mortgage payments after the date of separation.

Appeal by plaintiff and defendant from judgment entered 3 June 2002 by Judge Jonathan L. Jones in Catawba County District Court. Heard in the Court of Appeals 27 August 2003.

Starnes & Killian, P.L.L.C., by Mark L. Killian, for plaintiff-appellant.

Sigmon, Sigmon, Eisenhower & Poovey, by C. Randall Eisenhower, for defendant-appellant.

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[161 N.C. App. 414 (2003)]

HUNTER, Judge.

Dwight M. Fitzgerald (“plaintiff”) appeals from an amended judgment and order of equitable distribution and alimony filed 3 June 2002. Katherine T. Fitzgerald (“defendant”) brings forward a cross-assignment of error to the same amended judgment and order. We reverse and remand to the trial court on both the equitable distribution and alimony portions of the judgment and order.¹

Plaintiff and defendant were married on 1 June 1974 and separated on 4 April 1998. A judgment of absolute divorce was entered on 2 June 1999. The parties stipulated that plaintiff was a supporting spouse and defendant was a dependent spouse and that defendant was entitled to alimony.

The evidence presented at a hearing beginning on 12 March 2002 tends to show plaintiff has been employed as a general surgeon since 1974 and as of the date of separation had a fifty-percent (50%) partnership interest in his surgical practice, Catawba Surgical Associates, P.A. Both parties presented expert testimony on the valuation of plaintiff’s ownership interest in the surgical practice. Plaintiff’s expert valued plaintiff’s interest at \$89,500.00, based on quarterly financial reporting from 31 March 1998. Defendant’s expert valued plaintiff’s ownership interest at \$170,000.00. The trial court, without making any findings as to how it arrived at its valuation of plaintiff’s ownership interest in the surgical practice, found plaintiff’s interest to be valued at \$125,000.00 on the date of separation.

Plaintiff also introduced two appraisals of the marital home. The first appraisal, dated 7 December 1999, estimated the home’s value at \$395,000.00. The second appraisal, dated 1 July 2001, also appraised the home at a value of \$395,000.00. Neither party presented evidence as to the fair market value of the house on the date of separation. Again, without making any findings as to how it arrived at its figure, the trial court found that the marital home had a fair market value on the date of separation of \$375,000.00. Furthermore, the trial court made no findings as to the valuation of the marital home on the date of distribution and did not consider any post-separation appreciation in the value of the marital home as a distributional factor.

Defendant testified that she had returned to work in 1994 and that she had no retirement assets. On cross-examination, she admit-

1. Neither party assigns error to the child support portion of the judgment and order.

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ted she had a vested interest in a profit-sharing plan through her employer, which had vested in 1997. Plaintiff subsequently introduced into evidence a statement from defendant's employer showing defendant's vested account balance in the profit-sharing plan since 1997. Defendant had not listed this profit-sharing plan in her equitable distribution affidavit filed with the trial court on 12 October 1999. The trial court made no finding regarding defendant's interest in the profit-sharing plan and it was not included in the equitable distribution order.

The trial court found plaintiff's net marital estate was \$215,468.00 and defendant's net marital estate was \$77,347.00, and that an equal distribution would require plaintiff to pay a distributive award of \$69,060.50. In determining whether an equal distribution was equitable, the trial court considered a number of factors including: (1) plaintiff had made both first and second mortgage payments on the marital home from the date of separation to the date of distribution, including approximately \$160,000.00 in excess of his required post-separation support, as well as making other household bill payments and payments for upkeep and repairs to the marital home; (2) plaintiff is a medical doctor earning at least \$270,400.00 per year and was earning at least \$250,000.00 at the date of separation, while defendant has a high school diploma and a two-year radiology technician degree with some phlebotomist training and was presently capable of earning \$30,000.00 per year; (3) separate property of defendant was put into plaintiff's medical practice; (4) the duration of the marriage and age of the parties; and (5) defendant gave up her pursuit of her career to care for the children. The trial court then found, based on a consideration of these factors, that the equities worked in favor of plaintiff, equal distribution was not equitable, and ordered plaintiff to pay a distributive award of \$60,000.00.

With respect to the alimony portion of the judgment and order, the trial court found defendant needed at least \$6,000.00 per month in alimony and that plaintiff was capable of paying that amount. The trial court ordered plaintiff to pay permanent alimony of \$6,000.00 per month until defendant's death, remarriage, or cohabitation to be paid into the office of the Clerk of Superior Court.

The issues are whether: (I) the trial court erred by failing to consider evidence of defendant's profit-sharing plan; (II) the trial court erred by failing to make specific findings regarding its valuation of the marital home on the date of separation and any increase in value as of the date of distribution; (III) the trial court was required to

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make specific findings regarding its valuation of plaintiff's ownership interest in his surgical practice; and (IV) the award of permanent alimony was supported by the findings of fact. The sole issue from defendant's cross-appeal is whether (V) the findings of fact and conclusions of law are insufficient to support an unequal distribution in favor of plaintiff.

I.

[1] Plaintiff first contends the trial court erred in failing to consider evidence of defendant's profit-sharing plan provided by her employer and by failing to make findings of fact classifying, valuing, and distributing defendant's interest in the profit-sharing plan. We agree and remand this case to the trial court to equitably distribute defendant's interest in the profit-sharing plan.

In making an equitable distribution of marital assets, the trial court is required to undertake a three-step process: "(1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350 (1988). In this case, defendant admitted to having a profit-sharing plan vesting in 1997, and plaintiff introduced evidence to show the vested balance from 1997 to 2000. This is property that the trial court was required to classify, value, and divide.

Defendant argues that plaintiff has waived equitable distribution of the profit-sharing plan by not including it in the pre-trial order, citing as authority *Hamby v. Hamby*, 143 N.C. App. 635, 547 S.E.2d 110 (2001). In *Hamby*, this Court held that where a party entered into a pre-trial agreement classifying a deferred compensation plan as marital property, and that agreement was subsequently incorporated into a pre-trial order, the party waived any argument that the deferred compensation plan was separate property. *Id.* at 643, 547 S.E.2d at 115. That case is, however, distinguishable from the case *sub judice*, as in this case plaintiff had entered into no agreement concerning defendant's profit-sharing plan, and in fact, could not have entered into such an agreement as defendant failed to disclose its existence until the hearing. Thus, the equitable distribution portion of the order must be remanded for the trial court to include the profit-sharing plan in its consideration of how to equitably distribute the parties' property.

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II.

[2] Plaintiff next contends the trial court erred in finding the fair market value of the marital home on the date of separation was \$375,000.00, and by failing to consider any post-separation increase in the value of the home as a distributional factor. We agree.

A trial court's findings of fact in an equitable distribution case are conclusive if supported by any competent evidence. *See Mrozek v. Mrozek*, 129 N.C. App. 43, 48, 496 S.E.2d 836, 840 (1998). "In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties." *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 577 (2002) (footnote omitted). Furthermore, "[w]here there is evidence of active or passive appreciation of the marital assets after the date of separation, the court must consider the appreciation of the asset as a [distributive] factor." *Fox v. Fox*, 103 N.C. App. 13, 21, 404 S.E.2d 354, 358 (1991).

In this case, both parties concede they presented no evidence of the fair market value of the marital home on the date of separation and the only evidence presented on the value of the house were two appraisals valuing the house at \$395,000.00, one performed over a year after the parties' separation and one performed more than three years after the separation. Nothing in the findings of the trial court supports a fair market value of the house on the date of separation of \$375,000.00. Thus, as there is no evidence upon which to base a finding of the fair market value of the house on the date of separation, we must remand this case to the trial court for the taking of further evidence and findings of fact on this issue. *See Coleman v. Coleman*, 89 N.C. App. 107, 108-09, 365 S.E.2d 178, 179-80 (1988). Even if the trial court properly valued the house on the date of separation, it erred in failing to consider any post-separation increase in value of the property, evidenced by the appraisals, as a distributional factor.

III.

[3] Plaintiff further contends the trial court erred in failing to make specific findings regarding the valuation of plaintiff's partnership interest in the surgical practice. We agree.

"In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which 'reasonably approximates' the net value of the business interest." *Offerman v. Offerman*, 137 N.C. App. 289, 292, 527 S.E.2d 684, 686 (2000) (quoting

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Poore v. Poore, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272 (1985). “[A] [trial] court should make specific findings regarding the value of a spouse’s professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied.” *Id.* at 293, 527 S.E.2d at 686 (quoting *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272). A trial court’s valuation of a professional practice will be upheld on appeal if it appears the trial court reasonably approximated the net value of the practice and its goodwill based on competent evidence and on a sound valuation method. *Id.*

In this case, plaintiff’s expert testified plaintiff’s interest in the surgical practice was valued at \$89,500.00 and defendant’s expert testified it should be valued at \$170,000.00. The trial court apparently rejected both expert’s valuations and, without making any findings as to the methodology it applied or the facts upon which its valuation was based, found plaintiff’s interest in the surgical practice to be \$125,000.00. As the trial court failed to identify the evidence on which it based its valuation or the method it used to reach its figure, we must reverse and remand this case to the trial court for further findings of fact on the valuation of plaintiff’s interest in his surgical practice.

IV.

[4] Plaintiff finally contends the trial court’s findings do not support the award of alimony in the amount of \$6,000.00 per month and further that the trial court failed to make required findings as to the reasons for the duration of the alimony and the manner of payment.

A trial court’s decision on the amount of alimony to be awarded is reviewed for an abuse of discretion. *See Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). In *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794, *aff’d per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001), this Court held:

[F]indings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case.

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Id. (footnote omitted). Under N.C. Gen. Stat. § 50-16.3A(c) (2001), the trial court is also required to set forth the reasons for the amount of the alimony award, its duration, and manner of payment.

In this case, plaintiff first contends the trial court's findings were insufficient to support the amount of alimony awarded. Plaintiff does not assign error to the trial court's findings of fact in the alimony portion of the order, and they are thus treated as supported by competent evidence and are binding on appeal.² See *McConnell v. McConnell*, 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002). Plaintiff instead argues that although the trial court made findings regarding defendant's current living expenses and needs, it nevertheless erred by not making further findings as to the standard of living to which the parties were accustomed during the marriage. The trial court, however, made the ultimate finding of fact that defendant needed at least \$6,000.00 per month in alimony to pay her current expenses and anticipated needs.

We conclude the trial court made sufficient ultimate findings of fact to support its award of alimony. See *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000) (trial court must make ultimate findings of fact to support the amount of alimony awarded). Accordingly, based upon its findings, the trial court did not abuse its discretion in awarding defendant \$6,000.00 per month.

[5] The trial court, however, did not make required findings as to the reasons for making the duration of the alimony continuous until defendant dies, remarries, or cohabits, and why it is to be paid directly to the Clerk of Superior Court. This Court has held that a trial court's failure to make any findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c). See *id.* In *Williamson*, as in this case, the trial court, without making any findings as to its reasoning for the duration of the alimony or manner in which it was to be paid, ordered alimony to be paid until the death of a party or the dependent spouse's remarriage or cohabitation and that it be paid directly to the clerk of court. See *id.* Although we conclude that, unlike *Williamson*,

2. We nevertheless note that the evidence in the record from defendant's alimony affidavit shows defendant's actual expenses totaled \$4,555.75 per month, and a separate column indicates the difference in her expenses and anticipated needs was an additional \$1,122.00 per month, calculated by subtracting the amount already expended from the amount needed. The trial court also found that there was \$170.00 worth of amended expenses. Totaling these amounts together results in \$5,847.75 per month needed by defendant to cover her expenses and needs.

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the trial court in this case made sufficient findings to support the amount of the alimony award, we are nevertheless bound by that decision, *see In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989), to remand the alimony portion of the order to the trial court to make further findings of fact explaining its reasoning for the duration of the alimony award and its manner of payment.

V.

Defendant's Cross-Appeal

[6] On cross-appeal, defendant contends the trial court's findings in the equitable distribution portion of the judgment and order are insufficient to support an unequal distribution of the parties' marital property in favor of plaintiff. Specifically, defendant argues the trial court erred in considering as a distributional factor that plaintiff had paid in excess of his required minimum payments on the second mortgage. Defendant asserts that the evidence shows plaintiff admitted drawing on the equity line after the date of separation and then repaying those amounts, such that the balance was approximately the same as on the date of separation and consequently, defendant did not benefit from any increase in equity in the marital home, which was distributed to her.

The trial court, however, actually found that although between the date of separation and October 2000 plaintiff was under no order to pay post-separation support, during that time period plaintiff "made [first] mortgage payments of at least \$61,000 and [second] mortgage payments of at least \$48,000" and that plaintiff then also paid in excess of his required payments after October 2000. These payments on both mortgages, the trial court further found, substantially benefitted defendant as those payments resulted in increased equity in the marital home, which was distributed to her.

"In determining whether an [unequal] distribution is equitable, the trial court must make findings of fact showing its due consideration of the evidence presented by the parties in support of the factors enumerated under [N.C. Gen. Stat. §] 50-20(c)." *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 249, 502 S.E.2d 662, 665 (1998), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999). The trial court need not make exhaustive evidentiary findings, but must find the ultimate facts. *Id.* Under Section 50-20(c), in determining whether an unequal distribution is equitable, the trial court must consider evidence of

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"[a]cts of either party to maintain, preserve, develop, or expand . . . the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution." N.C. Gen. Stat. § 50-20(c)(11a) (2001).

In this case, there was evidence that plaintiff continued to make the payments on both the first and second mortgages after the date of separation and before he was required to pay post-separation support. There is evidence that plaintiff did pay in excess of \$61,000.00 toward the first mortgage between the date of separation and October 2000.³ There is also evidence defendant continued to make payments on the second mortgage in an amount over \$41,000.00 and made the excess payments listed by the trial court.⁴

Although plaintiff did admit the balance on the second mortgage equity line of credit remained about the same as on the date of separation, his payments on the first mortgage would still have had the effect of increasing the equity in the marital home. Thus, there was evidence to support the trial court's ultimate finding that defendant benefitted substantially by increased equity in the marital home, which was distributed to her, resulting from plaintiff's mortgage payments after the date of separation. Accordingly, the trial court's finding on this factor supports its conclusion that an unequal distribution was equitable and defendant's assignment of error is rejected.

As we have concluded, however, that the trial court erred in failing to (1) consider evidence of defendant's profit-sharing plan, (2) make proper findings of fact regarding the valuation of the marital home, (3) make proper findings regarding the valuation of plaintiff's interest in his surgical practice, and (4) make proper findings regarding the duration and manner of payment of alimony, this case must be reversed and remanded.

Reversed and remanded.

Judges TIMMONS-GOODSON and ELMORE concur.

3. This figure may be calculated by combining figures from plaintiff's exhibits 3 (mortgage payments made), 5 (showing monthly payments made on various accounts between June 1999 and October 2000, and 9 (showing statement of mortgage payments for 1998).

4. This is evidenced by plaintiff's exhibit 5.

IN RE DHERMY

[161 N.C. App. 424 (2003)]

IN THE MATTER OF: JESSICA DHERMY, MINOR CHILD

No. COA03-71

(Filed 2 December 2003)

1. Termination of Parental Rights— failure to appoint guardian ad litem—juvenile dependency

The trial court did not err in a termination of parental rights case by failing to appoint a guardian ad litem to represent respondent mother even though juvenile dependency was alleged as a ground for termination, because: (1) the Department of Social Services (DSS) only argued and the trial court ultimately terminated respondent's parental rights under N.C.G.S. § 7B-1111(a)(1) which requires no appointment of a guardian ad litem; (2) a valid finding on one statutorily enumerated ground is sufficient to support an order terminating parental rights; and (3) although DSS should have formally dismissed N.C.G.S. § 7B-1111(a)(6) as a ground for termination prior to the hearing, respondent was not prejudiced by this error since it was not pursued by DSS at the hearing or found as a ground for termination by the trial court.

2. Termination of Parental Rights— neglect—clear, cogent, and convincing evidence

The trial court did not err by terminating respondent mother's parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1), because clear, cogent, and convincing evidence revealed that: (1) the trial court's findings of fact established that the minor child was neglected by respondent over a four-year period; and (2) the findings of fact supported the probability of the repetition of neglect if the minor child is returned to respondent's care.

3. Termination of Parental Rights— purpose and legislative intent of statutes

The trial court did not fail to consider the purpose and legislative intent of pertinent statutes regarding the severance of a parent-child relationship when it terminated respondent mother's parental rights after finding clear, cogent, and convincing evidence that supported neglect as a ground for termination. N.C.G.S. §§ 7B-100, 7B-1110.

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4. Termination of Parental Rights— standard of review— clear, cogent, and convincing evidence

Although respondent mother contends that the trial court allegedly used the wrong standard in concluding that a ground existed to terminate her parental rights, the judgment affirmatively stated that the court concluded that clear, cogent, and convincing evidence supported a finding of neglect as a ground for termination.

5. Termination of Parental Rights— best interests of child— two phases of termination proceeding

The trial court did not abuse its discretion in a termination of parental rights case by concluding that it was in the best interests of the minor child to terminate respondent mother's parental rights allegedly without conducting the two phases of a termination of parental rights proceeding, because: (1) our statutes and case law have not set forth a requirement that the two phases be conducted during separate hearings; (2) the trial court made numerous findings regarding the extensive sexual abuse the minor child suffered at the hands of her half-brother and also her stepfather, of which respondent acknowledged awareness but failed to protect the minor child; and (3) the trial court found that respondent lacked insight regarding her own significant mental health issues, played a significant role in creating a neglectful and abusive home environment, and made minimal progress in correcting the issues that led to the minor child's removal from the home.

Appeal by respondent mother from judgment entered 30 May 2002 by Judge Earl J. Fowler, Jr. in Buncombe County District Court. Heard in the Court of Appeals 11 September 2003.

Charlotte A. Wade for petitioner-appellee Buncombe County Department of Social Services.

Attorney Advocate Judith Rudolph, Guardian Ad Litem.

Janet K. Ledbetter for respondent-appellant Susan Dhermy.

HUNTER, Judge.

Susan Dhermy ("respondent") appeals from an order terminating her parental rights to her daughter, "J.D." (d.o.b. 25 February 1991). For the reasons stated herein, we affirm.

IN RE DHERMY

[161 N.C. App. 424 (2003)]

On 25 September 2000, the Buncombe County Department of Social Services ("BCDSS") filed a juvenile petition alleging that J.D. was an abused and neglected juvenile. The events that occurred prior to the filing of the petition were as follows.

On 28 August 1996, BCDSS received a child protective services report ("CPS report") stating that respondent had taken J.D. (then four years old) to an emergency room claiming that the child's fourteen-year-old half-brother, Michael Dhermy ("Michael"), had raped her. Although a medical examination did not indicate the presence of any abnormality of her hymen, J.D. began seeing a therapist in connection with the alleged sexual abuse.

On 17 January 1997, BCDSS received a report from J.D.'s therapist that J.D. stated during a therapy session that Michael played with her vaginal area. Thereafter, respondent acknowledged that her son was a sexual offender and needed to be placed outside the home to protect J.D. However, shortly after out-of-home placement was located for Michael, respondent's husband and J.D.'s step-father, John Dhermy ("Dhermy"), returned Michael to the family home when respondent was hospitalized for psychological problems.

The juvenile court proceeded with an action against Michael for the sexual assault of J.D. The court was ultimately unable to adjudicate Michael as a sexual offender because J.D. and respondent recanted their previous statements, and Dhermy and Michael denied that J.D. had been sexually abused. Without any clear evidence, Michael was only ordered to (1) complete a sex offender specific evaluation, and (2) be placed outside the Dhermy home. Thus, the Dhermys placed another trailer next to their trailer for Michael to live in that was equipped with sensory devices to prevent him from leaving undetected. However, Michael regained access to his parents' home after his supervision by the juvenile court ended.

A third CPS report was received by BCDSS on 9 September 1997 concerning a violent fight between Dhermy and Michael. At that time, the social worker investigating the incident observed that Michael and J.D. were both living in the family home. Respondent threatened to kill anyone who tried to take Michael away.

On 9 October 1998, another CPS report was received by BCDSS in which J.D. disclosed to her therapist that both Michael and Dhermy had sexually abused her. The child made no further disclosures, and the matter was not substantiated.

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Next, respondent reported to BCDSS on 11 April 2000 that her step-daughter and the step-daughter's husband, Tammera and Justin Abbott respectively ("Tammera" and "Justin"), smoked marijuana in the presence of their two-year-old son, Brandon. Respondent further reported that Tammera and Justin, who were living with respondent at that time, were involved in drug dealing and were being targeted for revenge because they had ripped off a drug dealer. When questioned, Justin admitted using marijuana. Tammera denied all drug usage, but later gave birth to another son on 28 July 2000 who tested positive for marijuana.

The final event that led BCDSS to file a juvenile petition with respect to J.D. occurred on 24 September 2000 when Brandon was seriously burned while in the care of respondent. Respondent's initial story was that her step-grandchild had doused himself with lighter fluid and struck a match. However, after being advised that the evidence did not support her story, respondent accused J.D. of the incident. Although Brandon never specifically stated who burned him, he did state a number of times that "grandma matched me." Thus, the preliminary results of the investigation implicated respondent as the main suspect.

Following the filing of the juvenile petition, BCDSS obtained an order for non-secure custody of J.D. on 28 September 2000. J.D. underwent a medical evaluation on 26 October 2000 which indicated abnormalities of her hymen that were not present in J.D.'s 1996 medical evaluation. The evaluating physician opined that the abnormalities suggested sexual abuse.

By order filed 11 January 2001, J.D. was adjudicated a physically and sexually abused child and a neglected juvenile in that respondent and Dhermy had "created or allowed to be created a substantial risk of serious physical injury to the child by other than accidental means . . ." The court ordered custody of J.D. to remain with BCDSS and that a psychological evaluation of both parents and J.D. be performed.

On 4 April 2001, a permanency planning and review hearing was held. At the hearing, the court found that (1) respondent had been suffering from significant mental health issues at least since August of 1999, (2) J.D. had to be moved from her previous foster home after BCDSS received information that respondent had threatened to take the child and run to Canada, and (3) J.D. continued to be at risk if

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returned to her parents' care because they continued to deny responsibility for her neglect and abuse. The court concluded that BCDSS be relieved of reunification efforts and that the permanent plan be changed to adoption.

On 27 August 2001, BCDSS filed a petition to terminate respondent's parental rights on the grounds of neglect and juvenile dependency. Prior to the hearing, respondent told BCDSS social workers that "she had separated from John Dhermy and that she believed that he had been sexually abusing [J.D.], and had thought so for a number of years. The respondent mother gave no explanation why she had failed to protect [J.D.,]" but claimed that she would not be reconciling with Dhermy.

The termination of parental rights hearing was held on 25-28 March 2002. At the start of the hearing, BCDSS voluntarily dismissed the termination of parental rights action against Dhermy, as Dhermy had "no parental rights to terminate, as he [wa]s neither the biological father nor the legal father[]" of J.D. During the hearing, evidence was offered regarding the likelihood that respondent was responsible for setting Brandon on fire, respondent's prior and continuing mental health problems, and the Dhermy family's extensive and troublesome history, most of which evidenced that J.D. had been sexually abused and neglected. As to J.D. being sexually abused, respondent testified that she did not believe Michael "was dangerous or a threat to [J.D.], and that [respondent's] problems were limited to bad choices she made." She further testified as to her belief that Dhermy had sexually abused J.D. However, despite respondent's earlier claim that the two were separated and would not be reconciling, the court took notice that Dhermy and respondent attended court together every day during the hearing and that her apartment was in close proximity to where Dhermy was living. Based on all the evidence, the court concluded there was

clear, cogent and convincing evidence that grounds exist to terminate the parental rights of the respondent mother pursuant to N.C.G.S. 7B-1111(a)(1) in that she had neglected the minor child when the child came into the custody of the Department, she has continued to neglect the child during the entire time the child has been in the custody of [BCDSS], and there is a probability of the repetition of neglect if the minor child was returned to her care as the respondent mother has failed to correct the conditions which led to the abuse and neglect.

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Therefore, the trial court determined it would be in J.D.'s best interests to terminate respondent's parental rights. Respondent appeals.

I.

[1] By her first assignment of error, respondent argues the trial court committed reversible error by not appointing a guardian *ad litem* to represent her as statutorily required when juvenile dependency is alleged as a ground for termination. We disagree.

Subsection 7B-1111(a)(6) of our General Statutes provides, *inter alia*, that the court may terminate parental rights upon a finding that "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future." N.C. Gen. Stat. § 7B-1111(a)(6) (2001). In cases "[w]here it is alleged that a parent's rights should be terminated pursuant to G.S. 7B-1111(6)[,]" our statutes require that a guardian *ad litem* be appointed to represent the parent. N.C. Gen. Stat. § 7B-1101(1) (2001). Failure to meet this requirement results in remand of the case to the trial court for appointment of a guardian *ad litem*, as well as a rehearing. *In re Richard v. Michna*, 110 N.C. App. 817, 431 S.E.2d 485 (1993).

Here, BCDSS alleged Subsection 7B-1111(a)(6) as one of two grounds by which to terminate respondent's parental rights. In BCDSS' brief to this Court, it acknowledges that a guardian *ad litem* was not appointed for respondent as required by statute. However, BCDSS asserts *Richard* is distinguishable from the present case because, unlike the facts in *Richard*, BCDSS only argued and the trial court ultimately terminated respondent's parental rights pursuant to Subsection 7B-1111(a)(1) which requires no appointment of a guardian *ad litem*. This Court has held that "[a] valid finding on one statutorily enumerated ground is sufficient to support an order terminating parental rights." *In re Stewart Children*, 82 N.C. App. 651, 655, 347 S.E.2d 495, 498 (1986). Thus, although BCDSS should have formally dismissed Subsection 7B-1111(a)(6) as a ground for termination prior to the hearing, respondent was not prejudiced by this error since it was not pursued by BCDSS at the hearing or found as a ground for termination by the trial court.

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II.

[2] Next, respondent assigns error to the trial court terminating her parental rights based on neglect. In addressing this assignment of error in her brief, respondent takes specific exception to approximately half of the court's fifty findings of fact despite having made a broadside exception to those findings in the record. The scope of appellate review is limited to issues presented by assignments of error in the record on appeal and, if one of those issues includes a broadside exception, it "does not present for review the sufficiency of the evidence to support the entire body of the findings of fact." *In re Beasley*, 147 N.C. App. 399, 405, 555 S.E.2d 643, 647 (2001). Therefore, since respondent only brought forth a broadside exception in the record, our review is limited to whether the facts support the court's judgment. *See Hicks v. Russell*, 256 N.C. 34, 39, 123 S.E.2d 214, 218 (1961). We hold that the facts do support the judgment.

Pursuant to Subsection 7B-1111(a)(1), a court may terminate parental rights upon a finding that a juvenile is a neglected juvenile. A "neglected juvenile" is defined as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2001). If concluding that a juvenile is neglected, the trial court must enter a termination order that is "based on an independent determination of existing neglect or a determination that conditions exist which will in all probability precipitate a repetition of neglect." *Stewart Children*, 82 N.C. App. at 654, 347 S.E.2d at 497. All findings of fact in the judgment substantiating the termination of parental rights for neglect under either of these bases must be supported by clear, cogent, and convincing evidence. *See* N.C. Gen. Stat. § 7B-1109(f) (2001). If the termination is supported by such evidence, the trial court's findings are binding on appeal, even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988).

The court's findings of fact in the instant case clearly established that J.D. was neglected by respondent over a four-year period. These

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findings were based on and supported by substantial documentation (CPS reports, medical evaluations, and psychological evaluations), which the court adequately summarized as follows:

The minor child was sexually abused and neglected in the mother's home, the respondent mother was aware of this sexual abuse, and the respondent mother failed to protect her child from this abuse and neglect. The respondent mother help[ed] create the environment where this child was abused and neglected, and then did not protect this child, nor continue therapy for this child after she has been repeatedly sexually abused.

Moreover, the findings of fact supported the probability of the repetition of neglect if J.D. is returned to respondent's care. The court found that "respondent mother continues to deny and/or minimize her responsibility for the abuse and neglect of this child[]" in that respondent (1) does not believe that Michael is a threat to J.D., (2) apparently retains a close relationship with Dhermy, and (3) does not acknowledge the extent of her own psychological problems and their effect on J.D.

Accordingly, the court's termination of respondent's parental rights based on neglect was supported by clear, cogent, and convincing evidence.

III.

[3] Next, respondent assigns error to the trial court's failure to recognize the purpose and legislative intent of pertinent statutes regarding the severance of a parent-child relationship. We disagree.

This Court has held that one of the essential aims of the Juvenile Code "is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s)." *In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984). However, our Legislature has recognized that reunification may not always be a viable option. Thus, the "Abuse, Neglect, Dependency" subchapter of the Juvenile Code provides "standards for the removal, when necessary, of juveniles from their homes [as well as] for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C. Gen. Stat. § 7B-100(4) (2001). When the trial court determines that conditions such as abuse and neglect exist, our statutes provide for the issuance of "an order terminating the parental rights of [a] parent with respect

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to the juvenile unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." N.C. Gen. Stat. § 7B-1110(a) (2001).

Based on the evidence in this case, the court concluded that J.D. was a neglected juvenile and terminated respondent's parental rights. By enacting Sections 7B-100 and 7B-1110, the Legislature sought to protect juveniles like J.D. and recognized that such protection may include the removal of those juveniles from their homes and the termination of parental rights. Thus, the court did not fail to consider the purpose and legislative intent of these statutes when it terminated respondent's parental rights after finding clear, cogent, and convincing evidence that supported neglect as a ground for termination.

IV.

[4] Respondent also assigns error to the court's alleged use of the wrong standard in concluding that a ground existed to terminate her parental rights. It is well recognized that a trial court must affirmatively state in its judgment terminating parental rights that the allegations of the petition were proven by clear, cogent, and convincing evidence. *In re Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000). Here, the judgment did affirmatively state that the court concluded such evidence supported a finding of neglect as a ground for termination. However, respondent contends that only a preponderance of the evidence supported the court's conclusion, a standard which is less than that required to terminate parental rights. See *In re Montgomery*, 311 N.C. 101, 109-10, 316 S.E.2d 246, 252 (1984). Nevertheless, having held in Part II of this opinion that there was clear, cogent, and convincing evidence by which the court could have found neglect as a ground for termination, respondent's argument is without merit.

V.

[5] By her final assignment of error, respondent argues the trial court abused its discretion in concluding that it was in the best interests of J.D. to terminate respondent's parental rights without conducting the two phases of a termination of parental rights proceeding. We disagree.

Adjudication and disposition are the two phases involved in a termination of parental rights proceeding. At the adjudication phase, the

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petitioner has the burden of proving there is clear, cogent, and convincing evidence supporting at least one statutory ground for termination. *In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74, *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). Upon finding such a ground, the trial court proceeds to the disposition phase to determine whether it is in the best interests of the child to terminate parental rights. *Id.* at 408, 546 S.E.2d at 174.

In the instant case, respondent essentially contends that the trial court erred in not having separate hearings for adjudication and disposition. Yet, our statutes and case law have set forth no requirement that the two phases be conducted during separate hearings. *In re White*, 81 N.C. App. 82, 344 S.E.2d 36 (1986). Thus, having previously concluded that the court's findings of fact were supported by clear, cogent, and convincing evidence, we need now only determine whether those findings supported the court's conclusion that terminating parental rights was in the juvenile's best interests. See *McMillon*, 143 N.C. App. at 408, 546 S.E.2d at 174.

The court made numerous findings regarding the extensive sexual abuse J.D. suffered at the hands of Michael and Dhermy. Respondent acknowledged awareness of the abuse, but did virtually nothing to protect J.D. from it. Further, the court found that respondent (1) lacked insight regarding her own significant mental health issues, (2) played a significant role in creating a neglectful and abusive home environment for J.D., and (3) had made minimal progress in correcting the issues that led to J.D.'s removal from the home. Therefore, the court did not abuse its discretion in concluding it was in J.D.'s best interests to terminate respondent's parental rights.

Affirmed.

Judges McGEE and CALABRIA concur.

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[161 N.C. App. 434 (2003)]

KATRINA LETRESS GRIFFIS, PLAINTIFF V. PATRICIA JOYCE LAZAROVICH AND JOHN EDWARD LAZAROVICH, AND CASSANDRA MICHELLE LEAK, DEFENDANTS

No. COA03-181

(Filed 2 December 2003)

1. Appeal and Error— preservation of issues—motion in limine—failure to object to testimony

Although plaintiff contends the trial court erred in a negligence case by denying plaintiff's motion in limine seeking to prohibit defendant from testifying concerning her conversations with plaintiff immediately following the parties' car collision, this assignment of error is dismissed because plaintiff failed to object to the admission of the testimony at trial.

2. Appeal and Error— preservation of issues—failure to make offer of proof

Although plaintiff contends the trial court erred in a negligence case by refusing to allow plaintiff to rehabilitate her witness chiropractor, this assignment of error is dismissed because plaintiff failed to make an offer of proof indicating the relevance of the question and has therefore waived appellate review.

3. Evidence— cross-examination—testimony from occupant of vehicle regarding injuries

The trial court did not abuse its discretion in a negligence case by failing to allow plaintiff to cross-examine one defendant about the injuries she sustained as a result of the car accident in question, because: (1) it cannot be concluded that testimony from one occupant of a vehicle regarding her injuries in an accident would tend to show that another occupant, with a different medical history, threshold for pain, and susceptibility to injury, was also injured to the same degree in the collision; and (2) such evidence would tend to enlarge into importance and give undue influence to a weakly relevant fact that would confuse the jury.

4. Negligence— requested issues—abuse of discretion standard

The trial court did not err in a negligence case by allegedly failing to give plaintiff's requested issues, because: (1) the issues submitted to the jury properly reflected the material controversies involved; (2) the trial court did not abuse its discretion by combining the issues; and (3) the issues as presented allowed the jury to render judgment fully determining the cause.

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5. Negligence— requested instructions—no presumption of negligence based on accident

The trial court did not err in a negligence case by failing to instruct the jury on plaintiff's requested instructions that plaintiff did not have to prove by the greater weight of the evidence who was negligent, but that defendants' joint and concurring negligence was a proximate cause of her injuries, because: (1) the trial court instructed according to the pattern jury instructions; and (2) plaintiff's proposed jury instructions would allow the jury to presume negligence solely based on the fact an accident occurred.

6. Negligence— requested instructions—medical expenses presumed reasonable

The trial court did not err in a negligence case by failing to instruct the jury that the amount of plaintiff's medical expenses was presumed reasonable, because any instruction regarding the reasonableness of plaintiff's medical expenses would have been redundant and confusing to the jury when: (1) all parties stipulated to the amount of plaintiff's medical charges and to the reasonableness of the charges; and (2) neither the amount nor reasonableness of plaintiff's medical expenses were an issue.

7. Negligence— signing and entry of judgment—no presumption based on happening of accident

Although plaintiff assigns error to the trial court's signing and entry of judgment in a negligence case, this assignment of error is overruled because a defendant's negligence will not be presumed from the mere happening of an accident.

8. Negligence— motion for judgment notwithstanding the verdict—motion for new trial

The trial court did not err in a negligence case by denying plaintiff's motion for judgment notwithstanding the verdict and motion for new trial, because: (1) in regard to the motion for judgment notwithstanding the verdict, viewing the evidence in the light most favorable to the nonmoving party indicated that neither defendant was negligent in causing the accident; and (2) plaintiff reasserted her prior assignments of error to show she was entitled to a new trial, and those assignments were either dismissed or overruled, and there was no abuse of discretion.

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Appeal by plaintiff from judgment entered 26 July 2002 and order entered 29 August 2002 by Judge Paul G. Gessner in Wake County District Court. Heard in the Court of Appeals 29 October 2003.

E. Gregory Stott, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Dayatra T. King, for defendants-appellees Patricia Joyce Lazarovich and John Edward Lazarovich.

Hall & Messick, L.L.P., by Jonathan E. Hall and Kathleen M. Millikan, for defendant-appellee Cassandra Michelle Leak.

TYSON, Judge.

Katrina Letress Griffis (“Griffis”) appeals from judgment entered after a jury’s verdict and order denying her motion for judgment notwithstanding the verdict and motion for new trial. The jury found that Griffis was not injured by the negligence of Patricia Joyce Lazarovich (“Lazarovich”) or Cassandra Michelle Leak (“Leak”). We find no error and affirm the trial court’s order denying Griffis’s motions.

I. Background

On 2 December 2000, at approximately 6:00 p.m., Griffis was riding as a “guest passenger” in a vehicle owned and operated by Leak, Griffis’s cousin and friend. Both Griffis and Leak testified that Lazarovich negligently drove a vehicle, owned by her husband John Edward Lazarovich, from a stopped position into the side of Leak’s vehicle. Lazarovich denied negligence and testified that she was stopped in the median when Leak drove her vehicle into Lazarovich’s car. Lazarovich testified that she never took her foot off the brake or accelerated prior to the collision. She described the collision as a “slight impact.” The parties pulled over to the curb to allow traffic to pass, which caused the vehicles not to be in the same position when the police arrived as when the accident occurred.

Lazarovich testified, without objection, that both Griffis and Leak exited the vehicle, cursed, and hurled derogatory racial slurs and threats at her after the collision. Two witnesses, who arrived at the scene after the collision, testified and corroborated Lazarovich’s testimony regarding the vulgar and derogatory language used by Griffis and Leak. Griffis testified that at no point did she have a conversation with or “say one word” to Lazarovich. Griffis asserted

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she remained in Leak's vehicle until the investigative officer arrived on the scene.

Dr. George Case ("Dr. Case"), Griffis's chiropractor, testified that he had examined and treated Griffis. In his opinion, the accident caused Griffis to sprain her lower back, neck, upper back, and rotator cuff.

The jury's verdict found that Griffis's injuries were not caused by the negligence of Lazarovich or Leak. The trial court denied Griffis's motion for judgment notwithstanding the verdict and motion for new trial. Griffis appeals.

II. Issues

Griffis contends the trial court erred by: (1) denying her motion in limine and allowing Lazarovich to testify concerning communications and interactions between Griffis and Lazarovich immediately following the accident; (2) refusing to allow Dr. Case to be rehabilitated on redirect examination; (3) refusing to allow Leak to testify concerning injuries that Leak sustained as a result of the collision; (4) refusing to submit Griffis's requested five issues and submitting three issues to the jury; (5) refusing to submit Griffis's requested instructions on the issues of negligence, proximate cause, and the plaintiff's burden of proof; (6) refusing to instruct the jury regarding a presumption of reasonableness for Griffis's medical expenses; (7) signing and entering a judgment based on inappropriate and inadequate evidence; and (8) denying Griffis's motion for judgment notwithstanding the verdict and motion for new trial.

III. Motion in Limine

[1] Griffis argues that the trial court should have granted her motion in limine and prohibited Lazarovich from testifying concerning her conversations with Griffis immediately following the collision. Although Griffis filed a motion in limine, she failed to object to the admission of this testimony at trial.

We have held:

[a]lthough defendant filed and the trial court ruled on the motion in limine, defendant failed to object at trial to the admission of [witness's] testimony. The rule is that a motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the movant fails to further object to that evidence at the time it is offered at trial. Defendant failed to object to this tes-

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timony at trial and waived his right to appellate review of the trial court's denial of the motion in limine.

City of Wilson v. Hawley, 156 N.C. App. 609, 613, 577 S.E.2d 161, 164 (2003) (internal citations omitted). Griffis failed to object to Lazarovich's testimony at trial regarding her conversations and interactions with Griffis. During Griffis's case-in-chief, her counsel questioned Lazarovich regarding the events following the collision and solicited the testimony she now assigns as error. This assignment of error is dismissed.

IV. Rehabilitation of Witness

[2] Griffis argues the trial court erred by refusing to allow her to rehabilitate Dr. Case. Dr. Case was duly qualified as an expert in the chiropractic field. During cross-examination, Lazarovich's counsel asked Dr. Case if he had referred Griffis to her attorney. Dr. Case could not remember any referral, but admitted that Griffis's attorney had previously represented him in an action wherein Lazarovich's attorney had represented the defendant. On redirect examination, Griffis's attorney attempted to have Dr. Case identify the defendant in that action. On appeal, Griffis contends that Dr. Case would have testified that Lazarovich's counsel represented an insurance company.

"[A] party must preserve the exclusion of evidence for appellate review by making a specific offer of proof unless the significance of the evidence is ascertainable from the record." *In re Dennis v. Duke Power Co.*, 341 N.C. 91, 102, 459 S.E.2d 707, 714 (1995). Further, evidence of insurance is generally inadmissible as relevant evidence unless offered for some collateral purpose. N.C. Gen. Stat. § 8C-1, Rule 411 (2001); *Carrier v. Starnes*, 120 N.C. App. 513, 516, 463 S.E.2d 393, 395 (1995), *disc. rev. denied*, 342 N.C. 653, 467 S.E.2d 709 (1997).

Griffis argues that Lazarovich's line of questioning was propounded to inform the jury of Dr. Case's potential bias. Griffis contends the trial court should have allowed her to rehabilitate Dr. Case's credibility. Griffis did not make an offer of proof indicating the relevance of the question or that the testimony sought was for purposes allowed under N.C.R. Evid. 411. See N.C. Gen. Stat. § 1A-1, Rule 43(c) (2001) ("In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given."). Griffis failed to make an

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offer of proof and has waived appellate review of this assignment of error. This assignment of error is dismissed.

V. Evidence of Similar Occurrences

[3] Griffis argues the trial court erred by not allowing her to cross-examine Leak regarding the injuries she sustained as a result of the accident. Griffis contends that Leak's injuries were identical, relevant, and admissible. This Court has held:

when substantial identity of circumstances and reasonable proximity in time is shown, evidence of similar occurrences or conditions may, in negligence actions, be admitted as relevant to the issue of negligence. 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), *disc. rev. denied*, 351 N.C. 357, 542 S.E.2d 212 (2001) (internal citations omitted).

Here, the jury was to determine: (1) whether Lazarovich or Leak was negligent, (2) whether such negligence caused injury to Griffis, and if so, (3) what amount of damages Griffis was entitled to recover. Griffis attempted to compel Leak to testify that she also suffered back and neck pain following the collision. We cannot conclude that testimony from one occupant of a vehicle regarding her injuries in an accident would tend to show that another occupant, with a different medical history, threshold for pain, and susceptibility to injury, was also injured to the same degree in the collision. *See Horr v. Kansas C. E. R. Co.*, 137 S.W. 1010, 1011 (Mo. Ct. App. 1911) ("[T]o . . . show how [other passengers] were affected by their injuries would be evidence not pertaining to the *res gestae* and devoid of any but a remote bearing on the issues [S]uch evidence would tend to enlarge into importance and . . . give undue influence to, at best, a weakly relevant fact of the slightest evidentiary worth and to confuse the jury"). Griffis failed to show any abuse of discretion in the trial court's refusal to admit this evidence. This assignment of error is overruled.

VI. Jury Issues

[4] Griffis argues that the trial court erred and confused the jury by failing to give her requested issues. Griffis requested the court to submit five issues to the jury:

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1. Was the negligence of the defendant, Patricia Joyce Lazarovich, a proximate cause of the accident on December 2, 2000?
2. Was the negligence of the defendant, Cassandra Michelle Leak, a proximate cause of the accident on December 2, 2000?
3. Was the plaintiff, Katrina Letress Griffis, injured by the negligence of the defendants, Patricia Joyce Lazarovich and John Edward Lazarovich?
4. Was the plaintiff, Katrina Letress Griffis, injured by the negligence of the defendant, Cassandra Michelle Leak?
5. What amount is the plaintiff, Katrina Letress Griffis, entitled to recover for her personal injuries?

The trial court submitted the following issues:

1. Was the Plaintiff, Katrina Letress Griffis, injured by the negligence of the Defendant, Patricia Joyce Lazarovich?
2. Was the Plaintiff, Katrina Letress Griffis, injured by the negligence of the Defendant, Cassandra Michelle Leak?
3. What amount is the Plaintiff, Katrina Letress Griffis, entitled to recover for personal injuries?

The trial court gave Griffis's last three jury instructions as requested, with the omission of "John Edward Lazarovich."

"It is an elementary principle of law that the trial judge must submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings and supported by the evidence." *Uniform Service v. Bynum International, Inc.*, 304 N.C. 174, 176, 282 S.E.2d 426, 428 (1981). "The number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E.2d 505, 507 (1967). Further, N.C.R. Civ. P. 49(b) provides that "[i]ssues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues." N.C. Gen. Stat. § 1A-1, Rule 49(b) (2001).

Here, the issues submitted to the jury properly reflect the "material controversies" involved in this negligence action. *Uniform Service*, 304 N.C. at 176, 282 S.E.2d at 428. The trial court did not

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abuse its discretion by combining the issues. The issues as presented allowed the jury to render judgment fully determining the cause. *Chalmers*, 269 N.C. at 435-36, 152 S.E.2d at 507. This assignment of error is overruled.

VII. Jury InstructionsA. Negligence

[5] Griffis contends the court erred by failing to instruct the jury on her requested instructions. "When charging the jury in a civil case, it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action." *Adams v. Mills*, 312 N.C. 181, 186, 322 S.E.2d 164, 168 (1984); N.C. Gen. Stat. § 1A-1, Rule 51(a) (2001).

On appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction.

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

Griffis requested the court to instruct the jury that she did not have to prove by the greater weight of the evidence who was negligent, but that the defendants' joint and concurring negligence was a proximate cause of her injuries. The trial court denied Griffis's request and instructed the jury using North Carolina Pattern Jury Instructions as follows:

The plaintiff not only has the burden of proving negligence, but also has—[sic] but also such negligence was the proximate cause of the injury or damage. . . .

There may be more than one proximate cause of an injury. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the injury. The plaintiff must prove by the greater weight of the evidence only that the defendant's negligence was a proximate cause.

. . . .

Finally, . . . if you find by the greater weight of the evidence that either defendant or both were negligent in any one or more of the

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ways intended by the plaintiff and that such negligence was a proximate cause of the plaintiff's injuries, then it would be your duty to answer the issues yes

Griffis's proposed jury instructions would allow the jury to presume negligence solely because an accident occurred. "[A] defendant's negligence will not be presumed from the mere happening of an accident, but, on the contrary, in the absence of evidence on the question, freedom from negligence will be presumed." *Etheridge v. Etheridge*, 222 N.C. 616, 618, 24 S.E.2d 477, 479 (1943); see also *Coakley v. Motor Co.*, 11 N.C. App. 636, 641, 182 S.E.2d 260, 263 (1971), cert. denied, 279 N.C. 393, 183 S.E.2d 244 (1971).

The trial court properly instructed the jury on the applicable North Carolina law and was not required to submit Griffis's proposed instructions. Griffis has not met her burden of showing that the jury was misled by the trial court's instructions. *Bass*, 149 N.C. App. at 160, 560 S.E.2d at 847. This assignment of error is overruled.

B. Presumptions

[6] Griffis argues the trial court erred by failing to instruct the jury that the amount of her medical expenses was presumed reasonable. N.C.R. Evid. 301 states that the trial court must instruct the jury when a statutory or judicial presumption exists. N.C. Gen. Stat. § 8C-1, Rule 301 (2001). N.C. Gen. Stat. § 8-58.1 (2001) creates a mandatory presumption of reasonableness for a plaintiff's medical expenses if the medical expenses are an issue and evidence is presented showing the total charges.

Here, all parties stipulated to the amount of Griffis's medical charges and to the reasonableness of the charges. Neither the amount nor reasonableness of Griffis's medical expenses were "an issue." N.C. Gen. Stat. § 8-58.1 (2001). Any instruction regarding the reasonableness of Griffis's medical expenses would have been redundant and confusing to the jury. This assignment of error is overruled.

VIII. Signing of Judgment

[7] Griffis also assigns error to the trial court's signing and entry of the judgment. An assignment of error concerning the signing and entry of a judgment "presents only the question of whether an error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment and

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whether the judgment is regular in form." *Green v. Maness*, 69 N.C. App. 403, 407, 316 S.E.2d 911, 913, *disc. rev. denied*, 312 N.C. 622, 323 S.E.2d 922 (1984).

To support this assignment of error, Griffis argues that "somebody had to be negligent" in order for the collision to have occurred. As we previously stated, "a defendant's negligence will not be presumed from the mere happening of an accident . . ." *Etheridge*, 222 N.C. at 618, 24 S.E.2d at 479. This assignment of error is overruled.

IX. Motion for Judgment Notwithstanding the Verdict and
Motion for New Trial

[8] Griffis assigns as error the trial court's denial of her motions for judgment notwithstanding the verdict and for new trial. We address these assignments of error together. "The test for determining whether a motion for directed verdict is supported by the evidence is identical to that applied when ruling on a motion for judgment notwithstanding the verdict." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (quoting *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986)). "In ruling on the motion, the trial court must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor." *Id.* (quoting *Taylor v. Walker*, 320 N.C. 729, 733-34, 360 S.E.2d 796, 799 (1987)). "The party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Id.* (quoting *Taylor*, 320 N.C. at 733, 360 S.E.2d at 799).

Here, Griffis had the burden of proving the negligent acts of the defendants. The evidence tended to show that one of the two drivers could have been negligent, neither Leak nor Lazarovich were negligent, or that both were negligent. Viewing the evidence in the light most favorable to the nonmoving parties indicates that neither Leak nor Lazarovich were negligent in causing the accident. Griffis did not meet her "heavy burden" of proving the negligence of Leak or Lazarovich and, thus, was not entitled to a judgment notwithstanding the verdict. This assignment of error is overruled.

"Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion." *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). In support of her motion for new

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[161 N.C. App. 444 (2003)]

trial, Griffis reasserts the arguments stated in her prior assignments of error. We have either dismissed or overruled Griffis's prior assignments of error and find no abuse of discretion by the trial court. This assignment of error is overruled.

X. Conclusion

The evidence presented at trial supports the jury's verdict, that neither Lazarovich nor Leak negligently caused Griffis's alleged injuries. In her brief, Leak argues cross-assignments of error to be addressed in the event this Court reverses the trial court's order. Since we affirm the trial court's order, we do not reach Leak's cross-assignments of error.

No error at trial. Affirmed.

Judges McCULLOUGH and BRYANT concur.

STEVE D. BRYANT, PLAINTIFF v. DALE O. WILLIAMS, DEFENDANT

No. COA02-1431

No. COA02-1586

(Filed 2 December 2003)

1. Appeal and Error— notice of appeal—timeliness

An appeal was heard in the Court of Appeals, even though the notice of appeal was not timely given from an April order, where there was a subsequent June order which was a recapitulation of the first, and from which notice of appeal was timely given.

2. Domestic Violence— consent judgment—complaints dismissed—no finding of violence

The trial court could not enter an order approving a consent judgment intended to stop domestic violence after dismissing the parties' domestic violence complaints. The court's authority to enter a protective order or to approve a consent agreement depends upon a finding that an act of domestic violence occurred.

Judge WYNN concurring in the result.

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[161 N.C. App. 444 (2003)]

Appeal by defendant from orders entered 21 June 2002 and 26 July 2002 by Judge Robert M. Brady in Catawba County District Court. Heard in the Court of Appeals 26 August 2003.

J. Steven Brackett Law Office, by J. Steven Brackett, for plaintiff-appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellant.

CALABRIA, Judge.

Dale O. Williams (“Ms. Williams”) appeals the trial court’s order approving a consent agreement, entered pursuant to N.C. Gen. Stat. § 50B-3, and denying her Rule 60(b) motion to set aside the orders.¹ We find because the order approving the consent agreement dismissed the domestic violence claims, the trial court could not enter this order under Chapter 50B, and therefore it must be vacated.

In early April 2002, the parties filed complaints against each other seeking domestic violence protective orders. Ms. Williams’ *ex parte* order was granted; Mr. Bryant’s was denied. On 22 April 2002, a hearing on Ms. Williams’ order was held, and a consent order was entered and filed. Thereafter, on 8 May 2002, Ms. Williams filed a Rule 60(b) motion seeking relief from the 22 April order. On 21 June 2002, the trial court entered an order that was a typewritten recapitulation of the earlier order, but was not, as is common practice, entered *nunc pro tunc* to 22 April. Although the trial court had not ruled on the Rule 60(b) motion, Ms. Williams filed notice of appeal from the June order. On 26 July 2002, the trial court denied the Rule 60(b) motion; Ms. Williams appealed.

[1] First, we note the concurring opinion asserts this Court does not have jurisdiction to consider Ms. Williams’ appeal of the April order because no appeal from the order was timely made. Ms. Williams appealed both the June typewritten order and the denial of her Rule 60(b) motion to set aside the April order. Under the concurring opinion’s analysis that the April order was valid because “it was ‘reduced to writing, signed by the judge, and filed with the clerk of court,’” the June order is also a valid order. The parties stipulated that Ms. Williams gave timely notice of appeal from the June order as well as the order denying her Rule 60(b) motion to set aside the April order.

1. In this opinion we consolidate and address both Ms. Williams’ appeals: COA02-1431, from the 21 June order, and COA02-1586, from the 26 July order.

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[2] We now address the merits of the appeal. Ms. Williams asserts the trial court lacked subject matter jurisdiction to enter the consent order because the order purported to transfer real property, an action outside the scope of Chapter 50B. We do not reach this argument because the complaints were dismissed and therefore the trial court could not enter an order under Chapter 50B.

The consent orders provide, in part, that both parties' claims for domestic violence orders "shall be dismissed." Where the complaint is voluntarily dismissed, plaintiff is returned "to the legal position enjoyed prior to filing of the complaint." *Augur v. Augur*, 356 N.C. 582, 590, 573 S.E.2d 125, 131 (2002) (citing *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000)). Accordingly, no allegation of domestic violence remained. Although our District Courts are empowered to enter protective orders or approve consent agreements under Chapter 50B, these orders are authorized only "to bring about a cessation of acts of domestic violence." N.C. Gen. Stat. § 50B-3(a) (2001). The court's authority to enter a protective order or approve a consent agreement is dependent upon finding that an act of domestic violence occurred and that the order furthers the purpose of ceasing acts of domestic violence. See *Brandon v. Brandon*, 132 N.C. App. 646, 654, 513 S.E.2d 589, 595 (1999) (where a protective order does not contain a conclusion of law supported by adequate findings of fact that domestic violence occurred, the "conclusion [of law] cannot provide grounds for issuance of the DVPO [Domestic Violence Protective Order]"); *Augur*, 356 N.C. at 590, 573 S.E.2d at 131 (where the court concludes there was no act of domestic violence, the court may not enter a protective order and the court's decision "ha[s] the effect of leaving defendant exactly where he was prior to the filing of plaintiff's complaint"); *Story v. Story*, 57 N.C. App. 509, 291 S.E.2d 923 (1982) (Chapter 50B authorizes the trial court to enter protective orders only where there is an act of domestic violence occurring on or after the effective date of the statute). Although the concurring opinion states these cases do not arise from mutual domestic violence protective orders, we find this distinction between cases arising from mutual claims for domestic violence and claims by only one party is immaterial because the statute generally does not distinguish between mutual claims and claims by only one party requesting a domestic violence protective order.²

2. We recognize that mutual claims require an additional complaint and detailed findings by the court. See N.C. Gen. Stat. § 50B-3(b) (2001).

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Further, the concurring opinion's quote from *In Re Estate of Peebles*, 118 N.C. App. 296, 300, 454 S.E.2d 854, 857 (1995) which was reiterated in *Buckingham v. Buckingham*, 134 N.C. App. 82, 89, 516 S.E.2d 869, 875 (1999) is not applicable here because those cases merely explain that a consent order need not contain findings of fact and conclusions of law as required by N.C. Gen. Stat. § 1A-1, Rule 52 (2001). Here, there is no assertion that this order is invalid for failing to have Rule 52 findings of fact and conclusions of law. Rather, the issue is whether by dismissing the domestic violence complaints the court loses its authority to enter *any* domestic violence protective order. We hold it does. Therefore, since the order in the case at bar dismissed the complaints for a domestic violence order, and the court could not enter an order approving a consent agreement for the purpose of ceasing domestic violence pursuant to Chapter 50B, the consent order must be reversed.

The concurring opinion considers that the April 2002 order "may still be enforceable under contract law." Whether the order constitutes a valid contract has not been raised by the parties or litigated at the trial level; accordingly it is not properly before our appellate court.

The order of the trial court is

Vacated.

Judge HUDSON concurs.

Judge WYNN concurs in the result in a separate opinion.

WYNN, Judge concurring in the result.

I disagree with the majority's holding that because the trial court's order approving the consent agreement dismissed the domestic violence claims, the trial court could not enter its order under Chapter 50B. Under N.C. Gen. Stat. § 50B-3(a), "the court, . . ., may grant any protective order or approve any consent agreement to bring about the cessation of acts of domestic violence." As I believe the consent agreement was entered into by the parties in order to bring about a cessation of acts of domestic violence, I would conclude the trial court had authority to enter the consent order. However, because the trial court failed to comply with N.C. Gen. Stat. § 50B-3(b), I concur in the result.

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In this case, the parties entered into a consent agreement on 22 April 2002, which provided:

1. Files 02 CVD 1071 and 02 CVD 1038 shall be consolidated into 02 CVD 1071;
2. Both parties claims for domestic violence orders shall be dismissed;
3. Both parties, however, agree that the Court shall have jurisdiction over them personally so as to enforce the consent agreement of the parties herein as a consent judgment;
4. Plaintiff (Steven O. Bryant) shall have the immediate possession and use of a rental house owned by Defendant (Dale O. Williams) at 1125 Loblolly Lane, Newton;
5. Defendant shall continue to have the use and possession of the residence jointly owned by Plaintiff and Defendant on the condition that not later than 5 p.m. April 24, 2002 the Defendant shall deliver to the Plaintiff in the presence of the Catawba County Sheriff without damage air compressor, tool box and tools, space heater and tank, metal desk, air rifle and scope, entertainment center, computer desk, 35" Sony T.V., odds and ends, nuts and bolts;
6. Not later than June 1, 2002 Defendant shall deliver to Plaintiff [the] deed to the rental [home] without any liens or encumbrances;
7. Plaintiff shall deliver to Defendant [a] deed conveying all his interest in the jointly owned house with the Defendant having refinanced or otherwise removed Plaintiff's name from all debts secured by the residence;
8. Simultaneously with the exchange of deeds, the Plaintiff shall pay to Defendant \$5,000;
9. A restraining order shall be entered providing that the Plaintiff and Defendant shall not contact each other or otherwise assault, harass, go about, or otherwise interfere with each other;
10. Neither party shall go to the residence of the other without the presence of a law enforcement officer pursuant to the terms of this Order. This shall also apply to both the

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place of work and public areas where one or the other may be present;

11. Plaintiff shall pay the April 2002 \$441.00 home equity payment on the home owned jointly by the parties.

Pursuant to the terms of this agreement, the parties will live in separate homes, have restraining orders against one another for their protection, and have terminated joint debts. Such an agreement is permissible under Chapter 50B because it was a consent agreement entered into by the parties “to bring about a cessation of acts of domestic violence.” *See* N.C. Gen. Stat. § 50B-3(a). Therefore, the provision in the consent order dismissing the parties respective claims for domestic violence protective orders did not divest the trial court of jurisdiction to approve the consent agreement.

Furthermore, I disagree with the majority’s conclusion that “the court’s authority to enter a protective order or approve a consent agreement is dependent upon finding that an act of domestic violence occurred . . .” None of the cases cited by the majority in support of this statement address consent agreements resolving mutual claims for domestic violence protective orders. *See Brandon v. Brandon*, 132 N.C. App. 646, 513 S.E.2d 589 (1999); *Augur v. Augur*, 356 N.C. 582, 573 S.E.2d 125 (2002); *Story v. Story*, 57 N.C. App. 509, 291 S.E.2d 923 (1982). As stated in *Buckingham v. Buckingham*, 134 N.C. App. 82, 89, 516 S.E.2d 869, 875 (1999), “a consent judgment is merely a recital of the parties agreement and not an adjudication of rights. This type of judgment does not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties.” Accordingly, the validity of a consent agreement resolving mutual claims for a domestic violence protective order under Chapter 50B is not dependent upon the trial court finding an act of domestic violence occurred.

Moreover, it should be pointed out that while the majority consolidates the two appeals made by Ms. Williams, only her appeal from the trial court’s denial of her Rule 60(b) motion (COA02-1586) is properly before us. As to the other appeal (02-1431), Ms. Williams attempts to appeal from the trial court’s order approving the consent agreement without having filed a notice of appeal during the appropriate time period.

The procedural history of this case shows the following chronology:

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4 April 2002: Ms. Williams files Complaint and Motion for an Ex Parte Domestic Violence Protective Order; Order entered.

9 April 2002: Mr. Bryant files Complaint and Motion for an Ex Parte Domestic Violence Protective Order; Order denied.

22 April 2002: Both parties inform the trial court that all issues in controversy have been resolved by the parties pursuant to the terms of the Memorandum of Judgment/Order. Ms. Williams, her attorney, and the Court sign the Memorandum of Judgment. The Memorandum of Judgment is filed with the clerk of court.

29 April 2002: Mr. Bryant and his attorney sign the Memorandum of Judgment.

8 May 2002: Ms. Williams files a Rule 60B motion.

21 June 2002: Trial court enters an order incorporating the terms of the Memorandum of Judgment, stating the agreement is enforceable by the trial court's contempt powers and indicating that this Order constitutes a formal judgment.

21 July 2002: Ms. Williams files Notice of Appeal from the 21 June 2002 Order.

26 July 2002: Trial court enters order denying Rule 60B motion.

19 August 2002: Ms. Williams files Notice of Appeal from the 26 July 2002 order.

While the record shows that the parties stipulated and agreed that Ms. Williams gave timely Notice of Appeal from the Order filed 21 June 2002, the facts show that the trial court entered the order on 22 April 2002. Indeed, that order was a valid order because it was "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2001); *See In re Estate of Trull*, 86 N.C. App. 361, 357 S.E.2d 437 (1987). Typically, a Chapter 50B consent order is entered and filed in handwritten form, as with the 22 April 2002 order here, and then is typed and entered *nunc pro tunc* to the date of the original order and filed. However, in this case, the 21 June 2002 order was not entered *nunc pro tunc*; instead, it recapitulated the April order. Thus, the record shows that the trial judge entered the order regarding the distribution of the parties property on 22 April 2002. Since Ms. Williams did not appeal from the 22 April order, this Court did not acquire jurisdiction to consider the issue decided by the majority. *See N.C.R. App. P. 3 (2001); see also*

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Von Ramm v. Von Ramm, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (stating “proper notice of appeal requires that a party shall designate the judgment or order from which appeal is taken. Without proper notice of appeal, this Court acquires no jurisdiction. A court may not waive the jurisdictional requirements of . . . Rules 3 and 4, even for good cause shown under Rule 2, if it finds that they have not been met”). Accordingly, I would dismiss Ms. Williams’ appeal from the 21 June 2002 order. However, Ms. Williams’ appeal from Order denying her Rule 60B motion is properly before this Court.

Regarding Ms. Williams’ appeal in COA02-1586, the sole issue presented by Ms. Williams in her brief is whether the trial court’s order is void for want of subject matter jurisdiction. Ms. Williams contends the district court partitioned the jointly-owned property without subject-matter jurisdiction because Chapter 46 of our statutes vests the superior court with exclusive jurisdiction over the partitioning of property. However, Chapter 46 applies to compulsory or judicial partition, not partition by agreement such as the one in this case. *See Keener v. Den*, 73 N.C. 132 (1875). Moreover, Chapter 46 does not vest the superior court with jurisdiction over the partition of real property unless “one or more persons claiming real estate as joint tenants or tenants in common . . . [seek] partition by petition to the superior court.” N.C. Gen. Stat. § 46-3 (2001). Indeed, N.C. Gen. Stat. § 46-1 states that “partition under this Chapter shall be by special proceeding,” and according to N.C. Gen. Stat. § 1-393 *et seq.*, the Clerk of Court has jurisdiction over special proceedings. *See Baggett v. Jackson*, 160 N.C. 26, 76 S.E.86 (1912) (explaining the superior court acquires jurisdiction over proceedings to partition lands upon their being transferred by the clerk thereto, in terms, and may proceed therewith and fully determine all matters in controversy). Thus, the trial court had subject-matter jurisdiction.

However, the consent order must be deemed void as it failed to comply with the requirements of N.C. Gen. Stat. § 50B-3(b). Under this provision, “Protective orders entered or consent orders approved pursuant to [Chapter 50B] shall be for a fixed period of time not to exceed one year.” In this case, the consent order did not provide for the one-year limitation.

Nevertheless, the record shows the parties in this case reached an agreement to divide their properties and then sought to have the trial court approve that agreement as a consent order under Chapter 50B. As indicated in the record, the trial court entered a memorandum of judgment on 22 April 2002, which indicated the parties had

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reached an agreement and agreed to be legally and mutually bound by the terms and conditions. In that light, as stated by the majority, the subject agreement while not enforceable as a consent judgment under N.C. Gen. Stat. § 50B-3, may still be enforceable under contract law. *See Harbrogate Property Owners Ass'n v. Mountain Lake Shores Development Corp.*, 145 N.C. App. 290, 297, 551 S.E.2d 207, 212 (2001) (stating “ordinarily, a consent judgment is the contract between the parties entered upon the records with the approval and sanction of the court and it is construed as any other contract”).

ERIC JOHN LUHMAN, PLAINTIFF v. BILLY HOENIG AND CAPE CARTERET VOLUNTEER FIRE AND RESCUE DEPARTMENT, INC., DEFENDANTS

No. COA03-23

(Filed 2 December 2003)

Immunity—volunteer fire department—qualification

The trial court erred by holding that a volunteer fire department was not entitled to summary judgment on immunity. Defendants met all of the statutory requirements for a rural fire department or fireman and were responding to and suppressing a reported fire when the incident which gave rise to this negligence suit occurred. Plaintiff did not allege or show willful and wanton conduct and cannot survive defendants' properly asserted affirmative defense of immunity. N.C.G.S. § 58-82-5.

Judge WYNN dissenting.

Appeal by defendants from order entered 5 February 2002 by Judge James R. Vosburgh, order entered 2 April 2002 by Judge W. Allen Cobb, Jr., order entered 19 April 2002 and judgment entered 3 May 2002 by Judge Carl Tilghman in Carteret County Superior Court. Heard in the Court of Appeals 7 October 2003.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., and Wheatly, Wheatly, Nobles & Weeks, P.A., by Stevenson L. Weeks, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier III and Jaye E. Bingham, and Barnes, Braswell & Haithcock, P.A., by R. Gene Braswell, for defendants-appellants.

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TYSON, Judge.

I. Background

The Cape Carteret Volunteer Fire and Rescue Department, Inc. ("Fire Department") was originally incorporated as Cape Carteret Volunteer Fire Department, a North Carolina non-profit corporation, on 23 May 1966. The Fire Department changed its name to include "and Rescue" on 11 June 1998. On 13 October 1997, the Fire Department contracted with Carteret County to provide fire protection for all property lying within the boundaries of the Cape Carteret Fire and Rescue Service District. On 26 February 2000, a brush fire started in Eric Luhmann's ("plaintiff") neighborhood. The Fire Department responded to the scene to suppress the fire with several vehicles, including a tanker truck and a pumper truck. The two trucks were connected by a fire hose. Plaintiff obtained a beer from a neighbor and went down to the fire trucks. He started a conversation with his acquaintance, fireman John Clark ("Clark"). Plaintiff and Clark talked with each other and walked around to the side of one of the fire trucks. No fire lines or tape marked off the area. Plaintiff was not asked to leave the scene. The scene became chaotic as the Fire Department continued its efforts to suppress the fire.

Fire Department Chief Harold Henrich ("Chief Henrich") directed Billy Hoenig ("Hoenig") to leave the scene and replenish his water supply. The parties stipulated that Hoenig, a Fire Department employee, attempted to drive one of the fire trucks away from the scene without disconnecting the fire hose from the trucks. Hoenig engaged the "back up alarm" and looked behind the truck in his mirrors. Hoenig did not see plaintiff standing between the other truck and the hose. As Hoenig backed the truck, the hose connecting the two trucks gradually tightened. Plaintiff became pinned against the other truck and began screaming for help. Clark yelled into the radio for Hoenig to stop. The vehicle stopped, the pressure was relieved, and plaintiff fell to the ground.

Several emergency medical technicians on the scene rendered aid to plaintiff and loaded him in an ambulance. He was transported to Carteret General Hospital where he was diagnosed with a displacement fracture of the upper part of the tibia, the bone between the knee and the ankle. The day after the accident, Dr. Jeffrey Moore ("Dr. Moore"), an orthopedic surgeon, performed surgery on plaintiff to support the bone and repair the meniscus cartilage and the anterior cruciate ligaments. Following the surgery, plaintiff wore a large

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leg immobilizer, took pain medication, and underwent physical therapy. On 20 September 2000, Dr. Moore performed another surgery to stabilize plaintiff's knee. Prior to the accident, plaintiff owned an auto repair business. Following the accident, he attempted to return to work, but eventually sold the business to an employee.

Plaintiff filed suit against Hoenig and the Fire Department ("defendants"). Both parties filed motions for summary judgment. The trial court found that: (1) Hoenig and the Fire Department were negligent as a matter of law, (2) plaintiff was entitled to partial summary judgment on the issue of negligence, and (3) both parties' motions for summary judgment on the issue of contributory negligence were denied. At trial, the jury found that plaintiff was contributorily negligent but that Hoenig had the last clear chance to avoid plaintiff's injuries or damages. The jury awarded plaintiff \$950,000.00. Defendants appeal.

II. Issues

Defendants contend the trial court erred by: (1) denying their motion for summary judgment, motion for directed verdict, and posttrial motions because Hoenig and the Fire Department were immune from liability pursuant to N.C. Gen. Stat. § 58-82-5; (2) granting plaintiff's motion for summary judgment on the issue of negligence; (3) submitting the issue of last clear chance to the jury; (4) denying defendants' motion to continue and motion for mistrial, as defendants were allowed only three days to obtain an independent medical examination; and (5) allowing evidence and testimony to be admitted when defendants were not provided with supplemental discovery responses in a timely manner.

Plaintiff cross-appeals and contends the trial court erred by: (1) allowing defendants to introduce evidence of signs on the fire trucks that read "Keep Back 400 Feet;" (2) submitting the issue of contributory negligence instead of comparative negligence; and (3) allowing defendants to include documents in the record on appeal, which were neither admitted nor considered by the trial court.

III. Immunity**A. Failure to Assert**

Defendants argue the trial court's denial of their motion for summary judgment, motion for directed verdict, and posttrial motions constitutes error. Summary judgment is proper where the movant

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shows that plaintiff cannot survive an affirmative defense. *Trexler v. Norfolk S. Ry. Co.*, 145 N.C. App. 466, 469, 550 S.E.2d 540, 542 (2001). Defendants contend N.C. Gen. Stat. § 58-82-5 grants them immunity and bars plaintiff's claims. Plaintiff asserts that defendants failed to assert this defense in their answer and are barred from asserting this defense on appeal. N.C.R. Civ. P. 8(c) requires that a party shall set forth a "short and plain statement . . . sufficiently particular to give the court and the parties notice . . ." N.C. Gen. Stat. § 1A-1, Rule 8(c) (2001). Here, defendants' answer asserted as the fourth defense "sovereign, governmental, and qualified immunity."

Defendants asserted the immunity found in N.C. Gen. Stat. § 58-82-5 in their motion for summary judgment and at the hearing on the motion. "[U]npled affirmative defenses may be raised for the first time on a motion for summary judgment, even if not asserted in the answer, if both parties are aware of the defense." *Mullis v. Sechrest*, 126 N.C. App. 91, 95, 484 S.E.2d 423, 425-26 (1997), *rev'd on other grounds*, 347 N.C. 548, 495 S.E.2d 721 (1998); *see also Bank v. Gillespie*, 291 N.C. 303, 306, 230 S.E.2d 375, 377 (1976). Plaintiff was provided ample notice that defendants would assert this defense as required by N.C.R. Civ. P. 8(c).

B. Statutory Immunity

N.C. Gen. Stat. § 58-82-5(b) (2001) provides that:

A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of the reported fire, when that act or omission relates to the suppression of a reported fire . . . unless it is established that the damage occurred because of gross negligence, wanton conduct or intentional wrongdoing of the rural fire department or the fireman.

Plaintiff did not allege "gross negligence, wanton conduct, or intentional wrongdoing" by the defendants in his complaint. A "rural fire department" is defined in that statute as: (1) a bona fide fire department; (2) incorporated as a nonprofit corporation, which is classified as not less than Class "9" under schedules filed with the Commissioner of Insurance; and (3) which operates fire apparatus of the value of five thousand dollars or more. N.C. Gen. Stat. § 58-82-5(a) (2001).

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Defendants offered evidence to show the Fire Department is properly classified as a “rural fire department” pursuant to this statute. Chief Henrich’s affidavit stated that at the time of the incident, the Fire Department: (1) was a fire and rescue department; (2) was incorporated as a non-profit corporation with a 9S rating from the North Carolina Department of Insurance; and (3) owned in excess of five thousand dollars worth of fire apparatus. Chief Henrich’s uncontested testimony at trial also established that the Fire Department meets all statutory requirements of a “rural fire department.” *Id.* Plaintiff’s injuries occurred “at the scene of the reported fire” as Hoenig prepared to obtain more water, an act relating “to the suppression of the reported fire.” N.C. Gen. Stat. § 58-82-5(b). Defendants’ evidence shows their entitlement to the limited immunity established in N.C. Gen. Stat. § 58-82-5.

Plaintiff argues that N.C. Gen. Stat. § 58-82-5 does not apply and contends that N.C. Gen. Stat. § 69-25.8 applies to defendants. N.C. Gen. Stat. § 69-25.8 (2001) states:

Members of any county, municipal or fire protection district fire department shall have all of the immunities, privileges and rights . . . when performing any of the functions authorized by this Article, as members of a county fire department would have in performing their duties in and for a county, or as members of a municipal fire department would have in performing their duties

Plaintiff further contends that defendants waived this immunity by purchasing two insurance policies with limits of one million dollars (\$1,000,000.00) each. N.C. Gen. Stat. § 153A-435 (2001) provides that the “purchase of insurance . . . waives the county’s governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function.”

Plaintiff argues N.C. Gen. Stat. § 58-82-5 is not applicable because of the Fire Department’s contract with Carteret County, receipt of money from Carteret County taxes, and the purchase of insurance qualifies it as a “fire protection district fire department” subject to the requirements of N.C. Gen. Stat. § 69-25.8 and N.C. Gen. Stat. § 153A-435. This argument requires us to recognize a “conversion” of the Fire Department from a “rural fire department” to a “fire protection district fire department.” This interpretation would also require us to hold that N.C. Gen. Stat. § 69-25.8 abrogates the specific immunity provided in N.C. Gen. Stat. § 58-82-5.

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N.C. Gen. Stat. § 69-25.8 was enacted in 1951 and was amended once for a technical modification in 1979. 1979 N.C. Sess. Laws ch. 714, § 2. N.C. Gen. Stat. § 58-82-5 was enacted in 1983 to provide a specific immunity that would apply in specific circumstances. Presuming the Fire Department is a “fire protection district fire department” as plaintiff argues, the specific and limited immunity provided by N.C. Gen. Stat. § 58-82-5 still applies to the facts at bar.

Our Supreme Court interpreted N.C. Gen. Stat. § 58-82-5 to mean that “the overall purpose of the General Assembly was to protect rural volunteer fire departments from liability for ordinary negligence *when responding to a fire.*” *Spruill v. Lake Phelps Vol. Fire Dep’t, Inc.*, 351 N.C. 318, 321, 523 S.E.2d 672, 675 (2000) (emphasis supplied). In *Spruill*, two rural fire departments responded to a reported fire and spilled water as they filled their fire truck tanks from a hydrant approximately one-half mile from the fire. *Id.* at 319, 523 S.E.2d at 674. This water froze on the pavement and plaintiff suffered injuries as his car hit the ice and spun off the road. *Id.* After plaintiff sued, defendants claimed immunity under N.C. Gen. Stat. §58-82-5(b). *Id.* at 320, 523 S.E.2d at 674. The trial court granted defendants’ motion for summary judgment and this Court reversed. *Spruill v. Lake Phelps Vol. Fire Dep’t, Inc.*, 132 N.C. App. 104, 510 S.E.2d 405 (1999). Our Supreme Court reversed and upheld the trial court’s award of summary judgment in favor of the defendant-fire departments. *Spruill*, 351 N.C. at 323-24, 523 S.E.2d at 676-77. The Court stated that N.C. Gen. Stat. § 58-82-5(b) was amended in 1987 as part of “An Act to Expand the Traffic Control Authority of Firemen and Rescue Squad Members in Emergency Situations,” which further indicated the General Assembly’s intent to “provide statutory immunity for the ordinary negligence of a rural fire department’s acts or omissions which relate to the suppression of a fire” *Id.*

In light of our Supreme Court’s interpretation of N.C. Gen. Stat. § 58-82-5 in *Spruill*, we hold that defendants are immune from liability under N.C. Gen. Stat. § 58-82-5 under the facts at bar. Defendants met all three statutory requirements of a “rural fire department” or a “fireman” and were responding to and suppressing a reported fire when the incident occurred. Plaintiff did not allege or show willful and wanton conduct and cannot survive defendants’ properly asserted affirmative defense of immunity provided in N.C. Gen. Stat. § 58-82-5. *Trexler*, 145 N.C. App. at 469, 550 S.E.2d at 542. The trial court erred in ruling that defendants were not entitled to summary judgment on immunity as a matter of law under N.C. Gen.

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Stat. § 58-82-5. In light of our holding, we do not reach the remaining assignments of error.

IV. Conclusion

Defendants were entitled to summary judgment on statutory immunity. The trial court's order denying defendants' motion for summary judgment is reversed and judgment is vacated.

Reversed. Judgment vacated.

Judge LEVINSON concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge dissenting.

Because I believe the contract between Carteret County and Cape Carteret Volunteer Fire and Rescue Department, Inc. ("Carteret Fire Department"), conferred the benefit of sovereign immunity under N.C.G.S. § 69-25.8 on the Carteret Fire Department, I respectfully dissent.

The record on appeal shows that the contract between Carteret County and Carteret Fire Department specifically provided that Carteret Fire Department would render fire protection services to the district in exchange for \$0.10 per \$100 valuation of property taxes collected by the county in the district. In performing its contract with the county, the Carteret Fire Department collected approximately \$850,000.00 per year from the County, 98.7% of the department's annual budget. This infusion of funds allowed the Carteret Fire Department to pay the majority of its firefighters for their services. Also relevant, the Carteret Fire Department had two insurance policies in effect at the time of Luhmann's injury, each with a policy limit of one million dollars. Finally, the Carteret Fire Department did not initially claim to be a "rural fire department" under N.C.G.S. § 58-82-5; rather, the Fire Department's Answer asserted sovereign immunity (N.C.G.S. § 69-25.8) as a defense:

these answering defendants allege that they are entitled to sovereign, governmental and qualified immunity, except to the extent those immunities may be deemed waived by the purchase of liability insurance . . .

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Indeed, the Carteret Fire Department first developed its “rural fire department” theory in a 11 March 2002 summary judgment motion, almost two years after Luhmann filed his Complaint and less than two months prior to the Judgment from which they now appeal.

In light of their contract with and significant compensation from the county, no less than 98.7% of the department’s budget, I would hold that Carteret Fire Department acted as a “fire protection district fire department,” as was held by the trial court. As such, the Carteret Fire Department was entitled to sovereign immunity under N.C.G.S. § 69-25.8. However, because the Carteret Fire Department purchased two insurance policies, each with a policy limit of one million dollars, I would uphold the trial court’s judgment in favor of Luhmann. *See N.C.G.S. § 153A-435(a)* (The purchase of liability insurance “waives the county’s governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function.”).

Moreover, I disagree with the majority’s contention that even if Carteret Fire Department was a “fire protection district fire department” as Luhmann argues, the specific immunity provided by N.C. Gen. Stat. § 58-82-5 would still apply to the facts at bar.” N.C.G.S. § 69-25.8 and N.C.G.S. § 58-82-5 cover different types of fire departments, codify different immunities, and are not interchangeable. N.C.G.S. § 69-25.8 governs “district fire departments,” whereas N.C.G.S. § 58-82-5 governs “rural fire departments.” Since the Carteret Fire Department, by virtue of its contract with Carteret County acted as a “district fire department,” it was entitled to immunity under N.C.G.S. § 69-25.8.

In sum, Carteret Fire Department acquired “district fire department” status by virtue of its contract with Carteret County. Although Carteret Fire Department enjoyed sovereign immunity under the statutory provision governing “district fire departments,” N.C.G.S. § 69-25.8, they waived that immunity by purchasing insurance. Thus, the trial court’s judgment was not erroneous and should not be disturbed.

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[161 N.C. App. 460 (2003)]

ROSA CHILDERS FOX, PLAINTIFF v. RAY L. GREEN, M.D.; STATESVILLE CLINIC FOR OBSTETRICS & GYNECOLOGY, P.A.; AND HOSPITAL CORPORATION OF NORTH CAROLINA D/B/A DAVIS COMMUNITY HOSPITAL, NOW DAVIS COMMUNITY HOSPITAL, L.L.C. D/B/A DAVIS MEDICAL CENTER, DEFENDANTS

No. COA02-1419

(Filed 2 December 2003)

1. Courts— overruling prior judge—granting summary judgment after prior denial

Although a trial court judge may have improperly ruled on a second motion for summary judgment after the first was denied by another judge, the ruling was reversed on its merits elsewhere in the opinion.

2. Medical Malpractice— sponges to control bleeding—left inside body—res ipsa loquitur—therapeutic purpose—isue of fact

Summary judgment for the defendants in a medical malpractice action was reversed where plaintiff alleged res ipsa loquitur arising from sponges being left inside plaintiff following childbirth, and defendants contended that the sponges had been used to control bleeding and had a therapeutic purpose. The resolution of this issue was for the jury.

3. Pleadings— Rule 11 sanctions denied—second summary judgment motion—no improper purpose

The trial court properly refused to award plaintiff Rule 11 sanctions for filing a second summary judgment motion after the first motion was denied. There was an additional issue and no evidence that the motion was filed for an improper purpose.

Appeal by plaintiff from order and judgment entered 20 May 2002 by Judge Mark Klass in the Superior Court in Alexander County. Heard in the Court of Appeals 26 August 2003.

Edward Jennings, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Harvey L. Cosper, Jr. and John H. Beyer, for defendant-appellees Ray L. Green, M.D. and Statesville Clinic for Obstetrics & Gynecology, P.A.

Cranfill, Sumner & Hartzog, by David H. Batten, for defendant-appellee Davis Community Hospital, L.L.C. d/b/a Davis Medical Center.

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HUDSON, Judge.

This appeal arises from the grant of summary judgment in favor of defendants dismissing plaintiff's cause of action. For the following reasons, we reverse in part, affirm in part and remand.

On 4 March 1999, plaintiff, Rosa Childers Fox, filed a complaint against Ray L. Green, M.D., Statesville Clinic for Obstetrics and Gynecology, and Davis Community Hospital, alleging that during the delivery of her child at Davis Hospital, Dr. Green negligently left sponges in Ms. Fox's body that caused her pain and suffering and that necessitated a second surgery for their removal. On 23 May 2000, Davis Hospital moved for summary judgment, which motion Judge Erwin Spainhour denied on 17 August 2000.

Defendants Dr. Green and Statesville Clinic moved for summary judgment on 22 March 2002, asserting that Dr. Green left the sponges in Ms. Fox's body as a therapeutic measure, thus making the doctrine of *res ipsa loquitur* inapplicable to Ms. Fox's case. On 25 April 2002, Davis Hospital again moved for summary judgment, and by amended motion 26 April 2002, incorporated Dr. Green's therapeutic justification as a basis for summary judgment.

Superior court judge Mark E. Klass heard the motions for summary judgment, and on 20 May 2002, granted the motions as to all defendants, thereby dismissing plaintiff's cause of action. Plaintiff appeals.

On 6 March 1996, plaintiff arrived at Davis Hospital to give birth to her third child. Dr. Green, her prenatal physician as well as the attending physician at this birth, induced her labor. After a difficult labor, plaintiff's child experienced a rapid decrease in fetal heart rate immediately prior to delivery. Dr. Green performed a third-degree episiotomy, and the child was born vaginally, assisted by forceps and vacuum. During the delivery, there were lacerations to plaintiff's vagina, and hospital charts estimated that plaintiff lost approximately two liters of blood. In response to the bleeding, Dr. Green packed plaintiff's vagina with surgical sponges. The bleeding eventually stopped, a sponge removal was undertaken, and a surgical team assisted in closing the lacerations. The hospital chart spaces for "vaginal pack count" and "sponge count" were marked "N/A" for not applicable.

Plaintiff was discharged from the hospital on 8 March 1996, although she was complaining of severe abdominal pain and inability

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to have a bowel movement since she gave birth. Over the next two days, her abdominal pain increased, and she was still unable to move her bowels. On 10 March 1996, plaintiff returned to Davis Hospital complaining of severe abdominal pain, a distended abdomen, swelling feet, lightheadedness, and bowel obstruction. X-rays revealed a retained surgical sponge within plaintiff's abdomen. That same day, Dr. Gary T. Robinson performed laparoscopic surgery to remove the retained sponge. Plaintiff's condition improved after the surgery, but she continues to experience abdominal pain and discomfort.

Anaylsis

I.

[1] First, plaintiff argues that the trial court improperly granted summary judgment in favor of defendant Hospital since a prior motion for summary judgment made by defendant Hospital involving the same legal issues had been denied by another superior court judge. We agree in part.

In *Taylorsville Fed. Sav. & Loan Ass'n v. Keen*, 110 N.C. App. 784, 431 S.E.2d 484 (1993), the plaintiff filed a motion for summary judgment, which was denied by a superior court judge. *Id.* at 784-85, 431 S.E.2d at 484. Approximately six months later, plaintiff filed a second motion for summary judgment, which was granted by a different superior court judge. *Id.* In reversing the grant of the second motion, this Court noted that “[A] motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues.” *Id.* at 785, 431 S.E.2d at 484 (quoting *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 440, 291 S.E.2d 892, 894, *cert. denied*, 306 N.C. 555, 294 S.E.2d 369 (1982)). The Court further noted that:

This rule is based on the premise that no appeal lies from one superior court judge to another. Moreover . . . to allow an unending series of motions for summary judgment would defeat the very purpose of summary judgment procedure, to determine in an expeditious manner whether a genuine issue of material fact exists and whether the movant is entitled to judgment on the issue presented as a matter of law.

Id. (citations and internal quotations omitted).

This rule, however, is not without exceptions. Subsequent motions for summary judgment are allowed when they present legal

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issues different than those raised in prior motions. See *Carr v. Carbon Corp.*, 49 N.C. App. 631, 635, 272 S.E.2d 374, 377 (1980), *disc. review denied*, 302 N.C. 217, 276 S.E.2d 914 (1981). The presentation of a new legal issue is distinguishable from the presentation of additional evidence. "It is the rule in this State that an additional forecast of evidence does not entitle a party to a second chance at summary judgment on the same issues." *Metts v. Piver*, 102 N.C. App. 98, 100-01, 401 S.E.2d 407, 408 (1991).

Here, defendant Hospital first moved for summary judgment on 22 May 2000. In support of that motion, defendant Hospital argued that *res ipsa loquitur* was inapplicable to plaintiff's negligence claim, or in the alternative that plaintiff could not produce expert testimony that defendant Hospital breached any duty of care owed to plaintiff. On his own accord, the judge raised the issue of whether defendant Hospital could be held liable for corporate negligence by allowing an unqualified doctor to operate in its hospital. In an order entered 16 August 2000, the court denied the motion, citing "*Blanton v. Moses H. Cone Hospital*, 319 N.C. 372, 376-77 (1987)" (corporate hospital may be liable for negligence of doctor).

On 25 April 2002, defendant Hospital filed a second motion for summary judgment, and by amended motion on 26 April 2002, again argued *res ipsa loquitur* was inapplicable to plaintiff's claim and offered a therapeutic justification for the retention of the sponge as a basis for its inapplicability. Additionally, defendant Hospital sought summary judgment on the issue of plaintiff's claim for punitive damages. Although it appears that the parties made essentially the same arguments about *res ipsa loquitur* in both proceedings, notwithstanding defendant Hospital's therapeutic justification argument, see *Metts*, 102 N.C. App. at 100-01, 401 S.E.2d at 408, neither order clearly specifies the ground upon which it is based. Thus, even if the second judge improperly ruled upon the issue of liability, the issue of punitive damages was not argued in the materials supporting the first motion, and thus was an appropriate matter for the second ruling.

Plaintiff presents no argument in support of the contention within her complaint that she is entitled to an award of punitive damages against defendant Hospital. Rule 28 of the Rules of Appellate Procedure provides that questions not presented and discussed in a party's brief are deemed abandoned. N.C.R. App. P. 28(a); see also *Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 237, 371 S.E.2d 302, 303 (1988). Thus, we do not address the issue of punitive damages. However, even though the court may have improperly ruled on the

issue of liability for a second time, we reverse the trial court's order on its merits, as set forth below.

II.

[2] Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c) (2001). The purpose of the rule is to avoid a formal trial where only questions of law remain and where an unmistakable weakness in a party's claim or defense exists. *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001). Our Supreme Court has elaborated that:

an issue is genuine if it is supported by substantial evidence, which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion. Further, . . . 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.

Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citations and internal quotations omitted).

"When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707 (2001). "All inferences of fact must be drawn against the movant and in favor of the nonmovant." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

Finally, it is a general rule that,

issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant "but should be resolved by trial in the ordinary manner." Hence it is only in exceptional negligence cases that summary judgment is appropriate because the . . . applicable standard of care must be applied, and ordinarily the jury should apply it under appropriate instructions from the court.

Vassey v. Burch, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980) (internal citations omitted). Here, plaintiff has alleged that the doctrine of *res*

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ipsa loquitur applies and that it is sufficient to allow her negligence claim to withstand summary disposition. We agree, and for the reasons set forth below, reverse the decision of the trial court.

The doctrine of *res ipsa loquitur*,

in its distinctive sense, permits negligence to be inferred from the physical cause of an accident, without the aid of circumstances pointing to the responsible human cause. Where this rule applies, evidence of the physical cause or causes of the accident are sufficient to carry the case to the jury on the bare question of negligence. But where the rule does not apply, the plaintiff must prove circumstances tending to show some fault of omission or commission on the part of the defendant in addition to those which indicate the physical cause of the accident.

Harris v. Mangum, 183 N.C. 235, 237, 111 S.E. 177, 178 (1922). Thus, “[r]es *ipsa loquitur* (the thing speaks for itself) simply means that the facts of the occurrence itself warrant an inference of defendant’s negligence, i.e., that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking.” *Sharp v. Wyse*, 317 N.C. 694, 697, 346 S.E.2d 485, 487 (1986) (emphasis in original) (quoting *Kekelis v. Machine Works*, 273 N.C. 439, 443, 160 S.E.2d 320, 323 (1968)). However,

applicability of the *res ipsa loquitur* doctrine depends on whether as a matter of common experience it can be said the accident could have happened without dereliction of duty on the part of the person charged with culpability.

Diehl v. Koffer, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000) (citations omitted and emphasis removed).

“Uniformly, in this and other courts, *res ipsa loquitur* has been applied to instances where foreign bodies, such as sponges, towels, needles, glass, etc., are introduced into the patient’s body during surgical operations and left there.” *Mitchell v. Saunders*, 219 N.C. 178, 182, 13 S.E.2d 242, 245 (1941); see also *Tice v. Hall*, 310 N.C. 589, 313 S.E.2d 565 (1984); *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932); *Hyder v. Weilbaecher*, 54 N.C. App. 287, 283 S.E.2d 426 (1981), *disc. review denied*, 304 N.C. 727, 288 S.E.2d 804 (1982). “[W]ell-settled law in this jurisdiction is and has been that ‘a surgeon is under a duty to remove all harmful and unnecessary foreign objects at the completion of the operation. Thus the presence

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of a foreign object raises an inference of lack of due care.’” *Tice*, 310 N.C. at 593, 313 S.E.2d at 567 (quoting *Hyder*, 54 N.C. App. at 289, 283 S.E.2d at 428).

Defendants argue that the sponge was left in plaintiff’s body for therapeutic purposes, which nullifies the application of *res ipsa loquitur*. We disagree and hold that *res ipsa loquitur* permits a jury to infer negligence here.

In *Mitchell*, a sponge was left in plaintiff’s body following a surgical procedure. Both doctors involved in the surgery testified to the procedures used to ensure that no sponges were left in the patient’s body and that these procedures were carried out with due care. Various experts also testified to the adequacy of the procedures employed by the defendant doctors. The Supreme Court held, however, that the doctrine of *res ipsa loquitur* applied, and that once applicable the inference of negligence created does not disappear upon the introduction of an explanation by defendant. *Id.* at 183-84, 13 S.E.2d at 246. Here, as in *Mitchell*, the defendants may raise their therapeutic justification at trial to rebut the inference of negligence raised by *res ipsa loquitur*. The resolution of these issues is for the jury.

III.

[3] Finally, plaintiff argues that the superior court erred by refusing to award plaintiff sanctions against defendant Hospital when defendant Hospital filed a second motion for summary judgment on what plaintiff claims were the same legal issues as those raised in defendant Hospital’s first motion for summary judgment. We disagree.

A trial court’s decision to deny sanctions under Rule 11 of the Rules of Civil Procedure is reviewed *de novo*. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). On review, the appellate court determines: (1) whether the trial court’s conclusions of law support its judgment or determination; (2) whether the trial court’s conclusions of law are supported by its findings of fact; and (3) whether the findings of fact are supported by the sufficiency of the evidence. *Id.* If the trial court makes no findings of fact or conclusions of law in its denial of Rule 11 sanctions, then the case must be remanded unless there is no evidence in the record, when viewed in the light most favorable to the moving party, which could support an award of sanctions. *DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 606, 544 S.E.2d 797, 802 (2001).

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Rule 11 of the Rules of Civil procedure provides in pertinent part that:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction[.]

G.S. § 1A-1, Rule 11(a) (2001).

As noted above, the second motion sought summary judgment on liability due in part to the defendants' therapeutic justification argument, and on an additional issue, that of punitive damages. Even assuming that the second motion on liability was not well grounded, we see no evidence in the record that the motion was "interposed for any improper purpose." Thus, plaintiff's motion for sanctions was properly denied.

Conclusion

For the foregoing reasons, we reverse the order granting summary judgment to defendants on the issue of negligence based on *res ipsa loquitur*, and affirm the trial court in regards to its ruling on punitive damages.

Reversed in part, affirmed in part, and remanded.

Judges WYNN and CALABRIA concur.

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[161 N.C. App. 468 (2003)]

STATE OF NORTH CAROLINA v. FREDERICK LEON DUNSTON

No. COA02-1634

(Filed 2 December 2003)

1. Evidence— corroborative testimony—credibility

The trial court did not err in a first-degree sex offense with a child and taking indecent liberties with a child case by admitting the testimony of two witnesses of statements made to them by the victim as corroborative evidence, because: (1) although there are variances between the testimony of the victim and the corroborating testimony given by the two witnesses, their testimony generally corroborates the testimony of the victim; and (2) the variances in the statements relate only to the credibility and weight to be given to the statements by the jury and are not sufficient to render the testimony contradictory.

2. Evidence— prior crimes or acts—defendant engaged in and enjoyed consensual anal sex with adult

The trial court erred in a first-degree sex offense with a child and taking indecent liberties with a child case by improperly admitting evidence under N.C.G.S. §8C-1, Rule 404(b) that defendant engaged in and enjoyed consensual anal sex with an adult, and defendant is entitled to a new trial because: (1) the fact that defendant engaged in and liked consensual anal sex with an adult, whom he married, is not by itself sufficiently similar to engaging in anal sex with an underage victim; (2) the evidence was not relevant for any purpose other than to prove defendant's propensity to engage in anal sex; and (3) it is highly probable this testimony was prejudicial to defendant especially in light of the inconsistent and unclear nature of the remaining evidence.

Appeal by defendant from judgment entered 27 April 2001 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 13 October 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Allison S. Corum and Special Deputy Attorney General Judith Robb Bullock, for the State.

Clifford, Clendenin, O'Hale & Jones, L.L.P., by Robert I. O'Hale, for defendant-appellant.

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[161 N.C. App. 468 (2003)]

HUNTER, Judge.

Frederick Leon Dunston (“defendant”) appeals from a judgment filed 27 April 2001 entered consistent with jury verdicts finding him guilty of first degree sex offense with a child and taking indecent liberties with a child. Defendant was sentenced to a minimum term of imprisonment of 216 months and a maximum term of 269 months. Because the trial court improperly admitted evidence that defendant engaged in and enjoyed consensual anal sex with an adult, we grant defendant a new trial.

At trial beginning on 24 April 2001, the minor victim stated she was born on 6 November 1988, and was therefore twelve years old at the time of trial. The victim then testified that while she was a foster child living with defendant and Tonya Dunston, whom defendant married during this period, defendant “sex abused” the victim in their home on several occasions. She further testified this meant touching a person in their “private spot.” The victim stated that defendant had touched her “private part” in the front of her body and touched her butt with “[h]is pickle.”

Earlene Thomas (“Thomas”) testified that after the victim was removed from the Dunston’s home she was placed with Thomas. During the time the victim was placed with Thomas, the victim required treatment for various behavioral problems at Charter Hospital. Following one such treatment, the victim told Thomas that “I learned that I didn’t have to let that man touch me like he did.” The victim then indicated through gestures that defendant had touched her vagina and bottom and also stated defendant had his “‘ding-a-ling . . . punching me in my bottom.’” This evidence was admitted as corroborative evidence and the jury was instructed to only consider it as such.

Tonya Dunston testified that she and defendant had taken in the victim as a foster child in December 1997 and that defendant would discipline her by having her stand in the corner or by sending her to her room. After being recalled to the stand, Tonya Dunston was asked, over defendant’s objection, if she and defendant had a sexual relationship, to which she replied affirmatively. She was then asked, over defendant’s objection, what sort of sexual activity they engaged in and she replied, “[m]issionary and anal.” Again over defendant’s objection, she was asked what sort of sexual activity defendant liked to engage in and she stated, “[a]nal.”

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Kim Madden ("Madden") was received by the trial court as an expert for the State in the field of interviewing and evaluating sexually abused children. She testified that she met the victim in June 1999 when the victim was taken to the Moses Cone Hospital Outpatient Clinic. Madden conducted an interview of the victim, observing the victim was a cognitively limited child and that by her mannerisms seemed to be mildly mentally retarded. Evidence of statements made by the victim during the interview were admitted as corroborative evidence. The victim told Madden that defendant had touched her "‘private part’" and put "‘his private part in my part’" such that "‘[i]t felt like he was doing it to me.’" The victim also related that defendant had put his private part on her butt. The victim further stated that defendant had smacked her with his hand and that defendant had tied her to a chair, cut her with a knife, jabbed her with a pin, and injured her ankle with a rollerblade. Madden testified in her expert opinion, although it was striking that she was aware of anal sex, the victim's behavior did not necessarily mean that the victim was sexually abused. Instead, it was Madden's opinion that the victim's behavior indicated a child "who is ten and shouldn't have that type of knowledge [about anal sex] had been either inappropriately exposed to that or had experienced that."

Dr. Angela Stanley ("Dr. Stanley") testified that she examined the victim. Her examination revealed that the victim's genitalia were normal and her hymen was "quite healthy." The victim's anus, however, appeared abnormal. Dr. Stanley observed the victim's anus was smooth and somewhat hollowed out in the area between five o'clock and seven o'clock. This was termed "funneling" and can exist where there has been repeated stretching or friction in that area so the folds of the anus have been stretched out. According to Dr. Stanley, such a finding was rare and can be consistent with anal abuse or anal sex. In her opinion, the findings from the examination were supportive of the victim's statements about being sexually abused. On cross-examination, Dr. Stanley conceded that the conditions she observed could be caused by sexual abuse, but not necessarily so. On redirect examination, Dr. Stanley testified that she had performed over 800 examinations of child sexual abuse victims, including victims of anal sexual abuse, and this was the only case in which she had observed funneling.

The defense, in its case in chief, called Dr. Scott Bowie ("Dr. Bowie") as an expert in obstetrics, gynecology, and sexual abuse examination. Dr. Bowie testified that he reviewed Dr.

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Stanley's notes and that those notes were inconsistent with vaginal sexual intercourse, and further that the findings from the anal examination did not necessarily indicate sexual abuse. Dr. Bowie further stated that such a finding can be normal, particularly in cases of women who have not had a pregnancy or a vaginal delivery. On cross-examination, Dr. Bowie testified that there were two schools of thought on whether funneling of the anus was indicative of anal sexual abuse, and that one side believed that such findings were indicative of anal sexual abuse.

Defendant testified on direct examination, in his own behalf, about an interview with the investigating officer. Defendant admitted that he lied to the investigating officer when asked if he had ever spanked the victim and admitted he had spanked her in violation of the rules for the foster parent program. On cross-examination, defendant stated the officer had advised him of his *Miranda* rights. When the State asked defendant if the investigating officer subsequently asked about the victim's allegations of abuse the following exchange occurred:

Q. . . . Now, [the investigating officer] stated to you, "Did you do this"; isn't that true?

A. She asked me that.

Q. And what was your response?

A. I said, "Do I have to answer that?"

Q. And what did [the investigating officer] say?

A. She—I believe she said no.

Q. And what was your response at that time?

A. I asked to terminate the interview.

Q. But your initial response was do I have to answer?

A. That's correct.

Q. It wasn't no?

A. I said—it was not no.

Defendant did not object or move to strike any of this testimony.

Defendant also called Lisa Childress ("Childress") who had been a classroom teacher of the victim. Childress testified that in 1996,

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prior to being placed in foster care with defendant, the victim had numerous behavioral problems including inserting the names of all the students in her class into the chant: "male and female . . . 'sitting in a tree, K-I-S-S-X-Y-Z. F— her up. F— her down. F— her hole all around.' " Childress also stated that records showed there were other instances where the victim had used sexually explicit language.

At the close of all the evidence, the trial court allowed the defense motion to dismiss a charge of first degree statutory rape, but allowed the charges of first degree sex offense, based on the alleged anal sexual abuse, and indecent liberties to go to the jury.

The issues are whether: (I) the testimony of Thomas and Madden was admissible as corroborative evidence; (II) testimony that defendant liked to engage in anal sex was admissible under Rule 404(b); and (III) it was plain error for the State to elicit testimony that defendant chose to terminate his interview with the investigating officer and did not deny his guilt after being given his *Miranda* warnings.

I.

[1] Defendant first contends that the testimony by Thomas and Madden of statements made to them by the victim was inadmissible as corroborating evidence. We disagree. At the outset, we note that the State contends Madden's testimony was admissible as statements made for the purpose of medical diagnosis or treatment. The record, however, clearly reveals that these statements were admitted solely for purposes of corroborating the victim's testimony.

"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. See *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).

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In this case, although there are variances between the testimony of the victim and the corroborating testimony given by Thomas and Madden, their testimony generally corroborates the testimony of the victim. The variances in the statements relate only to the credibility and weight to be given to the statements by the jury and are not sufficient to render the testimony contradictory.

II.

[2] Defendant next contends that admission of testimony by Tonya Dunston that defendant engaged in and liked anal sex is inadmissible under Rule 404(b) of the North Carolina Rules of Evidence. We agree.

Under Rule 404(b), evidence tending to show a defendant committed other wrongs, crimes, or acts and his propensity to commit such acts is admissible as long as it is relevant for some purpose other than to show the propensity of a defendant to commit the crime charged. *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990). Examples of purposes for which evidence of other crimes, wrongs, or acts is admissible include: "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). "Under Rule 404(b) a prior act or crime is 'similar' if there are 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both.'" *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 890-91 (1991) (citations omitted). Where, however, the State fails to show sufficient similarity between the acts "beyond those characteristics inherent to [the acts]," evidence of the prior acts is inadmissible under Rule 404(b). See *State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002).

In this case, the State contends evidence defendant engaged in and liked anal sex was relevant to prove both identity and motive. We conclude that the fact defendant engaged in and liked consensual anal sex with an adult, whom he married, is not by itself sufficiently similar to engaging in anal sex with an underage victim beyond the characteristics inherent to both, i.e., they both involve anal sex, to be admissible under Rule 404(b). We conclude this evidence was not relevant for any purpose other than to prove defendant's propensity to engage in anal sex, and thus, the trial court erred in admitting this evidence.

Furthermore, given the sensitive and potentially inflammatory nature of this evidence it is highly probable this testimony was prej-

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udicial to defendant, especially in light of the inconsistent and unclear nature of the remaining evidence in this case, which includes: (1) testimony of the State's expert that, in her opinion, the victim's behavior did not necessarily mean that she had been sexually abused, but rather that she had either experienced anal sex or had inappropriate knowledge of anal sex; (2) evidence that the victim had knowledge of sexually explicit language and activities prior to being placed in foster care with defendant; and (3) expert medical testimony from both sides recognizing that findings from the medical examination of the victim did not necessarily indicate sexual abuse and that there were differing opinions within the medical community as to the significance of such findings. As we have determined that evidence defendant engaged in and enjoyed consensual anal sex with his wife was improperly admitted under Rule 404(b) and that this error was probably prejudicial to him, defendant is entitled to a new trial.

III.

Defendant finally argues that the trial court committed plain error in allowing the State to elicit testimony from him that after being given his *Miranda* warnings he terminated the interview with the investigating officer when she began questioning him about the allegations of sexual abuse and that he did not deny the allegations.

Assuming the examination about which defendant now complains violates "the implicit assurance contained in the *Miranda* warnings that silence will carry no penalty[,]” where a defendant fails to object to questioning in violation of *Miranda* rights, that violation is subject only to plain error review on appeal. *State v. Walker*, 316 N.C. 33, 38, 340 S.E.2d 80, 83 (1986). “The plain error rule applies only in truly exceptional cases. Before deciding that an error by the trial court amounts to ‘plain error,’ the appellate court must be convinced that absent the error the jury probably would have reached a different verdict.” *Id.* at 39, 340 S.E.2d at 83 (citation omitted).

As we have already granted defendant a new trial in this case, it is unnecessary to comment on whether the State's examination constituted plain error.

New trial.

Chief Judge EAGLES and Judge GEER concur.

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IN THE MATTER OF KRISTOFOR SCOTT EVERETT, DOB 7/31/1993 AND BRITTNEY NICOLE EVERETT, DOB 4/28/1994

THE NEW HANOVER COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER V.
LISA RENEE EVERETT AND ALFRED "JUNIOR" EVERETT, RESPONDENTS

No. COA03-316

(Filed 2 December 2003)

Termination of Parental Rights— reunification—order allowing efforts to end

An order relieving DSS from efforts to reunify respondent and his children was reversed because it did not comply with N.C.G.S. §§ 7B-507 and 7B-907 and because the evidence did not support the conclusion that reunification efforts should cease.

Appeal by respondent Alfred "Junior" Everett from order entered 20 September 2002 by Judge Shelly Sveda Holt in New Hanover County District Court. Heard in the Court of Appeals 30 October 2003.

No brief filed for petitioner-appellee or Guardian ad Litem.

A. Michelle FormyDuval, for respondent-appellant.

CALABRIA, Judge.

Alfred "Junior" Everett ("respondent") appeals the 20 September 2002 permanency planning order relieving New Hanover County Department of Social Services ("DSS") from facilitating reunification efforts between the minor children and their father, respondent. Respondent appeals asserting the trial court's findings were not supported by competent evidence and the order did not comport with the requirements of N.C. Gen. Stat. § 7B-507(b) and 7B-907(b). We agree and reverse the order of the trial court.

Respondent and his wife Lisa Renee Everett ("Lisa") lived together with the minor children in Fayetteville until April 2001 when Lisa moved with the children to her mother and stepfather's home in Wilmington. Thereafter, on 21 June 2001, DSS filed a petition alleging Kristophor Scott Everett and Brittney Nicole Everett ("the children"), both age seven, were abused, neglected and dependent children. The petition alleged both parents failed to provide "proper care, supervision and discipline" but no facts were alleged to support this allegation against respondent. Rather, the petition explained Lisa had

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abused them by “kissing, licking and caressing pornographic materials” in front of the children. The court found Lisa thereby sexually abused her children while living in Wilmington with her parents, and while respondent resided in Fayetteville with his parents. The children were taken into DSS custody and placed in foster homes.

On 21 and 24 August 2001, the court held an adjudicatory hearing. With regard to respondent, the court found as fact:

Alfred Everett has limited mental capacities. Mr. Everett cannot read and write. He has no driver’s license and could not obtain a license. Mr. Everett is not able independent of his mother and step-father or sisters or other capable adult to provide adequate care and supervision of his children.

The court adjudicated the children “dependent and neglected” as to their father, respondent, on the basis that:

[in the Spring of 2001], Mr. Everett resided with his wife and children [in Fayetteville]. During this time there were occasions in which Mr. Everett was aware and observed Ms. Everett administer medication to the children inappropriately by giving the child more medicine than prescribed. . . . Mr. Everett cannot maintain a residence of his own or reside independently without the assistance of others in transportation and other matters.

The court ordered respondent to “have a psychological evaluation and a psychiatric evaluation to determine the nature and extent of his limitations and his therapeutic needs . . . [and] to follow all recommendations for treatment.”

Thereafter, the court conducted periodic review hearings. On 15 November 2001, the court held “[t]hat reunification remains the plan but determination on the course and pace of reunification is deferred until receipt of the psychological and psychiatric evaluations of both parents.” Respondent was ordered to obtain the evaluations and follow the recommendations. On 17 January 2002, the court found that respondent “has been unable to obtain the evaluations from the Cumberland County Mental Health facility as of yet,” although records reveal he had re-entered treatment there in an effort to comply with the court order. The court again held “[t]hat reunification remains the plan but reunification is not possible at this time.”

In February and March 2002, respondent obtained both psychological and psychiatric evaluations from the Cumberland County Mental Health Center. The psychological evaluation revealed that

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respondent has a Full Scale IQ score of 65, and lives with his mother and three of his other children. Although respondent is not able to work, he receives \$545.00 per month in social security benefits. Despite respondent's prior drug and alcohol problem, he reported that he had not used either since 1993. The evaluator found no evidence of psychosis, delusional disorder, or depression. He noted respondent's "insight into his problems appeared to be extremely limited and his judgment is considered to be marginal due to intellectual limitation and tendency towards impulsivity." The evaluator raised concerns regarding respondent's ability to financially support and intellectually stimulate his children, especially considering the children's special needs. Nevertheless the evaluator recommended respondent "be referred for a parenting assessment to help clarify his ability to parent his children effectively" and "could benefit from participating in a parenting class." The psychiatric evaluation also revealed no evidence of "psychiatric distress" and listed his only limitation as his "mental retardation." The evaluation concluded that "[n]o further psychiatric intervention [is] indicated at the present time." Both evaluations concluded that respondent's abilities had not significantly changed since 1993, but respondent had changed his behavior, including ceasing drug and alcohol use and limiting his caffeine intake.¹

Despite the evaluations concluding that respondent was not in need of treatment, DSS' report to the court preceding the permanency planning hearing reiterated that "Mr. Everett needs to come to terms with his mental health needs and be able to obtain treatment for himself." The report reasoned, "[i]t is virtually impossible for either parent to parent their children without some consistent treatment for themselves which would include both individual and joint counseling with their children and a medication assessment." The report also commented, "Mr. Everett still verbalizes to the Department that he wants to have his children with him, but without him being able to understand his own mental health issues and needs, he cannot effectively parent his children who also have special needs." Therefore, DSS determined, "[t]he Department feels that Mr. Everett needs to be in individual counseling to help him understand

1. In 1993 respondent consumed two cups of coffee and twenty-four cans of Coca Cola in one-half of a day. At that time respondent was having trouble sleeping, had bad nerves and was "impulsive and explosive." In the 2002 report, his caffeine intake had reduced to two to three cups of coffee and three cans of Mountain Dew per day. Respondent was no longer having trouble sleeping and there was no indication of his prior behavioral issues.

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his needs and how he can best get his needs met." Lastly, and again directly contrary to the mental health professionals that evaluated respondent, DSS concluded, respondent "currently is not receiving any therapy or medication treatment for his mental health needs. Mr. Everett needs to be involved with Cumberland County Mental Health to address his mental health needs."

On 30 May 2002, the court held a permanency planning hearing. The court found:

3. . . [T]he report of an evaluation by the Cumberland County Mental Health facility of Alfred Everett has been received. There is no significant change in the abilities of Mr. Everett as found in the recent evaluation and an evaluation of 1993. Mr. Everett is reported in both evaluations to have an IQ of 65, with limited ability to read and write.

. . .

7. That both children have significant emotional, behavioral and educational needs. That Mr. Everett's limitations prevent him from being a placement resource for these children. It is in the children's best interests that the relationship with their father be maintained and visitation with Mr. Everett should continue to be provided.

The court then held on this basis that "[t]he New Hanover County Department of Social Services is relieved of reunification efforts as to Mr. Everett." Prior to this time, the issue of reunification was always addressed to affect both parents, as a unit, as though the parents represented one household and one option for placement despite their separation and subsequent divorce.

Respondent appeals asserting the trial court's findings of fact were not supported by the evidence and the order did not comport with the requirements of N.C. Gen. Stat. §§ 7B-507(b) and 7B-907(b). We agree.

The purpose of a permanency planning hearing is "to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2001). In achieving this goal, the court may direct DSS to cease reunification efforts with a parent. N.C. Gen. Stat. § 7B-507 (2001). However, "[o]ne of the essential aims, if not the essential aim, of . . . [the hearing] is to reunite the parent(s) and the child, after the child has been

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taken from the custody of the parent(s).’” *In re Ekard*, 144 N.C. App. 187, 196, 547 S.E.2d 835, 841 (2001) (quoting *In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984)). Accordingly, the court’s authority to order the cessation of reunification efforts between a parent and a child is limited to where the court makes written findings of fact that:

- (1) Such efforts clearly would be futile or would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time;
- (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101;
- (3) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent; or
- (4) A court of competent jurisdiction has determined that: the parent has committed murder or voluntary manslaughter of another child of the parent; has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; or has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

N.C. Gen. Stat. § 7B-507(b).

In the case at bar, none of the court’s findings addressed the four reasons required to cease reunification efforts between respondent and his children.² Rather, the court explained “[t]hat Mr. Everett’s limitations prevent him from being a placement resource for these

2. The trial court did find as fact: “2. That pursuant to Order of 18 October 2001, for 24 August 2001, the children were determined to be as to their mother, Lisa Everett, abused, neglected and dependent children and as to their father, Alfred Everett, neglected and dependent children.” Although this finding of fact states, as required by N.C. Gen. Stat. § 7B-507(b)(2), that “[a] court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101,” the order delineates the reason for the cessation of reasonable efforts was respondent’s limitations and not the prior adjudication. Accordingly, although by way of delineating the history of the case, the court made a finding regarding the prior adjudication of neglect and dependency, since this finding was historical reference and not judicial reasoning, we recognize it may not now be considered as such to fulfill the N.C. Gen. Stat. § 7B-507(b) requirements.

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children" due to their special needs. While this reasoning most closely relates to a finding that "[reunification] efforts clearly would be futile," the court made no such finding and therefore failed to comport with N.C. Gen. Stat. § 7B-507(b).

Even assuming *arguendo* the court intended its finding that respondent's limitations prevented reunification, the evidence in the record would not support this finding. The only action requested by DSS in their effort to reunite respondent with his children was that respondent obtain a mental health evaluation and follow the treatment recommendations. Respondent was evaluated by the mental health center, who recommended both a parenting assessment "to help clarify his ability to parent his children effectively" and "a parenting class" to help him apply better parenting skills. However, at the hearing, the DSS social worker explained that DSS chose not to follow these suggestions, instead determining, based upon their interactions with him, that his limitations would prevent him from being able to apply what he learns from a parenting class to his parenting of the children. The social worker further admitted that the *only* efforts DSS made towards reunification with respondent was "getting him to have the psychological and psychiatric evaluation." The social worker explained that because respondent cannot drive and lives far away that he wasn't included in the children's therapy, but rather "mainly the focus has been with Lisa because she's here in town;" adding that had respondent also lived in Wilmington she believed "we certainly would have probably tried to make him more a part of the case." Finally, the social worker explained that because respondent has a limited ability to read and write, and his children have special educational needs, that he would be unable to meet their needs and could not be a placement option. Accordingly, the record reveals that DSS never pursued reunification efforts with respondent, or properly evaluated his parenting capabilities. Therefore, the record would not support a finding that reunification was futile under N.C. Gen. Stat. § 7B-507(b)(1).

Finally, we note our statute requires certain findings of fact be made at permanency planning hearings. N.C. Gen. Stat. § 7B-907(b) (2001). First, the court must determine "[w]hether it is possible for the juvenile to return home immediately or within the next six months. . ." N.C. Gen. Stat. § 7B-907(b)(1). The court must explain why, and if the juvenile will not be returning home within six months, there are other required findings. N.C. Gen. Stat. § 7B-907(b)(1)-(6). The court found that although "reunification with Lisa Everett

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Simpson remains the plan but reunification is not imminent." Neither this finding nor the other findings comport with N.C. Gen. Stat. § 7B-907.

Accordingly, we reverse the order of the trial court finding it failed to comply with N.C. Gen. Stat. §§ 7B-507 and 7B-907, and the evidence does not support the trial court's conclusion of law that reunification efforts between respondent and his children should cease.

Reversed.

Judges McGEE and HUDSON concur.

[REDACTED]

JAMES ROBINSON PREWITT AND WIFE, MARY JULIA PREWITT, PETITIONERS v. TOWN OF WRIGHTSVILLE BEACH AND TOWN OF WRIGHTSVILLE BEACH BOARD OF ADJUSTMENT, RESPONDENTS

No. COA02-1166

(Filed 2 December 2003)

1. Zoning—certificate of occupancy—zoning variance—oceanfront property—setback requirement

A de novo review revealed that the trial court did not err by affirming the Board of Adjustment's denial of petitioners' certificate of occupancy or alternatively a variance after the completion of construction of their oceanfront residence that failed to be in compliance with the town's rear yard setback requirements even though petitioners contend that a 1939 Act of the General Assembly that affects oceanfront property in Wrightsville Beach supercedes any contrary zoning ordinance enacted by the town, because: (1) while the 1939 Act does not contain language granting the town the authority to establish setbacks, a 1981 amendment to the 1939 Act does; (2) the town was authorized by N.C.G.S. § 160A-381(a) to establish setback requirements; and (3) the clear language of the pertinent ordinance provided for a rear yard setback of 7½ feet from the property line, and petitioners' house was 1½ feet from the property line.

3. Lisa married Bill Simpson during the pendency of the case.

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2. Zoning—selective enforcement of ordinance—due process and equal protection

Respondent town did not selectively enforce its rear yard setback ordinance and thus did not violate petitioners' due process and equal protection guarantees under both the North Carolina and United States Constitutions, because: (1) a review of the evidence shows that only four residences in the vicinity of petitioners' residence have been built to or beyond the property line; (2) there is uncontradicted testimony from a town building inspector that during his sixteen years with the town a rear yard setback of 7½ feet from the property line was required; and (3) the record is devoid of any evidence to suggest conscious and intentional discrimination on the part of the town in enforcing its ordinances.

Appeal by petitioners from judgment entered 3 June 2002 by Judge Herbert O. Phillips, III in the Superior Court in New Hanover County. Heard in the Court of Appeals 21 May 2003.

Shipman & Hedges, L.L.P., by Gary K. Shipman and William G. Wright, for petitioner-appellants.

Wessell & Raney, L.L.P., by John C. Wessell, III, for respondent-appellees.

HUDSON, Judge.

This appeal arises from a decision by the Board of Adjustment of the Town of Wrightsville Beach denying petitioners a certificate of occupancy or alternatively a variance after the completion of construction on their residence. On review pursuant to a petition for writ of certiorari, the superior court affirmed. We affirm.

Petitioners are the owners of a parcel of real property located at 753 Lumina Avenue in Wrightsville Beach, North Carolina ("the Property"). The eastern or oceanfront boundary of the Property is located 175 feet from the street on which the Property fronts. In 1998, petitioners retained Wright Holman Construction Company, Inc. ("Holman") to construct a residence on the Property. Holman obtained a copy of a survey performed by Jack Stocks of the existing structure located on the Property, and prepared a plot plan for petitioners that showed the new structure would be located 7½ feet from the eastern property line. Petitioners submitted the plot plan to the Town in June 1998, and the Town approved the plan. The first page of the plan submitted by Holman provides that:

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No revisions shall be made of plans without approval of building inspector.

In April 2000, Tony Wilson, a Town building inspector required petitioners to submit a new survey. The new survey, dated 14 April 2000, indicated that the house had been actually built approximately sixteen feet closer to petitioners' eastern property line than was shown on the approved plan. Additionally, the new survey indicated that stairs leading down from the back of the house had been constructed east of the property line on property owned by the Town. The new set of plans indicated several other changes in the plan as approved, including an additional finished bathroom, an unfinished attic, additional windows and two additional exterior decks. Mr. Wilson testified that he never discussed these changes with Holman or any of his agents.

After receiving this information, the Town's building inspector refused to issue petitioners a certificate of occupancy because the newly built structure was not in compliance with the Town's rear yard setback requirements. On 26 April 2000, petitioners appealed the Building Inspector's decision, and, alternatively, applied to the Board of Adjustment for a variance from the setback ordinance. On 2 May 2001, the Board of Adjustment of the Town of Wrightsville Beach denied both petitioners' appeal and their application for the variance. Petitioners then filed a Petition for Writ of Certiorari in the superior court. On 4 October 2001, the superior court in New Hanover County granted the Petition for review, and, after a hearing, on 3 June 2002, the court affirmed the decision of the Respondent Board of Adjustment. Petitioners appeal.

Upon review of a decision from a Board of Adjustment, the superior court should:

- (1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). This Court recently explained that:

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an appellate court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency . . . and the superior court *without* [(1)] examining the scope of review utilized by the superior court and (2) remanding the case

Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment (II), 152 N.C. App. 474, 567 S.E.2d 440 (2002) (*quoting Capital Outdoor, Inc. v. Guilford County Bd. of Adjustment (I)*, 146 N.C. App. 388, 390, 392, 552 S.E.2d 265, 267 (2001), (Greene, J., dissenting), *rev'd per dissenter*, 355 N.C. 269, 559 S.E.2d 547 (2002)); Cf. *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001), *appeal after remand*, 153 N.C. App. 652, 571 S.E.2d 262 (2002). “Where the petitioner alleges that a board decision is based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been determined.” *Id.* at 470, 513 S.E.2d at 74. Upon *de novo* review, we can freely substitute our judgment for that of the respondent. *Capricorn Equity Corp. v. Town of Chapel Hill Board of Adjust.*, 334 N.C. 132, 137, 431 S.E.2d 183, 187 (1993). Here, all of the assignments of error brought forth by petitioner allege errors of law. Thus, we review these issues *de novo*.

The pertinent conclusions of law made by the superior court are as follows:

10. Sufficient competent evidence was introduced to establish that Petitioners' residence on the Property was required to be constructed 7½ feet west of Petitioners' eastern property line, that eastern property line being the Building Line. Further, the evidence shows that Petitioners' residence has been constructed within 1½ feet of their eastern property line (the Building Line) and therefore violates the 7½ foot rear yard setback established under the provisions of the zoning ordinances of the Town of Wrightsville Beach.

11. This Court further concludes that the decision of the Wrightsville Beach Board of Adjustment as set forth in its Order entered herein on May 2, 2001 was not arbitrary and capricious. Specifically, the evidence supports the findings by the Board of Adjustment that the Building Line is a property line, that the Petitioners' residence was required to be constructed 7½ feet from said Building Line, that Petitioners' residence is not constructed 7½ feet from said Building Line, but rather is constructed 1½ feet from said Building Line, that Petitioners' resi-

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dence was relocated from the position as shown on the plans originally submitted to the Town of Wrightsville Beach and that such relocation was done without the consent or approval of the Town of Wrightsville Beach and that while there was some evidence presented indicating that residences in the vicinity of Petitioners' property were constructed in violation of the rear yard setbacks . . . , there was no evidence that any such violations were approved by the Building Inspector.

[1] Petitioners first argue that a 1939 Act of the General Assembly ("the 1939 Act") that affects oceanfront property in Wrightsville Beach supercedes any contrary zoning ordinance enacted by the Town. The Act, entitled "An Act Relative to the Title to the Land Built Up and Constructed in the Town of Wrightsville Beach in the County of New Hanover as a Result of Certain Erosion Control Work in Said Town," provides in pertinent part as follows:

Section 1. That all land filled in, restored, and made, and to be filled in, restored, and made, as the result of the recitals in preamble of this Act, which will exist between the present Eastern property line of the lot owners at present bordering on said ocean, and the low water mark of the Atlantic Ocean, after the work referred to in the preamble hereof, is completed, shall be within the corporate limits of the Town of Wrightsville Beach, and so much of said lands so filled in, restored and made, which will lie West of "the building line," to be defined and determined by Section two of this Act, is hereby granted and conveyed in fee simple to the land owner, to the extent that his land abuts thereon, and the balance of said land lying East of said building line to be fixed and determined by Section two of this Act, is hereby granted and conveyed in fee simple to the Town of Wrightsville Beach; *provided, however,* that no building or structure shall be built and erected on said made and built up land lying East of "the building line," to be defined and set out in Section two of this Act, and *provided further* that all made and constructed land lying East of "the building line" shall be, at all times, kept open for the purpose of streets and highways for the use of the public, and further for the development and uses as a public square or park, as the governing authorities of the Town of Wrightsville Beach, by ordinance, shall determine; and *provided further* that if any such property as is hereby granted and conveyed to the Town of Wrightsville Beach, shall cease to be used for the purposes or in the manner prescribed in this Act, it shall

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revert and become the property of the State of North Carolina, *and provided further* that the owners of property abutting on said newly made or constructed land, shall, in front of their said property, possess and keep their rights, as if littoral owners, in the waters of the Atlantic Ocean, bordering on said newly acquired and constructed land.

Act of March 30, 1939, ch. 246, sec. 1, 1939 N.C. Sess. Laws 508-11.

Section two of the 1939 Act requires the Town to survey and fix “the building line” for beachfront lots and to record a map showing the same. Such a map was prepared and duly recorded in 1939. This map reflects that the “building line” for petitioners’ property is 175 feet from the eastern boundary of Seaforth Avenue (now South Lumina Avenue).

Petitioners contend that “the building line” discussed in the 1939 Act “supersedes Respondent Town’s setback requirements for oceanfront homes on Wrightsville Beach, because to hold that section 155.009(A) [of the Town’s ordinances] creates a second building line in addition to the 1939 Act would be tantamount to a second taking of the land of oceanfront property owners.” Petitioners further claim that had the General Assembly “truly intended Wrightsville Beach to establish an additional setback from the ‘Building Line,’ such language would be included within the 1939 Act.” While we agree that the 1939 Act does not contain language granting the Town the authority to further zone setbacks, a later amendment to the 1939 Act does.

In 1981, the General Assembly amended the 1939 Act as follows:

Section 1. Chapter 246 of the Public Laws of 1939 is amended by striking the word phrase “the building line” where it appears in quotes throughout the act and substituting in lieu thereof the word phrase “the property line” which shall be without quotes as the phrase “the building line” was in the original act.

Sec. 2. The Town of Wrightsville Beach, by ordinance, shall determine the minimum building setback requirements from the property line described in Chapter 246, Public Laws of 1939, as amended by this act.

Act of June 19, 1981, ch. 618, sec. 1, 2, 1981 N.C. Sess. Laws 904.

Additionally, the General Assembly has authorized municipalities to “regulate and restrict the height, number of stories and size

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of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, . . . and the location and use of buildings, structures and land . . . ,” in order to promote health, safety, morals, or the general welfare. G.S. § 160A-381(a).

Here, the Town enacted a zoning ordinance that provides that there shall be a “15 feet setback for the front yard street access frontage and 7-1/2 feet for all other yards.” Town of Wrightsville Beach, Zoning Ordinance § 155.009(A). This ordinance was established under the grant of power contained in both the 1981 Amendment to the 1939 Act and G.S. § 160A-381(a), and is valid. The clear language of this ordinance calls for a rear yard setback of “7-1/2 feet,” from the property line. Petitioners’ house was one and one-half feet from the property line, and thus was not in conformity with the ordinance, as the Board of Adjustment and the superior court found. This assignment of error is overruled.

[2] Petitioners next argue that the Town’s selective enforcement of its rear yard setback ordinance violates petitioners’ due process and equal protection guarantees under both the North Carolina and United States Constitutions. Specifically, petitioners contend that the Town allowed other residents near their property to build closer to the property line than the 7½ foot rear yard setback. For the following reasons, we overrule this assignment of error.

In *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372, our Supreme Court held that:

A party seeking to prove that a municipality’s enforcement of a facially valid ordinance amounted to a denial of equal protection must show that the municipality engaged in conscious and intentional discrimination. Mere laxity in enforcement does not satisfy the elements of a claim of selective or discriminatory enforcement in violation of the equal protection clause. The party who alleges selective enforcement of an ordinance has the burden of showing that the ordinance has been administered with an evil eye and an unequal hand. To satisfy this burden, he must demonstrate a pattern of conscious discrimination.

Id. at 445, 358 S.E.2d at 376 (internal citations and quotation marks omitted).

A review of the evidence shows that only four residences in the vicinity of petitioners’ residence have been built to or beyond the

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property line. Further, there is uncontradicted testimony from Bill Manley, a Town Building Inspector, that during his sixteen years with the Town a rear yard setback of 7½ feet from the property line was required. The record is devoid of any evidence to suggest “conscious and intentional discrimination” on the part of the Town in enforcing its ordinances.

Affirmed.

Judges WYNN and STEELMAN concur.

JAMES WILLIAM BURGESS AND GEORGIA BURGESS, PLAINTIFFS V. JIM WALTER HOMES, INC.; FIRST UNION NATIONAL BANK; YADKIN COUNTY, BY AND THROUGH ITS COUNTY MANAGER CECIL WOODS; JERRY MILLER, INDIVIDUALLY; AND JERRY MILLER, IN HIS CAPACITY AS HOUSING INSPECTOR FOR THE COUNTY OF YADKIN, DEFENDANTS

No. COA03-160

(Filed 2 December 2003)

1. Appeal and Error— appealability—denial of arbitration

An order denying arbitration is interlocutory but appealable.

2. Arbitration and Mediation— reference to attached arbitration agreement—not attached or executed—not enforceable

There was no meeting of the minds on an agreement to arbitrate where the contract provision referred to another “attached” document which was not attached or executed.

3. Contracts— arbitration agreement in prior contract—not incorporated into new agreement

The arbitration clause in an earlier contract was not incorporated into a subsequent contract where the parties expressed their clear and definite intent to execute a new contract that would supersede the first.

4. Arbitration and Mediation— right to challenge agreement—not waived

Plaintiffs preserved their right to challenge an arbitration agreement where they denied the existence of an arbitration

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agreement, demanded a jury trial, and did not participate in the arbitration hearing.

Appeal by defendants Jim Walter Homes, Inc. and First Union National Bank from order entered 15 November 2002 by Judge Michael E. Helms in Yadkin County Superior Court. Heard in the Court of Appeals 29 October 2003.

Ronald J. Short and Eleanor Panetti, for plaintiffs-appellees.

Timothy G. Sellers and Michelle Price Massingale, for defendants-appellants Jim Walter Homes, Inc. and First Union National Bank.

TYSON, Judge.

Jim Walter Homes, Inc. (“Jim Walter Homes”) and First Union National Bank (“FUNB”) appeal from the trial court’s order denying their motion to stay action pending arbitration. We affirm.

I. Background

On 27 October 1997, James William Burgess and Georgia Burgess (“plaintiffs”) entered into a contract (“1997 contract”) with Jim Walter Homes for construction of a house. While executing that contract, plaintiffs also signed a separate arbitration agreement which was incorporated by reference in paragraph nine. The arbitration agreement was attached as Exhibit D to the contract and stated, in part, “The parties agree that . . . any controversy or claim arising out of or relating to this contract . . . shall be settled by binding arbitration . . . The parties agree and understand that they choose arbitration instead of litigation to resolve disputes.” No work was performed by Jim Walter Homes pursuant to the terms of the 1997 contract.

The parties signed a second contract on 14 April 1999 (“1999 contract”) for the construction of a house to be built at the same location but with different costs and specifications from those in the 1997 contract. Plaintiffs initialed paragraph nine, identical to paragraph nine signed in the 1997 contract, which states “BUYER ACKNOWLEDGES HAVING READ, UNDERSTOOD AND ACCEPTED THE ARBITRATION AGREEMENT SET FORTH IN EXHIBIT D ATTACHED HERETO AND INCORPORATED BY THIS REFERENCE.” No Exhibit D was attached to the 1999 contract. The parties did not execute a separate arbitration agreement.

Subsequent to the signing of the 1999 contract, a controversy arose between the plaintiffs and Jim Walter Homes concerning Jim Walter Homes's performance of the 1999 contract terms. Discussions between the parties ultimately led to mediation. The parties did not reach a settlement.

Jim Walter Homes gave notice on 7 September 2001 that it was exercising its right, under the 1999 contract, to have the dispute arbitrated. A Notice of Commencement of Arbitration was forwarded to the parties on 14 September 2001. The parties held an administrative conference to discuss the procedures for the submission of claims and counterclaims, as well as the final selection of an arbitrator. Plaintiffs filed a complaint and moved for summary determination of the existence of an arbitration agreement, or in the alternative, to set aside any agreement to arbitrate. Jim Walter Homes and FUNB moved to stay action pending arbitration. The trial court determined that no arbitration agreement existed and denied Jim Walter Homes and FUNB's motion to stay action pending arbitration. Jim Walter Homes and FUNB appeal.

II. Issues

The issues are: 1) whether a valid arbitration agreement exists, and 2) whether plaintiffs waived their right to contest the validity of the arbitration agreement by submitting to preliminary arbitration procedures.

III. Arbitration Agreement

[1] Jim Walter Homes and FUNB contend the trial court erred by failing to stay action pending arbitration because the parties had specifically agreed to arbitrate any disputes regarding the building contract. We first note that "an order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991); see also *Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. 120, 121-22, 582 S.E.2d 375, 377 (2003). "Strong public policy favoring settlement of disputes by arbitration requires us to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 546, 342 S.E.2d 853, 855 (1986). Our Court has held

before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate. G.S. § 1-567.2. The law of

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contracts governs the issue of whether there exists an agreement to arbitrate. *Southern Spindle and Flyer Co., Inc. v. Milliken & Co.*, 53 N.C. App. 785, 281 S.E.2d 734 (1981), *disc. review denied*, 304 N.C. 729, 288 S.E.2d 381 (1982). Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. *Id.*

Routh v. Snap-On Tools Corp., 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992).

N.C. Gen. Stat. § 1-567.2 (2001) states:

(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

To determine whether the parties agreed in writing to submit to arbitration, we must consider whether the 1999 contract alone is sufficient to bind the parties to arbitration, and, if not, whether the 1999 contract sufficiently incorporates the 1997 agreement by reference.

A. The 1999 Contract Standing Alone

[2] “Before a valid contract can exist, there must be a mutual agreement between the parties as to the terms of the contract.” *Martin v. Vance*, 133 N.C. App. 116, 121, 514 S.E.2d 306, 309 (1999). “When there has been no meeting of the minds on the essentials of an agreement, no contract results.” *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998); *see also Routh*, 108 N.C. App. at 273, 423 S.E.2d at 795 (parties did not have a meeting of the minds with regard to agreement to arbitrate). “Where the contract’s language is clear and unambiguous, the court is required to interpret the contract as written.” *Red Springs Presbyterian Church v. Terminix Co.*, 119 N.C. App. 299, 302, 458 S.E.2d 270, 273 (1995) (citing *Routh*, 108 N.C. App. 268, 423 S.E.2d 791).

In the case at bar, plaintiffs initialed the ninth paragraph of the 1999 contract which states “BUYER ACKNOWLEDGES HAVING READ, UNDERSTOOD AND ACCEPTED THE ARBITRATION

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AGREEMENT SET FORTH IN EXHIBIT D ATTACHED HERETO AND INCORPORATED BY THIS REFERENCE.” No arbitration agreement was executed or attached to the 1999 contract. The “clear and unambiguous language” of the 1999 contract does not indicate the parties agreed to arbitrate their claims, but only references a purported document whereby the parties intended to set forth an arbitration agreement. *Id.*

“Parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate.” *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 678 (2001). Here, the initialed ninth paragraph of the 1999 contract does not clearly express whether the parties agreed to arbitrate or specify the “scope and terms” of any agreement. *Id.* The initialed ninth paragraph of the 1999 contract neither requires nor sheds light on the parties’ intent to settle their disputes by arbitration. *See Routh*, 108 N.C. App. at 273, 423 S.E.2d at 795.

We hold that paragraph nine in the 1999 contract, standing alone, is insufficient to show a “meeting of the minds” with regard to an agreement to arbitrate disputes between the parties. *Creech*, 347 N.C. at 527, 495 S.E.2d at 912.

B. Incorporation by Reference

[3] Jim Walter Homes and FUNB argue the trial court erred by concluding that the 1999 contract superseded the 1997 contract and was the only controlling contract.

If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, and the surrounding circumstances, if the words do not make it clear, to determine whether the second contract supersedes the first. If the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs.

Whittaker General Medical Corp. v. Daniel, 324 N.C. 523, 526, 379 S.E.2d 824, 827 (1989). “Novation requires the agreement of the parties that a new contract take the place of an existing obligation. The intention of the parties to effectuate a novation must be clear and definite, for novation is never to be presumed.” *Kirby Building Systems v. McNeil*, 327 N.C. 234, 243, 393 S.E.2d 827, 832 (1990) (citations omitted).

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Here, the parties expressed their “clear and definite” intent to execute a new contract to supersede the 1997 contract. *Id.* Paragraph eighteen in the 1999 contract reads “This Building Contract, promissory note, deed of trust and the contract documents executed here-with constitute the entire agreement between the parties hereto with respect to the transactions contemplated herein, and this Building Contract promissory note, deed of trust and the contract documents supersede all prior oral or written agreements, commitments or understandings with respect to the matters provided for herein.” (emphasis supplied).

We conclude that the 1999 contract supersedes the 1997 contract. The 1999 contract did not incorporate by reference the prior 1997 arbitration agreement. Without the execution of a new Exhibit D Arbitration Agreement, Jim Walter Homes and FUNB cannot prove the existence of an agreement to arbitrate all disputes arising out of the 1999 contract. This assignment of error is overruled.

IV. Waiver of Right to Challenge Arbitration Process

[4] Jim Walter Homes and FUNB argue the trial court erred by denying their motion to stay action pending arbitration because plaintiffs waived their right to challenge the arbitration agreement. This Court has held that a party’s “consent to submission of the matter to arbitration and his participation in the arbitration hearing, without making any objection, demand for jury trial or motion to stay the proceedings, resulted in a waiver of the right to subsequently challenge the arbitration process.” *McNeal v. Black*, 61 N.C. App. 305, 308, 300 S.E.2d 575, 577 (1983); see also *Carteret County v. United Contractors of Kinston*, 120 N.C. App. 336, 341, 462 S.E.2d 816, 820 (1995) (“Participation in arbitration proceedings without making any protest or demand for a jury trial waives any right to later object to the arbitration award on these grounds.”)

Here, plaintiffs challenged the existence of an arbitration agreement prior to a hearing and after giving Jim Walter Homes and FUNB the opportunity to produce an agreement to arbitrate. The parties had set an arbitration schedule, along with a tentative hearing date in November, 2002. Plaintiffs filed a complaint requesting a jury trial on 26 July 2002. Plaintiffs’ amended complaint, filed on 28 August 2002, also requested a jury trial. Plaintiffs obtained a hearing to determine the existence of an arbitration agreement on 9 September 2002. At no point did the parties participate in an arbitration hearing or obtain a decision on the merits.

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Plaintiffs properly objected to the arbitration process by: 1) denying the existence of an arbitration agreement, 2) demanding a jury trial, and 3) not participating in the arbitration hearing. *See McNeal*, 61 N.C. App. at 308, 300 S.E.2d at 577. Plaintiffs did not waive their right to challenge the arbitration agreement. This assignment of error is overruled.

V. Conclusion

The trial court correctly concluded that the 1999 contract failed to include an agreement to arbitrate disputes between the parties. The trial court did not err in concluding plaintiffs did not waive their right to challenge the existence of the arbitration agreement. We affirm the trial court's order denying Jim Walter Homes and FUNB's motion to stay action pending arbitration.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

LUTZE HAHNE, PLAINTIFF v. JOHN F. HANZEL, DEFENDANT

WILLIE M. EASTERWOOD AND RAYMOND MONROE, PLAINTIFFS V.
DANIEL BAUGUESS; INVINCASHIELD, INC.; AND JOHN F. HANZEL, DEFENDANTS

No. COA03-72

(Filed 2 December 2003)

Negligence— purchase of stock—contributory negligence

The trial court did not err by entering summary judgment in favor of defendant on plaintiffs' negligence claims arising from their purchases of certain stock, because the doctrine of contributory negligence precludes any recovery by plaintiffs on these facts when: (1) none of the three plaintiffs reviewed or even requested financial data for the two companies before purchasing at least tens of thousands of dollars of stock in one or both corporations; and (2) each plaintiff signed an investment letter stating, in effect, that his decision to purchase the stocks was not based upon any representation as to the stock's likely performance, but rather upon his independent examination and

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judgment of the company's prospects with the understanding that there was an inherent economic risk involved.

Appeal by plaintiffs from judgment entered 4 November 2002 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 October 2003.

Womble Carlyle Sandridge & Rice, PLLC., by Allan R. Gitter and Douglas R. Vreeland, for plaintiffs-appellants.

Poyner & Spruill L.L.P., by E. Fitzgerald Parnell, III and Rebecca B. Wofford, for defendant-appellee.

ELMORE, Judge.

Lutz Hahne, Willie M. Easterwood, and Raymond Monroe (collectively, plaintiffs) appeal from entry of summary judgment in favor of John F. Hanzel (defendant) on their negligence claims arising from their purchases of certain stock. Because we conclude the doctrine of contributory negligence precludes any recovery by plaintiffs on these facts, we affirm.

On 26 January 2001, plaintiffs Easterwood and Monroe filed an action asserting claims against defendant and others for violation of state and federal securities law, legal malpractice, and negligence, all in connection with the purchase of stock in Invincashield, Inc. (Invincashield) by Easterwood and Monroe. On 18 April 2002, plaintiff Hahne filed an action alleging a single cause of action, negligence, against defendant, arising from Hahne's purchases of stock in Invincashield and another corporation, Golf Pro Savings, Inc. (Golf Pro). On 22 April 2002, Easterwood and Monroe voluntarily dismissed without prejudice all their claims against all defendants, save the negligence claim against Hanzel. Defendant thereafter filed motions for summary judgment in each case, and on 21 August 2002 a consent order was entered allowing consolidation of the cases for pretrial purposes. Thus, at the time defendant's motions for summary judgment were heard, the only remaining claims against defendant in either case were for negligence arising out of plaintiffs' purchases of stock in either Invincashield, Golf Pro, or both.

On 4 November 2002, the trial court granted summary judgment in defendant's favor on all of plaintiffs' remaining claims. From this judgment, plaintiffs now appeal.

The record evidence reveals that plaintiff Monroe engaged defendant, an attorney, to incorporate various businesses and handle

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other legal matters unrelated to the purchase of securities, beginning in 1996. At his deposition, Monroe testified that while visiting defendant's office to talk about "some other matter," defendant encouraged him to invest in Invincashield. Monroe testified that defendant characterized Invincashield as being in "excellent financial condition," but Monroe did not ask to see any financial statements of Invincashield prior to making his investment. On 16 February 2000, Monroe purchased \$70,000.00 worth of Invincashield stock by delivering to defendant a check, made payable to defendant as trustee for Invincashield. On 18 February 2000, Monroe executed a share subscription agreement and an accompanying investment letter, which provided in pertinent part as follows:

2. Subscriber is not acquiring the Shares based upon any representation, oral or written, by any person with respect to the future value of, or income from, the Shares but rather upon an independent examination and judgment as to the prospects of [Invincashield]; and,

....

Subscriber acknowledges that Subscriber must continue to bear the economic risk of the investment in the Shares for an indefinite period

....

. . . . Acceptance by Subscriber of the certificate representing the Shares shall constitute a confirmation by Subscriber that all agreements and representations made herein shall be true and correct at such time.¹

....

Monroe testified that defendant did not try to keep him from reading these documents, and also that Monroe did not tell defendant he disagreed with any of the investment letter's terms.

At his deposition, plaintiff Easterwood testified that he met defendant twice prior to purchasing Invincashield stock; each time they discussed matters unrelated to the purchase of securities. Easterwood regularly trades stocks online through E-trade, without the assistance of a broker, and has invested at least tens of thousands of dollars per year in stocks over the past decade. Easterwood testi-

1. As discussed below, each of the three plaintiffs signed investment letters containing this language.

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fied that he decided to invest \$30,000.00 in Invinca-Shield based solely on information given to him by plaintiff Monroe, and that he never spoke with defendant about Invinca-Shield prior to his investment. Easterwood was never a party to any discussions between Monroe and defendant regarding Invinca-Shield. Like Monroe, Easterwood did not ask to see any financial statements of Invinca-Shield prior to making his investment. On 18 February 2000, Easterwood also signed a share subscription agreement and an investment letter identical to the one executed by Monroe. Easterwood testified that defendant did not try to prevent him from reading the investment letter, and that he did not object to any of its terms.

Plaintiff Hahne testified at his deposition that he engaged defendant to incorporate several of his businesses, handle multiple real estate closings, and perform other legal services unrelated to the purchase of securities, beginning in 1997. Hahne testified that in late 1999, defendant encouraged him to invest in Invinca-Shield, and that he subsequently purchased \$200,000.00 of Invinca-Shield stock “totally relying upon [defendant’s] representations . . . without having seen any financials, without having met anyone, because [defendant] says this is the greatest thing and they are going to go public . . . and this is going to be a tremendous investment.” On or about 11 January 2000, Hahne signed a share subscription agreement and an investment letter identical to those executed by Monroe and Easterwood. Hahne testified that he did not read the investment letter before signing it, and that defendant did not prevent him from reading the document. Hahne neither requested nor reviewed any financial data regarding Invinca-Shield prior to investing. Hahne testified that in June 2000 defendant encouraged him to invest an additional \$350,000.00 in Invinca-Shield, but that after he gave defendant the money, defendant invested it in Golf Pro Savings instead. Hahne signed a share subscription agreement and investment letter with terms identical to the Invinca-Shield documents, again without reading them. Hahne testified that during the time between his first investment in Invinca-Shield and his subsequent purchase of Golf Pro stock, he neither requested nor reviewed any financial data for either corporation.

“In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, *establishes contributory negligence on the part of plaintiff*, or establishes that the alleged negligent conduct was not the

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proximate cause of the injury." *Williams v. Power & Light Co.*, 36 N.C. App. 146, 147, 243 S.E.2d 143, 144 (1978), *rev'd on factual grounds*, 296 N.C. 400, 250 S.E.2d 255 (1979) (emphasis added).

Our Supreme Court has explained the doctrine of contributory negligence as follows:

Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

Clark v. Roberts, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965). The defendant has the burden of proving contributory negligence, and the existence of contributory negligence is "rarely appropriate for summary judgment, and only where the evidence establishes a plaintiff's negligence so clearly that no other reasonable conclusion may be reached." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 479, 562 S.E.2d 887, 896 (2002). After carefully considering the record, the parties' deposition testimony, and the arguments of counsel, we conclude that this is such a case.

The record evidence shows that each of the three plaintiffs were experienced investors who were actively seeking investment opportunities involving substantial sums of money when defendant encouraged plaintiffs Monroe and Hahne to purchase Invincashield stock in late 1999-early 2000. By his own admission, plaintiff Easterwood never even spoke to defendant about Invincashield prior to purchasing \$30,000.00 worth of stock in the company, instead relying solely on information given to him by plaintiff Monroe. None of the three plaintiffs reviewed, or even requested, financial data for Invincashield or Golf Pro before purchasing at least tens of thousands of dollars of stock in one or both corporations. Only plaintiff Monroe made any effort to speak with Invincashield management or inspect the company's facilities prior to investing, and Monroe testified that he invested \$70,000.00 based on what he saw and heard while touring the facility and speaking with an Invincashield employee. Each plaintiff signed an investment letter stating, in effect, that his decision to purchase the stock was not made based upon any representation as to the stock's likely performance, but rather upon

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his independent examination and judgment of the company's prospects, with the understanding that there was an inherent economic risk involved. Plaintiff Hahne, by his own admission, did not even read the share subscription agreement or investment letter before signing off on a \$200,000.00 stock purchase, and he subsequently made an additional \$350,000.00 investment, again without undertaking any independent investigation or even reading the transaction documents.

Because we conclude that on these facts, the contributory negligence of all three plaintiffs has been so clearly established that no other reasonable conclusion may be reached, the trial court's order granting summary judgment in defendant's favor is affirmed. *Carolco Studios, Inc.*, 355 N.C. at 479, 562 S.E.2d at 896.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

CARLTON S. ASHBY, JR., CORA B. ASHBY, AND ASHBY FURNITURE GALLERIES,
PLAINTIFFS-APPELLANTS V. THE TOWN OF CARY, DEFENDANT-APPELLEE

No. COA03-203

(Filed 2 December 2003)

Zoning— denial of rezoning request—traffic congestion—plausible basis

The trial court correctly entered summary judgment for defendant town in an action seeking a declaration that the denial of plaintiffs' rezoning application was contrary to law. Although plaintiffs contend that the town council's decision was arbitrary and capricious, the transcript reveals that the council denied the request because it was concerned that the traffic increase, though minimal, would exacerbate existing congestion and because it would be inappropriate to approve the request on the same day that it approved \$10-20 million to investigate relief of traffic problems in the area.

Appeal by plaintiff from judgment entered 2 December 2002 by Judge Abraham Penn Jones, Superior Court, Wake County. Heard in the Court of Appeals 18 November 2003.

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Morgan, Reeves & Gilchrist, by C. Winston Gilchrist, for plaintiff-Appellants.

The Brough Law Firm, by G. Nicholas Herman, for defendant-appellee.

WYNN, Judge.

By this appeal, Carlton S. Ashby and his wife, Cora B. Ashby, d/b/a Ashby Furniture Galleries ("the Ashbys"), challenge the trial court's summary judgment upholding the Town of Cary's denial of their rezoning application. After careful review, we affirm.

The underlying facts show that in 2000, the Ashbys owned a lot of approximately one acre on Walnut Street outside of the Town of Cary's jurisdiction. The Ashbys wanted to build a new furniture store on this lot but needed additional land. Adjacent to the lot, the Town of Cary owned a lot consisting of less than one acre. The Town of Cary and the Ashbys negotiated a deal in which the Ashbys acquired the Town of Cary's lot and in exchange the Town of Cary obtained frontage from the Ashby lot necessary for the widening of Walnut Street.

In December 2000, pursuant to an annexation petition filed by the Ashbys, the Town of Cary annexed the Ashby property. The Ashbys contend that throughout the land exchange negotiations and the annexation process, the Town of Cary knew they intended to use their land for the construction of a furniture store. However, the Town of Cary contends the town council only knew the Ashbys were interested in developing the property in some unspecified way.

The two tracts of land total 1.99 acres located in an area commonly referred to as the "Walnut Street Corridor." The area consists of two major retail malls, a variety of commercial and retail developments, a movie theater, two auto dealerships, several office complexes and a 776-unit multi-family residential complex. Contiguous to the Ashby property is the Centrum Shopping Center, which consists of more than 750,000 square feet of retail and restaurant space.

Notwithstanding the abundance of commercial and retail establishments in this area, the Ashby tracts were zoned R-30 (Residential 30), for low-density residential purposes. Thus, in September 2001, the Ashbys filed an application with the Town of Cary to rezone the property from R-30 to B-2 (Business-2 Commercial) Conditional Use

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district classification and also submitted an application for a conditional use permit. In their applications, the Ashbys proposed several conditions on the use of their property such as the property would be used only for a furniture store; the store would be no larger than 19,000 square feet; the traffic generated would not exceed 100 peak hour trips and 1000 average daily trips; and no certificate of occupancy for the store would be issued before the completion of the Town of Cary's project to widen and realign Walnut Street. The Ashbys included with their application a letter from an engineering firm, which stated that during a typical weekday the store would generate 51 additional car trips per day on Walnut Street. However, the letter did not address the amount of additional traffic the store would generate on weekends.

During the same time period in which the Ashbys submitted their applications, the Town of Cary began reconsidering the Southeast Gateway Area Plan, which was adopted in 1998 by the town council to address land use and transportation issues in the Walnut Street Corridor and the area surrounding the Crossroads Plaza Shopping Center. It was adopted as a reference guide to direct growth when rezoning, annexation, subdivision, and site plans are considered and had a goal of alleviating and mitigating existing and future traffic movement within the area. Under this plan, the proposed conditional use of the Ashbys property would meet the criteria of commercial low intensity land use, which was one of the three uses recommended for the area in which the Ashbys property is located. However, in April 2001, the town council approved funding for a new land use study to be called the "Walnut Street Land Use/Transportation Plan." Thus, at the time the Ashbys submitted their applications in September 2001, the Town of Cary was in the process of reviewing land uses in the Walnut Street corridor.

After following the requisite procedures for considering rezoning applications, the Ashbys' applications were placed on the town council's agenda for a final decision on 10 January 2002. On this same date, the town council had a work session to discuss the status and preliminary recommendations of the new "Revised Walnut Street Land Use/Transportation Plan." During the work session, the council members discussed traffic congestion on weekends and during peak hours and had extensive discussions about the differences between the Southeast Gateway Plan and the proposals set forth in the new plan. In particular, the town council discussed whether the Walnut Street area should be permitted to accommodate additional retail and com-

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mercial uses or should be zoned for more office and institutional uses that would reduce traffic congestion.

That evening, the town council voted, 5-2, to deny the Ashbys application. The town council expressed a concern that even with the widening and realignment of Walnut Street, the weekend traffic congestion in the area could not accommodate additional retail or commercial uses. Thereafter, the town council voted to waive the restriction that prohibits a landowner from submitting a new application within 12 months after a denial. Thus, the Ashbys were permitted to submit a new application at any time.

Notwithstanding the town council's concerns about traffic congestion, on the same evening the town council considered and approved a rezoning application by Crossroads Ford, an automobile dealership, which rezoned 14.11 acres from Office and Institutional to B-2 Conditional Use for a parking lot storage facility for inventory.

After denial of their rezoning request, the Ashbys filed a declaratory judgment action seeking a declaration that the Town of Cary's denial of their rezoning application was null and void and contrary to law. After summary judgment was entered in favor of the Town of Cary, the Ashbys appealed.

On appeal, the Ashbys contend the trial court erroneously entered summary judgment in the Town of Cary's favor because genuine issues of material fact exist as to whether the council's decision was arbitrary and capricious. We disagree.

"Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to 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 non-

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movant." *Hayes v. Turner*, 98 N.C. App. 451, 456, 391 S.E.2d 513, 516 (1990).

The Ashbys contend the town council's decision was arbitrary and capricious because (1) the Town of Cary entered into the land-exchange transaction with knowledge that the Ashbys wished to acquire the property for the sole purpose of a furniture store, (2) the furniture store would generate low traffic, (3) the rezoning request complied with the Southeast Gateway Plan, the zoning plan in effect at the time of the request, (4) the Planning Board recommended the proposed rezoning by a unanimous vote, and (5) the town council approved Crossroads Ford's rezoning request. It is well established that the grant or denial of a rezoning request is purely a legislative decision which will be deemed arbitrary and capricious if "the record demonstrates that it had no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *Graham v. Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981). A reviewing court is "not free to substitute [its] opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body." *Id.*

As an initial matter, we note that the Ashbys sought the introduction of evidence in the trial court that was not presented to the town council. Specifically, the Ashbys offered affidavits from a zoning expert and a traffic engineer. However, as indicated in *Graham v. Raleigh*, this Court considers the record before the legislative body in assessing the validity of a zoning action. *See id.* (stating "a zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense"). As stated, in reviewing rezoning decisions, this Court is not free to substitute our opinion for that of the legislative body so long as there is some plausible basis for the conclusions reached by that body. *See id.*

During the 10 January 2002 meeting, the town council members expressed some concern about the traffic increase that would be generated by the furniture store. Even though the traffic increase would be minimal, a majority of the council members felt that even a minimal increase in traffic would exacerbate the traffic congestion in the Walnut Street corridor. Moreover, council members felt it was inappropriate to approve the rezoning request on the same day that the council approved a \$10-20 million dollar expenditure to investigate

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how to alleviate the traffic problems in that area. As one council member stated: "I cannot, in good conscious, tell a resident when they ask me, 'What are you doing to fix the area?' "Well, we're going to spend \$10 to 20 million, but we're going to add a little more retail too.' " Thus, the transcript reveals the town council denied the rezoning request because of the minimal increase in traffic in a heavily traffic congested area. Accordingly, the record reveals a plausible basis for the town council's decision that had a basis in reason and bore a substantial relation to public safety.

As stated, this Court is not free to substitute its judgment for that of the town council. Furthermore, "the courts may not "interfere with or control a municipality's zoning power or direct zoning ordinances to be repealed, enacted, or amended." *In re Markham*, 259 N.C. 566, 570, 131 S.E.2d 329, 333 (1963). Accordingly, the judgment below is,

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. MONTAVIUS ANTOINE JOHNSON

No. COA02-1383

(Filed 2 December 2003)

1. Constitutional Law— effective assistance of counsel—failure to bring forth affirmative defense

Defendant did not receive ineffective assistance of counsel in a first-degree murder and armed robbery case even though his counsel failed to bring forth the affirmative defense that he allegedly forecast during opening statements, because: (1) defense counsel did not promise to put on an affirmative defense, but merely admonished the jury to listen carefully to the witnesses and weigh their testimony against other facts; and (2) even if defense counsel's statements were unkept promises, defendant offers no evidence that the opening statements prejudiced the outcome of the trial.

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2. Constitutional Law— effective assistance of counsel—failure to object

Defendant did not receive ineffective assistance of counsel in a first-degree murder and armed robbery case even though his counsel failed to object to alleged improper questioning of a witness regarding the fact that the victim had a 10-millimeter gun, because: (1) failure to make an evidentiary objection does not necessarily place defense counsel's behavior below an objective standard of reasonableness; and (2) defense counsel's failure to object to the testimony in this case did not fall below an objective standard of reasonableness.

3. Robbery— armed—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of armed robbery, because: (1) facts in the record on appeal support a reasonable inference that defendant perpetrated each element of armed robbery; and (2) the facts could lead a jury to reasonably conclude that by using a dangerous weapon, defendant took possession of the victim's property and, without his permission, threw some of the victim's possessions out of the car.

4. Evidence— testimony—extrinsic evidence—witness credibility

The trial court did not err in a first-degree murder and armed robbery case by disallowing the testimony of a witness who claimed to have seen the prosecution's sole eyewitness assist a prisoner escape from jail because while defendant could have used cross-examination to challenge the eyewitness's credibility, N.C.G.S. § 8C-1, Rule 608(b) prohibits the use of extrinsic evidence, such as the testimony of another witness, to attack a witness's credibility.

Appeal by Defendant from judgment entered 8 February 2002 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Court of Appeals 9 September 2003.

Bruce T. Cunningham, Jr., for the defendant-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Ralf F. Haskell, for the State.

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WYNN, Judge.

Following his convictions on the charges of first-degree murder and armed robbery, Defendant, Montavius Johnson contends on appeal that (I) his defense counsel prejudicially failed to present an affirmative defense after promising to do so in the opening statement, and object to the improper questioning of Kimberly Pegues; (II) the trial court erroneously denied his motion to dismiss the charge of armed robbery; and (III) the trial court erroneously disallowed the testimony of witness Jimmy Darryl Lasko. After careful review, we hold that Defendant received a trial free from prejudicial error.

The State's evidence tended to show that on 2 July 1999 at approximately 2:30 a.m., Kimberly Pegues met her boyfriend Antonio Baker at a friend's apartment. When Pegues arrived, she noticed that Baker had a 10-millimeter Glock handgun in his pocket. Shortly thereafter, the couple left the apartment and Baker put the gun in his car. The couple then drove their separate cars to a fast food restaurant where Pegues got out of her vehicle to use the phone; Baker remained in his car. Upon returning to her car and backing out of the parking space, Pegues saw Defendant and another person approach Baker's car (later identified as C. J. Toney). Pegues heard someone yell "Give me your shit" and then "I don't have anything, man." Pegues saw defendant rummaging through Baker's car, and observed him throw belongings from Baker's glove box and back seat into the street. Pegues heard a shot and saw Defendant run back to his vehicle. Shortly thereafter, defendant returned to Baker's car and Pegues heard another shot. Baker died from a gunshot wound to the head.

A police investigation uncovered a 10-millimeter shell in Defendant's yard, with markings consistent with having been fired from a 10-millimeter Glock. Defendant was charged with first-degree murder and armed robbery.

At trial, Defendant's counsel made the following statements during his opening statement:

C. J. Toney is the individual who shot both shots that night. That is our contention. And, he is the individual who shot and killed Baker.

Now, what happens in between there is a question of whether Mr. Johnson was trying to prevent that or not. Now remember, whatever Ms. Pegues tells you, we're asking you to pay close attention

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to it and look at; because, the positioning of the people is very important; where they were; and, what they may or may not have been doing.

Because, there may have been other reasons why Mr. Johnson was in between Mr. Toney and Mr. Baker. And, we will ask you to consider those reasons, at the appropriate time.

So, listen carefully to this eyewitness testimony and weigh what could have been seen and what could not be seen.

[1] From his convictions on the charged offenses, and sentence to life in prison, Defendant first argues that his counsel's failure to bring forth the affirmative defense that he forecast in his opening statement constituted ineffective assistance of counsel *per se*, in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States. We disagree.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

Defendant argues his counsel's statements in opening were promises to offer evidence that Defendant tried to prevent the shooting for which he was charged. Specifically, Defendant points to the following statement made by his counsel during opening but never developed during trial: "[T]here may have been other reasons why Mr. Johnson was in between Mr. Toney and Mr. Baker. And we will ask you to consider those reasons, at the appropriate time." To augment his ineffective assistance of counsel claim, Defendant offered the following quote from the prosecutor's closing argument:

The defense also made an opening statement. And, in that opening statement, the defense offered to show you that the defend-

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ant, Montavius Johnson, tried to prevent the murder of Baker. But what did the evidence show you? I would contend that the evidence showed you that Montavius Johnson did everything but attempt to prevent the murder of Baker.

We disagree with Defendant's characterization of his counsel's opening statements as "promises" to put on an affirmative defense. Rather, defense counsel admonished the jury to listen carefully to the witnesses and weigh their testimony against other facts. Moreover, even if defense counsel's statements were unkept promises, Defendant offers no evidence that defense counsel's opening statements prejudiced the outcome of the trial. Absent evidence establishing to a reasonable probability that the trial outcome would have been different had defense counsel offered the evidence "promised" in the opening, Defendant has failed to satisfy the prejudice prong of his ineffective assistance of counsel claim.

[2] Defendant further argues that defense counsel was ineffective in failing to object to improper questioning of Kimberly Pegues regarding whether Antonio Baker had a 10-millimeter gun. Defendant argues that his counsel should have objected when the prosecutor asked eye witness Pegues the following question: "While you were there, were you aware that Antonio had his 10-millimeter Glock handgun with him?" Defendant contends this question assumed three facts not in evidence: (1) Baker had a gun; (2) the gun was manufactured by Glock and (3) the caliber was 10 millimeters. Defendant further argues that had his counsel objected, the objection would have been sustained and the Motion to Dismiss the armed robbery charge would have been granted. We disagree.

As stated earlier, an ineffective assistance of counsel claim can only succeed if defense counsel's behavior falls below an objective standard of reasonableness and such behavior prejudiced Defendant. *Id.* However, failure to make an evidentiary objection does not necessarily place defense counsel's behavior below an objective standard of reasonableness. See *State v. Gainey*, 355 N.C. 73, 113, 558 S.E.2d 463, 488 (2002) (holding that "counsel's failure to object to these issues [admission of statements, jury instructions and the verdict sheets] at trial cannot be said to fall below an objective standard of reasonableness"). In this case, defense counsel's failure to object to the testimony of Pegues did not fall below an objective standard of reasonableness. Accordingly, Defendant's claim of ineffective assistance of counsel is without merit.

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[3] Defendant next argues that the trial court erred in denying his motion to dismiss the armed robbery charge for insufficiency of the evidence. We disagree.

“In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence.” *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997). “[T]he question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant’s being the perpetrator of such offense.” *State v. Brayboy*, 105 N.C. App. 370, 373-74, 413 S.E.2d 590, 592 (1992). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Williams*, 133 N.C. App. 326, 328, 515 S.E.2d 80, 82 (1999).

N.C. Gen. Stat. § 14-87 provides that:

Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

Contrary to Defendant’s argument, facts in the record on appeal support a reasonable inference that Defendant perpetrated each element of armed robbery. In particular, Pegues testified that she heard someone yell “Give me your shit” and “I don’t have anything, man.” She also testified that defendant rummaged through the victim’s car; the victim’s wallet and other personal items were ultimately found strewn outside his car. Prior to the shooting, Pegues said she saw Baker put a Glock handgun in his car. These facts could lead a jury to reasonably conclude that by using a dangerous weapon, Defendant took possession of the victim’s property and, without his permission, threw some of the victim’s possessions out of the car. This evidence is sufficient to support Defendant’s conviction. Accordingly, we uphold the trial court’s denial of Defendant’s motion to dismiss.

[4] Lastly, Defendant asserts that the trial court erred by excluding testimony from defense witness Jimmy Darryl Lasko, who claimed to

have seen the prosecution's sole eye witness, Pegues, assist a prisoner escape from jail. Defendant sought to introduce Lasko's testimony to cast doubt on Pegues' credibility, but the trial court found the evidence irrelevant and proscribed Lasko's testimony.

While Defendant could have used cross-examination to challenge Pegues's credibility, North Carolina statute prohibits the use of extrinsic evidence, i.e., the testimony of another witness, to attack a witness' credibility. N.C. Gen. Stat. § 8C-1, Rule 608(b). Therefore, we uphold the trial court's exclusion of Lasko's testimony.

No error.

Judges TYSON and LEVINSON concur.

ALEC D. HICKOX, AND HICKOX ENTERPRISES, INC., PLAINTIFFS V. R&G GROUP INTERNATIONAL, INC., D/B/A MCLAREN INDUSTRIES AND MCLAREN RUBBER INDUSTRIES, DEFENDANT

No. COA03-130

(Filed 2 December 2003)

1. Appeal and Error—appealability—denial of motion to dismiss—forum selection clause

The denial of a motion to dismiss based on a forum selection clause is interlocutory but appealable because it involves a substantial right.

2. Appeal and Error—misnamed motion—content of arguments

The application of a forum selection clause was considered on appeal of the denial of a motion to dismiss for lack of jurisdiction because the arguments to the trial court and the arguments on appeal concerned the forum selection clause. N.C.G.S. § 1A-1, Rule 15(b).

3. Venue—forum selection clause—choice of law clause—employment contract dispute

A forum selection clause did not apply to a dispute over an employment contract where the plain language of the contract limited the clause to disputes over orders and commissions,

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[161 N.C. App. 510 (2003)]

which were not involved here. A provision relating to disputes regarding performance of the contract was a choice of law provision.

Appeal by defendant from order entered 22 October 2002 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 October 2003.

Giordano, Gordon, & Burns, P.L.L.C., by William F. Burns, Jr., for plaintiffs-appellees.

Van Hoy, Reutlinger, Adams & Dunn, by Stephen J. Dunn, for defendant-appellant.

CALABRIA, Judge.

On 2 April 2002, Alec D. Hickox (“Hickox”) and Hickox Enterprises, Inc., (“plaintiffs”) filed suit in Mecklenburg County, North Carolina, against R&G Group International (“defendant”) alleging defendant unlawfully terminated Hickox and breached their employment contract. Thereafter, defendant moved to dismiss the suit pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b) (2001). The trial court denied this motion, and defendant appealed.

[1] Although a denial of a motion to dismiss is an interlocutory order, where the issue pertains to applying a forum selection clause, our case law establishes that defendant may nevertheless immediately appeal the order because to hold otherwise would deprive him of a substantial right. *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566 & n.1, 566 S.E.2d 160, 161 & n.1 (2002).

[2] In the case at bar, defendant raised the issue pursuant to a motion to dismiss for lack of subject matter jurisdiction, under Rule 12(b)(1), and personal jurisdiction, under Rule 12(b)(2). Fundamentally, “a forum selection clause designates the venue,” and therefore a motion to dismiss for improper venue pursuant to Rule 12(b)(3) would be most applicable. *Corbin Russwin, Inc. v. Alexander's HDWE, Inc.*, 147 N.C. App. 722, 726, 556 S.E.2d 592, 596 (2001). However, despite this difference in the posturing of the issue, our Rules provide: “[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” N.C. Gen. Stat. § 1A-1, Rule 15(b) (2001). Accordingly, although defendant termed the motion to dismiss for lack of jurisdiction rather than venue, it is apparent from

the trial court's order that the arguments presented to that court, and the issue now before us, is the application of the forum selection clause.

[3] The contested issues in the case at bar relate to provisions of the contract which sought to avoid potential litigation by expressly designating which state's law would be applied and which forum would determine a dispute. “[T]he choice of law provision[] names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated.” *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 92, 414 S.E.2d 30, 33 (1992). “A forum selection provision designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship.” *Id.*, 331 N.C. at 93, 414 S.E.2d at 33. This contract provided:

JURISDICTION

The parties acknowledge that this Agreement has been signed and executed in the County of Los Angeles, State of California, and is deemed to be in accordance with California law, which law shall be applied in the event of any dispute which may arise in connection with the performance of its terms.

It is agreed that any and all orders solicited herein, shall be accepted by Employer at its principal place of business in Paramount, California, and that any disputes arising from any such orders or commissions thereunder, shall be determined in accordance with California law, and that the appropriate jurisdiction for the determination of any such dispute is deemed to be in the County of Los Angeles, State of California.

The first paragraph is a choice of law provision which sets forth that California law will apply to “any dispute” regarding the performance of the contractual terms. The second paragraph is both a choice of law and a forum selection provision, which provides that California law will be the applicable law, and Los Angeles, California will be the appropriate forum for disputes regarding orders solicited under the contract, or commissions earned thereunder. Accordingly, the contract provided that all disputes be determined in accordance with California law, and those disputes “arising from . . . orders or commissions” be litigated in California.

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The parties assert the controlling determination for application of the forum selection clause is whether California or North Carolina law is applied to the case at bar. Defendant asserts that because California was chosen by the parties as the law to be applied to “any dispute” regarding the contract, California law must determine the validity of the forum selection clause. *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980) (North Carolina recognizes that “where parties to a contract have agreed that a given jurisdiction’s substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect”). Plaintiffs, on the other hand, assert that California law may not control a forum selection clause voided by North Carolina public policy, which prohibits forum selection clauses limiting prosecution of cases to venues outside North Carolina where the claim involves a contract entered into in North Carolina. See *Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000) (holding the parties’ choice is given effect “as long as they [(1)] had a reasonable basis for their choice and [(2)] the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law.”); N.C. Gen. Stat. § 22B-3 (2001) (stating “any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable”). However, we need not address whether North Carolina public policy overrides the parties’ choice of law because North Carolina public policy is only concerned with application of the forum selection clause, and the forum selection clause itself provides that it is not applicable to the case at bar.

Although the choice of law provisions apply California law to any dispute arising from the contract, the plain language of the forum selection clause limits its application to only some disputes which arise under the contract. Specifically, the forum selection clause is limited to disputes over *orders* and the *commissions* under the orders and does not apply the forum selection clause to disputes “aris[ing] in connection with the performance of [the contract].” This case is a dispute over the performance of the contract not a dispute over orders and commissions arising under the contract. The complaint alleges defendant breached the employment contract by requiring that if Hickox did not “sell a certain number of units by February 15, 2002, Defendant would not pay him a salary any longer.” Moreover, defendant attempted to modify the contract by requiring that defendant’s compensation after 15 February 2002 be exclusively

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based on commission. Finally, defendant “took the automobile the Plaintiff had been provided as part of his compensation package on the pretense of their having to use it to return to California.” Hickox at no time agreed to the modification of the contract. On 22 February 2002, defendant notified Hickox that he was terminated, and no compensation was provided following 23 February 2002. Accordingly, this complaint sets forth a dispute which does not “aris[e] from any [] orders [solicited under the contract] or commissions thereunder,” but rather is a “dispute [] aris[ing] in connection with the performance of [the contract's] terms.” Under California law,¹ if the written provisions of the contract are “clear and explicit” they govern.² *Rosen v. State Farm General Ins. Co.*, 70 P.3d 351, 354 (Cal. 2003). Since the plain language of the contract does not provide for application of the forum selection clause to the case at bar, we affirm the order of the trial court on this basis.

Affirmed.

Judges McGEE and HUDSON concur.

1. We apply California law because the contract provided a choice of law provision for “any dispute which may arise in connection with the performance of [the contract].” Although choice of law provisions may not be complied with if they are unreasonable or violate public policy, plaintiffs never asserted application of California law was unreasonable. *See Torres*, 140 N.C. App. at 241, 535 S.E.2d at 625. Moreover, plaintiffs’ assertion that California law was inapplicable based on the public policy expressed in N.C. Gen. Stat. § 22B-3 only relates to forum selection clauses and not contract interpretation as applied here. Accordingly, we apply the parties’ choice of law provision as expressed in the first paragraph under “Jurisdiction” set forth above.

2. We note that even were North Carolina law to apply, North Carolina courts also abide by the plain language of the contract. *Rouse v. Williams Realty Bldg. Co.*, 143 N.C. App. 67, 69-70, 544 S.E.2d 609, 612, *aff'd*, 354 N.C. 357, 554 S.E.2d 337 (2001) (explaining our courts have a duty to enforce contracts as written, for this duty acts to preserve the fundamental freedom of contract).

COATES v. NIBLOCK DEV. CORP.

[161 N.C. App. 515 (2003)]

BEN COATES AND WIFE, YVETTE COATES, PLAINTIFFS v. NIBLOCK DEVELOPMENT CORP., DEFENDANT

No. COA03-479

(Filed 2 December 2003)

Warranties— express warranty—structural defects—synthetic stucco

The trial court properly denied defendant developer's motion for a directed verdict in plaintiff homeowners' action to recover damages for breach of an express ten-year warranty against structural defects for water damages caused by defective synthetic stucco on a home purchased by plaintiffs because (1) there was sufficient evidence of damage to load-bearing elements of the home in the testimony by the supervisor in charge of repairs to the home that there was a lot of "structural, rotted wood" damage in the wall studs, headers over the tops of windows, and sill bands; (2) in the instant case, the actual physical damage occurring to the covered load-bearing elements of the house, if left untreated, would cause the house to become unsafe or unlivable; and (3) plaintiffs were not required to stand idly by until the damage became so severe that choosing to remain in the house presented a risk.

Appeal by defendant from judgment entered 22 October 2002 by Judge John R. Jolly, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 30 October 2003.

DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for plaintiffs-appellees.

Templeton & Raynor, P.A., by Amy F. Wise and Kenneth R. Raynor, for defendant-appellant.

CALABRIA, Judge.

Niblock Development Corporation ("defendant") appeals from a judgment entered upon a jury verdict finding defendant breached its express warranty against structural defects on the house of Ben and Yvette Coates (collectively "plaintiffs") and awarding damages in the amount of \$55,000.00. We find no error.

In 1995, plaintiffs purchased a house from defendant. As part of the consideration for the purchase of the house, defendant provided

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plaintiffs with a ten year warranty. In 1999, plaintiffs had the house inspected after hearing concerns from neighbors and learning of problems associated with the exterior cladding of the house, which was constructed of a product known as Exterior Insulation Finish Systems, commonly referred to as synthetic stucco. According to the inspection report, there were high moisture readings in several areas around the house, which could cause wood rot and softening. In addition, modifications and caulking were needed to prevent water and moisture from continuing to reach behind the stucco. As a result of the report, plaintiffs undertook certain repairs, including repainting and re-caulking areas where the moisture readings were highest.

In 2000, plaintiffs again had a moisture scan analysis performed on the house and learned the moisture readings were as high and sometimes higher, despite the repairs undertaken to correct the problem. In addition, new areas where possible damage was occurring were implicated.

In 2001, plaintiffs sought a second opinion and had yet a third analysis performed by Phillip Jansen ("Jansen"). Jansen recommended plaintiffs contact a contractor to remove and replace the stucco and any portions beneath it damaged by wood rot and softening due to moisture. Plaintiffs had the work performed at a cost of approximately \$92,699.00.

On 23 November 2001, plaintiffs filed suit against defendant, alleging defendant had breached the terms of the express warranty resulting in physical damage to the house and diminution in its value. At the close of plaintiffs' evidence and at the close of all the evidence, defendant moved for a directed verdict. Both motions were denied, and defendant presented no evidence at trial. The jury found defendant had breached the express warranty and awarded damages of \$55,000.00. Defendant moved for a judgment notwithstanding the verdict, which the trial court also denied. Defendant appeals.

"A motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury." *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 98, 337 S.E.2d 94, 98 (1985). "This is a high standard for the moving party, requiring a denial of the motion if there is more than a scintilla of evidence to support the non-movant's *prima facie* case." *Ellis v. Whitaker*, 156 N.C. App. 192, 195, 576 S.E.2d 138, 140 (2003). "In passing on a motion for directed verdict, the trial court must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with infer-

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ences which may be drawn therefrom must be resolved in favor of the nonmovant.” *Mut. Benefit Life Ins. Co. v. City of Winston-Salem*, 100 N.C. App. 300, 304, 395 S.E.2d 705, 707 (1990).

“A motion for judgment notwithstanding the verdict [(“JNOV”)] is simply a renewal of the movant’s earlier motion for directed verdict.” *DeHart*, 78 N.C. App. at 98, 337 S.E.2d at 98. “A JNOV motion pursuant to Rule 50 seeks entry of judgment in accordance with the movant’s earlier motion for directed verdict, notwithstanding the contrary verdict actually returned by the jury.” *Streeter v. Cotton*, 133 N.C. App. 80, 82, 514 S.E.2d 539, 541 (1999). “The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict.” *DeHart*, 78 N.C. App. at 99, 337 S.E.2d at 98.

On appeal, defendant contends the trial court erred in denying his motion for directed verdict because (I) plaintiffs presented no evidence of “actual, physical damage to a load bearing element of the house,” and (II) plaintiffs presented no evidence that the structural problems existing caused the house to be unsafe or unlivable.

I. Actual, Physical Damage to Covered Elements

Plaintiffs’ claims are premised on the coverage provided by the express warranty accompanying the purchase of their house. The warranty provided, in pertinent part, as follows:

Your new home is warranted for ten (10) years against structural defects. A structural defect being defined as actual physical damage to those load-bearing elements of the home that would cause it to become unsafe or otherwise unlivable. The following load-bearing portions are covered: foundation systems and footings, beams, girders, lintels, columns, walls and partitions, floor systems, and roof framing systems.

“An express warranty is contractual in nature, and its terms are therefore construed in accordance with their plain meaning[.]” *Allen v. Roberts Constr. Co.*, 138 N.C. App. 557, 570-71, 532 S.E.2d 534, 542 (2000) (citations omitted).

Defendant first asserts the evidence presented at trial concerning the damage to the house was insufficient to show that it was the type of damage for which the warranty provided coverage. Victor Searfoss, the supervisor in charge of the repairs to plaintiffs’ house, testified

generally that his work consisted of repairing structural problems and damaged wood. He stated there was a "lot of structural, rotted wood damage" in the walls around the house. Specifically, he testified damaged portions included wall studs and headers over the top of windows. He further explained a header functions to "support . . . the structure above the window." Additionally, he testified the sill bands, which "sit[] on the foundation wall itself" were damaged and required repair. The sill bands are the part of the structure that functions to "support everything from the floor on up."

This testimony was more than a scintilla of evidence tending to support plaintiffs' claim that defendant breached the terms of the express warranty, particularly with respect to the degradation of the walls and floor systems. Accordingly, we reject defendant's argument.

II. Condition of House

Defendant also asserts the express warranty was not breached because the damage to the house did not cause it to become unsafe or unlivable. Defendant's argument would place plaintiffs in the untenable position of choosing between the following two options: (1) ignore the increasing damage and risk until it became so severe that their well-being was compromised by remaining in the house, or (2) undertake repairs at their own expense before the terms of the warranty could be invoked. We reject this argument outright. In the instant case, the actual, physical damage occurring to the covered load-bearing elements of the house, if left untreated, "would cause [the house] to become unsafe or unlivable." Nothing more is required by the terms of the warranty. We find meritless defendant's argument that, as a prerequisite to invoking the warranty provisions, plaintiffs were required to stand idly by until the damage became so severe that choosing to remain in the house presented risk. Indeed, as plaintiffs correctly point out, not only would such action in the instant case have allowed the damage to increase unchecked, it could also raise issues concerning the defense of failure to mitigate damages. This assignment of error is overruled, and we find the proceedings below to be without error.

No error.

Judges McGEE and HUDSON concur.

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[161 N.C. App. 519 (2003)]

DALLAS R. ALLEN, JR. AND WIFE, GLORIA ALLEN, PLAINTIFFS V.
JEFFREY MAX STONE, DEFENDANT

No. COA02-1600

(Filed 2 December 2003)

Appeal and Error— appealability—interlocutory order—denial of motion to dismiss

Defendant's appeal from the trial court's order denying his motion to dismiss an action filed against him by plaintiffs is dismissed as an appeal from an interlocutory order, because: (1) an order denying a motion to dismiss under N.C.G.S. § 1A-1, Rule 41(a)(1) is interlocutory; and (2) a denial of a motion to dismiss made on the ground that the action is barred under the Rule 41(a)(1) two-dismissal rule does not affect a substantial right.

Appeal by defendant from judgment entered 19 September 2002 by Judge Cy A. Grant, Sr. in Northampton County Superior Court. Heard in the Court of Appeals 10 September 2003.

Perry W. Martin for plaintiffs-appellees.

Faison & Gillespie, by Keith D. Burns, for defendant-appellant.

ELMORE, Judge.

Defendant Jeffrey Max Stone appeals from the trial court's order denying his motion to dismiss an action filed against him by Dallas R. Allen, Jr. and wife, Gloria Allen (collectively, plaintiffs). For the reasons stated herein, defendant's appeal is dismissed as interlocutory.

On or about 20 January 1999, plaintiff Dallas R. Allen, Jr. filed an action against defendant, civil action number 99 CVD 23, (the district court action) in Northampton County District Court. In the district court action, Mr. Allen asserted claims for fraud, alleging that he advanced money to defendant on various occasions in 1993 based on defendant's "fraudulent statements, representations, and inducements" regarding defendant's ability to profitably invest Mr. Allen's money. Mr. Allen mistakenly filed the action in district court despite seeking actual damages of \$183,511.82 and punitive damages of at least \$300,000.00 in his complaint. On 10 August 1999, Mr. Allen voluntarily dismissed the district court action without prejudice, pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) (2001).

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On or about 13 August 1999, Mr. Allen filed a second action against defendant, this time in Northampton County Superior Court, civil action number 99 CVS 359 (the superior court action). The complaint filed in the superior court action also alleged fraud and was identical to the district court action's complaint in all material respects save one: the superior court action's complaint contained an additional paragraph alleging "the sums of money [defendant allegedly defrauded from Mr. Allen] are attested to and executed by the Defendant under general warranty notes with clear reference to the use of the word 'Under Seal' (attached hereto as Exhibit A of this Complaint)." Attached to the superior court action's complaint were two documents, each entitled "Promissory Note" and each executed by Mr. Allen and defendant. The first promissory note, in the principal amount of \$37,500.00, was dated 1 January 1993; the second, in the principal amount of \$49,000.00, was dated 16 April 1993.

On 4 December 2001, plaintiff filed a notice of voluntary dismissal of the superior court action, which stated as follows:

Pursuant to the provisions of Rule 41(a) of the North Carolina Rules of Civil Procedure, the Plaintiff, Dallas R. Allen, Jr. hereby voluntarily dismisses his complaint without prejudice. This Notice of Dismissal is taken with the specific understanding and stipulation of all parties and attorneys that the prior dismissal in District Court by the Plaintiff due to a clerical error does not cause the "two dismissal rule" to apply in regard to this case, and the Plaintiff specifically reserves the right to file this action in Superior Court within the time allowed by law.

....

Defendant denies entering into any understanding or stipulation that the Rule 41 "two dismissal rule" would not apply in this case.

On 12 February 2002, Mr. Allen, this time joined as a party plaintiff by his wife, commenced the present action against defendant by filing a complaint in Northampton County Superior Court, civil action number 02 CVS 53. Unlike the complaints in the district court and superior court actions, the complaint in the present action contained no allegations of fraud but instead expressly asserted a claim for "Collection of Promissory Notes" and specifically alleged the execution and delivery by defendant to plaintiffs of two promissory notes, dated 1 January 1993 and 16 April 1993 and in the principal amounts of \$37,500.00 and \$49,000.00, respectively. Plaintiffs, alleging that

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“[d]efendant has defaulted under the terms of the notes, and the notes have become due and now past due[,]” seek recovery in the present action of each note’s principal amount plus interest.

On 17 April 2002, defendant filed a motion to dismiss plaintiffs’ present action, asserting the claims therein have been dismissed twice previously and are therefore barred by Rule 41(a)(1). Defendant appeals from the trial court’s order denying his motion to dismiss.

An order is interlocutory if it is made during the pendency of an action and does not dispose of the case, but rather requires the trial court to take further action in order to finally determine the entire controversy. *Duquesne Energy, Inc. v. Shiloh Indus. Contr’rs., Inc.*, 149 N.C. App. 227, 229, 560 S.E.2d 388, 389 (2002). While interlocutory orders are generally not immediately appealable, a party may appeal from an interlocutory order which affects a substantial right. *Hart v. F.N. Thompson Constr. Co.*, 132 N.C. App. 229, 230, 511 S.E.2d 27, 28 (1999); see also N.C. Gen. Stat. § 1-277(a) (2001); N.C. Gen. Stat. § 7A-27 (2001).

Because defendant in the present case acknowledges that the order denying his motion to dismiss pursuant to Rule 41(a)(1) is interlocutory, we must determine whether the order affects a substantial right. As the appellant, defendant has the burden of showing this Court that the order deprives him of a substantial right which would be jeopardized absent our review prior to a final determination on the merits. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). If defendant fails to carry this burden, the appeal is subject to dismissal as interlocutory. *Auction Co. v. Myers*, 40 N.C. App. 570, 574, 253 S.E.2d 362, 365 (1979).

Our appellate courts have not previously addressed the issue of whether denial of a motion to dismiss made on the grounds that the action is barred under Rule 41(a)(1) affects a substantial right. However, our appellate courts have considered this question regarding denials of motions to dismiss made on other grounds, and these decisions guide our analysis in the present case. For example, this Court has held that an order denying a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b) is ordinarily interlocutory and does not affect a substantial right, and consequently does not give rise to a right of immediate appeal, except in cases where “the jurisdictional challenge is substantive rather than merely procedural.” *Hart*, 132 N.C. App. at 230-31, 511 S.E.2d at 28. In so holding, we have noted

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that the denial of a motion to dismiss pursuant to Rule 12(b)(6) merely continues the action in the trial court for further litigation. *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 164, 519 S.E.2d 540, 544 (1999), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207-08 (2000). Moreover, this Court has held that a “claim that the action should be dismissed pursuant to Rule 41(b) for failure to prosecute must be dismissed as interlocutory.” *Berkman v. Berkman*, 106 N.C. App. 701, 703, 417 S.E.2d 831, 833 (1992).

In the present case, defendant correctly notes that in cases in which a party asserts sovereign, governmental, or qualified immunity, denial of a motion to dismiss affects a substantial right and is immediately appealable. *Derwort v. Polk County*, 129 N.C. App. 789, 790-91, 501 S.E.2d 379, 380 (1998). In his brief, defendant argues the Rule 41(a)(1) two-dismissal rule creates a “right to be free from the burdens of litigation” giving rise to a “conditional immunity from suit,” such that denial of a motion to dismiss grounded on Rule 41(a)(1) likewise affects a substantial right and is immediately appealable. We decline to adopt defendant’s interpretation of Rule 41(a)(1) as creating a “conditional immunity from suit.”

After a careful review of the record and existing legal authority, we discern no substantial right that would be affected absent immediate appellate review. This Court has previously stated that avoidance of a trial, no matter how tedious or unnecessary, is not a substantial right entitling an appellant to immediate review. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780-81 (1983). In the present case, the order denying defendant’s motion to dismiss merely continues this matter for further litigation in the trial court. Because defendant has not met his burden of showing this Court that the order deprives him of a substantial right which would be jeopardized absent our review prior to a final determination on the merits, defendant’s appeal is dismissed as interlocutory.

Dismissed.

Judges TIMMONS-GOODSON and HUDSON concur.

IN RE FAIRCLOTH

[161 N.C. App. 523 (2003)]

IN RE: MARGARET FAIRCLOTH, AMANDA FAIRCLOTH, DAKOTA FAIRCLOTH,
JAMES D. FAIRCLOTH, JUVENILES

No. COA03-124

(Filed 2 December 2003)

Termination of Parental Rights— findings and evidence—ability to pay support—six preceding months

The findings and evidence were not sufficient for termination of a mother's parental rights on the ground that she willfully failed to pay a reasonable portion of the cost of care of the children where the court did not specifically address whether she was employed or otherwise able to pay support during the six months preceding the filing of the petition.

Appeal by respondent mother from an order entered 19 July 2002 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 20 August 2003.

David Kennedy for petitioner-appellee Cumberland County Department of Social Services.

Attorney Advocate Robin Weaver-Hurmence, Guardian Ad Litem.

Janet K. Ledbetter for respondent-appellant Tesha Lewis.

HUNTER, Judge.

Tesha Faircloth Lewis ("respondent-mother") appeals from an order terminating her parental rights to three of her minor children. For the reasons stated herein, we reverse.

Respondent-mother and James Faircloth, Sr. ("respondent-father") are the parents of four minor children: James Faircloth, Jr. (d.o.b. 4 June 1987), Dakota Faircloth (d.o.b. 22 September 1990), Amanda Faircloth (d.o.b. 7 August 1992), and Margaret Faircloth (d.o.b. 26 January 1995) ("the Faircloth children"). On 5 August 1997, the Cumberland County Department of Social Services ("CCDSS") filed a juvenile petition alleging that the Faircloth children were abused and neglected juveniles. The Faircloth children were placed in the custody of CCDSS, and such custody was continued by a series of orders until an adjudicatory hearing was commenced on 15 December 1998. At the conclusion of that hearing, the Faircloth chil-

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dren were adjudicated abused and neglected juveniles. Only respondent-father appealed the adjudicatory order at that time. On appeal, this Court reversed and remanded the case for a new hearing because the trial court had applied an erroneous legal standard in denying respondent-father's request to call the Faircloth children as witnesses. *See In re Faircloth*, 137 N.C. App. 311, 527 S.E.2d 679 (2000).

Thereafter, CCDSS filed a Petition to Terminate the Parental Rights of Respondents on 3 August 2000. Separate hearings were held for each parent. Respondent-father's termination hearing was held on 26 July 2001, resulting in termination of his parental rights by order entered on 16 November 2001. Respondent-father subsequently appealed the termination order, which was affirmed by this Court on 5 November 2002. *See In re Faircloth*, 153 N.C. App. 565, 571 S.E.2d 65 (2002).

Respondent-mother's termination hearing was held on 6 May 2002. Based on the evidence presented at the hearing, the following pertinent findings of fact were made by the trial court:

13. The mother has been employed and is physically able and financially able to pay support and to pay a reasonable portion of the cost of care for the children.
14. At the time the Termination Petition was filed on 8/3/00, the mother had paid \$0.00 towards support of the children.
15. On or about 1/15/01 the mother apparently tried to deliver to the social worker a \$20 check for each child, payable to the children.
16. The checks were returned to the mother along with a letter giving specific instructions to her on how to provide money to the children or how to pay support for them. Since that time she has provided no money or support.

The trial court concluded that these findings supported the following ground for terminating respondent-mother's parental rights:

That the minor children have been placed in [CCDSS] custody since July 30, 1997, and that the Respondent mother, for a continuous period of six months next preceding the filing of th[e] petition, has willfully failed to pay a reasonable portion of the cost of care for the minor children although physically and financially able to do so. §7B-1111(a)(3).

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However, while the trial court further concluded that termination of her parental rights was in the best interests of the three younger Faircloth children, the same was not concluded as to the eldest child, James. Thus, the trial court ordered legal and physical custody of James returned to respondent-mother.

Respondent-mother argues the trial court's findings of facts were insufficient to support termination of her parental rights with respect to her three younger children. A trial court's findings of fact in an order substantiating termination of parental rights must be supported by clear, cogent, and convincing evidence. *See* N.C. Gen. Stat. § 7B-1109(f) (2001). If termination is supported by such evidence, the court's findings are binding on appeal, even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988).

In the case *sub judice*, the trial court concluded that its findings supported Section 7B-1111(a)(3) as the only ground for termination of respondent's parental rights. This section provides:

The juvenile has been placed in the custody of a county department of social services, a licensed child-placing agency, a child-caring institution, or a foster home, and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (2001). Respondent-mother contends the trial court's findings of fact were insufficient to establish that she was financially able to pay for the cost of foster care for the Faircloth children during the six months preceding the petition being filed. We agree.

A parent's ability to pay is the controlling characteristic of what is a "reasonable portion" of cost of foster care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay.

In re Clark, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981). During the termination hearing, respondent-mother testified on cross-examination that her approximate income per month varied: "Sometimes I can make a thousand dollars a month, sometimes I can make more. It just depends." However, further elaboration upon this testimony on re-

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direct examination established that respondent-mother's income also depended on whether she was even employed. Specifically, respondent-mother testified as follows:

A. . . . I work with Jackie's Custom Painting now.

Q. Okay. And how long have you had that job?

A. With Jackies's [sic] Custom Painting, I've worked with them off and on with them for the past—since '99.

Q. But it has not been full-time, steady employment, has it?

A. It varies. Construction is—you know, it's painting, so it varies.

This was the extent of the relevant testimony establishing respondent-mother's ability to pay.

Based on the evidence, the trial court found that “[t]he mother has been employed and is physically and financially able to pay support and to pay a reasonable portion of the cost of care for the children.” The trial court further found that “[a]t the time the Termination Petition was filed on 8/3/00, the mother had paid \$0.00 towards support of the children.” “[N]onpayment . . . constitute[s] a failure to pay a ‘reasonable portion’ if and only if respondent were able to pay some amount greater than zero.” *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982). Yet, while the evidence established that respondent-mother has been employed at various times since 1999, it did not specifically address whether she was employed at any time between 3 February 2000 and 3 August 2000 (the six months preceding the filing of the petition), or whether she was otherwise financially able to pay.¹ Absent such findings or evidence in the record that respondent-mother could pay some amount greater than zero towards the cost of care for children during that period of time, the trial court did not have clear, cogent, and convincing evidence to determine respondent's financial ability.

In conclusion, there was insufficient evidence to support terminating respondent-mother's parental rights pursuant to Section 7B-1111(a)(3). We therefore reverse the trial court's termination

1. We also note that both the record and respondent-mother's testimony indicate that CCDSS never initiated legal proceedings requiring respondent-mother to pay support after the Faircloth children were placed in CCDSS custody; thus, there was no child support order entered establishing what would have been a reasonable portion of the cost of care for the Faircloth children.

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order as to the three younger Faircloth children. Further, because we hold the order terminating respondent-mother's parental rights must be reversed, we need not reach her remaining arguments. *See In re Phifer*, 67 N.C. App. 16, 28, 312 S.E.2d 684, 691 (1984).

Reversed.

Judges TIMMONS-GOODSON and ELMORE concur.

STATE OF NORTH CAROLINA v. KEITH LEE JAMERSON

No. COA02-1682

(Filed 2 December 2003)

Appeal and Error—appealability—guilty plea—habitual felon indictment

Defendant's appeal from his sentence for possession of cocaine after a guilty plea and from the habitual felon indictment, allegedly being attached to a misdemeanor instead of a felony, is dismissed without prejudice to his right to file a motion for appropriate relief under N.C.G.S. § 15A-1413, because: (1) defendant does not have a right of appeal when neither argument is presented in conjunction with the denial of a motion to withdraw a guilty plea or a motion to suppress evidence as required by N.C.G.S. §§ 15A-1444(e) and 15A-979(b); (2) neither challenges the sufficiency of the evidence as required by N.C.G.S. § 15A-1444(a1); (3) defendant did not assert the trial court improperly applied the sentencing statutes under N.C.G.S. §§ 15A-1340.14, 15A-1340.17, 15A-1340.21, or 15A-1340.23; and (4) the Court of Appeals is without authority to issue a writ of certiorari.

Appeal by defendant from judgment entered 14 August 2002 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 16 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Bruce T. Cunningham, Jr., for defendant-appellee.

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[161 N.C. App. 527 (2003)]

CALABRIA, Judge.

Keith Lee Jamerson (“defendant”) pled guilty to possession of cocaine and to attaining the status of habitual felon. Defendant appeals asserting the sentence of 80 to 105 months imprisonment violated his constitutional protection against cruel and unusual punishment. Defendant also asserts the trial court erred in failing to dismiss the habitual felon indictment on the ground that “N.C. Gen. Stat. § 14-7.6 provides that to be indicted as an Habitual Felon a defendant must ‘commit a felony’ ” and possession of cocaine is a misdemeanor.

The preliminary issue is whether this Court has the authority to hear defendant’s appeal. “In North Carolina, a defendant’s right to appeal in a criminal proceeding is purely a creation of state statute. Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings.” *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002).

A defendant who pleads guilty has a right of appeal limited to the following:

1. Whether the sentence “is supported by the evidence.” This issue is appealable only if his minimum term of imprisonment does not fall within the presumptive range. N.C. Gen. Stat. § 15A-1444(a1) (2001);
2. Whether the sentence “[r]esults from an incorrect finding of the defendant’s prior record level under G.S. 15A-1340.14 or the defendant’s prior conviction level under G.S. 15A-1340.21.” N.C. Gen. Stat. § 15A-1444(a2)(1) (2001);
3. Whether the sentence “[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(2) (2001);
4. Whether the sentence “[c]ontains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant’s class of offense and prior record or conviction level.” N.C. Gen. Stat. § 15A-1444(a2)(3) (2001);
5. Whether the trial court improperly denied defendant’s motion to suppress. N.C. Gen. Stat. §§ 15A-979(b) (2001), 15A-1444(e) (2001);

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6. Whether the trial court improperly denied defendant's motion to withdraw his guilty plea. N.C. Gen. Stat. § 15A-1444(e).

Defendant's assertions on appeal, that his sentence violates his constitutional protection against cruel and unusual punishment, and that the habitual felon indictment was improper because the substantive crime to which it attached was a misdemeanor not a felony, are not issues for which defendant has an appeal of right. Neither argument is presented in conjunction with the denial of a motion to withdraw a guilty plea or a motion to suppress evidence. N.C. Gen. Stat. §§ 15A-1444(e), 15A-979(b). Additionally, neither challenges the sufficiency of the evidence. N.C. Gen. Stat. § 15A-1444(a1). Finally, defendant does not assert the trial court improperly applied the following sentencing statutes: N.C. Gen. Stat. §§ 15A-1340.14, 15A-1340.17, 15A-1340.21, 15A-1340.23. Therefore, defendant does not have an appeal of right to this Court.

Where a defendant does not have an appeal of right, our statute provides for defendant to seek appellate review by a petition for writ of certiorari. N.C. Gen. Stat. § 15A-1444(e). However, our appellate rules limit our ability to grant petitions for writ of certiorari to the following situations: (1) defendant lost his right to appeal by failing to take timely action; (2) the appeal is interlocutory; or (3) to review a trial court's denial of a motion for appropriate relief. N.C.R. App. P. 21(a)(1) (2003). In considering appellate Rule 21 and N.C. Gen. Stat. § 15A-1444, this Court has reasoned that since the appellate rules prevail over conflicting statutes, we are without authority to issue a writ of certiorari except as provided in Rule 21. *State v. Nance*, 155 N.C. App. 773, 574 S.E.2d 692 (2003); *Pimental*, 153 N.C. App. at 73-74, 568 S.E.2d at 870; *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002). Accordingly, we are without authority to review either by right or by certiorari the trial court's denial of defendant's motion to dismiss the habitual felon indictment or defendant's assertion the judgment violates his constitutional rights.

Without an appeal of right or the authority to grant certiorari, this Court may not consider the arguments asserted by defendant. Although defendant's assertion that the habitual felon indictment was improperly attached to a misdemeanor is of jurisdictional concern, our Supreme Court has explained that "[w]hile it is true that a defendant may challenge the jurisdiction of a trial court, such challenge may be made in the appellate division only if and when the case is properly pending before the appellate division." *State v. Absher*, 329 N.C. 264, 265 & n.1, 404 S.E.2d 848, 849 & n.1 (1991). Moreover, the Court

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held defendant's purported appeal must be dismissed. *Id.*, 329 N.C. at 265, 404 S.E.2d at 849. Accordingly, we must dismiss defendant's appeal.

However, we note, defendant is not without relief. Defendant may seek post-trial relief through a motion for appropriate relief. N.C. Gen. Stat. § 15A-1411 thru -1422. Such relief must be sought in the trial court, under N.C. Gen. Stat. § 15A-1413, since the appellate courts may rule on such a motion under N.C. Gen. Stat. § 15A-1418 only when the defendant has either an appeal of right or a properly pending petition for a writ of certiorari. *State v. Waters*, 122 N.C. App. 504, 470 S.E.2d 545 (1996). See *State v. Hawkins*, 110 N.C. App. 837, 431 S.E.2d 503 (1993) (holding a defendant who pled guilty may not appeal asserting his indictment was facially invalid, rather his remedy lies with a motion for appropriate relief). Accordingly, we dismiss defendant's appeal without prejudice to defendant's right to file a motion for appropriate relief.

Dismissed.

Judges McGEE and HUDSON concur.

STATE OF NORTH CAROLINA v. JEFFREY W. HARDIN, DEFENDANT

No. COA03-132

(Filed 2 December 2003)

Constitutional Law; Jury— trial by twelve person jury—seating of alternate juror

A defendant was entitled to a new trial where a juror was replaced by an alternate juror after deliberations were begun, which resulted in a verdict by more than twelve people. N.C. Const. art. I, § 24.

Appeal by defendant from judgment entered 24 July 2002 by Judge Ola M. Lewis in Robeson County Superior Court. Heard in the Court of Appeals 8 October 2003.

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[161 N.C. App. 530 (2003)]

Attorney General Roy Cooper, by Assistant Attorney General Michael D. Youth, for the State.

Michelle FormyDuval for defendant-appellant.

ELMORE, Judge.

Jeffrey W. Hardin (defendant) appeals from judgments entered upon jury verdicts finding him guilty of conspiracy to commit breaking, entering and larceny; felonious breaking and entering; felonious larceny; and being a habitual felon. For the reasons stated herein, we conclude that defendant is entitled to a new trial.

The evidence presented at trial tended to show that in the early morning hours of 24 May 1999 Officer John Simmons (Officer Simmons), then a Robeson County sheriff's deputy, responded to a call concerning a possible break-in at a mobile home. Officer Simmons testified that when he arrived at the scene, two males, later identified as Montray Howell and Harley Chavis, emerged from the mobile home and fled on foot. Officer Simmons then observed a pickup truck parked in the mobile home's back yard with its lights off, the tailgate down, and a refrigerator in its bed. A moving dolly lay on the ground beside the truck. Defendant was standing at the rear of the pickup, and Wanda Chavis was sitting in the passenger seat. After placing defendant and Wanda Chavis under arrest, Officer Simmons discovered the mobile home's sliding rear glass door had been broken out and that the refrigerator appeared to have been removed from inside.

Detective Sterile Little (Detective Little) of the Robeson County Sheriff's Office testified that he interviewed defendant following defendant's arrest. Defendant, who is blind, told Detective Little that someone had come by defendant's house offering to sell defendant a refrigerator for \$100.00 worth of crack cocaine. Defendant, believing he could turn around and sell the refrigerator for \$400.00, arranged for Wanda Chavis, Howell, and Harley Chavis to assist him in picking up the refrigerator later that night. Detective Little testified that the plan was for Howell and Harley Chavis to go to the mobile home and remove the refrigerator, while defendant and Wanda Chavis were to arrive shortly thereafter with the truck.

Jacqueline Thompson (Thompson) testified that on 24 May 1999 she owned the mobile home in question, though it was unoccupied at the time. She testified that she had not given anyone permission to

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enter the mobile home or to remove the refrigerator, and that she did not know defendant, Wanda Chavis, Harley Chavis, or Howell.

After the trial court denied defendant's motion to dismiss and instructed the jury, the jury began its deliberations. The transcript reveals that the trial court, after stating "I don't like to release alternates until I get a verdict," failed to release the lone alternate juror prior to submitting the case to the jury. The jury failed to return a verdict before the evening recess. The next morning, one of the jurors was dismissed after disclosing that she had discussed the case with a friend the previous evening. The trial court then stated as follows:

Good morning Ladies and Gentlemen of the jury. Due to circumstances beyond our control, we have lost . . . [juror] number 12. Which means [alternate juror], see why I had you stick around. . . . You now become juror number 12. And will join your fellow jurors in deliberation in this case. . . .

The jury, with the alternate taking the dismissed juror's place, resumed deliberations and thereafter returned verdicts convicting defendant on all four charges. The trial court imposed sentences of 125-159 months for each conviction, with the sentences to run concurrently. Defendant appeals.

By his first assignment of error, defendant contends the trial court committed reversible error by replacing a juror with the alternate juror after deliberations had begun. We agree.

In the present case, we are bound by our Supreme Court's decision in *State v. Bunning*, 346 N.C. 253, 485 S.E.2d 290 (1997). In *Bunning*, the jury began its capital sentencing deliberations in the afternoon and continued until the evening recess. The next morning, one of the jurors said she could not continue with the trial because she was a manic-depressive and asked to be excused. The court removed this juror, replaced her with an alternate, and instructed the jury to begin its deliberations anew. The jury then recommended the death penalty. In holding that the defendant was entitled to a new capital sentencing proceeding, our Supreme Court stated as follows:

. . . Article I, Section 24 of the North Carolina Constitution, which guarantees the right to trial by jury, contemplates no more or less than a jury of twelve persons.

In this case, the jury verdict was reached by more than twelve persons. The juror who was excused participated in the delibera-

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[161 N.C. App. 530 (2003)]

tions for half a day. We cannot say what influence she had on the other jurors, but we have to assume she made some contribution to the verdict. The alternate juror did not have the benefit of the discussion by the other jurors which occurred before he was put on the jury. We cannot say he fully participated in reaching a verdict. In this case, eleven jurors fully participated in reaching a verdict, and two jurors participated partially in reaching a verdict. This is not the twelve jurors required to reach a valid verdict in a criminal case. . . . If alternate jurors must be discharged when the case is submitted to the jury, they cannot be substituted for jurors who subsequently become incapacitated.

Bunning, 346 N.C. at 256, 485 S.E.2d at 292; *see also* N.C. Gen. Stat. § 15A-1215(a) (2001) (“Alternate jurors receive the same compensation as other jurors and, unless they become jurors, must be discharged upon the final submission of the case to the jury.”)

In the present case, as in *Bunning*, the trial court replaced a regular juror with an alternate after deliberations had begun, which resulted in a jury verdict reached by more than the constitutionally-mandated twelve persons. Moreover, we cannot employ a harmless error analysis here, and the fact that defendant did not object to substitution of the alternate juror is of no consequence, because “[a] trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand.” *Bunning*, 346 N.C. at 257, 485 S.E.2d at 292.

Because we hold that defendant is entitled to a new trial, we need not address defendant’s remaining assignments of error.

New trial.

Judges TIMMONS-GOODSON and HUDSON concur.

ODOM v. LANE

[161 N.C. App. 534 (2003)]

MARTHA C. ODOM, AS GUARDIAN AD LITEM FOR TIMOTHY DUSTIN HONEYCUTT, A MINOR, PLAINTIFF V. CHRISTOPHER LANE, M.D., ANSON REGIONAL MEDICAL SERVICES, INC., F/K/A MORVEN AREA MEDICAL CENTER, INC. AND/OR MID-CAROLINAS MEDICAL CENTER, AND CAROLINAS-ANSON HEALTHCARE, INC., D/B/A ANSON COMMUNITY HOSPITAL, DEFENDANTS

No. COA02-1759

(Filed 2 December 2003)

Immunity— governmental—public hospital—proprietary function

The trial court erred in a medical malpractice case by granting summary judgment for defendant hospital based on governmental immunity, because the operation of a public hospital is not one of the traditional services rendered by local governmental units and is a proprietary function.

Appeal by plaintiff from judgment entered 9 September 2002 by Judge Albert Diaz in the Superior Court in Mecklenburg County. Heard in the Court of Appeals 8 October 2003.

Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumpster, by William Simpson, for plaintiff-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Harvey L. Cosper, Jr. and John E. Grupp, for defendant-appellees.

HUDSON, Judge.

Plaintiff filed a medical malpractice claim against defendants on 16 April 2001 alleging that their negligence during his birth left him with permanent injuries. Defendant Carolinas-Anson Healthcare, d/b/a Anson Community Hospital, moved for summary judgment on the basis of governmental immunity. The trial court granted that motion by order and judgment filed 9 September 2002. Plaintiff appeals.

Plaintiff Timothy Dustin Honeycutt was born at Anson County Hospital on 10 July 1986. Plaintiff alleges that negligence on the part of the hospital's staff during his birth caused him serious permanent injuries. At the time of plaintiff's birth, the hospital was owned and operated by Anson County as a public, non-profit hospital. Defendant Carolinas-Anson Community Hospital ("the hospital") acquired the assets and liabilities of Anson County Hospital by an agreement dated

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26 November 1997. The hospital moved for summary judgment based on governmental immunity, and, after a hearing, the trial court granted the motion and dismissed with prejudice claims against the hospital. For the reasons discussed below, we reverse.

Claims against the other defendants in the underlying case are pending. Following its entry of summary judgment for defendant hospital, the court authorized an immediate appeal and stayed all other proceedings. "The final dismissal of a claim under summary judgment involves a substantial right from which a plaintiff has an immediate right of appeal." *Tinch v. Video Indus. Servs.*, 347 N.C. 380, 382, 493 S.E.2d 426, 428 (1997). In addition, this Court has held that an order allowing summary judgment on grounds of governmental immunity for one of several defendants affected a substantial right. *Urquhart v. University Health Systems of East Carolina, Inc.*, 151 N.C. App. 590, 592 n.2, 566 S.E.2d 143, 145 n.2 (2002). Thus, this appeal is properly before this Court.

Under the doctrine of governmental immunity, "the State cannot be sued except with its consent or upon its waiver of immunity." *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998). "The counties are recognizable units that collectively make up our state, and are thus entitled to sovereign immunity under North Carolina law" unless they waive immunity or otherwise consent to be sued. *Archer v. Rockingham Cty.*, 144 N.C. App. 550, 553, 548 S.E.2d 788, 790 (2001), *disc. rev. denied*, 355 N.C. 210, 559 S.E.2d 796 (2002). Plaintiffs argue that the hospital is not covered by any immunity the county might have. The defendants disagree, contending that the trial court properly dismissed the claim on grounds of immunity, because the hospital was engaged in a governmental, rather than proprietary, function. Thus, the sole issue before us is whether the county-owned hospital enjoyed governmental immunity from the suit.

Our Supreme Court answered this question decisively over a quarter-century ago in *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 213 S.E.2d 297 (1975). The Court undertook an exhaustive analysis of factors that might be considered, and determined that the dispositive question is whether the entity performs services historically engaged in by government, rather than those ordinarily engaged in by private corporations. *Id.* at 23, 213 S.E.2d at 303. Following this analysis, the Court held that:

It seems clear to us that the operation of a public hospital is not one of the "traditional" services rendered by local governmental

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[161 N.C. App. 536 (2003)]

units. Accordingly, for this reason, and for the reasons herein-before stated, we hold that the construction, maintenance and operation of a public hospital by either a city or a county is a proprietary function. Hence, such hospitals, just like any other corporate employer, are liable in tort for the negligent acts of their employees committed within the course and scope of their employment.

Id. at 25-6, 213 S.E.2d at 304.

The instant case is not distinguishable from *Sides* in any meaningful aspect. Anson County Hospital was owned and operated by Anson County when plaintiff was born there. Because its operation was a proprietary function pursuant to *Sides*, it did not enjoy governmental immunity for tort claims against it. Defendant acquired the assets and liabilities of Anson County Hospital by agreement, including any liability it might have for injuries to plaintiff. Thus, we conclude that the trial court erred in granting summary judgment for the hospital on the basis of governmental immunity.

Reversed.

Judges TIMMONS-GOODSON and ELMORE concur.

BRENDA HIGH EATMON, PLAINTIFF V. ROBERT MICHAEL ANDREWS, JR., AND
POWERSCREEN MID-ATLANTIC, INC., DEFENDANTS

No. COA03-128

(Filed 2 December 2003)

Damages and Remedies— punitive—car crash after drinking—evidence sufficient

There was sufficient evidence to go to the jury on punitive damages in a car crash case, and the trial court erred by granting a directed verdict for defendant, where defendant caused a collision after drinking two twelve ounce beers, admitted fleeing the scene to avoid the Breathalyzer, and no blood alcohol content was ever obtained.

Appeal by plaintiff from order entered 28 August 2002 by Judge Frank R. Brown in the Superior Court in Wilson County. Heard in the Court of Appeals 30 October 2003.

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[161 N.C. App. 536 (2003)]

Taylor Law Office, by W. Earl Taylor, Jr., for plaintiff-appellant.

Battle, Winslow, Scott & Wiley, P.A., by W. Dudley Whitley, III, for defendant-appellees.

HUDSON, Judge.

On 9 March 2001, plaintiff filed a civil complaint against defendant seeking compensatory and punitive damages for personal injuries resulting from a car crash. Defendant moved for summary judgment on the issue of punitive damages on 1 April 2002, and following a hearing on 6 May 2002, the court denied the motion. Defendants moved to bifurcate the trial regarding compensatory and punitive damages. The court allowed the motion to bifurcate and the trial on liability and compensatory damages began on 12 August 2002. The jury awarded plaintiff \$45,000 for her personal injuries, and the court directed a verdict in favor of defendant at the close of plaintiff's evidence in the punitive damages portion of the trial. Plaintiff assigns error to the trial court's directed verdict for defendant on plaintiff's claim for punitive damages. For the reasons discussed below, we vacate the directed verdict for defendant on the issue of punitive damages and remand for further proceedings.

The evidence showed that on 13 September 2000, plaintiff entered an intersection in Wilson on a green light, and collided with defendant, who, operating his employer's vehicle, failed to yield the right of way. Plaintiff suffered personal injuries and lost wages as a result of the collision. During the punitive damages portion of the trial, defendant acknowledged that he had left the bar at Applebee's just prior to the collision, and admitted consuming two twelve ounce beers in the two to three hours he spent at the bar. Immediately after the wreck, defendant walked away from the scene, to a convenience store, where he found a ride to a hotel. Defendant testified that he left the scene because he had a previous conviction for driving while impaired, knew that he had been drinking before the accident, and knew that the legal blood alcohol level had been lowered. Because he made his living by driving, defendant testified, he wanted to avoid taking a Breathalyzer test. After spending the night at the hotel, defendant called several attorneys and then came forward and identified himself as the driver involved in the accident.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is

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sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322-23, 411 S.E.2d 133, 138 (1991). When reviewing a directed verdict, "the question is whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor, or to present a question for the jury." *Id.* We thus consider whether the evidence presented here, taken in the light most favorable to plaintiff, was sufficient to present a question for the jury on plaintiff's claim for punitive damages.

"To prevail on a claim for punitive damages plaintiff must show that defendant's established negligence which proximately caused his injury reached a higher level than ordinary negligence; that it amounted to wantonness, willfulness, or evidenced a reckless indifference to the consequences of the act." *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 428, 444 S.E.2d 694, 697 (1994) (internal citations omitted). Such gross negligence can be established where a defendant is intoxicated. *Byrd v. Adams*, 152 N.C. App. 460, 462, 568 S.E.2d 640, 642 (2002).

In *Byrd*, evidence was offered that defendant 'fell asleep' while driving and did not wake up until after his vehicle rear-ended plaintiff's car, crossed over the interstate median and the opposite lanes of travel, and crashed into a tree. *Id.* at 463, 568 S.E.2d at 643. In addition, the defendant conceded that he had consumed two beers and taken three prescription drugs prior to the incident. *Id.* After the crash, the defendant left the scene, and went to a nearby house where he called the police. *Id.* at 461, 568 S.E.2d at 641. The police picked up defendant and returned him to the scene about twenty-five minutes after the accident. *Id.* At that time, a state trooper gave defendant an Alco-Sensor test, which indicated defendant's blood-alcohol level was below the legal limit. The test is not a legal screening device, but is simply used to measure any alcohol concentration. *Id.* The trial court, however, granted summary judgment in defendant's favor on the issue of punitive damages. Despite the test result, this Court reversed, holding that the evidence, taken in the light most favorable to the plaintiff, "could have allowed a jury to possibly recognize and estimate defendant's alleged impairment," sufficiently to justify a finding of gross negligence and an award of punitive damages. *Id.* at 464, 568 S.E.2d at 643.

Here, as in *Byrd*, the evidence presented a question for the jury on punitive damages. Defendant caused a collision after consuming two twelve ounce beers and admitted having fled the scene to avoid taking the Breathalyzer. Defendant spent the entire night at a hotel

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before contacting the police, and as a result no blood alcohol content was ever obtained. Drawing all inferences of fact in plaintiff's favor, the evidence is sufficient to present a jury question on the plaintiff's punitive damages claim. Thus, the court erred in directing a verdict for the defendant.

Reversed in part and judgment vacated in part; remanded for trial on punitive damages.

Judges McGEE and CALABRIA concur.

CASES WITHOUT PUBLISHED OPINIONS

BALMER v. ANDERSON CREEK, INC. No. 02-1620	Cumberland (01CVS4691)	Reversed and remanded
GREEN v. WALKER No. 03-154	Alamance (00CVS1615)	No error
IN RE J.J.B. No. 02-1452	Rowan (96J148) (96J150) (96J151)	Reversed and remanded
LEE v. LEE No. 03-79	Cumberland (01CVD6645)	Affirmed
MARTINEZ v. GODWIN No. 02-1513	Ind. Comm. (I.C. 693345)	Affirmed
PRICE v. PRICE No. 03-465	Guilford (93CVD2011)	Dismissed
STATE v. BEACHER No. 02-1710	Hertford (00CRS2785) (00CRS2786) (00CRS2787) (00CRS2788) (00CRS2789) (00CRS2790) (00CRS3651)	No error
STATE v. BELL No. 02-1428	Columbus (01CRS52441) (01CRS52443)	No error
STATE v. CASE No. 03-239	Stokes (01CRS51204) (01CRS51205) (02CRS51212)	No error
STATE v. COPPAGE No. 03-17	Wake (01CRS49929) (01CRS61788) (01CRS61789) (01CRS61790)	No error
STATE v. DAVIS No. 03-61	Guilford (01CRS80751)	No error
STATE v. DUNHAM No. 03-351	Mecklenburg (01CRS103490)	No error

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STATE v. FARLOW No. 03-123	Buncombe (98CRS63978)	No error
STATE v. HERRON No. 03-249	Durham (01CRS22453) (01CRS53501)	No error
STATE v. HYMAN No. 02-1648	Halifax (01CRS54309) (02CRS1549)	No prejudicial error
STATE v. KIRK No. 03-324	Cabarrus (01CRS16205) (01CRS16206) (01CRS16207) (01CRS16208) (01CRS16209) (01CRS16210) (01CRS16211) (01CRS16212)	No error
STATE v. McCLAIN No. 02-1120	Cumberland (01CRS58576) (01CRS58577)	No error
STATE v. MCKOY No. 03-383	New Hanover (02CRS51088) (02CRS51089)	Affirmed
STATE v. MEDINA No. 03-209	Lee (01CRS53125)	No error
STATE v. OGLES No. 03-83	Cleveland (00CRS55486)	No prejudicial error
STATE v. TAYBRON No. 02-1599	Wake (01CRS55190) (01CRS73594)	No error
STATE v. WILLIAMS No. 03-414	Guilford (00CRS110813)	No error
STATE ex rel. McKINEY v. LOTHARP No. 03-161	Mecklenburg (93CVD2824) (93CVD2924)	Reversed and remanded
YOUNG v. YOUNG No. 02-1674	Buncombe (00CVD2288)	Affirmed

STATE FARM FIRE & CAS. CO. v. DARSIE

[161 N.C. App. 542 (2003)]

STATE FARM FIRE AND CASUALTY COMPANY, PLAINTIFF v. CHARLES DARSIE,
ADMINISTRATOR CTA OF THE ESTATE OF BERNARD ALBERT LEINFELDER,
AND MARION HARRIS LEINFELDER, DEFENDANT

No. COA03-40

(Filed 16 December 2003)

1. Statutes of Limitation and Repose— amended counter-claim—fraud—no relation back

Defendant insured's amended counterclaim against plaintiff insurer for fraud did not relate back for statute of limitations purposes to the date of filing of the original counterclaim because a claim for fraud must allege all material facts and circumstances constituting fraud with particularity, and the allegations in the original counterclaim go only to the face of the policies at issue and the interpretation of the terms of those policies and do not give notice of the circumstances constituting the alleged fraud. N.C.G.S. § 1A-1, Rule 15(c).

2. Statutes of Limitation and Repose— fraud—personal liability umbrella insurance policy

The trial court erred by entering an order estopping plaintiff insurance company from denying coverage of its personal liability umbrella policy to defendant deceased husband's estate from defendant wife's claims for injuries and damages sustained in a car accident occurring 29 October 1996 even though there was a fiduciary relationship, because: (1) reasonable diligence required defendant wife to inquire as to the scope of her coverage under the personal liability umbrella policy (PLUP) when claims were ripe and even required by the policy; (2) defendant wife did not lack capacity to challenge the policy at all times after the accident and before the three years preceding her counterclaims dated 10 May 2001; and (3) the three-year statute of limitations under N.C.G.S. § 1-52(9) began to run sometime within a year of the accident since sometime within a year after the accident, defendant was both on notice of the alleged fraud by her insurance agent and had capacity to bring an actionable fraud claim against the insurance company.

Appeal by State Farm Fire and Casualty (State Farm) from a judgment entered 22 August 2002 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 15 October 2003.

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[161 N.C. App. 542 (2003)]

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Mark E. Anderson, for plaintiff appellant.

Pulley, Watson, King & Lischer, P.A., by Guy W. Crabtree, for defendant appellees.

McCULLOUGH, Judge.

This case arises from an order estopping State Farm from denying coverage of its Personal Liability Umbrella Policy (PLUP) to the Estate of Bernard Leinfelder for Mrs. Leinfelder's claims for injuries and damages sustained in a car accident occurring 29 October 1996. The following facts were found without exception by the trial court issuing the order. Beginning in 1984 and continuing at least through 1996, Mr. and Mrs. Leinfelder (the "Leinfelders" collectively) considered Mr. Larry High (Mr. High) their insurance agent. During that time, Mr. High was an agent for State Farm. The Leinfelders continuously carried their homeowner's and automobile insurance coverage with State Farm.

In 1994, the Leinfelders altered their insurance coverage. At that time, they were in their midsixties and were the sole employees of their own electronics business run out of their basement. Before the alteration to their coverage, they carried automobile insurance with State Farm which provided them with liability and UM (uninsured motorist)/UIM (underinsured motorist) coverage limits of \$500,000 per person and \$500,000 per accident (500/500). The limits of this policy applied to both first-party claims (claims brought by an insured or family member against another insured or family member) and third-party claims (claims brought by all others). In 1993 or early 1994, the Leinfelders were solicited by Mr. High to consult with him for an insurance "check-up." In February of 1994, Mrs. Leinfelder met with Mr. High while Mr. Leinfelder stayed at home to run their business. At that meeting Mrs. Leinfelder took notes of Mr. High's recommendations of a better coverage scheme and so reported to her husband. As a result of the meeting and Mr. High's recommendations, the Leinfelders reduced their automobile liability coverage to \$100,000 per person/\$300,000 per accident (100/300) and purchased a \$1,000,000 PLUP.

Included in the PLUP was a first-party exclusion or "intra-family" exclusion that read:

10. For **bodily injury** or **personal injury** to the **named insured**, spouse, or anyone within the meaning of Part A. or

Part B. of the definition of **insured**. This exclusion also applies to any claim or suit made against you to share damages with or repay someone else who may be obligated to pay damages because of the **bodily injury or personal injury**.

Thereafter, for first party claims, rather than increase the Leinfelders' liability coverage up to \$1,000,000, because the underlying automobile limits were reduced from 500/500 to 100/300, the intra-family exclusion of the PLUP actually reduced the coverage limit that they had before the 1994 alteration by 80% (500 to 100).

On 29 October 1996, the Leinfelders were involved in a serious automobile accident, resulting in the death of Mr. Leinfelder. Mrs. Leinfelder sustained substantial injuries with ensuing medical expenses exceeding \$500,000. The wreck was caused by the negligence of Mr. Leinfelder when he drove on the wrong side of a divided highway. On that day, both the State Farm PLUP and automobile policy were in effect.

Mrs. Leinfelder instituted a claim against her husband's estate for damages on 5 October 1999. State Farm contended the extent of her husband's automobile liability coverage was \$100,000, and the \$1,000,000 coverage purchased in 1994 did not cover the liability of first-party claims pursuant to the intra-family exclusion. Being the wife and one of the insured, she thus had no claim beyond \$100,000 as of the 1994 alterations to their coverage.

The action now before this Court was originally instituted by State Farm on 4 February 2000 for determination of the respective parties' rights and obligations under the automobile insurance policy and PLUP sold to the Leinfelders. Mrs. Leinfelder served a counterclaim on State Farm on 8 March 2000, denying that the State Farm coverage was limited, and arguing that the intra-family exclusion clause was void as against public policy.¹ By order dated 10 May 2001, after both parties took discovery depositions, Mrs. Leinfelder was allowed to amend her counterclaim to add the claim of fraudulent misrepresentation, and relief in the form of equitable estoppel and reformation of the PLUP. On 20 November 2001, partial summary judgment was entered in favor of State Farm wherein the trial court determined the intra-family exclusion of the PLUP policy was clear and unambiguous. Summary judgment was denied as to State Farm's affirmative defense of statute of limitations, and on the issues of

1. Mrs. Leinfelder and State Farm stipulated Mr. Leinfelder's estate need not counterclaim as the issues could be determined without his estate's involvement.

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fraud, equitable estoppel, and reformation. In a trial without a jury, the trial court held as a matter of law that the statute of limitations on a claim of fraud had not run in this case, and in light of the relationship Mr. High established with the Leinfelders, they were entitled to reformation of the PLUP.

State Farm raises two issues on appeal: first, that the trial court was incorrect in finding the statute of limitations had not run on the Leinfelders' claim of fraud; and second, that there was insufficient evidence to support the trial court's finding of fraud. Because we hold the statute of limitations had run by the time Mrs. Leinfelder made her claim for fraud, equitable estoppel, and reformation, we reverse the trial court's order reforming the PLUP policy and hold Mrs. Leinfelder is bound by the intra-family exclusion.

Statute of Limitations for Fraud*I. Filing Date of Amended Counterclaim and Governing Statute*

[1] As a threshold matter for our statute of limitations analysis, we must first determine whether the amended counterclaim alleging fraud/misrepresentation of 10 May 2001 relates back to the initial counterclaim of 8 March 2000 brought by Mrs. Leinfelder. In granting Mrs. Leinfelder's leave to amend, the trial court did not state if the amended counterclaim related back to the date of the original claim. Rule 15(c) of the North Carolina Rules of Civil Procedure, which govern a party's ability to add a new claim after the statute of limitations has expired, provides:

A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, *unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.*

N.C. Gen. Stat. § 1A-1, Rule 15(c) (2001) (emphasis added). For an amended claim to relate back to the date of the original pleading, it will depend upon whether the original pleading gave sufficient notice of the proposed amended claim. *Pyco Supply Co. v. American Centennial Ins. Co.*, 321 N.C. 435, 440, 364 S.E.2d 380, 383 (1988).

Since Rule 15(c) is modeled after section 203(e) of the New York Civil Practice Law and Rules, New York decisions provide guidance for relation back in North Carolina. *Stevens v. Nimocks*, 82 N.C. App. 350, 354, 346 S.E.2d 180, 182, *cert. denied*, 318 N.C. 511, 349 S.E.2d

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873 (1986) (negative history on issue of adding parties and relating back these claims not relevant in this instance). We find support in New York decisions for the following: when a claim requires unique factual allegations such as fraud, medical malpractice and lack of informed consent, there must be some of those unique factual allegations present in the original counterclaim. In *Jolly v. Russell*, 203 A.D.2d 527-29, 611 N.Y.S.2d 232, 233 (1994), the Supreme Court of New York, Appellate Division, held:

Considering the nature of the cause of action, and the distinctions to be made between allegations of lack of informed consent and allegations of general negligence, we conclude that the original pleadings in this case did not provide notice of the series of transactions or occurrences to be proved in a cause of action based on lack of informed consent. Accordingly, the cause of action to recover damages for lack of informed consent did not relate back to the interposition of the original complaint, and was therefore untimely.

Id. (citations omitted); see also *Monaco v. New York Univ. Medical Ctr.*, 213 A.D.2d 167, 168, 623 N.Y.S.2d 566, 568, *appeal dismissed in part, denied in part*, 86 N.Y.2d 882, 659 N.E.2d 767 (1995) (the cause of action for fraud would not relate back to the time the action was commenced as the medical malpractice claim did not sufficiently state the circumstances constituting fraud to give the defendant hospital sufficient notice to save the claim). We agree with the apparent rationale of the New York appellate division that when a party seeks to relate back a claim with specialized pleading requirements, fairness to defending parties requires more particular notice in the original pleading as to the transaction or occurrence to be proven in the amended pleading. In the instant case, Mrs. Leinfelder first alleges false or negligent misrepresentation by State Farm Agent Mr. High in her amended counterclaim. A claim of fraud must allege all material facts and circumstances constituting fraud with particularity. See N.C. Gen. Stat. § 1A-1, Rule 9(b) (2001); *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E.2d 63 (1979).

The amended counterclaim alleges the fraud occurred during the procurement of Mrs. Leinfelder's insurance policy. However, in her original counterclaim she avers no elements of fraudulent conduct on the part of State Farm or its agent Mr. High (who is not mentioned once in the entire original counterclaim). The original counterclaim seeks four claims of relief: the first, that she is owed UIM coverage generally; the second, that State Farm is obligated to pay UIM cover-

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age under the PLUP policy in the amount of \$1,000,000 pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) (2001) of the North Carolina Financial Responsibility Act; third, the PLUP policy should be interpreted in accord with Ms. Leinfelder's reasonable expectations; and fourth, the spousal exception in the PLUP policy should be declared void as against public policy. These claims go only to the face of the policies and the interpretation of its terms; they provide no allegations concerning the conduct of the contracting parties.

We conclude these claims for relief do not sufficiently give notice of the transactions, occurrences, or series of transactions or occurrences, of the alleged fraudulent conduct in the amended counter-claim. Fraud in pleading requires particularity. The purpose of Rule 9(b), and its relation to Rule 15(c) in this instance, is because fraud embraces such a wide variety of potential conduct that the alleged fraudulent party needs particularity of allegations in order to meet the evidentiary demands of the charges. *Terry v. Terry*, 302 N.C. 77, 273 S.E.2d 674 (1981). Therefore, we hold the amended date does not relate back to 8 March 2000, and is deemed filed 10 May 2001.

[2] Both Mrs. Leinfelder and State Farm recognize the applicable statute of limitations governing the claims made by Mrs. Leinfelder as N.C. Gen. Stat. § 1-52(9) (2001), which states that a claim “[f]or relief on the ground of fraud or mistake” must be filed within three years of the aggrieved party’s “discovery . . . of the facts constituting the fraud or mistake.” Under this provision, “discovery” means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence. See *Grubb Properties, Inc. v. Simms Investment Co.*, 101 N.C. App. 498, 501, 400 S.E.2d 85, 88 (1991). When the statute is pled as an affirmative defense, the burden rests on the party asserting a cause of action to remove the bar. *Swartzberg v. Insurance Co.*, 252 N.C. 150, 156-57, 113 S.E.2d 270, 277 (1960); *Solon Lodge v. Ionic Lodge*, 247 N.C. 310, 316-17, 101 S.E.2d 8, 13 (1957). Specifically in this case, it is Mrs. Leinfelder’s burden to show she should not be charged with discovery or imputed discovery by reasonable diligence of the exclusion within the period of three years next preceding the filing of her counterclaim to reform the policy. See *Hooker v. Worthington*, 134 N.C. 283, 46 S.E. 726 (1904); *Tuttle v. Tuttle*, 146 N.C. 484, 59 S.E. 1008 (1907). Or, alternatively, if she was on notice of the fraud, she falls within the disability statute tolling the statute of limitations until a later date. See N.C. Gen. Stat. § 1-17(a) (2001); N.C. Gen. Stat. § 35A-1101(7) (2001). We hold that the record supports no findings of fact or con-

clusions of law that Mrs. Leinfelder has carried her burden of either of these alternatives.

II. Imputed Discovery by Reasonable Diligence

Imputing discovery of a fraud or misrepresentation for the purposes of triggering the statute of limitations on the willfully blind is long standing in North Carolina, and our Supreme Court stated clearly in *Peacock v. Barnes*, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906):

A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case, a man's failure to note facts of this character should be imputed to him for knowledge, and in the absence of any active or continued effort to conceal a fraud or mistake or some essential facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action will be deemed to have accrued from the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary diligence.

Our Court has held that a court's determination of reasonable diligence under N.C. Gen. Stat. § 1-52(9) may either be a matter of fact or a matter of law depending on the circumstances of the underlying case. *Grubb Properties, Inc.*, 101 N.C. App. at 501, 400 S.E.2d at 88. Ordinarily, when fraud should be discovered in the exercise of reasonable diligence is a question of fact for the jury, particularly when the evidence is inconclusive or conflicting. See *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976). However, where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the fraud but failed to do so, the absence of reasonable diligence is established as a matter of law. *Moore v. Casualty Co.*, 207 N.C. 433, 437, 177 S.E. 406, 408 (1934); see also *Grubb Properties, Inc.*, 101 N.C. App. at 501, 400 S.E.2d at 88.

A. Standard of Review

Whether reasonable diligence or discovery can be determined as a matter of fact or one of law determines our standard of review. As

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to findings in a bench trial, we review matters of law *de novo*; we review matters of fact for any competent evidence of record to support the trial court's findings of fact and conclusions of law, whether or not contradictory evidence as to any one fact exists. *See Graham v. Martin*, 149 N.C. App. 831, 561 S.E.2d 583 (2002) (upholding the trial court's factual determination of unjust enrichment, but reversing the constructive trust remedy with *de novo* application of the Statute of Frauds).

Because we believe evidence in the record is unclear about when Mrs. Leinfelder discovered or should have discovered with reasonable diligence the alleged fraud by Mr. High, we search the record for only competent evidence to support the trial court's findings. *Id.* However, while we review these findings with great deference, there must be at least some quantum of evidence to support them. Specifically in this case, there must be evidence showing Mrs. Leinfelder has carried her burden to toll the statute of limitations by showing the fraud was first discovered sometime within the three years preceding her claim, or by lack of capacity at an otherwise reasonable time of discovery preceding those three years.

B. Finding of Fact #43 and Conclusion of Law #27

In its finding of fact #43, the trial court determined:

- 43) After Mrs. Leinfelder instituted her claim against her husband's estate for her damages, she discovered that State Farm was contending that her husband only had \$100,000 of automobile liability coverage from which to recover rather than the \$1,000,000 of liability coverage which she and her husband thought they had purchased in 1994 upon the recommendation of Mr. High.

This is the only finding of fact clearly suggesting when Mrs. Leinfelder first discovered the fraud. Mrs. Leinfelder's claim against her husband's estate was brought on 5 October 1999. State Farm instituted its declaratory action on 4 February 2000 which sought to deny coverage under the PLUP. Mrs. Leinfelder did not then make a claim of fraud, equitable estoppel, and reformation until 10 May 2001. In its last conclusion of law #27, the trial court found:

- 27) The claims of equitable estoppel and reformation raised in the Amended Counterclaim are not barred by the statute of limitations.

1. February 1994 to October 1996

In her brief, Mrs. Leinfelder argues that finding of fact #43 and conclusion of law #27 are supported by these findings of fact made by the trial court:

- 57) At the time of the meeting in February 1994, Mr. High had been the Leinfelders' insurance agent for almost 10 years.
- 58) The Leinfelders considered Mr. High to be their State Farm agent and contacted him with whatever questions they had regarding their insurance.
- 59) The Leinfelders always followed Mr. High's recommendations in regards to their insurance issues.
- 60) The Leinfelders had complete trust and faith in Mr. High in 1994.
- 61) In 1994, Mr. and Mrs. Leinfelder relied on what Mr. High told and recommended to them about their insurance coverages.

* * * *

- 65) A few weeks after signing the application for the personal umbrella policy, the umbrella policy and accompanying documents were mailed to, and received by, Mr. and Mrs. Leinfelder.
- 66) Mrs. Leinfelder received and reviewed the insurance policy and documents to make sure that it was an umbrella policy as Mr. High had told her, that it did have limits of \$1,000,000.00, and that she and her husband were the insured parties under the policy. However, she did not read the policy from cover to cover.
- 67) Mr. and Mrs. Leinfelder relied on what Mr. High told them was contained in the policy, and since they trusted him completely, they did not feel it necessary to check behind what he had told them, to wit: that they would have better coverage with increased limits for the same claims that they would have had under their existing coverages if they made the changes that he recommended.
- 68) Mr. and Mrs. Leinfelder rightly expected that Mr. High would tell them if part of their coverage was actually removed or decreased because of the recommended changes.

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We agree with Mrs. Leinfelder that these findings by the trial court are supported by competent evidence of record. Furthermore, we agree that our Court and our Supreme Court have extended the statutory trigger of reasonable diligent discovery of fraud in an insurance policy when the fraud was procured by a fiduciary. The essence of these holdings is that the fiduciary, acting as a trustee or confidant, supplements for a party's own reasonable diligence. *Small v. Dorsett*, 223 N.C. 754, 763, 28 S.E.2d 514, 518 (1944); see also *Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327, disc. review denied, 348 N.C. 500, 510 S.E.2d 653 (1998) (stating that "An insurance agent acts as a fiduciary with respect to procuring insurance for an insured, correctly naming the insured in the policy, and correctly advising the insured about the nature and extent of his coverage"); see also *R-Anell Homes v. Alexander & Alexander*, 62 N.C. App. 653, 659, 303 S.E.2d 573, 577 (1983) (upholding a trial court's finding of fact that the plaintiff failed to reasonably discover lack of coverage based upon evidence that the insured relied upon the superior knowledge and advice of an insurance agent).

Here the trial court's findings, which we believe are based on competent evidence, along with supporting case law, excuse Mrs. Leinfelder's discovery of the terms of the PLUP policy as of the date of its issuance and receipt in 1994. Further, without any event between February 1994 and October 1996 that would cause her to question or inquire into the terms of the PLUP policy as colored by her fiduciary, during those years there was no failure on her part to review the policy and discover any fraud or misrepresentation.

Because we find the record adequate to support the trial court's finding of a fiduciary relationship, we distinguish this case from the general rights and obligations of parties to insurance transactions where no such relationship exists. These are set out clearly in *Baggett v. Summerlin Ins. & Realty Inc.*, 143 N.C. App. 43, 545 S.E.2d 462 (2001), rev'd per curiam, 354 N.C. 347, 554 S.E.2d 336 (2001) (where a party has an opportunity to read an insurance policy under which he claims coverage, he is held to be on notice of those terms in the policy which are otherwise clear and unambiguous. Failure to read the policy will bar his right to reformation.).

2. Within a Year of 29 October 1996

Despite the lower court's determination of a fiduciary relationship, and after close review of the record and exhibits thereto, we believe the above findings do not establish competent evidence to toll

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N.C. Gen. Stat. § 1-52(9) beyond sometime within a year of 29 October 1996. As we noted above, a fiduciary relationship can at times supplement for reasonable diligence in complete understanding of one's own affairs. However, in cases such as insurance claims, when a claim becomes ripe and due under a policy requiring action on the part of the insured, at that point or a reasonable time thereafter, the policyholder is charged with more than a cursory knowledge of the extent of their coverage. In general, this Court will not wholly excuse discovering a fraud merely because a relationship of trust and confidence exists. Where something happens which reasonably excites suspicion that a fiduciary has failed to disclose all essential facts, diligent inquiry puts one on notice and triggers the time period for which a claim can be made. *Shepherd v. Shepherd*, 57 N.C. App. 680, 682-83, 292 S.E.2d 169, 170-71 (1982); *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 208 (1951).

State Farm evoked the statute of limitations defense in their response to Mrs. Leinfelder's amended counterclaim. The burden then rests upon Mrs. Leinfelder to remove the statutory bar. See *Swartzberg*, 252 N.C. 150, 113 S.E.2d 270. Therefore, when the statute of limitations' trigger is based on discovery by reasonable diligence, as in a case of fraud, there must be some competent evidence as to when discovery of the fraud was reasonable. Or alternatively, when it was otherwise reasonable to discover, there must be some competent evidence that plaintiff lacked "capacity and opportunity" at all times while discovery was reasonable and before the three years preceding the claims. *Grubb Properties*, 101 N.C. App. 498, 400 S.E.2d 85.

Based on the uncontradicted evidence in the record set out below, we hold as a matter of law that an otherwise reasonable time to discover fraud or misrepresentation in the PLUP policy was when the policy itself required certain claims, such as an accident, be brought to the attention of the insurer for the purposes of determining coverage. *Id.* at 501, 400 S.E.2d at 88 (where we held that the mistake or discrepancy in a deed that plaintiff complains of should have been discovered through the exercise of due diligence, at least by 30 May 1984, when plaintiff filed its Declaration converting the apartment complex to condominiums, and that the action filed nearly four years later was barred). We charge Mrs. Leinfelder with due diligence at least sometime within a year of the accident.

We next conclude there is no evidence of record that Mrs. Leinfelder lacked opportunity and capacity to inquire into her coverage under the policy at all times after the accident and before the

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three years preceding her counterclaims dated 10 May 2001. In fact, the record shows that she did make such inquiries via her stepdaughter-in-law, Janice Nichols (Janice), to whom she gave power of attorney.

The PLUP policy Mr. and Mrs. Leinfelder contracted for has a section entitled "Your Duties To Us." The section begins:

These are the things you must do for us. We may not provide coverage if you refuse to:

1. notify us of an accident. If something happens that might involve this policy, you must let us know promptly. Send written notice to us or our agent.

Under the policy, assuming one was covered thereunder, notice was to be given to State Farm "promptly" after an accident. Mrs. Leinfelder had Janice, acting with power of attorney soon after the accident, make this prompt contact with State Farm. Mrs. Leinfelder therefore took the initial step in exercising reasonable diligence in determining the extent of her coverage, and the person acting as her attorney-in-fact was put on notice of the denial of coverage. In a 13 July 2002 deposition taken by her attorney, Mrs. Leinfelder stated:

Q I see. Now, after you were injured in this automobile wreck of October, 1996 did you make a claim for your injuries, or did Miss Nichols . . .

A Yes.

Q . . . Or your attorney, in fact, your stepdaughter-in-law made a claim for you?

A Yes, she did.

Q And after that claim was made what did you find out regarding your insurance coverage?

A She told—she told me that the insurance wouldn't cover, the insurance I had.

Q Okay, and what was your reaction to hearing that?

A Complete shock.

In a deposition taken by State Farm's attorney, on 12 June 2002, Mrs. Leinfelder testified as follows:

Q After the accident tell me what happened with regard to the State Farm coverage? Did you contact State Farm?

A Yes, indirectly.

Q Okay. Who directly contacted State Farm?

A Janice.

Q Did you ever contact State Farm?

A Yes, through Janice.

Q Through Janice, but did you personally ever talk to anyone at State Farm?

A After the accident, no.

Q Okay, because you were badly injured as I understand.

A Very badly.

Q Right. What did Janice tell you that State Farm had said?

A First thing when she dared to tell me was that State Farm was not paying anything for my injuries.

While Mrs. Leinfelder's testimony does not reveal exactly when she requested Janice to contact State Farm, other circumstantial evidence suggests that she made this request approximately three months after the accident. In a deposition taken by Mrs. Leinfelder's lawyer, Mr. High described Mrs. Leinfelder's file to include the following:

Q Drawing your attention to the next page, I see an indication there maybe a third of the way down, 1/28/97, "Jeff Campbell called. Gave him contact name and number. R.H."

A Correct.

Q What does that tell you?

A That tells—Jeff Campbell was a claims person at that time, an auto claims person. And apparently he didn't have—who is it? Janice Nichols?—did not have her phone number and wanted to know if we had any contact numbers. And they were given to him.

Further testimony by Mrs. Leinfelder on 13 July 2002 reveals Mrs. Leinfelder was on actual notice of State Farm's denial of coverage, at least within a year of the 29 October 1996 accident:

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Q Okay. Now, when did you first discover that you and your husband's coverages had been decreased in regards to the injuries suffered in the automobile wreck in October of 1996?

A I don't know when Janice let me know. They were afraid because my fragile condition to—I wasn't able to even understand with all the medication I had. I, and she's coming from—I don't know, it might have been six months, it might have been a year. I really can't answer when she told me.

Mrs. Leinfelder alleges fraud in procuring the PLUP policy. We find as a matter of law that notice of denial of the PLUP coverage triggered the statute of limitations as the date when reasonable diligence would result in the fraud's discovery, and she was first injured by the denial. Mrs. Leinfelder's brief does not dispute this legal determination, but argues pursuant to the trial court's finding of fact #43 that she was not put on notice of the denial of coverage until she brought her claim against Mr. Leinfelder's estate in 1999. We see no competent evidence in the record to support this, and in fact only evidence to the contrary. There is direct deposition testimony that Mrs. Leinfelder herself had actual notice no later than a year of the accident, and that her power of attorney had notice soon after the accident. By making immediate inquiry into her coverage, through her attorney-in-fact, Mrs. Leinfelder was exercising reasonable diligence as to discovery of any fraud in the procurement of her policy. We charge her with discovery of the fraud sometime within a year of the accident, or at least by 29 October 1997. Therefore, without more, her counterclaims of May 2001 came too late.²

Mrs. Leinfelder cites *Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 442 S.E.2d 316 (1994), in her argument as to when the statute of limitations accrued. In *Jefferson-Pilot*, the insured was misinformed by the insurance company that his wife was the beneficiary of his life insurance policy. This Court held that "an action for negligent misrepresentation of an insurance contract does not accrue before the misrepresentation is discovered, neither does it accrue until the misrepresentation has caused the claimant harm." *Id.* at 56, 442 S.E.2d at 320 (holding that because the beneficiary of the policy only had an expected interest, rights under the policy did not vest until the death of the policyholder, and at that point triggered the statute of

2. We need not decide here, as we hold above that Mrs. Leinfelder had actual notice sometime before 29 October 1997 that coverage was denied, whether State Farm's denial of coverage given to Janice as attorney-in-fact immediately triggered the date for discovery by reasonable diligence.

limitations). We agree with the applicability of *Jefferson-Pilot*. However, we believe the two requirements to trigger the statute of limitations in the case of a fraudulently procured insurance contract, both its discovery and the harm caused thereby, will often occur simultaneously. Most insurance policies require immediate notice of potential claims due to events such as accidents or deaths.

When an alleged claim under a policy is ripe, notice of the denial normally will be the time when the claimant is charged with discovery by reasonable diligence of the underlying fraud, and also injured by the lack of coverage. In her brief, Mrs. Leinfelder cites *R-Anell Homes*, 62 N.C. App. 653, 303 S.E.2d 573; and *Transit, Inc. v. Casualty Co.*, 20 N.C. App. 215, 201 S.E.2d 216 (1973), *aff'd*, 285 N.C. 541, 206 S.E.2d 155 (1974), as authority to extend the statute of limitations by reasonable discovery. However, in both of these cases, the fiduciary relationship only excuses the reading of the new or renewed insurance policy during the policy's dormancy. These cases say nothing about excusing a party from the discovery of the extent of their policy after claims under the policy are ripe. Both cases were heard before a superior court within three years of the date of the incident which implicated the policy.

III. Incompetent Adult

In North Carolina, statutes of limitation are also "subject to expansion . . . by North Carolina's . . . 'disabilities' statutes." *Leonard v. England*, 115 N.C. App. 103, 106-07, 445 S.E.2d 50, 52 (1994), *disc. review denied*, 340 N.C. 113, 455 S.E.2d 663 (1995); *see also Soderlund v. Kuch*, 143 N.C. App. 361, 369, 546 S.E.2d 632, 638 (2001). The disability statute which might operate to toll the statute of limitations at bar is N.C. Gen. Stat. § 1-17(a)(3) (2001), which states in pertinent part:

(a) A person entitled to commence an action who is at the time the cause of action accrued under a disability

. . . .

(3) The person is incompetent as defined in G.S. 35A-1101(7) or (8).

N.C. Gen. Stat. § 35A-1101(7) (2001) defines an incompetent adult as being

an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate

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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.

(Emphasis added.) The appropriate test for establishing an adult incompetent "is one of mental competence to manage one's own affairs." *Cox v. Jefferson-Pilot Fire and Casualty Co.*, 80 N.C. App. 122, 125, 341 S.E.2d 608, 610 (emphasis added), *cert. denied*, 317 N.C. 702, 347 S.E.2d 38 (1986).

Mrs. Leinfelder has not argued, nor did the trial court find as fact or conclude as law, that she lacked capacity or opportunity to make the proper claims under her PLUP policy. Regardless, we here feel compelled to close this potential issue. While there is competent evidence that Mrs. Leinfelder was extremely and unfortunately injured by the accident, in and out of hospitals, and on and off of many painkillers, we find no competent evidence that her injury made her incapable of managing her own affairs. There is evidence that she named Janice as her attorney-in-fact shortly after the accident to look after her affairs, that she had Janice contact the insurance company to discern her auto and PLUP coverage soon after the accident, and that Janice informed her that coverage was being denied within a year of the accident. Yet, claims of fraud were not brought until 10 May 2001, beyond the three years from 29 October 1997, the latest date Mrs. Leinfelder could be charged with notice of the fraud.

In sum, we hold the evidence in the record, exhibits, and the lower court's findings of fact, do not establish competent evidence of the following: (1) that reasonable diligence did not require Mrs. Leinfelder to inquire as to the scope of her coverage under the PLUP policy when claims were ripe and even required by the policy (had she been covered as she thought); or, alternatively, (2) that she lacked capacity to challenge the policy at all times after the accident and before the three years preceding her counterclaims dated 10 May 2001. Furthermore, because we find evidence showing that sometime within a year after the accident of 29 October 1996, Mrs. Leinfelder was both on notice of the alleged fraud by Mr. High and had capacity to bring an actionable fraud claim against State Farm, we hold the statute began to toll sometime within a year of the accident, 29 October 1996, statutorily barring her claim of fraud first alleged in 10 May 2001. We reverse the trial court's order.

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Reversed.

Judges TYSON and BRYANT concur.

IN THE MATTER OF: THE PROPOSED ASSESSMENTS OF ADDITIONAL SALES AND USE TAX FOR THE PERIOD OF JANUARY 1, 1994 THROUGH NOVEMBER 30, 1996 BY THE SECRETARY OF REVENUE, PETITIONER v. JEFFERSON-PILOT LIFE INSURANCE CO., RESPONDENT

No. COA02-1591

(Filed 16 December 2003)

Taxation—use taxes—insurance company exemption

The trial court correctly ruled that Jefferson-Pilot is liable for a use tax, and reversed the Tax Review Board, where Jefferson-Pilot contended that N.C.G.S. § 105-228.10 prior to its 1998 amendment unambiguously forbade assessment of a local use tax against insurance companies. However, the construction given to this statute by the N.C. Supreme Court and the General Assembly supports a contrary view. Identical language was supported by the N.C. Supreme Court more than a century ago to make insurance companies liable for local use taxes, and legislative enactments since then have embraced that ruling. Moreover, the ruling urged by Jefferson-Pilot would produce an absurd result.

Judge TYSON dissenting.

Appeal by respondent from judgment entered 6 August 2002 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 7 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Kay Linn Miller Hobart, for the State.

C.B. McLean, Jr., for respondent-appellant.

LEVINSON, Judge.

Respondent appeals from a judgment reversing Administrative Decision No. 361 of the Tax Review Board and ruling that respondent is liable for the disputed local use tax. We affirm.

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The relevant facts are not disputed, and may be briefly summarized as follows: Jefferson-Pilot Life Insurance Company is engaged in business as an insurance company and paid gross premiums tax pursuant to Article 8B of Chapter 105 of the North Carolina General Statutes between 1 January 1994 and 30 November 1996 ("the relevant period"). When Jefferson-Pilot made purchases within this State, the company paid state and local sales tax on those purchases pursuant to Articles 5, 39, 40, and 42 of Chapter 105 of the North Carolina General Statutes.

During the relevant period, Jefferson-Pilot purchased tangible personal property outside of this State for storage, use, or consumption in this State. The company did not pay state or local use tax with respect to these purchases. The Department of Revenue issued a proposed notice of tax assessment against Jefferson-Pilot for state and local use taxes for the period of 1 January 1994 through 30 November 1996. Jefferson-Pilot paid the State use tax, but contested liability for local use tax on the ground that N.C.G.S. § 105-228.10, as it existed at the time of the proposed assessment, prohibited the assessment of local use taxes against insurance companies. The Assistant Secretary sustained the proposed assessment. On appeal, the Tax Review Board reversed, ruling against the proposed assessment. The State petitioned for review in superior court; the trial court reversed the Tax Review Board and ruled that Jefferson-Pilot is liable for the proposed use tax.

Jefferson-Pilot now appeals, contending that the trial court misconstrued the following statutory provision:

No county, city, or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company or association paying the [gross premiums tax on insurers].

N.C.G.S. § 105-228.10 (1997) (amended 1998). Jefferson-Pilot insists that the plain language of this statute prohibited local use taxes from being assessed against insurance companies. Thus, the central issue in this case is the meaning of the pre-1998 version of G.S. § 105-228.10.

Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court. *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 588, 492 S.E.2d 369, 371 (1997). In conducting this review, we are guided by the following principles of statutory construction.

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The paramount objective of statutory interpretation is to give effect to the intent of the legislature. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998). The primary indicator of legislative intent is statutory language; the judiciary must give “clear and unambiguous” language its “plain and definite meaning.” *Begley v. Employment Sec. Comm’n*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981). However, strict literalism will not be applied to the point of producing “absurd results.” *Taylor v. Crisp*, 286 N.C. 488, 496, 212 S.E.2d 381, 386 (1975).

When the plain language of a statute proves unrevealing, a court may look to other indicia of legislative will, including: “the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means[.]” *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998) (citation omitted). The intent of the General Assembly may also be gleaned from legislative history. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001). Likewise, “[l]ater statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute.” *Wells v. Consol. Judicial Ret. Sys.*, 354 N.C. 313, 318, 553 S.E.2d 877, 880 (2001).

Statutory provisions must be read in context: “Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole.” *State ex rel. Comm’r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978). “Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.” *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 844 (1980) (internal citations omitted).

Tax statutes “are to be strictly construed against the State and in favor of the taxpayer.” *Watson Industries, Inc. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952). In arriving at the true meaning of a taxation statute, the provision in question must be considered in its appropriate context within the Revenue Act. *See Insurance Co. v. Stedman*, 130 N.C. 221, 223, 41 S.E. 279, 280 (1902) (“Taking all the [relevant] sections of the Revenue Act of 1901 together” to arrive at an interpretation of a section of the act). The interpretation of a revenue law adopted by the agency charged with its enforcement is a significant aid to judicial interpretation of the same provision; however, “[u]nder no circumstances will the courts follow an administrative

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interpretation in direct conflict with the clear intent and purpose of the act under consideration." *Watson Industries, Inc.*, 235 N.C. at 211, 69 S.E.2d at 511.

We turn now to application of these principles to the present case, which requires our examination of the statutory provisions governing the taxes at issue: (1) the local use tax, and (2) the gross premiums tax on insurance companies.

The use tax is an excise tax which is the counterpart of the sales tax. *See Johnston v. Gill*, 224 N.C. 638, 643-44, 32 S.E.2d 30, 33 (1944) (discussing the State use tax). N.C.G.S. § 105-467 (2003) authorizes local governments in this State to levy a sales tax on certain purchases. N.C.G.S. § 105-468 (2003) authorizes local governments to charge a use tax on "[an] item or article of tangible personal property that is not sold in the taxing county but is used, consumed, or stored for use or consumption in the taxing county." G.S. § 105-468 explicitly provides that "[t]he [use] tax applies to the same items that are subject to [sales] tax under G.S. [§] 105-467." The use tax is designed to prevent unfair competition, which may result where a purchaser can evade the local sales tax by purchasing in a locality which does not charge sales tax and then make use of the purchased property in a locality which does charge the sales tax. *See Johnston*, 224 N.C. at 644, 32 S.E.2d at 33. The sales and the use tax, "taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased. That is, the sales tax and the use tax are complementary and functional parts of one system of taxation." *Id.*

Where a locality chooses to assess local sales and use taxes, G.S. § 105-467(b) requires their assessment absent an exemption which the General Assembly has made applicable to State sales and use tax: "A taxing county may not allow an exemption, exclusion, or refund that is not allowed under the State sales and use tax." Jefferson-Pilot enjoys no exemption from the State use tax; therefore, absent some other controlling statute, it is liable for local use taxes.

Jefferson-Pilot contends that its exemption derives from the special system of taxation that applies to insurance companies: the gross premiums tax. N.C.G.S. § 105-228.5(b)(1) (2003) provides that "[t]he tax imposed . . . on an insurer . . . shall be measured by gross premiums from business done in this State during the preceding calendar year." Because they are subject to the gross premiums tax, subsection (a) exempts insurers from other types of taxes: "An insurer . . . that is

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subject to the [gross premiums tax] is not subject to franchise or income taxes imposed by Articles 3 and 4, respectively, of this Chapter [105].” It is clear that the gross premiums tax also restricts the imposition of some local taxes; for the purposes of the instant case, it is relevant that the pre-1998 version of G.S. § 105-228.10, titled “No additional local taxes,” set forth the following prohibition:

No county, city, or town shall be allowed to impose any additional tax, license, or fee, other than ad valorem taxes, upon any insurance company or association paying the fees and taxes levied in this Article [governing taxes on insurers].

Jefferson-Pilot contends that the quoted version G.S. § 105-228.10, which was effective during the relevant period, unambiguously forbade the assessment of local use tax against insurance companies. After careful examination of the relevant statutes and cases, we do not agree. Though it is possible the pre-1998 version of G.S. § 105-228.10, read in isolation and out of context, seemingly shielded insurance companies from liability for local use taxes, the construction given to this statute by our General Assembly and Supreme Court supports a contrary view. To hold as Jefferson-Pilot urges would require us to ignore clear indicia of legislative intent and to adopt an interpretation of the statute which produces an absurd result.

The identical language at issue in the present case was interpreted by the North Carolina Supreme Court more than a century ago in such a way as to make insurance companies liable for local use taxes. In 1901, the predecessor of G.S. § 105-228.10 contained the following language: “Companies paying the taxes levied in this section shall not be liable for tax on their capital stock, and no county or corporation *shall be allowed to impose any additional tax, license or fee.*” (emphasis added). The North Carolina Supreme Court interpreted that provision as follows:

The defendant insists that the proper construction of section 78, it being under Schedule B, is that all of the taxes mentioned therein constitute a privilege or license tax; that no tax can be collected or assessed against the capital stock of the company, because the section prohibits such a tax; and that *no county or corporation can assess or collect any other privilege tax, but that the personal and real property of the company is taxable.* We are of opinion that the defendant’s position is the true one.

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Insurance Co., 130 N.C. at 222-23, 41 S.E. at 280 (emphasis added). Thus, the language at issue in this case has been held to prohibit only privilege taxes. *Id.*

Legislative enactments made in light of the holding in *Insurance Co.* have embraced the rule it established. In 1945, the words “other than *ad valorem* taxes” were added to the existing version of G.S. § 105-228.10. 1945 N.C. Sess. Laws ch. 752, § 2. Jefferson-Pilot alleges that the four words added in 1945 significantly altered the meaning of the statute. This proposition is dubious, however, in light of the change that was made. The legislature is presumed to act with full and complete knowledge of prior and existing law. *State ex rel. Utilities Com. v. Thornburg*, 84 N.C. App. 482, 485-86, 353 S.E.2d 413, 415 (1987). Therefore, we must assume that the legislature was aware that the predecessor to G.S. § 105-228.10 had been construed to forbid only privilege taxes. *See id.* By adding the phrase “other than *ad valorem* taxes” while making no other substantive changes, the legislature apparently wished to codify the rule set forth by the North Carolina Supreme Court that local governments could tax the property of insurance companies.

Subsequent action by the General Assembly reveals that it did not consider G.S. § 105-228.10 to be inconsistent with the assessment of the local use tax: the 1945 amendment co-existed for some period of time with a provision which expressly provided that insurance companies were subject to local sales and use taxes. In 1957, G.S. § 105-228.5 was amended to provide as follows:

The taxes levied herein measured by premiums shall be in lieu of all other taxes upon insurance companies except: . . . taxes imposed by Article 5 of Chapter 105 of the General Statutes of North Carolina as amended. . . .

1957 N.C. Sess. Laws ch. 1340, § 12. Article 5 of Chapter 105 governed State sales and use taxes in 1957. In 1969, Article 5 of Chapter 105 was amended to include the “Local Option Sales and Use Tax Act.” 1969 N.C. Sess. Laws c. 1228. At that time, G.S. § 105-228.5 still required insurance companies to pay the taxes levied in Article 5. Thus, in 1969, the General Assembly expressly made insurance companies subject to state and local use taxes. The subsequent removal of the local sales and use taxes from Article 5 have in no way affected the liability of insurance companies for local use taxes because those changes were unrelated to the taxation of insurance companies, and the parallel structure of the State and local sales and use tax schemes

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indicates that the legislature intended for insurance companies to pay local use taxes.

In 1971, the North Carolina Supreme Court declared the Local Option Sales and Use Tax Act to be unconstitutional. *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971). The General Assembly repealed that act and enacted the current local government sales and use taxes in Articles 39, 40 and 42. 1971 N.C. See. Laws, c. 77, s. 1 and s. 2. Insurance companies are not specifically exempted from the local use taxes in any of these articles. Moreover, exemptions from local use taxes are explicitly limited to and made dependent on the existence of codified exemptions from the State sales and use taxes. N.C.G.S. § 105-467 and 68 (2003). In N.C.G.S. § 105-164.13, the legislature has meticulously set forth approximately fifty exemptions and exclusions to the States sales and use taxes, many of which are sub-categorized by industry. Nowhere in G.S. § 105-164.13 are insurance companies exempted from State sales and use tax. Thus, local use taxes are generally applicable, and the General Assembly did not intend to make them inapplicable to insurance companies.

Recent amendments make it clear that insurance companies are currently responsible for local use taxes. *See* 1998 N.C. Sess. Laws. ch. 98, § 18. In 1998, G.S. § 105-228.10 was amended to provide:

No city or county may levy on a person subject to the tax levied in this Article [the gross premiums tax] a privilege tax or a tax computed on the basis of gross premiums.

“In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it.” *Childers v. Parker’s, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968). In light of the following information, we conclude that the 1998 changes were made to clarify the law that existed prior to the amendments: (1) Senate Bill 1226, which proposed the 1998 changes, indicated that it was proposing “technical and conforming changes to the revenue laws,” and (2) the 1998 amendment merely codified the common law interpretation which had been in existence for nearly a century.

Even if we were to ignore the strong evidence of legislative intent, we would still be compelled to read G.S. § 105-228.10 as we have because the reading urged by Jefferson-Pilot would produce an absurd result. *See Taylor*, 286 N.C. at 496, 212 S.E.2d at 386 (holding that statutes may not be read in such a way as to produce an absurd result). Under Jefferson-Pilot’s proffered interpretation of G.S.

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§ 105-228.10, it is still liable for local sales tax but not for local use tax. This result cannot obtain where the General Assembly has made local sales and use taxes companion parts of the same taxation scheme, and has made the local use tax applicable to the same category of items to which the sales tax applies. *See G.S. § 105-467; Johnson*, 224 N.C. at 644, 32 S.E.2d at 32 (discussing State sales tax).

The assignments of error are, therefore, overruled.

Affirmed.

Judge WYNN 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 trial court erred in concluding that N.C. Gen. Stat. § 105-228.10 does not prohibit North Carolina counties, cities, or towns from imposing local use taxes upon insurance companies who pay gross premium taxes under this statute prior to its amendment in 1998.

II. Standard of Review

When reviewing appeals from an administrative agency, "the proper standard of review to be employed by the [trial] court depends upon the nature of the alleged error." *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62, 468 S.E.2d 557, 559 (1996) (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)).

If a petitioner asserts that the administrative agency decision was based on an error of law, then 'de novo' review is required. 'De novo' review requires a court to consider a question anew, as if not considered or decided by the agency. The court may freely substitute its own judgment for that of the agency.

On the other hand, if a petitioner asserts that the administrative agency decision was not supported by the evidence, or was arbitrary or capricious, then the court employs the 'whole record' test. The 'whole record' test requires the court to examine all

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competent evidence comprising the ‘whole record’ in order to ascertain if substantial evidence therein supports the administrative agency decision.

Id. at 62, 468 S.E.2d 559-60 (internal citations omitted). “The standard of review for an appellate court upon an appeal from an order of the superior court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court.” *Id.* at 62-63, 468 S.E.2d at 560 (quoting *In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995)). Where the position of a petitioner is “not clear,” this Court, in its discretion, undertakes a *de novo* review of the agency’s conclusions of law, as well as a review of the “whole record” to determine whether evidence supports the agency’s action. *Davis v. N.C. Dept. of Human Resources*, 110 N.C. App. 730, 735, 432 S.E.2d 132, 134-35 (1993).

Here, the trial court applied a *de novo* standard of review and the “whole record” test in making its findings of fact and conclusions of law. Jefferson-Pilot contends that the trial court’s order is: (1) affected by errors of law; (2) not supported by competent, material, and substantial evidence in the record; and (3) arbitrary and capricious. At bar, we should apply a *de novo* standard of review and the “whole record” test in reviewing that agency’s decisions. *Id.*

III. N.C. Gen. Stat. § 105-228.10

This case arises under N.C. Gen. Stat. § 105-228.10 prior to its amendment in 1998. The statute read:

No county, city, or town shall be allowed to impose any additional tax, license or fee, other than ad valorem taxes, upon any insurance company or association paying the fees and taxes levied in this Article.

N.C. Gen. Stat. § 105-228.10 (1945). N.C. Gen. Stat. § 105-228.10 (2001) now reads:

No city or county may levy on a person subject to the tax levied in this Article a privilege tax or a tax computed on the basis of gross premiums.

The paramount objective of statutory interpretation is to give effect to the intent of the legislature. *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998). Our Supreme Court has held that “[w]hen the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an

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administrative body or a court under the guise of construction.” *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1976) (citations omitted).

This Court has held “[w]here the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning” *Begley v. Employment Security Comm.*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981) (citations omitted). “[T]he Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain.” *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670-71 (1969) (quoting *Board of Architecture v. Lee*, 264 N.C. 602, 142 S.E.2d 643 (1965)).

This Court has further held that “although courts are the final interpreters of statutory terms, ‘the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference.’” *Best v. N.C. State Board of Dental Examiners*, 108 N.C. App. 158, 162, 423 S.E.2d 330, 332 (1992) (quoting *Savings and Loan League v. Credit Union Comm’n*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981)).

The scope of administrative review for petitions filed with the North Carolina Tax Review Board (“Tax Review Board”) is governed by N.C. Gen. Stat. § 105-241.2(b2) (2001). After the Tax Review Board conducts a hearing, this statute provides in pertinent part: “The Board shall confirm, modify, reverse, reduce, or increase the assessment or decision of the Secretary” *Id.*

This matter was twice appealed to and heard by the Tax Review Board, chaired by Harlan E. Boyles, State Treasurer, with Ms. Jo Anne Sanford, Chair of the Utilities Commission, and Noel L. Allen, Attorney at Law, Adjunct Professor at Norman Adrian Wiggins School of Law at Campbell University, participating. The Tax Review Board is a statutory body charged to hear sales and use tax appeals. Its members possess detailed and specialized knowledge of the Revenue statutes. After the first hearing, the Tax Review Board found that the Secretary of Revenue erred in concluding that N.C. Gen. Stat. § 105-228.10 did not grant a specific exemption to insurance companies from liability for local sales and use taxes. The Tax Review Board remanded the matter to the Secretary for further consideration based on the Tax Review Board’s findings.

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On remand, the Secretary disagreed with the Tax Review Board and again found that the statute did not grant a specific exemption. The Tax Review Board heard the matter for the second time and again ruled that the Secretary had erred.

The Tax Review Board held that N.C. Gen. Stat. § 105-228.10 was clear and unambiguous in prohibiting additional local taxes, “other than *ad valorem* taxes,” from being imposed upon insurance companies who pay taxes solely on gross premiums. Although the Tax Review Board’s ruling is not binding upon this Court, we should give its decision deference in reaching our decision given the specialized knowledge and power given to the Tax Review Board under N.C. Gen. Stat. § 105-241.2(b2). *Best*, 108 N.C. App. at 162, 423 S.E.2d at 332.

Here, the language of N.C. Gen. Stat. § 105-228.10, prior to its amendment, clearly and unambiguously prohibited the imposition of additional taxes, “other than *ad valorem* taxes,” upon insurance companies who paid the gross premiums tax. N.C. Gen. Stat. § 105-228.10 (1945). The 1998 amendment to N.C. Gen. Stat. § 105-228.10 substantively changed this prohibition against additional taxes, including local use taxes, by limiting the prohibition to “a privilege tax or a tax computed on the basis of gross premiums.” N.C. Gen. Stat. § 105-228.10 (2001). It is undisputed that the General Assembly substantively narrowed the statute by omitting the exemption from local use or other taxes previously granted to insurance companies by enacting the 1998 amendment.

The majority’s opinion relies on *Wilmington Underwriter Ins. Co. v. Stedman* to support its conclusion that the “identical” language of N.C. Gen. Stat. § 105-228.10 was interpreted under its predecessor statute by our Supreme Court and held to mean that insurance companies are only exempted from privilege taxes, not local use taxes. 130 N.C. 155, 41 S.E. 279 (1902). *Wilmington Underwriter Ins. Co.*, however, was decided over 100 years ago when the entire statutory scheme of state and local taxation was far different from what exists today. In 1902, the General Assembly had not delegated any authority to cities, towns, or counties for the imposition of local sales and use taxes, and individual state income taxes were not levied. The language at issue in *Wilmington Underwriter Ins. Co.* dealt specifically with local taxes on capital stock, not local sales and use taxes. Delegation of the power to impose local sales and use taxes was not enacted until 1971. See N.C. Gen. Stat. § 105-467 (2001); N.C. Gen. Stat. § 105-468 (2001). As taxes on capital stock were the only taxes

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at issue in *Wilmington Underwriter Ins. Co.*, the reliance on this case in the majority's opinion is misplaced.

The majority's opinion contends that the addition of the phrase "other than *ad valorem* taxes" to N.C. Gen. Stat. § 105-228.10 in 1945 shows the General Assembly's intent to codify the holding of *Wilmington Underwriter Ins. Co.* issued forty-three years earlier. I disagree. The addition of this phrase significantly altered the meaning of the statute from its original text. By adding this phrase, the General Assembly made it clear that under N.C. Gen. Stat. § 105-228.10, counties, cities, and towns were prohibited from imposing *any* additional taxes, "other than *ad valorem* taxes," upon insurance companies who pay gross premium taxes. N.C. Gen. Stat. § 105-228.10 (2001).

In *Watson Industries v. Shaw, Comr. of Revenue*, our Supreme Court reviewed a different revenue statute and stated,

[t]ax statutes are to be strictly construed against the State and in favor of the taxpayer.

In the interpretation of statutes levying taxes, *it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out.* In case of doubt they are construed most strongly against the government, and in favor of the citizen.

235 N.C. 203, 211-12, 69 S.E.2d 505, 511-12 (1952) (emphasis supplied) (internal citations omitted).

In *Childers v. Parker's Inc.*, our Supreme Court interpreted a statute which had been subsequently amended. Justice Sharp wrote,

[i]n construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it. The presumption is that the legislature intended to change the original act by creating a new right or withdrawing any existing one.

274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968) (internal citations omitted). In *Phillips v. Phillips*, Justice Sharp similarly wrote, "[w]hile the purpose of an amendment to an ambiguous statute may be presumed to be to clarify that which was previously doubtful, it is logi-

cal to infer that an amendment to an unambiguous provision . . . evinces an intent to *change* the law." 296 N.C. 590, 597, 252 S.E.2d 761, 766 (1979) (citations omitted).

The language of N.C. Gen. Stat. § 105-228.10, prior to the 1998 amendment, is clear and unambiguous in prohibiting "any additional tax, license, or fee, other than *ad valorem* taxes," from being imposed upon insurance companies who solely and alternatively pay gross premium taxes. N.C. Gen. Stat. § 105-228.10 (1945) A plain comparison of the text of N.C. Gen. Stat. § 105-228.10, before and after the 1998 amendment, shows that the 1998 amendment eliminated the prohibition against the levy of local use taxes by limiting the prohibition to "a privilege tax or a tax computed on the basis of gross premiums." N.C. Gen. Stat. § 105-228.10 (2001).

As the plain language of N.C. Gen. Stat. § 105-228.10 is unambiguous, it is "logical to infer that an amendment to [this] unambiguous provision . . . evinces an intent to *change* the law," not clarify it. *Phillips*, 296 N.C. at 597, 252 S.E.2d at 766. The General Assembly amended N.C. Gen. Stat. § 105-228.10 in 1998 to further limit the exemption to insurance companies from imposition of additional local taxes. *Childers*, 274 N.C. at 260, 162 S.E.2d at 483. The majority's opinion construes plain statutory language that is neither unclear nor ambiguous. I defer to the specialized knowledge and decision of the Tax Review Board. I respectfully dissent.

ANTHONY W. CULLEN, PLAINTIFF v. VALLEY FORGE LIFE INSURANCE COMPANY,
CNA LIFE INSURANCE COMPANY, MONEYMETRICS INSURANCE AGENCY,
INC., PIEDMONT CAROLINAS GROUP, LLC, AND MARK C. FLUR, DEFENDANTS

No. COA02-1328

(Filed 16 December 2003)

1. Insurance— life insurance—good health provision—waiver by actions

An insurer may not avoid coverage by asserting provisions in the contract which it had waived by actions inconsistent with an intent to enforce those provisions. Defendant negotiated plaintiff's check, received and granted a change of beneficiary request, and did not claim that plaintiff had violated the "good health" provision of the contract or assert that it intended to deny coverage

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on this basis until more than three months after it learned of plaintiff's melanoma.

2. Accord and Satisfaction— insurance dispute—misrepresentation

There was no accord and satisfaction in an insurance dispute where the basis of the accord was defendant's representation that coverage had never come into effect, which defendant knew to be false.

3. Unfair Trade Practices— insurance—denial of coverage—misrepresentation

Summary judgment was correctly granted for plaintiff on an unfair and deceptive practices claim arising from the denial of insurance coverage. Deceptive practices by the party breaching the contract allow the plaintiff to recover for either breach of contract or unfair practices. Reliance on the misrepresentation was not necessary to show injury.

4. Unfair Trade Practices— attorney fees—insurance claim

The trial court did not err or abuse its discretion by awarding attorney fees to plaintiff after granting summary judgment for plaintiff on an unfair and deceptive practices claim arising from an insurance company's refusal to pay benefits.

5. Civil Procedure— summary judgment—discovery incomplete—information sought immaterial

The trial court did not err by granting summary judgment for plaintiff on an insurance claim even though defendant had contended in an affidavit that discovery was incomplete. Nothing sought by defendant bore on the issues in this case.

Appeal by defendants from judgment entered 8 March 2002 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 21 August 2003.

Faison & Gillespie, by O. William Faison, Reginald B. Gillespie, Jr., and Kristen L. Beightol, for plaintiff-appellee.

Smith Moore L.L.P., by James G. Exum, Jr. and Samuel O. Southern, and Drinker Biddle & Reath, L.L.P., by Stephen C. Baker and John B. Dempsey, for defendants-appellants Valley Forge Life Insurance Company and CNA Life Insurance Company.

CALABRIA, Judge.

This appeal arises from the trial court's granting of Anthony W. Cullen's ("plaintiff")¹ summary judgment motion awarding plaintiff \$499,605.02 for breach of a life insurance contract, treble damages for unfair and deceptive practices, costs, and attorneys' fees. We affirm in part and reverse in part.

In the early 1990's, Marc Flur ("Flur"), plaintiff's insurance agent and acquaintance, contacted him to discuss insurance policies. Plaintiff subsequently applied for a one million dollar life insurance policy. The application process required plaintiff to disclose his medical history. Although plaintiff listed prior surgeries, treatment for a skin disorder, and Crohn's disease (a degenerative gastrointestinal disorder), his application was approved.

Each year, Flur and plaintiff met to discuss plaintiff's insurance needs. In 1999, around the time of the existing life insurance policy's conversion date, plaintiff asked Flur about increasing his life insurance coverage for the benefit of his children due to an increase in the size of plaintiff's family and a more stable financial outlook. Flur explored the options available and presented a \$500,000.00 life insurance policy (the "subject policy") application with Valley Forge Life Insurance Company ("Valley Forge").²

On 2 April 1999, Flur and plaintiff met and filled out the application. Since plaintiff did not submit a premium with the application, the following provision applied: "insurance will not take effect until the application is approved and accepted by the Company . . . and the policy is delivered while the health of each person proposed for insurance and other conditions remain as described in this application and . . . the first premium . . . has been paid in full."

On 14 April 1999, plaintiff submitted to a medical examination and provided blood and urine samples as required by the application. Plaintiff also authorized the release of his medical records. These records disclosed the existence of a "blood blister" he had noticed

1. Plaintiff passed away on 5 April 2002 during the pendency of this appeal. Accordingly, this Court allowed a motion to substitute a party pursuant to Rules 37 and 38(a) of the North Carolina Rules of Appellate Procedure. Rod N. Santomassimo, Co-Administrator CTA of the Estate of Anthony William Cullen has been substituted for Anthony W. Cullen.

2. CNA Life Insurance Company ("CNA") is a registered service mark, trade name, and domain name. For purposes of this appeal, Valley Forge will refer both to CNA and Valley Forge.

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on his back in late 1998. Valley Forge reviewed those records and “need[ed] to know what was the diagnosis, treatment and current condition.” Flur was asked to inquire concerning the blood blister. Despite the fact that Flur and plaintiff both agree plaintiff did not represent the blood blister had gone away, Moneymetrics, the company acting as Flur’s general agent, reported to Valley Forge the “blood blister went away without any treatment needed.” On 19 May 1999, the subject policy was approved, and Flur contacted plaintiff to inform him that he would collect the premium upon delivery of the subject policy.

On 26 May 1999, plaintiff had a regularly scheduled appointment with Dr. Kim Isaacs (“Dr. Isaacs”), his primary care physician since 1994, for his Crohn’s disease and inquired as to the blood blister on his back. Dr. Isaacs arranged for plaintiff to see a dermatologist to perform a biopsy and eliminate the possibility of melanoma, a form of skin cancer. An analysis of the biopsy revealed that the blood blister was in fact melanoma. Plaintiff was informed of the diagnosis on 2 June 1999.

On 11 June 1999, plaintiff and Flur met, Flur delivered the subject policy, and plaintiff paid the premium of \$394.98. At some point in time, Flur and plaintiff completed a second life insurance application for additional coverage with Valley Forge. Plaintiff underwent a second medical examination and submitted a medical supplement on 14 June 1999. The information in the medical supplement included that plaintiff had been treated for a “[d]isorder of the skin or lymph glands, cyst, tumor or cancer” and an additional handwritten answer further indicated “melanoma on back—will be removed 6/17/99 Dr. Benjamin Calvo UNC Hospitals.” Diane Waggoner, the nurse Valley Forge procured to conduct both medical examinations of plaintiff for the purposes of his applications for life insurance, witnessed the medical supplement.

Valley Forge deposited plaintiff’s premium payment, which cleared plaintiff’s bank account on 17 June 1999. On 9 July 1999, Valley Forge complied with plaintiff’s request to change the beneficiary named under the subject policy. Subsequently, in a letter from Valley Forge dated 21 September 1999, plaintiff learned his second application for insurance was declined. In addition, the letter informed him that, regarding the subject policy, “no coverage or contract was ever in effect” and that “no coverage ever existed.” Valley Forge included a refund check for the premium payment, which was eventually re-issued and deposited by plaintiff.

Plaintiff filed suit on 11 June 2001 against Flur, Valley Forge, CNA, Moneymetrics, and Piedmont Carolinas Group, L.L.C. seeking a judgment declaring he was insured under the subject policy³ and later amended his complaint to include a claim for unfair and deceptive practices arising out of the same transaction as the breach of contract action. Valley Forge answered asserting numerous defenses including, *inter alia*, accord and satisfaction and that plaintiff's health, when the policy was delivered and the premium paid, was not the same as his health as described in the application. On 18 and 24 January 2002, plaintiff's "Motion for Summary Judgment or Partial Summary Judgment" against Valley Forge was heard. Valley Forge opposed the motion, asserting discovery was not yet complete. On 8 March 2002, the trial court granted plaintiff's motion for summary judgment on his claims against Valley Forge, awarding plaintiff in excess of 2.2 million dollars for breach of contract and unfair and deceptive practices as well as attorneys' fees and costs.

On appeal, we find the issue of waiver controlling on plaintiff's breach of contract claim. The ramifications of our holding concerning waiver and the undisputed surrounding circumstances are, moreover, dispositive of plaintiff's remaining claims and Valley Forge's defenses. Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). "The rule is designed to permit penetration of an unfounded claim or defense in advance of trial and to allow summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). The party moving for summary judgment has the burden of showing that there is no genuine issue as to any material fact. *Dixie Chemical Corp. v. Edwards*, 68 N.C. App. 714, 715, 315 S.E.2d 747, 749 (1984).

I. Waiver

[1] A life insurance policy is a contract. *Motor Co. v. Insurance Co.*, 233 N.C. 251, 253, 63 S.E.2d 538, 540 (1951). As such, the parties entering into the insurance contract may agree upon "its terms, provisions and limitations." *Allen v. Insurance Co.*, 215 N.C. 70, 72, 1 S.E.2d 94, 95 (1939). "Waiver is 'an intentional relinquishment or abandonment of a known right or privilege.'" *Medearis v. Trustees of*

3. Plaintiff does not contest Valley Forge's right to deny coverage under the second life insurance policy application.

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Myers Park Baptist Church, 148 N.C. App. 1, 10, 558 S.E.2d 199, 206 (2001) (citation omitted). Although “[w]aiver is a mixed question of law and fact[, w]hen the facts are determined, it becomes a question of law.” *Hicks v. Insurance Co.*, 226 N.C. 614, 619, 39 S.E.2d 914, 918 (1946).

As we have previously held, waiver of a provision in an insurance policy “is predicated on knowledge on the part of the insurer of the pertinent facts and conduct thereafter inconsistent with an intention to enforce the condition.” *Town of Mebane v. Insurance Co.*, 28 N.C. App. 27, 32, 220 S.E.2d 623, 626 (1975) (quoting *Hicks*, 226 N.C. at 617, 39 S.E.2d at 916). “Ordinarily, an insurance company is presumed to be cognizant of data in the official files of the company, received in formal dealings with the insured.” *Gouldin v. Insurance Co.*, 248 N.C. 161, 165, 102 S.E.2d 846, 849 (1958) (citing *Hicks*, 226 N.C. 614, 39 S.E.2d 914; *Robinson v. B. of L.F. and E.*, 170 N.C. 545, 87 S.E.2d 537 (1916)). Moreover, “[k]nowledge of facts which the insurer has or should have had constitutes notice of whatever an inquiry would have disclosed and is binding on the insurer.” *Id.* (citation omitted).

To comply with our standard of review, the operative facts, viewed in the light most favorable to Valley Forge, are as follows: plaintiff did not disclose the existence of the blood blister in the subject policy application, but the medical records, obtained as part of the application, revealed its existence. Plaintiff did not disclose the diagnosis of malignant melanoma when applying for additional life insurance with Valley Forge, but the medical supplement tendered to Valley Forge on 14 June 1999 detailed the diagnosis and proposed treatment. Accordingly, Valley Forge had notice that the blood blister remained, that it had been diagnosed as melanoma, and that it would be removed. Nonetheless, Valley Forge negotiated plaintiff’s check in payment of the subject policy’s premium, received without objection a request for a change of beneficiary, and granted that request almost a month after knowledge of the pertinent facts concerning plaintiff’s health. Notably, at no time before 21 September 1999, more than three months after Valley Forge learned of the melanoma, did Valley Forge make the assertion that plaintiff had violated the “good health” provision, that the “good health” provision precluded coverage from taking effect or prevented the contract from being concluded, or that Valley Forge intended to deny coverage on that basis. We hold this conduct was inconsistent with an intent to enforce the provision; therefore, Valley Forge waived the right to enforce it.

Our holding today is further supported by our analysis in *Hardy v. Integon Life Ins. Co.*, 85 N.C. App. 575, 355 S.E.2d 241 (1987), where this Court examined whether an insurer could avoid, on the basis of misrepresentation, the obligations in an insurance contract where the submitted medical records revealed the applicant had squamous cell carcinoma although the application represented the applicant had never had cancer. This Court charged the insurer with the knowledge of what was contained in the medical records they received but held the insurer had not, as a matter of law, waived its right to avoid coverage. This was so because there remained a question of fact concerning, in part, whether a reasonable inquiry would have disclosed a subsequent operation and diagnosis of metastasis not contained in the submitted medical records. *Id.* Our holding in *Hardy* makes clear that if, as here, the insurer has knowledge of all pertinent facts and if reasonable inquiry would reveal no other information exists other than that submitted in the medical records and application, then the insurer waives the right to assert provisions in the insurance contract permitting the insurer to avoid coverage by acting inconsistently with the intent to enforce those provisions.

II. Accord and Satisfaction

[2] Valley Forge asserts the defense of accord and satisfaction operates as a bar to plaintiff's claim because plaintiff accepted and cashed the returned premium check. Valley Forge contends the check refunding plaintiff's premium for the policy was accompanied by the representation that "no coverage ever existed" and, therefore, constituted a legal compromise accepted by plaintiff when he cashed the check.

"An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considers himself, entitled to; and a 'satisfaction' is the execution or performance, of such agreement."

Dobias v. White, 239 N.C. 409, 413, 80 S.E.2d 23, 27 (1954) (citation omitted). Accord and satisfaction is a "method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement." *Shopping Center v. Life Insurance Corp.*, 52 N.C. App. 633, 642-43, 279 S.E.2d 918, 924-25 (1981) (quoting *Prentzas v.*

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Prentzas, 260 N.C. 101, 103-04, 131 S.E.2d 678, 680-81 (1963)). “The word ‘agreement’ implies the parties are of one mind—all have a common understanding of the rights and obligations of the others—there has been a meeting of the minds.” *Moore v. Bobby Dixon Assoc.*, 91 N.C. App. 64, 67, 370 S.E.2d 445, 447 (1988) (citation omitted).

Normally, the existence of an accord and satisfaction is a question of fact for the jury. *Id.* “Establishing an accord and satisfaction . . . as a matter of law requires evidence that permits no reasonable inference to the contrary and that shows the ‘unequivocal’ intent of one party to make and the other party to accept a lesser payment in satisfaction . . . of a larger claim.” *Moore v. Frazier*, 63 N.C. App. 476, 478-79, 305 S.E.2d 562, 564 (1983). However, any accord in the present case would be voidable by plaintiff if, when the accord was purportedly made, it was premised upon a misrepresentation not known to plaintiff at that time. See *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 234, 259 S.E.2d 1, 5 (1979).

In this case, we find there was a misrepresentation made to plaintiff dispositive of Valley Forge’s defense of accord and satisfaction. Valley Forge returned a check for \$394.98, the amount of the premium paid by plaintiff, representing “no coverage or contract was ever in effect” and “no coverage ever existed.” The evidence, however, is uncontradicted that Valley Forge knew its representations in the 21 September 1999 letter to plaintiff were erroneous. Valley Forge’s own internal memo dated 27 July 1999 raised the question of “why when we knew that the melanoma was going to be excised on 6/17 that we issued anyway.” On 26 July 1999, an internal memo read “put note on [the subject policy] file ‘Do not reinstate without underwriter review.’” Another memo admitted the melanoma was made known on 14 June 1999. In addition, on 24 July 1999, an internal memo stated the policy was “approved before dx [diagnosis] of mm [melanoma].” Finally, a memo on 26 July 1999 stated “[n]ot sure how to handle recently activated file. Appears melanoma came up after app [approval] date.”

Valley Forge’s representations in its 21 September 1999 letter to plaintiff stand in stark contradistinction to its own internal memos. The memos clearly indicate Valley Forge knew coverage did in fact exist, yet chose to represent to plaintiff that coverage had never come into effect. Given the fact that this misrepresentation was the basis upon which the accord was purportedly made, there could be no agreement, and this defense is precluded as a matter of law. We

hold the trial court correctly granted summary judgment to plaintiff regarding whether Valley Forge breached the contract of insurance.

III. Unfair and Deceptive Practices

[3] In addition to granting plaintiff's summary judgment motion for his breach of contract claim, the trial court granted summary judgment on plaintiff's unfair and deceptive practices claim and awarded treble damages under N.C. Gen. Stat. § 75-16 (2001) based upon the misrepresentations contained in the 21 September 1999 letter. North Carolina General Statutes § 75-1.1 (2001) states that unfair or deceptive acts or practices in or affecting commerce are unlawful. "To prevail on a claim of unfair and deceptive . . . practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998). On appeal, Valley Forge concedes the second element has been met; therefore, we confine our discussion to whether plaintiff carried his burden on the first and third elements.

Initially, we note plaintiff's unfair and deceptive practices claim is not barred simply because plaintiff prevailed in his breach of contract claim. Ordinarily, "[u]nder section 75-1.1, a mere breach of contract does not constitute an unfair or deceptive act[]," *Becker v. Gruber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 910 (2002) (citing *Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992)); however, aggravating circumstances, such as deceptive conduct by the breaching party, can trigger the provisions of the Act, *id.* (citing *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989); *see also Poor v. Hill*, 138 N.C. App. 19, 28, 530 S.E.2d 838, 845 (2000); *Mosley & Mosley Builders v. Landin, Ltd.*, 97 N.C. App. 511, 518, 389 S.E.2d 576, 580 (1990)).

Where the same course of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1

Marshall v. Miller, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), modified and aff'd, 302 N.C. 539, 276 S.E.2d 397 (1981). *See also Canady v. Mann*, 107 N.C. App. 252, 419 S.E.2d 597 (1992). Where

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this occurs, “[w]e treat plaintiff’s arguments as an election of damages for unfair and deceptive trade practices[.]” *Garlock v. Henson*, 112 N.C. App. 243, 246-47, 435 S.E.2d 114, 116 (1993). Accordingly, plaintiff was entitled to proceed on his unfair and deceptive practices claim despite having prevailed in his breach of contract claim.

North Carolina General Statutes § 58-63-15(1) (2001) (emphasis added) provides, in pertinent part, as follows:

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts.—*Making . . . any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance.*

A violation of this statute constitutes an unfair or deceptive practice in violation of N.C. Gen. Stat. § 75-1.1 as a matter of law. *Jefferson-Pilot Life Ins. Co. v. Spencer*, 336 N.C. 49, 53, 442 S.E.2d 316, 318 (1994). Since our discussion concerning Valley Forge’s defense of accord and satisfaction makes clear that the 21 September 1999 letter constituted a misrepresentation to plaintiff, the policyholder, the only question we must answer regarding the first element of N.C. Gen. Stat. § 75-1.1 is whether the misrepresentation had the “purpose of inducing or tending to induce” plaintiff to surrender coverage.

We are mindful that summary judgment is generally inappropriate “where issues such as motive [and] intent . . . are material and where the evidence is subject to conflicting interpretations.” *Creech v. Melnik*, 347 N.C. 520, 530, 495 S.E.2d 907, 913 (1998). However, Valley Forge’s internal memos compel the conclusion that Valley Forge, despite knowing coverage existed, represented and attempted to convince plaintiff that there had never been coverage under the subject policy. Where the only reasonable inference is existence or non-existence, purpose may be adjudicated by summary judgment when the essential facts are made clear of record. The undisputed facts in the record compel the conclusion that the purpose of the letter accompanying the check was to induce plaintiff to accept the returned premium check under the false impression that Valley Forge was correct in claiming coverage had never existed. Thus, the evidence supports the existence of an unfair and deceptive act by Valley Forge.

The 21 September 1999 letter also establishes the third element, an injury proximately caused by Valley Forge, because it represented no coverage existed and reflected Valley Forge's position declining coverage to plaintiff as the beneficiary of the subject policy. While this is the same injury forming the basis for plaintiff's breach of contract claim, it is also sufficient for the purposes of an unfair and deceptive practices claim. *See Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 794, 561 S.E.2d 905, 911 (2002) (allowing an unfair and deceptive practices claim to go forward despite it being premised upon the same alleged facts as the breach of contract claim); *Garlock v. Henson*, 112 N.C. App. 243, 246, 435 S.E.2d 114, 116 (1993) (allowing the same set of facts to form the basis for both breach of contract and unfair and deceptive practices claim but allowing recovery for only one claim).

Valley Forge contends plaintiff cannot show injury in the absence of reliance on the misrepresentation. We disagree. First, neither the statutory language of N.C. Gen. Stat. § 58-63-15(1) nor the statutory language of N.C. Gen. Stat. § 75-1.1 require reliance in order to show causation. Indeed, N.C. Gen. Stat. § 58-65-15(1) specifically states the misrepresentation need only have the "purpose of inducing or tending to induce" the loss of insurance coverage. The focus is on the insurance company, not the effect on the policyholder. Moreover, our Courts have clearly held that *actual* deception is not an element necessary under N.C. Gen. Stat. § 75-1.1 to support an unfair or deceptive practices claim. *See Johnson v. Insurance Co.*, 300 N.C. 247, 265, 266 S.E.2d 610, 622 (1980), *overruled in part on other grounds*, *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988); *Poor v. Hill*, 138 N.C. App. 19, 29, 530 S.E.2d 838, 845 (2000). Accordingly, actual reliance is not a factor. We thus conclude that there were no genuine issues of material fact that Valley Forge engaged in an unfair and deceptive practice, and plaintiff was entitled to judgment as a matter of law with respect to this claim.

IV. Attorneys' Fees

[4] The trial court, in its discretion, awarded attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1 (2001). Valley Forge contends the trial court erred in awarding attorneys' fees because the "order entering summary judgment for Cullen on his unfair trade practices claim is error, [and] he is not the prevailing party on that claim." For the reasons stated above, Valley Forge's assertion is incorrect. In the alternative, Valley Forge contends the trial court abused its discretion in awarding attorneys' fees because there were "genuine disputes about

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what happened and what that means [and it cannot] with any fairness be maintained that Valley Forge's refusal to settle was unwarranted." Our holding makes clear that any contention premised on the existence of genuine issues of material fact is also without merit. Any other grounds upon which Valley Forge could have contested this ruling are not argued in Valley Forge's brief or supported by citation to authority in violation of our Rules of Appellate Procedure. N.C.R. App. P. 28(a),(b)(6) (2003). In addition, independent review by this Court reveals no abuse of discretion by the trial court that would otherwise justify reversing the award of attorneys' fees. Accordingly, this assignment of error is overruled.

V. Rule 56(f)

[5] Finally, Valley Forge asserts the entirety of the trial court's summary judgment ruling was improper under our Supreme Court's holding in *Kidd v. Early* because a Rule 56(f) affidavit had been offered in opposition. See *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976) (holding "summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate"). The Rule 56(f) affidavit in the instant case argued discovery was incomplete and "some, all or none" of the remaining discovery could contradict matters relied on by plaintiff in his summary judgment motion. Specifically, Valley Forge wished to depose plaintiff's health care providers and Moneymetrics and to subpoena "document custodians for health insurance records, phone records, other insurance applications, and possible additional medical records."

Rule 56(f) contemplates when affidavits are unavailable and provides as follows:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C. Gen. Stat. § 1A-1, Rule 56(f) (2001). Even in the face of a Rule 56(f) affidavit, a trial court is permitted to grant summary judgment,

when appropriate, based upon the materials presented at any stage of the proceedings. *N.C. Council of Churches v. State of North Carolina*, 120 N.C. App. 84, 93, 461 S.E.2d 354, 360 (1995).

In the instant case, the materials presented to the trial court and in the record before this Court indicate Valley Forge's records, at the time it wrote the 21 September 1999 letter, contained plaintiff's medical supplement, when plaintiff's premium check cleared, when plaintiff requested a change of beneficiary, and when Valley Forge complied with plaintiff's request. Nothing sought by Valley Forge bore on the questions of waiver, accord and satisfaction, or the unfair and deceptive practices at issue in this case. Accordingly, we find the trial court did not err in granting summary judgment despite the fact that Valley Forge had filed a Rule 56(f) affidavit.

VI. Conclusion

In summary, Valley Forge, by its conduct, waived the right to enforce the "good health" provision in the insurance policy. Because Valley Forge's accord and satisfaction defense is premised on a misrepresentation, that defense is disallowed. Plaintiff is entitled to treble damages for unfair and deceptive practices resulting from Valley Forge's 21 September 1999 letter and attorneys' fees awarded as a result of Valley Forge's unwarranted refusal to settle. Plaintiff's recovery on his claim for unfair and deceptive practices claim precludes additional recovery for his breach of contract claim. *Marshall v. Miller*, 47 N.C. App. at 542, 268 S.E.2d at 103 (1980), modified and aff'd, 302 N.C. 539, 276 S.E.2d 397 (1981). We have carefully considered the remaining issues and found them to be without merit.

Affirmed in part, reversed in part.

Judges BRYANT and GEER concur.

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STATE OF NORTH CAROLINA v. RAYMOND WIGGINS

STATE OF NORTH CAROLINA v. RAYMOND LEE WIGGINS

No. COA03-33

(Filed 16 December 2003)

1. Rape; Sexual Offenses—statutory rape—statutory sexual offense—amendment of indictment—age

The trial court did not err in a multiple statutory rape and statutory sexual offense case by amending the indictments over defendant father's objection to state that defendant was "more than six years older" than the victim instead of "more than four years older," because: (1) the amendment related to defendant's age and not the manner and means by which the crime was perpetrated; (2) defendant knew his age and was therefore aware that N.C.G.S. § 14-27.7A(b), which was neither referenced in the indictments by its statute number nor quoted, did not apply to him; and (3) it would be biologically impossible for defendant to father the victim and fall within the age requirements of subsection (b), and therefore defendant could not have been misled or surprised as to the nature of the charges and the respective punishment.

2. Jury—request for removal of juror—plain error analysis improper

The trial court did not commit plain error in a multiple statutory rape and statutory sexual offense case by failing to remove a juror even though neither the State nor defendant requested her removal, because: (1) plain error analysis applies only to jury instructions and evidentiary matters; and (2) in the absence of an objection during jury selection, defendant's argument is waived and cannot be resurrected through plain error analysis.

3. Rape—statutory—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the multiple statutory rape charges, because: (1) a child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility; (2) the evidence established that the victim was between thirteen and fifteen years old, an essential element of statutory rape under N.C.G.S. § 14-27.7A(a), during the pertinent time she lived with defendant and that defendant engaged in

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almost daily sexual intercourse with her; and (3) the victim testified that defendant was her biological father, and it was biologically impossible for defendant to be less than six years older than the victim to be her father.

4. Evidence— testimony—incest—sexual abuse

The trial court did not commit plain error in a multiple statutory rape and statutory sexual offense case by failing to exclude as irrelevant and/or unduly prejudicial the testimony of a pastor and a doctor, because: (1) in regard to the pastor's testimony that her sermon on the sins of incest had been directed by God through her to defendant, the testimony was not prejudicial in light of the victim's extensive testimony as to the sexual acts defendant imposed on her and the fact that defendant told the victim's aunt that he was teaching his daughter how to have sex; and (2) in regard to the doctor's testimony on female development and the effect of sexual abuse depending on the level of estrogen present in an adolescent body, the testimony was relevant since it served to explain to the jury why there would be no physical findings in someone like the victim even after years of sexual abuse.

5. Constitutional Law— right to unanimous verdict—failing to differentiate each individual charge in jury instructions and verdict sheet

The trial court did not violate defendant's right to a unanimous verdict in a multiple statutory rape and statutory sexual offense case by failing to specifically differentiate each individual charge in its jury instructions and on the verdict sheet, because: (1) verdict sheets do not need to match the specificity of indictments; (2) the indictments in this case which distinguished the offenses charged by their names and case numbers without pointing to any specific encounter between defendant and the victim were proper since they could be understood by the jury based on the evidence presented at trial; and (3) the trial court differentiated each instruction on two counts of statutory sexual offense and five counts of statutory rape by the applicable case number found on the indictments.

6. Sentencing— aggravating factors—taking advantage of position of trust and confidence

The trial court did not err in a multiple statutory rape and statutory sexual offense case by finding the aggravating factor

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that defendant violated a position of trust and confidence even though defendant could have also been charged with incest between near relatives under N.C.G.S. § 14-178.

7. Sentencing— proportionality—parole past normal life expectancy

The trial court did not err in a multiple statutory rape and statutory sexual offense case by imposing a sentence that was allegedly excessive and disproportionate even though defendant would not be eligible for parole until past his normal life expectancy, because: (1) defendant received two concurrent sentences of 810 to 999 months, which was about half the prison term for which he could have been sentenced; and (2) in light of the acts committed by defendant to the victim over the course of several years, there was no abuse of discretion.

8. Constitutional Law— effective assistance of counsel—failure to show prejudice

Defendant did not receive ineffective assistance of counsel in a multiple statutory rape and statutory sexual offense case, because: (1) defendant cannot show any prejudice in light of testimony by the victim and her aunt concerning defendant's acts and admissions; and (2) there was no reasonable probability that the result of the trial would have been different absent the alleged errors committed by counsel.

Appeal by defendant from judgments dated 26 June 2002 by Judge Thomas D. Haigwood in Pasquotank County Superior Court. Heard in the Court of Appeals 15 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Jennie Wilhelm Mau, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

BRYANT, Judge.

Raymond Lee Wiggins¹ (defendant) appeals judgments dated 26 June 2002 entered consistent with a jury verdict finding him guilty of five counts of statutory rape and two counts of statutory sexual offense.

1. Some of the judgments list defendant's name as Raymond Wiggins and others as Raymond Lee Wiggins.

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The indictments for statutory sexual offense, issued on 1 October 2001, referred to N.C. Gen. Stat. §§ 14-27.4(a)(2) and 14-27.5(a)(1) and stated that between 1 May 1998 and 30 September 1998 defendant “unlawfully, willfully and feloniously did engage in a sex offense with [R.B.], a child who is 13, 14 or 15 years old, . . . defendant being more than 4 years older than [R.B.]” The indictments for statutory rape, issued the same day, designated N.C. Gen. Stat. § 14-27.7A(a) as the statutory basis and stated that between 1 May 1998 and 30 September 1998 “defendant . . . unlawfully, willfully and feloniously did carnally know and abuse [R.B.], a child who is 13, 14 or 15 years old, . . . defendant being more than 4 years older than [R.B.]” Both the statutory sexual offense and statutory rape indictments were amended during the trial to change (1) all the statutory references to N.C. Gen. Stat. § 14-27.7A(a) and (2) the language “defendant being more than 4 years older” to “more than 6 years older” to comply with section 14-27.7A(a). Defendant objected to the amendments.

At trial, seventeen-year-old R.B. testified that when she was nine years old and in the third grade, her menstrual cycle had begun and she was placed in a sex education class for sixth graders. Having been too shy in class to ask questions, R.B. asked defendant, her biological father, to explain sex to her. Defendant did so and, a couple of days later, told R.B. “now that [she] knew what [sex] was that [she] should see how it felt” and proceeded to have sexual intercourse with her. Thereafter, defendant had sexual intercourse with R.B. “once or twice a month.” When R.B. was thirteen years old, her parents separated, and R.B. lived with defendant on Meadowlands Street while her brother and sister lived with her mother. R.B. testified that after the separation “things began to get worse[]” in that defendant would have sexual intercourse with her “[f]ive times or more a week.” R.B. described in detail four occasions on which defendant forced her to have sexual intercourse with him while she lived on Meadowlands Street. R.B. also testified to one time defendant performed oral sex on her and another time she had to perform oral sex on him. Once R.B. took a knife out of the kitchen drawer and told defendant to stop, but this did not deter him. Finally, when R.B. was fifteen years old, she put a knife to her wrist and again told defendant to stop because she “couldn’t take it anymore.” Defendant then agreed that it was over.

One day, when R.B. was home sick, defendant “got jumpy” and told R.B. to go for a walk with him. As they were walking, R.B.’s aunt drove by, stopped, and asked if they wanted a ride. During

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the conversation that developed, defendant told the aunt that he had been teaching his daughter how to have sex. The aunt subsequently took R.B. to the home of R.B.'s mother. That same day, defendant came by the mother's house and insisted that the family see Pastor Randi Bryant. The Department of Social Services began its investigation soon thereafter based on an anonymous telephone call alleging incest.

Pastor Bryant testified, without objection, that R.B.'s family had requested to meet with her one afternoon in April. Pastor Bryant did not recall the year the meeting took place. During this meeting, Pastor Bryant, who did not know why defendant, R.B., and her mother had wanted to see her, began talking about love and forgiveness. R.B. began crying. The mother also became upset and started asking defendant "what was going on." Defendant did not reply. Earlier that day Pastor Bryant had held a sermon preaching on incest, at which R.B.'s family had been present. With respect to her sermon, Pastor Bryant noted that she was not looking at anyone in particular when speaking and did not know "who God was directing the message to," but she "knew that when God directs a message, it's to someone in the building."

Dr. Suzanne Starling testified as an expert in forensic pediatrics. To aid and illustrate Dr. Starling's testimony, a diagram of the genital area of the female body was introduced into evidence. Defendant did not object to the admission of the diagram. Dr. Starling explained how a female child's hymen changes as the level of estrogen in the body increases when the child develops and begins to experience menstrual cycles. Because estrogen allows the hymen "to stretch and move," a doctor "may not see any changes [due to penile penetration] at all in a hymen of a child who has already estrogenized." Dr. Starling further testified that she had examined R.B. on 12 September 2001, almost two years after the last alleged incident between defendant and R.B. The examination was normal, revealing nothing unusual. According to Dr. Starling, this finding was not inconsistent with penile penetration over a period of years in a child like R.B.

Defendant did not present any evidence. His motions to dismiss the charges based on insufficiency of the evidence were denied by the trial court.

The issues are whether: (I) amendment of the indictments was improper; (II) the trial court's failure to excuse juror #10 was plain error; (III) there was insufficient evidence to overcome defendant's

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motions to dismiss the statutory rape charges; (IV) the testimony of Pastor Bryant and Dr. Starling should have been excluded as irrelevant and/or unduly prejudicial; (V) the trial court's failure to differentiate with more specificity each individual charge in its jury instructions and on the verdict sheet deprived defendant of a unanimous verdict; (VI) defendant's sentence was based on an improper aggravating factor and was excessive and disproportionate; and (VII) defendant received ineffective assistance of counsel.

I

[1] Defendant first argues the trial court erred in amending the indictments over his objection because defendant's age was an essential element of the offenses charged and the statute referenced in the amended indictments substantially increased the punishment he was facing.

"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. Ingram*, 160 N.C. App. 224, 225, 585 S.E.2d 253, 255 (2003); *State v. Rankin*, 55 N.C. App. 478, 480, 286 S.E.2d 119, 120 (1982). While N.C. Gen. Stat. § 15A-923(e) provides that "[a] bill of indictment may not be amended," N.C.G.S. § 15A-923(e) (2001), our Supreme Court has interpreted this provision to only prohibit amendments that substantially alter the charge set forth in the indictment, *Ingram*, 160 N.C. App. at 226, 585 S.E.2d at 255; *see also State v. Holliman*, 155 N.C. App. 120, 126, 573 S.E.2d 682, 687 (2002) ("[t]he change in an indictment is scrutinized because[] it is important that the defendant understand the charge in an indictment in order to defend himself against the allegation"). Furthermore, "'[a] change in an indictment does not constitute an amendment where the variance was inadvertent and [the] defendant was neither misled nor surprised as to the nature of the charges.'" *State v. McNair*, 146 N.C. App. 674, 676-77, 554 S.E.2d 665, 668 (2001) (quoting *State v. Campbell*, 133 N.C. App. 531, 535-36, 515 S.E.2d 732, 735 (1999)).

In this case, the amendment of the indictments relates to defendant's age, not the manner and means by which the crime was perpetrated. At trial, the language of defendant "being more than four years older than [R.B.]," found in all seven indictments, was amended to "more than six years older." The two statutory sexual offense indictments were also amended to reflect the proper statute, N.C. Gen.

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Stat. § 14-27.7A(a), already found on the five statutory rape indictments. Section 14-27.7A(a) provides:

A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person

N.C.G.S. § 14-27.7A(a) (2001). Defendant contends that because the previous language of “more than four years older” would have led defendant to believe he was subject to the lower punishment under N.C. Gen. Stat. § 14-27.7A(b), which applies to defendants who are “more than four but less than six years older than” the victim, the trial court erred in amending the indictments. N.C.G.S. § 14-27.7A(b) (2001). We disagree. Defendant knew his age and was therefore aware that section 14-27.7A(b), which was neither referenced in the indictments by its statute number nor quoted, did not apply to him. As the trial court’s observations indicate, defendant was “in his lower thirties if not older” at the time of trial. In addition, it would be biologically impossible for defendant to father R.B. and fall within the age requirements of subsection (b). Accordingly, defendant could not have been misled or surprised as to the nature of the charges and the respective punishment. Because of this holding, we do not address defendant’s additional argument that the *original* indictments were invalid.²

II

[2] Defendant next contends the trial court committed plain error in failing to excuse juror #10 even though neither the State nor defendant requested her removal. Our Supreme Court has held that “plain error analysis applies only to jury instructions and evidentiary matters.” *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Accordingly, in the absence of an objection during jury selection, defendant’s argument is waived and cannot be resurrected through plain error analysis. *See id.* at 616, 565 S.E.2d at 40.

III

[3] Defendant also assigns error to the trial court’s denial of his motions to dismiss the statutory rape charges.

2. For preservation purposes, defendant also raises the issue of the constitutionality of short-form indictments. Based on *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), we overrule this assignment of error.

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When a defendant moves for dismissal, the trial court is to 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. . . . Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

State v. Vause, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (citations omitted). The trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference. *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

Timing

Defendant argues the evidence was insufficient to establish the statutory rape offenses charged because R.B. did not testify to the specific dates when the alleged acts occurred. In his brief to this Court, defendant does not provide any authority to support this position. *See* N.C.R. App. P. 28(b)(6) (assignments of error in support of which there is "no . . . authority cited, will be taken as abandoned"). Moreover, established case law provides that:

"[A] child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense."

State v. Brothers, 151 N.C. App. 71, 81, 564 S.E.2d 603, 609 (2002) (quoting *State v. Effler*, 309 N.C. 742, 749, 309 S.E.2d 203, 207 (1983)), *appeal dismissed and disc. review denied*, 356 N.C. 681, 577 S.E.2d 895 (2003). In this case, the evidence established that R.B. was between thirteen and fifteen years old, an essential element of statutory rape under section 14-27.7A(a), during the time she lived with defendant on Meadowlands Street and defendant engaged in almost daily sexual intercourse with her. Accordingly, there was substantial evidence to withstand defendant's motions to dismiss.

Age

In addition, defendant asserts the motion to dismiss should have been granted because absent proof of his age, the State failed to establish an essential element of the offenses charged. *See* N.C.G.S.

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§ 14-27.7A(a) (requiring the defendant to be more than six years older than the victim). We note that R.B. testified defendant was her biological father. As it was biologically impossible for defendant to be less than six years older than R.B. and to be her father, we conclude that there was sufficient evidence of defendant's age to overcome the motions to dismiss.

IV

[4] Defendant further contends testimony by Pastor Bryant and Dr. Starling should have been excluded as irrelevant and/or unduly prejudicial.

Pastor Bryant

Defendant assigns as plain error the admission of Pastor Bryant's "testimony" that her sermon on the sins of incest had been directed by God, through her, to . . . [d]efendant." To the extent defendant raised arguments in his brief beyond the scope of this assignment of error, they are not properly before this Court. *See* N.C.R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"). Defendant argues the pastor's comment was irrelevant and unduly prejudicial. Assuming the testimony was indeed irrelevant, we nevertheless conclude that it was not prejudicial. R.B. testified extensively as to the sexual acts defendant had imposed on her; defendant had told R.B.'s aunt that he was teaching his daughter how to have sex; and that same day, defendant took his family to see Pastor Bryant. In light of this evidence establishing incest, defendant has not met the burden required to show plain error. *See State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999) (plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached") (citation omitted).

Dr. Starling

Next, defendant argues the trial court committed plain error by allowing irrelevant testimony of Dr. Starling on female development and the effect of sexual abuse depending on the level of estrogen present in an adolescent body. As Dr. Starling's examination of R.B. revealed no unusual findings, defendant argues the testimony neither proved nor disproved sexual abuse. Although this may be so, we nevertheless hold that Dr. Starling's testimony was relevant because it served to explain to the jury why there would be no phys-

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ical findings in someone like R.B. even after years of sexual abuse. *See* N.C.G.S. § 8C-1, Rule 401 (2001) (“[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). Accordingly, this assignment of error is overruled.

V

[5] Defendant also asserts the trial court’s failure to specifically differentiate each individual charge in its jury instructions and on the verdict sheet deprived him of a unanimous verdict. “Where there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment.’” *State v. Tucker*, 156 N.C. App. 53, 59, 575 S.E.2d 770, 774 (2003) (citation omitted). Our “statutes do not specify what constitutes a proper verdict sheet[,] . . . [n]or have our Courts required the verdict forms to match the specificity expected of the indictment.” *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 240-41 (2002). A verdict is deemed sufficient if it “can be properly understood by reference to the indictment, evidence and jury instructions.” *State v. Connard*, 81 N.C. App. 327, 336, 344 S.E.2d 568, 574 (1986), *aff’d*, 319 N.C. 392, 354 S.E.2d 238 (1987) (per curiam); *see also State v. Holden*, 160 N.C. App. 503, 507-08, 586 S.E.2d 513, 516-17 (2003) (analyzing the defendant’s contention that he was deprived of a unanimous verdict by reviewing the record, transcript, indictments, jury instructions, and verdict sheets). Normally, where the defendant appeals based on the content of the verdict sheet but failed to object when the verdict sheet was submitted to the jury, any error will not be considered prejudicial unless the error is fundamental. *State v. Gilbert*, 139 N.C. App. 657, 672-74, 535 S.E.2d 94, 103 (2000) (applying plain error analysis to verdict sheet issue because the defendant did not object to the verdict sheet). Violations of constitutional rights, such as the right to a unanimous verdict, however, are not waived by the failure to object at trial and may be raised for the first time on appeal. *Holden*, 160 N.C. App. at 506-07, 586 S.E.2d at 516; *see* N.C. Const. art. I, § 24 (“[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court”).

In this case, the trial court instructed the jury on two counts of statutory sexual offense and five counts of statutory rape, differentiating each instruction by the applicable case number found on the indictments. Likewise, the verdict sheets submitted to the jury iden-

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tified the seven offenses only by the felony charged (statutory sexual offense or statutory rape) and their respective case numbers. Since verdict sheets do not need to match the specificity of indictments, *Floyd*, 148 N.C. App. at 295, 558 S.E.2d at 240-41, and the indictments in this case, which distinguished the offenses charged by their names and case numbers without pointing to any specific encounter between defendant and R.B., were proper, *see N.C.G.S. §§ 15-144.1, -144.2 (2001)* (requirements for short-form sexual offense indictments and statutory rape indictments), the verdict sheets did not lack the required degree of specificity needed for a unanimous verdict if they could be properly understood by the jury based on the evidence presented at trial, *see Connard*, 81 N.C. App. at 336, 344 S.E.2d at 574. Since R.B. testified to only two incidents qualifying as statutory sexual offenses under section 14-27.7A(a), there was no possibility the jury could not have been unanimous in its vote on these two offenses. *Cf. Holden*, 160 N.C. App. at 508, 586 S.E.2d at 516-17 (awarding new trial for violation of the defendant's right to a unanimous jury where the trial court did not differentiate between the ten counts of rape submitted to the jury and the jury returned guilty verdicts on only two counts). As to the charges of statutory rape, R.B. testified to four specific occasions she could describe in detail during which defendant had sexual intercourse with her when she was between the ages of thirteen and fifteen. R.B. also testified that defendant had sexual intercourse with her five or more times a week during this two-year period. Thus, where seven offenses (two statutory sexual offense and five statutory rape) were charged in the indictments, and based on the evidence presented at trial, the jury returned seven guilty verdicts, there was no danger of a lack of unanimity between the jurors with respect to the verdict. *See Connard*, 81 N.C. App. at 336, 344 S.E.2d at 574.

VI

Defendant next assigns error with respect to his sentencing.

Aggravating Factor

[6] Defendant argues, because he could also have been charged with incest between near relatives under N.C. Gen. Stat. § 14-178, the trial court erred in finding the aggravating factor of violating a position of trust and confidence. In support of this argument, defendant relies on the holding in *State v. McGuire* that "it is error to use as an aggravating factor evidence of an element of a joinable offense with which [the] defendant has not been charged." *State v. McGuire*, 78 N.C. App.

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285, 292, 337 S.E.2d 620, 625 (1985). Not only has *McGuire* since been called into question and determined to be unsupported by the weight of the authority, *see State v. Jewell*, 104 N.C. App. 350, 354, 409 S.E.2d 757, 760 (1991), *aff'd*, 331 N.C. 379, 416 S.E.2d 3 (1992) (per curiam), but the statute underlying *McGuire*, N.C. Gen. Stat. § 15A-1340.4, has been repealed and replaced with N.C. Gen. Stat. § 15A-1340.16 omitting any reference to joinable offenses. We further note that the *McGuire* requirement only applied to the aggravating factor relating to prior convictions, N.C.G.S. § 15A-1340.4(a)(1)(o) (1993) (repealed effective January 1, 1995), and not to any of the other enumerated aggravating factors such as taking advantage of a position of trust or confidence, N.C.G.S. § 15A-1340.4(a)(1)(n) (1993). As such, this argument is without merit.

Excessive Sentence

[7] Defendant also contends the trial court imposed a sentence that was excessive and disproportionate because defendant would not be eligible for parole until past his normal life expectancy. Specifically, defendant argues that the General Assembly, not the trial court, decides the extent of the punishment. *See State v. Shane*, 309 N.C. 438, 445, 306 S.E.2d 765, 770 (1983). Defendant, however, concedes that "our legislature has vested the trial judge with broad discretion in deciding whether multiple sentences should be served consecutively or concurrently." *State v. Thompson*, 139 N.C. App. 299, 310, 533 S.E.2d 834, 842 (2000) (citing N.C.G.S. § 15A-1354(a) (1999)).

In the case *sub judice*, the trial court had the statutory authority to enter consecutive sentences of up to 270 to 333 months for each of the seven offenses of which defendant was found guilty, yielding a combined maximum sentence of 1,890 to 2,331 months. The trial court applied the aggravated sentence of 270 to 333 months but consolidated two convictions for judgment and sentencing and allowed three sentences to run concurrently with the remaining three sentences. As a result, defendant received two concurrent sentences of 810 to 999 months, about half the prison term for which he could have been sentenced. In light of the acts committed by defendant to R.B. over the course of several years, we do not find any abuse of discretion with respect to this sentence.

VII

[8] Finally, defendant assigns as error the ineffective assistance received from his counsel.

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An ineffective assistance of counsel claim is subject to a two-part test: the defendant must show (1) his counsel's performance "fell below an objective standard of reasonableness" in that his "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 693 (1984); *State v. Lee*, 348 N.C. 474, 491, 501 S.E.2d 334, 345 (1998), and (2) he was prejudiced by the error such that "a reasonable probability exists that the trial result would have been different absent the error," *Lee*, 348 N.C. at 491, 501 S.E.2d at 345. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

Under the facts of this case, defendant cannot show such prejudice. In light of R.B.'s and her aunt's testimony concerning defendant's acts and admissions, there was no reasonable probability that the result of the trial would have been different absent the alleged errors committed by counsel. Accordingly, this assignment of error is overruled.

No error.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. MICHAEL LAMONT MACK

No. COA03-176

(Filed 16 December 2003)

1. Criminal Law—court's comments to counsel—inappropriate

The trial judge's request that defense counsel use his "big boy voice" was inappropriate, but not prejudicial under the totality of the circumstances.

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2. Criminal Law— court's comments to counsel—sarcastic and inappropriate—not prejudicial

A trial judge's sarcastic and inappropriate comments, including the statement "If you'd like to ask that 15 more times . . ." were inappropriate and unprofessional but not prejudicial.

3. Criminal Law— court's questioning of witnesses—no abuse of discretion

A trial judge's questioning of witnesses was unusual, but not an abuse of discretion.

4. Constitutional Law— effective assistance of counsel—failure to object at trial

A defense attorney's failure to object to the court's rejection of a stipulation was not ineffective assistance of counsel.

5. Appeal and Error— special instruction—request not in record

An assignment of error to the failure to give a special instruction was dismissed where the request was not included in the record.

6. Homicide— lesser included offenses—failure to instruct ex mero motu—no error

There was no plain error in not instructing ex mero motu on lesser included offenses in a prosecution for attempted first-degree murder resulting from shots being fired at a police officer.

7. Homicide— attempted first-degree murder—evidence sufficient

There was no error in the trial court's refusal to dismiss a charge of attempted first-degree murder where the State's evidence tended to show that defendant fired at an officer several times at close range without provocation.

8. Appeal and Error— preservation of issues—excluded testimony—no offer of proof

The failure to make an offer of proof concerning excluded testimony about mitigating circumstances resulted in a dismissal of the assignment of error.

9. Sentencing— no finding on mitigating evidence—sentence within presumptive range

The trial court's failure to make findings concerning statutory mitigating factors about which evidence was presented was

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not error where defendant was sentenced within the presumptive range.

Appeal by defendant from judgment entered 11 July 2002 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 12 November 2003.

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

Bruce T. Cunningham, Jr., for defendant-appellant.

TYSON, Judge.

Michael Lamont Mack (“defendant”) appeals from a judgment entered after a jury found him guilty of assault on a law enforcement officer with a firearm, possession of a firearm by a convicted felon, and attempted first-degree murder.

I. Facts

The State’s evidence tended to show that on 6 September 1999, around 1:00 a.m., defendant went to Christina Johnson’s (“Johnson”) house to see his son. Johnson and defendant had conceived the child. Johnson did not allow defendant inside the house. Her mother called 911 while Johnson talked to defendant through the door. When Johnson informed defendant that the police were on their way, defendant stated, “I ain’t afraid of the police. When they get here I’ll show you.”

Around the same time, Raleigh police officer Kevin Lillis (“Officer Lillis”) responded to Johnson’s mother’s 911 call complaining of trespassing in violation of a domestic violence protection order. The call informed him that the suspect’s name was “Mike.” Officer Lillis was wearing an orange raincoat when he arrived at the apartment complex in his marked Raleigh Police Department vehicle. He saw a black male standing on the porch of one of the apartments. Officer Lillis yelled, “Mike,” as the suspect began to walk away. The suspect raised his arm toward Officer Lillis and fired two shots. Officer Lillis retreated to his vehicle for cover and drew his service weapon. He observed the suspect remove a red baseball cap and red shirt as he fled the scene. Officer Lillis pursued the suspect on foot but lost sight of him. Investigators found a semiautomatic pistol, red ball cap, red shirt, and a red bandana at the scene.

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Defendant was sentenced to a minimum of sixteen months and a maximum of twenty months for the possession of a firearm by a felon charge, and received a minimum 220 months and maximum 273 months for the attempted first-degree murder and assault on a law enforcement officer with a firearm. Defendant appeals.

II. Issues

The issues are whether the trial court erred by: (1) making comments and questioning witnesses in violation of defendant's right to an impartial judge; (2) rejecting defendant's proposed stipulation that he had previously been convicted of a felony; (3) failing to submit lesser included offenses to the jury; (4) failing to dismiss the charge of attempted first-degree murder; (5) refusing to allow an expert witness to testify regarding mitigating factors; and (6) failing to find the existence of statutory mitigating factors.

III. Right to an Impartial JudgeA. Standard of Review

Defendant argues the trial court violated his right to an impartial judge by: (1) making demeaning and sarcastic remarks, and (2) calling and questioning witnesses.

"The law imposes on the trial judge the duty of absolute impartiality. The trial judge also has the duty to supervise and control a defendant's trial . . . to ensure fair and impartial justice for both parties." *State v. Flemming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999) (citations omitted). "It is fundamental to our system of justice that each and every person charged with a crime be afforded the opportunity to be tried 'before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm.'" *State v. Larrimore*, 340 N.C. 119, 154, 456 S.E.2d 789, 808 (1995) (quoting *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)).

"In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." *Id.* at 155, 456 S.E.2d at 808 (citations omitted). The trial judge's broad discretionary power to supervise and control the trial "will not be disturbed absent a manifest abuse of discretion." *State v. Goldman*, 311 N.C. 338, 350, 317 S.E.2d 361, 368 (1984).

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B. Remarks by the Trial Judge to Defendant's Counsel

[1] Defendant assigns error to the trial judge's remarks made during cross-examination of a State's witness. "The judge's duty of impartiality extends to defense counsel. He should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in defendant's behalf." *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746, cert. denied, 311 N.C. 404, 319 S.E.2d 275 (1983).

Defendant argues the following comments were sarcastic, demeaning, and violated his right to an impartial judge:

Q. [Witness], do you know Michael Lamont Mack?

A. Personally, no.

Q. Do you know—

THE COURT: When you talk to the jury start the morning off with your big boy voice.

MR. McCOPPIN: Thank you, Judge.

THE COURT: I have the same problem. I'm like this in the morning.

Here, the trial judge was attempting to ensure that the court, jurors, and opposing counsel heard counsel's questions and the testimony. Although the statement requesting counsel to use his "big boy voice" constitutes an inappropriate comment, we cannot conclude, under the "totality of the circumstances," that this statement had a "prejudicial effect on the result of the trial." *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808.

[2] Defendant also assigns error to the trial judge's comments regarding his counsel's repetitive questioning. Officer Lillis was recalled by the State. Defense counsel asked on cross-examination whether the officer could "visually identify" defendant as the person who shot at him. This fact had been established in prior questioning. The court stated, in front of the jury, "If you'd like to ask that 15 more times, you've already asked that about five times."

"The trial court has a duty to control the examination of witnesses, both for the purpose of conserving the trial court's time and for the purpose of protecting the witness from prolonged, needless, or abusive examination." *State v. White*, 340 N.C. 264, 299, 457 S.E.2d

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841, 861, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). Here, defense counsel's question was cumulative and repetitive on Officer Lillis's lack of visual identity of defendant on the night of the incident. The trial judge's comment to avoid repetition might have tended to "belittle" counsel, but the comment was calculated to prevent "needless examination." *Coleman*, 65 N.C. App. at 29, 308 S.E.2d at 746; *White*, 340 N.C. at 299, 457 S.E.2d at 861.

The transcript at bar reveals other incidents of inappropriate and sarcastic comments not assigned as error in this case. The trial judge at bar was recently censured by our Supreme Court for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" for derogatory comments during trial. *In re: Inquiry of Hill*, 357 N.C. 559, 564, 591 S.E.2d 859, 862 (2003). We expressly disapprove and remonstrate the trial judge's inappropriate comments and unprofessional demeanor displayed before the court, litigants, and jury in this criminal trial. Such behavior falls below the standard of professionalism expected of an officer of the court.

Defendant has not, however, met his heavy burden of proving the trial judge's remarks deprived him of a fair trial and caused a prejudicial effect on the outcome. *State v. Waters*, 87 N.C. App. 502, 504, 361 S.E.2d 416, 417 (1987). This assignment of error is overruled.

C. Interrogation of Witnesses by the Court

[3] Defendant assigns as error the court's calling and questioning of witnesses. N.C. Gen. Stat. § 8C-1, Rule 614(b) (2003) provides that "[t]he court may interrogate witnesses, whether called by itself or by a party." "[T]he judge may question a witness in order to clarify confusing or contradictory testimony." *State v. Geddie*, 345 N.C. 73, 93, 478 S.E.2d 146, 156 (1996), *petition denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997) (quoting *State v. Ramey*, 318 N.C. 457, 464, 349 S.E.2d 566, 571 (1986)). "When the trial judge questions a witness to clarify his testimony or to promote an understanding of the case, such questioning does not amount to an expression of the trial judge's opinion as to defendant's guilt or innocence." *State v. Davis*, 294 N.C. 397, 402, 241 S.E.2d 656, 659 (1978).

The court questioned a State's witness following defense counsel's attempt to discredit the witness's personal knowledge of the case.

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MR. McCOPPIN: All that you know is what you have read from the document the prosecutor provided?

[THE WITNESS]: That's correct.

MR. McCOPPIN: If I may have just a moment.

THE COURT: Can we go back to the last question? Mr. McCoppin, you asked her: All you know is what is on the document the prosecutor provided you. Where did that document come from?

THE WITNESS: From the Clerk's Office. The document is a certified copy of what is on file in the Clerk's office.

THE COURT: Did it come from the prosecutor? Or from you, from the Clerk's office?

THE WITNESS: The original is in the Clerk's office. The certified copy was in the possession of the prosecutor. But it is a certified, true copy of the original, which is all filed in our office.

Defendant argues the court's questioning was intended to discredit the defense counsel and bolster the State's position.

Defendant also asserts the court erred by interposing a series of questions seeking to assist a witness in the description of the perpetrator. The State asked Officer Lillis to describe the perpetrator. Officer Lillis testified the person was about six feet tall, had on dark clothing, and wore a red bandana. The court then asked several questions:

THE COURT: Was it male, or female?

THE WITNESS: Male.

THE COURT: Could you tell what gender?

THE WITNESS: I could tell it was a male.

THE COURT: What race?

THE WITNESS: Black.

THE COURT: The person that was having this argument, had you ever met him before that you know of?

THE WITNESS: No.

Defendant contends the jury could have perceived this exchange as the trial judge assisting the State in proving its case.

Defendant also argues the court erred in calling and questioning a witness after the jury returned a guilty verdict and during the sentencing phase of the trial. Defense counsel called an expert witness who testified that, in his opinion, defendant was suffering from symptoms of schizophrenia when the incident occurred. After the State rested, the court recalled Officer Lillis to the stand and asked him:

BY THE COURT:

Q. During the entire incident in question did the defendant, while in your presence, including while running behind the house out of your sight, during any time that you were in the presence of the defendant that night did he at any time by his movements, his physical ability appear or mental appear [sic] to be impaired.

A. No, ma'am.

Defense counsel did not object or move to strike any of the questions asked or testimony given in each of these instances. *See N.C.R. App. P. 10(b)(1) (2003)* ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion").

While unusual, the court did not abuse its discretion in questioning witnesses in front of the jury to clarify the evidence and testimony being presented. The court's questioning during the sentencing phase, when no jury was present, was also proper. *See N.C. Gen. Stat. § 15A-1340.12 (2003)* ("primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability"). These assignments of error are overruled.

IV. Stipulation of Conviction

[4] Defendant contends the trial court committed plain error in rejecting defendant's proposed stipulation that he had previously been convicted of a felony. Since defendant was charged with possession of a firearm by a felon, the State was required to prove a prior felony conviction. Defendant offered to stipulate to the prior conviction to avoid putting this evidence before the jury. The court refused to give any special instructions and instructed the jury based on the

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Pattern Jury Instruction on possession of a firearm by a felon. Defendant then withdrew his stipulation. The Clerk of Court introduced evidence of a prior felony conviction. Defendant failed to object to or move to strike when this evidence was introduced and now argues plain error.

Defendant contends his attorney's failure to object constitutes ineffective assistance of counsel. Defendant has failed to provide any authority or support for this ineffective assistance of counsel claim. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." *State v. Walters*, 357 N.C. 68, 82-83, 588 S.E.2d 344, 353, *cert. denied*, — U.S. —, 157 L. Ed. 2d 320 (2003); N.C.R. App. P. 28(b)(6) (2003).

[5] "[I]n our review of the record for plain error, 'defendant is entitled to a new trial only if the error was so fundamental that, absent the error, the jury probably would have reached a different result.' " *Id.* at 85, 588 S.E.2d at 354 (quoting *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002)). Defendant has failed to include his request for a special instruction in the record on appeal. We cannot "assume or speculate that there was prejudicial error when none appears on the record before it." *State v. Moore*, 75 N.C. App. 543, 548, 331 S.E.2d 251, 255, *disc. rev. denied*, 315 N.C. 188, 337 S.E.2d 862 (1985). This assignment of error is dismissed.

V. Lesser-Included Offenses

[6] Defendant contends the trial court committed plain error by failing to submit to the jury lesser-included offenses of attempted voluntary manslaughter, assault with a deadly weapon with intent to kill, and attempted second-degree murder. At trial, defendant failed to object to the proposed instruction regarding attempted murder and argues plain error.

Defendant was indicted for attempted first-degree murder, not assault with a deadly weapon with intent to kill. "Because assault with a deadly weapon with intent to kill requires proof of an element not required for attempted murder—use of a deadly weapon—it is not a lesser-included offense of attempted murder, and must be charged in a separate indictment." *State v. Coble*, 351 N.C. 448, 453, 527 S.E.2d 45, 49 (2000) (citation omitted). Since defendant was not charged with assault with a deadly weapon with intent to kill under a separate indictment, the trial court was not required to give a jury instruction on this offense.

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Defendant's assignment of error regarding attempted second-degree murder was also addressed in *Coble*. "Because specific intent to kill is not an element of second-degree murder, the crime of attempted second-degree murder is a logical impossibility under North Carolina law." *Id.* at 451, 527 S.E.2d at 48. The trial court did not err by not giving an instruction on attempted second-degree murder.

"[T]o support an instruction on attempted voluntary manslaughter, a defendant must produce 'heat of passion' or 'provocation' evidence negating the elements of malice, premeditation, or deliberation." *State v. Rainey*, 154 N.C. App. 282, 290, 574 S.E.2d 25, 30, *disc. rev. denied*, 356 N.C. 621, 575 S.E.2d 520 (2002); *but see Coble*, 351 N.C. at 450, 527 S.E.2d at 47 ("[T]he crime of attempted murder, as recognized in this state, can be committed only when a person acts with the specific intent to commit first-degree murder."). Words or language do not constitute adequate provocation for taking human life. *State v. Watson*, 287 N.C. 147, 156, 214 S.E.2d 85, 91 (1975). Here, there was no assault or threatened assault on defendant prior to his firing of the weapon. Defendant has failed to show evidence of legal provocation.

Defendant has failed to show the court committed plain error by not instructing *ex mero motu* on attempted voluntary manslaughter, assault with a deadly weapon with intent to kill, and attempted second-degree murder. This assignment of error is overruled.

VI. Motion to Dismiss

[7] Defendant argues the trial court erred in failing to dismiss the charge of attempted first-degree murder. In a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State every reasonable inference to be drawn from the facts and evidence presented. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). "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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

"Substantial evidence is defined as relevant evidence which a reasonable mind could accept as adequate to support a conclusion." *Lee*, 348 N.C. at 488, 501 S.E.2d at 343. "[T]he evidence need only give rise

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to a reasonable inference of guilt for the case to be properly submitted to the jury." *State v. Barnett*, 141 N.C. App. 378, 383, 540 S.E.2d 423, 427 (2000), *aff'd*, 354 N.C. 350, 554 S.E.2d 644 (2001). "The elements of attempted first degree [sic] murder are: (1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the existence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing." *State v. Poag*, 159 N.C. App. 312, 318, 583 S.E.2d 661, 666 (2003) (quoting *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000)).

Defendant contends the State presented no evidence of his premeditation and deliberation to kill Officer Lillis. We have held "[p]remeditation is present where the defendant formed a specific intent to kill the victim [over] [sic] some period of time, no matter how short, prior to perpetrating the actual act. Deliberation is acting [in] [sic] a cool state of blood and not under the influence of a violent passion." *State v. Andrews*, 154 N.C. App. 553, 561, 572 S.E.2d 798, 804 (2002) (citations omitted).

Premeditation and deliberation "are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence." *State v. Sierra*, 335 N.C. 753, 758, 440 S.E.2d 791, 794 (1994). Here, the State's evidence tended to show the complete absence of any provocation by Officer Lillis. At the time defendant fired the gun, Officer Lillis had not drawn his service weapon and had only called out defendant's name. Additionally, defendant fired multiple shots within a fairly close range, approximately fifty feet, towards Officer Lillis, which required separate pulls of the trigger. "[S]ome amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger." *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). Defendant's own statements also tended to show defendant's intent to kill. After being informed that the police had been called, he stated, "I ain't afraid of the police. When they get here I'll show you." The circumstantial evidence presented was sufficient to allow a reasonable juror to conclude that defendant acted with premeditation and deliberation. This assignment of error is overruled.

VII. Mitigating Factors in Sentencing

[8] Defendant contends the trial court erred in refusing to allow an expert witness to testify regarding the existence of mitigating factors.

Defendant did not make an offer of proof for the excluded testimony. This assignment of error was not preserved for appellate review and is dismissed. *See State v. Williams*, 355 N.C. 501, 534, 565 S.E.2d 609, 629 (2002), cert. denied, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003).

[9] Defendant also argues the trial court erred in failing to find the existence of statutory mitigating factors despite sufficient evidence presented to support the factors. “The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2).” N.C. Gen. Stat. § 15A-1340.16(c) (2003). Defendant was sentenced in the presumptive range and concedes that this Court has rejected his argument in *State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240 (2001). This assignment of error is dismissed.

VIII. Conclusion

We have carefully reviewed all of defendant’s assignments of error. The trial judge’s comments and actions complained of were inappropriate, and fell below the professionalism expected of an officer of the court. Plaintiff, however, has failed to show that but for such comments and conduct, under the “totality of the circumstances,” the trial court’s actions had a “prejudicial effect on the result at trial.” *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808.

No prejudicial error.

Judges McCULLOUGH and BRYANT concur.

JOSEPH B. DUNN, EMPLOYEE, PLAINTIFF v. MARCONI COMMUNICATIONS, INC.,
EMPLOYER, ACE USA, CARRIER, DEFENDANTS

No. COA03-129

(Filed 16 December 2003)

1. Workers’ Compensation— coming and going rule—exceptions

The Industrial Commission did not err by allegedly failing to apply the proper standard when it denied workers’ compensation benefits based on its omitting several factual findings that, if found, would have provided sufficient evidence to allow

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plaintiff worker to recover under various exceptions to the coming and going rule, because: (1) the Commission's finding of fact that plaintiff's evidence about the purpose of his trip to his home was not believable eliminated all support for the exceptions to the going and coming rule that plaintiff argued were present in this matter; and (2) all of the exceptions relied upon by plaintiff can be eliminated from consideration based upon the Commission's finding that plaintiff was on a personal errand at the time of his accident and that the trip did not serve a dual business purpose.

2. Workers' Compensation— credibility of witnesses— reliance on deputy commissioner's determination

The Industrial Commission did not err in a workers' compensation case by deferring to the deputy commissioner's judgment regarding the credibility of witnesses, because: (1) the Commission's finding of fact stated that the Commission reached its decision after reviewing all competent evidence of record; and (2) the full Commission did not rely solely upon the deputy commissioner's credibility determination.

Appeal by plaintiff from opinion and award entered 16 September 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 2003.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr., N. Victor Farah and Lauren R. Trustman, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Dayle A. Flammia, for defendant-appellees.

EAGLES, Chief Judge.

Plaintiff Joseph B. Dunn appeals from an opinion and award of the full Industrial Commission denying workers' compensation benefits. Plaintiff asserts two arguments on appeal: that the Industrial Commission erred (1) by failing to apply the appropriate law to determine the compensability of plaintiff's claim and (2) by deferring to the deputy commissioner's judgment regarding the credibility of witnesses. After careful review of the transcript, exhibits, record and briefs, we affirm.

The evidence presented to the Commission tended to show that plaintiff was injured in an automobile accident on 14 April 2000.

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At the time of the accident, plaintiff was returning from his home in Maysville, North Carolina, to a job site located in Richmond, Virginia.

Plaintiff began working for defendant Marconi Communications, Inc. ("Marconi") in 1997. In 2000, plaintiff worked as a "lead man" for Marconi. As a lead man, plaintiff's job responsibilities consisted of supervising the installation of telephone equipment by teams of workers and maintaining the stock of materials necessary for the project. Plaintiff traveled frequently as part of his job. He testified that he had previously completed projects for Marconi in Oklahoma City, Oklahoma; Roswell, New Mexico; Dallas, Texas; Chattanooga, Tennessee; and Detroit, Michigan.

Marconi provided plaintiff a company van to drive and a company credit card in order to pay for gasoline for the van. Plaintiff was paid for any time he spent traveling between job sites. During weekends or between jobs, plaintiff would drive the company van to his home and then drive the van to the next job site.

Plaintiff used a pager that was turned on at all times. Plaintiff's supervisors contacted plaintiff using this pager in order to tell plaintiff the location of his next job site. Plaintiff testified that he called the company headquarters every week to inform the payroll clerk where to deliver his paycheck. The payroll clerk would then send plaintiff's paycheck to his location, using an express mail service if necessary.

Plaintiff was assigned to the project site in Richmond, Virginia, in late March or early April 2000. Marconi was hired to install telephone cable and equipment in the Bell Atlantic building. By 14 April 2000, the Marconi team was running behind schedule on the project. The team had begun the Richmond project later than expected and the project was further delayed by sabotage. Plaintiff testified that his immediate supervisor, Steve Wade, pressured the installation team and constantly asked plaintiff how much longer it would take to finish the project.

The Marconi crew working at the Bell Atlantic site was using a hydraulic crimper, a tool which is used to tighten cables during installation. When plaintiff worked the 8 p.m. shift on 13 April, he observed that the crew only had one hydraulic crimper in use. Plaintiff had an additional manual crimper, owned by Marconi, at his home in Maysville. Manual crimpers are used for the installation of smaller cables, while hydraulic crimpers are needed for larger cables.

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Plaintiff decided to retrieve the crimper from Maysville in order to complete the project more quickly. At 8 a.m. on 14 April, a few hours after he got off work, plaintiff began the drive to Maysville. Plaintiff did not tell any of his co-workers that he was traveling home or that he was going to retrieve the additional crimper. Plaintiff's fiancée Sherry accompanied him on the trip to Maysville. Plaintiff estimated that it would take him four hours to drive from Richmond to Maysville.

Plaintiff and his fiancée arrived at plaintiff's home in Maysville around noon. Plaintiff retrieved the crimper from his house. He checked his mailbox but his paycheck had not yet arrived.

Plaintiff began to drive back to Richmond with his fiancée. He was scheduled to be at work at the Richmond project site at 8:00 p.m. that evening. Plaintiff was injured in an accident during the trip back to Richmond at approximately 5:15 p.m. The accident occurred about forty miles away from the job site. Plaintiff fell asleep while driving on Interstate 95 and ran off the highway. When the van left the highway, it flipped several times and plaintiff was thrown from the van. Plaintiff had not slept or taken a nap since before he reported to work the previous evening at 8:00 p.m., meaning that plaintiff had been awake for at least 21 hours at the time of the accident. Plaintiff sustained a concussion, a scalp laceration, several broken ribs, a collapsed lung, a bruised heart, and a compound fracture of his ankle as a result of the accident.

Defendants denied compensability of plaintiff's claim, based upon defendants' decision that plaintiff's accident did not arise out of the course and scope of his employment. Plaintiff's claim was then presented to the deputy commissioner on 26 January 2001. Defendants introduced testimony that tended to show that plaintiff did not have a legitimate business reason for driving to his home in Maysville. Marconi's human resources manager testified that, at the time of the accident, plaintiff had requested his paycheck be directly deposited in his bank account, so there was no reason for plaintiff to expect his paycheck to be delivered to his home. Plaintiff testified that he had signed up for the direct deposit program but then cancelled his participation in it. Plaintiff was unable to remember when he cancelled direct deposit of his paycheck.

In addition, plaintiff stated on cross-examination that he knew another employee at the Richmond work site had an extra crimper which was the same type of tool that he retrieved from his home in

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Maysville. However, plaintiff admitted that he did not ask the other employee if he could use the "extra" crimper before he decided to drive to Maysville. Plaintiff also testified that he did not investigate the Richmond area to determine whether there was a store in Richmond where he could buy an extra crimper. Plaintiff's supervisor testified that all employees were instructed on the procedure for getting tools locally if needed for the job site. Employees were instructed to buy tools at stores near the job site or to have tools shipped in by an express service from Marconi's headquarters. In addition, the supervisor stated that company policy forbids employees from keeping tools at home, as plaintiff claimed to have done. The supervisor further testified that having an extra crimper on the Richmond job site would not have hastened the completion of the project. There were not enough workers on site to operate another hydraulic crimper, and the manual crimper only fit small cables.

The deputy commissioner and full Commission both denied plaintiff's claim for workers' compensation benefits. The Commission denied plaintiff's claim because it found that plaintiff's stated reasons for traveling to Maysville were not credible. Plaintiff appeals.

It is well-settled that "appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). However, the Commission's decision regarding whether "an accident arose out of and in the course of employment is a mixed question of law and fact; thus, this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence." *Bowser v. N.C. Dep't. of Corr.*, 147 N.C. App. 308, 311, 555 S.E.2d 618, 621 (2001) (quoting *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679 (1996), *disc. rev. denied*, 345 N.C. 751, 485 S.E.2d 49 (1997)), *disc. rev. denied*, 355 N.C. 283, 560 S.E.2d 796 (2002).

G.S. § 97-2 (6) defines "injury" under the Workers' Compensation Act to refer to "injury by accident arising out of and in the course of the employment" The "coming and going rule," which is the "general rule in this and other jurisdictions," states "that an injury by accident occurring en route from the employee's residence to his workplace or during the journey home is not one that arises out of or in the course of employment." *Powers v. Lady's Funeral Home*, 306 N.C. 728, 730-31, 295 S.E.2d 473, 475 (1982) (citing *Humphrey v. Laundry*, 251 N.C. 47, 110 S.E.2d 467 (1959)). However, the general

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rule barring compensability of injuries sustained while traveling to or from work is subject to several exceptions, including *inter alia*, the “traveling salesman” exception, the “contractual duty” exception, the “special errand” exception, and the “dual purpose” exception. *See Powers*, 306 N.C. 728, 295 S.E.2d 473 (1982); *Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 569 S.E.2d 675, *disc. rev. denied*, 356 N.C. 436, 572 S.E.2d 784 (2002); *Creel v. Town of Dover*, 126 N.C. App. 547, 486 S.E.2d 478 (1997).

[1] Plaintiff argues that the full Commission erred by omitting several factual findings that, if found, would have provided sufficient evidence to allow plaintiff to recover under various exceptions to the “coming and going” rule. Plaintiff contends that the Commission’s failure to find these facts indicates that the Commission misapprehended the law and failed to apply the proper standard when it denied workers’ compensation benefits. We disagree.

As a preliminary matter, we note that this Court has held that when the Commission determines “the credibility of the witnesses and the evidence and the weight each is to receive,” the Commission “may not wholly disregard or ignore the competent evidence before it.” *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 601, 532 S.E.2d 207, 212 (2000) (internal citations omitted). “[T]he Commission is not required to find facts as to all credible evidence.” *Peagler*, 138 N.C. App. at 602, 532 S.E.2d at 213. Therefore, merely because plaintiff presented credible evidence, the Commission was not required to make findings of fact regarding that evidence.

Here, plaintiff contends that the Commission failed to make a finding that plaintiff was on permanent “on call” status despite uncontested evidence that plaintiff carried a pager twenty-four hours each day. Plaintiff argues that such a finding would have allowed plaintiff to argue that his injury fell under the “traveling salesman” exception to the “coming and going” rule. The Commission also omitted any factual finding about defendant employer’s furnishing of a company vehicle for plaintiff’s use, which would have enabled plaintiff to argue that his injuries were compensable according to the “contractual duty” exception. In addition, plaintiff contests the lack of factual findings indicating that plaintiff had decision-making authority regarding where to get work materials for the job site, that plaintiff’s purpose in traveling to Maysville was to retrieve the crimper, and that plaintiff’s return trip assumed a business purpose because he was returning to work when the accident occurred. Any of these findings of fact would have allowed plaintiff to argue

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that either the “special errand” or “dual purpose” exception applied. Although plaintiff presented evidence that would tend to support these proposed factual findings and therefore allow plaintiff to make these arguments regarding compensability, we hold that the absence of these proposed findings is not error here. The Commission’s finding of fact that plaintiff’s evidence about the purpose of his trip to Maysville was “not believable” eliminates all support for the exceptions to the “going and coming” rule that plaintiff argues were present in this matter.

The “traveling salesman” exception to the “going and coming” rule has been defined as follows: “[E]mployees whose work entails travel away from the employer’s premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown.” *Chandler v. Teer Co.*, 53 N.C. App. 766, 768, 281 S.E.2d 718, 720 (1981) (quoting *Brewer v. Trucking Co.*, 256 N.C. 175, 179, 123 S.E.2d 608, 611 (1962)), *aff’d per curiam*, 305 N.C. 292, 287 S.E.2d 890 (1982); *see also Ross v. Young Supply Co.*, 71 N.C. App. 532, 322 S.E.2d 648 (1984). The “contractual duty” exception states that “[i]njuries received by an employee while traveling to or from his place of employment are usually not covered by the Act unless the employer furnishes the means of transportation as an incident of the contract of employment.” *Strickland v. King and Sellers v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977). However, the “contractual duty” exception can be negated if the Commission finds that the employee, while using an employer-provided vehicle, abandoned his employment-related purpose for using the vehicle. *See Alford v. Chevrolet Co.*, 246 N.C. 214, 217, 97 S.E.2d 869, 871 (1957). The “special errand” exception allows an employee to recover for injuries sustained while traveling to or from work if the injuries occur while the employee is engaged in a special duty or errand for his employer. *See Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 81 N.C. App. 140, 343 S.E.2d 551, *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 600 (1986); *Felton v. Hospital Guild*, 57 N.C. App. 33, 291 S.E.2d 158, *aff’d by an equally divided court*, 307 N.C. 121, 296 S.E.2d 297 (1982). The “dual purpose” exception is defined as follows:

[W]hen a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of failure of the private purpose, though the business errand remained undone; it is a business

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trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey.

Felton, 57 N.C. App. at 37, 291 S.E.2d at 161 (quoting 1 Arthur Larson, *The Law of Workmen's Compensation* § 18.12 (1978)).

All of the exceptions relied upon by plaintiff can be eliminated from consideration based upon a finding that plaintiff was on a personal errand at the time of his accident and that the trip did not serve a dual business purpose. Here, the Commission found that:

The greater weight of the competent evidence fails to support plaintiff's testimony that the purpose of his April 14, 2000 trip to Maysville, North Carolina with an anticipated return to Richmond, Virginia by 8:00 p.m. to work his next shift was to either pick up a manual crimper for the benefit of his employer or to pick up his paycheck.

This finding was sufficient to indicate that the Commission rejected the evidence offered to show that plaintiff had a business-related reason for his trip to Maysville. The "dual purpose" rule cannot apply to plaintiff's claim because no legitimate business purpose existed according to the Commission's factual finding.

The Commission's holding that plaintiff's accident did not occur within the course and scope of his employment is a mixed question of law and fact. Therefore, we must analyze whether sufficient evidence supports the Commission's findings of fact. Here, plaintiff offered two reasons for the trip to Maysville: (1) the necessity of getting a manual crimper and (2) the retrieval of his paycheck. Defendants responded by offering evidence that tended to show that plaintiff knew that neither of these goals required him to make an eight-hour round trip journey. Defendants presented evidence that plaintiff's paychecks were being electronically deposited into his bank account, meaning that plaintiff did not need to drive home in order to retrieve his paycheck. In addition, defendants and plaintiff presented evidence that tended to show that Marconi would send an employee's paycheck to him on a job site by an express delivery service if requested by the employee. Defendants also presented evidence that Marconi had a company policy of shipping in necessary tools or buying tools locally and that plaintiff knew of this policy. In addition,

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plaintiff knew that a co-worker at the same job site had the exact tool that plaintiff thought was needed. Plaintiff did not ask his co-worker for the tool, nor did he tell anyone where he was going when he left Richmond. Finally, defendants presented evidence that indicated the additional tool that plaintiff allegedly traveled home to get was not needed on the Richmond job site. Sufficient evidence supports the Commission's conclusion that plaintiff's stated reasons for returning home were not credible. Therefore, this assignment of error is overruled.

[2] Plaintiff's second argument is that the full Commission improperly deferred to the deputy commissioner's credibility determinations. Plaintiff contends that the full Commission may not rely on the deputy commissioner's findings at all, because the full Commission is the sole judge of credibility. We disagree.

The finding of fact that plaintiff disputes on appeal reads as follows, in pertinent part:

In light of the fact that the Deputy Commissioner had the opportunity to view the witnesses and make reasonable inferences therefrom from their conduct and having considering [sic] all competent evidence of record, the Full Commission concludes that plaintiff traveled home for some unknown personal reason.

We note that the Commission's finding of fact states that the Commission reached its decision after reviewing all competent evidence of record. Plaintiff argues that the Commission cannot rely upon the credibility determinations of the deputy commissioner according to *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). The *Adams* case stated:

Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full Commission is not required to demonstrate, as *Sanders* states, "that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one."

Adams, 349 N.C. at 681, 509 S.E.2d at 413 (quoting *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 641, 478 S.E.2d

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223, 226 (1996), *disc. rev. denied*, 346 N.C. 180, 486 S.E.2d 208 (1997), *overruled by Adams*, 349 N.C. 676, 509 S.E.2d 413 (1998)). *Adams* clearly holds that the full Commission is not required to defer to the deputy commissioner's credibility determinations simply because the deputy commissioner viewed the testimony or other evidence firsthand. However, *Adams* does not hold, as plaintiff argues here, that the full Commission may not consider the deputy Commissioner's findings.

Assuming *arguendo* that *Adams* does forbid the full Commission from giving any consideration to the deputy commissioner's credibility determinations, the Commission here did not commit reversible error. The Commission stated that it considered all the evidence and made factual findings different from the findings of the deputy commissioner, as noted in plaintiff's first argument on appeal. Because the full Commission did not rely solely upon the deputy commissioner's credibility determination, we overrule this assignment of error.

For the reasons stated above, the Industrial Commission's opinion and award is affirmed.

Affirmed.

Judges MARTIN and LEVINSON concur.

STATE OF NORTH CAROLINA v. ANTHONY LOAN JONES

No. COA02-1739

(Filed 16 December 2003)

1. Search and Seizure— consent by car owner—jacket found in car—motion to suppress evidence

The trial court did not err in a trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, possession of marijuana, possession of drug paraphernalia, carrying a concealed weapon, and possession of a firearm by a convicted felon case by denying defendant's motion to suppress the evidence found inside his leather coat that he placed in a car that was searched with the owner's consent because: (1) the car

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owner's general consent to the search of his car reasonably included the search of clothing lying on the seats of the car; and (2) the car owner had the authority to consent to a search of his vehicle which encompassed items found lying around in the car such as defendant's jacket, and defendant had no reasonable expectation of privacy in the jacket.

2. Confessions and Incriminating Statements— oral statement at time of arrest—statement signed by defendant—motion to suppress

The trial court did not err in a trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, possession of marijuana, possession of drug paraphernalia, carrying a concealed weapon, and possession of a firearm by a convicted felon case by denying defendant's motion to suppress statements given to law enforcement officers, because: (1) regarding defendant's oral statement at the time of his arrest that he had dope in his possession, the statement was a voluntary spontaneous utterance which was not in response to any question by law enforcement; and (2) regarding defendant's written statement, defendant's testimony does not suggest that he attempted to read the statement but was unable to do so, and the record contains testimony by a deputy that he wrote precisely what defendant said without paraphrasing and that he read the statement aloud as he transcribed defendant's statements.

3. Firearms and Other Weapons— carrying a concealed weapon—possession of a firearm by a felon—motion to dismiss

The trial court did not err by denying defendant's motion to dismiss the charges of carrying a concealed weapon and possession of a firearm by a felon based on a gun being found under defendant's jacket, because defendant acknowledged possession of the gun in his statement to police officers.

Appeal by defendant from judgments entered 29 August 2002 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 15 October 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Richard E. Jester for defendant-appellant.

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LEVINSON, Judge.

Defendant (Anthony Jones) appeals from convictions and judgments of trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, possession of marijuana, possession of drug paraphernalia, carrying a concealed weapon, and possession of a firearm by a convicted felon. For the reasons that follow, we conclude defendant had a fair trial, free of reversible error.

The relevant evidence is summarized as follows: On the night of 4 February 2000, members of the Durham County Sheriff's Department took part in a street interdiction operation in Durham, North Carolina. As part of this operation, Detective R. L. Rose and several other officers were driving in the area of Hyde Park Avenue in Durham, when they saw a number of people gathered around a car stopped in the middle of Hyde Park. The car had its engine running and was blocking traffic. The officers parked their van on the side of the street, got out, and approached the group in the center of the street; as they did so, the vehicle drove away and the group dispersed. Defendant, who had been among the group gathered around the car, began walking towards a different car—a red Mustang parked on the side of the street. He went around the rear of the car, opened the passenger door, got into the Mustang's back seat, and shut the door. While Rose and several other officers watched, defendant took off the leather jacket he was wearing and set it on the back seat. He then got out of the car, wearing only a tee shirt despite the freezing (25% F) winter weather.

Meanwhile, the officers had summoned Detective Ricky Keller, the Durham County Sheriff's Department canine handler. After observing defendant's behavior, Deputy J.M. Utley, another officer involved in the operation, asked Detective Keller to have his drug-sniffing dog, 'Marco,' walk around the outside of the Mustang. Marco alerted "very strongly" on the passenger side of the car where defendant had gotten in the car. At around the same time, another man, Robert Jiggetts, emerged from a nearby house. Jiggetts told the officers that the Mustang belonged to his wife, and that he was in charge of the car. Lieutenant Norman Gordon, also of the Durham County Sheriff's Department, asked Jiggetts for permission to search his car; Jiggetts gave his consent to the search, and provided Officer Gordon with his keys. Detective Rose then unlocked the car and retrieved the defendant's jacket from the back seat. Rose found a shoulder holster and handgun under the jacket; he then searched the pockets of the jacket and discovered a digital scale, a butterfly knife, marijuana,

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approximately 43 grams of crack cocaine, and over \$900 in currency. As these items were removed from the pockets of his jacket, defendant stated that the reason he had gotten into the car was because he had 'dope' in his possession. Defendant was arrested and transported to the law enforcement center by Deputy Utley. At the law enforcement center, he was informed of his *Miranda* rights, signed a waiver, and agreed to make a statement. Defendant dictated his statement to Deputy Utley, who transcribed defendant's words while reading them aloud. After writing the statement, Deputy Utley gave it to the defendant. The defendant looked over the statement, then signed it. In his statement, defendant acknowledged that he had money, a gun, and marijuana in his coat when he put it in the car; however, he denied ownership of the cocaine or scales.

On 15 May 2000 defendant was indicted for trafficking in cocaine by possession, possession with intent to sell or deliver cocaine, possession of marijuana, possession of drug paraphernalia, carrying a concealed weapon, and possession of a firearm by a convicted felon. Following a jury trial, defendant was convicted of all charges. He received an active sentence of 35 to 42 months for the cocaine and marijuana charges, and a consecutive sentence of 12 to 15 months for the remaining offenses. From these judgments and convictions, defendant appeals.

[1] Defendant presents three arguments on appeal. He argues first that the trial court erred by denying his motion to suppress the evidence found inside his leather coat. We disagree.

The Fourth Amendment to the U.S. Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *State v. Barnes*, 158 N.C. App. 606, 609, 582 S.E.2d 313, 316-17 (2003) (citation omitted).

Under the Fourth Amendment, "[as a] general rule, a warrant supported by probable cause is required before a search is considered reasonable. The warrant requirement is 'subject only to a few specifically established and well-delineated exceptions[.]'" *State v. Woods*, 136 N.C. App. 386, 390, 524 S.E.2d 363, 365 (2000) (quoting *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585, (1967)). "Consent, however, . . . [is] excepted from the warrant requirement,

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and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Barden*, 356 N.C. 316, 340-41, 572 S.E.2d 108, 125 (2002) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854 (1973)).

In the present case, defendant concedes that the law enforcement officers had Jiggetts' consent to search the vehicle where he had left his coat. He contends, however, that Jiggetts' giving general consent to search the vehicle did not entitle the officers to search the coat on the back seat. Defendant asserts that he retained a reasonable expectation of privacy with respect to his coat, even after leaving it in Jiggetts' car, and that Jiggetts did not have authority to consent to a search of his jacket. On this basis, defendant argues that without defendant's consent, the search of his jacket violated his rights under the Fourth Amendment. We do not agree.

The United States Supreme Court has held that general consent to the search of an automobile, given without any limitations placed on its scope, encompasses the search of "a closed container found within the car that might reasonably hold the object of the search." *Florida v. Jimeno*, 500 U.S. 248, 249, 114 L. Ed. 2d 297, 301 (1991) (the "Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile"). The Court rejected the argument that, after receiving general consent to search a vehicle, the police nonetheless must obtain specific permission to search each container inside the car:

Respondents argue . . . that if the police wish to search closed containers within a car they must separately request permission[.] . . . [W]e see no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness. . . . A suspect may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization.

Id. at 252, 114 L. Ed. 2d at 303. Our Court cited *Jimeno* in *State v. McDaniels*, 103 N.C. App. 175, 188, 405 S.E.2d 358, 366 (1991), noting that "a police officer may now search a closed container found in a vehicle, where the officer has the suspect's general consent to search and the officer might reasonably believe the container holds the

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object of the search." (citing *Florida v. Jimeno*, 500 U.S. 248, 114 L. Ed. 2d 297 (1991), and *California v. Acevedo*, 500 U.S. 565, 114 L. Ed. 2d 619 (1991)). *See also State v. Castellon*, 151 N.C. App. 675, 681-82, 566 S.E.2d 696, 700 (2002) ("defendant gave general consent to search the vehicle, which allowed the officers to search the trunk of the car"). In the instant case we conclude that Jiggetts' general consent to the search of his car reasonably included the search of clothing lying on the seats of the car.

We also reject defendant's argument that Jiggetts could not consent to a search of defendant's coat after defendant left it lying on the back seat of his car. "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it . . . may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171, 39 L. Ed. 2d 242, 249-50 (1974). *Matlock* was cited by the North Carolina Supreme Court in *State v. Garner*, 340 N.C. 573, 592, 459 S.E.2d 718, 728 (1995). The defendant in *Garner* moved to suppress evidence taken from his jacket, which he had left in another person's house. This third party consented to the search of her house, where police found defendant's jacket. Defendant argued that the third party did not have the authority to consent to a search of his personal belongings. The Court disagreed and, citing *Matlock*, upheld the trial court's conclusion that the "defendant had no reasonable expectation of privacy in the jacket . . . lying in a pile of clothes." Similarly, in a federal case from another jurisdiction, *United States v. Davis*, 967 F.2d 84, 88 (2d Cir. 1992), the defendant argued that the owner of a car lacked authority to consent to a search of defendant's luggage. The Court held:

[Defendant's] argument, however, ignores the 'assumption of the risk' approach adopted in *United States v. Matlock*, *supra*: "The underpinning of third-party consent is assumption of risk. One who shares a house or room or auto with another understands that the partner, may invite strangers[, and that his] privacy is not absolute, but contingent in large measure on the decisions of another. Decisions of *either* person define the extent of the privacy involved, a principle that does not depend on whether the stranger welcomed into the [area] turns out to be an agent or another drug dealer."

(quoting *United States v. Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990)). Although not binding on this Court, we find this analysis per-

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susive. *See also Frazier v. Cupp*, 394 U.S. 731, 740, 22 L. Ed. 2d 684, 694 (1969) ("[defendant], in allowing [his cousin] to use the bag and in leaving it in his house, must be taken to have assumed the risk that [his cousin] would allow someone else to look inside"). We conclude that Jiggetts had the authority to consent to a search of his vehicle which encompassed items found lying around in the car, such as defendant's jacket. To paraphrase *Garner*, *id.*, "defendant had no reasonable expectation of privacy in the jacket . . . lying in [Jiggetts' car]."

Defendant cites *State v. Cole*, 46 N.C. App. 592, 265 S.E.2d 507 (1980), in support of his argument that the evidence seized from his jacket should be suppressed. However, *Cole* involved a warrantless search of a jacket found inside an automobile in which the search was not supported by either probable cause or by consent from the vehicle's owner. We conclude that *Cole* is not germane to the resolution of the issues presented herein.

On appeal, "[o]ur review of a denial of a motion to suppress is limited to determining whether the trial court's findings of fact are supported by competent evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law are legally correct." *State v. Trapp*, 110 N.C. App. 584, 587, 430 S.E.2d 484, 486 (1993). In the present case, we conclude that the trial court's findings of fact were supported by the evidence. We further conclude that these findings support its conclusion of law, that the police did not violate the defendant's constitutional rights by searching his jacket after obtaining Jiggetts' consent to a search of the vehicle. Having reached this conclusion, we need not address the State's other arguments, that the search might equally be justified on the basis of probable cause or as a search incident to arrest. This assignment of error is overruled.

[2] Defendant next argues that the trial court erred by denying his motion to suppress statements given to law enforcement officers. Defendant challenges the admission of both (1) an oral statement made at the time of his arrest, and (2) a statement taken by Officer Utley at the law enforcement center, which was reduced to writing and signed by the defendant. He argues that both of these statements should be suppressed. We disagree.

Regarding the oral statement, Detective Rose testified that when he removed drugs and other items from the pockets of defendant's jacket, the defendant remarked that the reason he had gotten into the

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car was that he had ‘dope’ in his possession. Defendant argues on appeal that the statement was “not voluntary” because it was uttered when he “had just seen officers grab a coat they knew was his and search it without his permission.” Defendant cites no cases in support of his argument that the “environment” of “high pressure” surrounding his arrest rendered his statement involuntary. Moreover, the trial court found that:

....

13. At the time that Det. Rose found the items in the coat, the Defendant . . . made a spontaneous utterance that the reason he got into the car was because he had the dope on him. This utterance was not in response to any question, and Det. Rose did not ask Defendant any questions.

Based on this finding of fact, the trial court concluded that defendant’s oral statement “was a voluntary spontaneous utterance which was not in response to any question by law enforcement[.]” We conclude that the trial court’s finding of fact was supported by competent evidence, and supports its conclusion of law. We further conclude that the trial court did not err by overruling defendant’s motion to suppress this oral statement.

Regarding his written statement, the trial court found that:

....

14. After his arrest, the Defendant was brought to the Durham County Sheriff’s office where he was read his Miranda rights by Deputy Utley. Defendant signed a Miranda rights form and gave a written statement to Deputy Utley, which he signed after Deputy Utley wrote it for him.

On this basis, the trial court concluded that:

2. The Defendant was properly informed of his Miranda rights . . . stated that he understood them, and made a voluntary, knowing, and intelligent waiver of those rights.
3. The written statement signed by the Defendant is a true and accurate statement that was provided by the Defendant to Deputy Utley.

We conclude the trial court’s finding of fact is supported by ample evidence, and supports its conclusion of law. Defendant, however, argues on appeal that his written statement must be suppressed

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because "it differed dramatically from what he told the officer." Defendant contends that he was unaware of the difference between what he said and what Deputy Utley wrote down because he "cannot read or write." This argument is without merit.

Defendant testified that he was in school until the tenth grade, when he left to join the Job Corps. Moreover, on cross-examination, defendant denied telling Deputy Utley he was illiterate:

PROSECUTOR: But you're indicating that you don't read and write?

DEFENDANT: I can't read and write that well.

PROSECUTOR: Excuse me. Maybe that's where I—

DEFENDANT: That's what I told him. I didn't say I can't read and write; I can't read and write that well.

PROSECUTOR: So when Deputy Utley handed you back that statement, even though you can't read or write well, you should have been able to at least understand parts of it, correct?

DEFENDANT: Understand what?

PROSECUTOR: Your statement that you made to him.

DEFENDANT: Understand what? No, when he turned it to me, I immediately signed it, and trusted him that he was writing what I was saying. . . .

(emphasis added). Thus, defendant's testimony does not suggest that he attempted to read the statement but was unable to do so. Additionally, the record contains testimony by Deputy Utley, that he wrote precisely what defendant said without paraphrasing, and that he read it aloud as he transcribed defendant's statements.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000)). "It is the trial court's duty to resolve any conflicts and contradictions that may exist in the evidence." *State v. Johnson*, 322 N.C. 288, 293, 367 S.E.2d 660, 663 (1988) (citation omitted).

We conclude that the trial court's findings are supported by the evidence, and that these findings support its conclusions of law

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regarding both the written and oral statement. Accordingly, we hold that the trial court did not err by denying defendant's motion to suppress his statements. This assignment of error is overruled.

[3] Finally, defendant argues that the trial court erred by denying his motion to dismiss the charges against him for insufficiency of the evidence. Defendant was convicted of six separate criminal offenses; however, he argues the sufficiency of the evidence only with regards to the firearms charges. Accordingly, we confine our analysis to whether there was enough evidence presented to submit to the jury the charges of carrying a concealed weapon and possession of a firearm by a felon.

Upon a defendant's motion to dismiss for insufficient evidence, the trial court "must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). "If substantial evidence of each element is presented, the motion for dismissal is properly denied. 'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *State v. Shelman*, 159 N.C. App. 300, 304-05, 584 S.E.2d 88, 92 (2003) (quoting *State v. Cross*, 345 N.C. 713, 717, 483 S.E.2d 432, 434 (1997)). Moreover, in its 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 instant case, defendant argues that the evidence was insufficient to establish either his actual or constructive possession of the gun found under his jacket. However, in his written statement defendant stated that "[t]he cops searched the car and found my coat. I had some herb, a gun—and a gun in my coat." As discussed above, we have concluded that the trial court did not err by admitting this statement. Because defendant acknowledges his possession of the gun in this statement, it effectively disposes of his argument that there is no evidence of possession. This assignment of error is overruled.

For the reasons discussed herein, we conclude that the defendant had a fair trial, free of prejudicial error. Accordingly, defendant's convictions and sentences are

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Affirmed.

Judges MARTIN and STEELMAN concur.

HUMANE SOCIETY OF MOORE COUNTY, INC. PETITIONER V. TOWN OF SOUTHERN PINES AND THE SOUTHERN PINES TOWN COUNCIL, RESPONDENTS

No. COA03-77

(Filed 16 December 2003)

1. Zoning— conditional use permit—humane society veterinary clinic—insufficient evidence for denial

The denial of a conditional use permit for a humane society veterinary clinic was not based on competent, substantial, and material evidence where the town council found that the principal use of the facility was for an animal shelter and adoption facility, but there was no evidence that such an activity would be the primary use of the facility.

2. Zoning— conditional use permit—humane society veterinary clinic—road access or street frontage

An application for a conditional use permit for a humane society veterinary clinic satisfied zoning requirements for access by providing an access easement from a public road. The proposed development did not create a subdivision, as the Town found, which would have required that the lot front a public street or approved private street.

3. Zoning— conditional use permit—damage to adjoining property—evidence speculative

There was no competent, material evidence justifying the denial of a conditional use permit for a humane shelter veterinary clinic because it would injure adjoining property. Evidence thereto was speculative.

4. Zoning— conditional use permit—humane society veterinary clinic—town ordered to issue

It was not improper for the trial court to order issuance of a conditional use permit for a humane society veterinary clinic. Such rulings have been repeatedly upheld; moreover, the Town

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had the opportunity to consider conditions to the permit and the Humane Society had consented to restrictions on its use.

Appeal by respondents from judgment entered 10 October 2002 by Judge Russell G. Walker, Jr. in Moore County Superior Court. Heard in the Court of Appeals 29 October 2003.

Adams Kleemeier Hagan Hannah & Fouts, PLLC, by M. Jay DeVaney and Edward P. Lord, for petitioner.

Gill & Tobias, LLP, by Douglas R. Gill, for respondents.

MARTIN, Judge.

In November 1999, the Humane Society of Moore County ("Humane Society") submitted an application to the Town of Southern Pines ("Town") for a Conditional Use Permit for a "Community Animal Welfare and Activity Center" to be built upon a 12.5 acre property, which the Humane Society had an option to purchase. The property is zoned "Planned Development," a mixed use zoning which permits commercial land use. Among the permissible uses, according to the Town's Unified Development Ordinance ("UDO"), is "Veterinarian, Animal Clinic, Outside Kennel."

Prior to an initial hearing before the Town's Planning Board, the Humane Society received the comments and the recommendation of the Planning Director and amended the application to a proposed use as a "Humane Society Veterinary Clinic." As reason for the change, the Humane Society said that in addition to the Town objecting that the original proposed use did not fall within a permissible use category, the Humane Society had canceled their shelter contract with Moore County and would no longer be housing stray animals.

Pursuant to the Town's zoning ordinance, an application for a conditional use permit is processed in two phases. In the first phase, the Town considers whether the proposed use meets with the requirements of the UDO, Section 54(c), which states that subject to subsection (d), the Town:

shall issue the requested permit unless it concludes based upon the information submitted at the hearing, that:

1. The requested permit is not within its jurisdiction according to the table of permissible uses; or
2. The application is incomplete; or

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3. If completed as proposed in the application the development will not comply with one or more requirements of this chapter.

If the application complies with Section 54(c), a second phase occurs in which the Town may still deny the permit under subsection 54(d) of the UDO

if it concludes, based upon the information submitted at the hearing, that if completed as proposed, the development, more probably than not:

1. Will materially endanger the public health or safety; or
2. Will substantially injure the value of adjoining or abutting property; or
3. Will not be in harmony with the area in which it is to be located; or
4. Will not be in general conformity with the land use plan, thoroughfare plan, or other plan officially adopted by the council.

At its 19 April 2000 hearing, the Planning Board, over objections by the Town, voted unanimously to consider the amended application, rather than the first application, and recommended approval of the amended application subject to petitioner meeting street and sewer standards. However, the Town Council, at its 9 May 2000 meeting, denied the petitioner the right to be heard on the amended application, reasoning that the public did not have sufficient notice of the new proposed use. The council, at the request of the petitioner, considered the use proposed in the original application and after discussion, denied the conditional use permit because the proposed use was not a permitted use in the UDO. Since the council concluded the application did not meet the requirements of Section 54(c)(1) of the UDO, it never considered Section 54(d) factors.

The Humane Society filed a Petition for Writ of Certiorari and Complaint in superior court on 8 June 2000, requesting an order reversing the Town Council's decision on the amended application and asking the Court to require the Town to grant and issue the conditional use permit for the amended application. On 15 September 2000, the superior court issued an order finding as a matter of law that the Town Council should have considered the amended application and that the use proposed in the amended

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application was a permissible use within the scope of the Table of Permissible Uses in the UDO.

The Town appealed the order to this Court, which dismissed the appeal as interlocutory. *Humane Soc'y of Moore County, Inc. v. Town of Southern Pines*, 146 N.C. App. 110, 553 S.E.2d 247 (2001). The Town then held a public hearing on the amended application on 13 November 2001. On 11 December 2001, the Town Council voted unanimously to deny the application, finding as fact, *inter alia*, that the proposed facility was principally an animal shelter with incidental use for education and care of animals. It concluded as matters of law, *inter alia*, that (1) although the use of a veterinary clinic was a permitted conditional use within the PD district, an animal shelter or boarding kennel was not a permitted use, (2) the proposed development would, more probably than not, substantially injure the value of adjoining property and would not be in harmony with the surrounding area, and (3) the access easement did not meet the requirement of frontage on a public street or approved private street. In addition, the council concluded that the proposed development did not create a subdivision.

The Humane Society again sought review by the superior court of the Town's decision, alleging the decision was arbitrary and capricious and not supported by competent, material, and substantial evidence. On 3 September 2002, the superior court ruled that the Town's decision was arbitrary and capricious and not supported by competent, substantial evidence. The superior court remanded the matter to the Town Council with an order to issue the conditional use permit. Respondents appeal.

I.

[1] Respondents first argue that the trial court erred in finding that denial of the conditional use permit was arbitrary and capricious and not supported by competent, material, and substantial evidence. When the superior court reviews the decision of a town council, the court should:

- (1) review the record for errors of law, (2) ensure that procedures specified by law in both statute and ordinance are followed, (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in

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the whole record; and (5) ensure that the decision is not arbitrary and capricious.

Whiteco Outdoor Adver. v. Johnson County Bd. of Adjust., 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999). The task of this Court in reviewing a superior court order is “(1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review.” *Id.* When a party alleges an error of law in the Council’s decision, the reviewing court examines the record *de novo*, considering the matter anew. *Id.* at 470, 513 S.E.2d at 74. However, when the party alleges that the decision is arbitrary and capricious or unsupported by substantial competent evidence, the court reviews the whole record. *Id.* at 468, 513 S.E.2d at 73. “Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record.” *Howard v. City of Kinston*, 148 N.C. App. 238, 246, 558 S.E.2d 221, 227 (2002).

The superior court found, “upon review of the record,” that the decision of the Town Council was not supported by competent, material, and substantial evidence and the decision was arbitrary and capricious. Thus, the court applied the proper scope of review, the whole record test, examining all the evidence in the record to determine if there was substantial evidence to support the Town Council’s findings and conclusions. *Sun Suite Holdings, LLC v. Board of Aldermen of Town of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528 (2000), *disc. review denied*, 353 N.C. 280, 546 S.E.2d 397. Next, we must determine if the trial court correctly applied the scope of review.

Respondents first contend denial of the permit was proper because the facility will be used primarily as an animal shelter, which is not a permitted use, rather than a veterinary clinic. When an applicant produces competent, material, and substantial evidence of compliance with the requirements of a zoning ordinance, he has established a *prima facie* case of entitlement to approval of the application. *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). However, an application may be denied if there are “findings contra which are supported by competent, material, and substantial evidence appearing in the record.” *Id.* “Substantial evidence is ‘evidence a reasonable mind might accept as adequate to support a conclusion.’” *Whiteco*, 132 N.C. App. 465, 468, 513 S.E.2d at 73 (citation omitted).

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In its initial review of this matter, the superior court determined as a matter of law that the proposed use, as a “Humane Society Veterinary Clinic,” was a permissible use within the scope of the Table of Permissible Uses in the Southern Pines UDO. Additionally, the Town Council found, as findings of fact, that the following services would be provided at the facility: vaccination of animals, treatment of animal diseases, lab testing and analysis, x-rays, spay and neutering services, euthanasia for animals, adoption and shelter services, and educational services. Since uses common to a veterinarian clinic were established, and “Veterinarian, Animal Clinic, Outside Kennel” was listed as a permitted use in UDO § 12.000, the Humane Society presented a *prima facie* case of entitlement on the issue of whether the proposed use was a permitted use. Thus, the application can be denied only if there are findings *contra* which are supported by competent, substantial, and material evidence.

The Town Council found that the principal use of the facility was for an animal shelter and adoption facility. Though petitioner acknowledges that it will operate an adoption center at the facility among other functions, there is no evidence in the record that such an activity will be the primary use of the facility. Since there was not substantial evidence to show that petitioner does not meet the requirements of the ordinance, the denial of the permit was not based on competent, substantial, and material evidence.

[2] Next, respondents argue that the requirements for a conditional use permit have not been met because the lot does not front a public or approved private street as required by UDO § 211. Respondents rely upon UDO § 211 and § 220 for the street frontage requirement, which apply only to subdivisions. However, in its conclusions of law, the Town Council found that the proposed development did not create a subdivision. The applicable section of the UDO is Section 221—“Road and Sidewalk Requirements in *Unsubdivided Developments*” (emphasis added)—which states that “all private roads and access ways shall be designed and constructed to facilitate the safe and convenient movement of motor vehicle and pedestrian traffic.” Petitioner satisfied the requirements of Section 221 by providing an access easement from a public road.

[3] Respondents assert that even if the proposed use of the property were a permitted use, the Town Council was still justified in denying the conditional use permit, finding under Phase II, Section 54(d), of the UDO, that the development would substantially injure the value of the adjoining and abutting property. Pursuant to Section 55(c) of

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the UDO, the burden of persuasion on the issue of whether the permit should be denied under Section 54(d) rests on respondents. After careful review of the record, we conclude there was not competent, material evidence that justified denial of the permit.

Respondents' expert, Mr. Andy Hinds, an appraiser, admitted that after an extensive effort to locate materials addressing the effects of an animal care facility on an adjoining development, he was unable to find any information. Instead, Mr. Hinds developed seven case studies based on inquiries of appraisers, assessors, brokers, and developers in the state. In case study number one, where the tax value of property in Guilford County was affected by barking dogs on a neighboring lot, Mr. Hinds was unable to determine a quantifiable impact on value because there were several other factors that contributed to the reduced value.

In case study numbers two, three and six, Mr. Hinds used matched-pair lot comparisons for lots located near a railroad line, a power line and a waste water treatment plant to develop a correlation between the reduction of value from these influences and the reduction in value from an animal care facility. Case study number four, also conducted with matched-pairs lots, demonstrated the additional marketing time needed for sales of homes located close to a railroad. Evidence of the reduced value of lots and evidence of additional marketing time from these particular influences have no correlation with effects from an animal care facility and cannot be considered competent, material evidence.

Mr. Hinds, in case study number five, contacted operators of kennels in Moore County and Guilford County to determine the distance they would recommend a kennel be built from a residential development. However, these recommendations were simply the opinions of kennel operators and the evidence cannot be considered material, competent evidence. Speculative opinions that merely assert generalized fears about the effects of granting a conditional use permit for development are not considered substantial evidence to support the findings of a Town Council. *Howard*, 148 N.C. App. at 246, 558 S.E.2d at 227.

For case study number seven, Mr. Hinds surveyed residents within the Forest Hills subdivision asking them if the proposed location of the Humane Society facility would have affected their decision to purchase their home. In addition to the fact that the survey was flawed because it stated there would be one hundred sixty kennels,

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rather than the thirty to forty proposed, the survey cannot be used as competent, material evidence as the answers are simply speculative comments from neighborhood residents. As Mr. Hinds' testimony was the only testimony presented by respondents on the issue of whether the animal care facility would substantially reduce the value of adjoining and abutting property, the Town Council's denial of the conditional use permit on that basis was not supported by competent, material, and substantial evidence and cannot be upheld.

Respondents also contend the proposed facility is not in harmony with the surrounding area. "The inclusion of a use as a conditional use in a particular zoning district establishes a *prima facie* case that the permitted use is in harmony with the general zoning plan." *Vulcan Materials Co. v. Guilford County Bd. of Comm'r's*, 115 N.C. App. 319, 324, 444 S.E.2d 639, 643 (1994). However, "conclusions unsupported by factual data or background, are incompetent and insufficient to support the [Council's] findings." *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 253, 304 S.E.2d 251, 256 (1983). Accordingly, competent evidence is required to prove that the permitted use is not in harmony with the surrounding area in order to deny the application on that basis.

The O'Neal School and Sandhills Community College presented the testimony of Robert Stanley Hayter, a landscape architect, that the noises and smells from the proposed facility would produce an undesired awareness of the facility. However, he presented no evidence that petitioner's current facility produces unwanted smells that disturb the area surrounding it and therefore the evidence is speculative. The proposed facility would be located close to the Moore County Airport, which has commercial and general aviation flights each day, so noise is already present in the area. Furthermore, upon cross-examination, it became evident that Mr. Hayter considered whether the facility would be in harmony with the developments to the west, the O'Neal School, the Forest Creek subdivision and the Sandhills Community College, but did not consider whether the facility would be in harmony with the whole area.

The owner and developer of Forest Creek subdivision presented testimony of another landscape architect, Karen Ruscher. She, too, testified regarding noise and smells from the facility but failed to provide any evidence to substantiate her allegations. Although she did not believe the facility would be in harmony with Forest Creek, she admitted it would be in harmony with the airport, the mini-storage warehouse, and the Whispering Pines Animal Hospital.

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The Town Council improperly denied the conditional use permit on the basis of Section 54(d) of the UDO because the evidence with respect thereto was only upon speculative and opinion evidence.

II.

[4] Respondent next argues that by ordering the Town Council to issue the conditional use permit, the court deprived the Town Council of its right to attach conditions to the permit. Decisions by the North Carolina Court of Appeals have regularly upheld rulings of the trial court that remanded a case to the town for issuance of a conditional use permit. *See Clark v. City of Asheboro*, 136 N.C. App. 114, 524 S.E.2d 46 (1999); *Sun Suites Holdings*, 139 N.C. App. at 280, 533 S.E.2d at 532. Moreover, after the initial remand of the case to the Town Council for consideration of the amended application, respondents had an opportunity to consider conditions on the permit. The Humane Society consented to additional restrictions in connection with the proposed use, including limiting the number of outside kennels to forty and designing the building to include an interior courtyard to minimize noise and visibility to other properties. In addition, in its conclusions of law following the 11 December 2001 meeting, the Town Council pointed out that in order to conform to the Town's sewer plan, modifications should be made. We therefore hold that it was not improper for the trial court to order the issuance of the conditional use permit.

III.

Because we affirm the superior court's decision that the Town Council acted arbitrarily and capriciously in denying the conditional use permit, we need not address Petitioner's cross assignment of error.

Affirmed.

Judges HUDSON and STEELMAN concur.

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[161 N.C. App. 634 (2003)]

LORRAINE KEENER, WILLIAM McMILLEN AND WIFE, MILDRED McMILLEN, FRED FORSYTH AND WIFE, TEDDY FORSYTH, FRANK DAWSON AND WIFE, PENELOPE L. DAWSON, JIMMY GOODMAN, AND JANE MOORE, PLAINTIFFS V. WILLIAM ARNOLD AND WIFE, SHARON ARNOLD, DEFENDANTS

No. COA02-1445

(Filed 16 December 2003)

1. Appeal and Error— appealability—order to remove structures—partial summary judgment

A partial summary judgment ordering the removal of substantial structures from real property affects a substantial right and may be immediately appealed.

2. Easements— by grant—width not defined—space reasonably needed—issue of fact

Summary judgment should not have been granted for plaintiffs on the issue of whether they had an easement by grant over an area used for boating, swimming, and fishing. The width of the easement was not defined and there was an issue of fact about the space needed to effectuate the easement's purpose.

3. Easements— by prescription—active and hostile use—isue of fact

Summary judgment should not have been granted for plaintiffs on the issue of whether they had an easement by prescription over an area used for boating, swimming, and fishing. There were issues of fact about whether the disputed land was actively used and whether the use was hostile.

Appeal by defendants from order filed 17 April 2002 by Judge Samuel G. Grimes in Washington County District Court. Heard in the Court of Appeals 28 August 2003.

Davis & Davis, by Geo. Thomas Davis, Jr., for plaintiff-appellees.

Manning Fulton & Skinner, by William C. Smith, Jr. and Evan B. Horwitz; and Edward J. Harper, II, for defendant-appellants.

BRYANT, Judge.

William Arnold and Sharon Arnold (collectively defendants) appeal an order filed 17 April 2002 granting partial summary judg-

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ment to Lorraine Keener, William and Mildred McMillen, Fred and Teddy Forsyth, Frank and Penelope L. Dawson, Jimmy Goodman, and Jane Moore (collectively plaintiffs) and requiring defendants to remove a bulkhead, a pier, and stobs placed on an 81-foot-long parcel of land (disputed area) owned by defendants in Washington County, North Carolina. (See illustration.)

On 5 November 1999, plaintiffs filed a complaint alleging they had an easement by grant or by prescription over a parcel of land bounded on the north by the waters of the Albemarle Sound, on the east by the lot of plaintiffs Dawsons, on the south by Arnold Beach Drive, and on the west by the lot of plaintiff Goodman, and that defendants interfered with the easement through the construction of a bulkhead, a pier and stobs, and other acts.

Plaintiffs are owners of lots in or adjacent to the Arnolds Beach Subdivision in Washington County. The subdivision was once owned by Mr. and Mrs. E. O. Arnold (original grantors). From 1962 to 1976, the original grantors granted an easement to some plaintiffs' predecessors in title.¹ The 1962 deed to the predecessor in title of plaintiff Goodman has the following relevant language:

The parties of the first part have constructed a ramp between Lot No. 6 of the foregoing subdivision and the lot of Carl Stanfield [a predecessor in title of plaintiff Goodman], and that the second party may have the same use of said ramp for fishing and bathing, and the launching of his boats, so long as the said ramp is maintained by the [original grantors], but the foregoing use of the same is limited to the family of the party of the second part.

Lot No. 6 is next to and to the east of the lot of plaintiffs Dawsons.

The 1962 and 1967 deeds to the predecessors in title of plaintiffs Moore and McMillens do not mention the ramp.

The 1964 and 1968² deeds to the predecessors in title of plaintiffs Keener and Forsyths have the following relevant language:

The parties of the first part have constructed a ramp between Lot No. 6 of the foregoing subdivision and the lot of Carl Stanfield, and that the second party may have the same use

1. The original grantors also issued deeds to others whose successors are not parties to this action.

2. We note minor differences between the deeds: (1) the plural of the word "party" and (2) the omission of three commas.

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of said ramp for fishing and bathing, and the launching of . . . boats, for that the said ramp was constructed for the use and enjoyment of the owners of the lots contained in the foregoing subdivision, forever.

The 1976 deed to the predecessor in title of plaintiffs Dawsons has the following relevant language:

[T]he parties of the first part do grant and convey unto the party of the second part, the right to use the boat ramp and picnic area leading from Arnold Beach Road to Albemarle Sound and lying between the lot of Jennie Arnold and the lot now or formerly owned by Carl Stanfield.

Plaintiffs' supporting affidavits indicate plaintiffs, their predecessors in title, and others in the community had used the easement for many years for launching boats, swimming, fishing, picnicking, and recreation. The affidavits also state plaintiffs and others in the community mowed and maintained the waterfront areas subject to the easement.

In their brief to this Court, defendants denied the existence of an easement over an 81-foot-long property adjacent to and east of plaintiff Goodman's lot. However, defendants concede plaintiffs have an easement over the 125-foot-long property located between the disputed area and the lot of plaintiffs Dawsons.³ Defendants' affidavits state that defendants purchased the disputed area in 1994. After the purchase, defendants cleaned up the debris and constructed a bulkhead and a pier on the disputed area. Defendants observed nobody had used the disputed area, though occasionally some walked on it.

Plaintiffs moved for summary judgment. The trial court granted plaintiffs' motion as to liability and ordered defendants to remove the structures in the disputed area but reserved ruling on the issue of money damages.

The issue on appeal is whether the evidence undisputedly shows plaintiffs have an easement by grant or by prescription over the disputed land.

[1] A partial summary judgment on the issue of liability alone is interlocutory. N.C.G.S. § 1A-1, Rule 56(c) (2001). However, such an

3. Defendants submitted a non-certified survey map that labeled the boat ramp area as the 125-foot-long property between the disputed area and plaintiffs Dawsons' lot.

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interlocutory judgment is immediately appealable if it affects a substantial right of the appealing party if the appeal is delayed. *Development Corp. v. James*, 300 N.C. 631, 635, 268 S.E.2d 205, 209 (1980); *Liggett Group v. Sunas*, 113 N.C. App. 19, 23-24, 437 S.E.2d 674, 677 (1993). In the instant case, we hold that ordering the removal of substantial structures from real property affects defendants' substantial right, and therefore, the partial summary judgment is immediately appealable. *Development Corp.*, 300 N.C. at 636, 268 S.E.2d at 209 (mandatory injunction ordering the removal of concrete anchors placed on the plaintiffs' submerged lands affected the defendants' substantial right and was thus immediately appealable).

[2] Defendants argue factual issues exist as to whether plaintiffs have an easement by grant or by prescription over the disputed area and thus the trial court erred in granting plaintiffs' motion for summary judgment. We agree.

Easement by grant

Deeds of easement are construed according to the rules of construction of contract so as to ascertain the intention of the parties as gathered from the entire instrument at the time it was created. . . . “[W]hen an easement is created by express conveyance and the conveyance is ‘perfectly precise’ as to the extent of the easement, the terms of the conveyance control.”

. . .

. . . [W]hen the width of an easement is not specifically defined in the grant, . . . then the “previously undefined width is then established by the rule of reasonable enjoyment.” Under the doctrine of reasonable enjoyment, the width of an undefined easement is determined by considering the purpose of the easement and establishing a width necessary to effectuate that purpose.

Intermount Distrib'n, Inc. v. Public Serv. Co. of N.C. Inc., 150 N.C. App. 539, 542, 563 S.E.2d 626, 629 (2002) (quoting *Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991) and *Sunnyside Valley Irrigation District v. Dickie*, 43 P.3d 1277, 1281 (Wash. Ct. App. 2002), aff'd, 73 P.3d 369, 376 (Wash. 2003)).

In *Intermount*, the plaintiff acquired title to land that was subject to an easement granted in 1955 in favor of the defendant. *Id.* at

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539, 563 S.E.2d at 627. The easement agreement did not specify the width of the easement, but permitted the defendant “to maintain, construct, replace, change the size of, or lay one or more pipelines across the property for the transportation of natural gas and other materials that may be transported through a pipeline.” Shortly after obtaining the easement, the defendant laid an eight-inch-diameter gas pipeline across the land. In 1997, the defendant began to construct a second pipeline across the land. The plaintiff disputed the defendant’s right to do so under the easement. The trial court granted the plaintiff summary judgment, holding the easement was limited to eight inches. In reversing the trial court, this Court held that “[c]learly, the reasonableness of the amount of space needed to operate and maintain [the defendant’s] pipelines raises a question of fact that precludes summary judgment.” This Court remanded the case for a factual finding regarding the reasonableness of the amount of space needed to operate the defendant’s pipelines.

As in *Intermount*, the relative location of the easement in the instant case is known, but the precise width of the easement is not defined. Although the 1962, 1964, and 1968 deeds of plaintiffs Goodman, Keener, and Forsyths, respectively, expressly specified the ramp as the area subject to the easement, they noted only the relative location of the ramp (i.e., “between Lot No. 6 . . . and the lot of Carl Stanfield”). Plaintiffs Dawsons’ deed does not mention the precise location of the ramp, and the deeds of plaintiffs Moore and McMillens do not even mention the ramp. Of all the plaintiffs’ deeds, none indicated the geographical extent of the ramp. As a result, the width of the easement should be determined by the doctrine of reasonable enjoyment; that is, considering the purpose of the easement and establishing a width necessary to effectuate that purpose. *See id.* at 541, 563 S.E.2d at 629.

The deeds of plaintiffs Goodman, Keener, and Forsyths indicate that the purpose of the easement is to allow the grantees to use the ramp for fishing, swimming, and launching boats. However, the parties dispute the width necessary to effectuate that purpose. Plaintiffs argue that the 125-foot-long property, the only area defendants concede is subject to the easement, is too limited an area to accommodate the various activities of fishing, swimming, and launching boats. Defendants respond that “[v]irtually, all of the activities described in the original [grantors’] grants involve aquatic pursuits—fishing, swimming, boating—which must be accomplished in the water, not the land[; a] narrow water access is consistent with this intent.”

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Because of this disagreement between the parties, the reasonableness of the amount of space needed to effectuate that purpose raises a question of fact that precludes summary judgment. *See id.*

Easement by prescription

[3] Plaintiffs argue in the alternative that they have an easement by prescription over the disputed area. To establish an easement by prescription, a claimant must show the use of another's land: (1) is hostile and not permissive; (2) is open and notorious; (3) is continuous for twenty or more years; and (4) gives rise to a substantial identity of the easement. *Yadkin Valley Land Co., L.L.C. v. Baker*, 141 N.C. App. 636, 639, 539 S.E.2d 685, 688 (2000).

The use of another's land is presumed permissive. *Id.* To overcome this presumption, a claimant must prove a hostile use. *Id.* A hostile use is:

“a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.” . . . “A party can give notice to the true owner by ‘open and visible acts such as repairing or maintaining the way over [the true owner’s] land.’ ”

Id. at 639-40, 539 S.E.2d at 688 (alteration in original) (citations omitted). Since plaintiffs must show all the above elements of easement by prescription, the existence of a question of fact on just one element should lead to the denial of plaintiffs' motion for summary judgment. *See id.* at 639, 539 S.E.2d at 688.

In the instant case, the evidence is in conflict as to the use and as to whether the alleged use of the disputed area was or has been hostile and not permissive. Plaintiffs' supporting affidavits indicate they (and others in the community) have used the areas subject to the easement, including the disputed area, for fishing, boating, picnicking, parking boat trailers, and launching and removing boats from the water, and have mowed and maintained those areas. However, defendants' supporting affidavits state that nobody has used the disputed area, which had been full of debris before defendants' purchase and cleaning up of debris. Because a question of fact exists as to whether the disputed land was actively used, and, if so, whether the use was hostile, plaintiffs were not entitled to summary judgment based on an easement by prescription. *See id.*

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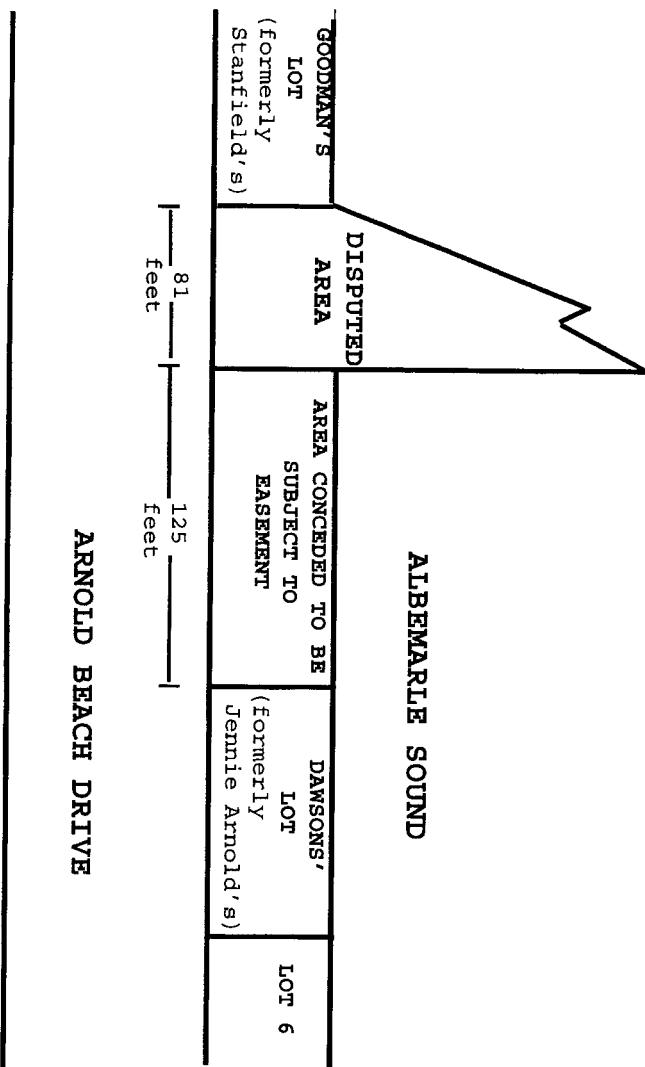
In their briefs to this Court, defendants contend that, assuming plaintiffs had an easement over the disputed area, defendants' construction over the area did not interfere with the easement and that plaintiffs had abandoned the easement by littering on it and not using it. Since we have held that a genuine issue of material fact exists as to whether plaintiffs have an easement over the disputed area, the issues of interference and abandonment are not addressed.

Reversed and remanded.

Judges McGEE and GEER concur.

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ILLUSTRATION

PALMER v. JACKSON

[161 N.C. App. 642 (2003)]

MARIA TERESA PALMER, GUARDIAN *AD LITEM* FOR J. CARMEN FUENTES,
EMPLOYEE/PLAINTIFF v. W. BRENT JACKSON d/b/a JACKSON'S FARMING COMPANY,
EMPLOYER, AND COMPANION PROPERTY & CASUALTY, CARRIER/
DEFENDANTS

No. COA03-16

(Filed 16 December 2003)

1. Workers' Compensation—attendant care—reasonable rate of compensation

The Industrial Commission did not err in a workers' compensation case by determining that \$7.00 per hour was a reasonable rate of compensation for nurses in plaintiff's community in Mexico, because there was competent evidence to support such a finding including testimony of a physician in Mexico who conducted an investigation into cost of nursing care in the town nearest plaintiff's home and thereafter concluded that the amount was reasonable.

2. Workers' Compensation—quality of care—rate of compensation

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's father and sister were entitled to \$7.00 per hour for attending to plaintiff's needs even though neither had formal medical training, because: (1) even defendants' medical case manager vouched for the quality nursing care that was provided by these two individuals; and (2) contrary to plaintiff's contention, by not offering any additional funds, the Commission considered and implicitly rejected plaintiff's request for additional overtime compensation.

3. Workers' Compensation—retroactive attendant care—interest

The Industrial Commission did not err in a workers' compensation case by awarding interest on retroactive attendant care, because: (1) the full Commission has authority to award interest for plaintiff's outstanding medical expenses; and (2) the fact that the money is going directly to the two relatives who are taking care of a worker in a vegetative state, rather than to the worker himself, does not preclude the full Commission from awarding interest.

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4. Workers' Compensation— wrongf ul defense of claim without reasonable grounds—attorney fees

Although plaintiff contends the Industrial Commission erred in a workers' compensation case by failing to address whether defendants wrongfully defended the claim for retroactive care without reasonable grounds, this claim is unfounded because the Commission considered plaintiff's claim and awarded those fees, including attorney fees, which it believed to be appropriate.

Appeal by plaintiff and defendants from opinion and award entered 9 August 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 October 2003.

Massengill & Bricio, P.L.L.C., by Francisco J. Bricio; and White & Allen, P.A., by Thomas J. White, III, for plaintiff appellant-appellee.

Morris York Williams Surles & Barringer, L.L.P., by John F. Morris and Keith B. Nichols, for defendant appellants-appellees.

MCCULLOUGH, Judge.

On 10 July 1998, J. Carmen Fuentes (Carmen) suffered a compensable heatstroke. Since then, Carmen has been in a coma or persistent vegetative state and requires twenty-four-hour nursing care. Carmen returned to Mexico, and his father, Porfirio Fuentes (Porfirio), and his sister, Yolanda Fuentes (Yolanda), provided around-the-clock care from 4 November 1998 to 15 June 1999 and from 27 June 1999 to 13 May 2001. Yolanda provided twelve hours of care during the day, and Porfirio provided twelve hours of care at night. From 14 May 2001 to approximately 28 May 2001, Carmen received twelve hours of daytime care each day from two nurses hired by Porfirio. Each nurse worked six hours per day.

Porfirio and Yolanda have provided outstanding care for Carmen. The defendants' own medical care manager describes this care as "superb" and indicates that it is better than the level that would be provided in a professional facility in the United States. In fact, when Carmen developed an ulcer, the problem subsided because of the care he received from his family. Each day, Yolanda and Porfirio did numerous things for Carmen. They fed him, changed his diapers, cleaned the feeding tube to his stomach, aspirated him, rolled him over periodically to prevent bed sores, gave massages, took him out

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in his wheelchair, administered medication, and provided physical therapy. Yolanda and Porfirio also purchased medical supplies, food, and diapers on a regular basis. The Full Commission found that plaintiff needed twenty-four-hour nursing care and ordered defendants to pay for all medical care he needed. Defendants assigned Bruce Holt to provide case management services. He testified that despite the Full Commission's mandate requiring defendants to provide twenty-four-hour nursing care, defendants never asked him to obtain twenty-four-hour nursing care. Holt also testified that plaintiff's counsel requested twenty-four-hour nursing care on the following occasions: 30 October 2000, 1 November 2000, 1 March 2001, and 6 March 2001.

Holt testified that he tried to find suitable nursing services for Carmen. In an e-mail correspondence from 1 November 2000, Holt reported, "I have conducted research into the system of medical care in Mexico, specifically in the area [in] which Mr. Fuentes resides. I have learned, if such trained attendant care is available, it has to come from the nea[rest] hospital . . . As you know, Mr. Fuentes lives 2.5 hours away from San Luis Potosi, the nearest hospital to my knowledge." Holt further indicated there was virtually no chance of having a trained individual travel that far for this purpose despite any financial incentives.

In December of 2000, Holt spoke to Dr. Silvestre Carrizales Navarrete at his office in Mexico. At that time, Dr. Navarrete gave a very rough estimate of the cost of nursing care in the town nearest to Carmen's home. However, upon further investigation, the doctor was able to give a more accurate figure. He determined that government nurses made 8,000 pesos per month and worked 37-1/2 hours per week. The nurses did basic work including: minor treatment, injections, and vaccines. However, Dr. Navarrete indicated that the conditions of Carmen's home would make the nurses' job harder and more stressful. Based on the nature of the work, the conditions in which the nurses would have to work, and the rate charged by the two nurses who were willing to take care of Carmen, Dr. Navarrete concluded that the rate of \$7.00 per hour is "very correct because as a doctor also I know what it's like to work with that type of patient."

Holt was unable to secure any nursing care for Carmen at any rate of compensation. With defendant carrier's permission, Holt presented a plan to address care for Carmen. It included setting up an account for Yolanda in Cardenas, arranging to have funds for atten-

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dant care wired to this account, supplying names of the trained individuals Dr. Navarrete mentioned to Yolanda and Porfirio, and having Yolanda and Porfirio pay for attendant care as they saw fit.

In response, plaintiff's attorney contacted Dr. Navarrete and asked him to locate nurses who would be willing to care for Carmen. Dr. Navarrete did find two nurses who were willing to work. These nurses contacted Holt and indicated that they were willing to work from Monday through Saturday from 8:00 in the morning to 8:00 in the evening (six hours for each nurse) at a rate of \$7.00 per hour. This information was passed on to defendant carrier, and defendant carrier never mentioned its refusal to use the nurses Dr. Navarrete identified.

One of these nurses, Gloria de Leon, confirmed that she and her colleague, Julieta Segura, planned to charge \$7.00 per hour. She also denied Holt's suggestion that plaintiff's counsel told her how much to charge. For approximately two weeks, Porfirio paid de Leon and Segura a total of \$1,008.00 for two weeks of nursing care at the rate of \$7.00 per hour.

Porfirio and Yolanda have provided over 22,000 hours of care, but defendant carrier has only paid \$4,000 to Porfirio and has made no payments to Yolanda. In its opinion and award entered 9 August 2002, the Full Commission awarded plaintiff the following:

1. The defendants shall pay Yolanda Fuentes for attendant care she has rendered to J. Carmen Fuentes at the reasonable rate of \$7.00 per hour for the hours she has worked plus interest at the legal rate set out in N.C. Gen. Stat. §24-1 until paid. This amount is subject to the attorney fee awarded in paragraph 6.
2. The defendants shall pay Porfirio Fuentes for attendant care he has rendered to J. Carmen Fuentes at the reasonable rate of \$7.00 per hour for the hours he has worked plus interest at the legal rate set out in N.C. Gen. Stat. §24-1 until paid. This amount is subject to the attorney fee awarded in paragraph 6.
3. Defendants do not dispute that they owe Yolanda Fuentes \$3.00 per hour for attendant care. Should defendants appeal this Opinion and Award, notwithstanding the appeal they SHALL IMMEDIATELY pay to Yolanda Fuentes the undisputed amount of \$3.00 per hour for the care she has rendered plus interest at the legal rate set out in N.C. Gen. Stat. §24-1 until paid. N.C. Gen. Stat. §86.1.

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4. Defendants do not dispute that they owe Porfirio Fuentes \$3.00 per hour for attendant care. Should defendants appeal this Opinion and Award, notwithstanding the appeal they SHALL IMMEDIATELY pay to Porfirio Fuentes the undisputed amount of \$3.00 per hour for the care he has rendered plus interest at the legal rate set out in N.C. Gen. Stat. §24-1 until paid. N.C. Gen. Stat. §86.1.

5. For future care, defendants shall pay Yolanda Fuentes, Porfirio Fuentes, or any qualified person the reasonable rate of \$7.00 per hour. This amount is not subject to an attorney fee.

6. The defendants shall pay to the plaintiff's counsel a fee equal to twenty-five percent of the lump sum amount retroactively paid for attendant care for attorney's fees.

Both sides appealed. On appeal, defendants claim that the Industrial Commission erred by (1) determining that \$7.00 per hour was a reasonable rate of compensation for nurses in Mexico, (2) concluding that Porfirio and Yolanda Fuentes were entitled to \$7.00 per hour for past and future medical care, and (3) awarding interest on retroactive attendant care. Plaintiff argues that the Industrial Commission erred by failing to determine whether defendants contested plaintiff's claim for retroactive care without reasonable grounds.

The standard of review in this case is limited to "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 Full Commission is the "sole judge of the weight and credibility of the evidence[.]" *Id.* An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* If there is any evidence at all, taken in the light most favorable to the plaintiff to support it, the finding of fact stands, even if there is substantial evidence going the other way. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'y denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). With these principles in mind, we consider the case before us.

PALMER v. JACKSON

[161 N.C. App. 642 (2003)]

I. Defendants' Assignments of Error

[1] Defendants argue that the Commission erred in determining that \$7.00 per hour was a reasonable rate of compensation for nurses in plaintiff's community in Mexico. In particular, defendants take issue with the following finding of fact:

24. In light of the stressful conditions encountered by a nurse caring for a patient in his rural home, the difficulty and extent of care required by a patient in a persistent vegetative state, as well as the customary rate of compensation received by a nurse in a government clinic who performs much less difficult work in better conditions, the reasonable rate of compensation received by a nurse in J. Carmen Fuentes' community is \$7.00 per hour.

We conclude that there is competent evidence to support the Commission's finding in this regard. A physician in Mexico, Dr. Silvestre Carrizales Navarrete, conducted an investigation into the cost of nursing care in the town nearest to Carmen's home. The doctor also estimated the rate nurses in Mexico should be paid to take care of Carmen. Dr. Navarrete concluded that nurses who would have to take care of Carmen in his rural home would have more difficult work than government nurses who earn 8,000 pesos per month. He explained:

[T]o go take care of—in your own vehicle to do something a lot more and a lot different than what a regular nurse would do that works for the government that makes 8,000 pesos, I think it's a lot harder and it's much more stressful. Example, there is no bathroom there. They don't have a floor there; it's concrete. The conditions of their home, I mean, I think all of that stuff should be taken into consideration and if you ask me for my opinion the conditions there are very hard.

Similarly, when comparing ordinary nursing to working with a patient who is in a persistent vegetative state, Dr. Navarrete stated, "It's just totally different." Finally, Dr. Navarrete did indicate that \$7.00 per hour was a reasonable rate of compensation. He concluded that the rate was "very correct because as a doctor also I know what it's like to work with that type of a patient." Since there is competent evidence to support finding of fact 24, this assignment of error is overruled.

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[2] Defendants also contend that Porfirio and Yolanda are not entitled to \$7.00 per hour because they have no formal medical training. They object to the following finding of fact:

25. Based on the limited evidence presented regarding the hourly rate paid to nurses in plaintiff's community, the undersigned find \$7.00 an hour to be an appropriate hourly rate for Porfirio Fuentes and Yolanda Fuentes. Porfirio Fuentes and Yolanda Fuentes have provided superb care for the plaintiff and that the plaintiff is in better condition under their care than he was when he was at UNC.

There is competent evidence to support the Commission's finding on this issue. By all accounts, Porfirio and Yolanda are doing an admirable job in caring for their ailing relative. Porfirio testified to some of the things he and Yolanda do for Carmen each day. They feed him (using a feeding tube), change his diapers, bathe him, take his blood pressure, and clean the feeding tube and the tracheotomy. Even defendants' medical case manager, Bruce Holt, vouched for the quality nursing care Porfirio and Yolanda are providing.

Q. Thank you. You previously testified that the care that Porfirio and Yolanda have provided to Carmelo has been superb, is that correct?

A. That is true, sir.

Q. Can you more fully describe the quality of care he's received?

A. To be—to be quite honest, I admire—I'm—I mean I'm in awe of the care that they have provided to Mr. Fuentes. Going down there . . . I was expecting to see a horror story, and it was—it was a hundred and eighty degrees opposite. . . . They have done a wonderful job, a superb job, in fact, in excess of what I've seen in many facilities with fully-staffed facilities basically.

Since there is competent evidence in the record supporting finding of fact 25, this assignment of error is overruled.

While plaintiff generally agrees with the Commission's determination of the hourly rate, plaintiff contends that the Commission erred by failing to consider the issue of overtime compensation. We disagree. As we have noted, there was competent evidence in the record to support the Commission's finding that \$7.00 per hour is an

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appropriate rate for the nursing care provided by Porfirio and Yolanda Fuentes. In making this determination, the Commission relied on competent evidence in the record. By not offering any additional funds, the Commission considered and implicitly rejected plaintiff's request for additional overtime compensation.

[3] In their final assignment of error, defendants contend that the Industrial Commission improperly awarded interest on retroactive attendant care.

N.C. Gen. Stat. § 97-86.2 (2001) states:

In any workers' compensation case in which an order is issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in G.S. 24-1. If interest is paid it shall not be a part of, or in any way increase attorneys' fees, but shall be paid in full to the claimant.

In interpreting this statute, this Court has previously held that the Industrial Commission may require a defendant to pay interest on plaintiff's outstanding medical expenses. *Childress v. Trion, Inc.*, 125 N.C. App. 588, 590-92, 481 S.E.2d 697, 698-99, *disc. review denied*, 346 N.C. 276, 487 S.E.2d 541 (1997). Defendants argue that *Childress* is distinguishable from the case at bar because in the present case, the Full Commission awarded benefits directly to the family members who are taking care of plaintiff, instead of plaintiff himself. We do not believe that this distinction is persuasive. The Full Commission has the authority to award interest for plaintiff's outstanding medical expenses. In this case, the fact that the money is going directly to the two relatives who are taking care of a worker in a vegetative state, rather than the worker himself, does not preclude the Full Commission from awarding interest. This assignment of error is overruled.

II. Plaintiff's Assignment of Error

[4] Plaintiff contends that the Commission failed to address whether defendants wrongfully defended the claim for retroactive care without reasonable grounds. This claim is unfounded as the Commission's award addresses attorney's fees:

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6. The defendants shall pay to the plaintiff's counsel a fee equal to twenty-five percent of the lump sum amount retroactively paid for attendant care for attorney's fees.

It is apparent that the Commission did consider plaintiff's claim and awarded those fees which it believed to be appropriate. This assignment of error is unfounded.

We have reviewed all other assignments of error and found them to be without merit. Thus the opinion and award of the Full Commission is

Affirmed.

Judges TYSON and BRYANT concur.

IN RE: BARBARA MARIE DESIREE HOWELL, DOB: 6-30-1995, A MINOR JUVENILE

No. COA03-85

(Filed 16 December 2003)

1. Trials— poor quality of audio recording—motion for new trial

Respondent mother is not entitled to a new trial in a termination of parental rights case based on the poor quality of the audio recording of portions of the termination hearing, because respondent failed to demonstrate any specific affirmative showing that error was committed in the unintelligible portions of the recording in order to overcome the presumption of regularity in a trial.

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

Although respondent mother contends the trial court did not have jurisdiction over her since she alleges that no summons was issued to or served on her in regard to the petition to terminate her parental rights as required by N.C.G.S. §§ 7B-1106 and 7B-1102, this assignment of error is waived because: (1) respondent failed to object, by motion or otherwise, under N.C.G.S. § 1A-1, Rule 12 to either lack of personal jurisdiction over her or insufficiency of process or service of process at any

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point prior to or during the termination hearing; (2) respondent made a general appearance at the adjudicatory hearing and at the dispositional hearing; (3) there was no evidence that respondent raised these defenses in her answer or pre-answer motion; and (4) respondent agreed at the termination hearing that service of process was proper.

3. Termination of Parental Rights— best interests of child— abuse of discretion standard

The trial court did not abuse its discretion in a termination of parental rights case by determining that the minor child's best interests would be served by terminating respondent mother's parental rights and allowing the minor child to be adopted by the foster parents who had cared for her since three weeks after her birth, because: (1) respondent willfully left the minor child in foster care for more than twelve months without showing that reasonable progress had been made in correcting the conditions which led to the child's removal; (2) respondent failed to provide any verification of required substance abuse treatment; (3) respondent failed to fulfill the requirements of gaining employment and submitting to random alcohol and drug screens; (4) respondent failed to maintain independent and stable housing and failed to assist in determining the child's paternity; (5) respondent was provided with forty-one visitation opportunities and only visited thirteen times where she often arrived late, left early, and failed to engage in activities with the child; (6) respondent never provided proof that she attended required anger management treatment; (7) respondent never provided any financial support during the entire six years that the child remained in foster care; and (8) respondent continued to consume alcohol until nearly five weeks prior to the termination proceeding and consumed alcohol between court sessions during the termination proceeding.

Appeal by respondent from judgment entered 13 June 2002 by Judge James A. Jackson in Gaston County District Court. Heard in the Court of Appeals 12 November 2003.

David A. Perez, for petitioner-appellee Gaston County Department of Social Services.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for respondent-appellant Kimberly Nicole Howell Jackson.

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TYSON, Judge.

Kimberly Nicole Howell Jackson (“respondent”) appeals from a judgment that terminated her parental rights. We affirm.

I. Background

On 25 July 1995, the Gaston County Department of Social Services (“GCDSS”) filed a juvenile petition alleging that respondent’s minor child, Barbara Marie Desiree Howell (“Barbara”), was a neglected child. GCDSS assumed legal custody of Barbara. An adjudication hearing was held on 25 September 1995. In its adjudication order, the trial court found Barbara to be “neglected” within the meaning of N.C. Gen. Stat. § 7A-517(21), in that Barbara did not receive proper care, supervision, or discipline from respondent. The trial court further found that Barbara tested positive for cocaine at birth and that respondent was homeless, a substance abuser, and exhibited incoherent and bizarre behavior. The trial court found respondent had a history of mental health treatments. On its own motion, the court also found Barbara to be “dependent” within the meaning of N.C. Gen. Stat. § 7A-517(13).

A dispositional hearing was held on 6 November 1995. Respondent was ordered to complete certain requirements to regain custody of Barbara. These requirements included: (1) obtaining a substance abuse evaluation, (2) receiving anger management treatment, (3) providing proper care and supervision for Barbara, and (4) cooperating in establishing paternity of Barbara.

Barbara remained in the legal and physical custody of GCDSS for over six years until the judgment terminating respondent’s parental rights was filed on 13 June 2002. Respondent testified that she no longer used illegal drugs, that she continued to drink, but that her drinking was not a problem even though she was a recovering alcoholic.

Prior to the termination hearing, respondent had never provided GCDSS with any proof that she had participated in a substance abuse treatment program or an anger management program as ordered. Respondent was able to work and married to a man who had earned income of up to \$5,000.00 per month, but never provided any financial assistance to Barbara during her six years in foster care.

From 8 April 1999 until visitation was ceased on 28 November 2000, respondent was afforded forty-one visitation opportunities with

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Barbara. Respondent attended only thirteen of these visits. Respondent arrived late and left early during some of these visits and involved herself in one activity while Barbara was involved in another. Respondent attributes her failure to attend more visitations and leaving early to having more than six social workers assigned to her case. Lack of transportation from her home in Cleveland County to Gaston County also caused communication difficulties and problems scheduling visitation.

Respondent's son, Barbara's half-brother, was twice-removed from but returned to respondent's care. Her son was removed in August of 2000 after a report was filed with the Cleveland County Department of Social Services ("CCDSS") that respondent and her son were riding in a vehicle where the driver was charged with DWI and where respondent was also very intoxicated. Respondent's son was again removed from her care after CCDSS received a report that respondent had threatened a farm worker with a knife after consuming wine.

CCDSS, however, also reported that respondent had maintained her supervised visitation schedule with her son and that she had enrolled and completed a forty-hour intermediate outpatient treatment program. CCDSS also reported that respondent completed an anger management program and that alcohol was never detected in over ninety in-home contacts.

On 21 October 1999, a psychological evaluation of respondent was ordered. Dr. William H. Varley ("Dr. Varley") concluded that Barbara had been under the foster mother's care since she was three-weeks-old. Dr. Varley testified that Barbara had attached and bonded to her foster mother. Dr. Varley also testified respondent's long-term instability and substance abuse had compromised her parenting capacity. The trial court found it to be in Barbara's best interests to terminate respondent's parental rights. Respondent appeals.

II. Issues

The issues are whether: (1) respondent should be granted a new trial due to the poor quality of the audio recording of portions of the termination hearing; (2) the trial court had jurisdiction over respondent or the termination hearing because no summons was issued to respondent in regards to the petition to terminate her parental rights as required by N.C. Gen. Stat. § 7B-1106; (3) the trial court had jurisdiction over respondent or the termination hearing as respondent

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was not served with the petition to terminate her parental rights pursuant to N.C. Gen. Stat. § 7B-1102; and (4) the trial court abused its discretion in determining that Barbara's best interests would be served by terminating respondent's parental rights.

III. Quality of Audio Recording

[1] Respondent contends that she should be granted a new trial due to the poor quality of portions of the audio recordings at the termination hearing. We disagree.

There is a presumption of regularity in a trial. *State v. Sanders*, 280 N.C. 67, 72, 185 S.E.2d 137, 140 (1971). In order to overcome this presumption, it is necessary that matters which constitute material and reversible error appear in the record on appeal. *Id.*

Before a new trial should be ordered, certainly enough ought to be alleged to show that error was probably committed. If defense counsel even suspect[s] [sic] error in the charge, they should set out in the record what the error is. If the solicitor does not object, theirs becomes the case on appeal. If he does object, the court could then settle the dispute. The appellate court would then have something tangible upon which to predicate a judgment. The material parts of a record proper do not include either the testimony of the witnesses or the charge of the court.

Id.

In *State v. Neely*, this Court considered an assignment of error in which a complete stenographic trial transcript was lacking. 26 N.C. App. 707, 708, 217 S.E.2d 94, 96 (1975). A partial transcript was prepared. *Id.* The direct examination of at least two witnesses, in addition to defendant's testimony, were not transcribed. *Id.* The defendant appealed and alleged errors which may have been committed in portions of the lost testimony. *Id.* This Court emphasized the presumption of regularity in a trial and indicated that specific error should have been set forth by the defendant in the record. *Id.* We concluded that mere allegations that error *may* have occurred was not sufficient for a reversal. *Id.* at 709, 217 S.E.2d at 97. We stated that "[a]bsent some specific, affirmative showing by the defendant that error was committed, we will uphold the conviction because of the presumption of regularity in a trial." *Id.*

Respondent sets out numerous portions of the transcript of the termination hearing that are unintelligible, but cites no specific

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instances of alleged reversible error committed by the trial court in these omitted portions. Respondent argues these portions are unintelligible and that a new trial should be granted. Respondent has failed to demonstrate any “specific, affirmative showing” that error was committed in the unintelligible portions of the transcript to overcome the presumption of regularity. *Id.* Respondent’s assignment of error is overruled.

IV. Failure to Issue Summons and Serve Petition

[2] Respondent contends that the trial court had no jurisdiction over her or the termination hearing. She asserts no summons was issued in the petition to terminate her parental rights and she was not served with the petition to terminate parental rights. As issues three and four are similar, we address them together.

Rule 12 of the North Carolina Rules of Civil Procedure requires that certain defenses must be raised by a pre-answer motion or in a responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 12(h) (2001). Failure to do so waives these defenses. *Id.* Among the defenses that must be raised are jurisdiction over the person, insufficiency of process, and insufficiency of service of process. *Id.* Our Supreme Court has held that a general appearance of a party in an action gives the court jurisdiction over the appearing party even though no service of a summons is shown. *Harmon v. Harmon*, 245 N.C. 83, 86, 95 S.E.2d 355, 358-59 (1956).

Respondent failed to object, by motion or otherwise under Rule 12 of the North Carolina Rules of Civil Procedure, to either a lack of personal jurisdiction over her or insufficiency of process or service of process at any point prior to or during the termination hearing. Respondent made a general appearance at the adjudicatory hearing and at the dispositional hearing. Respondent waived these issues as defenses. The trial court gained jurisdiction through respondent’s waiver. Respondent appeared in court on 28 August 1995, signed an affidavit of indigency, and requested that counsel be appointed to her. Respondent was represented by counsel at the adjudicatory hearing on 25 September 1995. Both respondent and her counsel were present at the dispositional hearing on 6 November 1995.

Respondent filed and served upon petitioner in the dispositional hearing an “Answer to Petition to Terminate Parental Rights,” which was verified by respondent. Respondent failed to assert the defenses of lack of personal jurisdiction and insufficiency of process or serv-

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ice of process. There is no evidence that respondent raised these defenses in a pre-answer motion. These issues were raised for the first time by respondent's counsel on appeal. In *Harmon*, our Supreme Court stated that "[t]he filing of an answer is equivalent to a general appearance, and a general appearance waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons." *Id.* at 86, 95 S.E.2d at 359.

Respondent agreed at the termination hearing that service of process was proper. Based on this agreement, the trial court entered a ruling that "the parties agree that service was properly executed pursuant to that petition [to terminate parental rights]"

Respondent failed to raise the defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process in either her answer or in a pre-answer motion in the termination proceeding and waived these defenses. N.C. Gen. Stat. § 1A-1, Rule 12(h) (2001). Respondent made a general appearance in the termination hearing and prior hearings and filed an answer to the termination petition. The trial court properly exercised jurisdiction over respondent. *Harmon*, 245 N.C. at 86, 95 S.E.2d at 359. Respondent's assignments of error are overruled.

V. Abuse of Discretion in Determining Best Interests

[3] Respondent contends that the trial court abused its discretion in determining at the dispositional stage that Barbara's best interests would be served by terminating respondent's parental rights. We disagree.

A termination of parental rights proceeding is a two-stage process. At the adjudication stage, the trial court determines whether grounds exist to warrant a termination of parental rights. N.C. Gen. Stat. § 7B-1111 sets forth the grounds upon which parental rights can be terminated. A finding of any one of the separately enumerated grounds under N.C. Gen. Stat. § 7B-1111 that is supported by clear, cogent, and convincing evidence is sufficient to terminate. *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233-34 (1990). Once the court determines that one statutory ground exists, it moves to the dispositional stage. At the dispositional stage, the court is given discretion to terminate parental rights consistent with the best interests of the child. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984).

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After review of all the evidence, the trial court decided that it was in Barbara's best interests to terminate respondent's parental rights. Barbara had been in the custody of GCDSS and in foster care since she was three weeks and five days old and had remained there over six years. The trial court concluded that respondent had willfully left Barbara in foster care for more than twelve months without respondent showing to the satisfaction of the court that reasonable progress had been made in correcting the conditions which led to Barbara's removal. Respondent was required to obtain substance abuse treatment, but failed to provide GCDSS with any verification of treatment. Respondent was required to be employed and to submit to random alcohol and drug screens, but failed to fulfill these requirements. Respondent also failed to maintain independent and stable housing and failed to assist in determining the paternity of Barbara.

On 13 May 1997, an order amended the long-term goal of reunification to adoption based on respondent's failure to fulfill the requirements for return of Barbara to her custody. GCDSS continued to deliver services to respondent with the purpose of reunifying respondent and Barbara. Respondent was provided forty-one visitation opportunities and only visited thirteen times, where she often arrived late, left early, and failed to engage in activities with Barbara. Respondent never provided GCDSS with proof that she attended required anger management treatment or substance abuse treatment. Respondent never provided any financial assistance during the entire six years that Barbara remained in foster care. Respondent continued to consume alcohol until nearly five weeks prior to the termination proceeding and consumed alcohol between court sessions during the termination proceeding.

This Court, in *In re Tate*, stated,

[t]he decision to terminate parental rights is often a heart-wrenching one for the court. On one hand, the court considers the interests of the parents who, despite shortcomings, have often formed a bond with his or her child. On the other hand, the court must consider the best interests of the child.

67 N.C. App. 89, 96, 312 S.E.2d 535, 540 (1984). Any one of the above grounds found by the trial court is supported by clear, cogent, and convincing evidence and is sufficient to terminate parental rights. The trial court did not abuse its discretion in deciding Barbara's best interests would be served by terminating respondent's parental rights and allowing Barbara to be adopted by the foster parents who had

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cared for her since three weeks after her birth. *In re Taylor*, 97 N.C. App. at 64, 387 S.E.2d at 233-34. Respondent's assignment of error is overruled.

VI. Conclusion

Respondent failed to show that reversible error was committed by the trial court in the unintelligible portions of the audio recording of the dispositional hearing. Respondent waived her right to assert the defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process. Respondent failed to show that the trial court abused its discretion in determining that Barbara's best interests would be served by terminating respondent's parental rights. The order of the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

THE ESTATE OF GILBERT BARBER, BY AND THROUGH ITS ADMINISTRATORS, JESSIE BARBER AND CALVERT STEWART; AND JESSIE BARBER AND CALVERT STEWART, AS PARENTS OF THE DECEDENT, PLAINTIFFS v. GUILFORD COUNTY SHERIFF'S DEPARTMENT AND THOMAS GORDY, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA03-146

(Filed 16 December 2003)

1. Specific Performance— enforcement—original action dismissed

The trial court erred by ordering specific performance of a settlement agreement based upon a motion for sanctions where the moving party had dismissed the original action after the agreement was signed. After taking a voluntary dismissal with prejudice, the moving party (defendant) could only institute a new action or file a motion to set aside the dismissal.

2. Civil Procedure— voluntary dismissal—proceeding under Rule 60(b)—motion to set aside

A voluntary dismissal without prejudice is a "proceeding" under Rule 60(b), and the trial court should have ruled on defend-

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ant's motion to set aside his voluntary dismissal of a counter-claim pursuant to Rule 60(b) on the basis of misrepresentation and misconduct by plaintiffs.

3. Constitutional Law— Free Speech—settlement agreement—voluntary waiver

A settlement agreement limiting the things that wrongful death plaintiffs could say constituted a voluntary, knowing, and intelligent waiver of the First Amendment right to free speech.

4. Arbitration and Mediation— mediated settlement agreement—violation—sanctions—authority

The trial court erred by imposing sanctions on a party who violated a settlement agreement. The Mediation Rules require attendance at a conference, but do not require that a party abide by the terms of an agreement entered into at a mediated settlement conference where the agreement is not entered as a consent judgment of the court.

Appeal by plaintiffs Jessie Barber and Calvert Stewart from order entered 15 October 2002 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 29 October 2003.

Lawyers' Committee for Civil Rights Under Law, by Anita S. Hodgkiss, for plaintiffs-appellants.

Moss, Mason & Hill, by Matthew L. Mason and William L. Hill, for defendant-appellee Thomas Gordy.

TYSON, Judge.

Jessie Barber and Calvert Stewart ("plaintiffs") appeal from an order imposing sanctions on plaintiffs and specifically enforcing a settlement agreement between plaintiffs and Thomas Gordy ("defendant").

I. Background

On 15 July 2002, plaintiffs and defendant attended a mediated settlement conference. The mediated settlement conference concluded after plaintiffs and defendant signed a settlement agreement. The settlement agreement contained, among others, the following provisions:

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2. Mr. Stewart and Ms. Barber shall focus their public discussion of the death of their son upon the institutions involved and the people heading those institutions and their immediate advisers—not upon Deputy Gordy;
3. Mr. Stewart and Ms. Barber agree not to use the word “murder” with respect to Deputy Gordy in the future and further agree that neither the results of the Sheriff Department’s investigation nor their discovery in this action provide a basis for accusing Deputy Gordy of committing a crime.

Paragraph three was included in the settlement agreement at the specific request of the plaintiffs. Plaintiffs and their attorney signed the settlement agreement, as did defendant and his attorney. The settlement agreement did not provide that it would be entered as a consent judgment by the court. To comply with the settlement agreement, defendant dismissed his counterclaims with prejudice on 19 July 2002. Later that day, plaintiffs called a press conference at the Guilford County Courthouse. Plaintiff Barber stated that she did not intend to abide by the settlement agreement. She publicly stated, “Pysche! I lied. I will not honor it” and also called defendant a “murderer.” Plaintiff Stewart also spoke at the press conference and called defendant various names, including “assassin,” “executioner,” and “butcher.” Plaintiffs also stated they would not apologize to defendant as they had agreed in the settlement agreement.

On 26 July 2002, defendant filed a motion for sanctions against plaintiffs for violations of the settlement agreement and, in the alternative, to set aside defendant’s entry of dismissal. The trial court granted defendant’s motion for sanctions and ordered the settlement agreement specifically enforced. The court did not rule on defendant’s motion to set aside the defendant’s entry of dismissal with prejudice of his counterclaims. Plaintiffs appeal.

II. Issues

The issues are whether: (1) the trial court erred in approving and adopting the terms of the settlement agreement and in ordering specific performance of that settlement agreement; (2) the settlement agreement is unenforceable because it violates the freedom of speech guaranteed by the First Amendment to the United States Constitution and Article I and XIV of the North Carolina Constitution by placing a prior restraint on plaintiffs’ speech; and (3) the trial court exceeded its authority in imposing sanctions on plaintiffs.

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III. Specific Performance

[1] Plaintiffs contend that the trial court erred in ordering them to specifically perform all terms in the settlement agreement.

This Court, in *State ex rel. Howes v. Ormond Oil & Gas Co.*, stated “it is well-settled in North Carolina that compromises and settlements of controversies between parties are favored by our courts.” 128 N.C. App. 130, 136, 493 S.E.2d 793, 796 (1997) (citing *PCI Energy Services, Inc. v. Wachs Technical Services, Inc.*, 122 N.C. App. 436, 439, 470 S.E.2d 565, 567 (1996)).

We explained that “[a]lthough our courts have not laid down a precise method for the enforcement of such agreements, the general rule in other jurisdictions is that a party may enforce a settlement agreement by filing a voluntary dismissal of its original claim and then instituting another action on the contract, or it may simply seek to enforce the settlement agreement ‘by petition or motion in the original action.’” *Id.* at 136, 493 S.E.2d at 796-97 (emphasis supplied) (quoting *Beirne v. Fitch Sanitarium, Inc.*, 167 F. Supp. 652, 654 (S.D.N.Y. 1958)).

Instead of instituting an action to enforce a compromise agreement, a [party] who has already commenced an action on an antecedent claim may seek to enforce a [compromise] which was entered into subsequently to the commencement of the action, and he may have the compromise enforced simply by moving for judgment in accordance with the terms of the compromise. Even where a [party] is seeking to obtain some form of equitable relief, rather than a payment of money, he may obtain a judgment in accordance with the terms of a compromise agreement and may thereby obtain whatever performance the [other party] agreed to in the compromise agreement.

Id. at 136-37, 493 S.E.2d at 797 (quoting 15 Am. Jur. 2d *Compromise and Settlement* § 38). This Court held that the trial court had the authority to enter specific performance since the parties and their action were still pending before the court when the State sought specific performance of the agreement on the State’s original action. *Id.*

Here, plaintiffs originally brought suit against defendant and the Guilford County Sheriff’s Department for violations of North Carolina constitutional rights and wrongful death. Defendant filed counterclaims against plaintiffs alleging defamation, abuse of

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process, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiffs subsequently took a voluntary dismissal of their claims without prejudice.

Defendant's claims remained before the court, which ordered the parties to attend a pretrial mediated settlement conference in order to settle defendant's claims. A settlement was reached between the parties. On 19 July 2002, defendant voluntarily dismissed his counterclaims with prejudice after the settlement agreement was executed. Later that day, plaintiffs violated the settlement agreement by referring to defendant as a "murderer" at a public rally.

As stated above, defendant had two options in deciding how to specifically enforce the terms of the settlement agreement. Defendant could: (1) take a voluntary dismissal of his original action and then institute a new action on the contract, or (2) seek to enforce the settlement agreement by petition or motion in the *original* action. *Id.* at 136, 493 S.E.2d at 796-97 (emphasis supplied). Defendant chose the former of these two options and voluntarily dismissed his claims against plaintiffs. Defendant asks this Court to affirm the trial court's order of specific performance of the settlement agreement through his motion for sanctions under the second option.

Once defendant voluntarily dismissed his claims with prejudice, the only options defendant had left were to either institute a new action on the settlement agreement itself or to file a motion to set aside the dismissal with prejudice of his counterclaims. Defendant no longer had the option of seeking to specifically enforce the settlement agreement in the original action because the original action had been dismissed with prejudice.

The trial court erred in ordering specific performance of the settlement agreement based upon defendant's motion for sanctions. We reverse the order of the trial court granting specific performance of the settlement agreement.

IV. Motion to Set Aside the Entry of Dismissal with Prejudice

[2] On 19 July 2002, after defendant voluntarily dismissed his counterclaims with prejudice to comply with the executed settlement agreement, plaintiffs breached the settlement agreement. Defendant filed a motion for sanctions and, in the alternative, to set aside the entry of dismissal of his counterclaims.

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The trial court held a hearing on these motions, granted defendant's motion for sanctions, and erroneously ordered the terms of the settlement agreement to be specifically performed. The trial court did not rule on defendant's motion to set aside the dismissal of his counterclaims.

Under N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2001), a plaintiff may voluntarily dismiss a suit by filing a notice of dismissal at any time before resting his case. The rule provides that dismissal is without prejudice, unless otherwise stated, and allows a plaintiff to commence a new action on the same claim within one year. *Carter v. Clowers*, 102 N.C. App. 247, 251, 401 S.E.2d 662, 664 (1991); *see also* N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2001). "A dismissal taken with prejudice, however, 'indicates a disposition on the merits, [and] is said to preclude subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication.'" *Id.* (quoting *Johnson v. Bollinger*, 86 N.C. App. 1, 8, 356 S.E.2d 378, 383 (1987).

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2001) states:

On motion and upon such terms as just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons . . . (3) Fraud . . . misrepresentation, or other misconduct of an adverse party . . .

"To proceed under Rule 60(b), however, requires an initial determination of whether a notice of dismissal constitutes a 'judgment, order or proceeding.'" *Carter*, 102 N.C. App. at 252, 401 S.E.2d at 665. This Court followed a United States District Court decision and held that a voluntary "dismissal can be considered a 'proceeding' thus allowing relief via Rule 60(b)." *Id.* (quoting *Noland v. Flohr Metal Fabricators, Inc.*, 104 F.R.D. 83, 85 (1984)). We explained that "[t]he purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments." *Id.* at 254, 401 S.E.2d at 666. "Procedural actions that prevent litigants from having the opportunity to dispose of their case on the merits are not favored." *Id.*

Here, defendant specifically requested the trial court to set aside his voluntary dismissal pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure on the basis of misrepresentation and misconduct by plaintiffs. The trial court granted sanctions and erroneously ordered the terms of the settlement agreement to be specifici-

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cally performed by plaintiffs. The court did not rule on defendant's motion to set aside.

A voluntary dismissal with prejudice is a "proceeding" under Rule 60(b). *Id.* at 252, 401 S.E.2d at 665. The trial court should have ruled on defendant's motion. We remand this portion of the court's order for a ruling on defendant's motion to set aside his dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b). In the event the trial court sets aside defendant's dismissal, defendant may assert a claim for breach of the settlement agreement in addition to his original claims and may seek specific performance and damages as remedies. *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E.2d 44, 53 (1952). If the trial court does not set aside defendant's dismissal, defendant is free to bring a new action for breach of the settlement agreement and seek specific performance and damages as remedies. *State ex rel. Howes*, 128 N.C. App. at 136, 493 S.E.2d at 796-97.

V. Prior Restraint on Speech

[3] Plaintiffs contend that the settlement agreement is unenforceable because it violates their freedom of speech by placing a prior restraint on their speech. We disagree.

The general rule is that prior restraints on speech are not *per se* unconstitutional, but there is a heavy presumption against its constitutional validity. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 43 L. Ed. 2d 448, 459 (1975). However, the law permits parties to knowingly and intelligently waive their constitutional rights. "The Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent." *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) (citing *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 31 L. Ed. 2d 124, 134 (1972)). The United States Court of Appeals for the Fourth Circuit has stated that "[t]he contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, and must not undermine the relevant public interest in order to be enforceable." *Lake James Fire Dep't, Inc. v. Burke County, N.C.*, 149 F.3d 277, 280 (4th Cir. 1998).

Here, plaintiffs offered no evidence to show that their First Amendment right to freedom of speech was not knowingly, voluntarily, and intelligently waived. Plaintiffs and their attorney agreed to and executed the mediated settlement agreement. Plaintiffs agreed to paragraph two and insisted on the inclusion of paragraph three,

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which specifically limited their speech regarding defendant. At the hearing on defendant's motion for sanctions, plaintiffs' attorney stated, "I'm not contesting the agreement or the validity of it or that it was voluntary." Plaintiffs offered no evidence that their First Amendment rights were not voluntarily, knowingly, or intelligently waived. This assignment of error is overruled.

VI. Sanctions

[4] Plaintiffs contend that the trial court erred by exceeding its authority in imposing sanctions on plaintiffs for bad faith actions at the mediated settlement agreement. We agree.

Trial courts have authority, pursuant to N.C. Gen. Stat. § 7A-38.1(g) (Mediation Rule 5), to impose "any appropriate monetary sanction" on a person required to attend a mediated settlement conference who fails to attend without good cause. N.C. Gen. Stat. § 7A-38.1(g) (2001). N.C. Gen. Stat. § 7A-38.1(g) does not expressly provide for sanctions under any other circumstances. In *Few v. Hammack Enterprises, Inc.*, however, this Court held that "[e]ven absent an express grant of authority, however, trial courts have inherent authority to impose sanctions for wilful failure to comply with the rules of court." 132 N.C. App. 291, 298, 511 S.E.2d 665, 670 (1999) (citing *Lee v. Rhodes*, 227 N.C. 240, 242, 41 S.E.2d 747, 749 (1947)). "Accordingly, the trial court has inherent authority to sanction a party for wilful failure to comply with the Mediation Rules." *Id.*

Here, plaintiffs complied with the Mediation Rules and attended the mediated settlement conference. Plaintiffs participated in the mediated settlement conference and ultimately reached an agreement with defendant. This agreement was reduced to writing and signed by the parties and their attorneys. Plaintiffs subsequently decided not to abide by the terms of the settlement agreement and violated it. The Mediation Rules do not require a party to abide by the terms of a settlement agreement entered into at a mediated settlement conference that is not entered as a consent judgment of the court. Further, nothing in N.C. Gen. Stat. § 7A-38.1(g) grants the trial court the authority to sanction a party who subsequently violates a settlement agreement that has not been incorporated into a consent judgment. *Id.* The trial court was without authority under N.C. Gen. Stat. § 7A-38.1(g) or its inherent authority to sanction plaintiffs for violating the terms of the settlement agreement. Defendant's remedy is to bring a new action on the settlement agreement or to seek relief

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in the present action if the trial court grants defendant's motion to set aside the dismissal. *State ex rel. Howes*, 128 N.C. App. at 136, 493 S.E.2d at 796-97. We reverse that part of the trial court's order imposing sanctions on plaintiffs.

VII. Conclusion

We affirm that portion of the trial court's order which holds that plaintiffs' waiver of their First Amendment rights was voluntarily, knowingly, and intelligently given. The trial court was without authority to impose sanctions on plaintiffs and to order plaintiffs to specifically perform the terms of the settlement agreement. We vacate those portions of the trial court's order. This action is remanded for a ruling on defendant's motion to set aside his dismissal with prejudice of his counterclaims pursuant to North Carolina Rules of Civil Procedure, Rule 60(b). *Carter*, 102 N.C. App. at 252, 401 S.E.2d at 665.

Affirmed in part, Vacated in part, and Remanded.

Judges MCCULLOUGH and BRYANT concur.

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No. COA02-1576

(Filed 16 December 2003)

Trusts— distribution of assets—summary judgment

The trial court did not err by denying plaintiff's motion for summary judgment and by granting summary judgment in favor of defendant bank in an action alleging that defendant breached its fiduciary duty as trustee by its distribution of the assets of two trusts so that the husband's trust assets were distributed to the wife's estate, combining them with the wife's trust assets, and distributing the combined trust assets along with the rest of the wife's estate as provided for in her will, instead of distributing to

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plaintiff all of the wife's trust assets, because: (1) a review of both trust instruments reveals an intent on each settlor's part that the assets of both trusts be available for the care and support of the surviving spouse, and the surviving spouse is allowed to control the ultimate disposition of the assets of both trusts; and (2) the wife survived her husband, did not disclaim any portion of the husband's trust assets, and exercised her general power of appointment in a validly drawn and executed will.

Appeal by plaintiff from judgment entered 27 February 2002 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 10 September 2003.

Epting & Hackney, by Steve Lackey and Joe Hackney, for plaintiff-appellant.

Newsom, Graham, Hedrick & Kennon, P.A., by Josiah S. Murray, III and J. Alan Campbell, for defendant-appellee.

ELMORE, Judge.

Plaintiff, Janice Taylor Davenport, appeals from judgment entered 27 February 2002 denying her motion for summary judgment and granting summary judgment in favor of defendant, Central Carolina Bank and Trust Company. For the reasons discussed herein, we affirm.

In February and March 1989, Louise C. Rightsell and her husband, Earl F. Rightsell, established an estate plan by executing various testamentary documents. The Rightsells were plaintiff's great-aunt and great-uncle. On 23 February 1989, Louise Rightsell and Earl Rightsell executed separate revocable management trust documents, thereby creating the Earl F. Rightsell Trust (Husband's Trust) and the Louise C. Rightsell Trust (Wife's Trust), with each naming defendant as trustee. Both the Husband's Trust and the Wife's Trust were subsequently amended on 14 March 1989, with defendant again named trustee in each instance.

Earl Rightsell died in 1989, survived by Louise Rightsell. Pursuant to the terms of the Husband's Trust, defendant thereafter held the balance of the Husband's Trust estate as trustee for Louise Rightsell, with the net income paid to her quarterly. Defendant continued to so administer the Husband's Trust until Louise Rightsell's death in 1998. Upon Louise Rightsell's death, defendant, pursuant to Article Sixth of the Wife's Trust, set aside and delivered to itself, as trustee, the bal-

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ance of the Wife's Trust estate. Article Sixth of the Wife's Trust provides in pertinent part as follows:

SIXTH

As soon after the death of [Louise Rightsell] as is reasonably possible, the Trustee shall:

- A. Set aside and deliver to itself, as Trustee for [Louise Rightsell's] husband, E.F. Rightsell and others, the balance of the Trust estate *to be held and administered under the applicable provisions of [the Husband's Trust]*. . . . (Emphasis added)

....

As plaintiff acknowledges in her brief, “construction of the ‘applicable provisions’ of Earl Rightsell’s [T]rust referred to in article ‘[s]ixth’ of Louise Rightsell’s Trust is the ultimate issue” before this Court for determination. Plaintiff argues that these “applicable provisions” are found only in Article Eighth of the Husband’s Trust, while defendant contends they are also found in Articles Sixth and Seventh therein.

The Husband’s Trust provides as follows in Articles Sixth, Seventh, and Eighth:

SIXTH

As soon after the death of [Earl Rightsell] as is reasonably possible, the Trustee shall:

- A. Set aside and hold *under the provisions of Article Seventh next below*, as Trustee for [Earl Rightsell's] wife, Louise Crowder Rightsell, *if she shall survive him*, the balance of the Trust estate. (Emphasis added) The said wife of [Earl Rightsell] shall have the right, power and authority, by written instrument filed with the Executor of [Earl Rightsell's] estate and the Trustee, within one-hundred fifty (150) days from the date of death of [Earl Rightsell], to disclaim a portion or all of the amount directed to be set aside for her under this paragraph A; whereupon the amount so disclaimed shall be added to and become a part of that trust which may be established pursuant to the provisions of Article Eighth below.
- B. If [Earl Rightsell's] wife does not survive him, or shall disclaim any portion of said Trust estate, in either of such

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events the balance of the Trust estate and/or the disclaimed portion shall be held under the provisions of Article Eighth below.

....

SEVENTH

The trust under this Article shall be for these purposes:

- A. The net income shall be paid to Louise Crowder Rightsell, quarterly or more often so long as she lives.
-
- C. Upon the death of Louise Crowder Rightsell, the principal shall be paid to such person or persons, or to her estate, *as she may by specific reference to this power in her Will appoint*.
- D. . . . The balance of any *unappointed* principal shall fall into the trust existing under Article Eighth and be there held and/or distributed as though it had originally been a part of that trust. . . . (Emphases added)

EIGHTH

The trust under this Article shall be for these purposes:

- A. During the lifetime of Alyse Walker Taylor the net income shall be paid in equal shares, monthly, to the said Alyse Walker Taylor and [plaintiff]; provided, however, that if [plaintiff] should predecease her mother, then [plaintiff's] daughter, Lisa Davenport, shall replace her mother as a beneficiary of this trust; and provided further, however, that upon the death of Alyse Walker Taylor this trust shall terminate and its assets shall be paid over to [plaintiff], if living, or to her daughter, Lisa Davenport, if [plaintiff] should be deceased
-

Alyse Taylor Walker, who was Louise Rightsell's niece and plaintiff's mother, died prior to Louise Rightsell's 1998 death.

On 26 September 1990, Louise Rightsell executed a last will and testament in which she appointed the Husband's Trust assets to her estate, to pass under her will. Louise Rightsell's will, which

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was drafted by the same attorney who had earlier drafted the Husband's Trust and Wife's Trust instruments, provided in pertinent part as follows:

In Paragraph C of Article Seventh of [the Husband's Trust] . . . , the following language appears:

"Upon the death of Louise Crowder Rightsell, the principal shall be paid to such person or persons, or to her estate, as she may by specific reference to this power in her Will appoint."

Pursuant to said authority *I hereby appoint the principal remaining in said Trust to my estate for use and distribution in accordance with the terms of this, my Will.*

. . . (Emphasis added)

Louise Rightsell's will then proceeded to make a number of specific bequests, including a bequest of \$10,000.00 to plaintiff and bequests in varying amounts to the Salvation Army, the Durham County Chapter of the American Red Cross, Trinity Avenue Presbyterian Church, Methodist Retirement Homes, Inc., Young Men's Christian Association, Roland C. Fields, Jr., and Lisa Davenport. The will also bequeathed \$200,000.00 in trust for the benefit of plaintiff and her family, with the trust ultimately to terminate and its assets to be paid over in equal shares to plaintiff and plaintiff's daughter. Plaintiff, a retired educator, bequeathed "all the rest, residue and remainder of [her] estate . . . in equal shares to DUKE UNIVERSITY and the UNIVERSITY OF VIRGINIA" for addition to each university's general endowment fund.

After Louise Rightsell's death on 30 January 1998, defendant promptly qualified as executor of her estate and proceeded to administer Louise Rightsell's estate according to the terms and provisions of her will. Defendant set aside and delivered to itself as trustee the Wife's Trust assets, totaling approximately \$394,301.00. Defendant then combined the Wife's Trust assets with the Husband's Trust and, pursuant to the general power of appointment exercised by Louise Rightsell in her will, defendant added the combined Trust assets to Louise Rightsell's estate for distribution as directed in the will. Including the assets of both Trusts, Louise Rightsell's estate was valued at approximately \$1,800,000.00 upon her death. Pursuant to the will's terms, plaintiff, Louise Rightsell's sole heir at law, received a total of \$110,000.00 from her great-aunt's estate. Plaintiff acknowl-

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edged receipt of this sum by executing two separate receipts before the Durham County Clerk of Superior Court on 16 March 1998.

Defendant completed its administration of Louise Rightsell's estate and distributed all the estate's assets on or about 26 May 1999. On 3 August 2000, plaintiff filed the subject civil action, alleging that defendant breached its fiduciary duty as Trustee by distributing the assets of the Wife's Trust to the Husband's Trust, and then adding the combined assets to Louise Rightsell's estate before distributing the estate's assets as directed by her will.¹ Plaintiff advocates a construction of the Wife's Trust whereby plaintiff would instead receive the Wife's Trust assets as the remainder beneficiary.

On 3 December 2001, plaintiff and defendant argued their cross-motions for summary judgment. By judgment entered 27 February 2002, the trial court denied plaintiff's motion and granted summary judgment in defendant's favor. Plaintiff gave notice of appeal on 28 March 2002.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). When reviewing a trial court's allowance of a summary judgment motion, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

By her first assignment of error, plaintiff argues that the four corners of the instruments establishing the Husband's Trust and the Wife's Trust compel a construction of these instruments that would result in distribution to plaintiff of all the Wife's Trust assets, pursuant to what she contends are the "applicable provisions" of Article Eighth of the Husband's Trust. To the contrary, however, we conclude that the plain language of the Husband's Trust and the Wife's Trust does not support such a construction, but rather compels administration of the Trust assets in the manner undertaken by defendant.

1. Also on 3 August 2000, plaintiff challenged the legal efficacy of Louise Rightsell's will by filing a *caveat* with the Durham County Clerk of Superior Court. On 6 September 2001, plaintiff voluntarily dismissed the *caveat*, with prejudice.

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In construing the terms of a trust, “[o]ur responsibility is to ascertain the intent of the settlor and to carry out that intent . . . deriv[ing] the settlor’s intent from the language and purpose of the trust, construing the document as a whole.” *Wheeler v. Queen*, 132 N.C. App. 91, 95, 510 S.E.2d 195, 198, *disc. rev. denied*, 350 N.C. 385, 536 S.E.2d 320 (1999). Where there are two or more instruments relating to a trust, the instruments should be construed together to effectuate the settlor’s intent. *Estate of Taylor*, 361 Pa. Super. 395, 400, 522 A.2d 641, 643 (1987).

Our review of the Wife’s Trust and Husband’s Trust instruments in their entirety reveals an intent on each settlor’s part that (1) the assets of both Trusts be available for the care and support of the surviving spouse, and (2) the surviving spouse be allowed to control the ultimate disposition of the assets of both Trusts. In the event that Louise Rightsell survived her husband, as happened here, Article Sixth of the Husband’s Trust clearly and unambiguously states that the Husband’s Trust assets be held in a support trust for Louise Rightsell “under the provisions of Article Seventh” of the Husband’s Trust. We must therefore proceed directly to Article Seventh of the Husband’s Trust, which clearly and unambiguously grants to Louise Rightsell the right to distribute the Husband’s Trust assets upon her death “to such person or persons, or to her estate, as she may by specific reference to this power in her Will appoint.” Louise Rightsell clearly and unambiguously exercised her general power of appointment in her will, wherein she cited the foregoing language from the Husband’s Trust Article Seventh and stated “[p]ursuant to said authority, I hereby appoint the principal remaining in said Trust to my estate for use and distribution in accordance with the terms of this, my will.”

While Article Eighth of the Husband’s Trust does make provision for the Husband’s Trust assets to be held in trust for the benefit of plaintiff and her mother, with remainder to plaintiff upon her mother’s death, the plain language of both the Husband’s Trust and Wife’s Trust instruments compels us to conclude that Earl and Louise Rightsell intended to fund such a trust only if Louise Rightsell (1) died before Earl Rightsell; (2) disclaimed any portion of the Husband’s Trust assets; or (3) failed to exercise her general power of appointment. Otherwise, the Husband’s Trust assets were to be held in a support trust for Louise Rightsell, subject to distribution upon her death according to her general power of appointment, if exercised.

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In order to adopt the construction sought by plaintiff, we would have to, in effect, skip over Article Seventh of the Husband's Trust entirely and proceed directly to Article Eighth for the "applicable provisions" under which the Husband's Trust assets were to be administered. However, where, as here, Louise Rightsell survived her husband, did not disclaim any portion of the Husband's Trust assets, and exercised her general power of appointment in a validly drawn and executed will, we conclude defendant properly construed both Trusts by following the plain language of both Trust instruments and distributing the Husband's Trust assets to Louise Rightsell's estate, combining them with the Wife's Trust assets, and distributing the combined Trust assets along with the rest of Louise Rightsell's estate as provided for in her will. In light of our holding that the plain language of the Trust instruments compels this outcome, we need not consider plaintiff's remaining assignments of error.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

MARY C. MORRIS, CORNELIA K. WILY, AND JOSEPH ERVIN MORRIS, PLAINTIFFS V.
THE E.A. MORRIS CHARITABLE FOUNDATION; WACHOVIA BANK OF NORTH
CAROLINA, N.A., TRUSTEE; JOHN S. THOMAS, TRUSTEE; ROY COOPER,
ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA03-189

(Filed 16 December 2003)

1. Trusts— remainder beneficiary—impossibility or impracticability of trust carrying out charitable purpose

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' complaint seeking to change the remainder beneficiary of four trusts based on alleged impossibility or impracticability of the trust to carry out its charitable purpose if the pertinent Foundation is the remainder beneficiary, because: (1) the Foundation's ability to carry out its generalized purpose is not jeopardized, much less rendered impossible or impracticable, by changes in management style, office location, or selection of particular charitable recipients; and (2) the Foundation continues to exist and to make charitable distributions. N.C.G.S. § 36A-53.

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2. Appeal and Error—preservation of issues—failure to raise issue below

Although plaintiffs presented several new theories of relief on appeal in an action seeking to change the remainder beneficiary of four trusts, issues and theories of a case not raised below will not be considered on appeal.

Appeal by plaintiffs from judgment entered 4 November 2002 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 17 November 2003.

Maupin Taylor & Ellis, P.A., by Charles L. Steel, IV, M. Keith Kapp, Tyler L. Randolph, and Kevin W. Benedict, for plaintiff-appellants.

Robinson, Bradshaw & Hinson, P.A., by Robert W. Fuller, for plaintiff-appellee E.A. Morris Charitable Foundation.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Debbie W. Harden, for plaintiff-appellee Wachovia Bank of North Carolina, N.A.

Teague, Campbell, Dennis & Gorham, L.L.P., by George W. Dennis, III, and Jacob H. Wellman, for plaintiff-appellee John Thomas, Trustee.

Attorney General Roy Cooper, by Assistant Attorney General Kay L. Hobart.

LEVINSON, Judge.

This appeal arises from a suit filed by plaintiffs (Mary Morris, Joseph Morris, and Cornelia Wily) seeking to change the remainder beneficiary of four trusts. Two of these trusts were established in 1993 by E.A. Morris; the other two were established in 1999 by Mary Morris. Each trust names one of the plaintiffs as lifetime income beneficiary, and all four trusts name the E.A. Morris Charitable Foundation (the Foundation) as the charitable remainder beneficiary. Plaintiffs appeal from the trial court's dismissal of their lawsuit, pursuant to N.C.R. Civ. P. 12(b)(6) (2003). We affirm the trial court.

The relevant facts are these: The Foundation, which was created by Mr. E.A. Morris in 1980, has no members and is governed by its board of directors. E.A. Morris was involved with the Foundation until his death in 1998, and the initial board of directors included

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several members of the Morris family. Plaintiffs filed suit on 7 August 2002, twenty years after E.A. Morris established the Foundation. They alleged that, after the trust instruments were executed naming the Foundation as remainder beneficiary, the board of directors made various changes to the Foundation's administration, management, and pattern of charitable giving. Plaintiffs asserted that as a result of these changes, "the charitable intentions of [E.A.] Morris and Mary C. Morris have become impossible and impractical [sic] of fulfillment." Plaintiffs asked the trial court to (1) assume jurisdiction over the matter under N.C.G.S. § 36A-53; (2) find that the charitable remainder interests set forth in the trusts at issue had become impossible or impracticable to carry out "due to the change in control of the E.A. Morris Charitable Foundation," and; (3) reform the trust agreements. We note that plaintiffs filed a related suit against several members of the Foundation's board of directors, seeking their removal from the board and other relief, which is also decided this date. *See Morris v. Thomas*, 161 N.C. App. —, — S.E.2d — (2003).

On 15 August 2002 the Foundation moved to dismiss plaintiff's claim for reformation of the trust agreement, pursuant to N.C.R. Civ. P. Rule 12(b)(1) and Rule 12(b)(6). Defendant Thomas joined the Foundation's motion to dismiss on 21 October 2002. On 4 November 2002 the trial court granted the defendants' motions to dismiss plaintiffs' complaint "for failing to state a claim upon which relief can be granted" and dismissed plaintiffs' action with prejudice, taxing costs to plaintiffs. From this order, plaintiffs appeal.

Standard of Review

[1] The trial court dismissed plaintiffs' complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. "A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. For the purpose of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted). "Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Jackson v. Bumgardner*, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citation omitted). Further, "on a motion to dismiss pursuant to Rule 12(b)(6) . . . [t]he

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complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000).

Applicability of N.C.G.S. § 36A-53

Plaintiffs' complaint sought relief under N.C.G.S. § 36A-53 (2003), which provides in relevant part:

If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment . . . and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may . . . order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. . . .

G.S. § 36A-53(a). This statute "expressly [gives] the courts the power to apply the *cy pres* doctrine to charitable trusts." *YWCA v. Morgan*, 281 N.C. 485, 489, 189 S.E.2d 169, 171 (1972). The *cy pres* doctrine "derives its meaning from the Anglo-French phrase *cy pres comme possible*, meaning 'near as possible,' " and allows a court, in the event that the "purpose set forth in a charitable trust becomes impossible, illegal or impracticable" to redirect the bequest to "a purpose as near as possible to that originally selected" by the settlor of the trust. *Id.* (citation omitted). However, "the statute applies only when three conditions have been met: (1) the testator manifested a general charitable intent; (2) the trust has become illegal, impossible, or impracticable; (3) the testator has not provided for an alternative disposition if the trust fails." *Trustees of Wagner Trust v. Barium Springs Home for Children*, 102 N.C. App. 136, 146, 401 S.E.2d 807, 813, *aff'd in part, rev'd in part on other grounds*, 330 N.C. 187, 409 S.E.2d 913 (1991) (citation omitted). In the instant case, the dispositive issue is whether the disposition of the remainder beneficiary interest to the Foundation has become "impossible, or impracticable."

"Impossible" is defined as "not possible; that cannot be done, occur, or exist," while "impracticable" is defined as "impossible in practice." Oxford Encyclopedic English Dictionary 709 (Judy Pearsall & Bill Trumble, eds., 2nd ed. 1995). Thus, "'[i]f the failed gift was to or for a charitable institution which never existed, or has ceased to exist, or is too vaguely described to be identified, the court will . . . deliver the principal to another like institution[.]'" *Riverton Area Fire Protection District v. Riverton Volunteer Fire Department*,

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208 Ill. App. 3d 944, 950, 153 Ill. Dec. 165, 566 N.E.2d 1015, 1019 (1991) (quoting G. Bogert, *Trusts and Trustees* § 442, at [214] ([Rev.] 2d ed. [1991])). *See Board of Trustees of UNC-CH v. Heirs of Prince*, 311 N.C. 644, 646, 655, 319 S.E.2d 239, 241, 247 (1984) (where testatrix left funds “for the purpose of erecting a building for the Carolina Playmakers” Court holds that “construction of the new dramatic arts facility . . . expressly made ‘impracticable’ the achievement of [her] trust”).

However, “[a] donor who brings into existence a charitable institution must recognize that most institutions are likely to change with time[.]” *Trustees of Dartmouth College v. Quincy*, 357 Mass. 521, 533-34, 258 N.E.2d 745, 753 (1970). Thus, the general rule is that, in the absence of an express restriction or condition contained in the trust instrument itself, if the intended beneficiary continues to function at the time the bequest is to take effect, the trust is not impossible or impracticable to effectuate. *Trustees of Wagner Trust v. Barium Springs Home for Children*, 102 N.C. App. 136, 401 S.E.2d 807 (1991). In this regard, the analysis in *Wagner Trust*, *id.*, is instructive. The settlor therein established a trust in 1942, naming his wife as lifetime income beneficiary and a local hospital as remainder beneficiary. The trust provided that, if the hospital was no longer in existence at the time of distribution of the remainder assets, the alternate remainder beneficiary was the Barium Springs orphanage. In 1988, when a declaratory judgment action was filed to determine the proper distribution of funds, Barium Springs was no longer an orphanage, but instead operated “a program of working exclusively with troubled, alienated and disturbed adolescents, for which treatment was not provided free of charge.” *Id.* at 140, 401 S.E.2d at 810. Upon this evidence, the trial court found that “the purpose, function, and services of Barium Springs have changed” and concluded that “the testator’s intention regarding Barium Springs [was] ‘impossible or impracticable to fulfill.’” *Id.* at 143, 401 S.E.2d at 811. This Court reversed, noting that “the will does not specify any condition requiring the institution to continue to function in the identical capacity in which it operated as of the death of the testator. Nonetheless, the trial court . . . apparently impl[ied] a condition that it not deviate from its precise function at the time of the execution of the will[.]” *Id.* at 144, 401 S.E.2d at 812. The Court rejected this interpretation, and held:

[T]here is no express condition in the will requiring that Barium Springs remain the same, and we will not imply such a

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condition . . . [because] a charitable organization would [then] be required to function in the exact same capacity as it did at the time the trust was created. . . . [C]haritable institutions would be unable to adapt to the changing needs of society . . . [Such an implied condition would lead to difficult determinations as to how much change is permitted and whether the charitable organization has changed to such an extent that it is no longer the charitable institution the testator intended to benefit. We do not wish to resort to such line-drawing.

Id. at 145, 401 S.E.2d at 812 (emphasis added).

Plaintiffs argue that the purpose of the trusts, and the charitable intention of the settlors, are ‘ambiguous’ and should be determined by reference to plaintiffs’ allegations regarding their personal understanding of the settlors’ wishes. Plaintiffs misstate the law in this regard. The issue of the “settlor’s intent” pertains not to the question of whether the trust has become impossible or impracticable to carry out, but instead to whether or not the settlor evinced a “general charitable intent.” Extrinsic evidence regarding the testator’s actions and statements while alive may be relevant to the determination of this issue. *See Board of Trustees of UNC-CH*, 311 N.C. 644, 319 S.E.2d 239 (comparing the evidence of testator’s general charitable intent to that of the testator in *Wilson v. Church*, 284 N.C. 284, 200 S.E.2d 769 (1973)). However, the holding of *Wagner Trust*, *id.* is that this Court will not look beyond the express language of the trust instrument itself in determining whether the trust is impossible or impracticable, and will neither “read between the lines” to imply unstated conditions, nor engage in assessments of how much a beneficiary may change before it is “disqualified” from serving as remainder beneficiary. In the instant case, the trust instruments do not contain any restrictions or conditions pertaining to the management, administration, or distribution of funds by the Foundation.

Nor would the changes alleged by plaintiffs make it impossible or impracticable for the Foundation to carry out its stated mission. Plaintiffs herein asserted that the Foundation’s board of directors (1) voted to remove Mary and Joseph Morris from the board; (2) made certain administrative changes, including, *e.g.*, using a different bank, hiring a different law firm to represent the Foundation, and changing the location of the Foundation’s office; (3) made decisions with which plaintiffs disagreed, such as increasing the compensation paid to the Foundation’s president, and revising the Foundation’s bylaws, and; (4) distributed income to several organizations “to which neither

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[E.A.] Morris nor the Morris family had any interest." On this basis, they allege that it is impossible or impracticable for the trust to carry out its charitable purpose if the Foundation is the remainder beneficiary. However, the purposes for which the Foundation was established are very general and contemplate gifts to a wide variety of nonprofits. Though not included in the record of this case, we take judicial notice of the Articles of Incorporation of the Foundation, included in the record of *Morris v. Thomas*, — N.C. App. —, — S.E.2d — (COA03-237 filed 16 December 2003), also decided this date. *See Sugg v. Field*, 139 N.C. App. 160, 163, 532 S.E.2d 843, 845 (2000) ("a court . . . may take judicial notice of its own records in an interrelated proceeding involving the same parties"). The Articles of the Foundation state, in relevant part, the following:

....

3. The purpose for which the Corporation is organized is to operate exclusively for charitable, religious, educational and scientific purposes; and in carrying out such purpose the Corporation shall . . . make distributions and donations as determined from time to time by the Board of Directors to the following:
 - (a) To colleges, universities and other schools, . . .
 - (b) To hospitals and organizations engaged in medical research, . . .
 - (c) To churches and other religious organizations, . . .
 - (d) To such other organizations as determined from time to time by the Board of Directors of the Corporation[. . .].

(emphasis added). The only other restriction on the Foundation's choice of recipients is that "said recipient [must] qualif[y] as an exempt organization under [§] 501(c)(3) of the [IRS] Code." We conclude that the Foundation's ability to carry out its generalized purpose is not jeopardized, much less rendered impossible or impracticable, by changes in, *e.g.*, management style, office location, or selection of particular charitable recipients.

Plaintiffs' complaint establishes that the Foundation continues to exist and to make charitable distributions. We conclude that "the complaint on its face reveals that no law supports plaintiff's claim[,]'" *Bumgardner*, 318 N.C. at 175, 347 S.E.2d at 745, and that the trial court did not err by granting defendants' Rule 12(b)(6) motion. This assignment of error is overruled.

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[2] Plaintiffs also present several new theories of relief on appeal, including (1) direct relief under the Declaratory Judgment Act, (2) the “doctrine of equitable approximation,” (3) the “doctrine of deviation,” and (4) relief under G.S. § 36A-23.1. “[Plaintiffs] raise th[ese] issue[s] for the first time on appeal to this Court. This Court has long held that issues and theories of a case not raised below will not be considered on appeal, and th[ese] issue[s are] not properly before this Court.” *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citation omitted). These issues are not properly before us.

The trial court’s dismissal of plaintiffs’ complaint is

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.



MARY CANNON MORRIS, AND JOSEPH E. MORRIS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE E.A. MORRIS CHARITABLE FOUNDATION, PLAINTIFFS V. JOHN S. THOMAS, KATHARINE A. THOMAS, K. BARRY MORGAN, AND DOROTHY S. SHAW, DEFENDANTS AND THE E.A. MORRIS CHARITABLE FOUNDATION, NOMINAL DEFENDANT, INTERVENOR AND INTERESTED PARTY DEFENDANTS

No. COA03-237

(Filed 16 December 2003)

Corporations— nonprofit—standing to file derivative action— former directors

The trial court correctly determined that plaintiffs lacked standing to bring a derivative action against a charitable foundation because they were not directors when the suit was filed. N.C.G.S. § 55A-7-40(a).

Appeal by plaintiffs from order entered 4 November 2002 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 17 November 2003.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mack Sperling, Charles E. Coble and Hubert Humphrey, for plaintiff-appellants.

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Teague, Campbell, Dennis & Gorham, L.L.P., by George W. Dennis, III and Jacob H. Wellman, for defendant-appellees John S. Thomas, Katharine Thomas, K. Barry Morgan, and Dorothy S. Shaw.

Robinson, Bradshaw & Hinson, P.A., by Robert W. Fuller and Thomas P. Holderness, for defendant-appellee The E.A. Morris Charitable Foundation.

LEVINSON, Judge.

Plaintiffs appeal from the entry of summary judgment in favor of defendants. For the reasons that follow, we affirm. The relevant facts are summarized as follows: In 1980 the E.A. Morris Charitable Foundation (“the Foundation”) was created by Mr. E.A. Morris, for the purpose of supporting “charitable, religious, educational and scientific” enterprises. Plaintiffs (Mary Morris and Joseph Morris) are E.A. Morris’s wife and son. The Foundation was established with no members and with a five-member board of directors.

The initial board of directors consisted of E.A. Morris, his wife Mary Morris, his son Joseph Morris, his daughter Mary Lou Morris, and defendant John Thomas (Thomas), who is not a member of the Morris family. When Mary Lou Morris died in 1994, she was replaced on the board by defendant Barry Morgan, an accountant who had worked for the Foundation and who is not related to the Morris family. In 1998, E.A. Morris died and defendant Dorothy Shaw was elected to the board of directors. In 1999, Thomas’s wife, Katharine Thomas, was added to the board of directors with the unanimous consent of all board members, including the plaintiffs. The board of directors then consisted of Mary and Joseph Morris, John and Katharine Thomas, Shaw, and Morgan. At the annual meeting of the Foundation board of directors on 2 November 2001, the board of directors removed Mary Morris by a four to one vote, and replaced her with E. J. Walker, Jr. At the same meeting, the board of directors removed Joseph Morris from the board by a vote of five to one.

On 10 May 2002 plaintiffs filed a complaint against John and Katharine Thomas, Shaw, and Morgan. Plaintiffs asserted that their suit was filed “on their own behalf, and derivatively on behalf of the Foundation[.]” Plaintiffs alleged that their removal from the Foundation’s board of directors had been “unlawful” and also alleged wrongdoing by defendants in regards to various other actions taken by the Foundation’s board of directors. Plaintiffs asserted that

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defendants had engaged in a “conspiracy”; that Thomas had used the Foundation for his “personal enhancement and benefit”; and that defendants had breached their fiduciary duty to the Foundation. They sought reinstatement as members of the board of directors, removal of defendants from the board, and other relief. On 26 June 2002 plaintiffs filed an amended complaint adding the Foundation as a “nominal party whose interests are aligned with the Plaintiffs’ side of this action” and reiterating that their action was brought “in part on behalf of the E.A. Morris Charitable Foundation.”

On 12 July 2002 defendants filed an answer and motion to dismiss, asserting that, pursuant to N.C.G.S. § Chapter 55A, plaintiffs lacked standing to bring either a derivative action on behalf of the Foundation or individual claims on their own behalf. On 16 July 2002 the Foundation filed an answer stating that it was investigating the allegations of the complaint, and requesting a stay of proceedings until their investigation was complete. The Foundation also sought dismissal of plaintiffs’ complaint for lack of standing to bring a derivative action and for failure to state a claim for relief. The Foundation submitted affidavits, the Foundation’s articles of incorporation and bylaws, the amended bylaws, the minutes of board meetings, and other documents pertinent to plaintiffs’ allegations. On 22 July 2002 the Foundation filed an alternate motion to intervene, alleging that the Foundation was a necessary party and that plaintiffs had not properly added the Foundation to the action. The Foundation also filed an amended answer on 22 July 2002, seeking dismissal on the grounds that plaintiffs (1) lacked standing to bring a derivative action, and (2) had not stated “any individual claims cognizable under North Carolina law.” Plaintiffs filed a motion on 23 July 2002 opposing the Foundation’s “active, non-neutral participation” in the case, and seeking a protective order barring the Foundation from active participation in the action. On 27 August 2002 the trial court entered an order directing, *inter alia*, that:

1. The Foundation’s motion to intervene was granted.
2. The plaintiffs’ motion for a preliminary injunction was denied.
3. Plaintiffs objection to the Foundation’s participation was overruled, and their request for a protective order was denied.
4. The defendants’ motions to dismiss were denied “without prejudice to summary judgment motions at the appropriate time.”
5. The Foundation’s motion for a stay was granted.

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On 18 October 2002 the Foundation moved for summary judgment, attaching affidavits, documents, and the Foundation's committee report summarizing the investigation into plaintiffs' allegations. The report concluded that plaintiffs' claims had no merit and that the best interests of the Foundation would be served by dismissal of the lawsuit. On 22 October 2002 plaintiffs filed an objection to the report and moved the court to reconsider their motion to bar the Foundation from "active non-neutral" participation in the lawsuit. The individual defendants also filed a motion for summary judgment.

On 28 October 2002 a hearing was conducted on the defendants' and the Foundation's motions for summary judgment. The trial court ruled from the bench that the issue of standing was dispositive of the summary judgment motions, and that defendants' motions for summary judgment should be granted. An order was entered on 4 November 2002 granting summary judgment for defendants and ruling that the Foundation's summary judgment motion was mooted by the granting of summary judgment in favor of defendants. The order denied plaintiffs' motion for reconsideration of the Foundation's participation and their objection to the Foundation's committee report. From this order, plaintiffs appeal.

Standard of Review

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003). Summary judgment is proper if the plaintiff lacks standing to bring suit. *See Northeast Concerned Citizens, Inc. v. City of Hickory*, 143 N.C. App. 272, 545 S.E.2d 768, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 220 (2001).

Plaintiffs' complaint asserted that their action was brought derivatively on behalf of the Foundation, as well as individually on their own behalf. However, plaintiffs did not assign error to the trial court's order of summary judgment as pertains to their purported individual claims. N.C.R. App. P. 10(a) of the Rules of Appellate Procedure provides, in pertinent part, that "except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." Moreover, plaintiffs do not present any arguments on appeal regarding their alleged individual claims against defendants. Questions not presented and discussed in a party's brief are

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deemed abandoned. N.C.R. App. P. 28(a). We conclude that plaintiffs have abandoned and failed to preserve for appellate review any issues pertaining to their individual claims against defendants. Accordingly, we consider plaintiffs' arguments only as regards their derivative claims.

Plaintiffs' Standing to Bring a Derivative Action

In the instant case, the trial court ruled that plaintiffs lacked standing to pursue derivative claims on behalf of the Foundation. The trial court ruled correctly in this regard.

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *American Woodland Indus., Inc. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 283 (2003) (citation omitted). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 165, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002) (citation omitted). "Additionally, plaintiffs have the burden of proving that standing exists." *Tolson*, 155 N.C. App. at 627, 574 S.E.2d at 57.

The issue herein is whether plaintiffs had standing to bring a derivative action against defendants. "A 'derivative proceeding' is a civil action brought . . . 'in the right of' a corporation, . . . while an individual action is . . . [brought] to enforce a right which belongs to [plaintiff] personally." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000). See *Stewart v. Kopp*, 118 N.C. App. 161, 454 S.E.2d 672 (1995) (derivative action against homeowners' association not properly brought where plaintiff does not allege injury to the association or seek to recover on its behalf).

The E.A. Morris Charitable Foundation is a non profit corporation, and thus is governed by the North Carolina Nonprofit Corporation Act. N.C.G.S. § 55A-1-01 (2003). Standing to bring a derivative suit against a non profit corporation is addressed in N.C.G.S. § 55A-7-40(a) (2003), which provides in relevant part:

An action may be brought in a superior court of this State, . . . in the right of any domestic or foreign corporation by any member or director, provided that, in the case of an action by a

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member, . . . it shall appear, that each plaintiff-member was a member at the time of the transaction of which he complains.

Plaintiffs assert that the statutory authority granted to “any member or director” to bring a derivative suit necessarily includes former members of the board of directors. However, “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *McKinney v. Richitelli*, 357 N.C. 483, 487, 586 S.E.2d 258, 262 (2003) (citing *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E.2d 184 (1977)). “A term is ambiguous if it has more than one meaning, and a layman would be unable to determine which meaning is intended.” *In re Estate of Montgomery*, 137 N.C. App. 564, 567 n3, 528 S.E.2d 618, 620 n3 (2000) (citation omitted). We discern no term or phrase in G.S. § 55A-7-40(a) whose meaning is unclear. Though it would have been very easy to do so, the legislature did not include language allowing former directors to file a derivative action.

Further, if we accepted plaintiffs’ argument, that the phrase “any member or director” should be interpreted to include former directors, we would then need to determine whether this meant all former directors, even those who last served on the board of directors ten years previously, or whether some other restrictions were appropriate. The question of how recently one would have to have served on a board of directors has no obvious answer. It is readily apparent that the answer cannot be merely that the director must have been on the board “at the time of the transaction of which he complains” because the statute expressly applies that restriction only to members. Nor does the statute provide any guidance on *which* former directors might be authorized to bring suit.

We conclude that the statute plainly restricts standing to bring a derivative action to the members and directors of a nonprofit corporation. Thus, “by statute, ‘only members, directors, or the Attorney General have standing to challenge ultra vires acts of a not-for-profit corporation.’” *Blue Cross & Blue Shield of Mo. v. Nixon*, 81 S.W.3d 546, 552 (Mo. App. W.D. 2002) (quoting *Champ v. Poelker*, 755 S.W.2d 383, 389 (Mo. App. E.D. 1988)).

It is conceded by the parties herein that the Foundation had no members. Therefore, the statutory provisions governing a member’s standing to bring a suit are of no relevance. It is also uncontested that plaintiffs were not on the Foundation’s board of directors when

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they filed their complaint; indeed, the complaint alleges that their removal was “unlawful”. We conclude that, inasmuch as plaintiffs were not directors when their complaint was filed, they lacked standing to bring a derivative action.

Plaintiffs argue that this result would permit a renegade board of directors to expel board members who challenge unlawful or unethical actions, thereby placing the corporation beyond the reach of a derivative action by the former directors. However, we note that the Attorney General has authority to bring an action to restrain a non-profit corporation from taking *ultra vires* or otherwise unlawful actions. See N.C.G.S. §§ 55A-3-04; 55A-3-05; 55A-14-30 (2003). Moreover, even assuming, *arguendo*, that the standing requirements of G.S. § 55A-7-40(a) place plaintiffs in a difficult position, it is not the prerogative of this Court to change the law. “[W]hen public policy requires a change in a constitutionally valid statute, it is the duty of the Legislature and not the courts to make that change.” *State v. Camp*, 286 N.C. 148, 153, 209 S.E.2d 754, 757 (1974) (citation omitted).

We conclude the trial court properly determined the plaintiffs lack standing to bring a derivative action, and that the court did not err by granting summary judgment for defendants. “Because Defendants were entitled to summary judgment on the ground Plaintiff lacked standing, we need not address Plaintiff’s additional assignments of error.” *Northeast Concerned Citizens*, 143 N.C. App. at 278, 545 S.E.2d at 772. Accordingly, the trial court’s order is

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

STATE OF NORTH CAROLINA v. JASON RAY WADE

No. COA02-1663

(Filed 16 December 2003)

1. Homicide; Assault— traffic offense—culpable negligence—alcohol not involved

There was sufficient evidence of culpable negligence to support defendant’s convictions on charges of assault and involuntary manslaughter arising from a traffic accident in which alcohol

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was not involved. There is precedent for recognizing that the operation of a vehicle can lead to involuntary manslaughter even without alcohol, and, although this may be the first such holding in the absence of alcohol, defendant's actions were also sufficient for assault with a deadly weapon inflicting serious injury.

2. Motor Vehicles—reckless driving—indictment—amendment—details added

The trial court did not err by allowing the State to amend an indictment charging reckless driving by adding details where the original language of the indictment tracked the appropriate statute.

3. Evidence—manslaughter victim's relationship with family—not prejudicial

The admission of testimony about a manslaughter victim's relationship with her nieces and a photograph of the victim with her nieces was neither prejudicial nor plain error. The evidence of defendant's culpable negligence in the automobile accident is overwhelming.

Appeal by defendant from judgments entered 3 July 2002 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 18 September 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Patricia A. Duffy, for the State.

Kathryn L. VandenBerg, for defendant-appellant.

CALABRIA, Judge.

Jason Ray Wade ("defendant") appeals from judgments entered on jury verdicts of guilty for involuntary manslaughter, assault with a deadly weapon inflicting serious injury ("AWDWISI"), and reckless driving. We find no reversible error.

The State's evidence at trial tended to show the following: on 12 June 2001, Fred McLean ("McLean") was traveling westbound on a two-lane road away from the Town of Lillington. Directly behind McLean was Shirley Louise Stone Redwine ("decedent"). Following behind decedent was defendant, who dated decedent for several years. McLean noticed that defendant intermittently sped up as if to

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pass decedent, but decedent would also increase her speed. As the three vehicles approached a sharp curve in the road, which prevented observation of traffic approaching from the opposite direction, defendant moved into the lane for on-coming traffic and attempted to pass decedent. When McLean entered the curve, he observed defendant alongside of him, entering the curve with him.

At the same time, Peter Green ("Green") was driving a Chevrolet Kodiak seven-ton truck towards Lillington. Timothy Lemmons ("Lemmons") was a passenger in the truck. The truck was hauling a sixteen-foot flat trailer, which carried equipment weighing approximately 9,000 pounds.

As the vehicles entered the curve, McLean and defendant saw the truck driven by Green approaching from the opposite direction. McLean took his foot off the accelerator and eased his vehicle off the side of the road. Defendant drove his pickup truck off the left-hand side of the road into a ditch to avoid hitting Green's truck. Green applied his brakes upon seeing defendant in his lane but lost control of the truck. The truck jackknifed and began to skid. The trailer detached from the truck, slid sideways, and struck decedent's vehicle. The truck itself rolled over and came to rest upright on its wheels. The road where the accident occurred was marked with a double yellow line 2500 feet before and up to the point of impact. Decedent suffered head injuries and internal bleeding and died at the scene of the accident. Green incurred several serious injuries including a broken back and collarbone and collapsed lungs, requiring several weeks of hospitalization and clinical therapy and from which he has not yet fully recovered.

On 1 October 2001, defendant was indicted for involuntary manslaughter of decedent, for AWDWISI of Green, and for careless and reckless driving. On 1 July 2002, in the Harnett County Superior Court, defendant was tried before a jury on all charges. At the close of the State's evidence, the State moved to amend the indictment for reckless driving, and defendant moved to dismiss the charges. The trial court allowed the State to amend the indictment but denied defendant's motion to dismiss. Defendant presented no evidence and renewed the motion to dismiss. The trial court again denied defendant's motion. The jury returned verdicts of guilty on all three charges. Defendant received 19 months to 23 months for involuntary manslaughter and 29 months to 44 months for AWDWISI. The trial court arrested judgment on the reckless driving charge. Defendant asserts on appeal that the trial court erred by (I) denying the motion

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to dismiss; (II) allowing the State to amend the indictment for reckless driving; and (III) allowing the State to admit evidence concerning decedent's relationship with her family and a photograph of the decedent and her family.

I. Motion to Dismiss

[1] Defendant asserts the convictions for involuntary manslaughter and AWDWISI must be vacated on the grounds that the evidence was insufficient as a matter of law to establish the element of culpable negligence. We disagree.

"A motion to dismiss on the ground of sufficiency of the evidence raises . . . the issue 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Barden*, 356 N.C. 316, 351, 572 S.E.2d 108, 131 (2002), *cert. denied*, — U.S. —, 155 L. Ed. 2d 1074 (2003) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). "The existence of substantial evidence is a question of law for the trial court, which must determine whether there is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). "The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence." *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). Evidence may be direct, circumstantial, or both. *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

"Involuntary manslaughter has been defined as the unlawful and unintentional killing of another without malice which proximately results from an unlawful act not amounting to a felony [and not] naturally dangerous to human life, or by an act or omission constituting culpable negligence." *State v. Smith*, 351 N.C. 251, 268, 524 S.E.2d 28, 40 (2000) (quoting *State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 782-83 (1986)). The crime of AWDWISI has the following four elements: (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).

[A] driver who operates a motor vehicle in a manner such that it constitutes a deadly weapon, thereby proximately causing serious injury to another, may be convicted of AWDWISI provided there is either an actual intent to inflict injury or cul-

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pable or criminal negligence from which such intent may be implied.

State v. Jones, 353 N.C. 159, 164-65, 538 S.E.2d 917, 922-23 (2000).

In the case at bar, the State sought to convict defendant of involuntary manslaughter and AWDWISI by putting forth evidence that he was culpably negligent in support of these crimes. “Culpable negligence is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.” *State v. Weston*, 273 N.C. 275, 280, 159 S.E.2d 883, 886 (1968) (quoting *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933)). Defendant argues the principle of culpable negligence as applied to automobile accidents is predominantly limited to driving offenses involving a defendant’s use of alcohol and thus, is not applicable in this case because he was sober.

As to involuntary manslaughter, cases like *State v. Nugent*, 66 N.C. App. 310, 311 S.E.2d 376 (1984), do not support defendant’s argument. In *Nugent*, this Court upheld a trial court’s decision to submit an involuntary manslaughter charge to the jury despite defendant’s challenge that the decision was based, in part, on evidence that failed to show he was culpably negligent in passing four vehicles at one time, some in a no passing zone. Since there was no evidence that the defendant in *Nugent* was impaired when he passed the vehicles, this Court recognized that operation of a vehicle could rise to the level of culpable negligence for purposes of an involuntary manslaughter conviction in the absence of impairment by alcohol. However, for purposes of an AWDWISI conviction, we have found no cases where the same has been held. In each of the cases where an appellate court has upheld an AWDWISI conviction supported by culpable negligence, the evidence established that the defendant was impaired by alcohol when his operation of a vehicle constituted a deadly weapon. See, e.g., *State v. Jones*, 353 N.C. at 164-65, 538 S.E.2d at 922-23 (where an impaired defendant was convicted of AWDWISI for colliding his vehicle into that of the victims).

Nevertheless, the legal definition for culpable negligence has historically been defined the same for both offenses, recognizing that, whether or not a defendant is impaired by alcohol, conduct that results in injury or death to another can be so reckless or careless as to constitute a “thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.” *Weston*, 273 N.C. at

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280, 159 S.E.2d at 886 (citation omitted). With that in mind, the evidence in the case *sub judice* indicates McLean noticed inappropriate driving by both defendant and decedent prior to their vehicles approaching a sharp curve because decedent would increase her speed each time defendant attempted to pass her. As they approached the curve, defendant attempted to pass decedent and McLean despite having no visibility around the curve. Further, defendant violated N.C. Gen. Stat. § 20-150 (2001), a safety statute, when he crossed over a double yellow line in his attempt to pass the vehicles. Our Supreme Court has held that “[a]n intentional, wilful or wanton violation of a statute . . . , designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence.” *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92-93 (1985) (quoting *Cope*, 204 N.C. at 31, 167 S.E. at 458). Defendant’s attempt to pass the vehicles at that particular time (1) was in blatant disregard of safety concerns associated with that portion of the highway and (2) ultimately resulted in decedent’s death and McLean’s injuries. Although defendant’s actions were not impaired by alcohol, they were still sufficient to establish the culpable negligence needed to support both involuntary manslaughter and AWDWISI based on these facts. While we recognize this is likely the first time an appellate court has held there can be sufficient evidence to support submission of an AWDWISI charge on the basis of culpable negligence in a non-alcohol-related case, the legal definition of this term and instructive case law preclude this Court from holding otherwise. Accordingly, the trial court did not err in denying defendant’s motion to dismiss either charge.

II. Amendment to the Indictment

[2] At the close of the State’s evidence, the trial court allowed the State to amend the indictment charging defendant with reckless driving. The indictment originally provided as follows: “The jurors for the State upon their oath present that on or about [12 June 2001] and in [Harnett County Jason Ray Wade] unlawfully, willfully and feloniously did operate a motor vehicle on a street or highway of the State of North Carolina without due caution and circumspection and in a manner as to endanger persons or property.” To this language, the State added the following: “to wit by passing another vehicle in an area inhibited by double yellow line marked on roadway.” Defendant asserts the language of the indictment prior to the amendment was insufficient to charge him with reckless driving because it failed to specify how defendant was reckless.

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"An indictment . . . is 'a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill.'" *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600, *cert. denied*, — U.S. —, 156 L. Ed. 2d 702 (2003) (quoting *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952)). "[A]n indictment must charge the essential elements of the alleged offense." *State v. Thomas*, 153 N.C. App. 326, 335, 570 S.E.2d 142, 147, *disc. rev. denied*, 356 N.C. 624, 575 S.E.2d 759 (2002). The language of an indictment charging a statutory offense is sufficient where it tracks the language of the statute. *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 241 (2002); *see also State v. Youngs*, 141 N.C. App. 220, 230, 540 S.E.2d 794, 800 (2000) (citation omitted) (stating "an indictment couched in the language of the statute is sufficient to charge the statutory offense").

North Carolina General Statute § 20-140(b) (2001) provides, in relevant part, the following: "[a]ny person who drives any vehicle upon a highway . . . without due caution and circumspection and . . . in a manner so as to endanger . . . any person or property shall be guilty of reckless driving." The original language of the indictment tracked the language of our statute; therefore, defendant's contention, that it was insufficient to charge reckless driving, is without merit.

III. Evidence of Decedent's Relationships and Photograph

[3] Defendant first asserts the trial court erred in allowing Louis Stone, decedent's brother, to testify about victim's relationship with her nieces. The following testimony forms the basis of defendant's assertion:

Q: Did [decedent] have a relationship with your children?

A: Yes, ma'am.

Q: How would you describe that relationship that she had with your children?

[DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: Overruled.

A: It was a good relationship. They—my little girl called her Weezie.

Defendant contends the testimony was irrelevant and inflammatory.

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Assuming *arguendo* the judge erroneously allowed testimony concerning decedent's relationship with her family, any error was harmless. "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial The burden of showing such prejudice . . . is upon the defendant." N.C. Gen. Stat. § 15A-1443(a) (2001). Here, three eyewitnesses and the officer investigating the accident testified, and the evidence indicated, defendant passed two cars over a double yellow line approaching and navigating a sharp curve around which he was unable to see. Defendant has failed to show a reasonable possibility a different result would have been reached absent the admission of the testimony.

Defendant also asserts the trial court committed plain error in allowing the admission into evidence of a photograph of the victim with her nieces. Plain error is "'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . grave error which amounts to a denial of a fundamental right . . . a miscarriage of justice or . . . the denial to appellant of a fair trial[.]'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original). "In meeting the heavy burden of plain error analysis, a defendant must convince this Court, with support from the record, that . . . absent the error the jury probably would have reached a different verdict." *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000). As previously noted, the evidence of defendant's culpably negligent acts in the instant case is overwhelming. Defendant fails to present an argument supported by the record that it is probable the jury would have reached a different verdict had the photograph not been admitted into evidence. For the foregoing reasons, we hold the trial of the defendant was free from reversible error.

No error.

Judges McGEE and HUNTER concur.

IN THE COURT OF APPEALS

DIAL v. COZY CORNER REST., INC.

[161 N.C. App. 694 (2003)]

PEARLINE DIAL, EMPLOYEE, PLAINTIFF v. COZY CORNER RESTAURANT, INC.,
EMPLOYER, DEFENDANT, NON-INSURED, DEFENDANT

No. COA02-1606

(Filed 16 December 2003)

Workers' Compensation— calculation of award—average weekly wage

Although the Industrial Commission did not err in a workers' compensation case by granting temporary total and permanent partial compensation to plaintiff, the case is remanded for recalculation of the award because the Commission's determination of plaintiff's average weekly wage is not supported by competent evidence.

Appeal by defendants from Opinion and Award entered 19 September 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 September 2003.

Huggins, Pounds & Davis, L.L.P., by Dallas M. Pounds, for plaintiff appellee.

Reid, Lewis, Deese, Nance & Person, by James R. Nance, Jr., for defendant appellant.

TIMMONS-GOODSON, Judge.

Cozy Corner Restaurant, Inc. ("defendant") appeals an Opinion and Award entered 19 September 2002 by the North Carolina Industrial Commission ("the Full Commission") in favor of Pearline Dial ("plaintiff"). We affirm.

Plaintiff filed a worker's compensation claim alleging that she injured her right foot on 7 July 2000 when she struck it against the leg of a chair while working for defendant. Following the injury, plaintiff was treated at Pembroke Family Practice Center who referred her to Southeastern Orthopaedic Clinic where plaintiff was further treated by Dr. Staley T. Jackson. An x-ray revealed a fracture of the right fifth metatarsal with slight displacement of plaintiff's right foot. Dr. Jackson treated plaintiff from 13 July 2000 through 2 July 2001.

After plaintiff's injury, plaintiff informed defendant that she was unable to work because of her injury. Defendant told plaintiff that if she was unable to work, they would have to fill her position with someone else.

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Plaintiff first brought this case before Deputy Commissioner Douglas E. Berger in Lumberton, North Carolina, on 17 September 2001. On 12 December 2001 Deputy Commissioner Berger issued an Opinion and Award wherein he concluded that plaintiff failed to show by the greater weight of evidence that she sustained an injury by accident arising out of and in the course of her employment with defendant. Accordingly, Deputy Commissioner Berger denied compensation to plaintiff.

Plaintiff appealed to the Full Commission. In an Opinion and Award filed 19 September 2002, the Full Commission reversed the Opinion and Award of Deputy Commissioner Berger and entered the following pertinent findings of fact:

3. On July 5, 2000 plaintiff was involved in a motor vehicle accident . . . as a result of the motor vehicle accident plaintiff described her knees as striking each other resulting in injury to her knees for which she received treatment . . . a notation was made [on plaintiff's medical record] by the nurse on duty that plaintiff received an ice pack to her right ankle; however, this notation was stricken through and a further notation was made that the notation had been entered onto the wrong chart.
4. On July 7, 2000 plaintiff was waitressing at the Cozy Corner when she attempted to maneuver between two tables to take the order of customers sitting at a third table. As she moved between the two tables plaintiff stood on her tip toes and struck her right foot on the leg of one of the chairs of the tables. Plaintiff felt sharp pain in her right foot and reported the incident immediately to the owner's son, Dwayne Cummings. Plaintiff's injury was an injury by accident within the course and scope of her employment and is compensable under the Workers Compensation Act.
5. Plaintiff continued to work the remainder of her shift but complained to several co-workers that she felt like she had broken her foot while trying to maneuver between the two tables. At the end of her shift she proceeded to Pembroke Family Practice Center for treatment of her right foot, giving a history of working at a local restaurant waiting tables when she accidentally caught that foot under a chair and twisted it.
6. Plaintiff was provided an ace wrap and pain medication and was sent to be x-rayed. She was then told to follow up with an orthopedic surgeon.

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7. On July 13, 2000 plaintiff was seen by Dr. Staley T. Jackson of the Southeastern Orthopaedic Clinic. Plaintiff provided a history of twisting her right foot on July 7, 2000. Plaintiff's complaints at that time were pain on the outside of her foot and x-rays revealed a fracture of the right fifth metatarsal with slight displacement. Dr. Jackson applied a walking cast to plaintiff's foot/ankle. Plaintiff treated with Dr. Jackson from July 13, 2000 through July 2, 2001. During the course of plaintiff's treatment plaintiff was treated with pain medication, arch supports and other conservative measures.

8. Following her compensable injury of July 7, 2000 plaintiff contacted Cozy Corner and told them that she would be unable to work because of her compensable injury. Cozy Corner told her that they would have to fill her position. As of the date of the hearing before the Deputy Commissioner, plaintiff had remained unemployed since July 7, 2000.

9. Due to pain in the metatarsal area and ankle and inability to regain her range of motion, plaintiff did not reach maximum medical improvement and regain the ability to return to work until January 3, 2001. As a result of her compensable injury she sustained a 5% permanent partial impairment of the right foot.

10. The Full Commission finds plaintiff to be credible. The fact that her knees were injured in an automobile accident two days prior to her injury at Cozy Corner does not mean that her foot and ankle were not injured in the table incident. Neither does the fact that she was seen limping prior to the table incident, for she had hurt her knees two days earlier. The customer who said the injury was to plaintiff's left foot was mistaken: all of the corroborative medical evidence shows a right foot injury on July 7, 2000, not a left foot injury.

Based on these findings of fact, the Full Commission concluded as a matter of law as follows:

1. Plaintiff has shown by the greater weight of the evidence that she sustained an injury by accident arising out of and in the course of [her] employment with defendant on July 7, 2000. N.C. Gen. Stat. § 97-2(6).
2. Plaintiff is entitled to temporary total compensation at the rate of \$99.00 per week from July 7, 2000 through January 3, 2001, the

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period when she was unable to work because of her compensable injuries. N.C. Gen. Stat. § 97-29.

3. Plaintiff is entitled to permanent partial compensation at the rate of \$99.00 per week for 7.5 weeks for the 5% rating to her right foot. N.C. Gen. Stat. § 97-31 (14).

4. With respect to her compensable injuries, plaintiff is entitled to medical treatments reasonably required to "effect a cure or give relief". [sic] Defendants shall pay medical providers for such treatment or, where appropriate, reimburse those who paid. N.C. Gen. Stat. § 97-25.

The Full Commission therefore awarded plaintiff temporary total compensation at the rate of \$99.00 per week from 7 July 2000 through 3 January 2001 and permanent partial compensation at the rate of \$99.00 per week for 7.5 weeks for a 5% permanent partial impairment rating of her right foot. Defendant appeals the Opinion and Award of the Full Commission.

The dispositive issue on appeal is whether the Full Commission's findings of fact are supported by the evidence and whether the findings of fact in turn support the conclusions of law. Specifically, defendant assigns error to four findings of fact and all the conclusions of law. For the reasons stated herein, we affirm in part, and remand in part the Opinion and Award of the Full Commission.

On appeal of a worker's compensation decision, this Court is limited to reviewing whether the findings of fact are supported by competent evidence and whether the findings of fact support the Full Commission's conclusions of law. *See Walker v. Lake Rim Lawn & Garden*, 155 N.C. App. 709, 713, 575 S.E.2d 764, 767, *disc. reviewed denied*, 357 N.C. 67, 579 S.E.2d 577 (2003). This Court does not have the authority to weigh the evidence and decide an issue on the basis of its weight. *Id.* "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* (citations omitted). The evidence tending to support the plaintiff's claim must be taken in the light most favorable to the plaintiff, and the plaintiff "is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *rehearing denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). If there is competent evidence to support the finding of fact, the finding of fact must stand, even if there is evidence to the contrary. *Id.*

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Defendant assigns error to the following findings of fact:

3. On July 5, 2000 plaintiff was involved in a motor vehicle accident . . . as a result of the motor vehicle accident plaintiff described her knees as striking each other resulting in injury to her knees for which she received treatment . . . a notation was made [on plaintiff's medical record] by the nurse on duty that plaintiff received an ice pack to her right ankle; however, this notation was stricken through and a further notation was made that the notation had been entered onto the wrong chart.

4. On July 7, 2000 plaintiff was waitressing at the Cozy Corner when she attempted to maneuver between two tables to take the order of customers sitting at a third table. As she moved between the two tables plaintiff stood on her tip toes and struck her right foot on the leg of one of the chairs of the tables. Plaintiff felt sharp pain in her right foot and reported the incident immediately to the owner's son, Dwayne Cummings. Plaintiff's injury was an injury by accident within the course and scope of her employment and is compensable under the Workers Compensation Act.

....

9. Due to pain in the metatarsal area and ankle and inability to regain her range of motion, plaintiff did not reach maximum medical improvement and regain the ability to return to work until January 3, 2001. As a result of her compensable injury she sustained a 5% permanent partial impairment of the right foot.

10. The Full Commission finds plaintiff to be credible. The fact that her knees were injured in an automobile accident two days prior to her injury at Cozy Corner does not mean that her foot and ankle were not injured in the table incident. Neither does the fact that she was seen limping prior to the table incident, for she had hurt her knees two days earlier. The customer who said the injury was to plaintiff's left foot was mistaken: all of the corroborative medical evidence shows a right foot injury on July 7, 2000, not a left foot injury.

Competent evidence supports the findings of fact above listed. The four findings of fact are supported by plaintiff's testimony and the medical records included within the record on appeal. The record contains hospital records from both accidents and progress notes from Pembroke Family Practice Center regarding plaintiff's foot injury. Furthermore, the record includes a letter written by plaintiff's

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treating physician, Dr. Staley T. Jackson, indicating that plaintiff sustained 5% permanent partial impairment of her right foot and did not reach maximum medical improvement until 3 January 2001. Thus, there is competent evidence in the record to support the above findings of fact.

Defendant's primary arguments against the Full Commission's findings of fact assert that the Full Commission failed to take into consideration plaintiff's noncompliance with her treatment regime in determining her award, and secondly, that the Full Commission erred when it found that plaintiff was a credible witness. The Full Commission did not make any findings of plaintiff's alleged non-compliance, and to the contrary, determined that plaintiff was a credible witness with a compensable injury.

At best, both of defendant's arguments attack the credibility determinations made by the Full Commission. We note that the Full Commission may reject all or any part of any witness' testimony. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). The Full Commission is in the best position to weigh the evidence and therefore does not need to explain its credibility determinations to this Court. See *Walker*, 155 N.C. App. at 713, 575 S.E.2d at 767. We hold that the findings of fact disputed by defendant are indeed supported by competent evidence.

Defendant next argues that the Full Commission's conclusions of law are not supported by the evidence. However, defendant's brief does not forward any discussion of the first, third, or fourth conclusions of law. Thus, the assignment of error as to these three conclusions of law are deemed abandoned. N.C.R. App. P. 28(a).

The Full Commission's second conclusion of law determined that plaintiff is entitled to temporary total compensation of \$99.00 a week from the date of injury until 3 January 2001. This conclusion of law is based on a finding of fact that plaintiff's average weekly wage is \$148.50, which yields her \$99.00.

The Full Commission found as fact that plaintiff worked an average of 13.5 hours a week at a rate of \$5.00 an hour with tips ranging from \$5.00 to \$7.00 a day. It is unclear how the Full Commission used these hours, rates and tips to find that plaintiff's average weekly wage was \$148.50. At \$5.00 an hour for 13.5 hours a week, plaintiff would earn \$67.50 weekly plus tips. The trial court found that plaintiff worked between 4 and 5 days a week. If the trial court calculated

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plaintiff's wage using the highest day and tip calculation, five days a week at \$7.00 in tips, plaintiff's weekly income is \$102.50, not \$148.50.

As plaintiff admits in her brief that she "waives argument with regard to this issue," we do not benefit from her argument in support of the trial court's calculation. Accordingly, plaintiff's average weekly wage as determined by the Full Commission is not supported by competent evidence.

For the reasons set forth above, we affirm the decision of the Full Commission granting compensation to plaintiff, but remand for recalculation of the award.

Affirm in part, remand in part.

Judges HUDSON and ELMORE concur.

THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, PETITIONER v. MARTIN
FEINSTEIN, RESPONDENT

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, PETITIONER v. HOWARD
GORMAN, RESPONDENT

NORTH CAROLINA STATE UNIVERSITY, PETITIONER v. PEARL A. WILKINS,
RESPONDENT

No. COA03-225

(Filed 16 December 2003)

Public Officers and Employees— termination of university employees—reduction in force—jurisdiction of Office of Administrative Hearings

The trial court erred by holding that the later enacted N.C.G.S. § 126-34.1 did not supersede N.C.G.S. § 126-35(c) and that the Office of Administrative Hearings (OAH) had jurisdiction to determine whether petitioners had just cause to terminate respondent university employees through a reduction in force (RIF), because: (1) N.C.G.S. § 126-34.1 was enacted five years after N.C.G.S. § 126-35, and by its own terms of exclusion, N.C.G.S. § 126-34.1 supersedes and controls over any contrary earlier enactments; (2) N.C.G.S. § 126-34.1 supplants N.C.G.S.

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§ 126-35 or otherwise the evident intent of the later enacted N.C.G.S. § 126-34.1 in setting out the specific contested cases that are appealable to OAH would be eliminated; and (3) N.C.G.S. § 126-34.1 is the sole source of appellate rights for university employees covered by the State Personnel Act, and it excludes appeals to OAH of RIFs on grounds of lack of just cause and procedural violations.

Appeal by petitioners from order entered 12 November 2002 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Celia Grasty Lata and Special Deputy Attorney General Thomas J. Ziko, for petitioners-appellants.

Schiller & Schiller, PLLC, by Marvin Schiller and David G. Schiller, for respondents-appellees Howard Gorman and Pearl A. Wilkins.

Martin Feinstein, respondent-appellee, pro se.

TYSON, Judge.

The University of North Carolina at Chapel Hill (“UNC-CH”) and North Carolina State University (“NCSU”) (collectively, “petitioners”) appeal from the 12 November 2002 order holding that: (1) N.C. Gen. Stat. § 126-34.1 does not supersede N.C. Gen. Stat. § 126-35(c), and (2) that the Office of Administrative Hearings (“OAH”) has jurisdiction to determine whether petitioners had just cause to terminate the employment of Howard Gorman (“Gorman”), Pearl A. Wilkins (“Wilkins”), and Martin H. Feinstein (“Feinstein”) (collectively, “respondents”) through a reduction in force (“RIF”). We reverse and remand.

I. Background

Feinstein worked in the Academic Technology and Networks Department at UNC-CH. On 17 December 2001, Feinstein was dismissed from his position due to permanent reductions in State funding reductions to UNC-CH’s budget. UNC-CH’s Information Technology Division was ordered to reduce their budget by four percent for fiscal year 2001-2002. UNC-CH decided to eliminate Feinstein’s position. Feinstein’s RIF was upheld after review within the UNC-CH internal grievance process.

Gorman worked as manager of UNC-CH's Materials and Support Department. On 31 December 2001, Gorman's position was also eliminated due to permanent reductions in State funding received by UNC-CH. In UNC-CH's internal grievance process, Gorman claimed his notice did not conform to UNC-CH's RIF policy. Chancellor James Moeser ("Chancellor Moeser") found that the notice did not address the efforts made to avoid the elimination of Gorman's position. Accordingly, Chancellor Moeser directed Roger Patterson, Associate Vice Chancellor for Finance, to address these issues and to give Gorman an additional thirty days' pay with benefits, in order to satisfy UNC-CH's RIF requirements.

Wilkins worked as the Customer Operations Manager in the Office of Communication Technologies at NCSU. Wilkins's position was eliminated due to reductions of State funding received by NCSU. Wilkins appealed her layoff through NCSU's grievance process. The review panel concluded that elimination of her position was appropriate. George Worsley, Vice Chancellor for Finance and Business, reviewed the panel's findings, accepted the panel's recommendation, and upheld Wilkins's RIF.

Respondents, subsequently filed OAH petitions in 2002 for contested case hearings alleging improper RIFs. Petitioners moved for, but were denied, dismissal of OAH petitions. Petitioners filed Petitions for Writ of Supersedeas, Certiorari, and Prohibition to OAH in Wake County Superior Court. The trial court found that respondents were entitled to OAH hearings to determine whether petitioners had just cause to terminate respondents' positions. Petitioners appeal.

II. Issue

Did the trial court err in upholding OAH of jurisdiction over RIF appeals on lack of just cause and procedural violations?

III. Jurisdiction of OAH

Petitioners contend that N.C. Gen. Stat. § 126-34.1 is the sole source of appellate rights for university employees covered by the State Personnel Act. They argue the statute excludes appeals to OAH of RIFs on grounds of lack of just cause and procedural violations. We agree.

The General Assembly expressly exempted the University of North Carolina from all provisions of the North Carolina

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Administrative Procedure Act except those of Article 4. N.C. Gen. Stat. § 150B-1(f) (2001); *see also Beauchesne v. University of N.C. at Chapel Hill*, 125 N.C. App. 457, 468, 481 S.E.2d 685, 692 (1997). The rights of university employees to challenge any employment action in OAH must derive independently, from The State Personnel Act. N.C. Gen. Stat. § 126 (2001); *see also Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 342-43, 389 S.E.2d 35, 38 (1990), *rev'd on other grounds*, *Empire Power Co. v. N.C. Dep't of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768, *reh'g denied*, 338 N.C. 314, 451 S.E.2d 634 (1994). OAH's jurisdiction over appeals of university employee grievances exists solely within the limits established by the State Personnel Act. *Empire Power Co.*, 337 N.C. at 579, 447 S.E.2d at 774.

In 1995, the General Assembly enacted N.C. Gen. Stat. § 126-34.1, which specifically defined which employee appeals constitute contested case issues OAH may hear. N.C. Gen. Stat. § 126-34.1(a) (2001) explicitly states that university employees may file in OAH "only as to the following personnel actions or issues." N.C. Gen. Stat. § 126-34.1(e) states that "[a]ny issue for which appeal to the State Personnel Commission through the filing of a contested case . . . [that] has not been *specifically authorized* by this section *shall not* be grounds for a contested case under Chapter 126." N.C. Gen. Stat. § 126-34.1(e) (2001) (emphasis supplied).

OAH's jurisdiction over state employee RIFs are specifically limited to two narrowly defined circumstances:

(2)(b) Demotion, reduction in force, or termination of an employee in retaliation for the employee's opposition to alleged discrimination . . .

. . . .

(4) Denial of the veteran's preference . . . or in connection with a reduction in force, for an eligible veteran

N.C. Gen. Stat. § 126-34.1 (2001). Respondents do not fall into either one of these two defined circumstances.

A. Lack of Just Cause

Respondents claim that they were separated from State employment without just cause and that N.C. Gen. Stat. § 126-34.1(a)(1) provides them with a basis for appealing their RIFs. They assert N.C. Gen. Stat. § 126-34.1(a)(1) specifically refers to N.C. Gen. Stat. § 126-35, which defines actions based on just cause.

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N.C. Gen. Stat. § 126-34.1(a)(1) specifically refers to “dismissal, demotion, or suspension” without just cause but does not mention RIFs for lack of just cause as a basis for appealing a RIF. RIFs are specifically referred to only twice in the statute. The General Assembly clearly stated in N.C. Gen. Stat. § 126-34.1 that a contested case that “has not been *specifically authorized* by this section *shall not* be grounds for a contested case under Chapter 126.” N.C. Gen. Stat. § 126-34.1(e) (2001) (emphasis supplied).

A fundamental rule of statutory interpretation requires the plain meaning of the statute to control its applicability. *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). A statute that provides a clear enumeration of its inclusion is read to exclude what the General Assembly did not enumerate. See *Dunn v. N.C. Dep’t of Human Resources*, 124 N.C. App. 158, 161, 476 S.E.2d 383, 385 (1996); see also *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (the statutory inclusion of specific things implies the exclusion of others). Where statutory language is clear and unambiguous, there is no room for judicial construction. *Begley v. Employment Security Comm’n*, 50 N.C. App. 432, 436, 274 S.E.2d 370, 373 (1981). The language of N.C. Gen. Stat. § 126-34.1 clearly and unambiguously states that the statutory list of appeal grounds in N.C. Gen. Stat. § 126-34.1 is exclusive. This list does not provide for appeals to OAH of RIFs based on lack of just cause.

Furthermore, N.C. Gen. Stat. § 126-34.1 was enacted in 1995, five years after N.C. Gen. Stat. § 126-35. By its own terms of exclusion, N.C. Gen. Stat. § 126-34.1 supersedes and controls over any contrary earlier enactments. N.C. Gen. Stat. § 126-35(c) existed as statutory law when N.C. Gen. Stat. § 126-34.1(e) was enacted. Our Supreme Court has held that construing conflicting statutes to give validity and effect to both is only possible if it can be done without destroying the evident intent and meaning of the later enacted act. *Bank v. Loven*, 172 N.C. 719, 724, 90 S.E. 948, 950 (1916). Given its clear and unambiguous language, the later enacted N.C. Gen. Stat. § 126-34.1 supplants N.C. Gen. Stat. § 126-35. Otherwise, the evident intent of the later enacted N.C. Gen. Stat. § 126-34.1 in setting out the specific contested cases that are appealable to OAH would be eliminated. *Id.*

B. Procedural Violations

Petitioners contend that N.C. Gen. Stat. § 126-34.1 also excludes appeals of RIFs on grounds of procedural violations. We agree.

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N.C. Gen. Stat. § 126-34.1 was ratified during the 1995 legislative session. The statute was embodied in House Bill 438 and Senate Bill 405. These bills originally set forth seven grounds for bringing contested cases before OAH. The seventh of these grounds read: "Reduction in force in violation of the policies and rules of the State Personnel Commission." H.R. 438, 1995 Sess. (N.C. 1995); S. 405, 1995 Sess. (N.C. 1995). On 28 March 1995, the House of Representatives amended its bill by deleting this seventh ground for a contested case hearing. H.R. 438, Committee Substitute (28 March 1995). The Senate deleted the seventh ground as well on 20 April 1995. S. 405, Committee Substitute (20 April 1995). The bill ultimately ratified and enacted by the General Assembly excluded any reference to RIF procedural violations as a contested case before OAH. S. 405, 1995 Session (N.C. 1995).

In *Burgess v. Your House of Raleigh*, our Supreme Court held that legislative history documenting rejection of a statutory provision is probative of the intent to exclude that provision from the statute as enacted. 326 N.C. 205, 209, 388 S.E.2d 134, 141 (1990). The Court found that the General Assembly had considered an amendment to the Communicable Disease Act that would have extended anti-discrimination protections to individuals with Human Immunodeficiency Virus ("HIV"). *Id.* at 217, 388 S.E.2d at 141. The bill was amended and the anti-discrimination provisions were deleted. *Id.* Relying on the General Assembly's consideration and rejection of the anti-discrimination provisions, our Supreme Court concluded that the Handicapped Persons Act was not intended to protect those with HIV and stated, "[t]he General Assembly specifically addressed the particular question at issue here and affirmatively chose not to include persons infected with the HIV virus within the scope of the Handicapped Persons Act." *Id.* at 217, 388 S.E.2d at 141-42.

Here, the General Assembly considered granting state employees the right to bring RIF policy violations as a contested case before OAH. Both the House and Senate bills were amended to delete this particular ground from contested cases. The ratified bill enacted excluded this ground. The General Assembly clearly intended to deny OAH jurisdiction over challenges to RIFs on procedural violation grounds and to grant state employees the right to bring only those RIF claims that are specifically set out in N.C. Gen. Stat. § 126-34.1 before OAH. Respondents have not challenged their RIFs on any of the grounds set out under N.C. Gen. Stat. § 126-34.1. We hold OAH has no jurisdiction to hear the petitions.

IV. Conclusion

The trial court erred in holding that the later enacted N.C. Gen. Stat. § 126-34.1 does not supersede N.C. Gen. Stat. § 126-35(c) and that OAH has jurisdiction to determine whether respondents' RIFs were based on lack of just cause or procedural violations. The order of the trial court is reversed. We remand with instructions to the superior court to enter an order directing OAH to grant petitioners' motions to dismiss on the grounds of lack of statutory authority.

Reversed and Remanded with instructions.

Judges McCULLOUGH and BRYANT concur.

WALTER HATCHER, JR., PLAINTIFF v. FLOCKHART FOODS, INC., DEFENDANT

No. COA02-1400

(Filed 16 December 2003)

Estoppel—statute of limitations—insurer concealing responsible party

A motion for summary judgment by a slip and fall defendant should have been denied because plaintiff's claim of equitable estoppel established a defense against the statute of limitations. Plaintiff sought to deal directly with the party responsible for the store in which he was injured (a Piggly Wiggly), the company which insured both Piggly Wiggly and the company to which the store was leased (Flockhart) responded on behalf of Piggly Wiggly, and settlement discussions continued for sixteen months. The insurer concealed the responsible party by its conduct, and plaintiff justifiably relied on that conduct to its detriment. An injustice would result from holding that these facts do not present an exception to the general rule that insurers do not act as agents for the insured when settling claims.

Appeal by plaintiff from an order entered 12 April 2002 by Judge Benjamin G. Alford in Duplin County Superior Court. Heard in the Court of Appeals 20 August 2003.

HATCHER v. FLOCKHART FOODS, INC.

[161 N.C. App. 706 (2003)]

Thompson & Mikitka, P.C., by E. C. Thompson, III and Susan Collins Mikitka, for plaintiff-appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Christopher M. Hinnant, for defendant-appellee.

HUNTER, Judge.

Walter Hatcher, Jr. ("plaintiff") appeals from a grant of summary judgment in favor of Flockhart Foods, Inc. ("Flockhart") and the subsequent dismissal of his complaint against Flockhart as being barred by the statute of limitations. For the reasons stated herein, we reverse.

On 10 July 1997, plaintiff sustained several injuries when he slipped and fell on a slick substance in a Piggly Wiggly grocery store in Wallace, North Carolina ("the Store"). On 10 February 1999, plaintiff's counsel forwarded correspondence to the corporate office of Piggly Wiggly, Inc. to inform it that he was representing plaintiff in a negligence claim for personal injuries as a result of the fall. Great American Insurance Company, which was later bought by Ohio Casualty Group, was the insurer of Piggly Wiggly, Inc. and received notice of plaintiff's claim on or about 26 April 1999. A representative of the insurer contacted plaintiff by telephone sometime thereafter, acknowledging the correspondence.

Plaintiff's counsel and the insurer's representatives engaged in various communications over a period of approximately sixteen months in an effort to settle the matter. During that time, no representative ever indicated that he or she represented any entity other than Piggly Wiggly, Inc. Plaintiff's counsel never inquired about the lease or ownership status of the Store or who was the responsible party for that property.

Due to the approaching three-year statute of limitations for plaintiff's negligence claim, plaintiff's counsel informed the insurer that he would be filing a complaint. Prior to filing that complaint, plaintiff's counsel checked the corporation's registry at the North Carolina Secretary of State website and discovered that "Piggly Wiggly of Wallace, Inc." was now known as "Wallace Farm Mart, Inc." Thus, plaintiff filed a complaint on 30 June 2000 naming "Wallace Farm Mart, Inc. formerly Piggly Wiggly of Wallace Inc." ("Wallace Farm Mart") as the defendant. A courtesy copy of the complaint was also forwarded to the insurer on that same day, which was approximately ten days before expiration of the statute of limitations.

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On 6 September 2000, Wallace Farm Mart filed a motion to dismiss plaintiff's action and an answer that alleged it was not the proper defendant because it had leased the Store to Flockhart. Plaintiff then moved to add Flockhart as a party-defendant. Wallace Farm Mart challenged plaintiff's motion on the ground that the statute of limitations had expired. Nevertheless, plaintiff's motion was allowed, and an amended complaint was filed on 13 December 2000. Afterwards, plaintiff voluntarily dismissed his claim against Wallace Farm Mart.

On 1 February 2001, Flockhart filed a motion to dismiss plaintiff's action on the ground that the statute of limitations had expired prior to the filing of plaintiff's amended complaint. In response, plaintiff filed a motion to amend his amended complaint to particularly plead that Flockhart should be equitably estopped from asserting the statute of limitations as a defense in the matter. In separate orders entered on 14 September 2001, Judge Jerry Braswell allowed plaintiff's motion, but denied Flockhart's motion, in part, because "there was no recorded lease in the office of the Register of Deeds of Duplin County indicating the property was leased by the owner, Wallace Farm Mart, Inc., to lessee Flockhart Foods, Inc."

Flockhart filed an answer to plaintiff's second amended complaint on 8 October 2001, which included an answer to plaintiff's equitable estoppel claim and a renewed request for dismissal of plaintiff's cause of action. When the motion was heard, Flockhart submitted additional materials for the court's consideration, which effectively converted its motion to dismiss into a motion for summary judgment. By order entered on 12 April 2002, Flockhart's motion was allowed by Judge Benjamin G. Alford, and plaintiff's complaint was dismissed. Plaintiff appeals.

Defendant assigns error to the trial court's order granting summary judgment in favor of Flockhart. On an appeal from a grant of summary judgment, an appellate court must determine whether the trial court, after viewing the evidence in the light most favorable to the non-movant, properly concluded that there was no genuine issue of material fact. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). If such a conclusion is made, the moving party is entitled to judgment as a matter of law. *Id.*

In its order, the trial court concluded that "plaintiff's contention of equitable estoppel fail[ed] to establish a defense against the applicable statute of limitations for negligence actions . . ." As the defend-

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ant, Flockhart was vested with the right to rely on the statute of limitations as a defense against plaintiff's stale claim. *See Staley v. Lingerfelt*, 134 N.C. App. 294, 299, 517 S.E.2d 392, 396 (1999). Yet, a defendant "may be equitably estopped from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit." *Friedland v. Gales*, 131 N.C. App. 802, 806, 509 S.E.2d 793, 796 (1998).

"[T]he essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts."

Meachan v. Board of Education, 47 N.C. App. 271, 277-78, 267 S.E.2d 349, 353 (1980) (citation omitted).

Plaintiff contends that a statute of limitations defense should not be available to Flockhart, the party being estopped, because the insurer acted as an agent of both Wallace Farm Mart and Flockhart thereby imputing its concealment of the proper defendant's identity on Flockhart. We agree.

The law of estoppel as applied to agency is as follows:

"Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact."

Fike v. Bd. of Trustees, 53 N.C. App. 78, 80, 279 S.E.2d 910, 912 (1981) (citation omitted). As a general rule, our courts have held that insurers and their agents "do not act as agents for the insured when settling claims." *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 204, 528 S.E.2d 372, 379 (2000) (citation omitted). This Court reasoned in *Cash* that

an insurance company, when settling claims with third party outsiders, is acting in its own interest. "It is a matter of common

knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims." Therefore, [our courts] can deduce that settling a . . . claim may cost an insurance company less than actually litigating it, and thus is in the insurer's best interest.

Id. at 201, 528 S.E.2d at 377 (citations omitted). However, although this general rule was intended to allow an insurer the freedom to reach a fair and reasonable settlement that is in its best interest, the rule was never intended to allow the insurer or the insured to circumvent liability in the manner presented by the facts in the instant case.

Here, it is undisputed that the insurer insured both Wallace Farm Mart and Flockhart. Yet, when plaintiff's counsel sent his first correspondence to Piggly Wiggly, Inc., the insurer responded on behalf of Piggly Wiggly, Inc. and not on behalf of Flockhart, the lessee of the Store where plaintiff fell. During the subsequent sixteen months in which the insurer and plaintiff attempted to reach a settlement, the insurer never indicated that it represented any party other than Piggly Wiggly, Inc. or that Piggly Wiggly, Inc. was not the responsible party. In fact, in a correspondence the insurer sent plaintiff on 19 July 2000, two weeks after the complaint was filed, the insurer was still referring to its insured as "Piggly Wiggly, Inc." Thus, even if no agency existed in fact, Flockhart's conduct permitted the insurer to act on its behalf thereby imputing the insurer's concealment of the responsible party on Flockhart.

Further, as the party asserting the defense of equitable estoppel, plaintiff must offer evidence of the following: "(1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Meachan*, 47 N.C. App. at 278, 267 S.E.2d at 353 (citation omitted). After viewing the evidence in the light most favorable to plaintiff, we can conclude that plaintiff lacked knowledge that Flockhart was the proper defendant to sue and was unable to discover that knowledge because the lease between Flockhart and Wallace Farm Mart was not recorded in the Register of Deeds office. Plaintiff relied on correspondence between he and the insurer that indicated "Piggly Wiggly, Inc." was the insured. At no point during the sixteen months plaintiff sought to settle the matter did the insurer state that Flockhart was actually the responsible party. Without that knowledge, plaintiff filed a complaint that named Wallace Farm Mart

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as the defendant. Plaintiff did not learn Wallace Farm Mart had leased the Store to Flockhart, making Flockhart the proper defendant, until Wallace Farm Mart filed its answer, which was after the limitations period ran out.

Finally, this case is generally analogous to *Fike*, 53 N.C. App. 78, 279 S.E.2d 910, in which a plaintiff successfully asserted agency by estoppel to prevent the defendant Retirement System from denying retirement benefits. In that case, the plaintiff followed the defendant's published guidelines in submitting his claim for benefits to his employer, despite the plaintiff's desire to deal directly with the defendant. The defendant subsequently denied the plaintiff's application because it was not timely submitted by the employer. This Court concluded that although the plaintiff's employer was not the defendant's actual agent, evidence of representations by the defendant that the employer was its agent was sufficient to create an agency by estoppel and that the plaintiff justifiably relied on those representations to his detriment. The Court reasoned that it would have been unjust to allow the defendant to deny benefits when it led the plaintiff to believe he was dealing with its agent when the plaintiff specifically sought to deal with the defendant.

Like the plaintiff in *Fike*, plaintiff in the case *sub judice* sought to deal directly with the party (i.e. the party's insurance company) responsible for the Store in which he received his injuries when he sent the initial correspondence to Piggly Wiggly, Inc. The insurer responded to plaintiff on behalf of Piggly Wiggly, Inc. and not on behalf of Flockhart, the entity that was actually the responsible party and also insured by the insurer. Thereafter, plaintiff engaged in sixteen months of settlement discussions with the insurer during which time the insurer, by its conduct, concealed that Flockhart was the responsible party, as well as represented that the responsible party was Piggly Wiggly, Inc. Ultimately, the action plaintiff initiated against "Wallace Farm Mart, Inc. formerly Piggly Wiggly of Wallace Inc." was dismissed by the trial court because plaintiff had failed to name Flockhart as the proper defendant prior to the applicable statute of limitations running out. Thus, since plaintiff justifiably relied on the insurer's conduct to his detriment, these facts are sufficient to create an agency by estoppel.

In conclusion, the doctrine of equitable estoppel "rests on principles of equity and is designed to aid law in the administration of justice when without its aid injustice would result." *Deal v. N.C. State University*, 114 N.C. App. 643, 645, 442 S.E.2d 360, 362 (1994). If we

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were to hold that the facts in this case did not present an exception to the general rule that insurers do not act as agents for the insured when settling claims, such an injustice would result. Accordingly, the trial court should have denied Flockhart's motion for summary judgment because plaintiff's contention of equitable estoppel established a defense against the applicable statute of limitations.

Reversed.

Judges TIMMONS-GOODSON and ELMORE concur.

JUDI BAKER, EMPLOYEE, PLAINTIFF v. SAM'S CLUB, EMPLOYER; AND CLAIMS MANAGEMENT, INC., CARRIER; DEFENDANTS

No. COA03-117

(Filed 16 December 2003)

1. Workers' Compensation— post-injury employment—necessary findings

A workers' compensation award was remanded for necessary findings about the suitability of plaintiff's post-injury employment by defendant.

2. Workers' Compensation— credibility and weight of evidence—Commission as sole judge

An assignment of error to Industrial Commission findings and conclusions was overruled where plaintiff contended that those findings and conclusions were contrary to the greater weight of the evidence. There was evidence to support the findings, and the Industrial Commission is the sole judge of the credibility and weight of the evidence.

Appeal by plaintiff from opinion and award entered 20 September 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 October 2003.

Brumbaugh, Mu & King, P.A., by Leah L. King, for plaintiff appellant.

Young, Moore & Henderson, P.A., by J.D. Prather and Michael W. Ballance, for defendant-appellees.

BAKER v. SAM'S CLUB

[161 N.C. App. 712 (2003)]

HUDSON, Judge.

Plaintiff Judi Baker ("plaintiff") suffered knee, arm, shoulder and neck injuries when she slipped and fell while at work. Plaintiff's employer, Sam's Club ("defendant"), paid disability compensation and medical treatment costs related to the knee injury, but denied compensability for the arm, shoulder and neck problems. Plaintiff sought a hearing. Deputy Commissioner Wanda Blanche Taylor heard plaintiff's case in Wilmington on 31 March 1998, and entered her opinion and award 1 July 1999, awarding compensation only for permanent partial disability related to her knee injury. Plaintiff appealed the Deputy Commissioner's decision to the Full Commission, which reviewed her case 29 February 2000. On 20 September 2002, the Full Commission filed an opinion and award, again awarding plaintiff compensation only for the permanent partial disability rating related to her knee injury, pursuant to N.C. Gen. Stat. § 97-31 (1995). Plaintiff appeals, alleging error in the Commission's failure to make findings about the suitability of plaintiff's job following her injury. For the reasons discussed below, we reverse in part and remand to the Full Commission for findings about the suitability of plaintiff's post-injury position, and for appropriate conclusions based on those findings.

The findings of the Commission indicate that plaintiff was employed by defendant as an outside marketing representative earning an average weekly wage of \$428.00. On 24 May 1996, in the course and scope of her employment, plaintiff slipped and fell while calling on Food Lion, a customer of defendant. Embarrassed by her fall, plaintiff attempted to complete the call, and then reported the accident to her supervisor immediately on returning from the field. Defendants accepted plaintiff's claim as a compensable injury by accident to her knee.

Plaintiff saw doctors at Cape Fear Occupational Health Services with anterior knee pain and reports of neck, arm and shoulder pain. Plaintiff eventually underwent knee surgeries on 11 November 1996 and 25 April 1997, and remained out of work until 7 September 1997. Plaintiff's physician released her to return to work with restrictions and recommended a primarily sedentary job without kneeling, stooping, squatting or bending, limited stair climbing and a lifting limit of twenty pounds.

Plaintiff returned to work with defendant 7 September 1997, taking a sit-down position at the Credit Applications desk. Plaintiff was able to perform this job, but the position was eliminated nationwide

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after 25 December 1997. Defendant then transferred plaintiff to a demonstrator job, preparing food products for customers to taste while in the store. The position required plaintiff to load the necessary food and equipment onto a cart, push the cart to the demonstration location, prepare the food, serve it to customers, clean up and break down the demonstration station afterwards, and take out the accumulated trash.

In January 1998, while working as a demonstrator, plaintiff's knee collapsed as she stooped to place food into a microwave. Defendant then moved plaintiff to a non-cooking position, albeit one which still required standing, reaching and lifting. The Commission made the following finding:

11. The plaintiff testified that her job as a non-cooking demonstrator exceeded her physical limitations and light duty restriction. However, the plaintiff was offered help by the preparation people to assist her in tearing down and setting up for her demonstrations. There are generally two prep people available. The plaintiff declined this help indicating that she did not want to be a strain on the team and that if a 60-year-old prep person could do it, she could do it.

Testimony also showed that plaintiff felt embarrassed about her physical limitations and about being paid \$11.40 per hour, when other demonstrators earned only \$8.00 to \$9.00 per hour. Plaintiff discussed her new position with her physician, who re-emphasized that she needed a sedentary job. Defendant's sales manager agreed that the job description presented for approval by plaintiff's physician was not accurate because it did not indicate that the job required lifting, squatting, kneeling and prolonged standing.

Following continued complaints of pain in her knee, arm, shoulder and neck, plaintiff's physician advised her that she would either need to quit work or work in pain. Plaintiff continued to be seen by physicians for the injuries to her knee, receiving a permanent partial impairment rating of seven percent to her left leg. Plaintiff also continued treatment for injuries to her right arm and shoulder, eventually being diagnosed with carpal tunnel and impingement syndromes. As a result of those injuries, plaintiff's physician removed her from work until they could be resolved surgically. Plaintiff remains out of work, contending that the demonstrator job assigned to her by defendants was not suitable given her restrictions.

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[1] Plaintiff first contends that the Industrial Commission erred in failing to make findings of fact on the issue of suitability of the jobs to which she returned on 7 September 1997 following her injury. Because the Commission's opinion and award fails to make any findings about the suitability of plaintiff's post-injury jobs, as required for its determination, we remand for findings on that issue.

Prior to the hearing before the deputy commissioner, the parties stipulated that one of the issues before the Commission was whether plaintiff is "entitled to payment of temporary partial disability from September 9, 1997 to the present and continuing." Under the Workers' Compensation Act, disability is defined by a diminished capacity to earn wages, not by physical infirmity alone. N.C. Gen. Stat. § 97-2(9) (1995). Findings about the plaintiff's ability to earn wages in the competitive job market are necessary for the Commission to determine her earning capacity which, in turn, is necessary for a determination of entitlement to temporary partial disability under N.C. Gen. Stat. § 97-30. *Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 765, 487 S.E.2d 746, 750 (1997). In order to determine whether the benefits for the seven percent rating are the more munificent remedy, the Commission must address the plaintiff's loss of wage-earning capacity, if any. *See Knight v. Wal-Mart*, 149 N.C. App. 1, 562 S.E.2d 434 (2002), *affirmed per curiam*, 357 N.C. 54, 577 S.E.2d 620 (2003).

"[A]n injured employee's earning capacity must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986). Thus, "the fact that an employee is capable of performing employment tendered by the employer is not, as a matter of law, an indication of plaintiff's ability to earn wages." *Saums*, 346 N.C. at 764, 487 S.E.2d at 750. As our Supreme Court has explained:

Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated.

Peoples, 316 N.C. at 438, 342 S.E.2d at 806; *see also Kisiah v. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 476 S.E.2d 434 (1996), *dsic. review*

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denied 345 N.C. 343, 483 S.E.2d 169 (1997). Thus, in order to make the necessary findings about plaintiff's earning capacity, the Commission must first make findings about whether the job offered by defendant to plaintiff accurately reflects her ability to earn wages in the competitive marketplace.

During the hearing, plaintiff presented medical records, and testimony from herself and from Michael Travelstead ("Travelstead"), a sales manager working for defendant, tending to show that jobs plaintiff held following her injury were not suitable given her medical restrictions. The defendants prepared job descriptions for the positions of credit membership table telemarketer and demonstrator, each of which plaintiff's physician approved for her. Plaintiff first undertook the job at the credit membership table, which she believed she was able to perform. However, when defendant eliminated that position 25 December 1997, plaintiff began work as a demonstrator. Travelstead testified that the job description he had prepared for plaintiff's physician did not accurately present the true physical requirements of the demonstrator position. In addition, plaintiff presented evidence that she was paid \$11.40 per hour for her work, while other demonstrators earned only \$8.00 to \$9.00 per hour, and that defendant offered her assistance to permit her to perform this work.

The Commission failed to make any findings about the suitability of plaintiff's post-injury employment by defendant. Because these findings were necessary in order for the Commission to determine whether plaintiff was entitled to temporary partial disability compensation, and whether those benefits or the benefits for the rating were more generous, we remand to the Commission to address these factual issues, and then draw appropriate conclusions.

[2] Plaintiff next argues that the Industrial Commission erred in making findings and reaching conclusions that go against the greater weight of the evidence on the issue of whether plaintiff's arm, shoulder and neck injuries are compensable. Because the Commission is the sole judge of credibility of the witnesses and the weight to be given their testimony, we overrule this assignment of error.

We do "not have the right to weigh the evidence and decide the issue on the basis of its weight." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Our "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* "[A]ppellate

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courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Id.* at 116, 530 S.E.2d at 553.

The evidence before the Commission included the report of Dr. James A. Nunley, a physician who evaluated plaintiff at the Commission's request. Dr. Nunley's report stated that plaintiff's "neck injury is not related to her workmen's compensation fall nor is her shoulder injury." Because this evidence before the Commission supports its findings, they are conclusive on appeal, and these findings in turn support the Commission's conclusions regarding the causation of plaintiff's arm, shoulder and neck injuries.

Remanded for additional findings and conclusions.

Judges McGEE and CALABRIA concur.

THOMAS C. CLARK, EMPLOYEE, PLAINTIFF v. CITY OF ASHEVILLE, EMPLOYER,
SELF-INSURED (HEWITT COLEMAN AND ASSOCIATES, SERVICING AGENT),
DEFENDANT

No. COA03-120

(Filed 16 December 2003)

**Workers' Compensation— post-traumatic stress—fireman—
abusive supervisor—driving test**

The Industrial Commission did not err by concluding that a workers' compensation plaintiff's post-traumatic stress disorder, depression, and other psychological conditions did not develop and were not aggravated by causes and conditions characteristic of and peculiar to his employment as a firefighter. An abusive supervisor, an employment test, and a perceived demotion are not uncommon in the workplace.

Appeal by plaintiff from opinion and award filed 17 September 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 November 2003.

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[161 N.C. App. 717 (2003)]

*Gary A. Dodd for plaintiff-appellant.**William F. Slawter, PLLC, by William F. Slawter, for defendant-appellee.*

BRYANT, Judge.

Thomas C. Clark (plaintiff) appeals an opinion and award of the North Carolina Industrial Commission (the Commission) filed 17 September 2002 denying his workers' compensation claim.

On 13 May 1999, plaintiff filed a Form 18 with the Commission alleging he had suffered an occupational disease, post-traumatic stress disorder, after failing a required driving test and being told he could no longer drive fire trucks for the city. Plaintiff's employer, the City of Asheville, denied his claim, and plaintiff requested a hearing before the Commission.

In its 17 September 2002 opinion and award, the Commission found as fact that:

1. Plaintiff is 52 years of age He completed high school. Plaintiff served in the Army from 1969-71, completing two tours of duty in Vietnam, with an honorable discharge in 1971. Plaintiff had combat duty, patrol duty and prisoner of war camp assignment while in Vietnam. While in Vietnam, plaintiff was exposed to violence and death.
2. Plaintiff began working with the Fire Department of the City of Asheville in 1973 and continued working there until he retired December 1, 1998. . . . Prior to May 1998, [p]laintiff had been trained and given the additional duty of driving the fire trucks. He had been driving the fire truck for about 20 years.
3. At the time that [p]laintiff began driving fire trucks, around 1978, the position of fire truck driver was not a specific, designated position. Firefighters would share this duty, and there was no additional pay. Previously, the driver position had been a promotional position and firefighters were required to pass a test.
4. In the spring of 1998, there were 39 firefighters who were also assigned as drivers, of which five had been tested and promoted into the driver position. At that time, the City determined that the position of truck driver would be changed back to a separate promotional position. A firefighter would be required to pass a hands-on test to qualify as a driver. Plaintiff and all the other fire-

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fighters were notified of this change. Anyone who wished to drive the truck, including the existing drivers, would be required to take and pass the test in order to keep driving. The only exception was for the five drivers who had previously taken and successfully completed the driving test and had been promoted to the designated position [in the past].

5. In May 1998, 62 firefighters, including [p]laintiff, took the test to qualify as drivers. Of those, 41 passed and 21 did not pass. Of the 21 who did not pass, 9, including [p]laintiff, were already assigned drivers. As a result of the test, those who were assigned drivers who did not pass[] would no longer be assigned to drive on a regular basis, but would work as relief drivers. There was no demotion involved, and there was no reduction in pay, but there was a change of duty assignment. All drivers who did not pass the test were given an opportunity to challenge the test results, which [p]laintiff chose not to do.

6. Plaintiff has a long history of treatment for post-traumatic stress disorder (PTSD), caused by his combat experience in Vietnam. He has a ten percent service connected disability through the Veterans Administration [(V.A.)] related to his PTSD. Plaintiff showed signs of a stress disorder shortly after returning from Vietnam As early as 1986, he reported to the V.A. [m]edical staff that he was having dreams about Vietnam. At that time, he was also having difficulties in his first marriage, problems with anger, and was expressing suicidal thoughts.

7. . . . [B]y March 1995, [plaintiff] had been assessed with PTSD and depression of several years duration. . . .

. . . .

10. At the time he took the driver's test in May 1998, [p]laintiff had many personal stressors in his life and an extensive history of mental health treatment for depression, PTSD, and anger management.

11. The position of firefighter may be considered inherently dangerous and exposes firefighters to many traumatic events not usually witnessed by the general public The evidence in this case, however, fails to show that such events were factors significantly contributing to [p]laintiff's psychological problems, including PTSD, depression and anger.

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12. After [p]laintiff was notified that he did not pass the driver's test, [p]laintiff became extremely angry. He called his employee assistance plan and was referred to Dr. Phillip Ellis, a psychologist . . . , who [p]laintiff then saw . . . for crisis intervention. Plaintiff expressed his anger at not passing the test and viewed the situation as a demotion. He was particularly upset with the [f]ire [c]hief

13. Having reviewed and considered the testimony of [the examining psychologists], the . . . Commission finds that [p]laintiff's post-traumatic stress disorder . . . resulted from his service during the Vietnam War and that his condition, combined with his personality type, led to extreme anger and potential violence when dealing with stresses of life such as marital, family, and relationship problems. He had a similar reaction to the driver's test and his relationship with the fire chief. To his credit, he recognized the potential for violence and sought help

. . . .

15. Failing an employment test and perceiving demotion are not uncommon circumstances in the workplace.^[1] Such occurrences are not characteristic to employment as a firefighter, and employment as a firefighter does not increase one's risk of experiencing stress as a result of failing a test or perceiving demotion. Neither [p]laintiff's PTSD nor his mental state in dealing with the driver's test or the [fire] chief were the result of any traumatic event or events characteristic of employment as a firefighter.

16. After May 1998, [p]laintiff returned to light duty work . . . until December 1, 1998, when . . . he went out of work on retirement status.

Based on these findings, the Commission concluded plaintiff's post-traumatic stress disorder, depression, and other psychological condition did not develop and was not aggravated by causes and conditions "characteristic of and peculiar to his employment" as a firefighter.

The dispositive issue is whether plaintiff's post-traumatic stress disorder or aggravation thereof was due to causes and conditions "characteristic of and peculiar to" his employment.

1. Plaintiff did not assign error to this finding of fact. Thus, it is "deemed supported by competent evidence." *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003).

CLARK v. CITY OF ASHEVILLE

[161 N.C. App. 717 (2003)]

In his brief to this Court, plaintiff contends that his claim for workers' compensation benefits rests on his inability to perform the duties of a firefighter due to the psychological reaction caused by the failed driving test and his perceived demotion and a comment by the fire chief, whom he now considered "the enemy," when plaintiff returned to light-duty work.²

An occupational disease is defined 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) (2001). Our courts have recognized work-related depression or other mental illness to be a compensable occupational disease "as long as the resulting disability meets statutory requirements," *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 119, 476 S.E.2d 410, 414 (1996), to establish that "'the mental illness or injury was due to stresses or conditions different from those borne by the general public,'" *Smith-Price v. Charter Pines Behavioral Ctr.*, 160 N.C. App. 161, 168, 584 S.E.2d 881, 886 (2003) (citation omitted). Thus, a plaintiff has to show that his psychological condition, or the aggravation thereof, was (1) "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment" and that it is not (2) an "ordinary disease[] of life to which the general public is equally exposed." N.C.G.S. § 97-53(13).

In this case, plaintiff is unable to meet the first requirement of this two-prong test. Plaintiff based his claim on the sole contention that the driving test and the fire chief's comment to him were the catapult for his post-traumatic stress disorder and other mental conditions. The giving of tests, however, is not "characteristic of and peculiar to" plaintiff's employment as a firefighter but can be expected in any work setting. N.C.G.S. § 97-53(13). Moreover, as our Supreme Court has acknowledged, working for an abusive supervisor, if this was indeed the case here, "can occur with any employee in any industry or profession." *Woody v. Thomasville Upholstery, Inc.*, 146 N.C. App. 187, 202, 552 S.E.2d 202, 211 (2001) (Martin, J., dissenting), *rev'd*, 355 N.C. 483, 562 S.E.2d 422 (2002) (per curiam based on the reasoning of Judge Martin's dissent). Accordingly, the Commission did not err in concluding that plaintiff's post-traumatic stress disorder, depression, and other psychological condition did

2. While plaintiff was working on a fire hydrant and was dirty and sweaty, the fire chief had walked over to him and said: "Hot day in Vietnam, isn't it?"

not develop and were not aggravated by causes and conditions “characteristic of and peculiar to his employment” as a firefighter because, as stated in finding of fact #15, “[f]ailing an employment test and perceiving demotion are not uncommon circumstances in the workplace.” *See Smith v. Housing Auth. of Asheville*, 159 N.C. App. 198, 203, 582 S.E.2d 692, 695 (2003) (conclusions proper if supported by findings of fact); *Mann Contr'rs, Inc. v. Flair With Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999) (“[t]he conclusions of law drawn . . . from [the] findings of fact are fully reviewable *de novo* by the appellate court”). As all other issues raised in plaintiff’s brief to this Court are subordinate to this determination, we do not reach those issues.

Affirmed.

Judges McCULLOUGH and TYSON concur.

DONALD STANLEY, HUSBAND, AND CHERYL STANLEY, DAUGHTER OF PATRICIA STANLEY, DECEASED EMPLOYEE, PLAINTIFFS v. BURNS INTERNATIONAL SECURITY SERVICES, EMPLOYER, LUMBERMANS MUTUAL CASUALTY COMPANY, CARRIER, DEFENDANTS

No. COA03-259

(Filed 16 December 2003)

Workers’ Compensation— injury by accident—coming and going rule

The Industrial Commission did not err in a workers’ compensation case by concluding that the deceased worker did not sustain a compensable injury by accident when she was involved in an automobile accident on her way home after completion of her shift at work, because: (1) the coming and going rule provides that an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment; and (2) none of the exceptions to the coming and going rule apply in this case.

Appeal by plaintiffs from opinion and award filed 26 November 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 November 2003.

STANLEY v. BURNS INT'L SEC. SERVS.

[161 N.C. App. 722 (2003)]

McGougan, Wright, Worley, Harper & Bullard, LLP, by Paul J. Ekster and Dennis T. Worley, for plaintiff-appellants.

Lewis & Roberts, P.L.L.C., by John D. Elvers and Jeffrey A. Misenheimer, for defendant-appellees.

BRYANT, Judge.

Donald Stanley and Cheryl Stanley (collectively plaintiffs), husband and daughter of the deceased Patricia Stanley, appeal an opinion and award of the North Carolina Industrial Commission (the Commission) filed 26 November 2002 denying their workers' compensation claim.

In its 26 November 2002 opinion and award the Commission found:

1. Patricia Stanley, deceased, began working for . . . defendant-employer [(Burns International Security Services)] on February 17, 1996. The deceased worked as a Site Captain and Security Guard at Bricklanding Plantation that is located outside of Shallotte, North Carolina. The deceased worked approximately 40 hours per week and worked a shift from 4:00 p.m. until midnight. The deceased lived in Nakina, North Carolina . . . approximately 30 miles from Bricklanding.
2. On September 16, 1999, Hurricane Floyd passed through the area and resulted in flooding to the area. . . . [D]efendant-employer's site was closed on September 16, 1999, due to the hurricane. On September 17, 1999, . . . defendant-employer was able to get officers back onsite for the 4:00 p.m. through midnight shift. . . . [D]efendant-employer spoke with the deceased on that day and told her that it was not necessary to come into work because the other officers . . . could cover the site until the water receded and the roads were safe for travel.
3. On Monday, September 20, 1999, the deceased called . . . defendant-employer to report that she still could not get to work. Ms. Dawn Greenburg again told the deceased that it was not necessary for her to come into work until it was safe to travel.
4. On Monday, September 20 [sic], 1999, the deceased called . . . defendant-employer and told . . . defendant-employer that she was coming to work that day. The deceased worked September 21, September 22, September 23, and September 24, 1999. The deceased worked eight-hour shifts on each of those dates.

5. On September 25 [sic], 1999, the deceased traveled to work and worked her shift from 4:00 p.m. until midnight. At the conclusion of her shift, the deceased was on her way home when she was involved in an automobile accident that resulted in her death [on 25 September 1999].

6. The deceased was driving her personal vehicle at the time of her death. . . . [D]efendant-employer did not provide transportation to and from work to the deceased employee. . . . [D]efendant-employer did not pay the deceased for travel time to and from work. . . . [D]efendant-employer also did not reimburse the deceased for mileage for travel to and from work.

7. At the hearing, the deceased's daughter alleged that the deceased was required to come to work on September 24, 1999, or else risk losing her job. This allegation was directly contradicted by the testimony of Ms. Dawn Greenburg and Mr. Clayton Collins. Additionally, this allegation further lacks credibility considering the fact that the deceased worked four complete shifts on September 21, 22, 23, and 24, 1999, prior to her untimely death. Both Ms. Greenburg and Mr. Collins testified that [the deceased] was a good employee[] and that she would never have been given any type of ultimatum as alleged by the deceased's daughter.

Based on these findings, the Commission concluded that because "none of the exceptions to the 'going and coming rule' appl[ied] in this case," "the deceased's automobile accident did not arise out of and was not in the course and scope of her employment with . . . defendant-employer" and was therefore not compensable.

The sole issue on appeal is whether the Commission's findings support its conclusion that the deceased did not sustain a compensable injury by accident.¹

An employee is entitled to workers' compensation benefits for injuries sustained in an accident arising out of and in the course of her employment. "Arising out of" refers to the cause of the accident; the employee must be about the business of the employer. "In the course of" points "to the time, place, and cir-

1. As plaintiffs did not challenge whether the Commission's findings are supported by competent evidence our analysis is limited to whether the findings support the Commission's conclusion. See *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (findings of fact not challenged on appeal "are deemed supported by competent evidence" and are binding on this Court).

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[161 N.C. App. 722 (2003)]

cumstances under which an accident occurred." The accident must happen during the time and at the place of employment.

Hunt v. Tender Loving Care Home Care Agency, Inc., 153 N.C. App. 266, 269, 569 S.E.2d 675, 678 (2002) (quoting *Ross v. Young Supply Co.*, 71 N.C. App. 532, 536-37, 322 S.E.2d 648, 652 (1984)). An employee is not engaged in the business of the employer while driving his or her personal vehicle to the place of work or while leaving the place of employment to return home. *Ellis v. Service Co., Inc.*, 240 N.C. 453, 456, 82 S.E.2d 419, 421 (1954). Therefore, "[t]he general rule in this State is that an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment." *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). This rule is known as the "coming and going" rule. *Id.* Exceptions to this rule have been recognized when: (1) an employee is going to or coming from work but is on the employer's premises when the accident occurs (premises exception), *id.*; (2) the employee is acting in the course of his employment and in the performance of some duty, errand, or mission thereto (special errands exception), *Powers v. Lady's Funeral Home*, 306 N.C. 728, 731, 295 S.E.2d 473, 475 (1982); (3) an employee has no definite time and place of employment, requiring her to make a journey to perform a service on behalf of the employer (traveling salesman exception), *Creel v. Town of Dover*, 126 N.C. App. 547, 556-57, 486 S.E.2d 478, 483 (1997); or (4) an employer contractually provides transportation or allowances to cover the cost of transportation (contractual duty exception), *Hunt*, 153 N.C. App. at 270, 569 S.E.2d at 679.

In this case, none of the exceptions to the "coming and going" rule apply. As found by the Commission, the deceased had voluntarily returned to work on 24 September 1999 and was traveling home after her shift had ended at midnight. The deceased was driving in her own vehicle at the time of the accident, and her employer did not pay the deceased for travel time to and from work or reimburse her for mileage. Moreover, at the time her vehicle swerved off the road, the deceased was no longer on the employer's premises. While the deceased's daughter testified that her mother had been pressured to come in to work on 24 September 1999 and threatened with losing her job if she did not report to work, arguably bringing this case into the special errand analysis, the Commission rejected this testimony as not credible in light of testimony from the deceased's supervisors and the fact that the deceased had already worked for three days prior to her last shift. See *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116,

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[161 N.C. App. 726 (2003)]

530 S.E.2d 549, 553 (2000) (the Commission is the “sole judge of the weight and credibility of the evidence”). As the Commission’s findings thus support its conclusion that none of the exceptions to the “coming and going” rule applied and the deceased therefore did not sustain a compensable injury by accident, there was no error.

Affirmed.

Judges McCULLOUGH and TYSON concur.

GLENN I. HODGE, JR., PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND NORRIS TOLSON, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DEFENDANTS

No. COA03-51

(Filed 16 December 2003)

Costs—attorney fees—failure to file timely motion

The trial court erred by ordering defendants to pay plaintiff attorney fees under N.C.G.S. § 6-19.1 in a claim for injunctive relief to compel plaintiff’s reinstatement to the position of Chief Internal Auditor, because: (1) a request for attorney fees contained within a complaint’s prayer for relief does not constitute a petition within the meaning of N.C.G.S. § 6-19.1; and (2) the trial court did not have jurisdiction to hear plaintiff’s motion for attorney fees since plaintiff failed to petition for attorney fees within thirty days of the final disposition of his case.

Appeal by defendants from judgment entered 15 October 2002 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 28 October 2003.

Broughton Wilkins Sugg & Thompson, P.L.L.C., by R. Palmer Sugg, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert O. Crawford, III and Assistant Attorney General Sarah Ann Lannom, for defendants-appellants.

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[161 N.C. App. 726 (2003)]

ELMORE, Judge.

In this appeal, we must determine whether the trial court erred by ordering the North Carolina Department of Transportation (DOT) and Norris Tolson (collectively, defendants) to pay attorney's fees incurred by Glenn I. Hodge, Jr. (plaintiff) in plaintiff's prosecution of his claim for injunctive relief. For the reasons discussed herein, we conclude that the trial court did not have jurisdiction to hear plaintiff's motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 (2003), and we vacate the trial court's order.

The facts are set out in full in a previous opinion of this Court, *Hodge v. N.C. Dep't. of Transportation*, 137 N.C. App. 247, 528 S.E.2d 22, *rev'd*, 352 N.C. 664, 535 S.E.2d 32 (2000). Briefly, plaintiff was employed in January 1992 by the DOT as an internal auditor and was promoted to chief of the DOT's Internal Audit Section in May 1992. In May 1993, plaintiff's position was reclassified as policymaking exempt pursuant to N.C. Gen. Stat. § 126-5(d). Plaintiff petitioned the Office of Administrative Hearings for a contested case hearing challenging this reclassification, and in November 1993, the DOT dismissed plaintiff as chief of its Internal Audit Section. After proceedings before the Office of Administrative Hearings, the State Personnel Commission, the Wake County Superior Court, and this Court, our Supreme Court ultimately determined that the position of Chief Internal Auditor had been improperly reclassified as policymaking exempt. *See N.C. Dept. of Transportation v. Hodge*, 347 N.C. 602, 499 S.E.2d 187 (1998). Consequently, plaintiff was awarded back pay and reinstated to employment by the DOT in May 1998, albeit as an Internal Auditor II rather than as Chief Internal Auditor.

In July 1998, plaintiff commenced the litigation giving rise to this appeal by applying to the Wake County Superior Court for injunctive relief to compel his reinstatement to the position of Chief Internal Auditor. On 12 February 1999, the trial court granted summary judgment in plaintiff's favor and ordered that he be immediately reinstated to the position of Chief Internal Auditor. On appeal, a divided panel of this Court reversed the trial court's order. *See Hodge v. N.C. Dep't. of Transportation*, 137 N.C. App. 247, 528 S.E.2d 22 (2000). However, in an opinion filed 6 October 2000, our Supreme Court reversed this Court's decision, effectively reinstating the trial court's order granting summary judgment and injunctive relief in plaintiff's favor. *See Hodge v. N.C. Dep't. of Transportation*, 352 N.C. 664, 535 S.E.2d 32 (2000) (*per curiam*). Approximately seventeen months later, on 15 March 2002, plaintiff filed a motion seeking to recover

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attorney's fees from defendants. By its order entered 15 October 2002, the trial court granted plaintiff's motion and awarded reasonable attorney's fees in the amount of \$25,500.00, and costs in the amount of \$837.85. From this order, defendants now appeal.

By their first assignment of error, defendants contend the trial court lacked jurisdiction to award attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1, because plaintiff did not file his motion within 30 days of the final disposition of his case. We agree.

Section 6-19.1 of our General Statutes provides, in pertinent part, as follows:

In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. *The party shall petition for the attorney's fees within 30 days following final disposition of the case.* The petition shall be supported by an affidavit setting forth the basis for the request. . . .

N.C. Gen. Stat. § 6-19.1 (2003) (emphasis added).

In reviewing an award of attorney's fees under Section 6-19.1, a different panel of this Court has previously stated that “[t]he 30-day filing period contained in the statute is a *jurisdictional prerequisite* to the award of attorney's fees, and it begins to run *after the decision has become final* and it is too late to appeal.” *Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993), *appeal dismissed and disc. review denied*, 335 N.C. 566, 441 S.E.2d 135 (1994) (citations omitted) (emphasis added). In *Whiteco*, this Court cited with approval the *Black's Law Dictionary*

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definition of “final disposition” as “‘[s]uch a conclusive determination of the subject-matter that after the award, judgment, or decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.’” *Id.* at 818, 434 S.E.2d at 232 (quoting *Black’s Law Dictionary* 630 (6th ed. 1990)).

In the present case, we conclude that the litigation underlying the instant appeal reached its “final disposition” within the meaning of Section 6-19.1(2) twenty days after the North Carolina Supreme Court filed its written opinion on 6 October 2000 reinstating plaintiff to the position of chief of the DOT’s Internal Audit Section. *See N.C.R. App. P. 32(b)* (2004) (unless an appellate court orders otherwise, its mandate shall issue 20 days after the court’s written opinion is filed with the clerk). We reject plaintiff’s contention that he satisfied the 30-day filing period contained in Section 6-19.1(2) by praying for attorney’s fees within the complaint by which he initiated this litigation. The statute’s plain language requires a prevailing party seeking recovery of attorney’s fees to “*petition*” for them. “When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.” *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658, *reh’g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). Because a petition is “[a] formal written application to a court requesting judicial action on a certain matter,” *see Black’s Law Dictionary* 1145 (6th ed. 1990), we conclude that a request for attorney’s fees contained within a complaint’s prayer for relief does not constitute a “petition” within the meaning of Section 6-19.1(2).

Because plaintiff did not move for attorney’s fees until 15 March 2002, almost a year and a half after final disposition of his case, we hold that plaintiff failed to satisfy the “jurisdictional prerequisite” imposed by Section 6-19.1(2) that he petition for attorney’s fees within 30 days of his case’s final disposition. *Whiteco*, 111 N.C. App. at 818, 434 S.E.2d at 232. Accordingly, we vacate the trial court’s order awarding attorney’s fees and costs to plaintiff and remand to the trial court for entry of an order dismissing plaintiff’s motion for attorney’s fees and costs.

Because we conclude that the trial court lacked jurisdiction to order an award of attorney’s fees to plaintiff, we need not address defendants’ remaining assignments of error.

TICCONI v. TICCONI

[161 N.C. App. 730 (2003)]

Vacated and remanded.

Judges WYNN and TIMMONS-GOODSON concur.

BETHANY ANNE TICCONI, PLAINTIFF v. MATTHEW TICCONI, DEFENDANT

No. COA03-315

(Filed 16 December 2003)

1. Child Support, Custody, and Visitation— support—modification—Guidelines—consent of parties

The parties to a separation agreement each consented to modifications of their child support obligations through application of the Child Support Guidelines where they entered into a consent order modifying visitation and submitted the issue of child support to the court to be determined in accordance with the Guidelines.

2. Child Support, Custody, and Visitation— support—modification—entire Guidelines apply—tax deduction provisions

The trial court erred by not applying the provisions of the Child Support Guidelines concerning tax deductions where the parties waived the enforcement of their separation agreement (which specified the deductions) by asking the court to determine child support in accordance with North Carolina law after they entered into a consent order modifying visitation. Where a party requests a recalculation of child support, that request directs the court to apply the entirety of the North Carolina Child Support Guidelines.

Appeal by plaintiff from order entered 25 October 2002 by Judge Susan R. Burch in Guilford County District Court. Heard in the Court of Appeals 19 November 2003.

Robert D. Davidson, Jr., for plaintiff-appellant.

Ronald P. Butler, for defendant-appellee.

CALABRIA, Judge.

Bethany Anne Ticconi (“plaintiff”) appeals the 25 October 2002 order of the trial court finding the court is without authority to mod-

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[161 N.C. App. 730 (2003)]

ify the parties' separation agreement regarding the issue of which parent may claim which child as a dependent for State and Federal taxation purposes. We find the trial court had the authority to consider the issue of the tax deduction as part of its application of the North Carolina Child Support Guidelines ("the Guidelines"); accordingly, we reverse the order of the court and remand for application of the Guidelines in their entirety.

Plaintiff and Matthew Ticconi ("defendant") were married on 31 July 1993. Two children were born to their marriage, Tobie Michael on 12 January 1995 and Corin Alissa on 2 January 1997. The parties separated in February 2001 and entered into a separation and property settlement agreement which provided, in pertinent part:

3. Child Support. The parties have agreed to deviate from the North Carolina Child Support Guidelines and Husband shall continue to support the minor children by making regular payments monthly . . . in the amount of ONE HUNDRED AND FIVE and 00/100 (\$105.00) DOLLARS per week and a like amount shall be paid on or before Friday of each week thereafter, until the oldest child reaches the age of 18 or graduates from High School whichever event occurs last, at which time the child support will be recalculated. Simultaneously with the execution of this Agreement, Husband shall sign a Voluntary Support Agreement and a Voluntary Wage Assignment for deducting the child support amount. The Husband shall claim TOBIE MICHAEL TICCONI as a dependent for Federal and State income tax purposes and Wife shall claim CORIN TICCONI as a dependent for Federal and State income tax purposes. Both parties shall sign whatever documents are necessary to effectuate the dependent exemption for the other party.

On 12 March 2002, plaintiff filed a complaint against defendant seeking, *inter alia*, a modification of defendant's visitation and child support obligation. On 10 May 2002, following defendant's answer and counterclaim and plaintiff's reply, the parties entered into a consent order¹ which adopted the separation agreement with certain modifications to the children's custody. Therefore, the only remaining issue before the court was the modification of child support in accordance with the Guidelines. The court accepted memoranda on the issue of child support modification. At the 28 June 2002 hearing, the court

1. The May consent order was signed by Judge A. Robinson Hassell on 13 August 2002, and filed on 15 August 2002.

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[161 N.C. App. 730 (2003)]

determined child support in accordance with the Guidelines and utilized Worksheet B for calculation of a new child support amount. However, the court found it did not have the authority to modify the income tax deduction provision of the separation agreement. Plaintiff appeals.

Plaintiff asserts the trial court had the authority to modify the provisions of the separation agreement regarding child support because: (I) the parties consented by both requesting the court apply the Guidelines; and (II) the court's inherent authority to protect children required application of the Guidelines to the case at bar. Since we find plaintiff correctly asserts the parties consented to the court's application of the Guidelines, we need not reach plaintiff's remaining argument.

[1] "A separation agreement which is not incorporated into a court judgment is a contract and cannot be modified absent the consent of the parties." *Rose v. Rose*, 108 N.C. App. 90, 94, 422 S.E.2d 446, 448 (1992). *Accord Pataky v. Pataky*, 160 N.C. App. 289, 296, 585 S.E.2d 404, 409 (2003). In the case at bar, both parties expressly requested that if visitation was modified that the court likewise modify the child support. After the parties entered a consent order modifying visitation, they submitted the issue of child support to the trial court to be determined in accordance with the Guidelines. Accordingly, each party consented to the court modifying the support obligations by applying the Guidelines.

[2] The remaining question is whether the parties' consent to the court's application of the Guidelines included modification of the tax dependency deduction. In determining child support under the applicable North Carolina law,² the Guidelines "apply as a rebuttable presumption to all child support orders in North Carolina" and the court may only deviate from the Guidelines "where application would be inequitable to one of the parties or to the child(ren)" and where the court makes written findings of fact justifying deviation. N.C. Child Support Guidelines, 1998 Ann. R. (N.C.) 33, 34; N.C. Gen. Stat. § 50-13.4 (2001). With regard to the tax deduction, the

2. We note the applicable Guidelines are those effective 1 October 1998 and not the current Guidelines which became effective on 1 October 2002. Nevertheless the current Guidelines also provide "the parent who receives child support claims the tax exemptions for the child. If the parent who receives child support has minimal or no income tax liability, the court may consider requiring the custodial parent to assign the exemption to the supporting parent and deviate from the guidelines." N.C. Child Support Guidelines, 2003 Ann. R. (N.C.) 33, 34.

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Guidelines provided: “[it is] presume[d] the custodial parent claims the tax exemptions for child(ren) due support. [However i]f the custodial parent has no income tax liability, the Court may consider assigning the exemption for the child(ren) to the non-custodial parent, and deviate from the Guidelines by increasing the obligor’s support obligation.”³ N.C. Child Support Guidelines, 1998 Ann. R. (N.C.) 33, 34. Therefore, the Guidelines plainly address the issue of income tax dependency deductions. Accordingly, application of the applicable Guidelines included a determination of the tax dependency deduction.

Nevertheless, defendant asserts that because the tax dependency deduction is not utilized in the worksheet calculations of child support, the court did not have the authority to modify this portion of the separation agreement. We disagree. Application of the Guidelines is not limited solely to the numbers applied to the worksheet. The written commentary to the Guidelines explains how the court defines certain terms, gives context to the requirements of the worksheets, and addresses related issues. We hold that where a party requests a recalculation of child support, that request directs the court to apply the entirety of the North Carolina Child Support Guidelines, including not only the worksheets but also the commentary.

Defendant also asserts that because the tax dependency deduction is merely presumed, and not required, to be awarded to the custodial parent, and because the allocation in the separation agreement is equitable, the court should award the deduction in accordance with the agreement. We note that all the provisions of the Guidelines are presumptive, and were we to follow defendant’s reasoning, the separation agreement would usurp the Guidelines as the default. Moreover, the Guidelines provide that to overcome the presumption in favor of their application, the court must consider whether application of the Guidelines is inequitable and not begin with a prior agreement and question its equity.

Accordingly, we hold that where the parties waive the enforcement of their separation agreement by asking the court to determine child support in accordance with North Carolina law, the court shall apply the Guidelines in their entirety. We find the trial court erred in not applying the provision of the Guidelines regarding tax deduc-

3. It is well established that the income tax deduction is part of child support and not marital property. *Rowan County DSS v. Brooks*, 135 N.C. App. 776, 522 S.E.2d 590 (1999). This should not be a surprise to the parties since the separation agreement itself treated the tax deduction as part of the child support provisions.

OLD LINE LIFE INS. CO. OF AM. v. BOLLINGER

[161 N.C. App. 734 (2003)]

tions. We reverse the order of the trial court and remand for application of the Guidelines in their entirety in accordance with the requests of the parties.

Reversed and remanded.

Judges McCULLOUGH and BRYANT concur.

THE OLD LINE LIFE INSURANCE COMPANY OF AMERICA, PLAINTIFF v. JACK
JOHNSON BOLLINGER AND JEAN BONDURANT, DEFENDANTS

No. COA03-32

(Filed 16 December 2003)

1. Insurance— life insurance—proceeds from policy—beneficiary not changed

Summary judgment was properly granted for defendant Bollinger in an action to determine entitlement to the proceeds from an insurance policy assigned in a separation agreement. The policy is clear and unambiguous; defendant Bondurant was the assignee of the policy but had the right to change the beneficiary designation from defendant Bollinger to herself only until the death of the insured (her ex-husband).

2. Trusts— constructive—evidence not sufficient

The circumstances did not give rise to a constructive trust to receive life insurance benefits where the policy was assigned to defendant Bondurant in a divorce settlement, but the beneficiary designation was never changed. There was no evidence of collusion by the beneficiary, Bollinger, no indication that there was a confidential relationship between Bondurant and Bollinger, and Bondurant has adequate remedies at law for claims of fraud.

Appeal by defendant Jean Bondurant from order entered 31 October 2002 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 8 October 2003.

Hill, Evans, Duncan, Jordan & Beatty, by William W. Jordan and Richard T. Granowsky, for defendant appellant.

Wyatt Early Harris Wheeler, L.L.P., by Jason Moss, for defendant appellee.

OLD LINE LIFE INS. CO. OF AM. v. BOLLINGER

[161 N.C. App. 734 (2003)]

TIMMONS-GOODSON, Judge.

Defendant Jean Bondurant ("Bondurant") appeals from an order of the trial court granting summary judgment to defendant Jack Johnson Bollinger ("Bollinger") in this interpleader action. For the reasons stated herein, we affirm the order of the trial court.

The pertinent facts of the instant appeal are as follows. Bondurant married Jimmie Castle Bollinger ("Jimmie") on 30 November 1974. Jimmie purchased two life insurance policies in 1975 and 1977. Both policies listed Bondurant as the beneficiary. Jimmie and Bondurant subsequently divorced on 30 May 1989 and entered into a settlement agreement on 4 October 1990, resolving in part the equitable distribution claim. The settlement required Jimmie to assign said insurance policies to Bondurant, who paid the policy premiums until Jimmie's death. Pursuant to the settlement agreement, Jimmie provided Bondurant with the original insurance policies and original beneficiary endorsements, which listed Bondurant as the beneficiary designee. However, without Bondurant's knowledge, Jimmie changed the designated beneficiary designees for said insurance policies before he entered into the 4 October 1990 settlement agreement with Bondurant. At the time of the settlement agreement, the designated beneficiaries on the policies were Jimmie's mother, Annie Laura Bollinger as primary beneficiary, and Bollinger as contingent beneficiary. Annie Laura Bollinger pre-deceased Jimmie, thus elevating Bollinger to the status of primary beneficiary of said policies. Bondurant did not change the beneficiary designation on either policy after the settlement agreement assigned them to her.

After Jimmie died, both Bondurant and Bollinger petitioned plaintiff, The Old Line Life Insurance Company of America ("Old Line"), for the proceeds of said policies. Old Line commenced an interpleader action to determine who was entitled to the insurance proceeds at issue. Bondurant asserted a crossclaim against Bollinger arguing that if the court found Bollinger had superior legal title to the proceeds, the proceeds should be held in a constructive trust for the benefit of Bondurant. Both Bondurant and Bollinger moved for summary judgment. The Honorable Peter M. McHugh granted Bollinger's motion for summary judgment and dismissed Bondurant's cross-claim. From the order granting summary judgment to Bollinger and dismissing Bondurant's crossclaim, Bondurant appeals.

Bondurant brings forth two assignments of error on appeal. Bondurant argues that the trial court erred when it granted

OLD LINE LIFE INS. CO. OF AM. v. BOLLINGER

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Bollinger's motion for summary judgment and further that if Bollinger is awarded the proceeds of said insurance policies, there are genuine issues of material fact in dispute regarding whether the money should be held in a constructive trust for the benefit of Bondurant.

[1] Summary judgment is appropriate when there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Lorbacher v. Housing Authority of the City of Raleigh*, 127 N.C. App. 663, 669, 493 S.E.2d 74, 77 (1997). The moving party must establish that there is an absence of a triable issue of fact. *Moore v. Bryson*, 11 N.C. App. 260, 262, 181 S.E.2d 113, 114 (1971). All evidence must be considered in the light most favorable to the non-moving party. *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 350, 363 S.E.2d 215, 217, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988).

Interpreting insurance policies is a matter of law. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970); *Gilbert v. N.C. Farm Bureau Mut. Ins. Cos.*, 155 N.C. App. 400, 403, 574 S.E.2d 115, 118 (2002), *aff'd per curiam*, 357 N.C. 244, 580 S.E.2d 691-92 (2003). It is well settled that an insurance policy is a "contract and its provisions govern the rights and duties of the parties thereto." *Gilbert*, 155 N.C. App. at 403, 574 S.E.2d at 118 (quoting *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986)). To determine the intent of the policy, our courts look to the language of the policy itself. *Rouse v. Williams Realty Bldg. Co.*, 143 N.C. App. 67, 69, 544 S.E.2d 609, 612, *aff'd per curiam*, 354 N.C. 357, 554 S.E.2d 337 (2001). "If the policy is clear, the courts may not, under the guise of an ambiguity in the policy, rewrite the contract." *Gilbert*, 155 N.C. App. at 403, 574 S.E.2d at 118.

The pertinent policy provisions in the instant appeal are as follows.

BENEFICIARY

The beneficiary is as designated in the application for this policy, unless changed. The beneficiary may be changed while the insured is living, by written notice on a form satisfactory to the Company . . . The beneficiary at the insured's death will be as provided in the beneficiary designation then in effect.

. . . .

OLD LINE LIFE INS. CO. OF AM. v. BOLLINGER

[161 N.C. App. 734 (2003)]

ASSIGNMENT

The rights of the owner and any beneficiary are subject to the rights of any assignee of record with the Company.

The rights of the assignee are further defined in the assignment contract signed by Jimmie and an agent for the insurance company.

The undersigned hereby assigns, transfers and sets over all rights, titles, interests and incidents of ownership in said policy unto said Assignee(s) as the separate property and estate of said Assignee(s) with the right to exercise all rights, benefits, privileges and options contained therein to receive dividends or any cash, loans or other values, if any, *to change the beneficiary*, to assign the policy, and to agree with the Company as to any release, modification or amendment to said policy (emphasis added).

Bondurant argues that as assignee of the policies, she holds superior title to the proceeds. Although the rights of the beneficiary are subject to the rights of the assignee on record, the policy clearly states that the right to change the beneficiary designation ceases upon the death of the insured. Thus, although Bondurant had the right to designate herself as beneficiary to said policies before Jimmie's death, she could not do so after he died. At the moment of Jimmie's death, Old Line was required to grant the proceeds of said policies to Bollinger as the beneficiary on record at the time of Jimmie's death. As the policy is clear and unambiguous, we must follow the language of the contract. We hold that the trial court properly granted Bollinger's motion for summary judgment, as there is no genuine issue of material fact as to Bollinger's entitlement to the proceeds.

[2] In Bondurant's second assignment of error, she argues that even if Bollinger is awarded the proceeds, there is a genuine issue of material fact regarding whether the proceeds should be held in constructive trust for her benefit. We disagree.

By definition, a constructive trust arises when "one obtains the legal title to property in violation of a duty he owes to another. Constructive trusts ordinarily arise from actual or presumptive fraud and usually involve the breach of a confidential relationship." *United Carolina Bank v. Brogan*, 155 N.C. App. 633, 635, 574 S.E.2d 112, 114 (2002) (citations omitted). Constructive trusts are imposed to prevent the unjust enrichment of a party to property he acquired through

fraud, breach of duty, or some other circumstance making it inequitable for him to retain it. *Brogan*, 155 N.C. App. at 636, 574 S.E.2d at 115.

In the case *sub judice*, there is no evidence in the record that Bollinger colluded with Jimmie to fraudulently transfer the insurance proceeds to Bollinger upon Jimmie's death. Furthermore, Bondurant has had no relationship with Bollinger since her divorce from Jimmie, and there is no indication that the relationship between Bondurant and Bollinger was ever of a confidential nature. Bondurant has adequate remedies at law to pursue claims of fraud against Jimmie's estate or Bollinger personally. Thus, we conclude that the circumstances as alleged herein, even taken in the light most favorable to Bondurant, do not give rise to a constructive trust.

Affirm.

Judges HUDSON and ELMORE concur.

MAHALEEL LUSTER, JUDGMENT CREDITOR v. GOOCH SUPPORT SYSTEMS, INC.,
GOOCH ENTERPRISES, INC., HAL GOOCH AND CHRIS GOOCH, JUDGMENT
DEBTORS

No. COA02-1642

(Filed 16 December 2003)

Courts— foreign order—payment of money—trial court judge overruling another trial court judge

The trial court erred by enforcing a Florida order involving the payment of money, because: (1) following a North Carolina trial court's denial of plaintiff's motion for enforcement of the foreign order, plaintiff brought the same issue before another North Carolina trial court judge under the guise of a motion to alter or amend judgment denying enforcement of a foreign order, and it was impermissible for a second trial court judge to reverse the action of the first trial court judge; and (2) the issue of whether this matter involves a money judgment or an order denying a motion to vacate a final judgment presents the issue of whether Florida Rule of Appellate Procedure 9.310(b)(1) is inconsistent with Florida Rule of Civil Procedure 1.540(b), which is a matter for the Florida courts.

LUSTER v. GOOCH SUPPORT SYS., INC.

[161 N.C. App. 738 (2003)]

Appeal by Debtor from judgment entered 24 June 2002 by Judge Christopher Collier in Superior Court, Davidson County. Heard in the Court of Appeals 28 October 2003.

William E. West, Jr., for Judgment Debtors.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Kenneth B. Oettinger, Jr., for Judgment Creditor.

WYNN, Judge.

By this appeal, Gooch Support Systems, Inc., Gooch Enterprises, Inc., and Hal and Chris Gooch (the “Gooches”), argue that the trial court erred by enforcing a Florida judgment that was a judgment solely for the payment of money, and therefore stayed by Florida Rules of Appellate Procedure 9.310(b)(1). We agree and therefore, reverse the trial court’s order.

This matter arises from a resolution of the competing claims of the Gooches and Mahaleel Luster by a Florida circuit court judge’s 21 May 2001 order requiring the Gooches to pay Mahaleel Luster \$240,808.71 because the Gooches had failed to perform their obligations under an earlier settlement agreement. Thereafter, the Gooches failed to timely appeal from the judgment; instead, they moved to vacate the judgment in which they asserted a clerical error prevented them from filing a timely notice of appeal. From the Florida trial court’s denial of that motion, the Gooches appealed to Florida’s Fourth District Court of Appeals. While the appeal was pending, the Gooches filed a second motion to vacate the 21 May 2001 final judgment alleging the trial court lacked subject matter jurisdiction to enter a money judgment as a sanction. Following the denial of the second motion to vacate the judgment, the Gooches appealed and filed a civil supersedeas bond, the posting of which, the Gooches argued, stayed enforcement of the judgment.

Meanwhile, in North Carolina, Mahaleel Luster filed a motion for enforcement of the 21 May 2001 foreign judgment. By Order of 11 April 2002, North Carolina Superior Court Judge Susan Taylor denied that Motion “without prejudice to renewing that motion in the event that a Florida Court declares that the filing of the bond in the Florida action does not stay the enforcement of the Florida Judgment.” Following Judge Taylor’s denial of his enforcement motion, Mahaleel Luster filed in North Carolina a motion to alter or amend Judge Taylor’s Order Denying Enforcement of Foreign Judgment; in response, the Gooches filed a Motion for Stay of Proceedings, “pend-

[161 N.C. App. 738 (2003)]

ing the resolution of related matters" in Florida. By order dated 24 June 2002, North Carolina Superior Court Judge Christopher Collier granted Mahaleel Luster's motion to alter or amend judgment denying enforcement of foreign judgment, and denied the Gooches Motion for Stay of Proceedings. The Gooches appealed to this Court.

On appeal, we summarily reverse Judge Collier's order for reasons given in our Supreme Court's recent decision, *State v. Woolridge*, 357 N.C. 544, — S.E.2d — (filed 7 November 2003). In *Woolridge*, our Supreme Court stated: "The power of one judge of the superior court is equal to and coordinate with that of another." Accordingly, it is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Id.* (citing *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966)).

In this case, following Judge Taylor's denial of his motion for enforcement of the 21 May 2001 foreign judgment, Mahaleel Luster brought the same matter before Judge Collier seeking an amendment or alteration. In fact, it appears that Judge Collier faced the same issue that Judge Taylor faced—whether the 21 May 2001 Florida judgment was a judgment solely for the payment of money, and therefore stayed by Florida Rules of Appellate Procedure 9.310(b)(1). Judge Taylor denied the motion; and thereafter Judge Collier granted it. Following *Woolridge*, we must hold that it was impermissible for Judge Collier to reverse the action of Judge Taylor.

Moreover, we agree with the Gooches that the issue of whether this matter involves a money judgment or an order denying a motion to vacate a final judgment, presents an issue of whether Florida Rule of Appellate Procedure 9.310(b)(1) is inconsistent with Florida Rule of Civil Procedure 1.540(b). Our review of Florida case law revealed no cases resolving the precise issue of whether the posting of a civil supersedeas bond in connection with their motion to vacate the final judgment for lack of subject matter jurisdiction stays enforcement of the judgment. That issue, as Judge Taylor recognized, is one for the Florida courts to decide, not our courts.

Reversed.

Judges TIMMONS-GOODSON and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

ASHLEY v. BUSTER BROWN APPAREL No. 02-1546	Ind. Comm. (I.C. 022164) (I.C. 270062) (I.C. 506551)	Affirmed
BRYANT v. CUMBERLAND CTY. BD. OF EDUC. No. 02-1755	Cumberland (01CVS5060)	Affirmed
CARMON v. CUNNINGHAM No. 02-1639	Greene (01CVD131)	Reversed and remanded
CDC PINEVILLE, LLC v. UDRT OF N.C., LLC No. 02-1695	Guilford (01CVS10277)	Remanded
COX v. COX No. 02-1609	Randolph (00CVD1991)	Vacated
FAIRCLOTH v. SCOTT HOWELL & CO. No. 02-1684	Sampson (02CVS612)	Affirmed
FARRIS v. MODERN POLYMERS, INC. No. 02-1438	Gaston (00CVS2062)	Reversed and remanded
FORESTER v. FORESTER No. 03-323	Wilkes (01CVD1248)	Affirmed
IN RE APPEAL OF TILLEY No. 03-162	Property Tax Comm. (00PTC131)	Affirmed
IN RE K.M. & C.H. No. 03-36	Caldwell (02J17) (02J18)	Affirmed
IN RE Y. No. 03-193	Forsyth (01J464)	Affirmed
KING v. HOLBROOK No. 02-1622	Guilford (02CVS984)	Dismissed
LACKEY v. SEARS, ROEBUCK & CO. No. 03-47	Ind. Comm. (I.C. 974960)	Affirmed
RICKER v. ZONING BD. OF ADJUST. OF ASHEVILLE No. 02-1505	Buncombe (01CVD3808)	Affirmed
SPRINKLE v. LILLY INDUS., INC. No. 02-1272	Ind. Comm. (I.C. 021154)	Affirmed

STATE v. DICKENS No. 02-1395	Martin (00CRS2932)	No error
STATE v. ENGLE No. 03-66	Moore (00CRS10284)	Reversed
STATE v. HAIR No. 02-1403	Robeson (97CRS13787) (97CRS13788) (97CRS13789) (97CRS13790) (97CRS13791) (97CRS15355)	No prejudicial error
STATE v. NIXON No. 03-148	New Hanover (01CRS26605) (01CRS26608) (01CRS26609)	Affirmed
STATE v. ROBINSON No. 02-1559	Mecklenburg (99CRS44811) (99CRS44812)	No error
STATE v. SANCHEZ-JIMENEZ No. 02-1729	Wilkes (02CRS50226)	No error
STATE v. WILLIAMS No. 02-1508	Craven (01CRS53958) (02CRS331)	No prejudicial error
STATE v. WRIGHT No. 02-1700	Craven (01CRS53738) (01CRS53742) (01CRS53743) (01CRS53744)	No error
WALLACE v. SMITH No. 03-297	Gaston (02CVS2206)	Reversed and remanded
WHITE v. LENNON No. 03-147	Dare (02CVS131)	Affirmed
WORTHINGTON v. FOOD LION, L.L.C. No. 03-98	Pitt (01CVS2814)	Affirmed

APPENDIX

ORDER ADOPTING AMENDMENTS
TO THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendments to the
North Carolina Rules of Appellate Procedure**

Appendix B of the North Carolina Rules of Appellate is hereby amended as described below:

APPENDIX B. FORMAT AND STYLE

All documents for filing in either Appellate Court are prepared on 8½ x 11 inch, plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least 12-point type so as to produce a clear, black image. Documents shall be set either in nonproportional type or in proportional type, defined as follows: Nonproportional type is defined as 10-character-per-inch Courier (or an equivalent style of Pica) type that devotes equal horizontal space to each character. Proportional type is defined as any non-italic, non-script font, other than nonproportional type, that is 14-point or larger. Under Appellate Rule 28(j), briefs in nonproportional type are governed by a page limit, and briefs in proportional type are governed by a word-count limit. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS.

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties except as provided by Rule 3(b) to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. _____

(Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)

(or)

(NORTH CAROLINA COURT OF APPEALS)

STATE OF NORTH CAROLINA)

or)

(Name of Plaintiff)) From (Name) County

) No. _____

v))

(Name of Defendant))

(TITLE OF DOCUMENT)

The caption should reflect the title of the action (all parties named except as provided by Rule 3(b)) as it appeared in the trial division. The appellant or petitioner is not automatically given top-side billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition which is 10 pages or more in length and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately $\frac{3}{4}$ " from each margin, providing a five-inch line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

I N D E X

Organization of the Court	1
Complaint of Tri-Cities Mfg. Co.	1
* * *	
* PLAINTIFF'S EVIDENCE:	
John Smith	17
Tom Jones	23
Defendant's Motion for Nonsuit	84
* DEFENDANT'S EVIDENCE:	
John Q. Public	86
Mary J. Public	92
Request for Jury Instructions	101
Charge to the Jury	101
Jury Verdict	102
Order or Judgment	108
Appeal Entries	109
Order Extending Time	111
Assignments of Error	113
Certificate of Service	114
Stipulation of Counsel	115
Names and Addresses of Counsel	116

USE OF THE TRANSCRIPT OF EVIDENCE WITH
RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

"Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8 $\frac{1}{2}$ x 11 paper of 16-20 pound substance. Enough copies should be

reproduced to assure the parties of a reference copy, and file one copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

In termination of parental rights and juvenile matters, the entire verbatim transcript must be sealed pursuant to Rule 9(c); if individual transcript pages are inserted in the record on appeal, the pages must be modified to comply with Rule 3(b).

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to A Uniform System of Citation (14th ed.).

FORMAT OF BODY OF DOCUMENT

The body of the document of records on appeal should be single-spaced with double-spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented $\frac{3}{4}$ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetical entry in the text. (R. pp. 38-40) References to the transcript, if used, should be made in similar manner. (T. p. 558, line 21)

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented $\frac{1}{2}$ inch from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, and e-mail address of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained)

ATTORNEY, COUNSELOR, LAWYER & HOWE

By: _____

John Q. Howe

By: _____

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(919) 999-9999
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These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Edmunds, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendments to the North Carolina
Rules of Appellate Procedure**

Rules 3, 26, 30, 37, and 41 of the North Carolina Rules of Appellate are hereby amended as described below:

Rule 3(b) is amended to read as follows:

(b) Special Provisions. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes section noted:

- (1) Termination of Parental Rights, G.S. 7B-1113.
- (2) Juvenile matters, G.S. 7B-1001.1001 or 7B-2602.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be

excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

Rule 26(g) is amended to add new subsection (4):

(4) *Termination of Parental Rights and Juvenile Matters.* All documents and exhibits filed with the appellate court shall not include the name of a juvenile or any other identifying information, in compliance with Rule 3(b).

Rule 30 is amended to read as follows:

(a) Order and Content of Argument.

(1) **(a) Order and Content of Argument.** The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) To the extent practicable, counsel shall refrain from using a juvenile's name in oral argument and, instead, refer to the juvenile consistent with the provisions of Rule 3(b).

Rule 37 is amended to add subsection (c):

(c) Termination of Parental Rights and Juvenile Matters. Any motion or response to a motion filed in the appellate courts shall not include the name of a juvenile, in compliance with Rule 3(b).

Rule 41(b)(2) is amended to read as follows:

(2) Each appellant shall complete and file the APPEAL INFORMATION STATEMENT with the Clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The APPEAL INFORMATION STATEMENT may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. For cases arising out of termination of parental rights and juvenile matters, the name of the juvenile shall not be included in the APPEAL INFORMATION STATEMENT, in compliance with Rule 3(b).

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Edmunds, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendments to the North Carolina
Rules of Appellate Procedure**

Rule 9 of the North Carolina Rules of Appellate is hereby amended as described below:

Rule 9(a) is amended to read as follows:

(a) **Function; Composition of Record.** In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and, the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.9, and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d). Parties may cite any of these items in their briefs and arguments before the appellate courts.

Rule 9(a)(1)(l) is amended to read as follows:

(l) a statement, where appropriate, that the record of proceedings was made with an electronic recording device.

Rule 9(a) is amended to add new subsection (4):

(4) *Exclusion of Social Security Numbers from Record on Appeal.* Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal.

Rule 9(b) is amended to read as follows:

Rule 9(b) Form of Record; Amendments. The record on appeal shall be in the format prescribed by Rule 26(g) and the appendices to these rules.

(1) *Order of Arrangement.* The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) *Inclusion of Unnecessary Matter; Penalty.* It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned, such as social security numbers referred to in Rule 9(a)(4). The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) *Filing Dates and Signatures on Papers.* Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) *Pagination; Counsel Identified.* The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p ____)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p ____)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) *Additions and Amendments to Record on Appeal.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(6) *Appeals from Termination of Parental Rights and Juvenile Matters.* The record on appeal shall comply with the provisions to protect the confidentiality of juveniles by redacting the juvenile's name and other identifying information as set out in Rule 3(b) from any documents included in the record on appeal.

Rule 9(c) is amended to read as follows:

(c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where

error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal. Verbatim transcripts in an appeal of a termination of parental rights or a juvenile matter, as identified by Rule 3(b), shall be submitted to the appellate court in a signed, sealed envelope or other appropriate container on which is noted a case caption that complies with the confidentiality provisions of Rule 3(b), including the District Court case number. The transcript shall be available to the public only with permission from the appellate court.

Rule 9(c)(2) is amended to read as follows:

(2) *Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.* Appellant may designate in the record on appeal that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

Rule 9(c)(3)(c) is amended to read as follows:

(c) in criminal appeals, the district attorney, upon settlement of the record on appeal, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

Rule 9(d)(1) is amended to read as follows:

(1) *Exhibits.* Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal. Social security numbers shall be deleted or redacted from exhibits prior to filing the exhibits in the appellate court.

Rule 9(d)(3) is amended to read as follows:

(3) *Removal of Exhibits from Appellate Court.* All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to ~~him~~the Clerk may seem best.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Edmunds, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendments to the North Carolina
Rules of Appellate Procedure**

Rule 11 of the North Carolina Rules of Appellate is hereby amended as described below:

Rule 11(b) is amended to read as follows:

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within ~~24~~30 days (35 days in capitally tried cases) after service of the proposed record on appeal upon ~~him~~ an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times

allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

Rule 11(c) is amended to read as follows:

(c) By Judicial Order or Agreement, by Operation of Rule, or by Court Order After Appellant's Appellee's Failure to Request Judicial Settlement~~Objection or Amendment~~. Within ~~2130~~ days (35 days in capitally tried cases) after service upon ~~him~~ appellee of appellant's proposed record on appeal, ~~and~~ that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed with the record on appeal, along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9((d)); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included.

If any party to the appeal contends that materials proposed alternative~~for inclusion in the record on appeal~~ or for filing therewith pursuant to Rule 9(c) or 9(d) were not filed, served, submitted for consideration, admitted, or made the appellant or any other appellee subject of an offer of proof, then that party, within 10 days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so served, and no

~~either party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so served, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.~~

The functions of the judge in the settlement of the record on appeal are to settle narrations of proceedings under Rule 9(c)(1) and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

Rule 11(d) is amended to read as follows:

(d) Multiple Appellants; Single Record on Appeal. When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The assignments of error of the several appellants shall be set out separately in the single record on appeal and ~~related~~ attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Edmunds, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Rule 18 of the North Carolina Rules of Appellate is hereby amended as described below:

Rule 18(c)(1) is amended to read as follows:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

Rule 18(d)(2) is amended to read as follows:

(2) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), ~~file in the office of the agency head and~~ serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon ~~him~~, an appellee, ~~that appellee may file in the office of the agency head and~~ serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

Rule 18(d)(3) is amended to read as follows:

(3) *By Conference or Agency Agreement, by Operation of Rule, or by Court Order; Failure to Request Settlement After Appellee's Objection or Amendment.* If any appellee timely files amendments,

objections, or a proposed alternative record on appeal, the ~~appellant record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other appellee parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal but shall be filed with the record on appeal along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included.~~

~~If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule 9(c) or 9(d) were not filed, served, submitted for consideration, admitted, or offered into evidence, then that party, within 10 days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have filed amendments, objections, or a proposed alternative record on appeal, may in writing request that the agency head ~~to~~ convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.~~

~~The functions of the agency head in the settlement of the record on appeal are to settle narrations of proceedings under Rule 9(c)(1) and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.~~

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Edmunds, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendments to the North Carolina
Rules of Appellate Procedure**

Rule 28 of the North Carolina Rules of Appellate is hereby amended as described below:

Rule 28(d) is amended to read as follows:

(d) Appendixes to Briefs. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 29(d). Verbatim portions of the transcript filed pursuant to this rule in an appeal of a termination of parental rights or juvenile matter must be modified to comply with the confidentiality provisions of Rule 3(b).

Rule 28(h) is amended to read as follows:

(h) Reply Briefs. Unless the court, No reply brief will be received or considered by the Court, except in the following circumstances:

(1) The Court, upon its own initiative, ordersmay order a reply brief to be filed and served, none will be received or considered by the court, except as herein provided.

(2) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(3) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(2).

(4) If the parties are notified that the case has been scheduled for oral argument, an appellant may file with the Court, within 14 days after the notice of argument is mailed, a motion for leave to file a reply brief. The motion shall state concisely the reasons why a reply brief is believed to be desirable or necessary and the issues to be addressed in the reply brief. The proposed reply brief may be submitted with the motion for leave and shall be limited to a concise rebuttal to arguments set out in the brief of the appellee which were

not addressed in the appellant's principal brief. Unless otherwise ordered by the Court, the motion for leave will be determined solely upon the motion and without responses thereto or oral argument. The clerk of the appellate court will notify the parties of the Court's action upon the motion, and, if the motion is granted, the appellant shall file and serve the reply brief within ten days of such notice.

(5) Motions for extensions of time in relation to reply briefs are disfavored.

Rule 28(j) is amended to read as follows:

(j) Page Limitations Applicable to Briefs Filed in the Court of Appeals. Each brief filed in the North Carolina Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, formatted according to Rule 26 and the Appendixes to these Rules, shall have either a page limit or a word-count limit, depending on the type style used in the brief:

(1) Type.

(A) *Type style.* Documents must be set in a plain roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. Documents may be set in either proportionally spaced or nonproportionally spaced (mono-spaced) type.

(B) Type size.

1. Nonproportionally spaced type (e.g., Courier or Courier New) may not contain more than 10 characters per inch (12-point).

2. Proportionally spaced type (e.g., Times New Roman), must be 14-point or larger.

3. Documents set in Courier New 12-point type, or Times New Roman 14-point type will be deemed in compliance with these type-size requirements.

(2) Document length.

(A) *Length limitations on briefs filed in the Court of Appeals.* Every brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be subject to either a page limit or a word-count limit, depending on the type style used in the brief.

1. *Page limits for briefs using nonproportional type.* The page limit for a principal brief that uses nonproportional (e.g.,

Courier) type is 35 pages. The page limit for a reply brief permitted by Rule 28(h)(1), (2), or (3) is 15 pages, and the page limit for a reply brief ~~if~~ permitted by ~~Appellate~~ Rule 28(h)(4) is ~~45~~12 pages. A page shall contain no more than 27 lines of double-spaced text of no more than 65 characters per line. Covers, indexes, tables of authorities, certificates of service, and appendixes do not count toward these page limits. The Court may strike or require resubmission of briefs with excessive single-spaced passages or footnotes that are used to circumvent these page limits.

2. *Word-count limits for briefs in proportional type.* A principal brief that uses proportional type may contain no more than 8,750 words, ~~and a~~. A reply brief ~~if~~ permitted by ~~Appellate~~ Rule 28(h)(1), (2), or (3) may contain no more than 3,750 words, ~~and a~~ reply brief permitted by Rule 28(h)(4) ~~may contain no more than 3,000 words~~. Covers, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, and appendixes do not count against these word-count limits. Footnotes and citations in the text, however, do count against these word-count limits. Parties who file briefs in proportional type shall submit along with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or, in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

Rule 28 is amended to add new subsection (k):

(k) Termination of Parental Rights and Juvenile Matters.
No brief shall include the name of a juvenile or other identifying information, in compliance with Rule 3(b).

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Edmunds, J.
For the Court

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Right to challenge agreement—not waived—Plaintiffs preserved their right to challenge an arbitration agreement where they denied the existence of an arbitration agreement, demanded a jury trial, and did not participate in the arbitration hearing. **Burgess v. Jim Walter Homes, Inc.**, 488.

ASSAULT

Intent to kill—evidence sufficient—There was sufficient evidence of an intent to kill in an assault prosecution where the victim was attacked with a deadly weapon, suffered serious injuries, placed in the trunk of defendant's car, and deprived of medical care for several hours. Defendant's motion to dismiss was correctly denied. **State v. Scott, 104.**

Maiming—partially severed ear not sufficient—A motion to dismiss a maiming charge should have been granted where the victim's ear was not totally severed from her head. **State v. Scott, 104.**

Traffic offense—culpable negligence—alcohol not involved—There was sufficient evidence of culpable negligence to support defendant's convictions on charges of assault and manslaughter arising from a traffic accident in which alcohol was not involved. **State v. Wade, 686.**

ATTORNEYS

Attorney to be called as witness—disqualification beyond trial—The trial court abused its discretion by extending beyond the trial the disqualification of an attorney who was to be a witness at the trial. **Cunningham v. Sams, 295.**

Attorney to be called as witness—disqualification of firm—The trial court abused its discretion in disqualifying counsel's entire firm in an action in which the attorney was to be called as a witness. **Cunningham v. Sams, 295.**

Disqualification—material witness—Plaintiff attorneys stated with sufficient specificity why defense counsel was a necessary and material witness in their action to recover fees for their representation of a former client in a domestic case, and the trial court did not abuse its discretion in disqualifying defense counsel from representing the former client in the trial of this action, where the only issue remaining in the case was the reasonableness of plaintiffs' fees, and plaintiffs' motion to disqualify stated that defense counsel had been present in numerous conferences and hearings in the domestic case in which plaintiffs represented the client and that they intended to call him as a witness as to the amount and nature of the work they performed for the client. **Cunningham v. Sams, 295.**

Disqualification—material witness—A disqualification of counsel was not an abuse of discretion in an action by a prior attorney to recover fees for representation in a domestic action because the evidence showed that defendant's attorney was a necessary and material witness in her case where defendant alleged that plaintiff did not provide any value or benefit for many of the charges claimed for services rendered; the nature and value of plaintiff's legal services were a contested issue; and defendant's deposition testimony indicated that her present attorney may have relevant information regarding the nature and value of plaintiff's legal fees obtained prior to his representation of defendant. Rule of Professional Conduct 3.7. **Robinson & Lawing, L.L.P. v. Sams, 338.**

BAILMENTS

Construction equipment parked on property—degree of control—Summary judgment should not have been granted for defendant on a bailment claim arising from an arrangement by which road construction equipment was parked on

BAILMENTS—Continued

defendant's property for a time after a project was finished. The critical question is the degree of control over the equipment by defendant, and here there was a genuine issue of fact. **Atlantic Contr'g & Material Co. v. Adcock, 273.**

Indemnification clause—not exculpatory—The trial court erred to the extent that it based summary judgment for defendant in a bailment claim on an indemnification clause in the parties' agreement. The clause was not an exculpatory agreement because it lacked the necessary explicit language, and indemnity applies to third parties. **Atlantic Contr'g & Material Co. v. Adcock, 273.**

Stored equipment—breach of agreement—summary judgment—Summary judgment should not have been granted for defendant on the issue of breach of a bailment contract where there was evidence that the equipment stored on defendant's property had been damaged, defendant's employee admitted moving it, and defendant admitted that no one else could have moved it. **Atlantic Contr'g & Material Co. v. Adcock, 273.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Child living with abuser—implied detrimental effect—The implied detrimental effect of a minor child living with his abuser is not too speculative to be considered, and there was sufficient evidence in a custody modification proceeding to show that contact with the abusive child was detrimental to the other children in the family. **Senner v. Senner, 78.**

Evidence in another state—no objection or motion to continue at hearing—There was no abuse of discretion in a proceeding to modify a child custody action in the denial of plaintiff's motion for a stay of the original action or a new trial. Although plaintiff contended that almost all of the evidence was in Texas and was not presented, or both, the court found that plaintiff had presented evidence and had made no objection or motion to continue regarding his ability to present evidence from Texas. **Senner v. Senner, 78.**

Extramarital affairs—children doing well—weight of evidence—There was no abuse of discretion in a child custody action where plaintiff asserted that the court did not properly weigh defendant's extramarital affairs and that the children were thriving with plaintiff. The weight of the evidence in child custody actions is within the province of the trial court. **Senner v. Senner, 78.**

Home state of children—implicit in evidence—There was no error in the denial of a modification of a child custody order where there was no explicit finding that North Carolina is the children's home state. The original order had made such a finding, and the court here found facts which would have supported that conclusion. **Senner v. Senner, 78.**

Support—modification—entire Guidelines apply—tax deduction provisions—The trial court erred by not applying the provisions of the Child Support Guidelines concerning tax deductions where the parties waived the enforcement of their separation agreement (which specified the deductions) by asking the court to determine child support in accordance with North Carolina law after they entered into a consent order modifying visitation. Where a party requests a

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

recalculation of child support, that request directs the court to apply the entirety of the North Carolina Child Support Guidelines. **Ticconi v. Ticconi, 730.**

Support—modification—Guidelines—consent of parties—The parties to a separation agreement each consented to modifications of their child support obligations through application of the Child Support Guidelines where they entered into a consent order modifying visitation and submitted the issue of child support to the court to be determined in accordance with the Guidelines. **Ticconi v. Ticconi, 730.**

Support—post-majority—college enrollment—findings—The court's finding in a post-majority child support action that one of the children was enrolled in college classes at the time of trial was supported by the evidence. **Helms v. Schultze, 404.**

Support—post-majority—college expenses—ability to pay—methodology—The trial court's methodology for determining the parties' ability to pay college expenses in a post-majority child support action was not unsupported by reason and was not an abuse of discretion. **Helms v. Schultze, 404.**

Support—prior consent order—income of new spouse—not considered—The income of plaintiff's new husband was properly excluded as irrelevant in a post-maturity support action because the plain language of the consent order obligated only the parties. **Helms v. Schultze, 404.**

Support—psychological and medical expenses—prior consent order—The court did not abuse its discretion in a post-majority support action by ordering defendant to reimburse plaintiff for medical, psychological, and psychiatric expenses which defendant had refused to pay in violation of the plain language of the parties' consent order. **Helms v. Schultze, 404.**

Temporary custody determination—passage of time—not converted to final—best interest of child applied—A child custody determination was a temporary order to which the best interest of the child standard applied rather than a substantial change of circumstances standard. **Senner v. Senner, 78.**

CITIES AND TOWNS

Annexation—industrial use—The trial court did not err in an annexation case by affirming respondent city's classification of the four tracts within PIN 1056 as industrial under N.C.G.S. § 160A-48(c)(3) where each tract was used in support of a power plant. **Carolina Power & Light Co. v. City of Asheville, 1.**

Annexation—non-urban areas—The trial court did not err by concluding that respondent city's annexation of Non-Urban Areas 1 and 4 met the requirements of N.C.G.S. § 160A-48(d)(2) because the statute does not require a non-urban area to touch the pre-annexation city limits of the annexing city. **Carolina Power & Light Co. v. City of Asheville, 1.**

CIVIL PROCEDURE

Findings—not requested, not required—An order disqualifying counsel was not vacated for lack of findings where neither party requested findings of fact or conclusions of law. **Cunningham v. Sams, 295; Robinson & Lawing, L.L.P. v. Sams, 338.**

CIVIL PROCEDURE—Continued

Motion for new trial—failure to seek ruling—Defendants' failure to seek a ruling on their motion for a new trial resulted in the remand of a medical malpractice action for entry of judgment on a jury verdict for plaintiff. **Cox v. Steffes**, 237.

Summary judgment—discovery incomplete—information sought immaterial—The trial court did not err by granting summary judgment for plaintiff on an insurance claim even though defendant had contended in an affidavit that discovery was incomplete. Nothing sought by defendant bore on the issues in this case. **Cullen v. Valley Forge Life Ins. Co.**, 570.

Summary judgment—motions for amended judgment or new trial—The provisions of Rule 52 of the North Carolina Rules of Civil Procedure under which a party may move for amended or additional findings and an amended judgment are not applicable to summary judgment. The trial court's decision on a Rule 59 request for a new trial is not reviewable absent an abuse of discretion, which was not shown in this case. **Broughton v. McClatchy Newspapers, Inc.**, 20.

Voluntary dismissal—proceeding under Rule 60(b)—motion to set aside—A voluntary dismissal without prejudice is a "proceeding" under Rule 60(b), and the trial court should have ruled on defendant's motion to set aside his voluntary dismissal of a counterclaim pursuant to Rule 60(b) on the basis of misrepresentation and misconduct by plaintiffs. **Estate of Barber v. Guilford Cty. Sheriff's Dep't**, 658.

CONFESSIONS AND INCRIMINATING STATEMENTS

Drive to magistrate's office—comments by officer—not an interrogation—A defendant's statement to an officer during the drive to the magistrate's office was not the result of a custodial interrogation. The exchange between the officer and the unruly defendant was not the functional equivalent of questioning. **State v. Gantt**, 265.

Noncustodial interrogation—defendant's age—statutory rape—Miranda warnings not required—The trial court did not err in a statutory rape case by concluding that defendant's responses to questions asked by the police about his age were not given while in custody and thus did not require Miranda warnings. **State v. Clark**, 316.

Oral statement at time of arrest—statement signed by defendant—motion to suppress—The trial court did not err by denying defendant's motion to suppress statements given to law enforcement officers because defendant's oral statement at the time of his arrest was a spontaneous utterance, and a deputy sheriff testified that he wrote precisely what defendant said without paraphrasing and that he read the statement aloud as the transcribed defendant's statements. **State v. Jones**, 615.

CONSTITUTIONAL LAW

Double jeopardy—felony murder—failure to arrest judgment on armed robbery charges—The trial court did not violate defendant's double jeopardy rights by arresting judgment on only the conviction for attempted armed robbery and by entering judgment on the three armed robbery convictions in addition to first-degree murder. **State v. Coleman**, 224.

CONSTITUTIONAL LAW—Continued

Double jeopardy—kidnapping, maiming, and assault in one incident—different elements—There was no double jeopardy violation in convictions for kidnapping, maiming, and assault arising from the same incident. Each crime requires different elements. **State v. Scott, 104.**

Effective assistance of counsel—concessions in opening statements—The trial court in a double first-degree murder and second-degree murder case did not fail to make an adequate inquiry of defendant as to whether he intelligently and knowingly consented to his attorney's concessions in opening statements that defendant caused the deaths of three people. **State v. Johnson, 68.**

Effective assistance of counsel—failure to bring forth affirmative defense—Defendant did not receive ineffective assistance of counsel in a first-degree murder and armed robbery case even though his counsel failed to bring forth the affirmative defense that he allegedly forecast during opening statements. **State v. Johnson, 504.**

Effective assistance of counsel—failure to move to dismiss—The failure to request dismissal of an armed robbery charge was not ineffective assistance of counsel where defendant was unable to show that the request would have brought a different result. **State v. Pratt, 161.**

Effective assistance of counsel—failure to object—Defendant did not receive ineffective assistance of counsel in a first-degree murder and armed robbery case even though his counsel failed to object to alleged improper questioning of a witness regarding the fact that the victim had a 10-millimeter gun. **State v. Johnson, 504.**

Effective assistance of counsel—failure to object at trial—A defense attorney's failure to object to the court's rejection of a stipulation was not ineffective assistance of counsel. **State v. Mack, 595.**

Effective assistance of counsel—failure to renew motion to continue—A defendant charged with multiple crimes including assault, armed robbery, and felony murder was not denied effective assistance of counsel because his counsel did not renew a pretrial motion to continue. There was no evidence that counsel's failure to renew the motion or the lack of additional time prejudiced defendant's case. **State v. Doyle, 247.**

Effective assistance of counsel—failure to request instruction—inconsistent statements by victim—The failure to request an instruction on inconsistent statements by an armed robbery victim was not an ineffective assistance of counsel that prejudiced defendant. The trial court questioned the victim and an officer about the inconsistent statements, and instructed the jurors that they could consider inconsistent statements when determining a witness's credibility. The suggested instructions would have added little. **State v. Pratt, 161.**

Effective assistance of counsel—failure to show prejudice—Defendant did not receive ineffective assistance of counsel in a multiple statutory rape and statutory sexual offense case. **State v. Wiggins, 583.**

Equal protection—statutory rape—marital status—North Carolina's statutory rape law under N.C.G.S. § 14-27.7(a) does not violate equal protection even though it exempts married couples. **State v. Clark, 316.**

CONSTITUTIONAL LAW—Continued

Free speech—settlement agreement—voluntary waiver—A settlement agreement limiting the things that wrongful death plaintiffs could say constituted a voluntary, knowing, and intelligent waiver of the First Amendment right to free speech. **Estate of Barber v. Guilford Cty. Sheriff's Dep't**, 658.

Right to be present at trial—bailiff sent to admonish absent juror—The trial court did not violate defendant's right to be present at his capital trial when it sent a bailiff to admonish an absent juror not to discuss the case with anyone while court was in recess. **State v. Coleman**, 224.

Right to unanimous verdict—failing to differentiate each individual charge in jury instructions and verdict sheet—The trial court did not violate defendant's right to a unanimous verdict in a multiple statutory rape and statutory sexual offense case by failing to specifically differentiate each individual charge in its jury instructions and on the verdict sheet where the verdict sheets and instructions differentiated the crimes charged by the case numbers found on the indictments. **State v. Wiggins**, 583.

Trial by twelve person jury—seating of alternate juror—A defendant was entitled to a new trial where a juror was replaced by an alternate juror after deliberations were begun, which resulted in a verdict by more than twelve people. **State v. Hardin**, 530.

CONTRACTS

Arbitration agreement in prior contract—not incorporated into new agreement—The arbitration clause in an earlier contract was not incorporated into a subsequent contract where the parties expressed their clear and definite intent to execute a new contract that would supersede the first. **Burgess v. Jim Walter Homes, Inc.**, 488.

Real property sales—mistake of fact—flood zone—The trial court incorrectly granted defendant Gore's motion for summary judgment on a mistake of fact claim arising from the sale of land in a flood zone. Plaintiff's allegation of mistake of fact based on the representations of the seller and his agents was sufficient to state a claim, and there were genuine issues of material fact such as whether the mistake was unilateral or mutual and whether it affected the essence of the contract. **Taylor v. Gore**, 300.

CONTRIBUTION

Negligent construction claim—architect—A de novo review revealed that the trial court did not err in a case arising out of the alleged negligent construction of a house by granting summary judgment in favor of defendant architect on the issue of contribution. **Kaleel Builders, Inc. v. Ashby**, 34.

Negligent construction claim—subcontractors—failure to allege tort theory—The trial court did not err in a case arising out of the alleged negligent construction of a house by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff general contractor's claim for contribution against defendant subcontractors because there is no negligence claim where all the rights and remedies have been set forth in the contractual relationship. **Kaleel Builders, Inc. v. Ashby**, 34.

CORPORATIONS

Corporate president—personal liability for purchase of goods and services—A defendant in a contract action entered into the contract for her own benefit and could not use the corporation of which she was president and majority owner as a shield. **Nutek Custom Hosiery, Inc. v. Roebuck**, 166.

Nonprofit—standing to file derivative action—former directors—The trial court correctly determined that plaintiffs lacked standing to bring a derivative action against a charitable foundation because they were not directors when the suit was filed. **Morris v. Thomas**, 680.

COSTS

Attorney fees—failure to file timely motion—The trial court erred by ordering defendants to pay plaintiff attorney fees under N.C.G.S. § 6-19.1 in a claim for injunctive relief to compel plaintiff's reinstatement to the position of Chief Internal Auditor because plaintiff failed to petition for attorney fees within thirty days of the final disposition of his case. **Hodge v. N.C. Dep't of Transp.**, 726.

Attorney fees—personal injury—court costs—prejudgment interest—The trial court erred in a personal injury action by determining that plaintiff was not entitled to recover attorney fees under N.C.G.S. § 6-21.1 based on its conclusion that the judgment exceeded \$10,000 after including the costs and prejudgment interest in its calculation of the judgment because only compensatory damages are included in determining the amount of the judgment under the statute. **Brown v. Millsap**, 282.

COURTS

Foreign—payment of money—trial court judge overruling another trial court judge—The trial court erred by enforcing a Florida order involving the payment of money where the trial court in effect reversed the decision of another judge. **Luster v. Gooch Support Sys., Inc.**, 738.

Overruling prior judge—granting summary judgment after prior denial—Although a trial court judge may have improperly ruled on a second motion for summary judgment after the first was denied by another judge, the ruling was reversed on its merits elsewhere in the opinion. **Fox v. Green**, 460.

CRIMINAL LAW

Competency to stand trial—length of observation—A competency examination in which defendant was observed for 1 hour and 40 minutes did not violate N.C.G.S. § 15A-1001 or due process. The plain language of the statute does not establish a minimum period of observation, and the court made 16 findings of fact based on the opinion of an expert forensic psychiatrist and its own observations. The evidence was more than sufficient to support those findings. **State v. Robertson**, 288.

Court's comments to counsel—inappropriate—The trial judge's request that defense counsel use his "big boy voice" was inappropriate, but not prejudicial under the totality of the circumstances. **State v. Mack**, 595.

Court's comments to counsel—sarcastic and inappropriate—not prejudicial—A trial judge's sarcastic and inappropriate comments, including the state-

CRIMINAL LAW—Continued

ment “If you’d like to ask that 15 more times . . .” were inappropriate and unprofessional but not prejudicial. **State v. Mack, 595.**

Court’s questioning witnesses—no abuse of discretion—A trial judge’s questioning of witnesses was unusual, but not an abuse of discretion. **State v. Mack, 595.**

Entrapment instruction not given—evidence of predisposition—The trial court did not err in a prosecution for possession of marijuana with intent to sell and deliver by not instructing the jury on entrapment. The State presented evidence tending to show that defendant was predisposed to commit the crime in that an informant testified about buying drugs from defendant before becoming an informant. **State v. Reynolds, 144.**

Flight—visit to friend’s house—not sufficient for instruction—The trial court erred by instructing the jury on flight on evidence that defendant went to the home of a friend after the crime. There was no evidence that defendant did so to avoid apprehension; visiting a friend at a residence is not an act that raises a reasonable inference that a defendant was avoiding apprehension. However, this error was harmless in light of the remaining evidence in the case, including the identification of defendant as the perpetrator of the crimes charged. **State v. Holland, 326.**

Instructions—impeachment of witness with unrelated crimes—testimony on direct examination—An armed robbery defendant was not entitled to a limiting instruction on impeachment with proof of unrelated crimes after he testified on direct examination about his prior crimes and convictions. He was not impeached. **State v. Jackson, 118.**

Instructions—referring to minor child as victim—The trial court did not commit plain error in a first-degree rape, first-degree sexual offense, taking indecent liberties with a child, incest, and crime against nature case by referring to the minor child as the “victim” forty times in its jury charge. **State v. Carrigan, 256.**

Motion to dismiss—credibility of witnesses—not for trial court to weigh—There was no error in the denial of a motion to dismiss charges of armed robbery, first-degree burglary, assault, sexual offense, and other crimes where defendant argued that the only evidence of identity was from co-defendants whom defendant contended lacked credibility. The trial court was not permitted to weigh the credibility of the witnesses, and all of the evidence permitted a reasonable inference of defendant’s guilt. **State v. Holland, 326.**

Motion for mistrial—failure to show substantial and irreparable prejudice—The trial court did not abuse its discretion in a first-degree rape, first-degree sexual offense, taking indecent liberties with a child, incest, and crime against nature case by denying defendant’s motion for a mistrial, nor did it commit plain error by failing to inquire of the jury if it could ignore improperly admitted evidence from the minor victim stating during direct examination that a family member now knew it was true about what happened to a person named Kathy. **State v. Carrigan, 256.**

Prosecutor’s argument—comparing defendant to an animal—acting in concert theory—Although the trial court erred in a first-degree murder, first-

CRIMINAL LAW—Continued

degree kidnapping, and burning personal property case by allowing the State during closing arguments to improperly compare defendant to a hyena and an animal of the African plain and to state that "he who hunts with the pack is responsible for the kill" when the reference went beyond a simple analogy to help explain the theory of acting in concert, the improper statements did not deny defendant due process and entitle him to a new trial. **State v. Sims, 183.**

Prosecutor's argument—defendant a devil—The trial court did not commit prejudicial error in a first-degree murder, first-degree kidnapping, and burning personal property case by allowing the State to contend during closing arguments that "if you are going to try the devil, you have to go to hell to get your witnesses." **State v. Sims, 183.**

Prosecutor's argument—rag contained victim's blood and traces of defendant's semen—The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning personal property case by failing to sustain defendant's objection to the State's reference during its opening and closing arguments to evidence of a rag found in the back seat area of the victim's Cadillac and the scientific analysis of that rag which concluded that the rag contained the victim's blood as well as traces of defendant's semen. **State v. Sims, 183.**

Request for written instructions— re-read instead—The trial court did not err by not providing written instructions upon the jury's request in a prosecution for armed robbery, first-degree burglary, assault, sexual offense, and other crimes. The fact that the judge re-read the instructions represents compliance with the essence of the jury's request. **State v. Holland, 326.**

Right to present defense—officer's statement excluded—A nontestifying defendant claiming self-defense was not deprived of the right to present his defense by the proper exclusion of a detective's synopsis of his statement to officers. **State v. Alston, 367.**

Trial court's remarks to jury—verdict not coerced—The trial court did not coerce a verdict in a prosecution for trafficking in cocaine and other offenses involving narcotics by its remarks to the jury at the beginning of the court week that allegedly intimated to the jurors that they would be held indefinitely without food until they reached a verdict. **State v. Baldwin, 382.**

Unlawful plea agreement—appellate review—The trial court erred in a possession with intent to sell and deliver cocaine case by allowing defendant to specifically condition his plea agreement on appellate review of the denial of his habeas corpus motion, his motion to suppress, his motion to dismiss the habitual felon charge as being double jeopardy based on alleged unlawful detention maintained in his previously denied habeas corpus motion, and the case is vacated and remanded. **State v. Jones, 60.**

Verdict sheet and judgment correct—transcript incorrect—A trial transcript was not corrected where it erroneously showed a conviction for voluntary manslaughter rather than involuntary manslaughter, but the verdict sheet and judgment were correct. Those are considered the official record, and a clerical error in the trial transcript will not prejudice defendant. **State v. Alston, 367.**

DAMAGES AND REMEDIES

Punitive damages—car crash after drinking—evidence sufficient—There was sufficient evidence to go to the jury on punitive damages in a car crash case, and the trial court erred by granting a directed verdict for defendant, where defendant caused a collision after drinking two twelve ounce beers, admitted fleeing the scene to avoid the Breathalyzer, and no blood alcohol content was ever obtained. **Eatmon v. Andrews**, 536.

Punitive damages—summary judgment—Summary judgment was correctly granted for defendant on a punitive damages claim in a bailment action. The evidence may rise to negligence, but falls short of fraud, malice, or willful or wanton conduct. **Atlantic Contr'g & Material Co. v. Adcock**, 273.

DISCOVERY

Extension of time—conflicting time statements—Defendant's response to a request for admissions was timely where the court granted an extension of time for filing the answer, the court separately granted "an additional thirty days" for answering the request for admissions, and the clerk entered the date for the answer on the order concerning admissions. The date was mere surplusage because granting it precedence over the "additional thirty days" would render the order useless. **Moore v. F. Douglas Biddy Constr., Inc.**, 87.

DIVORCE

Equitable distribution—marital property—proceeds from sale of stock—The trial court did not err in an equitable distribution case by concluding plaintiff wife's stock and proceeds therefrom were divisible property and by requiring plaintiff to pay defendant husband fifty-five percent of the proceeds from the sale of 10,000 shares of stock she had received from her employer. **Ubertaccio v. Ubertaccio**, 352.

Equitable distribution—post-separation mortgage payments—ultimate finding—The trial court's finding in an equitable distribution action supported an unequal distribution where there was evidence to support the ultimate finding that defendant benefitted by increased equity in the marital home resulting from plaintiff's mortgage payments after the date of separation. **Fitzgerald v. Fitzgerald**, 414.

Equitable distribution—profit sharing plan—Defendant's interest in a profit-sharing plan should have been classified, valued, and divided in an equitable distribution action even though it was not included in the pre-trial order. The existence of the plan was not disclosed until the hearing. **Fitzgerald v. Fitzgerald**, 414.

Equitable distribution—valuation of surgical practice—The valuation of a surgical practice for an equitable distribution was remanded where the trial court did not identify the evidence on which it based its valuation or the method it used to reach its figure. **Fitzgerald v. Fitzgerald**, 414.

Equitable distribution—value of marital home—findings—An equitable distribution action was remanded for evidence and findings on the fair market value of the marital home at the date of separation, and for consideration of any post-separation increase in value as a distributional factor. **Fitzgerald v. Fitzgerald**, 414.

DOMESTIC VIOLENCE

Consent judgment—complaints dismissed—no finding of violence—The trial court could not enter an order approving a consent judgment intended to stop domestic violence after dismissing the parties' domestic violence complaints. The court's authority to enter a protective order or to approve a consent agreement depends upon a finding that an act of domestic violence occurred. **Bryant v. Williams, 444.**

DRUGS

Conspiracy to traffic in cocaine—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to traffic in cocaine where defendant signed for a package containing cocaine and moved it to a car that was driven away by his roommate. **State v. Baldwin, 382.**

Maintaining dwelling for purpose of keeping or selling controlled substances—misdemeanor—The judgment against defendant for maintaining a dwelling for the purpose of keeping or selling controlled substances is remanded to correctly reflect the offense as a misdemeanor. **State v. Baldwin, 382.**

Maintaining dwelling for purpose of keeping or selling controlled substances—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for the purpose of keeping or selling controlled substances where the evidence showed more than a temporary occupancy of the dwelling by defendant. **State v. Baldwin, 382.**

Possession of marijuana with intent to sell or deliver—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of possession of marijuana with intent to sell or deliver where the marijuana was found in a common area of a house that was listed on defendant's driver's license and car registration as his home address. **State v. Baldwin, 382.**

Trafficking in cocaine by possession—trafficking in cocaine by transportation—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine by possession and trafficking in cocaine by transportation where defendant signed for a package containing cocaine, took it inside his residence, placed it in a car, and then moved it to another car. **State v. Baldwin, 382.**

EASEMENTS

By grant—width not defined—space reasonably needed—issue of fact—Summary judgment should not have been granted for plaintiffs on the issue of whether they had an easement by grant over an area used for boating, swimming, and fishing. The width of the easement was not defined and there was an issue of fact about the space needed to effectuate the easement's purpose. **Keener v. Arnold, 634.**

By prescription—active and hostile use—issue of fact—Summary judgment should not have been granted for plaintiffs on the issue of whether they had an easement by prescription over an area used for boating, swimming, and fishing.

EASEMENTS—Continued

There were issues of fact about whether the disputed land was actively used and whether the use was hostile. **Keener v. Arnold**, 634.

ESTOPPEL

Statute of limitations—insurer concealing responsible party—A motion for summary judgment by a slip and fall defendant should have been denied because plaintiff's claim of equitable estoppel established a defense against the statute of limitations. The insurer concealed the responsible party by its conduct, and plaintiff justifiably relied on that conduct to its detriment. **Hatcher v. Flockhart Foods, Inc.**, 706.

EVIDENCE

Audiotape of 911 call—authentication—The trial court did not err in an armed robbery and possession of a firearm by a convicted felon case by admitting an audiotape of the 911 call into evidence because the audiotape was authenticated by two witnesses who were able to identify their own voices and the voices of each other on the tape. **State v. Gaither**, 96.

Corroborative testimony—credibility—The trial court did not err in a first-degree sex offense with a child and taking indecent liberties with a child case by admitting the testimony of two witnesses of statements made to them by the victim as corroborative evidence. **State v. Dunston**, 468.

Cross-examination—testimony from occupant of vehicle regarding injuries—The trial court did not abuse its discretion in a negligence case by failing to allow plaintiff to cross-examine one defendant about the injuries she sustained as a result of the car accident in question. **Griffis v. Lazarovich**, 434.

Defendant's statement—partial statement not used—whole not required—A detective's synopsis of a nontestifying defendant's statement was not required to be admitted as the whole of the part after a detective testified about the same subject matter. The officer's testimony was based on his personal observations and no part of defendant's statement was offered as evidence. **State v. Alston**, 367.

Hearsay—admission by party-opponent—The trial court did not err in a statutory rape case by concluding that defendant's responses to questions asked by the police about his age were not inadmissible hearsay where the statements were admitted as an admission by a party opponent. **State v. Clark**, 316.

Hearsay—residual exception—notice—The trial court did not err in a first-degree rape, first-degree sexual offense, taking indecent liberties with a child, incest, and crime against nature case by denying defendant's motion to introduce the out-of-court statements of the minor victim's now deceased cousin under the residual exceptions to the hearsay rule. **State v. Sims**, 183.

Hearsay—synopsis of defendant's statement—recorded recollection—A detective's synopsis of defendant's statement was correctly excluded from an assault prosecution where there was no showing that defendant had the required insufficient recollection, that the statement was necessary to refresh the officer's memory, or that the statement was inconsistent with testimony. **State v. Alston**, 367.

EVIDENCE—Continued

Manslaughter victim's relationship with family—not prejudicial—The admission of testimony about a manslaughter victim's relationship with her nieces and a photograph of the victim with her nieces was neither prejudicial nor plain error. The evidence of defendant's culpable negligence in the automobile accident is overwhelming. **State v. Wade, 686.**

Prior crimes or bad acts—conspiracy to sell and deliver cocaine—authentication—The trial court did not err in an armed robbery and possession of a firearm by a convicted felon case by admitting evidence of defendant's previous conviction for conspiracy to sell and deliver cocaine allegedly without proper authentication of the document where a witness testified that the document was an exact copy of the original commitment order and he witnessed the copy produced and certified by the clerk of court. **State v. Gaither, 96.**

Prior crimes or bad acts—defendant engaged in and enjoyed consensual anal sex with adult—The trial court erred in a first-degree sex offense with a child and taking indecent liberties with a child case by improperly admitting evidence under N.C.G.S. §8C-1, Rule 404(b) that defendant engaged in and enjoyed consensual anal sex with an adult, and defendant is entitled to a new trial. **State v. Dunston, 468.**

Rag with victim's blood and defendant's semen—knowledge—active participant in crime—The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning personal property case by admitting into evidence a rag found in the back seat area of the victim's Cadillac and the scientific analysis of that rag which concluded that the rag contained the victim's blood as well as traces of defendant's semen because the evidence was not duplicative of other evidence. **State v. Sims, 183.**

Robbery victim's feelings—relevant to threat to her life—The admission of a robbery victim's testimony about how she felt when a gun was put to her head was not plain error. She testified that she was intimidated and in fear, which was relevant to whether her life was threatened. **State v. Jackson, 118.**

SBI lab report—stipulation package contained cocaine—plain error analysis—The trial court did not commit plain error in a prosecution for trafficking in cocaine by possession and other narcotics offenses by admitting the State Bureau of Investigation (SBI) lab report and other evidence regarding the nature of the substance in the pertinent package. **State v. Baldwin, 382.**

Testimony—extrinsic evidence—witness credibility—The trial court did not err in a first-degree murder and armed robbery case by disallowing the testimony of a witness who claimed to have seen the prosecution's sole eyewitness assist a prisoner escape from jail. **State v. Johnson, 504.**

Testimony—incest—sexual abuse—The trial court did not commit plain error in a multiple statutory rape and statutory sexual offense case by failing to exclude as irrelevant and/or unduly prejudicial the testimony of a pastor about her sermon on incest and a doctor on the effect of sexual abuse depending on the level of estrogen present in an adolescent body. **State v. Wiggins, 583.**

Traffic stop—marijuana discovered—acquittal of traffic offense—not admissible—A marijuana defendant arrested after a traffic stop was not entitled to present evidence of his acquittals on the traffic violations. **State v. Reynolds, 144.**

EVIDENCE—Continued

Video of incriminating statement—unruly defendant inside patrol car—bag over head—not prejudicial—A video of an incriminating statement was admissible in a second-degree sexual offense prosecution where the video was taken inside a patrol car; defendant was drunk, suicidal, and banging his head against the protective shield behind the front seat; officers had placed a bag over defendant's head because of the head banging and defendant's spitting at officers; the court allowed only the portions of the tape showing defendant's statement; and the main concern at trial seemed to be prejudice to the State. The danger of unfair prejudice did not outweigh the probative value. **State v. Gantt, 265.**

Videotaped news report of gun recovery—illustrative purpose—The trial court did not err in an armed robbery and possession of a firearm by a convicted felon case by admitting a videotaped news report of the gun recovery into evidence for illustrative purposes. **State v. Gaither, 96.**

FIREARMS AND OTHER WEAPONS

Carrying a concealed weapon—possession of a firearm by a felon—motion to dismiss—The trial court did not err by denying defendant's motion to dismiss the charges of carrying a concealed weapon and possession of a firearm by a felon based on a gun being found under defendant's jacket. **State v. Jones, 615.**

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 even though the possession occurred more than five years after the felony conviction. **State v. Gaither, 96.**

Possession of a firearm by a felon—habitual felon—motion to dismiss—prior conviction of possession of cocaine a misdemeanor—The trial court erred by failing to dismiss the charges of possession of a firearm by a felon and being an habitual felon because both charges were supported by defendant's prior convictions for possession of cocaine which are statutorily defined as misdemeanors. **State v. Sneed, 331.**

FRAUD

Newspaper reporter—representations—no reliance by plaintiff—Plaintiff's claim for fraud and misrepresentation against a newspaper and a reporter lacked the essential element of reliance, and summary judgment was correctly granted against plaintiff and for defendant. **Broughton v. McClatchy Newspapers, Inc., 20.**

Real estate sale—fraudulent misrepresentation—negligent misrepresentation—summary judgment—Summary judgment was properly granted for defendant seller and defendant real estate agent on a fraudulent misrepresentation claim arising from a real estate sale based upon defendants' representation to the buyers that none of the property was in a flood zone where defendants' affidavits that they did not know the property was in a flood zone negated the element of intent to deceive, and plaintiffs did not produce conflicting evidence. Furthermore, summary judgment was also properly entered for defendants on plaintiffs' negligent misrepresentation claim where defendants' affidavits showed

FRAUD—Continued

that they relied upon a survey of the property which stated that the property was not in a flood zone. **Taylor v. Gore**, 300.

HIGHWAYS AND STREETS

Stop sign—placement and maintenance—duty of State—DOT did not owe plaintiff a duty in the placement and maintenance of a stop sign controlling the flow of traffic onto a highway close to a railroad crossing, and the Industrial Commission erred by finding DOT negligent as a matter of law in an action arising from an automobile-train collision at the crossing. **Norman v. N.C. Dep't of Transp.**, 211.

HOMICIDE

Attempted first-degree murder—evidence sufficient—There was no error in the trial court's refusal to dismiss a charge of attempted first-degree murder where the State's evidence tended to show that defendant fired at an officer several times at close range without provocation. **State v. Mack**, 595.

Felony murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of felony murder based on armed robbery because felony murder based on armed robbery does not depend on whether the intent to take property was formed before or after the killing. **State v. Coleman**, 224.

Felony murder—motorist's death during flight from robbery—driving at the speed limit—not a break in circumstances—Defendant's driving at the speed limit for a time between an armed robbery and the beginning of a high speed chase did not separate the subsequent death of a motorist from the robbery and flight. Escape need not be accomplished at high speeds; defendant presented no evidence that he was diverted from his chosen route and his motion to dismiss a first-degree felony murder charge was correctly denied. **State v. Doyle**, 247.

Felony murder—motorist's death during high speed chase—insulating negligence—use of stop sticks foreseeable—Defendant's requested special instructions on insulating negligence were correctly denied in a felony murder prosecution for the death of a motorist which occurred as defendant avoided stop sticks (devices used by police to puncture automobile tires) while fleeing from an armed robbery. The use of stop sticks was reasonably foreseeable. **State v. Doyle**, 247.

Felony murder—short-form indictment—constitutionality—The use of a short form indictment for first-degree felony murder was not error. **State v. Doyle**, 247.

First-degree murder—failure to instruct on lesser-included offense of involuntary manslaughter—The trial court did not err by denying defendant's request to instruct on involuntary manslaughter as a lesser-included offense of first-degree murder. **State v. Coleman**, 224.

First-degree murder—short-form indictment—constitutionality—The short-form murder indictment used to charge defendant with first-degree murder was constitutional. **State v. Johnson**, 68.

HOMICIDE—Continued

First-degree murder—short-form indictment—constitutionality—The short-form indictment used to charge defendant with first-degree murder was sufficient. **State v. Coleman**, 224.

Lesser included offenses—failure to instruct ex mero motu—no error—There was no plain error in not instructing ex mero motu on lesser included offenses in a prosecution for attempted first-degree murder resulting from shots being fired at a police officer. **State v. Mack**, 595.

Manslaughter—sufficiency of evidence—A motion to dismiss a voluntary manslaughter charge (with an involuntary manslaughter conviction) was properly denied where the evidence, in the light most favorable to the State, showed that defendant shot the victim in the back as he was running away and immediately left with no regard to the victim. **State v. Alston**, 367.

Self-defense—lack of evidence—involuntary manslaughter conviction—A defendant is not required to present evidence to be entitled to an instruction on self-defense, but the error in not instructing on self-defense in this voluntary manslaughter prosecution was not prejudicial because defendant was convicted of involuntary manslaughter, which does not involve intent and which is therefore not excused by self-defense. **State v. Alston**, 367.

Traffic offense—culpable negligence—alcohol not involved—There was sufficient evidence of culpable negligence to support defendant's convictions on charges of assault and involuntary manslaughter arising from a traffic accident in which alcohol was not involved. **State v. Wade**, 686.

IDENTIFICATION OF DEFENDANTS

Photographic identification—motion to suppress—The trial court did not err in a double first-degree murder, second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and larceny case by denying defendant's motion to suppress evidence of a witness's photo identification of defendant as the shooter. **State v. Johnson**, 68.

IMMUNITY

Governmental—public hospital—proprietary function—The trial court erred in a medical malpractice case by granting summary judgment for defendant hospital based on governmental immunity because the operation of a public hospital is a proprietary function. **Odom v. Lane**, 534.

Sovereign—highway construction—additional compensation—A highway construction contractor's claims against the Department of Transportation seeking additional compensation based upon an "extra work" theory or a Department-caused work delay theory or, alternatively, based upon breach of an implied warranty of plans and specifications arose "under the contract" within the meaning of N.C.G.S. § 136-29 and were thus not barred by the doctrine of sovereign immunity. **Battle Ridge Cos. v. N.C. Dept. of Transp.**, 156.

Volunteer fire department—qualification—The trial court erred by holding that a volunteer fire department was not entitled to summary judgment on immu-

IMMUNITY—Continued

nity. Defendants met all of the statutory requirements for a rural fire department or fireman and were responding to and suppressing a reported fire when the incident which gave rise to this negligence suit occurred. Plaintiff did not allege or show willful and wanton conduct and cannot survive defendants' properly asserted affirmative defense of immunity. **Luhman v. Hoenig**, 452.

INDEMNITY

Negligent construction claim—architect—A de novo review revealed that the trial court did not err in a case arising out of the alleged negligent construction of a house by granting summary judgment in favor of defendant architect on the issue of indemnity. **Kaleel Builders, Inc. v. Ashby**, 34.

Negligent construction claim—express contract—contract implied-in-fact—contract implied-in-law—subcontractors—The trial court did not err in a case arising out of the alleged negligent construction of a house by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff general contractor's claim for indemnity against defendant subcontractors, because: (1) plaintiff's complaint alleges no express contractual right, neither written nor oral, of indemnity in the agreements between the parties; (2) plaintiff's allegations do not allege a right to indemnification implied-in-fact when plaintiff's complaint alleges breach of contract and breach of warranty by a number of independent subcontractors; and (3) plaintiff has not stated a claim for an equitable right under the implied-in-law theory of indemnity when North Carolina law requires there be an underlying injury sounding in tort, and plaintiff failed to allege tortious conduct from which indemnity is sought. **Kaleel Builders, Inc. v. Ashby**, 34.

INDIGENT DEFENDANTS

Attorney fees—appointed counsel—judgment against defendant—conviction reversed—The trial court erred by entering a judgment against defendant for his appointed counsels' attorney fees arising out of his first trial where the Supreme Court reversed his conviction in that trial. **State v. Rogers**, 345.

INSURANCE

Life insurance—good health provision—waiver by actions—An insurer may not avoid coverage by asserting provisions in the contract which it had waived by actions inconsistent with an intent to enforce those provisions. Defendant negotiated plaintiff's check, received and granted a change of beneficiary request, and did not claim that plaintiff had violated the "good health" provision of the contract or assert that it intended to deny coverage on this basis until more than three months after it learned of plaintiff's melanoma. **Cullen v. Valley Forge Life Ins. Co.**, 570.

Life insurance—proceeds from policy—beneficiary not changed—Summary judgment was properly granted for defendant Bollinger in an action to determine entitlement to the proceeds from an insurance policy assigned in a separation agreement. **Old Line Life Ins. Co. of Am. v. Bollinger**, 734.

JUDGMENTS

Entry of default—set aside—no abuse of discretion—Plaintiff failed to show that the trial court abused its discretion in setting aside an entry of default in a synthetic stucco action. **Moore v. F. Douglas Biddy Constr., Inc.**, 87.

Foreign—certificate of authority—timeliness—The trial court properly denied defendants' motion to strike a foreign judgment where plaintiff corporation received its certificate of authority to do business in North Carolina after defendant raised the issue, but before the North Carolina court considered the matter. The suggestion that the certificate of authority must be obtained prior to the trial in the foreign jurisdiction is not consistent with precedent. **Kyle & Assocs., Inc. v. Mahan**, 341.

JURY

Deliberations—jury's note—juror not following law—The trial court did not err in an armed robbery and felony murder case by failing to make further inquiry on the second day of jury deliberation after receiving a note from the jury alleging that one juror was not following the law and requesting that the juror at issue be replaced where the court informed the jury that the juror could not be replaced and instructed the jury on its duty to follow the law. **State v. Coleman**, 224.

Impanelment of wrong alternate juror—motion for mistrial—The trial court did not err in a prosecution for a double first-degree murder and other crimes by failing to declare a mistrial after it was discovered that the jury had been impaneled with the wrong individual sitting as an alternate juror even though the error was not discovered until after opening statements had been presented because the trial court re-impaneled the jury with the correct alternate and allowed opening statements to the re-impaneled jury. **State v. Johnson**, 68.

Panels—calling jurors in order assigned rather than randomly—Although defendant contends the trial court erred in a prosecution for a double first-degree murder and other crimes by dividing prospective jurors into panels and then calling prospective jurors from each panel in the order in which they were assigned rather than randomly from the jury venire as a whole, this assignment of error is dismissed because defendant failed to follow statutory procedures for challenging the entire jury panel. **State v. Johnson**, 68.

Request for removal of juror—plain error analysis improper—The trial court did not commit plain error in a multiple statutory rape and statutory sexual offense case by failing to remove a juror even though neither the State nor defendant requested her removal because plain error analysis does not apply. **State v. Wiggins**, 583.

Trial by twelve person jury—seating of alternate juror—A defendant was entitled to a new trial where a juror was replaced by an alternate juror after deliberations were begun, which resulted in a verdict by more than twelve people. **State v. Hardin**, 530.

JUVENILES

Adjudication order—motion to dismiss—sufficiency of evidence—Although a juvenile contends the trial court erred in its adjudication finding the

JUVENILES—Continued

juvenile to be delinquent by failing to grant juvenile's motion to dismiss based on alleged insufficient evidence, this assignment of error is overruled because the juvenile failed to renew his motion to dismiss after presenting evidence. **In re Rikard**, 150.

Adjudication order—notice of appeal—amendment—disposition—absence of jurisdiction—Trial courts in which a juvenile was adjudicated delinquent and to which his case was transferred for disposition were divested of jurisdiction to amend the adjudication order or to proceed to disposition when no disposition had been entered within 60 days after entry of the adjudication order and the juvenile filed notice of appeal of the adjudication order pursuant to N.C.G.S. § 7B-2602. **In re Rikard**, 150.

Adjudication order—sufficiency of oral findings—The 10 August 2001 juvenile adjudication order is remanded for correction of the written order to include the required finding beyond a reasonable doubt that the acts alleged in the petition were true, which the court stated orally. **In re Rikard**, 150.

KIDNAPPING

To facilitate flight—evidence sufficient—A motion to dismiss a kidnapping charge was correctly denied where there was sufficient evidence that defendant kidnapped the victim to facilitate his flight from his assault upon her. **State v. Scott**, 104.

LIBEL AND SLANDER

Libel per se—statements with more than one interpretation—To be libelous on their face, statements must be subject to one interpretation only, and that interpretation must be defamatory. **Broughton v. McClatchy Newspapers, Inc.**, 20.

Slander—newspaper article—true statements—Summary judgment was correctly granted for defendants and denied for plaintiff on a slander claim arising from a newspaper article where the pertinent statements were true. Moreover, plaintiff did not show damages. **Broughton v. McClatchy Newspapers, Inc.**, 20.

MEDICAL MALPRACTICE

Sponges to control bleeding—left inside body—res ipsa loquitur—therapeutic purpose—issue of fact—Summary judgment for the defendants in a medical malpractice action was reversed where plaintiff alleged res ipsa loquitur arising from sponges being left inside plaintiff following childbirth, and defendants contended that the sponges had been used to control bleeding and had a therapeutic purpose. The resolution of this issue was for the jury. **Fox v. Green**, 460.

Standard of care—motion for jnov—consideration of all evidence—The trial court erred by granting defendants' motion for judgment n.o.v. in a medical malpractice action. Although defendant contended that plaintiff's expert doctor was not competent to testify about the standard of care in Fayetteville, defendant's expert supplied evidence of a national standard of care, and the trial court was not limited to plaintiffs' evidence. **Cox v. Steffes**, 237.

MOTOR VEHICLES

Reckless driving—indictment—amendment—details added—The trial court did not err by allowing the State to amend an indictment charging reckless driving by adding details where the original language of the indictment tracked the appropriate statute. **State v. Wade, 686.**

NEGLIGENCE

Motion for judgment notwithstanding the verdict—motion for new trial—The trial court did not err in a negligence case by denying plaintiff's motion for judgment notwithstanding the verdict and motion for new trial were the evidence indicated that neither defendant was negligent in causing the accident. **Griffis v. Lazarovich, 434.**

Purchase of stock—contributory negligence—The trial court did not err by entering summary judgment in favor of defendant on plaintiffs' negligence claims arising from their purchases of certain stock because plaintiffs were contributorily negligent. **Hahne v. Hanzel, 494.**

Requested instructions—medical expenses presumed reasonable—The trial court did not err in a negligence case by failing to instruct the jury that the amount of plaintiff's medical expenses was presumed reasonable when the parties had stipulated to the amount and reasonableness of plaintiff's medical expenses. **Griffis v. Lazarovich, 434.**

Requested instructions—no presumption of negligence based on accident—The trial court did not err in a negligence case by failing to instruct the jury on plaintiff's requested instructions that plaintiff did not have to prove by the greater weight of the evidence who was negligent, but that defendants' joint and concurring negligence was a proximate cause of her injuries because plaintiff's proposed instructions would allow the jury to presume negligence from the fact an accident occurred. **Griffis v. Lazarovich, 434.**

Requested issues—abuse of discretion standard—The trial court did not err in a negligence case by allegedly failing to give plaintiff's requested issues because the issues submitted to the jury properly reflected the material controversies involved, and the court did not err by combining issues. **Griffis v. Lazarovich, 434.**

Signing and entry of judgment—no presumption based on happening of accident—Although plaintiff assigns error to the trial court's signing and entry of judgment in a negligence case, this assignment of error is overruled because defendant's negligence will not be presumed from the mere happening of an accident. **Griffis v. Lazarovich, 434.**

PLEADINGS

Motion to strike untimely answer—no entry of default—There was no abuse of discretion in the denial of plaintiff's motion to strike defendant's untimely answer in a libel action where default was never entered. **Broughton v. McClatchy Newspapers, Inc., 20.**

Rule 11 sanctions denied—second summary judgment motion—no improper purpose—The trial court properly refused to award plaintiff Rule 11

PLEADINGS—Continued

sanctions for filing a second summary judgment motion after the first motion was denied. There was an additional issue and no evidence that the motion was filed for an improper purpose. **Fox v. Green, 460.**

PRIVACY

Invasion of—newspaper writer—interviews and public records—Defendant's conduct in gathering information for a newspaper article did not rise to the level of invasion of privacy, and the trial court did not err by denying summary judgment for plaintiff or by granting it for defendant. There was no evidence of physical or sensory intrusion or prying into confidential personal records. **Broughton v. McClatchy Newspapers, Inc., 20.**

PUBLIC OFFICERS AND EMPLOYEES

Termination of university employees—reduction in force—jurisdiction of Office of Administrative Hearings—The trial court erred by holding that the later enacted N.C.G.S. § 126-34.1 did not supersede N.C.G.S. § 126-35(c) and that the Office of Administrative Hearings had jurisdiction to determine whether petitioners had just cause to terminate respondent university employees through a reduction in force. **University of N.C. at Chapel Hill v. Feinstein, 700.**

RAILROADS

Grade crossing—summary judgment—The trial court did not err by granting defendant railroad company's motion for summary judgment and concluding as a matter of law that defendant was not required to provide plaintiff a private grade crossing across its right-of-way and railroad lines which divide plaintiff's property. **Summerlin v. Norfolk S. Ry. Co., 170.**

RAPE

Statutory—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the multiple statutory rape charges because a child's uncertainty as to the time or particular days of the offenses goes to the weight of the testimony. **State v. Wiggins, 583.**

Statutory rape—statutory sexual offense—amendment of indictment—age—The trial court did not err in a multiple statutory rape and statutory sexual offense case by amending the indictments over defendant father's objection to state that defendant was "more than six years older" than the victim instead of "more than four years older." **State v. Wiggins, 583.**

ROBBERY

Armed—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of armed robbery where the evidence would permit the jury to conclude that by using a dangerous weapon, defendant took possession of the victim's property and threw some of the victim's possessions out of his car. **State v. Johnson, 504.**

Armed—motion to dismiss—sufficiency of evidence—lesser-included offense of common law robbery—The trial court did not err by denying

ROBBERY—Continued

defendant's motion to dismiss the charge of armed robbery, or in the alternative, refusing to instruct the jury on the lesser-included offense of common law robbery where defendant unlawfully took shirts from a store and showed security officers that he had a gun. **State v. Gaither, 96.**

Sufficiency of evidence—discrepancies in evidence—A motion to dismiss an armed robbery charge was correctly denied. Discrepancies in the testimony of a restaurant worker who may have participated in the robbery, his role in the crime, and conflicting testimony by another worker go to credibility and are for the jury to decide. **State v. Jackson, 118.**

SEARCH AND SEIZURE

Arrest—protective sweep of home—reasonableness—The trial court did not err in a prosecution for a double first-degree murder, second-degree murder and other crimes by denying defendant's motion to suppress evidence seized as a result of a protective sweep of defendant's house following his arrest. **State v. Johnson, 68.**

Consent by car owner—jacket found in car—motion to suppress evidence—The trial court did not err by denying defendant's motion to suppress the evidence found inside his leather coat that he placed in a car that was searched with the owner's consent because the car owner's general consent to the search of his car reasonably included the search of clothing lying on the seats of the car. **State v. Jones, 615.**

Motion to suppress—drugs—anticipatory search warrant—The trial court did not err in a prosecution for trafficking in cocaine by possession and other narcotics offenses by denying defendant's motion to suppress evidence seized pursuant to an anticipatory search warrant. **State v. Baldwin, 382.**

Search warrant—motion to suppress cocaine—The trial court did not err by denying defendant's motion to suppress cocaine found in his home as the result of a search warrant issued on the basis of an informant's tip and an officer's training and experience. **State v. Rodgers, 311.**

Traffic stop—probable cause—An officer had probable cause to stop a marijuana defendant's car where the officer observed defendant speeding and not using a turn signal when changing lanes. **State v. Reynolds, 144.**

SENTENCING

Aggravating factor—taking advantage of position of trust and confidence—The trial court did not err in a multiple statutory rape and statutory sexual offense case by finding the aggravating factor that defendant violated a position of trust and confidence even though defendant could have been charged with incest under N.C.G.S. § 14-178. **State v. Wiggins, 583.**

Aggravating factor—use of element of offense—The trial court did not violate N.C.G.S. § 15A-1340.16(d) when sentencing an inmate for malicious conduct for spitting at guards by finding in aggravation that defendant intended to hinder the lawful exercise of a governmental function. The fact that defendant knowingly spit at a guard does not implicitly presume that he intended to hinder the

SENTENCING—Continued

guard in his duties, so that additional evidence would be required to prove the intent necessary for a finding of this aggravating factor. **State v. Robertson, 288.**

Aggravating factor—violated pledge of good conduct at trial—contempt conviction—separate incident—Neither double jeopardy nor N.C.G.S. § 15A-1340.16(d) was violated by the enhancement of a sentence for malicious conduct by a prisoner for defendant's violation of his assurance of good behavior. Defendant had already been convicted for contempt for his conduct in court (overturning tables and cursing); however, the incident on which the enhancement was based (feigning a heart attack) was a separate, later incident. **State v. Robertson, 288.**

Failure to object at trial—appellate review—The issue of whether a sentence was improperly enhanced was properly before the Court of Appeals despite defendant's failure to object at trial. N.C.G.S. § 15A-1446(d)(18)(2001). **State v. Robertson, 288.**

Further active jail time—avoided by fine—There was no error in a marijuana sentence which allowed the defendant to avoid a portion of his active jail time by paying a fine. **State v. Reynolds, 144.**

Habitual felon—lack of subject matter jurisdiction—possession of cocaine—The trial court lacked subject matter jurisdiction over defendant's habitual felon indictment supported by the prior offense of possession of cocaine because that offense is a misdemeanor punishable as a felony. **State v. Jones, 60.**

No finding on mitigating evidence—sentence within presumptive range—The trial court's failure to make findings concerning statutory mitigating factors about which evidence was presented was not error where defendant was sentenced within the presumptive range. **State v. Mack, 595.**

Proportionality—parole past normal life expectancy—The trial court did not err in a multiple statutory rape and statutory sexual offense case by imposing a sentence that was allegedly excessive and disproportionate even though defendant would not be eligible for parole until past his normal life expectancy. **State v. Wiggins, 583.**

Rejection of plea bargain—court's comment—not prejudicial—There was no plain error in sentencing defendant for second-degree sexual offense in the court's comment about defendant rejecting an offered plea bargain. Although those comments cannot be approved, it cannot be said that defendant was prejudiced by a sentence between the requested minimum and maximum of the presumptive range under the facts of the case. **State v. Gantt, 265.**

Restitution—undercover marijuana purchase—There was no error in requiring a marijuana defendant to pay thirty dollars in restitution for the money used for an earlier marijuana purchase for which he was not charged. The first purchase was part of an ongoing investigation leading to defendant's conviction for the second offense. **State v. Reynolds, 144.**

SEXUAL OFFENSES

First-degree—failure to require unanimous verdict for specific sexual act—The trial court did not commit plain error by failing to require a unanimous verdict regarding the specific sexual act it found as the predicate act for the verdict of guilty of first-degree sexual offense. **State v. Carrigan**, 256.

Short-form indictment—second-degree sexual offense—The use of a short-form indictment for charging second-degree sexual offense was constitutional. **State v. Gantt**, 265.

Statutory rape—statutory sexual offense—amendment of indictment—age—The trial court did not err in a multiple statutory rape and statutory sexual offense case by amending the indictments over defendant father's objection to state that defendant was "more than six years older" than the victim instead of "more than four years older." **State v. Wiggins**, 583.

SPECIFIC PERFORMANCE

Enforcement—original action dismissed—The trial court erred by ordering specific performance of a settlement agreement based upon a motion for sanctions where the moving party had dismissed the original action after the agreement was signed. **Estate of Barber v. Guilford Cty. Sheriff's Dep't**, 658.

STATUTES OF LIMITATION AND REPOSE

Amended counterclaim—fraud—no relation back—Defendant insured's amended counterclaim against plaintiff insurer for fraud did not relate back for statute of limitations purposes to the date of filing of the original counterclaim because a claim for fraud must allege all material facts and circumstances constituting fraud with particularity, and the allegations in the original counterclaim go only to the face of the policies at issue and the interpretation of the terms of those policies and do not give notice of the circumstances constituting the alleged fraud. **State Farm Fire & Cas. Co. v. Darsie**, 542.

Equitable estoppel exception—Defendant was not equitably estopped from asserting the statute of repose as a defense in a synthetic stucco action through furnishing materials and failing to follow the manufacturer's specifications or Building Code requirements. **Moore v. F. Douglas Biddy Constr., Inc.**, 87.

Fraud—personal liability umbrella insurance policy—The trial court erred by entering an order estopping plaintiff insurance company from denying coverage of its personal liability umbrella policy to defendant deceased husband's estate from defendant wife's claims for injuries and damages sustained in a car accident occurring 29 October 1996 even though there was a fiduciary relationship. **State Farm Fire & Cas. Co. v. Darsie**, 542.

Negligent construction claim—breach of contract—breach of warranty—The trial court did not err in a case arising out of the alleged negligent construction of a house by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff general contractor's claims for breach of contract and breach of warranty against defendant subcontractors because those claims were barred by the pertinent statute of limitations. **Kaleel Builders, Inc. v. Ashby**, 34.

Statute of limitations—improper retroactive extension of time to issue alias and pluries summons—The trial court did not err by granting defendant's

STATUTES OF LIMITATION AND REPOSE—Continued

motion for summary judgment on the basis of the expiration of the statute of limitations in an action where plaintiffs alleged they had obtained a judgment against defendant, that the judgment had not been paid, and that this action was not barred by the statute of limitations because the first trial judge did not have authority to retroactively extend the time to issue an alias and pluries summons when the action had been discontinued, and his order was a nullity. **Russ v. Hedgecock**, 334.

Substantial completion of house—occupation by owner—Plaintiffs' synthetic stucco action was barred by the statute of repose where plaintiffs did not bring the first action until more than six years after the house was occupied. The six-year statute of repose of N.C.G.S. § 1-50(a)(5)(a) begins to run upon "substantial completion"; a house is substantially completed when it can be used for its intended purpose as a residence. **Moore v. F. Douglas Biddy Constr., Inc.**, 87.

Uninsured motorist claim—underlying action—An action against an uninsured motorist carrier is subject to the statute of limitations for the insured's tort action against the uninsured motorist. In this case, the company was served with a copy of the summons and complaint of the underlying wrongful death action well after the two-year statute of limitations had run. **Sturdivant v. Andrews**, 177.

TAXATION

Gift tax—property transfer—parol evidence—The trial court did not err by granting summary judgment in favor of defendant Department of Revenue regarding whether the pertinent property transfers are subject to applicable gift taxes in an action where plaintiff conveyed the property to his uncle by deed in fee simple to protect said property from plaintiff's former wife. **Joines v. Anderson**, 321.

Property tax—furnishing documents—prehearing order—The Property Tax Commission did not abuse its discretion by dismissing taxpayer's appeal concerning a county board's valuation of real property for the 2001 tax year where the taxpayer failed to furnish documents to the Commission at least ten days prior to the hearing and failed to enter into a prehearing order and to submit copies thereof to the Commission. **In re Appeal of Phillips**, 173.

Use taxes—insurance company exemption—The trial court correctly ruled that Jefferson-Pilot is liable for a use tax, and reversed the Tax Review Board, where Jefferson-Pilot contended that N.C.G.S. § 105-228.10 prior to its 1998 amendment unambiguously forbade assessment of a local use tax against insurance companies. **In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.**, 558.

TERMINATION OF PARENTAL RIGHTS

Best interests of child—abuse of discretion standard—The trial court did not abuse its discretion in a termination of parental rights case by determining that the minor child's best interests would be served by terminating respondent mother's parental rights and allowing the minor child to be adopted by the foster parents who had cared for her since three weeks after her birth. **In re Howell**, 650.

TERMINATION OF PARENTAL RIGHTS—Continued

Best interests of child—two phases of termination proceeding—The trial court did not abuse its discretion in a termination of parental rights case by concluding that it was in the best interests of the minor child to terminate respondent mother's parental rights without conducting the two phases of a termination of parental rights proceeding in separate hearings. **In re Dhermy, 424.**

Failure to appoint guardian ad litem—juvenile dependency—The trial court did not err in a termination of parental rights case by failing to appoint a guardian ad litem to represent respondent mother, even though juvenile dependency was alleged as a ground for termination, where respondent's parental rights were terminated on the ground of neglect which requires no appointment of a guardian ad litem. **In re Dhermy, 424.**

Findings and evidence—ability to pay support—six preceding months—The findings and evidence were not sufficient for termination of a mother's parental rights on the ground that she willfully failed to pay a reasonable portion of the cost of care of the children where the court did not specifically address whether she was employed or otherwise able to pay support during the six months preceding the filing of the petition. **In re Faircloth, 523.**

Neglect—clear, cogent, and convincing evidence—The trial court did not err by terminating respondent mother's parental rights based on neglect under N.C.G.S. § 7B-1111(a)(1). **In re Dhermy, 424.**

Purpose and legislative intent of statutes—The trial court did not fail to consider the purpose and legislative intent of pertinent statutes regarding the severance of a parent-child relationship when it terminated respondent mother's parental rights. **In re Dhermy, 424.**

Reunification—order allowing efforts to end—An order relieving DSS from efforts to reunify respondent and his children was reversed because it did not comply with N.C.G.S. § 7B-507 and 7B-907 and because the evidence did not support the conclusion that reunification efforts should cease. **In re Everett, 475.**

Standard of review—clear, cogent, and convincing evidence—Although respondent mother contends that the trial court allegedly used the wrong standard in concluding that a ground existed to terminate her parental rights, the judgment affirmatively stated that the court concluded that clear, cogent, and convincing evidence supported a finding of neglect. **In re Dhermy, 424.**

TORT CLAIMS ACT

Railroad crossing accident—contributory negligence—Competent evidence existed to justify the Industrial Commission's conclusion, following an evidentiary hearing and findings, that the plaintiff in a railroad crossing action was not contributorily negligent. While DOT offered evidence that plaintiff should have realized that a train was approaching, reasonable inferences could have been drawn from the evidence that plaintiff's attention was focused on a stop sign to the right of the tracks and that she was slowing to obey that sign. The choice of inferences was for the Commission. **Norman v. N.C. Dep't of Transp., 211.**

TORTS, OTHER

Obstruction of justice—no impedance of lawsuit—summary judgment— There was no evidence that plaintiff's case was prevented, obstructed, or hindered by defendant reporter's newspaper article about her domestic action, and summary judgment was properly granted for defendants on plaintiff's claim for obstruction of justice. **Broughton v. McClatchy Newspapers, Inc., 20.**

TRESPASS

Unannounced visit by reporter—entry not unauthorized—The trial court properly granted summary judgment for defendants on a trespass claim (and properly denied summary judgment for plaintiff) arising from a newspaper article where plaintiff complained that defendant reporter came to her house unannounced but did not show that the reporter's entry was unauthorized. **Broughton v. McClatchy Newspapers, Inc., 20.**

TRIALS

Poor quality of audio recording—motion for new trial—Respondent mother is not entitled to a new trial in a termination of parental rights case based on the poor quality of the audio recording of portions of the termination hearing. **In re Howell, 650.**

TRUSTS

Constructive—evidence not sufficient—The circumstances did not give rise to a constructive trust to receive life insurance benefits where the policy was assigned to defendant Bondurant in a divorce settlement, but the beneficiary designation was never changed. **Old Line Life Ins. Co. of Am. v. Bollinger, 734.**

Distribution of assets—summary judgment—The trial court did not err by denying plaintiff's motion for summary judgment and by granting summary judgment in favor of defendant bank in an action alleging that defendant breached its fiduciary duty as trustee by its distribution of the assets of two trusts so that the husband's trust assets were distributed to the wife's estate, combining them with the wife's trust assets, and distributing the combined trust assets along with the rest of the wife's estate as provided for in her will, instead of distributing to plaintiff all of the wife's trust assets. **Davenport v. Central Carolina Bank & Tr. Co., 666.**

Remainder beneficiary—impossibility or impracticability of trust carrying out charitable purpose—The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' complaint seeking to change the remainder beneficiary of four trusts based on alleged impossibility or impracticability of the trust to carry out its charitable purpose if the pertinent Foundation is the remainder beneficiary. **Morris v. E.A. Morris Charitable Found., 673.**

UNFAIR TRADE PRACTICES

Attorney fees—insurance claim—The trial court did not err or abuse its discretion by awarding attorney fees to plaintiff after granting summary judgment for plaintiff on an unfair and deceptive practices claim arising from an insurance company's refusal to pay benefits. **Cullen v. Valley Forge Life Ins. Co., 570.**

UNFAIR TRADE PRACTICES—Continued

Insurance—denial of coverage—misrepresentation—Summary judgment was correctly granted for plaintiff on an unfair and deceptive practices claim arising from the denial of insurance coverage. **Cullen v. Valley Forge Life Ins. Co., 570.**

UTILITIES

Wholesale electric energy contracts—written notice to Commission not required—The 10 July 2002 order of the Utilities Commission that requires public utilities to provide written notice twenty days prior to the execution of any wholesale electric energy contracts in interstate commerce was preempted by the Federal Power Act and violates the Supremacy Clause of the U.S. Constitution. **State ex rel. Utils. Comm'n v. Carolina Power & Light Co., 199.**

VENUE

Forum selection clause—choice of law clause—employment contract dispute—A forum selection clause did not apply to a dispute over an employment contract where the plain language of the contract limited the clause to disputes over orders and commissions, which were not involved here. A provision relating to disputes regarding performance of the contract was a choice of law provision. **Hickox v. R&G Grp. Int'l, Inc., 510.**

Purchase of store assets—assignment of lease—action affecting interest in real property—Plaintiff purchaser's action seeking specific performance and damages arising from defendant seller's breach of an agreement for the purchase of the assets of a convenience store that included an assignment of a sublease of the real property on which the convenience store was located affected an interest in real property and was required by N.C.G.S. § 1-76(1) to be brought in the county in which the real property was located; therefore, the trial court erred by denying defendant's motion to remove the action to such county. **Fox Holdings, Inc. v. Wheatly Oil Co., 47.**

WARRANTIES

Express warranty—structural defects—synthetic stucco—The trial court properly denied defendant developer's motion for a directed verdict in plaintiff homeowners' action to recover damages for breach of an express ten-year warranty against structural defects for water damages caused by defective synthetic stucco on a home purchased by plaintiffs because (1) there was sufficient evidence of damage to load-bearing elements of the home in the testimony by the supervisor in charge of repairs to the home that there was a lot of "structural, rotted wood" damage in the wall studs, headers over the tops of windows, and sill bands; (2) in the instant case, the actual physical damage occurring to the covered load-bearing elements of the house, if left untreated, would cause the house to become unsafe or uninhabitable; and (3) plaintiffs were not required to stand idly by until the damage became so severe that choosing to remain in the house presented a risk. **Coates v. Niblock Dev. Corp., 515.**

WORKERS' COMPENSATION

Attendant care—reasonable rate of compensation—The Industrial Commission did not err in a workers' compensation case by determining that \$7.00

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per hour was a reasonable rate of compensation for nurses in plaintiff's community in Mexico. **Palmer v. Jackson**, 642.

Calculation of award—average weekly wage—Although the Industrial Commission did not err in a workers' compensation case by granting temporary total and permanent partial compensation to plaintiff, the case is remanded for recalculation of the award because the Commission's determination of plaintiff's average weekly wage was not supported by the evidence. **Dial v. Cozy Corner Rest., Inc.**, 694.

Coming and going rule—exceptions—The Industrial Commission did not fail to apply the proper standard when it denied workers' compensation benefits based on its omitting several factual findings that, if found, would have provided sufficient evidence to allow plaintiff worker to recover under various exceptions to the coming and going rule because the Commission's finding that plaintiff's evidence about the purpose of his trip was unbelievable eliminated any support for exceptions to the coming and going rule. **Dunn v. Marconi Communications, Inc.**, 606.

Continuing temporary total disability—maximum medical improvement—The Industrial Commission's award in a workers' compensation case of continuing temporary total disability is affirmed, because: (1) reaching maximum medical improvement does not affect an employee's right to continue to receive temporary disability benefits; and (2) the hearing and deposition evidence, medical records, and stipulated fact six support the Commission's findings that plaintiff was out of work under medical care due to her injury, that she applied for and received unemployment benefits, and that she made reasonable efforts to obtain employment within her restrictions. **Hooker v. Stokes-Reynolds Hosp.**, 111.

Credibility and weight of evidence—Commission as sole judge—An assignment of error to Industrial Commission findings and conclusions was overruled where plaintiff contended that those findings and conclusions were contrary to the greater weight of the evidence. There was evidence to support the findings, and the Industrial Commission is the sole judge of the credibility and weight of the evidence. **Baker v. Sam's Club**, 712.

Credibility of witnesses—reliance on deputy commissioner's determination—The Industrial Commission did not err in a workers' compensation case by deferring to the deputy commissioner's judgment regarding the credibility of witnesses. **Dunn v. Marconi Communications, Inc.**, 606.

Death benefits—estranged wife—The Industrial Commission erred in a workers' compensation case by failing to award decedent employee's death benefits to his estranged wife. **Goodrich v. R.L. Dresser, Inc.**, 394.

Death benefits—stepchildren—substantial dependency—The Industrial Commission did not err in a workers' compensation case by awarding decedent employee's death benefits to his three stepchildren. **Goodrich v. R.L. Dresser, Inc.**, 694.

Disability—medical expenses—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was entitled to the payment of medical expenses incurred for the treatment of the injuries sus-

WORKERS' COMPENSATION—Continued

tained or further treatment necessary to cure, give relief, or lessen plaintiff's period of disability. **Joyner v. Mabrey Smith Motor Co.**, 125.

Injury by accident—coming and going rule—The Industrial Commission did not err in a workers' compensation case by concluding that the deceased worker did not sustain a compensable injury by accident when she was involved in an automobile accident on her way home after completion of her shift at work. **Stanley v. Burns Int'l Sec. Servs.**, 722.

Misrepresentation—medical history—Neither the Industrial Commission nor the Court of Appeals has the authority to adopt a misrepresentation defense regarding an employee's medical history if it is not found in the Workers' Compensation Act. **Hooker v. Stokes-Reynolds Hosp.**, 111.

Misrepresentation—medical history—The Industrial Commission did not err in a workers' compensation case by allegedly failing to make a finding about whether plaintiff employee made misrepresentations regarding her medical history during the interview process when applying for a CNA job with defendant hospital because the evidence supports the Commission's finding that plaintiff disclosed her prior injury before being hired. **Hooker v. Stokes-Reynolds Hosp.**, 111.

Post-injury employment—necessary findings—A workers' compensation award was remanded for necessary findings about the suitability of plaintiff's post-injury employment by defendant. **Baker v. Sam's Club**, 712.

Post-traumatic stress—fireman—abusive supervisor—driving test—The Industrial Commission did not err by concluding that a workers' compensation plaintiff's post-traumatic stress disorder, depression, and other psychological conditions did not develop and were not aggravated by causes and conditions characteristic of and peculiar to his employment as a firefighter. An abusive supervisor, an employment test, and a perceived demotion are not uncommon in the workplace. **Clark v. City of Asheville**, 717.

Quality of care—rate of compensation—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff's father and sister were entitled to \$7.00 per hour for attending to plaintiff's needs even though neither had formal medical training. **Palmer v. Jackson**, 642.

Retroactive attendant care—interest—The Industrial Commission did not err in a workers' compensation case by awarding interest on retroactive attendant care. **Palmer v. Jackson**, 642.

Sanctions—striking defenses—failure to answer interrogatories—The Industrial Commission did not abuse its discretion in a workers' compensation case by sanctioning defendant employer and striking its defenses based on a failure to comply with an order compelling discovery. **Joyner v. Mabrey Smith Motor Co.**, 125.

Total disability benefits—findings of fact—conclusions of law—The Industrial Commission's findings of fact and conclusions of law concerning plaintiff's entitlement to total disability benefits from 19 September 2000 in a workers' compensation case were supported by competent evidence where plaintiff's testimony and medical records support the Commission's determination that

WORKERS' COMPENSATION—Continued

plaintiff's efforts to find subsequent employment were thwarted by his medical restrictions. **Joyner v. Mabrey Smith Motor Co.**, 125.

Wrongful defense of claim without reasonable grounds—attorney fees—Although plaintiff contends the Industrial Commission erred in a workers' compensation case by failing to address whether defendants wrongfully defended the claim for retroactive care without reasonable grounds, this claim is unfounded because the Commission considered plaintiff's claim and awarded those fees, including attorney fees, which it believed to be appropriate. **Palmer v. Jackson**, 642.

ZONING

Certificate of occupancy—zoning variance—oceanfront property—set-back requirement—A de novo review revealed that the trial court did not err by affirming the Board of Adjustment's denial of petitioners' certificate of occupancy or alternatively a variance after the completion of construction of their oceanfront residence that failed to be in compliance with the town's rear yard setback requirements even though petitioners contend that a 1939 Act of the General Assembly that affects oceanfront property in Wrightsville Beach supercedes any contrary zoning ordinance enacted by the town. **Prewitt v. Town of Wrightsville Beach**, 481.

Conditional use permit—damage to adjoining property—evidence speculative—There was no competent, material evidence justifying the denial of a conditional use permit for a humane shelter veterinary clinic because it would injure adjoining property. Evidence thereto was speculative. **Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines**, 625.

Conditional use permit—humane society veterinary clinic—insufficient evidence for denial—The denial of a conditional use permit for a humane society veterinary clinic was not based on competent, substantial, and material evidence where the town council found that the principal use of the facility was for an animal shelter and adoption facility, but there was no evidence that such an activity would be the primary use of the facility. **Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines**, 625.

Conditional use permit—humane society veterinary clinic—road access or street frontage—An application for a conditional use permit for a humane society veterinary clinic satisfied zoning requirements for access by providing an access easement from a public road. **Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines**, 625.

Conditional use permit—humane society veterinary clinic—town ordered to issue—It was not improper for the trial court to order issuance of a conditional use permit for a humane society veterinary clinic. **Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines**, 625.

Denial of rezoning request—traffic congestion—plausible basis—The trial court correctly entered summary judgment for defendant town in an action seeking a declaration that the denial of plaintiffs' rezoning application was contrary to law. Although plaintiffs contend that the town council's decision was arbitrary and capricious, the transcript reveals that the council denied the request because

ZONING—Continued

it was concerned that the traffic increase, though minimal, would exacerbate existing congestion and because it would be inappropriate to approve the request on the same day that it approved \$10-20 million to investigate relief of traffic problems in the area. **Ashby v. Town of Cary, 499.**

Selective enforcement of ordinance—due process and equal protection— Respondent town did not selectively enforce its rear yard setback ordinance and thus did not violate petitioners' due process and equal protection guarantees under both the North Carolina and United States Constitutions. **Prewitt v. Town of Wrightsville Beach, 481.**

Sketch plan—compliance with zoning and subdivision ordinances—The trial court erred by determining that respondent town board's decision to deny petitioner's sketch plan proposing 145 single-family detached houses constructed on the pertinent property was supported by competent, material, and substantial evidence and thus the trial court's decision was arbitrary and capricious. **William Brewster Co. v. Town of Huntersville, 132.**

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