NORTH CAROLINA COURT OF APPEALS REPORTS

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162 N.C. APP.

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN[1]

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JOHN B. LEWIS, JR.

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GERALD ARNOLD
SIDNEY S. EAGLES, JR.[2]

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ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS

1. Appointed Chief Judge by Chief Justice I. Beverly Lake, Jr. and sworn in 1 February 2004.
2. Retired as Chief Judge 31 January 2004.

Administrative Counsel
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4B	Charles H. Henry	Jacksonville
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1. Retired 31 March 2005.
2. Resigned 1 July 2005.

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	SAMUEL M. TATE	Morganton

1. Appointed as interim Chief Judge effective 6 August 2005 while Chief Judge John J. Carroll III is serving active military duty.
2. Retired 31 October 2004.
3. Appointed and sworn in 7 March 2003 and elected and sworn in 6 December 2004.
4. Appointed and sworn in 1 September 2005 to replace Vance B. Long who was appointed to the Superior Court.
5. Appointed and sworn in 20 July 2005 to replace Charles A. Horn, Sr. who retired 30 April 2005.
6. Deceased 15 February 2003.
7. Resigned 4 October 2004.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

BENITO LUNA, BY PERSONAL REPRESENTATIVE, MARY JOHNSON, PETITIONER V. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, RESPONDENTS

No. COA02-557

(Filed 6 January 2004)

Public Assistance— Medicaid—undocumented immigrant—emergency medical condition

A de novo review revealed that the trial court erred by affirming the denial of Medicaid benefits for the treatment of petitioner undocumented immigrant's emergency medical condition including chemotherapy and related services for the rest of the finite course of treatment of the very condition that sent petitioner to the emergency room, and the case is remanded for a determination of some factual issues including: (1) whether petitioner's condition was manifesting itself by acute symptoms; and (2) whether the absence of immediate medical treatment could reasonably be expected to place petitioner's health in serious jeopardy or result in serious impairment to bodily functions or serious dysfunction of any bodily organ or part.

Appeal by petitioner from order entered 14 December 2001 by Judge Melzer A. Morgan, Jr. in the Superior Court in Rockingham County. Heard in the Court of Appeals 13 February 2003.

Turner, Enochs & Lloyd, P.A., by Melanie M. Hamilton, Thomas E. Cone, and Wendell H. Ott, for petitioner-appellant.

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

HUDSON, Judge.

Petitioner appeals from an order entered by the superior court, which affirmed the denial of Medicaid coverage. The sole question presented to us is whether the Department correctly applied the law in determining that certain care and services did not constitute treatment for Petitioner's emergency medical condition. For the following reasons, we reverse.

Background

On 26 December 1999, petitioner Benito Luna, an undocumented immigrant from Mexico, arrived at the emergency room at Moses Cone Hospital in Greensboro, North Carolina, complaining of weakness and numbness in the lower extremities, erectile dysfunction, and bladder hesitancy. He was admitted to the hospital that same day for x-rays and an MRI of his thoracic spine. The MRI revealed an intramedullary spinal cord tumor at the T6 level, and doctors originally diagnosed petitioner as having "medullary non-Hodgkin's lymphoma," and later clarified the diagnosis as "thoracic myelopathy with monoplegia in the lower limb and a malignant spinal cord neoplasm." On 28 December 1999, Luna underwent a thoracic laminectomy and resection of the spinal cord tumor.

After the surgery, the petitioner was gradually mobilized and, on 3 January 2000, the hospital transferred him to its rehabilitation unit for a comprehensive rehabilitation program. At the time of petitioner's transfer, 3 January 2000, his diagnosis was the same as in December. During petitioner's ten-day period in the rehabilitation service, the consulting oncologist noted that he had no signs of other disease, but believed that he had a primary central nervous system lymphoma. The pathology report confirmed this diagnosis. The doctor recommended "immediate" treatment to include high doses of chemotherapy.

On 14 January 2000, the rehabilitation service administered a Port-A-Cath to prepare petitioner for chemotherapy, and then transferred him to the hospital's oncology unit for intravenous chemotherapy. The oncology service then administered the treatment from 14

January through 24 January 2000, when petitioner was released to go home. Because the chemotherapy agent used in the course of petitioner's treatment was highly toxic at the doses used, it had to be administered on an inpatient basis. After 24 January 2000, petitioner was readmitted to the hospital for the remaining doses of the chemotherapy treatment plan.

On 28 April 2000, petitioner applied to the Rockingham County Department of Social Services for Medicaid benefits to cover the above admissions. Petitioner gave Moses Cone Hospital permission to act on his behalf and Mary Johnson of Moses Cone Hospital pursued his application for Medicaid benefits.

The Rockingham County DSS ("DSS") approved Medicaid coverage for the first few days of petitioner's initial hospitalization, 26 December 1999 up to 3 January 2000, during which time petitioner underwent the thoracic laminectomy and spinal cord tumor surgery. However, DSS denied Medicaid coverage for all treatment beginning 3 January 2000, determining that it was not for the treatment of a emergency medical condition. Petitioner then appealed to respondent North Carolina Department of Health and Human Services ("the Department"), which held a hearing, and on 23 February 2001, affirmed the decision of Rockingham County DSS. On 26 March 2001, petitioner filed a petition for judicial review in the superior court pursuant to G.S. § 108A-79(k) and Article 4 of Chapter 150B. On 14 December 2001, after hearing arguments from both parties, the superior court affirmed the respondent's final agency decision. Petitioner appeals.

Analysis

This Court's review of the superior court's order on appeal from an administrative agency decision generally involves "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994). In *Amanini*, this Court said that "our review of a trial court's order under G.S.§ 150B-52 is the same as in any other civil case—consideration of whether the court committed any error of law." *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19 (internal quotations and citations omitted); see also G.S. § 150B-43, et. seq. (2001). G.S. § 150B-52, as amended effective 1 January 2001, now provides that, in cases that are not governed by the amended G.S. § 150B-51(c), "[t]he scope of review to be applied by

the appellate court under this section is the same as it is for other civil cases." Put a different way, in other civil cases, in which the superior court sits without a jury,

> the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Findings of fact by the trial court in a non-jury trial . . . are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*.

Shear v. Stevens Building Co., 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (internal citations omitted). Here, however, petitioner has not assigned error to any of the findings of fact, which are thus binding. Thus, pursuant to G.S. § § 150B-51 and 108-79(k), we proceed to review the trial court's conclusions of law de novo. See *id.*

A.

"Medicaid is a federal program that provides health care funding for needy persons through cost-sharing with states electing to participate in the program." *Greenery Rehabilitation Group, Inc. v. Hammon*, 150 F.3d 226, 227 (2nd Cir. 1998). A state that chooses to participate in the Medicaid program is required to follow certain federal regulations. In North Carolina, the General Assembly empowered the Department to establish a state Medicaid program, which is administered by county departments of social services under rules adopted by the Department. G.S. § 108A-54 and 108A-25.

The Department's rules regarding eligibility for Medicaid benefits, which are nearly identical to their federal counterparts, provide that "undocumented aliens or aliens not otherwise permanently residing in the United States under color of law generally are not entitled to full Medicaid coverage." N.C. Admin. Code tit. 10, r. 50B.0302 (June 2002); see also 42 U.S.C. 1396b (v)(1), (3). The only exception to this exclusion in both the North Carolina rule and the federal regulations is that payment is authorized for medical "care and services" that are necessary for the treatment of an emergency medical condition. *Greenery*, 150 F.3d at 227-28.

The implementing federal regulation provides, however, that undocumented aliens are entitled to Medicaid coverage for emergency services required after the sudden onset of a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention

could reasonably be expected to result in: (i) placing the patient's health in serious jeopardy; (ii) serious impairment to bodily functions; or (iii) serious dysfunction of any bodily organ or part. 42 C.F.R. § 440.255(b). A state Medicaid plan must conform to these requirements. 42 U.S.C. § 1396a(a).

The North Carolina rule provides coverage:

> (c) . . . for care and services necessary for the treatment of an emergency condition if:
>
> (1) The alien requires the care and services after the sudden onset of a medical condition (including labor and delivery) that manifests itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could result in—
>
> (A) Placing the patient's health in serious jeopardy,
>
> (B) Serious impairment to bodily functions, or
>
> (C) Serious dysfunction of any bodily organ or part.

N.C. Admin. Code tit. 10, r. 50B.0302 (June 2002). Thus, North Carolina's rules regarding eligibility for Medicaid coverage are plainly consistent with the federal requirements.

B.

Here, the parties do not dispute that on 26 December 1999, petitioner presented at the hospital with an emergency medical condition. Indeed, the surgical part of the treatment was covered and paid by Medicaid and is not at issue. The issue, rather, is whether the rest of the treatment, the chemotherapy and related services, should have been covered as well. Petitioner contends that we should focus on the term "treatment," and argues that " 'treatment' is more extensive than, and covers a broader range of services than, providing emergency services or just those necessary for the stabilization of a patient's emergency medical condition." The Department, on the other hand, argues that the denial was proper.

The pertinent findings of the court are as follows:

> 3. Petitioner originally presented himself to the emergency room at Moses Cone Hospital on 26 December 1999 complaining of weakness and numbness in the lower extremities, erectile dys-

function and bladder hesitancy; he was admitted from the emergency room.

4. Petitioner was diagnosed as having medullary non-Hodgkin's lymphoma.

5. On 28 December 1999 Petitioner underwent a thoracic laminectomy and resection of a spinal cord tumor.

6. On 3 January 2000 Petitioner was transferred to the hospital's rehabilitation service for a comprehensive rehabilitation program.

7. On 14 January 2000 a Port-A-Cath was placed to prepare the Petitioner for chemotherapy, and he was transferred to another unit for chemotherapy. Physical therapy also continued.

8. Subsequent admissions covering 1/15-27/00, 1/31/00-2/4/00, 2/21-25/00, 3/6-9/00, 3/20-24/00, and 4/3-6/00 were all for planned courses of chemotherapy.

9. An application for Medicaid was submitted on the Petitioner's behalf on 28 April 2000 to the Rockingham County Department of Social Services.

10. The Respondent approved Medicaid coverage for the 12/26-28/99 admission.

11. The Respondent denied coverage for the subsequent admissions upon its determination that these admissions were not for the treatment of an emergency medical condition.

Based upon these findings and the court's interpretation of applicable law, the court reached the following conclusions:

3. Emergency medical conditions are limited to sudden, severe, short-lived illnesses (and injuries) that require immediate treatment to prevent further harm.

4. Emergency medical conditions do not include chronic debilitating conditions resulting from the initial event which later require ongoing regimented care.

5. Treatment for an emergency medical condition does not encompass all medically necessary treatment.

6. The potentially fatal consequences of discontinuing ongoing care, even if such care is medically necessary, does not

transform the Petitioner's condition into an emergency medical condition.

7. The Respondent's final agency decision is consistent with controlling federal statutes and regulations; it is not in violation of constitutional provisions, nor does it exceed the statutory authority or jurisdiction of the agency.

Based upon these conclusions, the court affirmed the Department's denial of coverage. Although we are bound by the findings of fact, we review de novo the legal issues, including whether the findings of fact are adequate to support the conclusions of law. Because we hold that these conclusions and thus the decision are affected by errors of law, and are not consistent with the applicable regulations, we reverse and remand.

The evidence before the court included a number of medical records and other documents contained in the administrative record, as well as a stipulation regarding testimony presented at the hearing before the Department. Among the documents are the hospital summaries and a letter from Dr. Gustav Magrinat, the petitioner's treating physician during the disputed period. In his letter Dr. Magrinat, who is board certified in both hematology and oncology, explained the following:

> Because of the rapid, life-threatening progression of [petitioner's type of] cancer if left untreated, immediate treatment was required . . . . Mr. Luna was fortunate in that we were able to start his chemotherapy during his initial hospitalization.
>
> The treatment Mr. Luna received included surgical intervention and [six cycles of] chemotherapy.
>
> . . .
>
> Medically this therapy is best considered a single course of treatment.
>
> . . .
>
> In my opinion, the care and services provided to Mr. Luna from December 26, 1999 through April 6, 2000, all constituted a single course of treatment which was necessary for the treatment of an emergency medical condition as defined in the statute.

Because the tape of the hearing was erased, the parties stipulated to the substance of testimony given by Dr. Mignon Benjamin, a family

practitioner who reviewed petitioner's case under contract with the Department. The parties stipulated that Dr. Benjamin "did not disagree with Dr. Magrinat's letter," although she "considered [petitioner's] admissions [after 3 January 2000] to be 'elective' " and believed that since "he had been stabilized," by that time, any further chemotherapy was not "of an emergency nature." She agreed that such treatment was appropriate and medically necessary, but expressed her opinion that Medicaid should not pay after 3 January 2000, because petitioner "had been stabilized and that an abrupt onset would be necessary for each admission to qualify as an emergency medical condition."

The Department argues that as a matter of law, petitioner's treatment cannot be covered because the chemotherapy constituted "ongoing and regimented care." Indeed, the court, in its conclusion 4, concluded that emergency conditions "do not include chronic debilitating conditions . . . which later require ongoing and regimented care." Whether the treatment at issue here was for the petitioner's emergency condition or for a "chronic debilitating condition" is an issue of medical fact, which neither the court nor the Department addressed in their findings. Although the court's conclusion may be a correct statement of law, its findings are insufficient to support the application of that legal principle here.

Specifically, the Department acknowledged and covered treatment for petitioner's myelopathy and spinal cord malignancy in the emergency room and in the surgical unit as treatment for an emergency medical condition. However, neither the Department nor the court made findings of fact as to whether any of the care and services provided beginning 3 January 2000 were necessary for the treatment of the emergency medical condition for which petitioner was admitted on 26 December 1999. We do not believe that the findings of fact support conclusions of law numbers 3, 4, 5, 6, and 7 (quoted above). While conclusions 3, 4, and 5 may be consistent with the applicable regulations and case law in defining "emergency medical condition," there are no findings at all indicating that petitioner's emergency condition (for which he was admitted on 26 December 1999) had changed in character.

Rather, the medical evidence on this issue was conflicting, and thus subject to resolution by the finder of fact. The factual question to be addressed, therefore, is whether the absence of "immediate medical attention" after 3 January 2000 could result in one or all of the three consequences listed in the regulation. See N.C. Admin. Code

tit. 10, r. 50B.0302(c)(1)(A), (B) and (C) (health in serious jeopardy, serious impairment to bodily function, or serious dysfunction). Because neither the court nor the Department addressed these issues, we must reverse and remand for findings on these issues, and then for conclusions based thereon.

In addition, we do not agree that the superior court's decision is "consistent with controlling federal statutes and regulations." In particular, conclusion of law 6 directly contradicts N.C. Admin. Code tit. 10, r. 50B.0302(c)(1)(A) (treatment covered if "the absence of immediate medical attention could result in placing the patient's health in serious jeopardy"). Neither the Department nor the superior court addressed the central issue required by the regulation, given that petitioner's condition upon admission was admittedly an "emergency medical condition" for which coverage was provided.

The Department further argues that, as a matter of law, the denial of coverage was proper, relying on several cases from other jurisdictions, including *Greenery Rehabilitation Group, Inc. v. Hammon*, 150 F.3d 226 (2d Cir. 1998), *Scottsdale Healthcare, Inc. v. Arizona Health Care Cost Containment System*, 45 P.3d 688 (Ariz. Ct. App. 2002), and *Quinceno v. Dept. of Social Services*, 728 A.2d 553 (Conn. Super. 1999). No court in this jurisdiction has addressed the precise issue here, namely the extent of Medicaid's coverage for "treatment of an emergency medical condition," in the case of an undocumented alien. In each of the cases cited, the petitioners sought coverage for long-term nursing care or open-ended treatment for a chronic condition that resulted many months or years after a traumatic injury. Although we cannot decide on the incomplete findings of fact here whether coverage was proper or not, we can say that none of these cases preclude coverage for this petitioner as a matter of law.

In *Greenery*, the plaintiff was a nursing home rehabilitation facility providing care for three patients who had all experienced traumatic, serious brain injuries three or four years earlier. One patient was injured in a automobile accident 16 June 1991, and was treated for an unspecified period in the hospital until she stabilized, at which point she was transferred to plaintiff's facility where she remained through the time of the hearing in 1995. The court noted that she was "[b]ed-ridden and quadriplegic, she continues to require a feeding tube, continual monitoring and extensive nursing care." *Id.* at 228. Of the second patient, who was shot in 1990 and transferred in 1991, the court noted that he was "unable to walk, requires monitoring and medication for seizures and behavioral problems related to his injury

and needs assistance with daily tasks such as bathing, dressing, eating and toileting." *Id.* at 229. The third patient was assaulted in 1990, treated in New York City and "later" transferred to plaintiff's facility. He is described as follows: "Although he is legally blind as a result of his injuries, he is ambulatory and can function if instructed to accomplish a given task. For example, he can feed himself if instructed to eat and is able to dress or use the toilet if directed to do so. He also suffers from behavioral and psychiatric problems that require medication and monitoring." *Id.* The federal district court determined that the first two patients were entitled to Medicaid as their continuing treatment was emergency medical care, but that the third patient was not. *Greenery Rehabilitation Group, Inc. v. Hammon*, 893 F.Supp. 1195, 1207 (N.D.N.Y. 1995).

The Second Circuit Court of Appeals reversed the district court, concluding that Greenery Rehabilitation was not entitled to reimbursement for providing ongoing daily and regimented care for "chronic debilitating conditions which result from sudden and serious injuries." *Greenery*, 150 F.3d at 231. The court reasoned that because the patients' initial injuries had been treated and that the patients were moved to the rehabilitation facility for long-term nursing care, their medical conditions could no longer be classified as "emergencies," despite the fact that all three patients had emergency conditions originally and even though discontinuing ongoing care could result in grave consequences. As the court elaborated, a chronic medical condition does not become an emergency under the statute simply because discontinuing care may place the patient's life at risk. *Id.* at 232.

In determining that the patients' conditions were "chronic" as opposed to "acute," the *Greenery* Court explained that:

> An acute symptom is a symptom characterized by sharpness or severity . . . having a sudden onset, sharp rise, and short course . . . [as] opposed to chronic. Moreover, as a verb, manifest means to show plainly. In § 1396b(v)(3) this verb is used in the present progressive tense to explain that the emergency medical condition must be revealing itself through acute symptoms. Thus . . . the statute plainly requires that the acute indications of injury or illness must coincide in time with the emergency medical condition. Finally, immediate medical care means medical care occurring . . . without loss of time or that is not secondary or remote. In sum, the statutory language unambiguously conveys the meaning that emergency medical conditions are sudden, severe and

> short-lived physical injuries or illnesses that require immediate treatment to prevent further harm.

Id. (internal citations and quotation marks omitted). The petitioner here, unlike any of the *Greenery* patients, sought coverage for the rest of the finite course of treatment of the very condition that sent him to the emergency room, and not for long-term or open-ended nursing care. Thus, we conclude that *Greenery* is inapposite. See also *Quinceno*, 728 A.2d 553 (Conn. Super. 1999) (relying upon *Greenery*, the Connecticut superior court affirmed a lower court's decision that the patient's "continuous and regimented" care consisting of end-stage renal dialysis was not treatment for an emergency medical condition); and *Szewczyk v. Dept. of Social Services*, 822 A.2d 957 (Conn. App. 2003) (petitioner not to entitled coverage for emergency condition, where patient presented to family doctor with stomach pain and nausea, and almost a week later received cancer diagnosis from test results, and was admitted for chemotherapy).

Similarly, in *Mercy Healthcare, Inc. v. Arizona Health Care Cost Containment System*, 887 P.2d 625 (Ariz. Ct. App. 1994), an undocumented alien was involved in a single vehicle accident. The patient, who was comatose with a severe closed head injury, was transported to a hospital and treated there. After approximately three weeks, he was transferred to a skilled nursing care facility. At the time of the transfer, he was non-verbal, could not move his lower extremities, had a gastrointestinal tube for feeding, and had a tracheostomy. He was later discharged to his son's care. *Id.* at 627. Mercy sought compensation for the patient's treatment at the hospital and the nursing care facility.

The Arizona Health Care Cost Containment System ("AHCCCS"), the state agency charged with administering Arizona's Medicaid program, authorized payment for the patient's treatment at the hospital, but refused payment beyond that point. In reversing this decision, an Arizona appeals court noted that:

> Contrary to AHCCCS's interpretation, the statute does not limit coverage to services for treatment while acute symptoms continue. Rather, the statute requires that the medical condition manifest itself by an "acute symptom (including severe pain)." The statute then mandates that AHCCCS must cover services for treatment of that medical condition so long as absence of immediate treatment for that condition "could reasonably be expected to result in" one of the three consequences defined by statute.

Id. at 628-29 (footnote omitted). Based on *Mercy*, petitioner here argues that "once the condition is determined to manifest itself by acute symptoms, then all acute care and treatment necessary to return the individual to a state of health must be covered by the Medicaid program." Subsequent to *Mercy*, however, the Arizona Court of Appeals and Supreme Court revisited this issue. *See Scottsdale Healthcare, Inc. v. AHCCCS*, 45 P.3d 688 (Ariz. Ct. App. 2002), *vacated and remanded*, 75 P.3d 91 (2003).

In *Scottsdale*, an undocumented alien patient fell out of a palm tree, injuring his neck and head, and was rendered partially quadriplegic. He was admitted to Scottsdale Healthcare; two weeks later, after his condition stabilized, he was transferred from the acute care unit to the hospital's rehabilitation unit, where his care consisted primarily of assistance with activities of daily living. AHCCCS paid for services rendered while the patient was in the acute care unit, but denied coverage for any of his rehabilitation-related care.

After *Greenery*, the Arizona Court of Appeals in *Scottsdale* specifically considered and adopted the reasoning of the Second Circuit's ruling in *Greenery*. In doing so, the Court of Appeals in *Scottsdale* distinguished, without overruling, its holding in *Mercy Healthcare*, in determining that the patient's rehabilitation care did not constitute treatment for an emergency medical condition. *Id.* at 691-92. The Arizona Supreme Court, however, vacated the Court of Appeals decision, and remanded for further proceedings. In its decision the Court specifically noted the conflict between *Mercy Healthcare* and *Greenery* regarding the importance of the "stabilization" of the initial condition in deciding whether a patient suffers from an emergency medical condition. The Court explained its rejection of stabilization as pivotal, as follows:

> *Greenery's* reliance on stabilization does not find support in the plain language of the statute. More importantly, we think reliance on the notion of stabilization, at least as applied in these cases, fails to account for either the wide variety of emergency conditions or patients' responses to treatment.
>
> . . .
>
> Thus, . . . a test that simply focuses on stabilization of the initial [condition] to determine when an emergency medical condition ends is impractical. Likewise, basing a decision of whether an emergency medical condition has ended on the type of ward on

> which the patient happens to be placed is similarly impractical. Neither the statute's plain language nor its intent contemplates that such a narrow, bright line distinction be drawn between what is an emergency condition and what is not . . .

Scottsdale, 75 P.3d at 96-97. Instead, the Court required that "the focus" be on the patient's current medical condition, and whether it is presently manifesting itself by symptoms of sufficient severity that the absence of immediate treatment could result in one of the three adverse consequences listed in the statute. "Whether a condition is manifested" as such is a question of fact, which "should be informed by the expertise of health care providers." *Id.*

We conclude that the analysis by the Arizona Supreme Court is most applicable here, because the statutory language at issue is identical to ours, because the factual context is similar, and because we believe the decision provides the clearest guidance. Thus, based on the available authorities, we remand for the superior court to resolve the critical factual issues, as of the time petitioner sought the services at issue. These issues are: (1) whether his condition was manifesting itself by acute symptoms, and (2) whether the absence of immediate medical treatment could reasonable be expected to place his health in serious jeopardy, or result in serious impairment to bodily functions or serious dysfunction of any bodily organ or part. Depending on the resolution of these factual matters, the court should then decide the legal issue of coverage.

Conclusion

We conclude that the superior court improperly affirmed the denial of Medicaid benefits for the treatment of Petitioner's emergency medical condition, based on the findings of fact in the record. We also conclude that the superior court and the Department have misapplied *Greenery* and the other available authorities in order to deny coverage as a matter of law. Therefore, we vacate the conclusions of law, leave standing the findings of fact of the superior court, and remand for further proceedings consistent with this decision.

Reversed and remanded.

Judges McGEE and STEELMAN concur.

CAPE MEDICAL TRANSPORT, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, RESPONDENT

No. COA02-1742

(Filed 6 January 2004)

1. **Administrative Law— judicial review—de novo standard of review—not stated**

The failure of the trial court to state its standard of review when reviewing an agency's revocation of an ambulance license was not error. N.C.G.S. § 150B-51(c) provides only one standard of review (de novo) and does not require that the standard of review be stated by the trial court.

2. **Administrative Law— judicial review—new findings**

A trial court is permitted to make its own findings of fact when reviewing an agency decision, even though the agency's findings were not objected to. Under N.C.G.S. § 150B-51(c), a trial court reviewing an agency decision shall make findings and conclusions and shall not be bound by the agency's final decision.

3. **Administrative Law— judicial review—additional findings—supported by evidence—conclusion that agency decision was arbitrary—supported by findings**

There was substantial evidence supporting the additional findings made by a trial court when reviewing an agency revocation of an ambulance license. The findings supported the conclusion that the agency's decision to revoke the license failed to give appropriate reasoning for not adopting the decision of the administrative law judge and was arbitrary and capricious. N..C.G.S. §§ 150B-51(b)(6) and 150B-36(b1).

Appeal by respondent from order filed 10 October 2002 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 17 September 2003.

Culbreth Law Firm, by Stephen E. Culbreth, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Melissa L. Trippe, for respondent-appellant.

BRYANT, Judge.

The North Carolina Department of Health and Human Services (the Department) appeals an order filed 10 October 2002 that suspended the ambulance provider license of Cape Medical Transport, Inc. (Cape Medical) in New Hanover County, North Carolina and stayed the revocation of Cape Medical's license in Brunswick County, North Carolina.

On 2 July 2001, Cape Medical filed a "Petition for a Contested Case Hearing" in the Office of Administrative Hearings to appeal the Department's revocation of Cape Medical's ambulance provider license. Initially, this case was heard by an Administrative Law Judge (ALJ). In the recommended decision issued on 31 December 2001, the ALJ made the following findings of fact:

> 1. The [Department] is charged with ensuring that the public's health and safety is met by establishing minimum standards and promulgating rules according to the General Statutes. . . .
>
> 2. [Cape Medical] provides non-emergency ambulance transport to patients. . . . in both New Hanover County and Brunswick County. . . .
>
> 3. Keith Harris is a regional manager of the [Department] . . . . [He] has conducted approximately 20 to 25 investigations and has completed both basic and advanced level investigation courses. . . .
>
> 4. On November 14, 2000, Mr. Harris . . . [learned] Ms. Rachel Odom had . . . report[ed] a complaint regarding [Cape Medical]. . . .
>
> 5. . . . Ms. Odom was employed with [Cape Medical] as an EMT [(emergency medical technician)] from approximately July 2000 until approximately early December 2000. . . .
>
> 6. Ms. Odom told Mr. Harris that on . . . November 14, 2000, while she was working for [Cape Medical], she transported by herself three dialysis patients by ambulance to Southeastern Dialysis Center in Wilmington. . . . Ms. Odom stated she conducted the transport without any other personnel on board because she was instructed to do so by Mr. Doug Kirk. . . . Mr. Kirk is employed by [Cape Medical] as a manager. . . .

7. . . . Ms. Odom completed a written statement and sent it to Mr. Harris . . . .

. . . .

9. The [Department] interprets N.C. Gen. Stat. § 131E-158 to require at least two certified personnel to be aboard an ambulance when patients are being transported . . . .

10. Previously, on September 18, 2000, as the result of having learned that [Cape Medical] possibly transported a patient by ambulance without sufficient personnel aboard, Mr. Harris went to [Cape Medical's] office and met with Mr. Kirk. . . . During that meeting, Mr. Harris informed Mr. Kirk that N.C. Gen. Stat. § 131E-158 states the minimum staffing requirements for ambulance transportation. . . .

11. Prior to September 18, 2000, Ms. Pat Well, a regional manager for the [Department], and Jeremy Banks, former employee of the [Department], met with Mr. Kirk and informed him of the minimum staffing requirements for ambulance transportation. . . .

. . . .

13. On . . . November 18, 2000, Mr. Harris returned to Southeastern Dialysis Center. . . . Mr. Harris observed Mr. Kirk arrive driving one of [Cape Medical's] ambulances. Mr. Harris observed Mr. Kirk get out of the driver's door and go around to the passenger side and assist a lady out of the ambulance. Mr. Harris observed Mr. Kirk help two other people out of the same side door. Mr. Kirk then got in the driver's side of the ambulance and drove off. . . . Mr. Harris saw no one else present in the ambulance. Mr. Harris could see in both the driver and passenger door and he saw both doors open. . . . Nothing was obstructing Mr. Harris' view. . . . Mr. Harris could not see into the back of the ambulance. . . .

14. On November 22, 2000, Mr. Harris . . . went to [Cape Medical's] office. . . . Mr. Harris requested to see [Cape Medical's] ACRs from October 1, 2000, through November 20, 2000. . . . ACR stands for ambulance call report. ACRs contain all patient information and medical care. . . . With regard to ACRs for November 18, 2000, Mr. Kirk did not produce any ACRs . . . , and stated he did not complete ACRs when he did a free transport. Mr. Kirk admitted during the meeting and later in his testimony at hearing,

that he, without anyone else on board the ambulance, gave a courtesy transport to a lady on November 18, 2000. . . . In response to [the Department's] First Set of Interrogatories and Request for Production of Documents, Mr. Kirk stated the ACRs for November 18 had been misplaced. . . .

15. During the November 22, 2000 meeting at [Cape Medical's] office, Mr. Harris informed Mr. Kirk of the minimum staffing requirements for transporting patients by ambulance. . . .

16. Also, during the November 22 meeting, Mr. Harris asked Mr. Kirk if [Cape Medical] had a franchise agreement in New Hanover County. Mr. Kirk said no. . . . [Cape Medical] was on notice from the County that it was required to have a franchise agreement in order to do business in New Hanover County. . . .

17. The [Department's] long-standing interpretation of 10 NCAC 3D.1501(a)(4) is that a provider must have a franchise agreement in each county where the provider makes pick-ups and deliveries. . . .

. . . .

19. Mr. Harris completed a written report of his entire complaint investigation. . . .

. . . .

28. Normally, the [Department] communicates with the provider about any alleged statutory and regulatory violations and the provider corrects any violations and revocation is not necessary. [Cape Medical] continued to violate the minimum staffing requirements after several communications with the [Department] and continued to operate in New Hanover County after being informed by the County that it needed a franchise. . . .

29. Mr. Pratt[, the section chief of the Department,] testified that the [Department] has received reports since March 5, 2001[] that [Cape Medical] has transported patients without sufficient staffing. . . .

The ALJ concluded Cape Medical violated N.C. Gen. Stat. § 131E-158 "on November 14, 2000 . . . , when it transported by ambulance three patients with only one certified personnel on board the ambulance, and . . . on November 18, 2000, when it transported by

ambulance a patient with only one certified personnel on board." The ALJ also concluded Cape Medical violated the Department's former rule 10 NCAC 3D.1501(a)(4)[1] for operating in New Hanover County without a franchise and presenting no written evidence of the county's intent to issue it a franchise. The ALJ suspended Cape Medical's operations in New Hanover County until Cape Medical obtained a franchise in that county and stayed revocation of Cape Medical's license in Brunswick County for five years on the condition that Cape Medical not violate the staffing requirements in the future.

In the final decision issued on 6 March 2002, the Department concurred with the ALJ's findings of fact and also found Cape Medical had committed the violations stated in the recommended decision. Nevertheless, the Department rejected the ALJ's ruling and revoked Cape Medical's license. According to the Department, the ALJ's decision "failed to give due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency" and was "clearly contrary to the preponderance of the admissible evidence in the record."

On 14 March 2002, Cape Medical petitioned for judicial review by the trial court. Cape Medical did not object to the Department's findings of fact. The trial court made many findings similar to those of the Department. Furthermore, the trial court made the following additional findings:

> 8. Mr. Kirk testified that he was the second certified EMT onboard the ambulance [on] the transports that Ms. Odom testified had only one person. . . . He further testified that Ms. Odom never at any time transported patients for [Cape Medical] by herself. . . .
>
> 9. Mr. Kirk testified that Ms. Odom is a disgruntled former employee who quit when she felt her pay was insufficient and she had a history of leaving jobs when she felt she was not being adequately compensated. . . .
>
> . . . .
>
> 13. Joshua Blanks, an Emergency Medical Technician for [Cape Medical], rode in the back of the ambulance during the November 18, 2000 transport. . . . Mr. Blanks was not feeling

1. 10 NCAC 3D.1501 was repealed effective 1 January 2002. 10 NCAC 3D.1501 (Jun. 2002).

well and therefore remained in the back of the ambulance while Mr. Kirk assisted the patients into the Center. . . .

. . . .

19. Other than the two (2) incidents . . . [on 14 and 18 November 2000], there was no substantiation of any reports of patients without the required number of staff because Drexdal R. Pratt . . . testified that his office did not investigate any additional allegations. . . .

20. . . . [T]he [Department] is aware of other North Carolina ambulance providers that have been investigated for understaffed transportation of patients. However, the agency has never revoked any other provider's license for any similar transgressions. . . .

. . . .

24. . . . [T]he [Department] has never in its history enforced a county franchise agreement. . . .

The trial court concluded:

5. That the "Final Decision" for the rejection of the recommended decision of the [ALJ] is flawed in that the [Department] has failed to demonstrate a knowledge and expertise within its specialized knowledge which would permit it to reject the recommendations of the [ALJ] and it has no guidelines for the revocation of a provider's license.

6. That the [Department] admits that there have been other providers who have made similar violations, but that their licenses have not been revoked by the [Department].

7. That the action of the [Department] in rejecting the [ALJ] was arbitrary and capricious.

8. That the [Department] failed to give appropriate reasoning for not adopting the decision of the [ALJ].

As a result, the trial court rejected the Department's final decision and reinstated the ALJ's decision to suspend Cape Medical's license in New Hanover County and stay the revocation of the license in Brunswick County.

The issues are whether the trial court erred by: (I) failing to state the standard of review in its order; (II) making additional findings of fact; and (III) rejecting the Department's final decision.

I

[1] The Department first argues the trial court erred in failing to state the standard applied to its review of the Department's final decision. Specifically, the Department argues the trial court's "failure to do so[] makes it simply impossible for this Court to review the trial court's order and determine, *what*, if any, standard of review was applied or whether an error was made in regard to the *way* in which a standard of review was applied." We disagree.

N.C. Gen. Stat. § 150B-51(c) provides:

> In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

N.C.G.S. § 150B-51(c) (2001) (emphasis added). Section 150B-51(c) provides only one standard of review, *de novo*, and does not require the trial court to state the standard of review. Therefore, the trial court did not err in failing to state the standard of review in its order.

II

The Department next contends the trial court erred in making additional findings of fact. The Department argues: (1) the findings in its final decision were binding on the superior court because Cape

Medical did not raise any exception to them and (2) alternatively, the trial court's additional findings were not supported by substantial evidence. We disagree.

1

[2] Section 150B-51(c) dictates the standard of judicial review in cases in which the agency does not adopt the ALJ's decision. N.C.G.S. § 150B-51(c). Added to the North Carolina Administrative Procedures Act in 2000, section 150B-51(c) is applicable to contested cases commenced on or after 1 January 2001. N.C.G.S. § 150B-51(c). In the instant case, the petition for contested case hearing was filed on 2 July 2001, after section 150B-51(c) became effective. Therefore, judicial review of the instant case is dictated by section 150B-51(c). Because our Courts have not yet had the opportunity to address this issue, we are presented with a matter of first impression.

As provided in section 150B-51(c), in its *de novo* review of an agency decision declining to adopt the ALJ's decision, the trial court "*shall make findings of fact and conclusions of law. . . . and shall not be bound by the findings of fact . . . in the agency's final decision.*" N.C.G.S. § 150B-51(c) (emphasis added). The plain language of the section permits the trial court to review the official record and make its own findings of fact and conclusions of law, without giving deference to any prior agency or ALJ decision. "*De novo* review requires a court to consider the question anew, as if the agency has not addressed it." *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001); *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). "Presumably, [section 150B-51(c)] makes clear that unlike the *de novo* review of questions of law under the traditional standard of review, in which the court might in some cases give 'some deference' even to questions of law, such deference is not to be given to any aspect of any prior decision in the case." Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C.L. Rev. 1571, 1609 (2001) (emphasis added).

The legislative intent behind section 150B-51(c) is to increase the judicial scope of review in cases in which an agency rejects the ALJ's decision. *Id.*; Brad Miller, *What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C.L. Rev. 1657, 1661 (2001) [hereinafter *Legislative Intent*]. Before the enactment of section 150B-51(c), "the standard of review for find-

ings of fact [in the final agency decision] was very deferential [to the agency]." Miller, *Legislative Intent*, 79 N.C.L. Rev. at 1658; *see also* Julian Mann, III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C.L. Rev. 1639, 1655 (2001) (section 150B-51(c) "is a substantial departure from previous statutory law").

We acknowledge our Courts have previously held that an agency's findings of fact if not objected to constituted the whole record and were binding on appeal. *See Town of Wallace v. Dept. of Environment*, 160 N.C. App. 49, 54, 584 S.E.2d 809, 814 (2003); *Dixie Lumber Co. of Cherryville v. N.C. Dep't of Env't, Health & Nat. Res.*, 150 N.C. App. 144, 148, 563 S.E.2d 212, 213-14 (2002); *Wiggins v. N.C. Dept. of Human Resources*, 105 N.C. App. 302, 306, 413 S.E.2d 3, 5 (1992). However, these cases were decided before section 150B-51(c) came into effect and are thus not applicable here. *See e.g., Town of Wallace*, 160 N.C. App. at 54 n.1, 584 S.E.2d at 813 n.1 (noting the standard of review articulated by section 150B-51(c) did not apply to the case before the Court because the contested case petition had been filed on 13 March 2000, before section 150B-51(c) came into effect). Therefore, consistent with section 150B-51(c), the trial court is permitted to make its own findings of fact, even though neither party objected to those findings.

2

[3] We now address whether the trial court's additional findings were supported by substantial evidence. "In cases reviewed under [section] 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." N.C.G.S. § 150B-52 (2001). "Substantial evidence is such 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' " even if contradictory evidence may exist. *Avant v. Sandhills Ctr. for Mental Health*, 132 N.C. App. 542, 546-47, 513 S.E.2d 79, 83 (1999) (citation omitted); *Dockery v. N.C. Dept. of Human Resources*, 120 N.C. App. 827, 830, 463 S.E.2d 580, 583 (1995). The "substantial evidence" test is a deferential standard of review. *See Avant*, 132 N.C. App. at 546-47, 513 S.E.2d at 83; *Dockery*, 120 N.C. App. at 830, 463 S.E.2d at 583 (1995); Miller, *Legislative Intent*, 79 N.C.L. Rev. at 1658.

The trial court's additional findings at issue here are findings of fact 8, 9, 13, 19, 20, and 24. These additional findings are supported by substantial evidence, as they were consistent with the testimony of Kirk, Blanks, and Pratt at the hearing before the ALJ. *See State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. 481, 492-93, 374 S.E.2d 361,

367 (1988) (testimony of two witnesses, despite conflicting testimony of other witnesses, constitutes substantial evidence in support of the findings of fact). Because the trial court properly made the additional findings, the Department's assignment of error is overruled.

III

Lastly, the Department argues the trial court erred in concluding that the Department's final decision to revoke Cape Medical's license failed to give appropriate reasoning for not adopting the decision of the ALJ and was arbitrary and capricious. We disagree.

> The court reviewing a final decision . . . may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

N.C.G.S. § 150B-51(c). Other than as provided in section 150B-51(c), the trial court "may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if . . . the agency's findings, inferences, conclusions, or decisions are . . . arbitrary [and] capricious." N.C.G.S. § 150B-51(b)(6) (2001).

For each ALJ finding rejected by the agency, the agency must set forth "separately and in detail" the reason for and the evidence in the record it relied upon for rejecting the finding. N.C.G.S. § 150B-36(b1) (2001). An agency's decision is arbitrary and capricious if it lacks "fair and careful consideration . . . [or] fail[s] to indicate 'any course of reasoning and exercise of judgment.' " *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980) (citation omitted) (holding order requiring insurance organization to submit audited data was arbitrary and capricious where Insurance Commission failed to determine availability of data and provide adequate guidelines for compliance with order).

N.C. Gen. Stat. § 131E-158(a) requires an "ambulance when transporting a patient . . . [to] be occupied . . . by . . . [a]t least one emergency medical technician . . . [and] [o]ne medical responder." N.C.G.S. § 131E-158(a) (2001). Under the Department's former rule 10 NCAC 3D.1501(a)(4), applicable to this action, a provider of ambulance services must have a franchise to operate or present written evidence of a county's intent to issue a franchise if the county to

be served had a franchise ordinance in effect. Furthermore, 10 NCAC 3D.1401 provides:

> (i) the Department may revoke or suspend an Ambulance Provider License whenever:
>
> (1) the Department finds that:
>
> (A) the licensee has substantially failed to comply with the provisions of G.S. 131E, Article 7 and the rules adopted under that article; and
>
> (B) it is not reasonably probable that the licensee can remedy the licensure deficiencies within a reasonable length of time.

10 NCAC 3D.1401(i)(1) (Jun. 2002).

As stated previously, the trial court made additional findings that there was no substantiation of any additional violations other than the 14 and 18 November 2000 incidents; and that other providers had been investigated for similar understaffing violations, but their licenses were never revoked. The trial court then concluded the Department had no guidelines for revocation of providers' licenses and the agency's decision in not adopting the ALJ decision failed to provide appropriate reasoning and was arbitrary and capricious. In our review of the record, we hold all of the trial court's additional findings to be based on substantial evidence, and that those findings support the trial court's conclusions that the Department's final decision was arbitrary and capricious and failed to give appropriate reasoning for its rejection of the ALJ decision. Accordingly, the trial court properly rejected the Department's final decision and reinstated the ALJ's decision.

Affirmed.

Judges MARTIN and GEER concur.

MARY ELLISON LITTLE AND ROBERT J. ELLISON, PLAINTIFFS v. JACK DOUGLAS STOGNER, INDIVIDUALLY, AND JACK DOUGLAS STOGNER, AS ADMINISTRATOR OF THE ESTATE OF PEGGY W. STOGNER, DEFENDANT

No. COA02-1704

(Filed 6 January 2004)

1. Fraud— sale of real property—failure to perk—reasonable reliance on representations

The trial court erred by directing a verdict for defendant on a fraud claim arising from the sale of real property where there was sufficient evidence that defendant knowingly made false representations that the property perked and that existing septic tanks had been grandfathered. These representations were not merely vague indications, but definite representations upon which a reasonable person would rely. Moreover, defendant's assertions induced plaintiffs to accept "as is" terms with no residential disclosure statement.

2. Real Property— Residential Property Disclosure Act—remedy

The trial court did not err by dismissing a claim for damages under the Residential Property Disclosure Act. The sole remedy was cancellation of the contract.

3. Vendor and Purchaser; Warranties— implied—restrictive covenants—failure of property to perk

The trial court erred by dismissing a claim for breach of implied warranty which arose from the sale of residential property that failed to perk where there was sufficient evidence that the property was not suitable for any conventional, modified, or alternative sewage system and could not be used to construct a residence in compliance with restrictive covenants. The defect was not reasonably discoverable because of defendant's misrepresentations and assurances.

4. Fraud— sale of real property—damages

The calculation of damages for fraud in the sale of real property is based upon the difference between the value of the property when the contract was made and the value it would have had without the fraudulent representation.

Appeal by plaintiffs from judgment entered 11 March 2002 and an order entered 14 November 2002 by Judges Robert P. Johnston and J. Gentry Caudill, respectively, in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 October 2003.

Andresen & Associates, by Christopher M. Vann and John W. Gresham, for plaintiff-appellants.

Helms Mulliss & Wicker, P.L.L.C., by Robert A. Muckenfuss, Thomas D. Myrick, and Jill C. Griset, for defendant-appellee.

HUNTER, Judge.

Mary Ellison Little ("Little") and Robert J. Ellison ("Ellison") (collectively "plaintiffs") appeal from a Directed Verdict and Judgment entered against them filed 11 March 2002 and an order denying plaintiffs' motion for relief from judgment filed 14 November 2002. Plaintiffs also petition this Court for certiorari to review a consent judgment dated 11 June 2002 and an order awarding bond and denying plaintiffs' motion to restore the injunction filed 6 August 2002. We grant plaintiffs' petition for certiorari in order to fully review this appeal. Because the trial court erred in granting a directed verdict against plaintiffs on their fraud claim and in dismissing plaintiffs' breach of implied warranty claim, we reverse in part and vacate the award of costs to defendant. We also vacate the order lifting the preliminary injunction and awarding the injunction bond to defendant. However, we affirm the trial court's dismissal of plaintiffs' claim under the Residential Property Disclosure Act and the exclusion of evidence on the valuation of the property at the time of trial.

The evidence presented at trial tends to show Jack Douglas Stogner ("defendant") sold two lots located on Lake Wylie in Mecklenburg County, North Carolina, to plaintiffs. Defendant on various occasions represented to plaintiffs and others that he had soil tests performed on the property and those tests revealed that the soil "perked," meaning the soil was suitable to support a septic tank system because it could filtrate water at an acceptable rate. In early May 1998, after Little had initially shown interest in buying the property from defendant, defendant called Little and made an appointment for her to view the lots. Defendant walked the property showing Little where the boundaries of the lots corresponded to copies of recorded plats. He informed Little that a lot of soil work had been performed on the property and that the property would "perk." Defendant also told Little that there were two septic tanks and that Mecklenburg

County had "grandfathered" both of the tanks. Defendant also represented that Little could connect houses she planned to build to the septic tanks without the expense of any additional septic system. Defendant reminded Little that her property next to the lots perked, that the next door neighbor's property perked, and that another property down the road also perked, and that his land was the same, he had all the soil work done and there would be no problem with the property. There was also evidence that defendant made similar representations to other potential buyers.

Little and defendant initially entered into a standard form offer to purchase and contract for the property on 1 June 1998. In that standard form contract, however, provisions related to property disclosure and inspections were crossed out. Further, the contract stated Little waived her right to receive a Residential Property Disclosure Statement and that the property was being sold "as is." Little was told by defendant and Malickson, the attorney advising defendant and who performed the closing, that the Residential Property Disclosure Statement only applied to a cabin located on the property, which was going to be removed, and dealt only with termites, chimney inspections, electrical wiring, and lead paint disclosures.

Following the signing of the offer to purchase and contract, Ellison, Little's brother, decided he would join Little in purchasing the lots, and plaintiffs and defendant once again viewed the property. Defendant again pointed out the location of the septic tanks, and reassured plaintiffs that he had performed soil work and the land would perk. Defendant further asserted that he and his wife had once planned to construct a three bedroom house on one of the lots and offered to show plaintiffs the plans assuring them they would have no problem constructing such a house.

At closing, plaintiffs received a general warranty deed for the property and signed a deed of trust to defendant for a portion of the sales price. Subsequently, plaintiffs, while in the process of trying to obtain building permits, were made aware of records in the Mecklenburg County Department of Health that showed soil testing of the property had been performed at the request of defendant and his wife and revealed that the property was not suitable to support septic tank systems and further that the septic tanks in place on the property had not been "grandfathered" in by Mecklenburg County. These records showed that in 1982, prior to defendant acquiring the lot, a site investigation report revealed the soil on one of the lots was unsuitable to support a septic tank system. A letter to defendant's

wife dated 12 February 1993 stated a soil investigation had been conducted at her request on the other lot and showed the property was unsuitable for use with "any conventional, modified or alternative system of which [the investigator] was aware." The records also contained two applications filed by defendant on behalf of his wife dated 23 February 1993, requesting water and wastewater services for the property in order to build a three bedroom home. A subsequent "Soil And Site Report For A Ground Absorption Wastewater System" dated 23 March 1993 listed defendant and his wife as "Owner/Applicant" and stated that defendant was present at the evaluation. This report concluded that the property was unsuitable for a conventional ground absorption wastewater system (a septic tank), and was further unsuitable for either a modified septic tank system or an alternative sewage system.

When confronted by Little, defendant stated that he would only provide the documents from the soil testing after plaintiffs paid off the deed of trust. Plaintiffs purchased the property from defendant for $370,000.00 with the intent of constructing three bedroom homes. An appraisal conducted on behalf of the plaintiffs valued the two lots at $100,000.00 and $140,000.00, respectively.

Plaintiffs brought suit against defendant alleging fraud, breach of implied warranty, and violation of the Residential Property Disclosure Act. Defendant reciprocated by beginning foreclosure proceedings based on non-payment under the deed of trust. The trial court, however, entered a preliminary injunction preventing defendant from proceeding on the foreclosure action during the pendency of this action. *See Little v. Stogner*, 140 N.C. App. 380, 536 S.E.2d 334 (2000) (dismissing defendant's appeal of the preliminary injunction as interlocutory).

Prior to trial, the trial court dismissed plaintiffs' breach of implied warranty and Residential Property Disclosure Act claims. The case proceeded to trial on plaintiffs' fraud claim, upon which the jury ultimately deadlocked seven to five. The trial court declared a mistrial and entered a directed verdict in favor of defendant on 11 March 2002, which lifted the preliminary injunction. Subsequently, the trial court entered a consent order awarding costs to defendant and later entered its separate order denying plaintiffs' motion to reinstate the preliminary injunction and awarded the injunction bond to defendant.

The issues on appeal are whether: (I) there was evidence sufficient to reach a jury that plaintiffs' reliance on defendant's represen-

tations was reasonable; (II) the Residential Property Disclosure Act provides a cause of action for damages; and (III) the trial court erred in dismissing the breach of implied warranty claim. Defendant raises a single cross-assignment of error: (IV) that the exclusion of testimony on the current value of the property at trial was error.

I.

[1] Plaintiffs first contend the trial court erred in directing a verdict in favor of defendant on the fraud claim. We agree.

"A motion for directed verdict tests the sufficiency of the evidence to take the case to the jury." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993). In ruling on a directed verdict motion, a trial court "must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence." *Id.* at 214-15, 436 S.E.2d at 825. " 'If there is more than a scintilla of evidence supporting each element of the plaintiff's case, the directed verdict motion should be denied.' " *Stamm v. Salomon*, 144 N.C. App. 672, 679, 551 S.E.2d 152, 157 (2001) (quoting *Little v. Matthewson*, 114 N.C. App. 562, 565, 442 S.E.2d 567, 569 (1994)).

The elements of fraud are:

> "(a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury."

Bolick v. Townsend Co., 94 N.C. App. 650, 652, 381 S.E.2d 175, 176 (1989) (citations omitted) (emphasis omitted). In this case, there is clearly sufficient evidence, viewed in the light most favorable to plaintiffs, to reach a jury that defendant knowingly made false representations that the property "perked" and was suitable to support a septic system and the septic tanks in place on the property had already been "grandfathered" in by Mecklenburg County. It is plainly apparent that defendant was aware of the fact that soil work had been performed on the property and that this soil work indicated that the property was not suitable to support septic tank systems. Further, these statements were made with the intention of inducing

plaintiffs to purchase the property and that plaintiffs relied on those statements and in fact purchased the property and suffered damages as a result.

The only close question is whether there is sufficient evidence that plaintiffs' reliance on defendant's fraudulent statements was reasonable. *See State Properties, LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002) (reliance on false statement must be reasonable). "The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *Id.* at 73, 574 S.E.2d at 186. It is the policy of our Courts "on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest." *Calloway v. Wyatt*, 246 N.C. 129, 135, 97 S.E.2d 881, 886 (1957). Thus, generally, where a plaintiff fails to make any independent investigation, reliance on an assertion is deemed unreasonable. *See State Properties, LLC*, 155 N.C. App. at 73, 574 S.E.2d at 186.

Where, however, a defendant has resorted to an "artifice which was reasonably calculated to induce [plaintiffs] to forego investigation," plaintiffs' failure to conduct an independent investigation is not fatal to a claim for fraud. *Calloway*, 246 N.C. at 134, 97 S.E.2d at 885-86. Our Courts have recognized the well established rule in such cases " 'that one to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon.' " *Kleinfelter v. Developers, Inc.*, 44 N.C. App. 561, 565, 261 S.E.2d 498, 500 (1980) (quoting *Keith v. Wilder*, 241 N.C. 672, 675, 86 S.E.2d 444, 447 (1955)). Thus in these scenarios, the buyer of property does not "necessarily have to examine the public records to ascertain the truth where the buyer reasonably relies upon representations made by the seller." *Id.* at 565, 261 S.E.2d at 500 (citing *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E.2d 522 (1965)).

In this case, plaintiffs concede that they conducted no independent investigation of the property's suitability to support a septic tank system or whether the existing septic tanks had been "grandfathered" in by Mecklenburg County. Defendant contends that reasonable diligence and inquiry on the part of plaintiffs would have led them to discover the results of the soil testing performed for defendant in the records kept by the Mecklenburg County Health Department, and that plaintiffs had ample opportunity to conduct their own inspection of the property.

The evidence in this case, however, shows that defendant's representations were not merely vague indications that the property would support a septic system, they were instead definite representations that soil work had been performed and the property "perked," and further that the septic tanks already on the property had, in fact, actually been "grandfathered" into compliance. Further, defendant assured plaintiffs that the property would perk and reminded them that Little's property perked as did that belonging to her next door neighbor and other property down the road. Defendant, moreover, indicated that he had planned to build a three bedroom residence on the property similar to those planned by plaintiffs and they would have no problem constructing such residences. This is sufficient evidence for a jury to find that these statements constituted positive and definite representations such that a reasonable person would be justified in relying upon them without inspecting the Health Department records.

Furthermore, when Little met with defendant and Malickson, defendant's attorney, to sign the standard form offer and contract to purchase, portions of the form regarding property disclosures were already crossed out. One of these provisions included the buyer's right to inspect the property including water and sewer systems. This is evidence tending to show defendant was taking steps to prevent an inspection by plaintiffs into the condition of the property, calculated to induce plaintiffs into foregoing their own investigation.

The contract also provided that the buyer was purchasing the property "as is" and was waiving any right to receive a Residential Property Disclosure Statement. Plaintiff was induced into accepting these terms by defendant's and Malickson's assertions that the property disclosure portion of the standard form contract would only apply to a cabin already on the property that was to be removed, and further that the Residential Property Disclosure Statement applied only to lead paint, termites, the condition of the roof and chimney, the foundation, and electrical systems.

The Residential Property Disclosure Act requires that owners of residential real property "shall furnish to a purchaser a residential property disclosure statement." N.C. Gen. Stat. § 47E-4(a) (2001). The owner of property has the option of either (1) disclosing items relative to conditions and characteristics of the property of which the owner has actual knowledge, including, *inter alia*, the water supply and sanitary sewage system, or (2) stating that the owner makes no

representations as to the conditions or characteristics of the property. N.C. Gen. Stat. § 47E-4. In the case *sub judice*, had defendant and his attorney not induced plaintiffs to waive their right to a residential property disclosure statement, defendant would have either been required to (1) truthfully disclose his knowledge that Mecklenburg County had found the property unsuitable to support a septic tank system and had not grandfathered the septic tanks into compliance, or (2) state that he made no representation about the condition of the property relating to sanitary sewer systems. If defendant had chosen the latter, after making the fraudulent representations to plaintiffs and others, it is reasonable to assume that this would have alerted plaintiffs to the potential for fraud causing them to perform an investigation. Thus, it is also reasonable to infer, in light of defendant's actual knowledge of the condition of the property, that defendant's desire not to provide a residential disclosure statement was reasonably calculated to prevent plaintiffs from conducting further investigation and discovering his false representations.

Under the standard for a directed verdict, we conclude that viewed in the light most favorable to plaintiffs and giving them the benefit of every reasonable inference drawn therefrom, this constitutes more than a scintilla of evidence to support the element that plaintiffs reasonably relied on defendant's assertions as, even though plaintiffs conducted no investigation, a jury could reasonably conclude defendant took steps calculated to prevent further investigation and that the representations made were definite and positive statements of such a character that a reasonable person would have foregone any further investigation. Thus, there was sufficient evidence to create a jury question on the issue of reasonable reliance, and the trial court erred in directing a verdict for defendant on the fraud claim.

II.

[2] Plaintiffs next contend that the trial court erred in dismissing the claim for damages under the Residential Property Disclosure Act. We disagree.

The Residential Property Disclosure Act contained in Chapter 47E of the North Carolina General Statutes, with certain exceptions, applies to sales or exchanges, installment land sales contracts, options, and leases with options to purchase involving transfers of residential real property consisting of between one and four dwelling units. N.C. Gen. Stat. § 47E-1 (2001). Under the Residential Property

Disclosure Act, the owner of residential real estate is required to furnish a disclosure statement to a purchaser of the real estate that either discloses characteristics and conditions of the property, of which the owner has actual knowledge, or states that the owner makes no representations as to the characteristics and condition of the property, except as provided in the real estate contract. N.C. Gen. Stat. § 47E-4. The disclosure statement is to be delivered to the purchaser no later than the time at which the purchaser makes an offer to purchase, exchange, option, or exercises an option to purchase leased property. N.C. Gen. Stat. § 47E-5(a) (2001).

The remedy for an owner's failure to comply with the Residential Property Disclosure Act is provided in Section 47E-5(b), which provides the sole remedy for a violation of the Residential Property Disclosure Act. Under this section, if a disclosure statement is not provided to the purchaser prior to or contemporaneously with the making of an offer, the purchaser has the right to cancel any resulting contract. N.C. Gen. Stat. § 47E-5(b). This right to cancel, however, expires (1) three calendar days from the delivery of a disclosure statement to the purchaser, (2) three calendar days following the date the contract was made, (3) at settlement or occupancy of the property by the purchaser, or (4) at settlement in the case of a lease with option to purchase. *Id.* Accordingly, plaintiffs' sole remedy under the Residential Property Disclosure Act was cancellation of the contract pursuant to Section 47E-5(b), and no separate action for damages under the Residential Property Disclosure Act will lie. Thus, the trial court did not err in dismissing plaintiff's claim for damages under the Residential Property Disclosure Act.

III.

[3] Plaintiffs also argue that the trial court erred in dismissing their claim for a breach of the implied warranty arising out of the restrictive covenants. We agree.

Our Court's have recognized an implied warranty arising out of restrictive covenants:

> "[W]here a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both unknown to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee,

> or by any subsequent grantee through mesne conveyance, for the specific purpose to which its use is limited by the restrictive covenants, the [grantor] breaches an implied warranty arising out of said restrictive covenants."

Balmer v. Nash, 65 N.C. App. 401, 403, 309 S.E.2d 518, 519-20 (1983) (quoting *Hinson v. Jefferson*, 287 N.C. 422, 435, 215 S.E.2d 102, 111 (1975)). Thus, in order to establish a breach of the implied warranty arising out of the restrictive covenants, a plaintiff must not only show that the property cannot be used for the purpose its use is limited to by the covenant, but also that the fact the property could not be used for that purpose was unknown to the plaintiff and not reasonably discoverable. *Id.*

In this case, restrictive covenants limited the use of the property to single family recreation and/or single family residence purposes and required the grantee to construct and maintain an outside toilet or inside sewage system in compliance with governmental regulations. Plaintiffs produced evidence tending to show that the property was unsuitable for any conventional, modified, or alternative sewage systems to support residential construction. Moreover, although the restrictive covenants permitted the construction of an outside toilet, a separate covenant prohibited "any refuse, garbage, rubbish or waste of any kind [from being] placed upon or allowed to remain" on the lot. Thus, plaintiffs have made a sufficient showing of evidence to support their claim that the property could not be used for the purpose of constructing a residential home in compliance with the restrictive covenants.

Defendant contends that even if the property cannot be used for the purpose of residential construction, the condition of the property was reasonably discoverable and cites *Balmer* as controlling authority. In this case, however, although Little lived next door to defendant's property, the evidence shows that Little's property perked, as did other property with which she was familiar. Furthermore, although the public records showed the property was unsuitable for a septic tank system and that the existing septic tanks had not been "grandfathered" into compliance, we have already concluded that the evidence, taken in the light most favorable to plaintiffs, tends to show that defendant took steps to prevent any investigation through his misrepresentations and assurances. Thus, plaintiffs produced evidence sufficient to show that, because of their reliance on defendant's misrepresentations, it was not reasonable to discover that the

property would not support a septic system sufficient for residential purposes. Therefore, the trial court erred in dismissing plaintiffs' breach of implied warranty claim.

Because we reverse the trial court on both plaintiffs' fraud and breach of implied warranty claims, we vacate the award of costs to defendant. In so doing, we also reverse the lifting of the preliminary injunction and vacate the order denying plaintiffs' motion to reinstate the preliminary injunction and awarding the bond to defendants.

IV.

[4] Defendant cross-assigns error under Rule 10(d) of the North Carolina Appellate Rules to the trial court's exclusion of expert testimony regarding the current fair market value of the property at the time of trial. Although defendant contends this evidence was generally admissible, he cites no authority to support his position and thus we reject this assignment of error pursuant to N.C.R. App. P. 28(b)(6). Furthermore, we note the calculation of damages in a fraud case is based upon the difference between the actual value of the property at the time of the making of the contract and the value it would have possessed had the fraudulent representation been true, and is not based upon the value of the property at trial. *See Horne v. Cloninger*, 256 N.C. 102, 104, 123 S.E.2d 112, 113 (1961).

Accordingly, we reverse the directed verdict on the plaintiffs' fraud claim and the dismissal of plaintiffs' implied warranty claim; we affirm the trial court's dismissal of plaintiffs' claims under the Residential Property Disclosure Act; and vacate the consent judgment awarding costs to defendant and the orders lifting the preliminary injunction and awarding bond.

Reversed in part, affirmed in part, vacated in part.

Chief Judge EAGLES and Judge GEER concur.

DANIELLE M. ROSE, M.D., PLAINTIFF v. LAKE NORMAN PEDIATRICS, P.A., DEFENDANT AND THIRD-PARTY PLAINTIFF

No. COA02-1725

(Filed 6 January 2004)

1. Insurance— COBRA—wrongful termination of health insurance coverage—directed verdict

The trial court abused its discretion by granting directed verdict in favor of defendant pediatric practice on plaintiff's claims for wrongful termination of health insurance coverage under the Consolidated Omnibus Reconciliation Act of 1985 (COBRA), and the case is remanded to the trial court for a jury determination on this claim, because: (1) plaintiff's employment was terminated as a result of an alleged material breach of her agreement with defendant, and the termination could be deemed a qualifying event that entitled her to continued health insurance coverage pursuant to COBRA, 29 U.S.C. § 1163(2); (2) plaintiff was never given the opportunity to continue coverage, and defendant put forth no evidence that as the plan sponsor it notified the plan administrator that plaintiff was entitled to continuation coverage; (3) defendant's answer to plaintiff's complaint never affirmatively denied defendant was not governed by COBRA, but only that plaintiff's alleged material breach did not obligate it to provide her notice pursuant to COBRA; and (4) plaintiff presented an exhibit that listed twenty-four employees employed by defendant during the applicable period, and COBRA only requires that there be at least twenty employees employed by the employer instead of the requirement that twenty employees participate in the employer's health insurance plan.

2. Insurance— COBRA—directed verdict

The trial court did not abuse its discretion by denying plaintiff pediatrician's motion for directed verdict on a Consolidated Omnibus Reconciliation Act of 1985 (COBRA) claim, because: (1) the evidence was insufficient to support whether defendant pediatric practice was required to comply with COBRA notice requirements due to the size of defendant's workforce; and (2) assuming defendant did not have at least twenty employees in its employ during the preceding calendar year, there was insufficient evidence as to whether plaintiff's termination was a qualifying event requiring compliance with those requirements or as to whether

defendant notified the plan administrator of plaintiff's entitlement to continuation coverage.

3. Employer and Employee— breach of contract—pediatric practice—directed verdict

The trial court abused its discretion by granting directed verdict in favor of defendant pediatric practice on plaintiff's claim for breach of an employment contract, and the case is remanded to the trial court for a jury determination on this claim, because: (1) when viewed in the light most favorable to plaintiff, the evidence established that plaintiff had simply made plans to open her own practice and was not a competitor or rival of defendant's at the time of her termination; and (2) there was sufficient evidence offered that plaintiff fulfilled her obligations to defendant under the parties' agreement.

Appeal by plaintiff from an order entered 26 July 2002 by Judge Susan C. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 9 October 2003.

Maupin, Taylor & Ellis, P.A., by Gretchen W. Ewalt and Terence D. Friedman; Massey & Cannon, P.L.L.C., by E. Bedford Cannon, for plaintiff-appellant.

Homesley, Parker & Wingo, P.L.L.C., by Clifton W. Homesley and Nancy Goodman, for defendant-appellee.

HUNTER, Judge.

Danielle M. Rose, M.D. ("plaintiff") appeals the trial court's grant of directed verdict in favor of Lake Norman Pediatrics, P.A. ("defendant") on her claims for wrongful termination of health insurance coverage under the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA") and breach of contract. Plaintiff also appeals the denial of her motion for directed verdict on the COBRA-related claim. For the reasons stated herein, we affirm the trial court's denial of plaintiff's motion, but reverse the grant of directed verdict in favor of defendant and remand the case to the trial court for a jury determination on both claims.

On 2 January 1997, plaintiff, a pediatrician, entered into an employment contract with defendant, a pediatric practice formerly known as Mooresville Pediatric Associates. The contract incorporated by reference a "Physician Employment Agreement" ("Agreement"), which stated, *inter alia*:

> Employee's rights with respect to [health insurance] benefits shall be subject to (a) the provisions of the relevant contracts, policies or plans providing such benefits, and (b) the right of Employer to amend, modify or terminate any of such benefits if that occurs with respect to all classes of employees covered by a given benefit.
>
> . . . .
>
> Employee shall be eligible to acquire an ownership interest in Employer at the end of one year of employment. The terms and conditions of such acquisition shall be determined at the end of eligibility by mutual agreement of both parties. . . .
>
> . . . .
>
> Employee agrees to devote his/her professional efforts in a full-time practice exclusively to the interest of Employer and shall not engage in the practice of medicine other than for Employer. Full-time practice is defined as a minimum of forty (40) hours per week plus call coverage as specified herein. . . .
>
> . . . .
>
> The term of this Agreement shall be for one (1) year from the date Employee begins employment and shall be automatically renewed for successive one year terms unless terminated . . . upon the occurrence of any of the following events:
>
> A. By notice in writing to the other party given ninety (90) days prior to the date of termination.
>
> B. Material breach of contract by Employee or Employer at the option of the non-breaching party.

The Agreement did not contain a covenant not to compete clause. Plaintiff subsequently began her employment with defendant in April of 1997. Shortly thereafter, another pediatrician, Wendy Gaskins, M.D. ("Dr. Gaskins"), was hired by defendant after entering into a similar employment contract and agreement.

By the summer of 1999, both plaintiff and Dr. Gaskins ("the doctors") had twice been denied an ownership interest in the practice despite each having had two years of eligible employment with defendant. As an alternative, the doctors discussed starting a pediatric practice separate and apart from defendant. Over the next few months, the doctors engaged in several activities relevant to the

establishment of that practice. In October of 1999, plaintiff spoke with the administrator of Lake Norman Regional Medical Center and learned that the hospital would provide limited assistance towards the lease of office space for their pediatric practice. In January of 2000, plaintiff had a conversation with Blair Craven ("Craven"), an employee of defendant's and the mother of small children who were patients of defendant's, about whether Craven would consider taking her children to plaintiff's pediatric practice if such a practice existed. On 1 February 2000, the doctors applied with the North Carolina State Medical Board to form a limited liability company known as "Growing Up Pediatrics." In late February of 2000, the doctors engaged in discussions to secure financing for their new practice. In February and March of 2000, the doctors retained the services of Opus Healthcare Consultants ("Opus") to assist them with setting up their pediatric practice, which included finding property to lease for that practice. Also in March of 2000, the doctors hired a firm to design a logo for "Growing Up Pediatrics." Finally, in early April of 2000, plaintiff conferred with and received a proposal from an architect regarding renovating office space to meet the needs of the doctors in their new practice. None of the doctors' activities relevant to the establishment of their practice took place on defendant's premises or during the doctors' scheduled work hours; however, plaintiff did make three one-minute phone calls to Opus on 8 March, 30 March, and 6 April 2002 while at work on defendant's premises.

Upon learning of plaintiff's plans, Amy Ferguson, M.D. ("Dr. Ferguson"), the principal in defendant, met with plaintiff on 14 April 2000 to discuss the matter. Plaintiff informed Dr. Ferguson of her interest in opening a pediatric practice because it was unlikely that she would be made a partner. Thereafter, on 17 April 2000, plaintiff received a termination letter from Dr. Ferguson stating that the following actions of plaintiff's were "totally unacceptable" and considered to be a "material breach" of plaintiff's Agreement with defendant:

1. That for some time you have been discussing with certain of my staff members your plans for practice on your own with [Dr. Gaskins].

2. That you have spoken with my patients and informed them that the change in your practice would occur within approximately six months or thereabouts and you have made efforts to recruit my patients for your practice.

3. That you intend to open your office in the Cornelius area and compete directly with me.

Plaintiff's termination was effective immediately, and termination of her health insurance coverage under defendant's group health plan was effective 1 May 2000. Dr. Gaskins was not terminated, but she gave notice to end her employment with defendant soon thereafter.

Plaintiff filed a complaint on 1 December 2000 alleging that defendant had breached their Agreement by wrongfully terminating plaintiff without (1) continuing her health insurance benefits pursuant to COBRA, and (2) giving her ninety days notice prior to termination. Defendant answered and counterclaimed, but voluntarily dismissed its counterclaims on 2 April 2002.

The trial was held on 8 April 2002. After resting, both parties moved for directed verdict. In an order entered on 26 July 2002, the trial court entered directed verdict in favor of defendant after concluding, *inter alia*:

5. When the plaintiff was terminated she formed a class of persons whose employment was terminated and the defendant had a right to terminate the insurance coverage of the plaintiff.

6. The plaintiff failed to devote her professional efforts in full-time practice exclusively to the interest of her employer (the defendant) and therefore failed to fulfill an explicit term of her employment agreement.

7. The plaintiff acquired an adverse interest in her employer, the defendant, in that she became engaged in a business which necessarily rendered her a competitor of her employer, no matter how much or how little of her time and attention she devoted to it.

Plaintiff appeals.

Plaintiff's assignments of error raised on appeal all take issue with the court granting defendant's motion for directed verdict on both of her claims. "A motion for directed verdict tests the sufficiency of the evidence to take [a] case to the jury." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993). In deciding a defendant's motion for directed verdict, "the [trial] court must consider all of the evidence in the light most favorable to the plaintiff, including evidence elicited from the defendant favorable to the plaintiff," *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 305,

330 S.E.2d 627, 628 (1985), and resolve "all inconsistences, contradictions and conflicts for [the plaintiff], giving [the plaintiff] the benefit of all reasonable inferences drawn from the evidence." *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350 (1990). A trial court's decision to grant or deny a motion for directed verdict should not be disturbed absent an abuse of discretion. *Crist v. Crist*, 145 N.C. App. 418, 422, 550 S.E.2d 260, 264 (2001). In this case, the issues for this Court involve whether (1) plaintiff was entitled to COBRA benefits upon the termination of her employment, and (2) plaintiff's conduct and actions amounted to a breach of the employment contract.

I.

[1] Plaintiff's first assignment of error argues the trial court erred as a matter of law in directing a verdict in favor of defendant on plaintiff's claim for wrongful termination of health insurance benefits under COBRA.

At the onset, defendant argues "[a]ppellate review of an order granting a directed verdict is limited to the grounds asserted by the moving party at the trial level." *Jay Group, Ltd. v. Glasgow*, 139 N.C. App. 595, 598-99, 534 S.E.2d 233, 236 (2000). Specifically, defendant contends that plaintiff abandoned her COBRA-related claim because she never raised any federal law issues regarding COBRA (1) during the course of the trial, (2) as a ground for granting a motion for directed verdict in her favor, or (3) in opposition to defendant's motion for directed verdict. While we found no reference to the words "COBRA" or "federal claim" in the transcript, plaintiff's questions and responses regarding the lack of notice she allegedly received as to the continuation of her insurance coverage clearly imply her attempt to argue the federal claim that appeared in her complaint. Moreover, the order indicates that the trial court recognized plaintiff's federal claim by incorporating "plaintiff's complaint by reference . . . ." Therefore, we review the trial court's grant of directed verdict on this claim.

COBRA "*demands*" that, in the event of certain qualifying events, "employers who provide insurance for their employees give the employees an opportunity to continue their insurance coverage under the employer's insurance plan . . . ." *Zickafoose v. UB Servcies, Inc.*, 23 F. Supp. 2d 652, 655 (S.D. W. Va. 1998) (emphasis added). The " 'ultimate duty to assure that an employee receives COBRA benefits resides exclusively' " with the employer. *Hamilton v. Mecca, Inc.*, 930

F. Supp. 1540, 1553 (S.D. Ga. 1996) (citation omitted). Thus, if the employer must comply with COBRA, the burden is on that employer to demonstrate it has implemented procedures reasonably calculated to effectuate actual notice of COBRA continuation rights. *Brown v. Neely Truck Line, Inc.*, 884 F. Supp. 1534 (M.D. Ala. 1995). One such procedure requires the employer (or plan sponsor) to notify the plan administrator of its group health plan about the occurrence of certain qualifying events within thirty days. 29 U.S.C. § 1166(a)(2) (1999). Failure to do so will result in the employer being held solely liable for a COBRA violation. *Ward v. Bethenergy Mines, Inc.*, 851 F. Supp. 235, 237-38 (S.D. W. Va. 1994).

When considered in the light most favorable to plaintiff, the evidence offered was sufficient to support a denial of defendant's motion for directed verdict on plaintiff's COBRA-related claim. Here, plaintiff's employment was terminated as a result of an alleged material breach of her Agreement with defendant. Based on the facts in this case, plaintiff's termination could be deemed a qualifying event that entitled her to continued health insurance coverage pursuant to COBRA. 29 U.S.C. § 1163(2) (1999) (providing that "[t]he termination (other than by reason of such employee's gross misconduct) . . . of the covered employee[]" is a qualifying event). Yet despite that qualifying event, additional evidence, undisputed by defendant, established that plaintiff was never given the opportunity to continue coverage. Plaintiff simply received notice of the cancellation of her insurance coverage from defendant, and subsequently received a letter from the plan administrator, John Alden Life Insurance Company, that her coverage had ended. Defendant put forth no evidence that, as the plan sponsor, it notified the plan administrator that plaintiff was entitled to continuation coverage.

Nevertheless, defendant also argues that there was insufficient evidence offered that it employed the requisite number of employees to necessitate compliance with COBRA's notice requirements. 29 U.S.C. § 1161(b) (1999) provides that an employer must provide an employee, who loses coverage under the employer's group health plan as a result of a qualifying event, the option to continue coverage under the plan *unless* the employer "maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calender year." However, defendant's answer to plaintiff's complaint never affirmatively denied defendant was not governed by COBRA, only that plaintiff's alleged material breach did not obligate it to provide her notice pursuant to COBRA.

"Averments in a pleading to which a responsive pleading is required . . . are admitted when not denied in the responsive pleading." N.C.R. Civ. P. 8(d). Moreover, plaintiff presented an exhibit that listed twenty-four employees employed by defendant during the applicable time period. Defendant, in turn, points this Court's attention to another of plaintiff's exhibits, listing only seventeen employees on a billing statement for defendant's group health plan for April of 2000. Yet, COBRA only requires that there be at least twenty employees employed by the employer, not that twenty employees participate in the employer's health insurance plan. *See* 29 U.S.C. § 1161(b) (1999).

Accordingly, the trial court's conclusion that defendant had a right to terminate plaintiff's insurance coverage because she "formed a class of persons whose employment was terminated," did not automatically excuse defendant from providing plaintiff with notice of her ability to continue such coverage under COBRA. Defendant would be excused if (1) defendant employed fewer than twenty employees during the preceding calendar year (making COBRA inapplicable), or (2) plaintiff's termination was not a qualifying event due to her gross misconduct. Since sufficient evidence was offered, when considered in the light most favorable to plaintiff, that defendant was governed by COBRA and that plaintiff's termination was a qualifying event, the trial court abused its discretion in granting defendant's motion for directed verdict. Therefore, plaintiff's COBRA-related claim should have been allowed to go to the jury.

II.

[2] Plaintiff's second assignment of error argues the trial court erred as a matter of law in failing to direct a verdict in plaintiff's favor on her COBRA-related claim. In deciding a *plaintiff's* motion for directed verdict, the trial court considers the evidence in the light most favorable to the *defendant*, giving it the benefit of all reasonable inferences drawn from the evidence. *See Environmental Landscape Design*, 75 N.C. at 305, 330 S.E.2d at 628. We conclude that, when considered in the light most favorable to defendant, the evidence was insufficient to support whether defendant was required to comply with COBRA notice requirements due to the size of defendant's workforce. Further, assuming defendant did have at least twenty employees in its employ during the preceding calendar year, there was insufficient evidence as to whether (1) plaintiff's termination was a qualifying event requiring compliance with those requirements, or (2) defendant notified the plan administrator of plaintiff's entitlement to

continuation coverage. Thus, the trial court did not abuse its discretion in denying plaintiff's motion for directed verdict.

III.

[3] Finally, plaintiff's third assignment of error argues the trial court erred in directing a verdict in favor of defendant on plaintiff's breach of contract claim. We agree.

Our Supreme Court has held that "[w]here an employee deliberately acquires an interest adverse to his employer, he is disloyal, and his discharge is justified." *In re Burris*, 263 N.C. 793, 795, 140 S.E.2d 408, 410 (1965) (where the Supreme Court upheld the City Manager's discharge of an employee of the City of Asheville after that employee acquired an interest in real property that he knew the City was attempting to purchase). *See also Long v. Vertical Technologies, Inc.*, 113 N.C. App. 598, 439 S.E.2d 797 (1994). The *Burris* Court reasoned that " 'when a servant becomes engaged in a business which necessarily renders him a competitor and rival of his master, no matter how much or how little time and attention he devotes to it, he has an interest against his duty.' " *Burris*, 263 N.C. at 795, 140 S.E.2d at 410 (citation omitted). Here, plaintiff, not bound by any covenant not to compete, testified to engaging in several activities relevant to opening her own pediatric practice. Plaintiff had tentatively scheduled to open her practice in September of 2001 to provide defendant with ninety days notice before ending her employment (as required by the Agreement). However, plaintiff's employment was abruptly terminated by defendant on 17 April 2000 without any evidence of plaintiff ever having been reprimanded or disciplined, or having caused defendant economic harm while in its employ. More importantly, plaintiff's termination took place prior to her having engaged in a business which necessarily rendered her a competitor of defendant because she had not obtained office space, financing, employees, patient supplies, or medical equipment for her new practice. On the contrary, plaintiff testified that she would have reconsidered opening her own practice if Dr. Ferguson had reconsidered giving her an ownership interest in the pediatric practice. Thus, when viewed in the light most favorable to plaintiff, the evidence establishes that plaintiff had simply made plans to open her own practice and was not a "competitor and rival" of defendant's at the time of her termination.

Nevertheless, defendant argues the *Burris* holding is but one factor for the trial court to consider when determining whether an

employer was justified in terminating an employee. *See Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). Specifically, defendant contends that while the trial court found that plaintiff had acquired an interest adverse to defendant, the court also found that defendant had breached an explicit term of the Agreement due to her failure to "devote [her] professional efforts in a full-time practice exclusively to the interest of Employer . . . ." Yet, there was no evidence offered at trial that during plaintiff's employment with defendant, she failed to work "full-time" exclusively for defendant during the required "forty (40) hours per week plus call coverage" as that term was defined in the Agreement. Our interpretation of this subsection of the Agreement gives effect to the words "full-time" and "exclusively" while, at the same time, construing any possible ambiguity against defendant, the drafter of the Agreement. *See Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986); *Camp v. Leonard*, 133 N.C. App. 554, 562, 515 S.E.2d 909, 914 (1999). Accordingly, the trial court abused its discretion in granting a motion for directed verdict in favor of defendant because there was sufficient evidence offered that plaintiff fulfilled her obligations to defendant under the parties' Agreement.

In conclusion, we affirm the trial court's denial of plaintiff's motion for directed verdict. We reverse the trial court's grant of directed verdict in favor of defendant on plaintiff's claims for wrongful termination of health insurance coverage under COBRA and breach of contract because there was sufficient evidence to take those claims to the jury. The case is therefore remanded to the trial court for a jury determination on plaintiff's claims.

Affirmed in part; reversed and remanded in part.

Judges McGEE and CALABRIA concur.

STATE OF NORTH CAROLINA v. DWAYNE ANTHONY SMITH, DEFENDANT

No. COA02-1363

(Filed 6 January 2004)

1. Kidnapping— indictment—unlawful removal—instruction too broad—plain error

There was plain error where a kidnapping indictment alleged unlawful removal but the court's instructions were that the jury could find defendant guilty if he unlawfully confined, restrained, or removed the victim. The error likely tilted the scale in light of the jury's request for more instructions on kidnapping, the conflicting evidence on unlawful removal, and the stronger evidence of confinement or restraint.

2. Kidnapping— indictment and instruction—begun in one county, ended in another

There was no error in the denial of a defendant's request for an instruction that the State was required to prove that the kidnapping occurred in Wilson County, as alleged in the indictment. Kidnapping is an ongoing offense; while the State's evidence may have suggested that the offense began in Wake County, it ended in Wilson County when the victim regained her freedom. There was no risk that the jury could convict defendant of a different kidnapping.

3. Criminal Law— absence of judge—harm must be shown

The absence of the trial judge from the proceedings will not constitute reversible error unless the record shows harm to defendant.

Appeal by defendant from judgment entered 13 March 2002 by Judge Cy A. Grant, Sr. in Wilson County Superior Court. Heard in the Court of Appeals 21 August 2003.

Attorney General Roy Cooper, by Assistant Attorney General Thomas B. Wood, for the State.

Daniel Shatz, for defendant-appellant.

GEER, Judge

Defendant Dwayne Anthony Smith appeals from his convictions for second-degree kidnapping, assault inflicting serious injury, and

communicating threats. Because the trial court instructed the jury as to kidnapping theories not included in the indictment, we vacate defendant's second-degree kidnapping conviction and remand for a new trial. We find defendant's remaining assignments of error to be without merit.

Facts

A. The State's Evidence.

The State's evidence tended to show the following. Kimberly Hare had been living with defendant since February 2000. On 14 January 2001, at approximately 6:00 p.m., defendant and Hare met three male friends at a bar called the Sports Page in Knightdale, North Carolina. Hare had already drunk four or five beers that afternoon and probably drank another four beers at the bar. When Hare and defendant left the bar at 11:00 p.m., they had an argument in the parking lot about whether defendant was too drunk to drive. During the argument, defendant hit Hare in the face with his fist. Hare returned to the bar, told their friends and the bartender what had happened, and the bartender called the police. Defendant attempted to drag Hare out of the bar, but the police arrived, arrested him, and transported him to jail.

Hare decided not to return to defendant's house in Wilson, but instead went with their friends, including a man named Nick, to a house on Hodge Road in Wake County. After about thirty minutes, Hare went to bed. She was awakened by defendant who picked her up, despite her requests that he put her back down, and carried her naked to his truck. Hare admitted that she did not scream or try to rouse her friends to help her, even though they passed a man on the couch while defendant was carrying her to the truck. In the truck, defendant punched her in the face, called her a slut, and said that "[she] was going to die [that day] because he was going to kill [her]."

Defendant began driving towards their home in Wilson, repeatedly threatening to kill Hare. Defendant stopped at a convenience store and told Hare to call Nick to tell him that she was pressing rape charges against him the next day. When Hare hesitated to make the call, defendant struck her again. After the call, he pulled her back in the truck, started driving again, and hit her repeatedly in the face, causing her to bleed all over the seats of defendant's truck.

Defendant then drove the truck to another location where there was a path. He stopped the truck and sexually assaulted Hare with a capped beer bottle while threatening to bury her at the end of the

path. During the entire truck drive, Hare was forced to remain unclothed. At some point, Hare falsely told defendant that she was pregnant hoping that he would stop hitting her.

When they finally reached their home in Wilson, defendant demanded that Hare take a shower to wash off the blood and sexually assaulted her again. Defendant left to get a pregnancy test and swore that he would kill her if it came back negative. When defendant was gone, Hare got dressed, ran to a neighbor's house, and called 911. Defendant was arrested when he returned from the store.

Hare's sister-in-law, Jennifer Wilson, picked Hare up at the Wilson County magistrate's office. Wilson testified at trial that Hare had cuts, marks, and bruises all over her face and that she could hardly walk. Wilson also testified that when she saw defendant's truck, there was blood "everywhere," including on the windshield, door, door handle, seats, and steering wheel. A deputy sheriff photographed and also testified about Hare's injuries.

B. Defendant's Evidence.

Defendant and his mother both testified. Defendant agreed that he and Hare had an argument in the parking lot of the Sports Page. Defendant claimed that he lightly pushed Hare and she went back into the bar. After he waited in the truck for a while and she did not return, he started to go back into the bar, but the police arrived and arrested him.

Defendant's mother, Diana Smith, testified that she received a call from Hare at about midnight, telling her that defendant was in the Wake County jail because they had been fighting. At approximately 3:00 a.m., defendant's mother bailed defendant out of jail. Defendant and his mother both testified that while she was driving him back to his truck, he "beeped" Hare on his Nextel two-way radio. Defendant's mother heard Hare respond and ask defendant to pick Hare up on Hodge Road. Defendant's mother testified that she told him that he should just go home and stay away from Hare. Defendant had his mother take him to his truck at the Sports Page and follow him to the house on Hodge Road.

Defendant testified that he knocked on the Hodge Road door, but got no answer. He entered the unlocked house and found Hare naked in bed with Nick. He picked her up, stood her on the floor, gathered her clothes off the floor, and put his coat around her. Defendant testified that Hare never indicated that she did not want to leave. While

arguing over the Sports Page incident, they walked outside, got into the truck, and left. Defendant's mother confirmed that she saw defendant and Hare walking to the truck side by side, that she heard them quarrelling, and that Hare was wearing a jacket. Defendant's mother followed them for a while, but then turned off the highway and headed home.

Defendant testified that as they drove towards Wilson, the argument became more heated and they started pushing and hitting each other. Hare demanded that he let her out of the truck. At one point, defendant stopped at a convenience store and told Hare to call someone to come pick her up. While Hare did make a phone call, she then got back into the truck and said, "Let's go." They drove to their home in Wilson with defendant stopping once to urinate. He claimed that Hare never tried to get away from him.

After they returned home, Hare told defendant that she was pregnant. He left to get a pregnancy test and when he returned, he was arrested. Defendant admitted hitting Hare at some point during the night, but denied ever threatening her life.

Defendant claimed that between the incident and the trial, he and Hare secretly saw each other often, including a trip to watch a race at Martinsville. The Wake County assault charges stemming from the argument in the Sports Page parking lot were dismissed when Hare failed to appear at numerous court dates.

Defendant was indicted with second-degree kidnapping, assault inflicting serious injury, and communicating threats. Defendant was tried at the 11 March 2002 regular criminal session of Wilson County Superior Court with Judge Cy A. Grant, Sr., presiding. The jury found defendant guilty of all three charges and the trial court sentenced defendant to a minimum of 29 and a maximum of 44 months.

I

[1] Defendant first assigns plain error to the trial court's instructions on the second-degree kidnapping charge, arguing that the instructions permitted the jury to convict defendant based on theories of kidnapping not alleged in the indictment. We agree.

The indictment charged that defendant had committed kidnapping by unlawfully removing Hare from one place to another:

> [t]he defendant named above unlawfully, wilfully and feloniously did kidnap Kimberly Wilson Hare, a person who had attained the

age of 16 years, *by unlawfully removing [her]* from one place to another, without the victim's consent, and for the purpose of doing serious bodily injury to Kimberly Wilson Hare.

(Emphasis added) The jury instructions, however, permitted the jury to find defendant guilty of second-degree kidnapping if the State proved that defendant, without consent, "unlawfully confined a person or restrained a person or removed a person from one place to another." After the jury began deliberations, the foreperson sent a note to the judge stating, "We need for you to review the list of conditions for 2nd degree kidnapping." The judge repeated his original instructions, but also defined "restrained" more specifically as "restrict[ing] her freedom of movement."

Although the instruction given in this case parallels the statutory definition of second-degree kidnapping, *see* N.C. Gen. Stat. § 14-39(a) (2001), it varies significantly from the indictment. As a basis for finding kidnapping, the indictment only alleged "removing," while the instructions allowed the jury to convict based on "confining, restraining, or removing."

The Supreme Court has already held in *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986), that such a variance constitutes error. In *Tucker*, the indictment alleged that the defendant had kidnapped the victim by "removing her from one place to another," but the trial judge instructed the jury that it could find defendant guilty of kidnapping if it found that "the defendant unlawfully *restrained* [the victim.]" *Id.* at 537, 346 S.E.2d at 420 (emphasis original). The fact that the State's evidence supported the giving of the instruction was immaterial since the instruction was inconsistent with the indictment: " 'It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.' " *Id.* at 537-38, 346 S.E.2d at 420 (quoting *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980)). The Court therefore concluded that "the trial court erred in its jury instructions on kidnapping." *Id.* at 538, 346 S.E.2d at 421.

In *State v. Lucas*, 353 N.C. 568, 590, 548 S.E.2d 712, 727 (2001), the Supreme Court expressly reaffirmed its holding in *Tucker*: "[W]e reaffirm our holding in *Tucker*, and we again adjure the trial courts to take particular care to ensure that the jury instructions [in kidnapping cases] are consistent with the theory presented in the indictment and with the evidence presented at trial." Although concluding that the

error was not prejudicial, the Court held in *Lucas* that "[b]ecause the indictment here charged confinement, the instructions given by the trial court based on the theory of removal were erroneous." *Id.* at 588, 548 S.E.2d at 726. *See also State v. Dammons*, 293 N.C. 263, 273, 237 S.E.2d 834, 841 (1977) (Instead of only alleging unlawful removal, "[h]ad the state desired to prosecute on the theory that defendant confined and restrained the victim by, perhaps, placing her in the trunk of the car, it should have so alleged by way of an additional count in the indictment.").

This Court addressed precisely the facts present here in *State v. Dominie*, 134 N.C. App. 445, 448-49, 518 S.E.2d 32, 34 (1999). This Court vacated the defendant's first-degree kidnapping convictions and remanded for a new trial when the indictment alleged only that the defendant unlawfully removed the victims, but the trial court instructed the jury that they could find defendant guilty of kidnapping if he unlawfully confined, restrained, or removed the victims.

Under *Tucker*, *Lucas*, *Dammons*, and *Dominie*, the trial court erred in instructing the jury that it could find defendant guilty of kidnapping if he unlawfully confined, restrained, or removed Hare when the indictment alleged only unlawful removal. Since defendant did not, however, object to the trial court's instructions, we must determine whether this error constituted plain error. "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

In *Tucker*, the Supreme Court found plain error when "[i]n light of the highly conflicting evidence . . . on the unlawful removal and restraint issues, we think the instructional error might have . . . tilted the scales and caused the jury to reach its verdict convicting the defendant." 317 N.C. at 540, 346 S.E.2d at 422 (internal quotation marks omitted). We believe the same is true here.

The question before this Court is whether the trial court's failure to limit the jury to considering whether defendant unlawfully removed Hare had a probable impact on the verdict. With respect to the question of removal, the evidence was in stark conflict. On the removal issue, the State offered only the testimony of Hare. While Hare testified that defendant removed her from the house on Hodge Road by physically carrying her to the truck despite her objections, she admitted that she made no attempt to seek help from her friends

even when passing someone on the couch. Defendant, on the other hand, offered not only his own testimony that Hare came with him voluntarily, but also presented corroborating testimony from his mother. Defendant's mother testified that she heard Hare ask her son, on his Nextel two-way radio, to pick her up on Hodge Road. She further testified that she followed her son to Hodge Road and, contrary to Hare's testimony, saw Hare walk unassisted with her son to his truck clothed in a jacket. In short, the evidence as to whether Hare consented to her removal from Hodge Road was highly conflicting.

Under the jury instructions, however, the jury did not have to decide who to believe because it could still find defendant guilty of kidnapping if he confined or restrained Hare, without her consent, for the purpose of doing serious bodily injury to her. "Restrained" was defined as "restrict[ing Hare's] freedom of movement." There is a considerable difference between finding that defendant removed Hare from one place to another without her consent and finding that defendant restricted Hare's freedom of movement without her consent for purposes of doing serious bodily injury.

In deciding whether the instructional error constituted plain error, the jury's question regarding the "conditions" for kidnapping is significant. It suggests that the precise wording of those conditions—which varied from the indictment—was important to the outcome of the case. *See State v. Brown*, 312 N.C. 237, 249, 321 S.E.2d 856, 863 (1984) (relying upon the jury's request for clarification as to the elements of kidnapping in finding plain error when the instructions on kidnapping differed from the theories alleged in the indictment). Here, in light of the jury's request, the conflicting evidence on removal, and the stronger evidence on confinement or restraint, we believe that the instructional error, as in *Tucker*, likely "tilted the scales" and resulted in the guilty verdict.

In support of its contention that the erroneous instruction did not constitute plain error, the State points to *State v. Gainey*, 355 N.C. 73, 94, 558 S.E.2d 463, 477, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165, 123 S. Ct. 182 (2002), *Lucas*, 353 N.C. at 573-74, 548 S.E.2d at 717, and *State v. Clinding*, 92 N.C. App. 555, 562, 374 S.E.2d 891, 895 (1989). As those opinions stress, however, in each instance, the evidence before the jury was not in conflict as to the theory charged in the indictment.

In *Gainey*, the jury instructions allowed a finding of kidnapping based on "restraint or removal," but the indictment relied only upon

confinement. The defendant, however, had admitted that he forced the victim at gunpoint into a car and that he later put the victim in the trunk, thus leading to the Supreme Court's conclusion that "[t]he evidence in the case *sub judice* is not highly conflicting." 355 N.C. at 94-95, 558 S.E.2d at 477. In *Lucas*, the indictment charged confinement, but the instructions allowed kidnapping based on removal. The Court distinguished *Tucker* because the evidence in *Lucas* was "compelling," including defendant's own testimony, that defendant, armed with a shotgun, accompanied his friend to the victim's home where his friend forced the victim into a car at gunpoint and that defendant then drove the car to a hotel. 353 N.C. at 588, 548 S.E.2d at 726. In *Clinding*, this Court found no prejudice when the trial court instructed as to restraint although the indictment alleged removal and confinement because of "overwhelming" evidence from five eyewitnesses and a confession from defendant establishing that the defendant at gunpoint forced five employees into a freezer. 92 N.C. App. at 562, 374 S.E.2d at 895.

Tucker, involving an indictment alleging unlawful removal and instructions discussing unlawful restraint, is more directly on point. In *Tucker*, as here, the two primary witnesses at trial were the victim and the defendant, who had been involved in a relationship. The victim claimed that, during an argument, the defendant would not allow her to leave his truck, transported her to a remote location, threatened her life, and sexually assaulted her. Defendant, however, testified that they engaged in consensual sex and that they were planning to elope on the night at issue. The victim's cousin and a doctor corroborated the victim's injuries, while defendant presented a witness who testified that he saw the victim and the defendant, on the day of the alleged kidnapping, sitting very close together.

The evidence in this case parallels that of *Tucker* and, as in *Tucker*, is highly conflicting with respect to the theory alleged in the indictment: whether defendant unlawfully removed the victim from one place to another. We therefore vacate defendant's conviction of second-degree kidnapping and remand for a new trial.

II

[2] Defendant also contends that the trial court erred by denying defendant's request to instruct the jury that the State was required to prove that the kidnapping occurred in Wilson County as alleged in the indictment. Because this issue may arise again, we address it and conclude that the trial court did not err.

Defendant relies solely on *State v. Cox*, 303 N.C. 75, 277 S.E.2d 376 (1981). In *Cox*, the indictment charged the defendants with rape in Pasquotank County, but the State offered evidence that the defendants may also have raped the victim in Virginia and Rocky Mount. Because "[i]t is a fundamental rule in the administration of criminal justice that a defendant must be convicted, if at all, of the particular offense charged on the bill of indictment," the Supreme Court held that the trial court erred in failing to charge the jury that they could only convict defendants of those rapes that occurred in Pasquotank County, as alleged in the indictment. *Id.* at 84-85, 277 S.E.2d at 382.

Unlike *Cox*, this case does not involve multiple possible offenses, but rather only one kidnapping. In contrast to rape, in which each act of intercourse is a separate offense, "kidnapping is an ongoing offense . . . ." *Lucas*, 353 N.C. at 589, 548 S.E.2d at 727. In this case, while the State's evidence may have suggested that the offense alleged in the indictment began at Hodge Road in Wake County, that offense ended in Wilson County when Hare regained her freedom. *See State v. White*, 127 N.C. App. 565, 571, 492 S.E.2d 48, 51 (1997) ("We therefore hold that the offense of kidnapping under N.C. Gen. Stat. § 14-39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will."). The evidence thus did not vary from the indictment and, contrary to *Cox*, there is no risk that the jury could convict defendant of a kidnapping different from the one alleged in the indictment. This assignment of error is overruled.

III

[3] Defendant further contends that the trial court committed error by leaving the courtroom during a portion of the prosecutor's closing argument. In *State v. Arnold*, 314 N.C. 301, 333 S.E.2d 34 (1985), however, our Supreme Court held that "it is well established that the absence of the judge from the proceedings will not constitute reversible error unless the record shows that something occurred which would harm the defendant." *Id.* at 308, 333 S.E.2d at 38.

Since defendant's only claim of prejudice relates solely to his conviction for kidnapping, which we have vacated, and since the issue is not likely to recur during the new trial, we do not address this issue. For the same reason, we decline to address defendant's remaining assignment of error.

Conclusion

We conclude that there was no error with respect to defendant's conviction for assault inflicting serious injury and for communicating threats. For the reasons stated above, defendant is entitled to a new trial on the charge of second-degree kidnapping.

New Trial.

Judges McGEE and BRYANT concur.

DORA TRIVETTE, PLAINTIFF v. RICK TRIVETTE, DEFENDANT

No. COA03-175

(Filed 6 January 2004)

1. Child Support, Custody, and Visitation— motion to modify custody—notice of hearing

Defendant father was given sufficient notice of a hearing on a motion to modify child custody where defendant had actual notice that a motion to modify custody was set to be heard on a certain date but was continued to some date in the future to accommodate his need to find new counsel, and defendant had actual notice of the scheduled court date prior to leaving on a planned vacation but chose to proceed with the trip rather than attend the hearing.

2. Contempt— civil—hearing—sufficiency of notice

Defendant was given sufficient notice of a contempt proceeding where he was served on 10 May for a 6 June hearing. N.C.G.S. § 5A-23(a1) (2003) provides that there is adequate notice of a contempt proceeding if the aggrieved party serves notice at least 5 days in advance of the hearing.

3. Contempt— civil—child custody and support—burden of proof

An adjudication of contempt in a child custody and support action was vacated where the trial court found that defendant was per se in willful contempt because he did not show cause as to why his failure to pay child support was not willful. Under N.C.G.S. § 5A-23(a1), the burden is on the aggrieved party.

4. Child Support, Custody, and Visitation— custody—change of circumstances—father's behavior

There was a substantial change of circumstances supporting a change in child custody where defendant had visited his children for only brief periods rather than the periods provided in a mediated consent judgment; defendant had interfered with the children's counseling; and defendant had become angry and enraged when communicating with the plaintiff even when the children were present.

5. Civil Procedure— new trial denied—not appearing at custody hearing

The trial court did not err by denying a motion for a new trial or to set aside a judgment where defendant learned the new date of a continued child custody hearing shortly before he was to leave on a trip and did not appear at the hearing.

6. Trials— continuance—withdrawal of attorney

The withdrawal of defendant's attorney is not ipso facto grounds for a continuance where defendant had 2 months notice of the withdrawal.

Appeal by defendant from judgments entered 16 August 2001 and 8 August 2002 by Judge Bruce Briggs in Avery County District Court. Heard in the Court of Appeals 17 November 2003.

Gail P. Fannon, for plaintiff-appellee.

Mary Elizabeth Arrowood, for defendant-appellant.

MARTIN, Judge.

Plaintiff and defendant were married on 2 September 1990, and they separated on 19 June 2000. Three minor children were born of the marriage; Christopher, age 12, Megan, age 8, and Brianna, age 3. On 31 January 2001, a mediated consent judgment was entered by the court addressing issues of custody, child support, and equitable distribution. The consent judgment granted plaintiff primary physical custody of the children and defendant visitation rights. The visitation was ordered to be carried out in the presence of defendant's mother and outside the presence of defendant's girlfriend, Elizabeth Mitchell. Defendant was ordered to pay $500 per month in child support, and the parties agreed to share the cost of medical/dental insurance, private school, and college for the minor

children. The parties also agreed that farm property deeded to the parties' eldest child, Christopher, by the child's paternal grandfather, would be held in trust, with proceeds from the farm being managed by plaintiff as trustee and the farm itself being managed by the defendant as trustee.

On 10 May 2001, plaintiff filed a motion seeking, *inter alia*, sole custody of the minor children, payment of past due child support, and a finding that defendant was in wilful contempt for his failure to perform his obligations pursuant to the mediated consent judgment. Defendant's attorney, Susan Haire, was served by mail with the motion and a notice setting the matter for hearing on 6 June 2001. On 14 May 2001, Ms. Haire filed a motion to withdraw as attorney for defendant, and a motion for continuance in order for defendant to obtain new counsel. Neither defendant nor Ms. Haire was present at the 6 June 2001 court date, but defendant's motion for continuance was granted in open court, and a new hearing date was set for 23 July 2001. Defendant learned from Ms. Haire that the matter had been continued, but asserts that he did not know the actual date of the next court hearing.

On 20 July 2001, a Friday, the defendant learned from his mother that the matter had been scheduled for hearing on the following Monday. Defendant was scheduled to leave for a vacation in Hawaii that day and attempted twice during his trip to call the courthouse to have the matter continued. On Monday, 23 July 2001, defendant's mother telephoned the court to inform them that her son was in Hawaii and could not attend the hearing.

In the absence of defendant or his attorney, the court allowed Ms. Haire's motion to withdraw as defendant's counsel and proceeded with plaintiff's motion. The court entered judgment on 16 August 2001, finding a substantial change in circumstances affecting the minor children sufficient to warrant an award of sole custody to plaintiff, holding defendant in wilful contempt of court for failure to pay his child support obligations, and finding that defendant had breached his fiduciary duty to manage the farm property for the benefit of his minor child. Defendant was ordered to pay past due child support or risk incarceration, and was replaced by plaintiff as trustee-manager of his son's farm property.

On 28 September 2001, defendant filed a motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure or in the alternative, for the 16 August 2001 judgment to

be set aside pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. On 8 August 2002, the court denied defendant's motions. Defendant appeals.

I.

[1] Defendant first argues the court erred in entering its 16 August 2001 judgment because defendant was not given sufficient notice of the hearing supporting the judgment as required by G.S. § 50-13.5(d)(1) and G.S. § 50A-205(a). After careful review, we disagree.

> N.C. Gen. Stat. § 50-13.5(d)(1) (2003) provides:
>
> Service of process in civil actions for the custody of minor children shall be as in other civil actions. . . . Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

G.S. § 50A-205 provides that notice and an opportunity to be heard must be provided to all interested parties before a child custody determination can be made. N.C. Gen. Stat. § 50A-205(a) (2003).

In this case, the defendant's attorney was timely served on 10 May 2001 with a copy of the motion seeking a modification of child custody and notice of hearing for 6 June 2001. *See* N.C. Gen. Stat. § 1A-1, Rule 5(b) (2003) (papers may be served upon either the party or the party's attorney of record). On 6 June 2001, the hearing was continued in open court to 23 July 2001. Neither the defendant nor his attorney was present in court and neither received written notice informing them of the new hearing date.

Defendant does not challenge service of the motion seeking a modification in custody or notice of the 6 June 2001 hearing. Defendant argues that he should have been served with written notice that the 6 June 2001 hearing had been continued until 23 July 2001. Whether a party has adequate notice is a question of law. *Barnett v. King*, 134 N.C. App. 348, 350, 517 S.E.2d 397, 399 (1999).

"N.C. Gen. Stat. § 50-13.5(d)(1) is designed to give the parties to a custody action adequate notice in order to insure a fair hearing." *Clayton v. Clayton*, 54 N.C. App. 612, 614, 284 S.E.2d 125, 127 (1981). Adequate notice is defined as "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the

action and afford them an opportunity to present their objections." *Randleman v. Hinshaw*, 267 N.C. 136, 140, 147 S.E.2d 902, 905 (1966) (internal quotations omitted).

It is generally held that parties have constructive notice of all orders and motions made during a regularly scheduled court date. *Wood v. Wood*, 297 N.C. 1, 6, 252 S.E.2d 799, 802 (1979). For example, in *Danielson v. Cummings*, this Court held that no written notice of dismissal was required to effectuate adequate notice to the opposing party where the dismissal was announced in open court. 43 N.C. App. 546, 547, 259 S.E.2d 332, 333 (1979), *judgment aff'd*, 300 N.C. 175, 265 S.E.2d 161 (1980). However, we have held that this rule can bend when necessary to "embrace common sense and fundamental fairness." *Hagins v. Redevelopment Comm'n of Greensboro*, 275 N.C. 90, 98, 165 S.E.2d 490, 495 (1969).

There is no need to bend the general rule in this case because the defendant admits that he was on actual notice that a motion to modify custody was set to be heard on 6 June 2001, but was continued to some date in the future in order to accommodate his need to find new counsel. Thus, defendant had a duty to either attend the 6 June 2001 hearing or affirmatively inquire as to the date on which the new hearing was scheduled. *See Collins v. North Carolina State Highway & Public Works Comm'n*, 237 N.C. 277, 282, 74 S.E.2d 709, 714 (1953) (parties have a duty to attend either personally or through their attorneys all regularly scheduled court dates). In addition, defendant had actual notice of the scheduled court date prior to leaving for his planned vacation, but chose to proceed with the trip rather than attend the hearing. He made no attempt to employ counsel to request a continuance of the hearing, even though he had been afforded a substantial period of time within which to procure new counsel. Therefore, we hold defendant was given adequate notice of hearing and an opportunity to be heard in this case as required by G.S. § 50-13.5(d)(1) and G.S. § 50A-205(a).

[2] Defendant next argues that he was not given sufficient notice that he could be held in contempt of court pursuant to G.S. § 5A-23 for wilful failure to pay his child support. N.C. Gen. Stat. 5A-23(a1) (2003) provides that a party is given adequate notice of a contempt proceeding by an aggrieved party if the aggrieved party serves a motion to show cause and a notice of hearing at least five days in advance of the hearing. Defendant was timely served on 10 May 2001 with both a motion to show cause and a notice of hearing for 6 June

2001. We hold that such service was adequate notice of the contempt proceeding in this case.

II.

[3] Defendant next asserts the trial court erroneously adjudicated him to be in civil contempt. "The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). Because the trial court erroneously placed the burden upon defendant, its findings do not support its conclusion of contempt.

Effective 1 December 1999, the legislature amended G.S. § 5A-23 by adding subsection (a1). N.C. Gen. Stat. § 5A-23(a1) (1999). Subsection (a1) provides as follows:

> Proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. A copy of the motion and notice must be served on the alleged contemnor at least five days in advance of the hearing unless good cause is shown. The motion must include a sworn statement or affidavit by the aggrieved party setting forth the reasons why the alleged contemnor should be held in civil contempt. ***The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.***

N.C. Gen. Stat. § 5A-23(a1) (2003) (emphasis added). In addition to permitting a contempt proceeding to be initiated by order or notice of a judicial official issued upon a finding of probable cause, the statute as amended also allows a contempt proceeding to be initiated upon motion and notice by an alleged aggrieved party without a judicial finding of probable cause. N.C. Gen. Stat. § 5A-23(a) (2003).

The contempt proceeding in this case was initiated by a motion and notice of hearing filed by plaintiff, the alleged aggrieved party, rather than an order or notice issued by a judicial official. Thus, there is no basis to shift the burden of proof to the alleged contemnor in this case. *See Plott v. Plott*, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985) (if a judicial official enters an order to show cause or a notice of contempt, the burden shifts to the alleged contemnor to prove that he or she was not in wilful contempt of the court's prior order).

Pursuant to the provisions of G.S. § 5A-23(a1), the burden is on the alleged aggrieved party to show wilful contempt. However, in its order, the trial court found that because defendant did not show cause as to why his failure to pay his child support obligations was not wilful, the defendant was *per se* wilfully in contempt of the mediated consent order. Because the trial court erroneously placed the burden on defendant to prove a lack of wilful contempt, the trial court's finding of fact does not support its conclusion of law. Thus, we must vacate the defendant's adjudication of wilful civil contempt.

III.

[4] Next, defendant argues the trial court erred when it found a substantial change in circumstances affecting the welfare of the minor children sufficient to justify a change of custody. When determining whether the trial court erred in modifying an existing child custody order, this Court must determine whether there was substantial evidence to support the trial court's findings of fact, and whether its conclusions of law are properly supported by such facts. *Shipman v. Shipman*, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 474, 586 S.E.2d at 253 (internal quotation omitted).

Evidence in the record supports the trial court's findings that defendant had visited his children only for brief periods rather than those visitations provided for in the mediated consent judgment; that he had interfered with the children's counseling, even to the extent of canceling a session when the children were not scheduled to be with him; and that he became angry and enraged when communicating with the plaintiff even when the children were present. Though defendant argues that only a four month period had elapsed from the initial custody order until plaintiff's motion, and that plaintiff had not presented any testimony by a professional suggesting that the children were in need of counseling at the time he canceled their counseling session, the trial court's findings support its conclusion that a substantial change of circumstances affecting the welfare of the minor children had occurred. Defendant's assignment of error to the contrary is overruled.

IV.

[5] Finally, defendant argues the trial court erred when it denied his motion for a new trial pursuant to G.S. § 1A-1, Rule 59; or in the alter-

native, to set aside its 16 August 2001 judgment pursuant to G.S. § 1A-1, Rule 60. We disagree.

A motion for a new trial pursuant to G.S. § 1A-1, Rule 59 must be served not later than ten days after entry of the judgment. N.C. Gen. Stat. § 1A-1, Rule 59(b) (2003). In this case, the judgment was entered on 16 August 2001; the motion for a new trial was served on 26 September 2001 and filed on 28 September 2001. Since defendant's Rule 59 motion was untimely, the trial court properly denied it.

Rule 60 permits a judgment to be set aside upon grounds of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, or any other reason justifying relief from the operation of the judgment. N.C. Gen. Stat. § 1A-1, Rule 60(b) (2003). Defendant contends that his lack of notice that the hearing had been continued to 23 July 2001, his attorney's withdrawal on the day of the hearing, and the fact that neither he nor any representative was present at the 23 July 2001 hearing constitute sufficient grounds to grant relief pursuant to this rule.

Defendant does not specify the basis of his motion for relief under Rule 60, however, his arguments can only be viable under the justification of excusable neglect, Rule 60(b)(1), or grounds set forth pursuant to Rule 60(b)(6). A trial court's determination to either grant or deny a Rule 60(b) motion will not be disturbed absent a showing of abuse of discretion. *Danna v. Danna*, 88 N.C. App. 680, 686, 364 S.E.2d 694, 698, *disc. review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988). After careful review, we discover no abuse of the trial court's discretion in its denial of defendant's Rule 60 motion to set aside the 16 August 2001 judgment.

The grounds for excusable neglect are established as a matter of law. *Mitchell County Dep't of Soc. Servs. v. Carpenter*, 127 N.C. App. 353, 356, 489 S.E.2d 437, 439 (1997), *aff'd*, 347 N.C. 569, 494 S.E.2d 763 (1998). "[W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 726, 515 S.E.2d 17, 21 (1999). The record shows that defendant had notice of the motion to modify custody and find defendant in civil contempt, was aware that the motion was set for hearing on 6 June 2001, and was aware the hearing had been continued on 6 June 2001 until some date in the future. On 20 July 2001, defendant was put on actual notice that

the hearing was scheduled for 23 July 2001. Furthermore, defendant was aware for at least two months that his attorney intended to withdraw and that he needed to obtain new counsel. As previously discussed, defendant had an affirmative duty to inquire as to the date to which his hearing had been continued, and thus, may not now assert that his negligence in failing to do so constituted excusable neglect. *See In re Hall*, 89 N.C. App. 685, 688, 366 S.E.2d 882, 885, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988) ("A party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of the judicial process."); *see also Jones v. Statesville Ice & Fuel Co.*, 259 N.C. 206, 209, 130 S.E.2d 324, 326 (1963) ("(p)arties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable") (internal quotation omitted).

The grounds for setting aside judgment pursuant to Rule 60(b)(6) are equitable in nature. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 587 (1987). What constitutes cause to set aside judgment pursuant to Rule 60(b)(6) is determined by whether (1) extraordinary circumstances exist; and (2) whether the action is necessary to accomplish justice. *Id.*, 361 S.E.2d at 588. No grounds for excusable neglect or setting aside the judgment pursuant to Rule 60(b)(6) were established in this case. Defendant's telephone calls requesting a continuance three days before the scheduled hearing were not sufficient to excuse his failure to attend the hearing or mandate a setting aside of the judgment pursuant to Rule 60(b)(6). Rule 40(b) of the North Carolina Rules of Civil Procedure provides:

> No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require.

N.C. Gen. Stat. § 1A-1, Rule 40(b) (2003). A telephone call, absent extenuating circumstances, does not qualify as application to the court. Defendant's planned vacation to Hawaii does not constitute extenuating circumstances in this case since he had adequate time beforehand to personally apply to the court for a continuance based on his vacation plans. Furthermore, defendant's failure to pay proper attention to his case does not constitute good cause to grant a continuance.

[6] Finally, the trial court's failure to grant a continuance due to the withdrawal of defendant's attorney on the day of the hearing does not

mandate a setting aside of the judgment pursuant to Rule 60(b)(6). "[A]n attorney's withdrawal on the eve of the trial of a civil case is not *ipso facto* grounds for a continuance." *Shankle v. Shankle*, 289 N.C. 473, 484, 223 S.E.2d 380, 387 (1976). In such a situation, the trial court must examine the circumstances of the case and determine "whether immediate trial or continuance will best serve the ends of justice." *Id.* at 485, 223 S.E.2d at 387. In this case, defendant had over two months notice of his attorney's intent to withdraw, and as such, the trial court did not abuse its discretion when it decided not to grant a continuance in the matter. *Lamb v. Groce*, 95 N.C. App. 220, 222, 382 S.E.2d 234, 236 (1989) (where party had two weeks notice of attorney's intent to withdraw, trial court did not abuse its discretion in denying a continuance of the matter). In conclusion, we find no excusable neglect nor any cause to set aside the judgment pursuant to Rule 60(b)(6), and thus, no abuse of discretion by the trial court in denying defendant's Rule 60 motion.

Affirmed in part, vacated in part.

Chief Judge EAGLES and Judge LEVINSON concur.

STATE OF NORTH CAROLINA v. DOUGLAS OLIVER McCALL

No. COA03-102

(Filed 6 January 2004)

1. Evidence— results of DNA and enzyme test—motion in limine

Although defendant contends the trial court erred in an indecent liberties with a minor and attempted first-degree rape case by granting the State's motion in limine allowing the suppression of the results of DNA and enzyme tests performed on the minor victim's underwear, this assignment of error is dismissed because the trial court reversed its ruling and explicitly stated the laboratory report could be admitted into evidence if defendant chose to do so, but defendant never offered the laboratory report into evidence.

2. Criminal Law— hand signals to child witness—plain error analysis inappropriate

Although defendant contends the trial court committed plain error in an indecent liberties with a minor and attempted first-degree rape case by failing to declare a mistrial sua sponte after it had been alerted that individuals in the courtroom were signaling to the child witness during her testimony, this assignment of error is waived because plain error review is restricted to issues involving either errors in the trial court's instructions to the jury or rulings on the admissibility of evidence.

3. Evidence— expert testimony—hypothetical questions

The trial court did not err in an indecent liberties with a minor and attempted first-degree rape case by allowing a child psychologist to testify about hypothetical evidence, because: (1) the expert's testimony could help the jury understand the behavior patterns of sexually abused children and assist in assessing the credibility of the victim; (2) the fact that the expert's testimony took the form of hypothetical questions and was based on information related to her by a third party does not affect the admissibility of her opinion, but instead goes to the weight of the evidence; (3) although the expert testified at least twice that her opinion was not based upon personal observation of the child, the source of her information about the child did not lessen her qualifications as a psychologist or her expertise in treating the victims of sexual abuse; and (4) the DSS report, the child's statement to police, and interviews with other medical or psychological evaluators provided sufficient information to form the basis for the witness's expert opinion.

Appeal by defendant from judgments entered 18 October 2002 by Judge J. Gentry Caudill in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 December 2003.

Attorney General Roy Cooper, by Assistant Attorney General M. Lynne Weaver, for the State.

Mary March Exum for defendant-appellant.

EAGLES, Chief Judge.

Defendant Douglas Oliver McCall appeals from his convictions of indecent liberties with a minor and attempted first-degree rape.

Defendant presents three arguments on appeal: that the trial court erred (1) by allowing the State's motion to suppress the results of the DNA and enzyme test; (2) by failing to inquire *sua sponte* into alleged hand signals to a child witness who was testifying; and (3) by allowing a child psychologist to testify upon hypothetical evidence. After careful consideration of the transcript, record and briefs, we find no error.

The complaining witness in this case, A.B., was a ten-year-old fifth-grader at the time of trial. At the time of the alleged sexual assaults by defendant, A.B. was seven years old. Defendant was A.B.'s step-grandfather, whom she called "Paw paw." Defendant was in his mid-thirties at the time of trial.

A.B. described several occasions when defendant inappropriately touched her while she visited defendant and her grandmother. These incidents all occurred after Thanksgiving 1999. A.B. said that defendant rubbed her breasts while she was watching television sometime between Thanksgiving and Christmas 1999. On another day around Christmas, defendant forced A.B. to watch a pornographic movie while he rubbed her breasts and pubic area. A.B. stated that defendant put his "privacy" into her "privacy" in another encounter. A.B. testified that on 7 January 2000 defendant performed cunnilingus on her while her grandmother was asleep.

A.B. testified that on the Sunday evening before 12 January 2000, while her grandmother was asleep upstairs, she was watching television in the living room and covered up with a blanket. Defendant pulled the blanket away, sat on her feet and attempted to remove her panties. He touched her breasts and pubic area and kissed her neck. Defendant then laid down on her and "started moving up and down" on A.B. Defendant masturbated and ejaculated. Once she got away from defendant, A.B. ran upstairs and locked herself in the bathroom until her grandmother woke up.

On 12 January 2000, A.B.'s mother saw her jumping on the bed after A.B. returned from a visit with her grandparents. A.B.'s mother observed that the child's underwear were ripped and asked how that happened. A.B. replied that it happened when defendant began "messing" with her. A.B. had not changed underwear since she returned from visiting with her grandparents three days earlier. A.B.'s mother called the police immediately and the investigation began.

A school counselor, Dr. Lynn Marder, interviewed A.B. at her mother's request. A.B. told Dr. Marder that defendant had threatened

to kill her grandmother and mother if A.B. told them what defendant did to her. A.B. also told Dr. Marder that part of the statement she made to police earlier was a lie; defendant never tied her up with a rope and never threatened her with a knife. Dr. Marder testified that A.B. was afraid to be alone outside or at the bus stop and felt that she was to blame for not being able to see her grandmother.

A.B.'s mother testified that after the child told her about the alleged contact with defendant, the child's personality changed. According to her mother, A.B. became "distant" and "started rebelling." A.B. started spending time alone, while the child previously had been much more social. In addition, during the time period of the alleged attacks, A.B. frequently had nightmares.

Susan Vaughn, an expert witness for the State, testified about the common characteristics and behaviors of children who have experienced sexual abuse. Vaughn did not interview A.B. or hear her testify in court. Vaughn based her opinion upon the reports by the Department of Social Services, the police report and the medical exam report, in addition to discussions regarding the child's testimony with the prosecutor. Vaughn opined that A.B.'s behavior and characteristics were consistent with those of a child who has been sexually abused.

The State moved to suppress the results of the DNA test performed on victim's underwear, which were worn during the most recent alleged incident. No DNA material on the underwear was linked to defendant. Defendant argued that this laboratory report should be admitted because the test revealed "a weak presumptive result for amylase." Defendant contended that the presence of amylase and absence of defendant's DNA indicated that defendant did not perform any sexual acts with A.B.

The trial court allowed the State's motion to suppress, but indicated that it would reconsider the admissibility of the test results if the evidence warranted that reconsideration.

On cross-examination, A.B. testified that defendant performed cunnilingus on her. The trial court reversed its ruling on the laboratory report and stated that the report was now admissible as a result of the testimony by A.B. After the State completed its presentation of evidence, defendant did not introduce the laboratory report or offer any other evidence.

Defendant was indicted for attempted first-degree rape, first-degree sex offense, and two counts of indecent liberties with a minor. During trial, the trial court dismissed one count of indecent liberties with a minor. The jury found defendant guilty of attempted first-degree rape and one count of indecent liberties with a minor. The jury found defendant not guilty of first-degree sex offense. Defendant was sentenced to a term of 200 to 249 months of imprisonment for attempted first-degree rape and 22 to 27 months of imprisonment for the indecent liberties conviction. Defendant appeals.

[1] Defendant argues that the trial court erred by granting the State's motion *in limine* and suppressing the laboratory report. Defendant contends that the DNA evidence was relevant because it tended to exonerate defendant. Defendant argues that the trial court's reversal of its original ruling on the motion to suppress was not sufficient to prevent error. We disagree.

An objection to a trial court's ruling on a motion *in limine* is not sufficient to preserve the issue for appeal. *See State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). A trial court may change its ruling on a pre-trial motion *in limine* during the presentation of the evidence. *See T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49, *disc. rev. denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). In order to preserve the underlying evidentiary issue, "[a] party . . . is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted)." *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (quoting *T&T Development Co.*, 125 N.C. App. at 602, 481 S.E.2d at 349), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998).

Here, defendant never offered the laboratory report into evidence. Defendant vigorously argued the report's relevance during the pre-trial hearing on the State's motion *in limine*. The trial court initially granted the motion, but clearly stated that its ruling was subject to change once the evidence was presented:

> THE COURT: [A]t this point I will allow the State's motion.
>
> However, if evidence develops in the course of the trial that makes it relevant, arguably relevant or somewhere in between that, I certainly will consider it.

> I guess what I'm saying is right now for the purpose of jury selection and opening statements I will sustain—allow the State's objection.
>
> However if during the course of the State's presentation of the evidence in chief evidence comes to light that may support your proposition then we will reconsider it.

After the State had presented most of its evidence, the trial court did in fact reconsider the motion and reversed its ruling. The trial court explicitly stated that the laboratory report could be admitted into evidence if defendant chose to do so. This ruling occurred before the State rested its case, which allowed defendant's trial counsel adequate time to consider whether the laboratory report should be admitted into evidence and time to prepare its possible witnesses. Defendant's argument that the trial court's reversal of its ruling constituted unfair surprise is unpersuasive.

Defense counsel never offered the laboratory report into evidence, despite vigorous argument about its admissibility during the pre-trial hearing on the motion *in limine*. Defendant did not offer the evidence, even after he had been given notice by the trial court that the evidence would be admitted. Therefore, according to the standard set forth in *Hill*, the trial court's ruling on the motion to suppress and the admissibility of the laboratory test evidence are not properly before this Court and will not be addressed. This assignment of error is dismissed.

[2] Defendant also argues that the trial court erred by failing to declare a mistrial *sua sponte* after it had been alerted that individuals in the courtroom were signaling to A.B. during her testimony. We disagree.

A trial court is required to "declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." G.S. § 15A-1061 (2003). "It is well settled that a motion for a mistrial and the determination of whether defendant's case has been irreparably and substantially prejudiced is within the trial court's sound discretion." *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422-23 (1998) (quoting *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996)), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999).

Here, on the second day of testimony, defense counsel told the trial court that someone in the courtroom signaled to A.B. on the first day of her testimony. Before the jury entered the courtroom on the second day of trial, the trial court stated the following:

> THE COURT: Before we call for the jury I would like to . . . make an announcement.
>
> I have had two complaints; one from representatives of the defense and one from the attorney for the State regarding matters that will not be tolerated if observed by this Court.
>
> The first involves an allegation of some signals being passed or made while a witness was testifying.
>
> That was made by representatives of the defense.
>
> And I asked Mr. Cook if he had observed such and he had not.
>
> I asked the attorneys for the defendant if they had observed such and they said they had not.
>
> I asked Mr. Cook in an abundance of caution, I suppose, to talk with those who are here supporting the victim in this case or any others that may have engaged in such conduct, not finding that they did, but to caution them that if such is reported again I will consider having a hearing and making some findings and taking appropriate action.

Defendant did not complain of further hand signaling throughout the remainder of the trial. The transcript does not indicate who was allegedly making hand signals to the witness or what type of signals were given. Defendant did not request further action by the trial court, other than the above admonition. Defendant did not move for a mistrial or object to the trial court's method of handling the alleged disruption in the courtroom.

Defendant asserts that the trial court's failure to declare a mistrial constituted plain error. However, the North Carolina Supreme Court has restricted review for plain error to issues "involv[ing] either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Cummings*, 346 N.C. 291, 314, 488 S.E.2d 550, 563 (1997) (citing *State v. Gregory*, 342 N.C. 580, 467 S.E.2d 28 (1991)), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). Since plain error review is not available here, this assignment of error is waived.

[3] Defendant further argues that the trial court erred by admitting the testimony of Susan Vaughn, the State's expert witness. Defendant contends that Vaughn's testimony should not have been allowed because her answers to hypothetical questions misled the jury and created unfair prejudice. In addition, defendant contends that because Vaughn could not testify that A.B.'s behaviors were certainly the result of sexual abuse, Vaughn's testimony did not assist the jury with a matter outside the realm of common knowledge. Defendant argues that because Vaughn did not have individual contact with A.B. before or during trial, her testimony was not relevant. We disagree.

> The North Carolina Rules of Evidence state that:
>
> [t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

G.S. § 8C-1, Rule 703 (2003). In cases involving sexual assaults on a minor, "[a]llowing experts to testify as to the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse is proper." *State v. Love*, 100 N.C. App. 226, 233, 395 S.E.2d 429, 433 (1990), *disc. rev. denied*, 328 N.C. 95, 402 S.E.2d 423 (1991); *see State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988); *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987); *State v. Johnson*, 105 N.C. App. 390, 413 S.E.2d 562, *disc. rev. denied*, 332 N.C. 348, 421 S.E.2d 158 (1992); *State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988). This type of expert testimony has been relevant in most cases:

> While [an expert], based on his experience and training, was not in a better position than the jury to make the ultimate determination of sexual abuse, he was in a better position than the jury, based on his training and experience, to determine what behavior was consistent or inconsistent with children who had been sexually abused.

State v. Isenberg, 148 N.C. App. 29, 34, 557 S.E.2d 568, 572 (2001), *disc. rev. denied*, 355 N.C. 288, 561 S.E.2d 268 (2002). In addition, the expert's testimony "could help the jury understand the behavior patterns of sexually abused children and assist in assessing the credibility of the victim." *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987).

Here, Vaughn testified that her expert opinion was not based on an interview or examination of the child victim A.B. Vaughn stated that she did not hear the child's testimony and had not talked to the child or the child's family. Vaughn received a summary of A.B.'s testimony from the prosecutor before Vaughn gave her own testimony. Vaughn also reviewed a copy of the child's statement to police, a copy of the Department of Social Services report, and narratives of interviews with A.B. conducted at the Pediatric Resource Center. Vaughn testified about the general characteristics and behaviors of sexually abused children. Vaughn also answered several hypothetical questions about those behaviors from the prosecutor on direct examination and the defense attorney on cross-examination. Vaughn testified that A.B. had been exposed to some type of trauma, which was probably sexual abuse. However, on cross-examination, Vaughn stated that A.B. could have displayed some of the same behaviors as a result of a non-sexual trauma. On cross-examination, Vaughn again stated that her opinion was not based upon a personal examination of the child.

Defendant argues that Vaughn's failure to examine A.B. rendered her expert opinion unreliable and prejudicial. We disagree.

Our Supreme Court has stated that "an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, if such information is inherently reliable even though it is not independently admissible into evidence." *State v. Wade*, 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979). The fact that Vaughn's expert testimony took the form of hypothetical questions and was based on information related to her by a third party does not affect the admissibility of her opinion, but instead goes to the weight of the evidence. *See State v. Daniels*, 337 N.C. 243, 446 S.E.2d 298 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995) (holding that an opinion based upon reviews of other doctors who had personally examined defendant was admissible); *State v. Purdie*, 93 N.C. App. 269, 377 S.E.2d 789 (1989) (holding that an expert who did not personally observe an accident scene was qualified to testify).

Here, Vaughn testified at least twice that her opinion was not based upon personal observation of the child. The source of her information about A.B. did not lessen her qualifications as a psychologist or her experience in treating the victims of sexual abuse. Most expert witnesses would have relied upon the DSS report, the child's state-

ment to police, her testimony at trial and interviews with other medical or psychological evaluators. Vaughn had firsthand knowledge of all of these sources of information, with the exception of the child's testimony. This information was sufficient to form the basis for Vaughn's expert opinion. Accordingly, we overrule this assignment of error.

No error.

Judges MARTIN and LEVINSON concur.

JOHNNY WALL AND WIFE, MICHELLE WALL, PLAINTIFFS v. FRANK B. FRY, KAYE FRY, CHRISTOPHER B. GARNER, AND HIGH ROCK REALTY, INC., DEFENDANTS

No. COA02-1426

(Filed 6 January 2004)

1. Vendor and Purchaser— breach of contract—purchase of lot with lake access—summary judgment

The trial court erred by granting summary judgment in favor of defendants on plaintiffs' breach of contract claim regarding the purchase of a lot that allegedly included a promise of access to a lake, and therefore the award of costs and attorney fees to defendants is reversed, because plaintiffs' evidence showed that: (1) plaintiffs were induced to inquire about the property based upon a sign at the entrance to the subdivision advertising that all lots had lake access, and the sign remained posted even after defendants recorded amended plats eliminating the planned lake access point; (2) when plaintiffs viewed the lot they later purchased, they were informed that lake access had not yet been approved, and a jury could find that this statement indicated that the approval process was ongoing; (3) both the contract to purchase and the deed conveying the lot from defendants to plaintiffs referenced a plat showing an area designated as a private boat ramp, and neither the contract or deed made any reference to the amended plat eliminating the private boat ramp; and (4) the deed incorporated by reference the restrictive covenants which promised maintenance of a lake access area.

2. Fraud— purchase of lot with lake access—punitive damages—summary judgment

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' fraud claim regarding the purchase of a lot that allegedly included a promise of access to a lake because plaintiffs failed to make a sufficient showing that they suffered damages, and thus, plaintiffs' claim for punitive damages based on that fraud claim must also necessarily fail.

3. Unfair Trade Practices— purchase of lot with lake access—summary judgment

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' unfair and deceptive trade practices claim regarding the purchase of a lot that allegedly included a promise of access to a lake, because plaintiffs failed to make a sufficient showing that they suffered damages.

4. Pleadings— motion to amend complaint—undue delay

The trial court did not abuse its discretion by denying plaintiffs' motion to amend their complaint to add claims for breach of the restrictive covenants and negligent misrepresentation, because: (1) undue delay is a proper reason for denying a motion to amend a pleading; and (2) plaintiffs filed their complaint 21 February 2001 and did not move to amend their complaint until 17 April 2002, following the filing of motions for summary judgment by defendants.

Appeal by plaintiffs from orders entered 8 May 2002 and 5 June 2002 by Judges Susan C. Taylor and Christopher M. Collier, respectively, in Davidson County Superior Court. Heard in the Court of Appeals 13 October 2003.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by David S. Pokela, for plaintiff-appellants.

No brief for defendant-appellees.

HUNTER, Judge.

Johnny Wall and Michelle Wall ("plaintiffs") appeal from orders (1) filed 8 May 2002 granting summary judgment to Frank B. Fry and Kaye Fry ("defendants") as well as denying plaintiffs' motion to amend the pleadings, and (2) filed 5 June 2002 awarding costs and attorneys' fees to defendants. Plaintiffs' appeal as to High Rock

Realty, Inc. was dismissed by this Court on 12 June 2003, and consequently we do not address assignments of error related to plaintiffs' claims against High Rock Realty, Inc. Furthermore, Christopher B. Garner was dismissed from this action without prejudice on 4 May 2001. Because the trial court erred in granting summary judgment for defendants on plaintiffs' breach of contract claim, we reverse that portion of summary judgment and the award of costs and attorneys' fees to defendants.

The evidence of record tends to show defendants obtained land on High Rock Lake in Davidson County, North Carolina, in order to develop a subdivision named Fox Creek. Plats filed on 24 July 1996 show a strip of land in Fox Creek and bordering on High Rock Lake designated as a "Private Boat Ramp." These plats were recorded in plat book 26 at pages 89, 90, 91. On the same day, defendants recorded restrictive covenants for Fox Creek. Article III of the restrictive covenants states: "The Declarant plans to provide for the continued maintenance of the . . . boat ramp and pier, including the area designated as 'lake access,' . . . ." Defendants posted a sign advertising Fox Creek, which stated, "All Lots with Lake Access." Defendants subsequently became agents of High Rock Realty, Inc. and entered into agreements giving High Rock Realty, Inc. the exclusive right to list and sell the lots in Fox Creek. Although defendants made attempts to obtain rights to access High Rock Lake from Fox Creek, those rights were never obtained. On 9 May 1997, a revised plat was filed and recorded at plat book 26, page 195 eliminating the "Private Boat Ramp" by incorporating it into an adjoining lot.

Plaintiffs inquired about purchasing a lot in Fox Creek in April 1998, based upon the sign, which defendants had not removed, indicating that all lots had lake access. Defendants informed plaintiffs that lake access and a pier had not yet been approved by the company that regulated access to High Rock Lake. On 10 May 1998, plaintiffs and defendants entered into a standard form Offer to Purchase and Contract for a lot in Fox Creek for $16,000.00, which appears to refer only to the maps recorded in plat book 26, pages 89-91. A general warranty deed conveying the lot from defendants to plaintiffs was recorded on 6 July 1998. The deed stated that a "map showing the . . . property is recorded in Plat Book 26 page[s] 89-91." The deed also referenced that the conveyance was subject to the restrictive covenants filed by defendants. There was no reference to the revised plat recorded at plat book 26, page 195. An appraisal of the lot dated 11 June 1998 valued the lot at $16,000.00.

Upon discovering, after the purchase, that they would have no lake access, plaintiffs brought suit claiming breach of contract, fraud, and unfair and deceptive trade practices alleging that they had been promised access to High Rock Lake as part of the contract to purchase the lot. On 10 April 2002, defendants filed a motion for summary judgment and on 17 April 2002, plaintiffs moved to amend their complaint to add additional claims for breach of the restrictive covenants and negligent misrepresentation. Following a 29 April 2002 hearing, defendants' summary judgment motion was granted on all claims and plaintiffs' motion to amend the complaint was denied. Subsequently, on 5 June 2002, the trial court granted defendants' motion for costs and attorneys' fees.

The issues presented are whether: (I) there was a genuine issue of material fact as to whether the contract to purchase the lot included a promise of access to the lake; (II) there was evidence of damages to support (A) plaintiffs' fraud claim, or (B) plaintiffs' unfair or deceptive trade practices claim; and (III) the trial court abused its discretion by denying plaintiffs' motion to amend the complaint.

Summary Judgment Standard

The law of summary judgment in North Carolina was laid out in detail by our Supreme Court in *Lowe v. Bradford*, 305 N.C. 366, 289 S.E.2d 363 (1982). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Lowe*, 305 N.C. at 369, 289 S.E.2d at 366. "If the moving party satisfies its burden of proof, then the burden shifts to the nonmoving party to 'set forth *specific facts* showing that there is a genuine issue for trial[,]' " or, alternatively, must produce an excuse for not doing so. *Id.* at 369-70, 289 S.E.2d at 366 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)). "The nonmoving party 'may not rest upon the mere allegations of his pleadings.' " *Id.* at 370, 289 S.E.2d at 366 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(e)). Thus where,

> the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing

party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleading, he does so at the risk of having judgment entered against him.

Id.

I.

[1] Plaintiffs first contend that the trial court erred in granting summary judgment for defendants on the breach of contract claim. " 'The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.' " *Lake Mary Ltd. Part. v. Johnston*, 145 N.C. App. 525, 536, 551 S.E.2d 546, 554 (2001) (quoting *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000)). Furthermore, this Court has recognized that:

> A developer may not by the use of recorded plats and restrictive covenants create the illusion of a high quality subdivision and then shield itself from responsibility by claiming that it did not promise to construct the amenities implied by the restrictive covenants and that these covenants do not give rise to an affirmative obligation.

Lyerly v. Malpass, 82 N.C. App. 224, 229, 346 S.E.2d 254, 258 (1986).

In this case there is no question that the parties entered into a valid contract for the purchase of the lot in Fox Creek. The only dispute is whether as a term of that contract defendants promised to provide access to High Rock Lake. The plaintiffs' evidence of record shows that plaintiffs were induced to inquire about the property based upon the sign at the entrance to the subdivision advertising that all lots had lake access, which remained posted despite the recording of the amended plat. When plaintiffs viewed the lot they later purchased, they were informed that lake access had not *yet* been approved. A jury could find that this statement indicated that the approval process was ongoing. These events all occurred after defendants recorded amended plats eliminating the planned lake access point.

Furthermore, both the contract to purchase and the deed conveying the lot from defendants to plaintiffs referenced the plat recorded at plat book 26, pages 89-91. This plat showed an area designated as a private boat ramp. Neither the contract to purchase nor the deed made any reference to the amended plat eliminating the pri-

vate boat ramp. Moreover, the deed also incorporated by reference the restrictive covenants, which promised maintenance of a lake access area.

In *Lyerly*, this Court held that evidence of plats showing a boat basin, when combined with restrictive covenants requiring lot owners to form a homeowners association that would provide for the maintenance of that basin, and oral representations by the seller that the boat basin would be dredged supported a judgment against the seller for breach of contract based upon an implied promise. *Lyerly*, 82 N.C. App. at 229, 346 S.E.2d at 258. We noted in that case that

> the restrictive covenant at issue in the instant case is not substantively the same type covenant historically contained in restrictive covenants such as setback lines, height of fences, and size of houses, all of which place a limitation on the owner. Here by contrast, the grantees are burdened with an affirmative obligation to maintain an amenity, the completion of which was an inducement for buying in the subdivision.

Id. The same is true in the case *sub judice*. Thus, we conclude that plaintiffs presented sufficient evidence that the contract included a promise by defendants to provide access to High Rock Lake so as to constitute the specific facts necessary to withstand summary judgment. Accordingly, we reverse summary judgment on plaintiffs' breach of contract claim and remand this case to the trial court.

II.

A.

[2] Plaintiffs next claim the trial court erred in granting summary judgment on their fraud claim. We disagree.
The elements of fraud are:

> "(a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury."

Bolick v. Townsend Co., 94 N.C. App. 650, 652, 381 S.E.2d 175, 176 (1989) (citations omitted) (emphasis omitted). In this case, plaintiffs

produced evidence that defendants knowingly made false representations inducing plaintiffs to purchase a lot in Fox Creek by establishing that defendants made these representations after recording an amended plat eliminating boat access to the lake and then failed to reference this amended plat in selling or conveying the lot to plaintiffs.

In order to prove fraud, however, a plaintiff is also required to prove that he suffered damages because of his reliance on the defendant's representation. *See Davis v. Sellers*, 115 N.C. App. 1, 10, 443 S.E.2d 879, 884 (1994). In this case, the evidence of record shows that plaintiffs purchased the lot for $16,000.00 and that an appraisal of the property conducted approximately one month prior to the purchase valued the property at $16,000.00. Thus, defendants presented evidence challenging plaintiffs' allegation of damages by showing that plaintiffs received property of the same value as the purchase price.

At this point it became incumbent upon plaintiffs, in order to survive summary judgment, to present specific facts supporting their allegation of damages, or an excuse for not doing so. Instead, plaintiffs, as they concede in their brief to this Court, relied on the allegations in the unverified complaint and a forecast of damages by plaintiffs' counsel. *See Strickland v. Doe*, 156 N.C. App. 292, 297, 577 S.E.2d 124, 129 (2003) (in summary judgment hearing, arguments of trial counsel may be considered, but not as facts or evidence); *see also Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161 (1976) (information adduced from trial counsel cannot support summary judgment motion). As such, plaintiffs have failed to make a sufficient showing that they suffered damages, and thus, the trial court correctly granted summary judgment for defendants on the fraud claim. Furthermore, because plaintiffs' claim for fraud fails, plaintiffs' claim for punitive damages based on that fraud claim must also necessarily fail.

B.

[3] Plaintiffs also contend that summary judgment was entered incorrectly on their claim for unfair and deceptive trade practices. As with a fraud claim, however, plaintiffs must show they suffered some damage, *see Edwards v. West*, 128 N.C. App. 570, 574, 495 S.E.2d 920, 923 (1998), and as discussed above they have failed to make a sufficient showing that they suffered any injury.

III.

[4] Plaintiffs finally assign error to the trial court's denial of their motion to amend their complaint to add claims for breach of the restrictive covenants and negligent misrepresentation. A ruling on a motion to amend a pleading following the time allowed for amending pleadings as a matter of course is left to the sound discretion of the trial court. *See Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154, 478 S.E.2d 197, 199 (1996). Undue delay is a proper reason for denying a motion to amend a pleading. *See id.* In this case, the record shows plaintiffs filed their complaint 21 February 2001 and did not move to amend their complaint until 17 April 2002, following the filing of motions for summary judgment by High Rock Realty, Inc. and defendants. As such, the trial court did not abuse its discretion in denying plaintiffs leave to amend their complaint.

Accordingly, we reverse summary judgment on plaintiffs' breach of contract claim, but affirm the grant of summary judgment on plaintiffs' remaining claims and the denial of plaintiffs' motion to amend their complaint. Because we reverse the trial court's grant of summary judgment on the breach of contract claim, we also reverse the award of costs and attorneys' fees to defendants.

Reversed and remanded in part. Affirmed in part.

Chief Judge EAGLES and Judge GEER concur.

THOMAS BELCHER AND WIFE, BARBARA BELCHER, PLAINTIFFS v. FLEETWOOD ENTERPRISES, INC., FLEETWOOD HOMES OF NORTH CAROLINA, INC., AND FLEETWOOD HOMES OF VIRGINIA, DEFENDANTS

No. COA02-1683

(Filed 6 January 2004)

1. Civil Procedure— motion to dismiss converted to motion for summary judgment—matters outside pleading

The trial court did not err in an unfair and deceptive trade practices case by converting defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment, because: (1) Rule 12(b) provides that if on a motion to dismiss made pursuant to Rule 12(b)(6) matters outside of the

pleadings are presented to and not excluded by the court, the motion is to be treated as a summary judgment motion under Rule 56, and that is what happened in this case; and (2) plaintiffs, through their counsel, fully participated in the hearing and cannot now complain that they were denied a reasonable opportunity to present materials to the court.

2. Unfair Trade Practices— damages—actual injury—summary judgment

The trial court did not err in an unfair and deceptive trade practices case by granting summary judgment in favor of defendants, because: (1) plaintiffs must prove they suffered actual injury as a result of defendants' unfair and deceptive act in order to recover damages; and (2) plaintiff husband admitted in his deposition that he has not suffered actual injury proximately caused by any alleged unfair and deceptive acts by defendants.

Appeal by plaintiffs from judgment entered 23 August 2002 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 15 September 2003.

Shipman & Hodges, L.L.P., by Gary K. Shipman and William G. Wright, and Ness Motley, P.A., by Edward B. Cottingham, Jr., for plaintiff-appellants.

Young Moore & Henderson, P.A., by Glenn C. Raynor, and Nelson Mullins Riley & Scarborough, by S. Keith Hutto and William H. Latham for defendant-appellees.

STEELMAN, Judge.

Plaintiffs, Thomas and Barbara Belcher, appeal the order of the trial court dismissing their claim against defendants pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure and granting summary judgment in favor of defendants. For the reasons discussed herein, we affirm.

This action was instituted by plaintiffs against defendants on 6 July 2001. Plaintiffs' complaint and amended complaint assert a single cause of action against defendants for unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes. In addition to plaintiffs' individual claims, their complaint asserts a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure on behalf of similarly situated individuals. In their com-

plaint, plaintiffs make the following allegations: Plaintiffs own a mobile home, which is secured to the ground by a "soil anchor tie-down system." Plaintiffs purchased their home from RC Manufactured Homes of Greenville, a retailer who is not a party to this action. Defendants Fleetwood Homes of Virginia, Inc. and Fleetwood Homes of North Carolina, Inc. are engaged in the business of manufacturing mobile homes. They are subsidiaries of defendant Fleetwood Enterprises, Inc., a non-manufacturing holding company. Mobile homes manufactured by defendants are marketed and sold in North Carolina and other states.

The United States Department of Housing and Urban Development (HUD) promulgates regulations pertaining to the manufactured housing industry which require all mobile home manufacturers to designate in their consumer manual at least one method to support and anchor their mobile homes. The Commissioner of Insurance of the State of North Carolina is authorized to adopt rules to carry out the regulations adopted by HUD. N.C. Gen. Stat. § 143-146(e) (2003). The mobile home is anchored to prevent personal injury and property damage caused by movement of the mobile home during high winds.

Defendants designate in their consumer manual that the "soil anchor tie-down system" is recommended for use on their homes. Additionally, defendants equip their mobile homes with clips and corner straps to be used with a soil anchor tie-down system. The consumer manuals accompanying defendants' mobile homes direct purchasers of their homes to use the anchors and straps. Defendants instruct retailers of their mobile homes to inform purchasers that the homes are safe and secure when installed with the soil anchor tie-down system, thereby promoting the sale of soil anchor tie-down systems. Consumers rely on these assertions when purchasing their mobile homes. Defendants make these recommendations despite knowledge of testing that indicates the soil anchor tie-down system is defectively designed and does not safely secure a mobile home in high winds. This testing was reported in well-know industry publications, government publications and publications maintained and indexed by the Manufactured Housing Institute.

Plaintiffs are owners of mobile homes manufactured by defendants, which are secured to the ground by a soil anchor tie-down system. The soil anchor tie-down system specified for use with their mobile homes is "defective and unreasonably dangerous in that it does not meet the minimum resistance standards set forth by federal

and state regulations." As a result of this defect, plaintiffs are exposed to the risk of personal injury and property damage during high winds. This risk is exacerbated by the fact that defendants have led plaintiffs to believe that their homes are safe and secure when the soil anchor tie-down system is in use.

The deposition of plaintiff, Thomas Belcher, was taken on 15 November 2001. On 14 March 2002, defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs filed the affidavit of plaintiff, Thomas Belcher, on 9 July 2002 in opposition to defendants' motions. On 12 July 2002, the trial court heard defendants' motions to dismiss. On 23 August 2002, the trial court entered an order granting defendants' motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). The trial court also converted defendants' 12(b)(6) motion to a summary judgment motion and granted summary judgment in favor of defendants. Plaintiffs appeal, arguing that the trial court erred in granting defendants' motions to dismiss, converting defendants' 12(b)(6) motion to a motion for summary judgment, and granting summary judgment.

The basis for the dismissal of plaintiffs' claims by the trial court under Rules 12(b)(1), 12(b)(6), and 56 was identical. Each ruling was based upon the plaintiffs' failure to either properly plead or present evidence that the plaintiffs had suffered an "actual injury" as required under Chapter 75. We find that the trial court properly dismissed plaintiffs' claims under Rule 56, and limit our discussion to the plaintiffs' assignments of error pertaining to this issue.

[1] Plaintiffs first contend that the trial court erred in converting defendants' Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. We disagree.

Rule 12(b) provides that if on a motion to dismiss made pursuant to Rule 12(b)(6), matters outside of the pleadings are presented to and not excluded by the court, the motion is to be treated as a summary judgment motion under Rule 56. N.C. Gen. Stat. § 1A-1, Rule 12(b) (2003). In this case, defendants presented to the court the deposition of plaintiff, Thomas Belcher, and plaintiffs presented the affidavit of the plaintiff, Thomas Belcher, the affidavit of Tim Hushion, the affidavit of Jimmy Ward, excerpts from the deposition of William Crawford Farish IV, excerpts from the deposition of Jerome Moriarty, and excerpts from the deposition of Robert Henry. None of these submissions were excluded by the trial court.

Plaintiffs now contend that they were not afforded a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id.* At the hearing before Judge Duke, plaintiffs did not request a continuance or additional time to produce evidence under Rule 56(f). Plaintiffs, through their counsel, fully participated in the hearing and cannot now complain that they were denied a reasonable opportunity to present materials to the court. *Knotts v. City of Sanford*, 142 N.C. App. 91, 97-98, 541 S.E.2d 517, 521 (2001).

Plaintiffs further contend that they objected to the trial court's consideration of matters outside the pleadings, except for the limited purpose of contesting the motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). As noted above, the basis of defendants' motions was a lack of "actual injury." The submissions of both the plaintiffs and defendants dealt with this issue. Further, the submissions of plaintiffs to the trial court were not limited to the issue of subject matter jurisdiction.

The standard of review of a trial court's decision to convert a Rule 12(b)(6) motion to a Rule 56 motion is abuse of discretion. *See Raintree Homeowners Assoc. v. Raintree Corp.*, 62 N.C. App. 668, 673-74, 303 S.E.2d 579, 582, *disc. rev. denied*, 309 N.C. 462, 307 S.E.2d 355 (1983). In this case, the trial court, upon consideration of matters outside the pleadings submitted by both plaintiffs and defendants, properly converted defendants' Rule 12(b)(6) motion into a Rule 56 motion. This was not an abuse of discretion. This assignment of error is without merit.

[2] Plaintiffs next contend that the trial court erred by granting summary judgment in favor of defendants. We disagree.

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) (2003) (emphasis added). A party moving for summary judgment satisfies its burden of proof (1) by showing an essential element of the opposing party's claim is nonexistent or cannot be proven, or (2) by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982). Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to set forth specific

facts showing there is a genuine issue of material fact as to that essential element. *Id.* at 369-70, 289 S.E.2d at 366.

Unfair or deceptive acts or practices in or affecting commerce are unlawful in North Carolina. N.C. Gen. Stat. § 75-1.1 (2003). To prevail on a claim for unfair and deceptive trade practices, plaintiffs must show: (1) an unfair or deceptive act or practice; (2) in or affecting commerce; (3) which proximately caused actual injury to plaintiffs. *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992). Thus, to recover damages, plaintiffs must prove they suffered actual injury as a result of defendants' unfair and deceptive act. *See Mayton v. Hiatt's Used Cars*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864, *disc. rev. denied*, 300 N.C. 198, 269 S.E.2d 624 (1980).

Actual injury may include the loss of the use of specific and unique property, the loss of any appreciated value of the property, and such other elements of damages as may be shown by the evidence. *Poor v. Hill*, 138 N.C. App. 19, 34, 530 S.E.2d 838, 848 (2000). "The measure of damages used should further the purpose of awarding damages, which is 'to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.' " *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 233, 314 S.E.2d 582, 585, *disc. rev. denied*, 311 N.C. 751 321 S.E.2d 126 (1984) (quoting *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950)).

In his deposition, plaintiff admitted that he did not rely on defendants' recommendation of the soil anchor tie-down system when he purchased his mobile home. In fact, he did not read the consumer manual which specified the soil anchor tie-down system as the recommended method to secure defendants' mobile homes. In addition, defendants did not make any representations to plaintiff regarding the soil anchor tie-down system prior to his purchase of the mobile home. Furthermore, plaintiff stated that his mobile home withstood two hurricanes without damage to the soil anchor tie-down system. During the course of Mr. Belcher's deposition, the following examination took place:

> Q: Have you suffered any damages of any kind that you're aware of that are related to the anchor tie-downs themselves?
>
> . . .
>
> A: No.

Q: You have not suffered any damages?

A: No.

Q: Can you say no, I have not suffered any damages.

A: No, I have not suffered any damages.

. . .

Q: Did you think that there was a problem to address with the anchor system before you received the letter from the attorney?

A: No, sir.

In his affidavit filed in response to defendants' motions to dismiss, Mr. Belcher stated that defendants caused damage to him and his wife "when they had us purchase the defective soil anchor tie down system that they recommended." However, considering plaintiff's prior admissions in his deposition, this affidavit alone is insufficient to create an issue of material fact to overcome summary judgment. *See Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App., 1, 9, 249 S.E.2d 727, 732 (1978) (stating that a non-moving party cannot create an issue of fact to defeat summary judgment simply by filing an affidavit contradicting his prior sworn testimony).

Plaintiff, Thomas Belcher, admitted in his deposition that he has not suffered actual injury proximately caused by any alleged unfair and deceptive acts by the defendants. This is a "fatal weakness" in plaintiffs' claim, and the trial court correctly granted summary judgment in favor of defendants. *See Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001). This assignment of error is without merit.

We note that an opinion reversing the trial court's dismissal of an unfair and deceptive trade practices claim in *Coley v. Champion Home Builders*, 162 N.C. App. 163, 590 S.E.2d 20, *cert. denied*, —— N.C. ——, —— S.E.2d —— (2004), was filed contemporaneously with this opinion. The complaint in *Coley* contained specific language pertaining to the actual injury alleged, which is not found in plaintiffs' complaint in the instant case. Further, in *Coley* there were no matters presented to the trial court outside of the pleadings, whereas the instant case was decided under Rule 56.

Because we hold that the granting of summary judgment in favor of defendants was appropriate, we need not reach plaintiffs' remaining assignments of error.

AFFIRMED.

Chief Judge EAGLES and Judge McCULLOUGH concur.

CHRISTOPHER YOUNG, PLAINTIFF v. GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., CITY OF FAYETTEVILLE, APRIL S. WORTHAM, OPHELIA PECHIE, AND SHANNON STECK PEELE, DEFENDANTS

No. COA02-1491

(Filed 6 January 2004)

Insurance— law enforcement liability—occurrences arising from law enforcement

A law enforcement liability insurance policy provided liability coverage for sexual assaults by a police officer despite language limiting coverage to occurrences arising out of law enforcement activities and a contention that these were not law enforcement activities. The officer would not have had the authority to detain his victims, nor the opportunity to assault them, but for his position as a police officer.

Judge HUNTER dissenting.

Appeal by defendants April S. Wortham, Ophelia Pechie, and Shannon Steck Peele, from judgment entered 5 August 2002 by Judge James F. Ammons in Cumberland County Superior Court. Heard in the Court of Appeals 27 August 2003.

William Pereoy for the plaintiff.

White & Stradley, L.L.P., by J. David Stradley for the defendant-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart for the defendant-appellee, Great American Insurance Company of New York.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Mark Davis for the defendant, City of Fayetteville.

ELMORE, Judge.

Plaintiff originally sued for declaratory judgment to determine rights to insurance coverage for a Fayetteville police officer to defend against suit by victims of sexual assault. Appellants are the female victim defendants; appellee is the defendant insurance company.

The appellants assigned error to the order dated 5 August 2002 granting summary judgment to Great American. In their brief the appellants argue that summary judgment was inappropriate for two reasons: first, that Great American was obligated to provide coverage under its Law Enforcement Liability Policy; and, second, that Great American was obligated by its General Liability Policy.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). On appeal, the standard of review is (1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law. *See Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). The evidence presented is viewed in the light most favorable to the non-movant. *See Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

We turn to the appellants' first assignment of error in the trial court's decision to allow Great American to avoid its obligation to provide insurance coverage under its law enforcement liability policy.

The case of *City of Greenville v. Haywood*, 130 N.C. App. 271, 502 S.E.2d 430 (1998) controls this case, and after thoroughly considering the contract before us in light of the *Haywood* decision, we must reverse the trial court's summary judgment order.

The proper construction of insurance contracts is well-settled in our case law:

> "An insurer's duty to defend suits against its insured is determined by the language in the insurance contract . . . ." The terms of an insurance policy govern the scope of its coverage, and "the intention of the parties controls any interpretation or construction of the contract . . . ." The court must use the definitions given in the policy to determine the meaning of words contained in the

policy. "In the absence of such definition[s], nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech. . . ."

Any ambiguity in an insurance contract must be resolved in favor of the insured. In addition, in North Carolina, "[e]xclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy."

Durham City Bd. of Education v. National Union Fire Ins. Co., 109 N.C. App. 152, 156, 426 S.E.2d 451, 453 (1993) (citations omitted).

The Great American policy provided:

A. Insuring Agreement

We will pay those sums that the Insured becomes legally obligated to pay as damages because of "wrongful act(s)" which result in

1. personal injury,

2. bodily injury,

3. property damage,

caused by an "occurrence" and arising out of the performance of the Insured's duties to provide law enforcement activities.

The policy identifies "all law enforcement officers" as the "Insured." In the definitions section, it defines "wrongful acts" as:

any or all of the following

a. actual or alleged errors,

b. misstatement or misleading statement;

c. act or omission, or

d. negligent act or breach of duty,

by an Insured while performing law enforcement duties[.]

"Personal injury" is defined to include "assault and battery." An exclusion in the policy states that coverage does not apply to

"[d]amages arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any Insured . . . ."

The language of the Great American policy is the exact language of the policy in the case of *City of Greenville v. Haywood*, 130 N.C. App. 271, 502 S.E.2d 430 (1998). The facts of that case are also on point. In *Haywood*, the issue was whether coverage was provided under an insurance contract when the police officer, who was the Insured in question, responded to the victim's call to investigate a break-in and subsequently, while in her home, sexually assaulted the victim. The *Haywood* Court concluded that such a case is appropriate for summary judgment, since only issues of law remain, and that the policy did provide coverage, affirming the lower court judgment in that case. The *Haywood* opinion compels us to reverse the lower court in the case *sub judice.*

Great American argues that no coverage is provided by the Law Enforcement policy because the Insured did not commit the acts "while performing law enforcement duties," and seeks to distinguish the *Haywood* case on the basis of this language. However, in the language of the policy, as quoted above, the "insuring agreement" section of the policy defines coverage for "wrongful acts" which are caused by an occurrence and "arising out of the performance of the Insured's duties to provide law enforcement activities." The language that Great American cites in support of this distinction is found in the section of the policy defining the term "wrongful acts." As noted above, any ambiguity in an insurance contract must be resolved in favor of the insured. *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). To that end, if either language would confer coverage in this case we must recognize that language. The *Haywood* case construed the "arising out of" language in the context of an on-duty police officer's sexual assault of the victim as follows:

> After gaining access to Ms. Haywood's apartment, Foster [the insured officer] and another officer conducted a partial investigation. When, however, the other officer left Ms. Haywood's apartment, Foster sexually assaulted Ms. Haywood. Foster, at the time of the 29 August 1993 incident, was performing his duties as a police officer and took advantage of his position as an officer to accomplish his own ends—the sexual assault of Ms. Haywood.

> A liberal construction of National's policy, and application of the ordinary meaning of the phrase "arising out of" requires a conclusion that Foster's sexual assault did indeed "arise out of the performance of [his] law enforcement duties," as "but for" Foster's position as a City of Greenville police officer, Foster would not have had an opportunity to enter Ms. Haywood's home, conduct a partial investigation of the reported break-in, and later sexually assault her. The phrase "in the course of employment" requires that an employee be acting in furtherance of his employer's business. However, the phrase "arising out of" does not pose such a requirement; it only requires a causal nexus between Foster's law enforcement duties and the resultant unlawful conduct. *See State Capital Ins. Co.*, 318 N.C. at 539, 350 S.E.2d at 69; *see also Mary M. v. City of Los Angeles*, 814 P.2d 1341 (1991) (holding that a police officer was "acting within the scope of his employment" when he raped a motorist). Finding the requisite connection between Foster's employment as a police officer and Ms. Haywood's sexual assault, we must conclude that the assault was an "occurrence" within the meaning of National's policy.

City of Greenville v. Haywood, 130 N.C. App. 271, 277-78, 502 S.E.2d 430, 434 (1998).

We likewise conclude that the assaults in the case *sub judice* were "occurrence[s]" within the meaning of the Great American Law Enforcement policy. While the officer was certainly not performing a service to society in sexually assaulting the victims, "but for" his position as a police officer he would not have had the authority to detain the women, nor the opportunity to assault them.

Because we hold that coverage is provided under the Law Enforcement policy, we do not reach appellants' second argument pertaining to the General Liability policy.

Reverse and remand.

Judge TIMMONS-GOODSON concurs.

Judge HUNTER dissents by separate opinion.

HUNTER, Judge, dissenting.

Because I do not believe Christopher Young ("plaintiff") committed these sexual assaults "while performing law enforcement duties," I respectfully dissent.

At the outset, I disagree with the majority's proposition that this case is indistinguishable from *City of Greenville v. Haywood*, 130 N.C. App. 271, 502 S.E.2d 430 (1998). It is the language of the policy in this case that limits the definition of a "wrongful act" to those acts occurring "while performing law enforcement duties" that distinguishes this case from *Haywood*. This language was not at issue in *Haywood*, since the policy in that case only used the language " 'arising out of the INSURED'S law enforcement duties.' " *Id.* at 274, 502 S.E.2d at 432. In construing an insurance contract, a court should not rewrite the contract, nor disregard the express language of that contract. *N.C. Insurance Guaranty Assn. v. Century Indemnity Co.*, 115 N.C. App. 175, 179, 444 S.E.2d 464, 467 (1994). " 'All parts of a contract are to be given effect if possible. It is presumed that each part of the contract means something.' " *Id.* at 180, 444 S.E.2d at 468 (quoting *Bolton Corp. v. T.A. Loving Co.*, 317 N.C. 623, 628, 347 S.E.2d 369, 372 (1986)). The term "while" is defined as "during the time that." Webster's New Collegiate Dictionary, 1343 (9th ed. 1991). The term "perform" is defined as "carry out, do." *Id.* at 873. The combination of the terms "arising out of the performance of the Insured's duties to provide law enforcement activities" and "while performing law enforcement duties" does not create an ambiguity. Rather the terms should be construed together and the insurance policy should be read to cover acts occurring during the time the officer was carrying out his law enforcement duties and that would not have occurred but for the fact that he was a police officer. The phrase "while performing law enforcement duties" requires a contemporaneity between the acts for which coverage is sought and the performance of law enforcement duties. The intent of the policy is clear and unambiguous: it is designed to cover those wrongful acts of police officers committed as the officer is carrying out duties related to law enforcement. A sexual assault is not a law enforcement duty.

In this case, plaintiff was not performing law enforcement duties at the same time as he was sexually assaulting the victims. In each instance, plaintiff actually stopped performing law enforcement duties in order to sexually assault the three women. In one instance, plaintiff allegedly ceased an otherwise normal traffic stop and forced

the victim behind a building before assaulting her. In a second instance, plaintiff, in the middle of a routine traffic stop, allegedly pushed the victim to the ground, assaulted her, and subsequently forced her back into her car where he raped her. In the third incident, plaintiff allegedly drove the victim to an abandoned building where he sexually assaulted her.

Although it is true that none of these assaults would have happened but for the fact plaintiff was a police officer, and thus had authority to stop or detain the victims, plaintiff's actions in forcing the women to commit sexual acts were not part of his law enforcement duties. Even though each case of assault began with a traffic stop or accident investigation, plaintiff at some point in each case stopped carrying out his duties in order to commit the assaults by performing acts so completely remote from law enforcement to constitute a cessation of his job duties, either by taking the women to a place unrelated to his law enforcement duties and by repeatedly physically and sexually assaulting a victim. Therefore, none of the assaults were committed as plaintiff actually carried out any duty of law enforcement.[1] These assaults were not committed while plaintiff was carrying out the public duties of a law enforcement officer, but rather they were committed while he was serving his own personal and reprehensible purposes for which he may be charged criminally and sued in his individual capacity. Thus, I would conclude that there is no coverage for plaintiff's assaults under the law enforcement liability policy.

Furthermore, although the majority opinion does not reach this issue, I would also conclude that the intentional sexual assaults were not within the scope of plaintiff's employment, and thus, the general liability policy also does not provide coverage for plaintiff's assaults on the three women. *See Medlin v. Bass*, 327 N.C. 587, 594, 398 S.E.2d 460, 464 (1990) (where assault by an employee cannot have been in furtherance of employer's business, the assault is not within course and scope of employment). Accordingly, I would affirm the judgment of the trial court.

1. Examples of acts that would be covered under the insurance policy would include using excessive force during an arrest or assaulting a suspect during an interrogation.

VIVICA McINTYRE, PETITIONER v. FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. COA02-1301

(Filed 6 January 2004)

Costs— attorney fees—employment dispute—State Personnel Commission—timeliness

The superior court was time barred from considering a petition for attorney fees incurred in the judicial review portion of an employment dispute involving the State Personnel Commission. The petition for attorney fees was filed well beyond the 30 day limit of N.C.G.S. § 6-19.1.

Appeal by respondent Forsyth County Department of Social Services from an order entered 4 June 2002 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 20 August 2003.

Cathryn Garner Carson for Robert Winfrey petitioner appellee.

Gloria L. Woods for Forsyth County Department of Social Services respondent appellant.

McCULLOUGH, Judge.

This matter is an appeal from the 4 June 2002 order granting $18,000 attorney's fees to Robert Winfrey. Mr. Winfrey provided legal services during the judicial review portion of Vivica McIntyre's (hereinafter "petitioner") underlying employment action. Petitioner was the prevailing party in the underlying action, and was awarded attorney's fees generally in an 8 April 1999 order. These fees were later assigned to Mr. Winfrey in a 9 July 2001 order by Judge Donald W. Stephens. The 9 July 2001 order also denied Mr. Winfrey's motion for a temporary restraining order and preliminary injunction regarding settlement negotiations between the named parties. The assignment of fees was necessary since Mr. Winfrey's license to practice law had been revoked at the time, and he could no longer act as petitioner's representative.

In the underlying employment case, petitioner was dismissed on 22 March 1995 from her position as an Income Maintenance Caseworker II in the Food Stamp Unit by respondent, Forsyth County Department of Social Services ("DSS"). DSS claimed petitioner's job

performance was unsatisfactory according to state and federal regulations. In a recommended decision on 24 January 1996, Administrative Law Judge ("ALJ") Sammie Chess granted petitioner reinstatement, lost wages, lost benefits, and reasonable cost of attorney's fees. The State Personnel Commission ("SPC") decided to counter the ALJ's recommended decision and issued an advisory recommendation that DSS's dismissal of petitioner was reasonable in light of the circumstances. DSS then rendered its final agency decision, fully accepting the SPC's recommended decision.

The case moved to Wake County Superior Court before Judge Stafford G. Bullock who granted reinstatement of petitioner's wages, benefits, and attorneys fees in an 8 February 1999 order. Judge Bullock's award to petitioner of attorney's fees was simply stated, "respondent shall pay petitioner the reasonable costs of her attorney fees." This Court affirmed the Wake County Superior Court in an unpublished decision on 6 June 2000. DSS's subsequent Petition for Writ of Certiorari was denied by the Supreme Court on 20 December 2000. On 6 April 2001, Mr. Winfrey filed pleadings entitled "NOTICE OF ATTORNEY CHARGING LIEN" on the parties to the underlying action. Therein, he asserted that he had rendered legal services in the amount of forty-five thousand four hundred and fifteen dollars ($45,415.00) to petitioner for both the administrative and judicial review portions of the case. Mr. Winfrey did not petition for attorney's fees on his behalf until 18 March 2002 in Wake County.

Mr. Winfrey's application for attorney's fees for the judicial review portion of the underlying case was heard at the 20 May 2002 Session of the Wake County Superior Court before Judge Bullock. The court ruled without review of the official record, and without sworn statements. The award from the May 2002 order was based on the oral representations by Mr. Winfrey as to the number of hours of legal services he provided during petitioner's judicial review portion of the underlying action up until his disbarment. DSS supplied the court with a copy of N.C. Gen. Stat. § 6-19.1 (2001), in effect in 1995 at the time the underlying cause of action arose. This statute was not directly applied in Judge Bullock's 4 June 2002 order's findings of fact or conclusions of law. DSS appealed.

DSS raises three alternative issues on appeal. The first of these issues claims that the superior court abused its discretion when ordering any specific amount of attorney's fees pursuant to Mr. Winfrey's motion for such fees, when Mr. Winfrey had not complied with the procedural steps of N.C. Gen. Stat. § 6-19.1. DSS argues that

the superior court lacked "jurisdiction" to hear the motion for attorney's fees, specifically that the superior court was time barred from hearing Mr. Winfrey's motion for attorney's fees.

The second issue raised by DSS is also based on N.C. Gen. Stat. § 6-19.1. It claims an abuse of discretion by the trial court's award of general attorney's fees in its 8 April 1999 order for the underlying employment dismissal claim by petitioner. Specifically, DSS claims it had "substantial justification" to dismiss the petitioner in the first place and therefore an award of attorney's fees against the agency violates the statute. If we determine DSS did have "substantial justification" to dismiss petitioner, DSS claims any award of attorney's fees is improper against the agency and violates N.C. Gen. Stat. § 6-19.1.

Finally, DSS argues that should this Court find the superior court had jurisdiction to assess the amount of the attorney's fee award to Mr. Winfrey in the 4 June 2002 order, and that DSS lacked "substantial justification" to dismiss petitioner in the underlying action, DSS claims the court abused its discretion when valuing the attorney's fees at $18,000. DSS claims the court failed to make requisite findings as to the following factors when assessing a reasonable fee for the judicial review portion of the case: (a) the actual attorney representation contract for legal services provided during the judicial review portion of the underlying employment case; (b) the basis for any allegation of complexity of the claim; (c) reasonableness of the application for fees considering the high degree of complexities; (d) customary charges for legal services where the cause of action arose; (e) the attorney's years of experience specifically representing clients with State Personnel Act Claims.

Because we believe Mr. Winfrey's motion for attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 did not comply with the statute's procedural requirements, this opinion will not address DSS's second and third issues.

Both respondent and Mr. Winfrey argue that this dispute for attorney's fees stemming from the judicial review portion of the case is governed by N.C. Gen. Stat. § 6-19.1. The statute grants the trial court authority to award attorney's fees to a prevailing party of an agency decision in an employment dispute, and provides:

> In any civil action . . . 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 . . . 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. Awards for fees incurred during the administrative portion of an employment dispute, involving the SPC, are specifically provided for by N.C. Gen. Stat. § 126-4(11) (2001) limiting review of a commission's award or denial of attorney's fees. A trial court cannot award attorney's fees in State Personnel cases for services rendered prior to judicial review. *See Morgan v. N.C. Dept. of Transportation*, 124 N.C. App. 180, 183, 476 S.E.2d 431, 433 (1996).

The underlying employment case and award to petitioner for her reinstatement, lost wages and benefits, and attorney's fees, was finally disposed of when the Supreme Court denied a Writ of Certiorari on 20 December 2000. This was the last action settling the rights of the parties and disposing all issues of the underlying controversy, leaving only the *amount* of the awarded attorney's fees to be determined. Mr. Winfrey's application for attorney's fees for the judicial review portion of the case was not until on or about 15 March 2002.

Respondent argues that the superior court lacked jurisdiction to hear the 15 May 2002 motion because Mr. Winfrey's petition for attorney's fees was well beyond the 30-day requirement of N.C. Gen. Stat. § 6-19.1. Respondent rests its jurisdictional argument on the case *Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993), *disc. review denied, appeal dismissed*, 335 N.C. 566, 441 S.E.2d 135 (1994), which states that: "the 30-day filing period contained in the statute [N.C. Gen. Stat. § 6-19.1] is a jurisdictional prerequisite to the award of attorney's fees, *cf., J.M.T. Mach. Co., Inc. v. United States*, 826 F.2d 1042, 1047 (Fed.

Cir. 1987) interpreting the Equal Access to Justice Act (EAJA)[.]" Thus, respondent argues under *Whiteco* that N.C. Gen. Stat. § 6-19.1 is an absolute 30-day deadline from final disposition for filing a petition for attorney's fees, which if not met, bars a superior court from assessing attorney's fees for the review portion of the underlying action.

Petitioner argues pursuant to the Supreme Court's holding in *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 459 S.E.2d 626 (1995), which states:

> N.C.G.S. § 6-19.1 provides for attorney's fees to be taxed as costs in some instances. The court had jurisdiction to interpret this section. *We do not believe the General Assembly intended that N.C.G.S. § 6-19.1 would provide for a separate proceeding in which the court does not have jurisdiction until certain prerequisites are met.*

Id. at 170, 459 S.E.2d at 628 (emphasis added). Petitioner interprets *Able* to allow a superior court to hear a petition for attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1, and grant a specified award, so long as a superior court generally awarded attorney's fees in the underlying action.

While Mr. Winfrey states the law of *Able* correctly—that a superior court has jurisdiction to award attorney's fees *before* final disposition of the case when reviewing the agency action *de novo*—we do not agree that *Able* governs the facts of this case. In *Able*, the attorney's fees were both awarded and the amount assessed by the superior court before the final disposition of the case. In the instant case, Mr. Winfrey did not petition for attorney's fees until well over a year *after* the Supreme Court denied certiorari and the case became final on 20 December 2000.

We agree with respondent's reading of *Whiteco* that N.C. Gen. Stat. § 6-19.1 acts as a time bar to a prevailing party seeking attorney's fees. *Whiteco* also falls in line with *Able*, stating that, "DOT's argument that the 30-day period establishes a starting point as well as a deadline" is too narrow. *Whiteco Indus.*, 111 N.C. App. at 818, 434 S.E.2d at 232. The statutory thirty days is not a starting point, meaning, a party seeking attorney's fees need not wait until final disposition to petition for them. Furthermore, the superior court may hear, award, and even assess attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 before final disposition on the merits of the underlying

claim as the Court did in *Able*.[1] The superior court initially awarding attorney's fees in the instant case made no findings as to the amount of fees owed for the review portion on the underlying merits. Therefore, Mr. Winfrey should have pursued the specifics of his award under N.C. Gen. Stat. § 6-19.1 after final disposition on the merits. He did not.

To hold that the statute allowed a party to petition for attorney's fees after the 30 days from final disposition would make the statute a nullity. Under such an interpretation, so long as attorney's fees were awarded in the underlying action generally, then an attorney could move for them with particularity obtaining actual valuation when he or she so chooses, and within no required time frame such as this tax year or the next.

In the instant case, Mr. Winfrey was generally awarded attorney's fees when Judge Bullock overturned DSS's final agency decision in the 8 April 1999 order. After the petitioner won on appeal and petition for certiorari was denied, the disposition on the merits was final. Judge Bullock's general award of attorney's fees for the review portion of the case still did not secure Mr. Winfrey's right to specified attorney's fees. By statute he was required to petition for them within the 30-day time frame with an accompanying affidavit, specifying the basis for the particularity of his fee petition. He did not make his petition for well over a year from the date of final disposition. Therefore, he is now time barred from moving for their recovery.

While this Court's holding in *Whiteco* and the Supreme Court's holding in *Able* adequately support our decision, federal decisions interpreting the similar Equal Access to Justice Act ("EAJA"), 28 U.S.C.S. § 2412, support our reasoning. The federal courts have repeatedly held the 30-day requirement for filing a petition for attorney's fees against a government agency is a jurisdictional prerequisite. In *Scarborough v. Prinicipi*, 319 F.3d 1346, 1350 (Fed. Cir. 2003) the Federal Circuit Court of Appeals reaffirmed the following:

> The same mandatory language ("shall") is used with respect to the thirty-day time limit and the other four requirements that

1. We note, as the Court did in *Whiteco*, that judicial economy favors the hearing of petitioner's motion for attorney's fees after final disposition of the underlying merits. This Court in *Whiteco* noted that, but for finding substantial justification for the agency action and denying attorney's fees on those grounds, this issue may have posed problems in the award of attorney's fees. *Whiteco*, 111 N.C. App. at 818, 434 S.E.2d at 232.

make up the application. This court and five other U.S. Courts of Appeals have characterized the thirty-day time limit for submitting a fee application under the EAJA as *jurisdictional in nature.* See *Bazalo v. West*, 150 F.3d at 1383; *J.M.T. Mach. Co. v. United States*, 826 F.2d 1042, 1047 (Fed. Cir. 1987); see also *Yang v. Shalala*, 22 F.3d 213, 215 n.4 (9th Cir. 1994); *Newsome v. Shalala*, 8 F.3d 775, 777 (11th Cir. 1993); *Damato v. Sullivan*, 945 F.2d 982, 986 (7th Cir. 1991); *Welter v. Sullivan*, 941 F.2d 674, 675 (8th Cir. 1991); *Peters v. Sec'y of HHS*, 934 F.2d 693, 694 (6th Cir. 1991).

(Emphasis added.)

The superior court was time barred from considering Mr. Winfrey's petition for attorney's fees. In light of our ruling on this issue, DSS's second and third issues on appeal contesting the propriety of the award are moot. After careful review of the arguments of the parties, the record, and governing North Carolina case law, the superior court order awarding Mr. Winfrey attorney's fees for the judicial review portion of the underlying agency action is

Reversed.

Judges MARTIN and LEVINSON concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. CHERYL FOWLER, BY AND THROUGH HER GUARDIANS, SHIRLEY AND GARY RUDISILL, SHIRLEY RUDISILL, INDIVIDUALLY, GARY RUDISILL, INDIVIDUALLY, AND ADAM FOWLER, DEFENDANTS

No. COA03-311

(Filed 6 January 2004)

1. Insurance— homeowners—coverage for bodily injury to insured

The trial court did not err by granting summary judgment in favor of plaintiff insurance company on the issue of whether the pertinent homeowner policy provided insurance coverage for the judgment obtained in 97 CVS 11417 for bodily injury to a wife caused by her husband, because: (1) the policy provides clear

language that coverage for personal liability does not apply to a "named insured" or "insured;" and (2) the wife was both a named insured and an insured under the policy.

2. Costs— insurance company—reasonable expectation—summary judgment

The trial court did not err by concluding that plaintiff insurance company was entitled to judgment as a matter of law on the issue of whether the insurance company was required to pay the costs assessed against an insured husband in 97 CVS 11417 for which there was no liability coverage under the pertinent homeowners policy, because plaintiff defended the husband under full reservation of rights and there was no reasonable expectation that plaintiff would pay costs incurred in a lawsuit for which there was no coverage.

Appeal by defendants from judgment entered 3 December 2002 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 20 November 2003.

Patterson Dilthey Clay Bryson & Anderson, LLP, by Reid Russell, for plaintiff-appellee.

James R. Ansley for defendant-appellants.

STEELMAN, Judge.

Defendants, Cheryl and Adam Fowler and Shirley and Gary Rudisill, appeal an order granting summary judgment in favor of plaintiff on the issue of insurance coverage. For the reasons discussed herein, we affirm.

On 28 October 1994, Adam Fowler became involved in an argument with his wife, Cheryl Fowler, at their marital residence located in Wake County. During the course of the encounter, Adam Fowler injured Cheryl Fowler, causing her to suffer severe head injuries. She was diagnosed with a subdural hematoma and underwent an emergency right frontal partial craniotomy. The incident left Cheryl with a loss of motor skills, strength, and coordination. Cheryl has limited short-term memory, limited sight and difficulties in maintaining concentration.

Cheryl's parents, defendants Gary and Shirley Rudisill, both individually and as guardians of Cheryl, filed an action against Adam Fowler on 7 October 1997, seeking recovery for injuries to Cheryl and

economic and emotional injuries suffered by the Rudisills (Wake County case # 97 CVS 11417). Cheryl Fowler was awarded a judgment in the amount of $997,760 based solely upon the negligence of Adam Fowler for failure to seek timely medical care for his wife. Costs were assessed against Adam Fowler in the amount of $11,295.99

Plaintiff, North Carolina Farm Bureau Mutual Insurance Company, had issued a homeowner's policy to Adam and Cheryl Fowler for their residence. This policy was in effect on 28 October 1994. During the pendency of 97 CVS 11417, plaintiff filed this action on 3 January 2000, seeking a declaratory judgment to determine whether Adam Fowler's homeowner's insurance policy provided coverage for his acts involving Cheryl Fowler (00 CVS 16). Plaintiff filed a motion for summary judgment. This motion was continued pending the resolution of case 97 CVS 11417. On 3 December 2002, the trial court granted summary judgment in favor of plaintiff, ruling that the policy issued by plaintiff did not afford Adam Fowler any insurance coverage under his homeowner's policy for the judgment obtained in 97 CVS 11417. Defendants Cheryl Fowler and Gary and Shirley Rudisill appeal.

[1] In their sole assignment of error, defendants argue that the trial court erred in granting summary judgment in favor of plaintiff. We disagree.

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)).

In the instant case, the policy contains Coverage E for Personal Liability, which provides:

> If a claim is made or a suit is brought against an **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:
>
> 1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice[.]

(Emphasis in original). In addition to the coverage provisions, the policy also contained exclusions to coverage which included the following language:

> **Coverage E—Personal Liability,** does not apply to:
>
> . . . .
>
> f. **bodily injury** to you or an **insured** within the meaning of part a. or b. of "**insured**" as defined.

(Emphasis in original). An "insured" is defined in the policy as "you and residents of your household who are: a. your relatives; or b. other persons under the age of 21 and in the care of any person named above."

Further, "you" and "your" refer to the "named insured" and the spouse if a resident of the same household. Adam and Cheryl Fowler were both shown as "named insureds" on the declarations page of the policy. The terms "you" and "insured" as used in the above exclusion are each applicable to Cheryl Fowler.

Defendants contend that the language in the coverage portion of the policy and the exclusions are in conflict, resulting in an ambiguity in the policy that was not proper for resolution by summary judgment.

The fundamental rule in interpreting insurance policies is that the language of the policy controls. *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996). When an insurance policy contains ambiguous provisions, the ambiguity is resolved in favor of coverage. *Id.*; *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978). However, if the terms of an insurance policy are not ambiguous, "the court must enforce the policy as written and may not reconstruct [it] under the guise of interpreting an ambiguous provision." *Mabe*, 115 N.C. App. at 198, 444 S.E.2d at 667 (citation omitted). "[L]anguage in an insurance contract is ambiguous only if the language is 'fairly and

reasonably susceptible to either of the constructions for which the parties contend.' " *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)).

"Exclusionary clauses are not favored and must be narrowly construed. The court, however, must interpret the policy as written and may not disregard the plain meaning of the policy's language." *Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 523, 369 S.E.2d 128, 130 (1988) (citations omitted).

"In [an] insurance policy, [an] 'exclusion' is [a] provision which eliminates coverage where were it not for [the] exclusion, coverage would have existed." *Black's Law Dictionary*, 563 (6th ed. 1990) (citing *Kansas-Nebraska Natural Gas Co. v. Hawkeye-Security Ins. Co.*, 240 N.W.2d 28, 31 (Neb. 1976)). By definition, an exclusion limits the extent of the coverage set forth in an insurance policy. Simply because an exclusion limits coverage, however, does not, by itself, create an ambiguity in the policy.

Here, the language of the exclusion is clear and unambiguous. It states plainly and succinctly that Coverage E, Personal Liability, does not apply to a "named insured" or "insured." Cheryl Fowler was both a named insured and an insured under the policy. There was thus no coverage under the policy for the injuries received by Cheryl Fowler on 28 October 1994. Other jurisdictions have construed similar exclusions contained in homeowner's insurance policies in this manner. *See Commercial Union Ins. Co. v. Alves*, 677 A.2d 70 (Me. 1996); *Zeringue v. Zeringue*, 654 So. 2d 721 (La. App. 1995), *cert. denied*, 661 So.2d 471 (La. 1995); *United Fire & Casualty Co. v. Reeder*, 9 F.3d 15 (5th Cir. 1993); *Shelter Mut. Ins. Co. v. Haller*, 793 S.W.2d 391 (Mo. App. 1990). We hold that the trial court did not err in granting summary judgment in favor of plaintiff on the issue of whether the policy provided liability coverage for the injuries to Cheryl Fowler.

[2] Further, we hold that the trial court correctly ruled that there was no genuine issue of material fact and that plaintiff was entitled to judgment as a matter of law on the issue of costs. The Additional Coverage portion of the policy contains the following provision:

> [I]n addition to the limits of liability:
>
> **Claim Expenses**. We pay:
>
> a. Expenses we incur and costs taxed against an **insured** in any suit we defend[.]

(Emphasis in original). In case 97 CVS 11417, plaintiff defended Adam Fowler under a reservation of rights. Adam Fowler executed a non-waiver agreement, which provided:

> no action heretofore or hereafter taken by [plaintiff] shall be construed as a waiver of the right of [plaintiff], if in fact it has such right, to deny liability and withdraw from the case; also, that by the execution of the agreement [Adam Fowler] does not waive any rights under the Policy.

The issue presented, one of first impression in North Carolina, is whether the above-cited provision requires plaintiff to pay the costs assessed against Adam Fowler in 97 CVS 11417 for which there was no liability coverage under the policy. In *Massachusetts Bay Ins. Co. v. Gordon*, 708 F. Supp. 1232 (W.D. Okla. 1989), one of the insureds under a homeowner's policy sought to have the insurer indemnify him in a prior action for civil assault. In denying his claim, the court held:

> However, no clause can be read or construed in isolation from the entire policy. The construction of a policy should be a natural and reasonable one; the policy must be fairly construed to effectuate its purpose, and viewed in light of common sense so as not to bring about an absurd result. . . . [T]his clause does not create any reasonable expectation that the insurer will pay the costs of an action based on an incident not covered by the policy, and which it has no duty to defend.

708 F. Supp 1234-35. *See also Grant v. Emmco Ins. Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978) (stating that insurance policy should be interpreted in accord with the reasonable expectations of the insured). We find the reasoning of the *Massachusetts Bay* court persuasive. In the instant case, there was no coverage under the policy for Cheryl's injuries. Plaintiff defended Adam Fowler under full reservation of rights. There was no reasonable expectation that plaintiff would pay costs incurred in a lawsuit for which there was no coverage. Defendant's assignment of error is without merit and the trial court's order is affirmed.

AFFIRMED.

Judges HUDSON and TYSON concur.

ROBERT L. CORNELL, EMPLOYEE, PLAINTIFF v. WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, EMPLOYER, AND GATES McDONALD, CARRIER, DEFENDANTS

No. COA02-1636

(Filed 6 January 2004)

1. **Workers' Compensation— dismissal of appeal—reconsideration of same issue—untimely notice—lack of jurisdiction**

The Industrial Commission did not err by dismissing defendants' appeal from an opinion and award of a deputy commissioner based on lack of jurisdiction due to untimely notice of appeal even though the chairman had previously denied plaintiff's motion to dismiss on the same ground in a summary order, because the full Commission panel had the authority under the Commission's own rules to reconsider the issue of jurisdiction raised by plaintiff's motion and, upon proper findings of fact and conclusions of law, to enter an order with respect to such issue.

2. **Workers' Compensation— failure to make timely application for review—excusable neglect**

The Industrial Commission did not err by dismissing defendants' appeal from an opinion and award of a deputy commissioner based on untimely notice even though defendants contend their application for review was timely, because: (1) timely notice of appeal was not given within 15 days as required by N.C.G.S. § 97-85 when the deputy commissioner faxed the opinion and award on 29 November 2001 and defendants' application for review was made upon its mailing on 17 December 2001; (2) service was accomplished when the notice was received by defendants' law firm and not when the law firm routed it to the individual attorney within the firm to whom the case had been assigned; and (3) an attorney's misapprehension of law is not grounds for relief due to excusable neglect.

Appeal by defendants from order entered 9 July 2002 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 15 October 2003.

Kathleen Shannon Glancy, P.A., by Terrie Haydu, for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Clayton M. Custer, for defendants-appellants.

MARTIN, Judge.

Defendants appeal from an order of the North Carolina Industrial Commission dismissing their appeal from an opinion and award of a deputy commissioner awarding plaintiff-employee compensation. The procedural history leading to this appeal is summarized as follows: Plaintiff-employee claimed an injury to his back sustained in the course and scope of his employment with employer-defendant. Defendants denied the claim. The matter was heard by a deputy commissioner, who entered an opinion and award concluding that plaintiff had suffered "an injury by accident arising out of and in the course of his employment in the nature of a specific traumatic incident to his back" and awarding benefits for disability and medical expenses.

Defendants gave notice of appeal to the Full Commission. Before the case was calendared for hearing by the Full Commission, plaintiff-employee moved to dismiss the appeal on grounds that defendants had not given notice of appeal within the time allowed by G.S. § 97-85. The Commission's chairman entered the following order:

> The undersigned having reviewed plaintiff's motion and defendant's response and having found that defendant received notice of Deputy Commissioner Ford's Opinion and Award on December 3, 2001, and that the Industrial Commission received defendants' notice of appeal of said Opinion and Award on December 17, 2001;
>
> It is therefore ORDERED that plaintiff's motion to dismiss defendants' appeal to the Full Commission for failure to file a notice of appeal within fifteen (15) days of receipt of the notice of the Opinion and Award of the deputy commissioner as required by N.C. Gen. Stat. § 97-85 and *Moore v. City of Raleigh*, 135 N.C. App. 332, 520 S.E.2d (sic) (1999) is hereby DENIED.

Plaintiff-employee filed a motion for reconsideration, directed to the chairman, which was also denied.

Upon hearing defendants' appeal, the Commission made findings of fact and based on those findings concluded that defendants' notice

of appeal had not been timely and, therefore, it had no jurisdiction to consider the appeal. The Commission ordered defendants' appeal dismissed. Defendants have appealed the order of dismissal to this Court.

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[1] First we must consider the very narrow issue presented by defendants' second assignment of error: whether the panel of the Commission to which defendants' appeal was assigned had authority to dismiss the appeal. Citing the rule well-established by North Carolina case law that "one superior court judge cannot rectify what may seem to be legal errors by another in the same case," *State v. Eason*, 336 N.C. 730, 740, 445 S.E.2d 917, 923 (1994), *cert. denied*, 513 U.S. 1096 (1995), defendants argue that the panel of the Commission to which the case was assigned had no authority, after the chairman had denied plaintiff's motion to dismiss, to thereafter dismiss the appeal for lack of jurisdiction due to the untimely notice. We disagree.

Unlike the superior court, the North Carolina Industrial Commission is not a court of general jurisdiction; the Commission is a quasi-judicial administrative board created by the legislature to administer the Workers' Compensation Act and has no authority beyond that provided by statute. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137-38, 337 S.E.2d 477, 483 (1985). N.C. Gen. Stat. § 97-77 (2003) provides that the Commission shall consist of seven members, one of whom is designated by the governor as chairman. "The chairman shall be the chief judicial officer and the chief executive officer of the Industrial Commission . . . ." N.C. Gen. Stat. § 97-77(b) (2003). Although composed of seven members, the Full Commission acts through three member panels when reviewing awards by hearing commissioners or deputy commissioners. N.C. Gen. Stat. § 97-85 (2003). The Commission has no authority to act *en banc*. *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 158, 542 S.E.2d 277, 281, *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001).

The Commission is also authorized by N.C. Gen. Stat. § 97-80(a) (2003) to promulgate its own rules to carry out the provisions of the Workers' Compensation Act, and it has exercised such authority by adopting the Workers' Compensation Rules of the North Carolina Industrial Commission. *See* Annotated Rules of North Carolina (2004). Rule 609 (1)(c) of the Workers' Compensation Rules provides:

> Motions filed after notice of appeal to the Full Commission has been given but prior to the calendaring of the case shall be directed to the Chair of the Industrial Commission.

Workers' Comp. R. Of N.C. Indus. Comm'n 609(1)(c), 2004 Ann. R. (N.C.) 901, 919. In this case, plaintiff's motion to dismiss defendants' appeal from the opinion and award of the deputy commissioner was directed to the Commission's chairman, as required by the rule, who denied the motion. Plaintiff's motion for reconsideration was likewise directed to the Commission's chairman and was denied.

Workers' Compensation Rule 703(1) provides, however, that "Orders, Decisions, and Awards made in a summary manner, without detailed findings of fact . . . may . . . be raised and determined at a subsequent hearing." Workers' Comp. R. Of N.C. Indus. Comm'n 703(1), 2004 Ann. R. (N.C.) 901, 925. The order by Chairman Lattimore denying plaintiff's motion to dismiss for lack of jurisdiction was just such a summary order. Therefore, we hold that the Full Commission panel had the authority, under the Commission's own rules, to reconsider the issue of jurisdiction raised by plaintiff's motion and, upon proper findings of fact and conclusions of law, to enter an order with respect to such issue. Defendant's assignment of error to the contrary is overruled.

[2] Defendants also contend, by their first assignment of error, that even if the Commission had authority to reconsider the issue, the Commission erred in dismissing the appeal because their application for review was timely. N.C. Gen. Stat. § 97-85 (2003) requires that an application for review of an opinion and award of a hearing commissioner or deputy commissioner must be made "within 15 days from the date when the notice of award shall have been given. . . ." This Court has held that the 15 day period commences on the date the appealing party receives notice of the award, and that an application for review is deemed made when it is mailed to the Commission by the appealing party. *Hubbard v. Burlington Industries*, 76 N.C. App. 313, 315-16, 332 S.E.2d 746, 747 (1985).

In dismissing defendants' appeal, the Commission found as facts, *inter alia*:

> 1. Deputy Commissioner Ford filed his Opinion and Award in this claim on November 29, 2001, at which time it was served on counsel of record for the parties;

2. Defendants filed their notice of appeal from Deputy Commissioner Ford's Opinion and Award on December 27, 2001, in a letter from Clayton M. Custer from the firm of Womble, Carlyle, Sandridge & Rice dated December 17, 2002. The Docket Director for the Industrial Commission acknowledged receipt of defendant's notice of appeal in a letter dated December 29, 2001.

. . .

4. The attorney of record for this case was Laura M. Wolfe with the office of Womble, Carlyle, Sandridge & Rice. Ms. Wolfe left the office of Womble, Carlyle, Sandridge & Rice on May 1, 2001; however this file remained with Womble, Carlyle, Sandridge & Rice. On July 25, 2001, Clayton M. Custer of the office of Womble, Carlyle, Sandridge & Rice relocated from their Winston-Salem office to their Greenville, South Carolina office . . . . The Opinion and Award of Deputy Commissioner Ford was faxed to the Winston-Salem office of Womble, Carlyle, Sandridge & Rice to the attention of Laura M. Wolfe. The mailroom of the Winston-Salem office of Womble, Carlyle, Sandridge & Rice on November 29, 2001, attempted to forward the Opinion and Award to Ms. Wolfe at her new office location. Clayton M. Custer of the office of Womble, Carlyle, Sandridge & Rice did not receive the Opinion and Award until December 3, 2001.

. . .

6. The Full Commission finds that defendants' counsel, Womble, Carlyle, Sandridge & Rice, received Deputy Commissioner Ford's Opinion and Award on November 29, 2001, by fax, and that defendants' counsel did not file the notice of appeal until it was mailed on December 17, 2001. The Full Commission notes that there is no record of a change of the lead attorney from Ms. Wolfe to Mr. Custer and that there was no notice of a change of address for the handling office from Winston-Salem to Greenville, South Carolina. Defendants' counsel had sufficient time, upon receipt of the Opinion and Award, to file a timely notice of appeal. Counsel's failure to do so was a result of a misapprehension of law.

Based on those findings, the Commission concluded that defendants' notice of appeal was not timely, and thus, it had no jurisdiction to consider defendants' appeal.

Defendant has not assigned error to any of the foregoing findings of fact. Generally, defendants' failure to assign error to the findings

renders them conclusive on appeal. *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 102-03, 296 S.E.2d 456, 458 (1982). However, this rule is excepted for questions of jurisdiction. *Dowdy v. Fieldcrest Mills, Inc.*, 308 N.C. 701, 705, 304 S.E.2d 215, 218 (1983). "Findings of jurisdictional fact by the Industrial Commission . . . are not conclusive upon appeal even though supported by evidence in the record." *Id.* When jurisdiction is challenged, the reviewing court "has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record." *Id.*; *Terrell v. Terminex Servs.*, 142 N.C. App. 305, 307, 542 S.E.2d 332, 334 (2001).

Upon our consideration of the entire record, we hold that defendants received notice of Deputy Ford's opinion and award, by fax, on 29 November 2001, *see In re Appeal of Intermedia Communications, Inc.*, 144 N.C. App 424, 426-27, 548 S.E.2d 562, 564 (2001) (notice of appeal to North Carolina Property Tax Commission may be perfected by fax), and that defendants' application for review was made upon its mailing on 17 December 2001. Notice of Deputy Commissioner Ford's opinion and award was served upon defendants' counsel, Womble, Carlyle, Sandridge & Rice, P.L.L.C., at the address shown on defendants' previous filings with the Commission. Workers' Compensation Rule 614 provides that after counsel files a notice of appearance with the Commission, all notices thereafter required to be served on a party are to be served on counsel for the party. Workers' Comp. R. of N.C. Indus. Comm'n 614(1), 2004 Ann R. (N.C.) 901, 923. Deputy Commissioner Ford complied with this rule and service was accomplished when the notice was received by Womble, Carlyle, Sandridge, & Rice, P.L.L.C., not when the law firm routed it to the individual attorney within the firm to whom the case had been assigned. We therefore conclude, as did the Commission, that timely notice or appeal (application for review) was not given within 15 days pursuant to G.S. § 97-85 and thus, the Commission had no jurisdiction to review the deputy commissioner's opinion and award. *See Moore v. City of Raleigh*, 135 N.C. App. 332, 334, 520 S.E.2d 133, 136 (1999), *disc. review denied*, 351 N.C. 358, 543 S.E.2d 131 (2000) (Industrial Commission has no jurisdiction to review an opinion and award that is not timely appealed pursuant to G.S. § 97-85).

Defendants also argue their failure to make a timely application for review was due to "excusable neglect" and that the Commission erred in failing to so rule. The Commission concluded:

> 2. Although the Commission has the power to remedy an error based on excusable neglect of counsel, *Hogan v. Cone Mills*,

315 N.C. 127, 337 S.E.2d 477 (1985), defendants' counsel's misapprehension of law in this case does not constitute excusable neglect. Defendants' failure to file a timely notice of appeal, therefore, should not be excused under the doctrine of excusable neglect.

Defendants' first assignment of error, by which they contend the Commission erred in dismissing the appeal because their application for review was timely, is not sufficient to raise the issue of whether their failure to file a timely application for review was due to excusable neglect. Therefore, their argument based on excusable neglect is not properly before us. N.C. R. App. P. 10(a). Assuming, *arguendo*, that the issue had been properly preserved by an assignment of error, an attorney's misapprehension of law, as found by the Commission in this case, is not grounds for relief due to excusable neglect. *See Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998) ("A showing of carelessness or negligence or ignorance of the rules of procedure" does not constitute excusable neglect).

The Order dismissing defendants' appeal to the Full Commission from the 29 November 2001 Opinion and Award of the deputy commissioner is affirmed.

Affirmed.

Judges STEELMAN and LEVINSON concur.

PATRICIA JORDAN, PLAINTIFF v. DENNIS C. JORDAN, DEFENDANT

No. COA02-1754

(Filed 6 January 2004)

1. Appeal and Error— assignments of error—arguments deemed abandoned

Violations of the assignment of error requirements of the Rules of Appellate Procedure resulted in arguments being dismissed or deemed abandoned.

2. Child Support, Custody, and Visitation— custody—change—interference with visitation and non-custodial relationship

The decision to change child custody from plaintiff to defendant was supported by findings of fact, which were supported by the evidence, that plaintiff had interfered with defendant's visitation and with the child's relationship with defendant and his new wife. Interference with visitation which has a negative impact on the welfare of the child can constitute a substantial change of circumstances.

3. Child Support, Custody, and Visitation— custody—best interest of child—contempt finding

A finding of contempt was sufficient to support the conclusion that a change of custody would be in the best interest of the child where plaintiff provided the basic physical needs of the child but exposed the child to emotional harm and caused the deterioration of the child's relationship with his father.

Appeal by plaintiff from order entered 8 March 2002, *nunc pro tunc* for 28 January 2002, by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 1 December 2003.

Janet Pittman Reed for plaintiff-appellant.

No brief filed for defendant-appellee.

EAGLES, Chief Judge.

Plaintiff Patricia Jordan appeals from an order modifying a previous custody order regarding her son Patrick. Plaintiff argues that the trial court erred in finding a substantial change in circumstances justifying its custody modification; that insufficient evidence supported the trial court's ruling that a change of custody would serve the best interest of the child; and that insufficient evidence supported the trial court's conclusion that plaintiff was in contempt for violating the previous custody order. After careful consideration, we affirm in part and dismiss plaintiff's appeal in part.

The evidence tended to show the following. Defendant is Patrick's biological father, Dennis C. Jordan. When plaintiff and defendant divorced in 1995, plaintiff was awarded primary physical custody of Patrick. An order entered on 17 February 1998 awarded

defendant significant periods of visitation with his son at defendant's home in Oklahoma. By another order on 16 May 2000, the trial court found plaintiff in contempt for violating the provisions of the 1998 custody order. The 16 May 2000 order also modified the visitation allowed by the 1998 custody order.

Patrick traveled to Oklahoma to spend his 2001 summer vacation with defendant as scheduled under the court orders. After Patrick went to Oklahoma for the summer, plaintiff enrolled him in a private school that had an earlier starting date for classes than the public school he had previously attended. Plaintiff testified that defendant's wife Rhonda called plaintiff on 16 or 19 July 2001 to determine when Patrick should return to North Carolina to start school. Plaintiff notified defendant and Rhonda that Patrick should return to North Carolina earlier than had been originally planned. Defendant and Rhonda exchanged Patrick's airplane ticket so that he could fly back on 3 August instead of 6 August. Plaintiff testified that Patrick called her from Oklahoma and said that he was scared to fly alone to North Carolina. Defendant and Rhonda testified that plaintiff would not finalize her plans regarding who was going to meet Patrick at the airport. Patrick was not able to fly from Oklahoma unaccompanied because of his youth and the fact that the airline was unable to confirm who would meet him at the Raleigh-Durham airport. Plaintiff's sister Dorothy Zimmer testified that she went to the Raleigh-Durham airport on 3 August to meet Patrick for plaintiff, but Patrick did not arrive on the anticipated flight.

Patrick returned from Oklahoma when he was accompanied on the flight by Rhonda Jordan on 7 August 2001. Patrick was sent home from school on 8 August with a note from the school nurse, stating that Patrick was suffering from a severe case of poison ivy. Defendant testified that he bought Patrick a "four-wheeler" immediately before Patrick returned to North Carolina. Defendant was not aware that Patrick had a poison ivy rash before he left, but stated that Patrick probably was exposed to poison ivy in the woods while riding the "four-wheeler."

The Thanksgiving 2001 visitation also caused a dispute. Plaintiff and defendant communicated through their attorneys in order to make the flight arrangements for Patrick to go to Oklahoma. Plaintiff stated that she did not receive airline tickets from defendant for the planned flight to Oklahoma on 21 November 2001 until 28 November 2001. Defendant stated that plaintiff would not cooperate with his

attempts to make travel plans for Patrick and refused to accept delivery of the plane tickets.

The parties agreed that Patrick could fly to Oklahoma during his Christmas vacation since Patrick did not visit defendant at Thanksgiving. Patrick told defendant over the telephone that he hated defendant and did not want to visit him. Plaintiff and defendant again experienced difficulty agreeing upon Patrick's travel arrangements. Defendant flew to Wilmington, North Carolina, in order to accompany Patrick back to Oklahoma. Plaintiff and Patrick arrived over an hour late to meet defendant at the airport. Plaintiff accompanied Patrick into the airport, but did not bring any luggage into the airport terminal. Plaintiff said that Patrick was so upset that she left his luggage in the car. Plaintiff had a video camera with her inside the airport terminal, but defendant testified that plaintiff never turned it on. Patrick had a temper tantrum at the airport and refused to fly to Oklahoma with his father. Patrick did not board the plane and did not have visitation with defendant over the Christmas vacation period.

After the Christmas vacation incident, defendant filed a motion for contempt and requested modification of the custody order. Plaintiff had filed a motion for contempt against defendant in August 2001. All motions were heard on 28 January 2002. Defendant testified that he had not been able to communicate with his son by telephone on Wednesday and Sunday nights as directed in the 2000 custody order. According to defendant's telephone records, he succeeded in contacting Patrick on only forty-five percent of the scheduled nights from March to December 2000, despite his repeated attempts. In 2001, defendant was able to contact Patrick only thirty-six percent of the time scheduled, with the majority of calls being unanswered and no phone calls returned.

The trial court entered an order modifying the custody arrangement on 8 March 2002. Plaintiff was required to pay $1250, which represented the expenses defendant incurred while trying to arrange the failed visitation attempt in December 2001. Plaintiff was also ordered not to communicate with the child until Patrick had been evaluated by a psychiatrist. In addition, plaintiff was ordered to seek anger management counseling. The trial court found that plaintiff had willfully interfered with defendant's telephone visitation with Patrick and that plaintiff tried to alienate Patrick from defendant and his wife Rhonda. The trial court found that plaintiff's actions and feelings of malice toward defendant had emotionally harmed Patrick. The trial court

awarded primary custody of the child to defendant. The trial court held that the issue of plaintiff's visitation rights would be determined at a later hearing. Plaintiff appeals.

[1] As a preliminary matter, we note that plaintiff has violated Rules 9(b)(4), 26(g), 28(b)(4), 28(b)(6) and 28(j) of the North Carolina Rules of Appellate Procedure in preparing the record on appeal and her brief. *See* N.C. R. App. P. 9(b)(4), N.C. R. App. P. 26(g), N.C. R. App. P. 28(b)(4), N.C. R. App. P. 28(b)(6) and N.C. R. App. P. 28(j). Plaintiff failed to comply with our Court's rules regarding the font size and spacing of her brief and the preparation and arrangement of the record on appeal. In her brief, plaintiff fails to cite an assignment of error to support her third argument. As a sanction, we dismiss plaintiff's third argument in its totality.

Plaintiff's remaining arguments on appeal do not correspond to the assignment of error cited in her brief. Six of plaintiff's assignments of error are not argued in her brief and are therefore deemed abandoned. Plaintiff cites her fourth assignment of error as the basis for her first and second arguments, which states: "The Plaintiff contends that the finding of Contempt was insufficient to base the change of custody to the Defendant without an inquiry into the best interests of the minor child." The North Carolina Rules of Appellate Procedure clearly state that "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." N.C. R. App. P. 10(a). Therefore, all arguments presented in plaintiff's brief that are inconsistent with her fourth assignment of error are deemed abandoned on appeal.

[2] Plaintiff argues that the trial court's findings of fact which supported its decision to hold plaintiff in contempt of court were insufficient to support its conclusion that a substantial change in circumstances had occurred. We disagree.

An interested party must file a motion in the cause and show a change in circumstances before a child custody order may be modified. *See* G.S. § 50-13.7(a) (2001). Whether a change of circumstances affecting the welfare of the child has or has not occurred is a conclusion of law. *See Benedict v. Coe*, 117 N.C. App. 369, 377, 451 S.E.2d 320, 325 (1994). "The decision of the trial judge regarding custody will not be upset on appeal absent a clear showing of abuse of discretion, provided that the decision is based on proper findings of fact sup-

ported by competent evidence." *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 279 (1986) (citing *Comer v. Comer*, 61 N.C. App. 324, 300 S.E.2d 457 (1983)).

Here, the trial court found, in pertinent part:

> b. The testimony from Defendant and Rhonda Jordan is that their relationship with the minor child has deteriorated since March 13, 2000. The Court finds that this deterioration in their relationship with the minor child has been a result of the Plaintiff's willful failure and refusal to comply with the terms of the previous orders of this Court, and as a result of Plaintiff discouraging the child from continuing a relationship with the Defendant and Rhonda Jordan, and as a result of Plaintiff discouraging the child from visiting Defendant and Rhonda Jordan.
>
> c. The Court finds that the Plaintiff's words and actions, as hereinbefore set forth, have emotionally harmed the minor child and have damaged the child's relationship with Defendant and Rhonda Jordan.
>
> d. That the Plaintiff has properly provided for the child's education, his nurturing and his physical health; however, her continued disruption and hampering of Defendant's visitation of his son and her continuing denigrating attitude and actions towards Defendant since March 2000 have adversely affected the child's relationship with his father and step-mother. The Plaintiff has failed to isolate the child from the problems between the parties, and the child's relationship with Defendant and Rhonda Jordan has deteriorated.

This Court has held that "[b]ecause the welfare of the child is the paramount concern in custody cases, interference with visitation of the noncustodial parent which has a negative impact on the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody." *Woncik v. Woncik*, 82 N.C. App. 244, 249, 346 S.E.2d 277, 280 (1986) (internal citation omitted). Here, the trial court's findings were adequately supported by the evidence. Both parties testified that plaintiff allowed Patrick to view electronic mail messages that were sent by defendant to plaintiff. Defendant also presented evidence that he had not been able to place telephone calls to Patrick as part of his visitation schedule. Accordingly, we overrule this assignment of error.

[3] Plaintiff also argues that the finding of contempt was not sufficient to support the trial court's conclusion that a change of custody would serve the best interest of the child. We disagree.

"In making the best interest decision, the trial court is vested with broad discretion and can be reversed only upon a showing of abuse of discretion." *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 79, 418 S.E.2d 675, 680 (1992) (citing *In re Peal*, 305 N.C. 640, 290 S.E.2d 664 (1982)), *overruled on other grounds*, *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Here, the trial court concluded that a change of custody was in the child's best interest after it found that plaintiff, although able to provide basic physical needs for the child, had exposed the child to emotional harm and caused the deterioration of the child's relationship with his father. It cannot be said that the trial court's decision to award primary custody of Patrick to defendant was "manifestly unsupported by reason." This assignment of error is overruled.

For the reasons stated, we affirm the trial court's order modifying custody and dismiss plaintiff's appeal in part.

Affirmed in part; dismissed in part.

Judges MARTIN and LEVINSON concur.

STATE OF NORTH CAROLINA v. RICKY LYNN YATES

No. COA03-151

(Filed 6 January 2004)

1. Appeal and Error— preservation of issues—failure to object—motion to suppress—motion in limine

Although defendant failed to object at trial to the evidence he sought to suppress through a motion in limine, which meant he did not preserve this issue for appeal, the Court of Appeals exercised its discretion under N.C. App. P. R. 2 to hear this issue.

2. Search and Seizure— warrantless—defendant's pocket—exigent circumstances

The trial court did not err in a resisting a public officer, possession of heroin, possession of methadone, possession of cocaine, possession of less than 1.5 ounces of marijuana, and possession of drug paraphernalia case by allowing evidence to be admitted at trial that resulted from a deputy's search of defendant's pocket after the deputy smelled a strong odor of marijuana emanating from defendant, because: (1) the odor of marijuana, as detected by a person who is qualified to recognize the odor, is sufficient to establish probable cause to search for a contraband drug; and (2) based on the fact that another officer was otherwise engaged at the time and the fact that narcotics can be easily and quickly hidden or destroyed, especially after defendant received notice of an officer's intent to discover whether defendant was in possession of marijuana, there was sufficient exigent circumstances justifying an immediate warrantless search.

3. Sentencing— possession of less than 1.5 ounces of marijuana—Class 3 misdemeanor

Although the judgment finding defendant guilty of possession of less than 1.5 ounces of marijuana correctly referenced N.C.G.S. § 90-95(d)(4), the case is remanded for resentencing because the judgment incorrectly states the offense is a Class 1 misdemeanor as opposed to the Class 3 misdemeanor for which defendant should have been sentenced.

Appeal by defendant from judgment dated 27 August 2002 by Judge David Q. LaBarre in Durham County Superior Court. Heard in the Court of Appeals 12 November 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

BRYANT, Judge.

Ricky Lynn Yates (defendant) appeals a judgment dated 27 August 2002 (1) entered consistent with a jury verdict finding him guilty of resisting a public officer, possession of heroin (a schedule I controlled substance), possession of methadone (a schedule II controlled substance), possession of cocaine (a schedule II controlled substance), possession of less than 1.5 ounces of marijuana (a schedule

VI controlled substance), and possession of drug paraphernalia, and (2) sentencing him as a habitual felon.

Prior to trial, defendant filed a motion *in limine* arguing for the suppression of evidence obtained by the police during a search of his person. At the suppression hearing, Deputy Raheem Abdul Aleem with the Durham County Sheriff's Department testified that he and Sergeant Derek O'Mary were at a Waffle House on Highway 55 at 2:30 a.m. on 15 September 2001. They were off-duty but dressed in uniform. The officers were standing in the foyer of the Waffle House between the entrance doors and the doors leading into the seating area when they noticed a vehicle pull into the parking lot. Defendant, with whom Deputy Aleem was familiar from seeing him at a substance abuse clinic, and two women exited the vehicle and entered the Waffle House. The women walked into the Waffle House ahead of defendant, passed the officers, and went to the seating area through the second set of doors. Defendant did not open the front door until the second set of doors had closed behind the women. As he passed through the foyer, the officers detected the odor of marijuana. Deputy Aleem was familiar with the scent of marijuana from his participation in approximately 400 to 500 cases while assigned to the narcotics division.

A few minutes later, the two women and defendant exited the Waffle House without having ordered any food. Defendant walked through the foyer first this time, and the officers again noticed the smell of marijuana. After asking defendant if he could speak to him for a minute, Deputy Aleem followed defendant into the parking lot while Sergeant O'Mary started a conversation with the two women. Deputy Aleem told defendant he had smelled marijuana on him. In response, defendant accused Deputy Aleem of harassing him because Deputy Aleem knew "he had a drug problem" and asked if he could call his mother on his cellular telephone. After defendant had placed the telephone call to his mother, Deputy Aleem explained that, due to the odor the officers had noted, he needed to know if defendant had anything in his pockets. Defendant again replied the officer was "harassing him" but then started emptying the contents of his pockets onto the hood of a vehicle, stating: "No, this is all I have." By this time, Sergeant O'Mary had obtained the women's consent to search their vehicle and was in the back seat, pointing to something inside the vehicle. According to Deputy Aleem, defendant "[t]hen . . . went into his side pocket, . . . got in there[,] and pulled his hand out," saying "[n]o, that's all I got." Defendant raised his hands in

the air, whereupon Deputy Aleem searched defendant's waistband and proceeded to defendant's inside pocket. As Deputy Aleem's hand moved toward that inside pocket, defendant grabbed the officer's hand from the outside of his coat, trapping Deputy Aleem's hand in the pocket. Deputy Aleem struggled with defendant to free his hand. During this struggle, small white pills fell out of defendant's pocket and onto the ground. When Deputy Aleem and Sergeant O'Mary, who came over to offer assistance, managed to restrain defendant, they found four bindles of heroin and a $10.00 bill, into which marijuana and a white powder substance had been folded, in defendant's hand. Defendant was subsequently placed under arrest, and the items found in his possession were analyzed and determined to be methadone, heroin, marijuana, and cocaine.

The trial court denied defendant's motion to suppress, finding Deputy Aleem had probable cause to search defendant under *State v. Greenwood*, 301 N.C. 705, 273 S.E.2d 438 (1981). The case proceeded to trial, at which Deputy Aleem testified in conformance with his *voir dire* testimony and the controlled substances and drug paraphernalia from defendant's pocket were introduced into evidence. Defendant made no objection to the admission of this evidence, nor to Deputy Aleem's testimony.

The dispositive issue is whether the trial court erred in allowing evidence to be admitted at trial that resulted from Deputy Aleem's search of defendant. Defendant contends the evidence obtained from Deputy Aleem's search of his pocket should have been suppressed because no probable cause and exigent circumstances justified the warrantless search.

[1] We first note that "[a] motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845 (1995). Moreover, "[r]ulings on these motions . . . are merely preliminary and subject to change during the course of trial, depending upon the actual evidence offered at trial[,] and thus an objection to an order granting or denying the motion 'is insufficient to preserve for appeal the question of the admissibility of evidence.' " *T&T Dev. Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49 (1997) (quoting *Conaway*, 339 N.C. at 521, 453 S.E.2d at 845). Because defendant failed to object at trial to the evidence he sought to suppress through the motion *in limine*, he has not preserved the

issue for appeal. Nevertheless, in the interest of justice, we choose to exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure to hear this issue. *See* N.C.R. App. P. 2.

[2] "The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement . . . ." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). One such exception exists when there are exigent circumstances justifying a warrantless search. *State v. Harper*, 158 N.C. App. 595, 602, 582 S.E.2d 62, 67 (2003) ("warrantless searches are not allowed absent probable cause and exigent circumstances, the existence of which are factual determinations that must be made on a case by case basis"). Probable cause has been defined as " 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' " *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (quoting 5 Am. Jur. 2d *Arrests* § 44 (1962)).

Our Supreme Court has held the odor of marijuana to be sufficient to establish probable cause to search for the contraband drug in an automobile. *Greenwood*, 301 N.C. at 708, 273 S.E.2d at 441; *see State v. Corpening*, 109 N.C. App. 586, 589-90, 427 S.E.2d 892, 894-95 (1993); *see also State v. Cooper*, 52 N.C. App. 349, 352, 278 S.E.2d 532, 534 (1981) (extending the plain view doctrine "to include contraband discovered through any of the officer's senses, especially odor"), *rev'd on other grounds*, 304 N.C. 701, 286 S.E.2d 102 (1982). Although no North Carolina court has addressed the issue of a warrantless search of a *person* based solely on smell, we find the case law that has developed in other states instructive on the issue.

In *State v. Moore*, the Ohio Supreme Court held: "[I]f the smell of marijuana [on the defendant], as detected by a person who is qualified to recognize the odor, is the sole circumstance, this is sufficient to establish probable cause" to obtain a search warrant. *State v. Moore*, 90 Ohio St. 3d 47, 50, 734 N.E.2d 804, 808 (2000). In further analyzing whether exigent circumstances existed to operate as an exception to the warrant requirement, the Ohio Supreme Court noted that exigent circumstances are present when "there is imminent danger that evidence will be lost or destroyed if a search is not immediately conducted." *Id.* at 52, 734 N.E.2d at 809. The Court then concluded that "[b]ecause marijuana and other narcotics are easily and

quickly hidden or destroyed, a warrantless search may be justified to preserve evidence." *Id.*; *see State v. Vanderveer*, 285 N.J. Super. 475, 667 A.2d 382 (1995) (finding probable cause and exigent circumstances to justify search of a person based solely on the odor of marijuana); *see also State v. Garcia*, 32 Ohio App. 3d 38, 513 N.E.2d 1350 (1986); *State v. Cross*, 23 Or. App. 536, 543 P.2d 48 (1975); *State v. Hernandez*, 706 So.2d 66 (Fla. Dist. Ct. App. 1998) (upholding warrantless searches of persons based on odor).

In this case, Deputy Aleem testified defendant walked by him twice, once going in, the other time out of the Waffle House, emanating a strong odor of marijuana, and each time defendant was alone. Deputy Aleem's testimony also established that he was qualified, based on his work experience, to recognize the odor of marijuana. We conclude, as the Ohio Supreme Court did in *Moore*, that, based on these facts, probable cause existed. The question thus remains whether there were exigent circumstances justifying the warrantless search of defendant. Just prior to Deputy Aleem's search of defendant, Sergeant O'Mary was occupied with a separate search of the women's vehicle and had apparently stumbled onto something at that moment. Sergeant O'Mary testified he found "stems and small pieces of leaves, and maybe a seed or so" in the vehicle.[1] Based on the fact that Sergeant O'Mary was otherwise engaged at the time and the fact, recognized in *Moore*, that narcotics can be easily and quickly hidden or destroyed, especially after defendant received notice of Deputy Aleem's intent to discover whether defendant was in possession of marijuana, we conclude that there were sufficient exigent circumstances justifying an immediate warrantless search. Because the search was constitutionally valid, we do not address defendant's second argument, raised in his brief to this Court, that the charge of resisting a public officer should have been dismissed because defendant was merely resisting an unlawful search of his person.

[3] A review of the record and judgment in this case does reveal an error with the judgment and corresponding sentence. Defendant was indicted, tried, and found guilty of possession of less than 1.5 ounces of marijuana. While the judgment references the correct statute for this offense, N.C.G.S. § 90-95(d)(4), it incorrectly states the offense "POSS MARIJ > 1/2 to 1 1/2 OZ," a Class 1 misdemeanor as opposed to the Class 3 misdemeanor for which defendant should have been sentenced. We thus remand this case for resentencing.

1. These items were subsequently examined and identified as less than 0.1 grams of marijuana.

Trial—No error.

Judgment—Vacated and remanded in part.

Judges McCULLOUGH and TYSON concur.

SOUTHERN FIRE & CASUALTY COMPANY, PLAINTIFF v. KIRBY'S GARAGE, INC., D/B/A KIRBY'S TOWING, DEFENDANT

No. COA02-1539

(Filed 6 January 2004)

Insurance— commercial automobile policy—UM endorsement—inapplicable to property damage

The uninsured motorist endorsement to a commercial automobile insurance policy did not provide underinsured motorist coverage for property damage to one of the insured's vehicles.

Appeal by plaintiff from judgment entered 2 October 2002 by Judge Ernest Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 27 October 2003.

Hedrick, Blackwell & Morton, L.L.P., by B. Danforth Morton, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

EAGLES, Chief Judge.

This appeal arises from an action for declaratory judgment to construe the terms of an insurance policy.

The record tends to establish the following facts: On 18 December 1996, Southern Fire & Casualty Company ("Southern") issued a commercial auto insurance policy to Kirby's Garage, Inc. ("Kirby's"), covering seven tow trucks. On 23 June 1997, during the coverage period of the policy, one of Kirby's tow trucks was damaged when it was hit from behind by a truck negligently driven by Anthony J. Padgett. Padgett's truck was insured by Travelers Insurance Co. ("Travelers"). Although Kirby's damages totaled $33,759.84 ($13,759.84 for property damage and $20,000.00 for loss of use),

Padgett's policy limited coverage to $25,000.00. Padgett subsequently admitted liability and Travelers tendered payment to Kirby's in the full amount of Padgett's policy. Kirby's sought to recover the balance ($8,759.84) from Southern by filing a claim against the underinsured motorist provisions of its policy with Southern.

The schedule of coverages on the "Business Auto Coverage Form" included in Kirby's policy indicates a policy limit, *i.e.*, the most Southern will pay for any one loss or accident involving a covered auto, in the amount of $1 million. The schedule further indicates that coverage in this amount extends to (1) liability, (2) uninsured motorists and (3) underinsured motorists. Kirby's policy also included an endorsement entitled "North Carolina Uninsured Motorist Form." This endorsement, which expressly states that it "modifies" the insurance provided under the "Business Auto Coverage Form" provides:

A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of:

a. An "uninsured motor vehicle" because of "bodily injury" sustained by the "insured" and caused by an "accident," and

b. An "uninsured motor vehicle" as defined in Paragraphs **a.** and **c.** of the definition of "uninsured motor vehicle" because of "property damage" caused by an "accident."

. . . .

F. Additional Definitions

As used in this endorsement:

. . . .

4. "Uninsured motor vehicle" means a land motor vehicle or trailer:

a. For which neither a bond or policy nor cash or securities on file with the North Carolina Commissioner of Motor Vehicles provides at least the amounts required by the North Carolina Motor Vehicle Safety and Responsibility Act;

b. That is an underinsured motor vehicle. An underinsured motor vehicle is a motor vehicle or trailer for which the sum of all bodily injury liability bonds or policies at the time of an "accident" provides at least the amounts required by the North Carolina Motor Vehicle Safety and Responsibility Act but their limits are either:

(1) Less than the limits of underinsured motorists coverage applicable to a covered "auto" that you own involved in the "accident"; or

(2) Less than the limits of this coverage, if a covered "auto" that you own is not involved in the "accident"; or

c. For which the insuring or bonding company denies coverage or is or becomes insolvent; or

d. That is a hit-and-run vehicle causing "bodily injury" to an "insured" and neither the driver nor owner can be identified. The vehicle must hit an "insured," a covered "auto" or a vehicle an "insured" is "occupying."

(Emphasis in original).

Southern denied coverage. Citing paragraph A.1.b. of the uninsured motorist endorsement, Southern contended that Kirby's policy did not cover property damage caused by underinsured motorists. On 31 May 2001, Southern filed this action in New Hanover County Superior Court, seeking a declaration that Kirby's policy with Southern did not cover property damage caused by underinsured motorists. The trial court concluded that the policy language relating to underinsured motorist coverage was ambiguous and that this ambiguity was compounded by the schedule of coverage, which purported to cover losses caused by underinsured motorists, without limitation, up to the $1 million policy limit. Consequently, the trial court construed the policy against Southern and in favor of coverage. Southern appeals.

Southern contends that the trial court erred by concluding that the policy was ambiguous and by construing the policy to cover property damage caused by underinsured motorists. We agree.

"In interpreting insurance policies, our appellate courts have established several rules of construction. Of these, the most funda-

mental rule is that the language of the policy controls." *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996).

> [W]hen an insurance policy contains ambiguous provisions, this Court will resolve the ambiguity against the insurance company-drafter, and in favor of coverage. On the other hand, if a contract of insurance is not ambiguous, "the court must enforce the policy as written and may not reconstruct it under the guise of interpreting an ambiguous provision."

Ledford v. Nationwide Mut. Ins. Co., 118 N.C. App. 44, 51, 453 S.E.2d 866, 869 (1995) (citations omitted).

"[A]mbiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). " '[L]anguage in an insurance contract is ambiguous *only* if the language is 'fairly and reasonably susceptible to either of the constructions for which the parties contend." " *Ledford*, 118 N.C. App. at 51, 453 S.E.2d at 869 (quoting *Watlington v. North Carolina Farm Bureau*, 116 N.C. App. 110, 112, 446 S.E.2d 614, 616 (1994)) (citation omitted) (emphasis added).

After careful review of the policy at issue, we conclude there is but one fair and reasonable construction of the language relating to underinsured motorists. Accordingly, we hold that the trial court erred by concluding the terms of the policy were ambiguous.

We begin our analysis by noting that "exclusions from, conditions upon and limitations of undertakings by the company, otherwise contained in the policy, are to be construed strictly so as to provide the coverage, which would otherwise be afforded by the policy." *Wachovia*, 276 N.C. at 355, 172 S.E.2d at 522-23. Here, the schedule of coverages in the Business Auto Coverage Form purports to provide uninsured motorist coverage, without limitation, in the full amount of the policy. However, the uninsured motorist endorsement expressly states that it "modifies" the insurance provided by the "Business Auto Coverage Form." Therefore, in determining what insurance is provided by the policy, the terms of the uninsured motorist endorsement must be construed strictly.

We further note that "[w]hen the policy contains a definition of a term used in it, this is the meaning which must be given to that term

wherever it appears in the policy, unless the context clearly requires otherwise." *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522. Here, the policy specifically defines the term "uninsured motor vehicle." Therefore, by virtue of paragraph F.4.b., the term "uninsured motor vehicle" must include an "underinsured motor vehicle," wherever the term is used in the policy, unless the context provides otherwise. With these principles in mind, we now consider whether the language of the policy is ambiguous.

Paragraph A.1.a. of the uninsured motorist endorsement states that Southern will pay all sums that Kirby's would be legally entitled to recover as compensatory damages, for "bodily injury" caused by an accident with an "uninsured motor vehicle." Since nothing in the context of this provision requires that a different meaning be given to the term "uninsured motor vehicle," we must give the term the meaning provided in the policy. Applying the relevant definition, we conclude this portion of the policy (paragraph A.1.a.) unambiguously provides coverage for any compensatory damages Kirby's would be entitled to recover for "bodily injury," up to the $1 million policy limit, caused by either an uninsured or underinsured motor vehicle. Since this portion of the policy is not ambiguous, it must be enforced as written.

Much like the preceding paragraph, paragraph A.1.b. of the endorsement states that Southern will pay all sums that Kirby's would be legally entitled to recover as compensatory damages for "property damage" caused by an accident with an "uninsured motor vehicle." However, this paragraph further specifies that the definition of "uninsured motor vehicle" includes only paragraphs "a." and "c." of the definition provided in the policy. Unlike paragraph A.1.a., the context in which the term "uninsured motor vehicle" is used here indicates clearly that another definition applies to this provision. We conclude that for purposes of construing this provision, the term "uninsured motor vehicle" means only a vehicle (1) for which there is no insurance on file with the Commissioner of Motor Vehicles, or (2) for which the insuring company becomes insolvent. Neither "underinsured" motor vehicles defined by paragraph "b." nor "hit-and-run" vehicles defined by paragraph "d." of the definition provided in the policy are included within this definition of "uninsured motor vehicle." Applying this definition, we conclude this portion of the policy (paragraph A.1.b.) provides coverage for any compensatory damages Kirby's would be entitled to recover for "property damage," up to the $1 million policy limit, but only when caused by an accident with an uninsured motorist as defined in paragraphs F.4.a. and F.4.c.

In the instant case, the damage to Kirby's truck falls under paragraph A.1.b. of the uninsured motorist endorsement. Furthermore, Padgett's car may only be considered an "uninsured motor vehicle" under the policy if paragraph F.4.b. remains in the definition. Since paragraph A.1.b. specifically exempts paragraph F.4.b. from the definition of "uninsured motor vehicle," Kirby's may not recover the balance of its damages from Southern.

Nothing in the schedule of coverages changes this outcome. The schedule of coverage states only "the most [Southern] will pay for any one accident or loss." The uninsured motorist endorsement provides all the pertinent policy language with respect to the coverage of uninsured motor vehicles. Furthermore, both the schedule of coverages and the uninsured motorist endorsement expressly provide that the insurance declarations in the schedule are modified by the endorsement.

Accordingly, the decision of the trial court is hereby reversed and this matter is remanded to the New Hanover County Superior Court for entry of judgment not inconsistent with this opinion.

Reversed and remanded.

Judges HUNTER and GEER concur.

JOHN LEE, EMPLOYEE, PLAINTIFF v. ROSES, EMPLOYER, AND SELF-INSURED/ALEXSIS, ADJUSTING COMPANY, DEFENDANTS

No. COA02-1740

(Filed 6 January 2004)

Workers' Compensation— failure to prosecute in timely manner—findings of fact—conclusions of law

The Industrial Commission erred as a matter of law in a workers' compensation case when it summarily affirmed a deputy commissioner's order, dismissing plaintiff's claim with prejudice for failure to prosecute in a timely manner, without making the necessary findings of fact and conclusions of law to support its order.

Appeal by plaintiff from order entered 25 July 2002 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 2003.

Pamela A. Hunter, for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Nicholas P. Valaoras, for defendants-appellees.

MARTIN, Judge.

On 30 September 1992, plaintiff injured his back while working in the stockroom of defendant Roses' store in Belmont, N.C. He was paid workers' compensation benefits for temporary total disability for two weeks, as well as compensation for medical expenses. On 27 September 1994, plaintiff filed N.C.I.C. Form 18 seeking additional compensation for his alleged injury. Defendants denied the claim and plaintiff filed N.C.I.C. Form 33 requesting that the claim be assigned for hearing. The case was set for hearing before a deputy commissioner on 21 March 1996, but was removed from the hearing docket at the request of the parties in order to engage in discovery and settlement discussions.

Thereafter, the parties engaged in discovery and exchanged correspondence concerning the case over a thirteen month period. On 20 March 1997, defendants' counsel inquired of plaintiff's counsel concerning plaintiff's request for medical treatment and concerning settlement possibilities. Having received no response to his inquiry, defendants' counsel wrote a follow-up letter on 22 April 1997 concerning the same issues. When plaintiff's counsel did not respond to the 22 April 1997 letter, defendants moved to dismiss plaintiff's claim with prejudice, pursuant to subsequently superseded Commission Rule 613(3)[1], for plaintiff's failure to prosecute the claim. On 25 June 1997, the deputy commissioner entered an order in which she found that "[o]ver seven weeks has elapsed since defendant's motion was filed, and no response has been received by plaintiff," and granted defendants' motion to dismiss with prejudice.

On 1 July 1997, plaintiff filed N.C.I.C. Form 44 seeking review of the deputy commissioner's order by the Full Commission. Apparently, the Form 44 was misplaced by the Commission and was not acknowl-

1. Effective June 1, 2000, Commission Rule 613(3) was superseded by Commission Rule 613(1)(c). Workers Comp. R. of N.C. Indus. Comm'n, 2004 Ann. R. (N.C.) 901, 901.

edged until 15 December 2000. A hearing before the Full Commission was twice continued, once upon motion of each of the parties. Pending the hearing, defendants served additional discovery on plaintiff, to which plaintiff failed to serve timely responses. On 25 January 2002, plaintiff was ordered to serve full and complete answers by 4 February 2002; the responses were served on 14 February 2002. The matter was heard by the Full Commission on 12 July 2002. On 25 July 2002, the Full Commission entered the following order:

> The Full Commission has reviewed the prior Order based upon the record of the proceedings before Deputy Commissioner Chapman and the briefs and arguments on appeal. Having reconsidered the material in the file, the Full Commission affirms the Deputy Commissioner's holding that plaintiff failed to prosecute this case in a timely manner. Therefore, this case is DISMISSED WITH PREJUDICE. Furthermore, PLAINTIFF SHALL PAY defendant's [sic] counsel a reasonable attorney's fee of $500.00 pursuant to N.C.G.S. 97-88.1.

Commissioner Riggsbee concurred in the result, but issued a separate opinion in which she stated:

> I concur in the result reached by the majority, but believe that the Full Commission is required to make findings of fact and conclusions of law to support our decision.

Plaintiff appeals from the order dismissing his claim.

Plaintiff's primary contention on appeal is that the Commission abused its discretion and committed error of law when it dismissed his claim with prejudice for failure to prosecute. After careful review, we hold that the Full Commission failed to make findings of fact and conclusions of law necessary to support its order dismissing plaintiff's claim.

Pursuant to its power to efficiently administer the Workers' Compensation Act, the Commission has inherent judicial authority to dismiss a claim with or without prejudice for failure to prosecute. *Harvey v. Cedar Creek BP*, 149 N.C. App. 873, 874, 562 S.E.2d 80, 81 (2002). At the time of the Full Commission hearing, the superseding Workers' Compensation Rule 613(1)(c) controlled the disposition of this matter. Rule 613(1)(c) of the Workers' Compensation Rules permits the dismissal of a claim with prejudice for failure to prosecute

upon proper notice and an opportunity to be heard. Workers Comp. R. of N.C. Indus. Comm'n 613(1)(c), 2004 Ann. R. (N.C.) 901, 922.

Neither the Workers' Compensation Act nor the Industrial Commission Rules provide further direction as to when a finding of failure to prosecute is proper and what types of sanctions are appropriate under the circumstances. Thus, this Court looks to G.S. § 1A-1, Rule 41(b) for guidance. *See Harvey*, 149 N.C. App. at 875, 562 S.E.2d at 81. Rule 41(b) of the North Carolina Rules of Civil Procedure permits a defendant in a civil action to move for dismissal when the plaintiff fails to prosecute his case. N.C. Gen. Stat. § 1A-1, Rule 41(b) (2003). Where sanctions are entered, a finding of failure to prosecute pursuant to Rule 41(b) requires a determination by the trial court that "plaintiff or his attorney 'manifest[s] an intent to thwart the progress of [the] action' or 'engage[s] in some delaying tactic.'" *Spencer v. Albemarle Hospital*, 156 N.C. App. 675, 678, 577 S.E.2d 151, 153 (2003) (internal quotation omitted). Such a finding is a finding of fact, and findings of fact by the Industrial Commission are conclusive on appeal as long as there is any competent evidence to support them. *Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997).

Once a failure to prosecute has been found, the Commission has authority to impose appropriate sanctions. *See Harvey*, 149 N.C. App. at 874, 562 S.E.2d at 81. Our courts have stated that dismissal with prejudice is the most severe sanction available to the court in a civil case, and thus, it should not be readily granted. *See Wilder v. Wilder*, 146 N.C. App. 574, 576, 553 S.E.2d 425, 427 (2001). This principle applies equally to the dismissal of a workers' compensation claim at the Industrial Commission since prosecution pursuant to the Workers' Compensation Act is an injured worker's exclusive remedy. *See Harvey*, 149 N.C. App. at 875, 562 S.E.2d at 82 (terminating plaintiff's "exclusive remedy when other lesser sanctions were appropriate and available" is an abuse of discretion); *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 16, 510 S.E.2d 388, 392-93 (sanctions by the Commission should be imposed in light of North Carolina's public policy behind the Workers' Compensation Act to provide swift and certain benefits to an injured worker and not to deny benefits based on "technical, narrow, or strict interpretation of its provisions"), *disc. review denied*, 350 N.C. 834, 538 S.E.2d 197 (1999).

Before a civil case may be involuntarily dismissed with prejudice for failure to prosecute pursuant to N.C. Gen. Stat. § 1A-1, Rule

41(b) (2003), the trial court must address the following three factors in its order:

> (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant [caused by the plaintiff's failure to prosecute]; and (3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Wilder, 146 N.C. App. at 578, 553 S.E.2d at 428. We find this rule to be relevant to and consistent with the underlying public policy of the Worker's Compensation Act, and thus apply these same standards to the dismissal of a workers' compensation claim with prejudice at the Industrial Commission for failure to prosecute. *See Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988) (Full Commission "is not an appellate court" and thus, is required "to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it"). *Cf. Matthews*, 132 N.C. App. at 17, 510 S.E.2d at 393 (holding that before a case may be dismissed pursuant to Worker's Compensation Rule 802, permitting dismissal for violation of any Worker's Compensation Rule, the Industrial Commission must consider (1) the appropriateness of alternative sanctions less severe than dismissal with prejudice, and (2) the proportionality of dismissal to the actions meriting sanction).

In this case, neither the deputy commissioner nor the Full Commission made findings of fact or conclusions of law addressing any of the above cited factors. Thus, the order is not sufficient as a matter of law to dismiss the plaintiff's claim with prejudice for failure to prosecute. *Spencer*, 156 N.C. App. at 678-79, 577 S.E.2d at 153-54 (dismissal vacated where trial court did not make finding regarding whether it considered lesser sanctions and did not make finding regarding whether plaintiff deliberately or unreasonably delayed the matter); *Wilder*, 146 N.C. App. at 577-78, 553 S.E.2d at 427-28 (dismissal vacated where trial court did not consider in the record whether lesser sanctions were appropriate); *see also Harvey*, 149 N.C. App. at 875, 562 S.E.2d at 82 (affirming the Full Commission's order to set aside a deputy commissioner's order dismissing a complaint with prejudice for failure to prosecute because lesser sanctions were available and appropriate). Accordingly, the Full Commission erred as a matter of law when it summarily affirmed the deputy commissioner's order dismissing plaintiff's claim with prejudice for failure to prosecute without making the necessary findings of fact and conclusions of law to support its order. The order of dismissal is

reversed and this cause remanded to the Industrial Commission for proceedings consistent with this opinion.

Reversed and remanded.

Chief Judge EAGLES and Judge LEVINSON concur.

LESSONIA JONES, PLAINTIFF v. ROBERT T. JONES, DEFENDANT

No. COA03-285

(Filed 6 January 2004)

Divorce— alimony—Tennessee marital dissolution agreement—oral statements by parties—no modification

Plaintiff former wife's right to alimony under a separation agreement was not modified or waived by a subsequent Tennessee marital dissolution agreement that did not specifically mention alimony. Nor could the separation agreement be modified orally even if the parties' conversations were corroborated.

Appeal by plaintiff from order entered 17 October 2002 by Judge E.J. Harviel in the District Court in Alamance County. Heard in the Court of Appeals 20 November 2003.

Walker & Bullard, by Daniel S. Bullard and James F. Walker, for plaintiff-appellant.

Frederick J. Sternberg, for defendant-appellee.

HUDSON, Judge.

Plaintiff Lessonia Jones ("Mrs. Jones") filed a complaint against defendant Robert T. Jones ("Mr. Jones"), her ex-husband, for specific performance of his obligations under a previously executed separation agreement and property settlement. Defendant failed to file an answer and the plaintiff obtained an Entry of Default on 27 February 2002. The court thereafter granted defendant relief from that Entry of Default, and defendant filed an answer 12 March 2002. Following a trial, the court denied relief to plaintiff's request. Plaintiff appeals. For the reasons discussed below, we reverse.

Mr. and Mrs. Jones married on 17 June 1972 and had one emancipated child at the time of the trial. Mr. and Mrs. Jones separated on 7 June 1999, and that July executed a separation agreement, which divided the parties' debts and property and obligated Mr. Jones to pay $600 per month alimony to Mrs. Jones.

Several months later, Mr. Jones telephoned Mrs. Jones, telling her that he was mailing her a paper that she would need to sign "for [their] divorce." Mrs. Jones received a complaint for divorce prepared by Mr. Jones' counsel in Tennessee. Attached to the complaint was a "Marital Dissolution Agreement" ("dissolution agreement"). The dissolution agreement purported to "equitable [sic] settle the property rights between" the Joneses. The dissolution agreement did not specifically mention alimony, but did include a clause stating that the "parties hereto agree that the foregoing constitutes their entire agreement with respect to the matters embraced herein. . . ." The parties each signed the dissolution agreement 19 December 1999, and were granted a divorce in Tennessee on 23 March 2000.

At trial, Mr. Jones testified, over the objection of plaintiff's counsel, about conversations he allegedly had with Mrs. Jones prior to the execution of the Tennessee dissolution agreement. Mr. Jones testified that he had agreed to pay her regular monthly alimony, in amounts that would gradually decrease and cease altogether after December 2000, and that Mrs. Jones knew that the dissolution agreement was a waiver of her alimony rights. All of the conversations to which Mr. Jones testified occurred before the execution of the dissolution agreement and none of the alleged oral agreements were reduced to writing.

Mrs. Jones testified that the dissolution agreement did not mention alimony and that she would not have signed any waiver of her right to alimony. She denied that she ever agreed with Mr. Jones to waive her right to alimony and she testified that any payments Mr. Jones planned to make to her were unilateral and not part of any agreement between them. Mrs. Jones appeals the order of the trial court refusing to enforce the alimony provisions in the original separation agreement.

Mrs. Jones assigns error to the court's ruling that the dissolution agreement constituted a waiver of her right to alimony under the earlier separation agreement. For the reasons discussed below, we agree and reverse.

In a bench trial, the trial court must "find the facts specifically and state separately its conclusions of law." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (1999). The court's conclusions of law must be supported by the court's factual findings. *Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 341, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001). However, "[i]f the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary. . . . In contrast, the trial court's conclusions of law are reviewable *de novo*." *Id.* at 246, 542 S.E.2d at 341 (internal citations and quotation marks omitted).

Here, the court's order purports to contain six findings of fact; however, the sixth "finding" is actually a mixed finding of fact and conclusion of law. Only the fifth and sixth findings pertain to the issue at hand:

> 5. That the Parties entered into a 'Separation Agreement and Property Settlement' dated July 27, 1999, as attached to the Plaintiff's Complaint, which included the provision for the payment of alimony by the Defendant to the Plaintiff.
>
> 6. That subsequent to the execution of the aforesaid Agreement, the Parties entered into and executed a 'Marital Dissolution Agreement' pursuant to Tennessee Code Annotated Section 34-4-103 on December 19, 1999, which was incorporated in the Defendant's 'Complaint for Divorce', in the divorce action in the Chancery Court of Madison County, Tennessee entitled "Robert T. Jones, Plaintiff vs. Leesonia [sic] H. Jones, Defendant, R. D. No. 56876' and approved by the Court. [sic] that although the aforesaid Tennessee Marital Dissolution Agreement does not specifically mention alimony, its [sic] clear that it is a total and complete resolution of all the claims between the Parties including alimony.

The last sentence of finding six is a conclusion regarding the legal effect of the dissolution agreement, which language appears verbatim as the court's conclusion two. The facts found are not sufficient to support this conclusion, and as a matter of law, can only support a conclusion that the dissolution agreement neither modified the previous separation agreement nor waived Mrs. Jones' right to alimony.

"Married couples are authorized to execute separation agreements, N.C.G.S. § 52-10.1 (1991), and alimony can be waived by 'an express provision of a valid separation agreement.' " *Napier v.*

Napier, 135 N.C. App. 364, 367, 520 S.E.2d 312, 314 (1999), *disc. review denied*, 351 N.C. 358, 543 S.E.2d 132 (2000), (quoting N.C.G.S. § 50-16.6 (1995)). Because such waivers must be express, general releases are insufficient to waive a spouse's right to alimony. *Id.* In *Napier*, the parties' separation agreement stated that it was "an agreement settling their property and marital rights" and that it was "in full satisfaction of all obligations which each of them now has or might hereafter or otherwise have toward the other." *Id.* at 366, 520 S.E.2d at 313. Despite this sweeping language, we held that the agreement did not constitute a waiver of alimony. "A release of 'all' claims and obligations or the settling of 'marital rights,' as occurred in the Agreement, does not constitute an 'express' release or settlement of alimony claims, as it does not specifically, particularly, or explicitly refer to the waiver, release, or settlement of 'alimony' or use some other similar language having specific reference to the waiver, release, or settlement of a spouse's support rights." *Id.* at 367, 520 S.E.2d at 314; *but see Stewart v. Stewart*, 141 N.C. App. 236, 241, 541 S.E.2d 209, 213 (2000) (holding that a separation agreement which "specifically and unambiguously waives all rights pursuant to Chapter 50 of the North Carolina General Statutes, which explicitly encompasses postseparation support and alimony" is sufficiently express to constitute a valid waiver of alimony).

A separation agreement must conform to the formalities and requirements of N.C. Gen. Stat. § 52-10.1. Specifically, "the separation agreement must be in writing and acknowledged by both parties before a certifying officer." N.C. Gen. Stat. § 52-10.1 (1995). "[A]n attempt to orally modify [a] separation agreement fails to meet the formalities and requirements of G.S. 52-10.1." *Greene v. Greene*, 77 N.C. App. 821, 823, 336 S.E.2d 430, 432 (1985). Thus, a modification of a separation agreement, to be valid, must be in writing and acknowledged, in accordance with the statute.

Here, the initial separation agreement clearly and expressly provided for defendant to pay alimony to plaintiff "until [she] remarries." The later dissolution agreement contains no specific mention either of alimony or of statutory provisions regarding alimony. The only statute mentioned in the dissolution agreement is Tenn. Code Ann. § 36-4-103, which simply sets forth the procedure for obtaining a divorce on grounds of irreconcilable differences and does not govern awards of alimony. In addition, the dissolution agreement purports to govern only "the matters embraced therein." Thus, the face of the dissolution agreement does not sup-

port the conclusion that it is "clear that it is a total and complete resolution of all the claims between the parties including alimony." Therefore, pursuant to *Napier*, the dissolution agreement does not operate to waive alimony.

Although the findings are not entirely clear, the court appears to have relied on testimony from defendant about conversations with plaintiff in which he contended that plaintiff agreed to a modified alimony arrangement, under which he would gradually reduce and then cease alimony payments. Defendant also submitted as exhibits checks he alleged supported his testimony. Because separation agreements cannot be orally modified, the testimony of conversations between plaintiff and defendant, even if corroborated, could not constitute a valid modification of their earlier agreement.

Because the alimony provision of the July 1999 separation agreement was never modified expressly and in writing, those provisions remain in effect and are enforceable by plaintiff. The order denying plaintiff any relief is reversed and remanded for further proceedings, consistent with this opinion.

Reversed and remanded.

Judges TYSON and STEELMAN concur.

STATE OF NORTH CAROLINA v. LUKE EDWARD STILLER, JR., DEFENDANT

No. COA03-214

(Filed 6 January 2004)

1. Sexual Offenses— crime against nature—instruction—penetration by object

The trial court did not err in a multiple second-degree rape and crime against nature case by its instruction on crime against nature, because: (1) while no case in our State has specifically included penetration of the genital opening by an object in its definition of crime against nature, such an act is consistent with the language of *State v. Joyner*, 295 N.C. 55 (1978); and (2) defendant failed to object to the instructions when given, and the instructions did not arise to the level of plain error.

2. Appeal and Error— preservation of issues—failure to make offer of proof

Although defendant contends the trial court erred in a multiple second-degree rape and crime against nature case by sustaining the State's objection to evidence of defendant's good character, defendant failed to preserve this issue for appellate review because: (1) defendant failed to make an offer of proof as to what the witness would have said; and (2) the content and relevance of the excluded testimony are not evident from the context of the questioning.

Appeal by defendant from judgments entered 9 May 2002 by Judge W. Erwin Spainhour in the Superior Court in Cabarrus County. Heard in the Court of Appeals 20 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Diane G. Miller, for the State.

Miles & Montgomery, by Mark Montgomery, for the defendant-appellant.

HUDSON, Judge.

Defendant was charged with sexual misconduct with his son, stepdaughter and niece, some twenty-five years before the trial. A jury found defendant guilty of eight counts of second-degree rape and eleven counts of crime against nature, and the court entered judgment 9 May 2002. Defendant appeals, alleging the court erred in the jury instructions on crime against nature and sustaining the State's objections to evidence of defendant's good character. For the reasons discussed below, we find no prejudicial error.

The State's evidence tended to show that Anita Stiller Blackwelder, defendant's estranged stepdaughter, after seeing him with a little girl at a family funeral, recalled that defendant molested her as a child and she went to the police. Ms. Blackwelder testified that defendant had forced her to engage in various sexual acts with himself and with her brother, Richard. Defendant's niece, son, and two other women also testified that, when they were children, defendant had sexually assaulted them or forced them to engage in sexual activity with each other.

Defendant testified in his own behalf, denying the charges against him. Patricia Simmons, defendant's former live-in companion, testi-

fied for defendant. Ms. Simmons and her young daughter, the child Ms. Blackwelder saw at the funeral with defendant, lived with defendant for two years. After the Department of Social Services contacted Ms. Simmons, she had her daughter examined for sexual abuse, but no evidence of abuse was found. Defendant's cousin and a family friend who spent time with defendant as a child testified that defendant had never been inappropriate with them. The jury convicted defendant of eight counts of second-degree rape and eleven counts of crime against nature, and defendant appeals.

[1] Defendant first argues that the jury instructions on crime against nature were erroneous and allowed for his conviction on an improper theory. In charging the jury, the court defined a crime against nature as follows:

> An unnatural sexual act would include cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another; fellatio which is any touching by the lips or tongue of one person to the male sex organ of another and *any penetration, however slight, by an object, such as a piece of candy, into the genital opening of a person's body.*

While this jury instruction is consistent with the pattern instruction on crime against nature, defendant argues that this offense is limited to oral and anal sex, and thus, the final part of the instruction given, regarding penetration, was error. For the reasons discussed below, we disagree.

Crime against nature is defined by the common law and interpreted by our courts. At the time of these offenses in 1976 and 1977, crime against nature was defined to "include[] all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified." *State v. Harward*, 264 N.C. 746, 746, 142 S.E.2d 691, 692 (1965). Our Supreme Court has stated that "though penetration by or of a sexual organ is an essential element of the crime, the crime against nature is not limited to penetration by the male sexual organ." *State v. Joyner*, 295 N.C. 55, 66, 243 S.E.2d 367, 374 (1978) (internal citations omitted). Instead, the offense is broad enough to include all forms of oral and anal sex, as well as unnatural acts with animals. *Id.* While no case in our State has specifically included penetration of the genital opening by an object in its definition of crime against nature, such an act is entirely consistent with

the language of *Joyner*. Thus, we do not believe the court's instruction was erroneous.

In addition, defendant failed to object to the instructions when given. Thus, even were the instruction in error, our review would be limited to plain error. "[T]o reach the level of 'plain error' . . ., the error in the trial court's jury instructions must be so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (internal quotation marks omitted). In light of the entire record of consistent testimony from numerous victims and witnesses, any possible error in the instructions probably had no effect on the jury's finding of guilt. This assignment of error is without merit.

[2] In his second argument, defendant argues it was error for the court to sustain the State's objection to evidence of defendant's good character. We disagree.

Defendant called Patricia Simmons, his former live-in companion, to the stand and asked her the following questions:

Q. [BY DEFENSE COUNSEL] Do you still reside in Mr. Stiller's home?

A. No.

Q. You decided about whether or not you would if he got out?

[STATE'S OBJECTION SUSTAINED]

Q. You moved out from his residence.

A. Yes.

Q. Is that fair to say?

A. Yes.

Q. What would be your concerns about letting Dominique [her daughter] be around Mr. Stiller, if any, at this point following the medical examination?

[STATE'S OBJECTION SUSTAINED]

Following the State's cross-examination of Ms. Simmons, defendant on redirect asked, "Is [your moving out] because of anything that you're aware or [sic] that you believe Mr. Stiller did that caused you to move out?" The State's objection was again sustained.

Defendant contends that the court prevented him from putting his character in issue, by offering evidence of good character from Ms. Simmons. However, defendant failed to make an offer of proof as to what Ms. Simmons would have said, and thus, has failed to preserve this issue for appellate review. "To prevail on a contention that evidence was improperly excluded, either a defendant must make an offer of proof as to what the evidence would have shown or the relevance and content of the answer must be obvious from the context of the questioning." *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157, *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1996).

Defendant contends that it is obvious from the context of the questions that Ms. Simmons' excluded answers would have reflected her lack of concern about her daughter living with defendant and that she did not move out of his home because of such concerns. We disagree, finding that the content and relevance of the excluded testimony are not evident from the context of the questioning. *See State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 643 (1998), *cert. denied*, 525 U.S. 1180, 143 L. Ed. 2d 114 (1999) (finding no error where "[a]fter the objection was sustained, defendant's counsel did not rephrase the question or make an offer of proof as to how [the witness] would have answered. . . .").

No prejudicial error.

Judges TYSON and STEELMAN concur.

R.B. CRONLAND BUILDING SUPPLIES, INC., PLAINTIFF v. LEON J. SNEED AND WIFE, BETSY SNEED, DEFENDANTS v. JAMES J. MAUNEY, JR. AND WIFE, MELISSA H. MAUNEY, THIRD-PARTY DEFENDANTS

No. COA02-1681

(Filed 6 January 2004)

1. Appeal and Error— appealability—interlocutory order—denial of summary judgment

Plaintiff's appeal from the denial of summary judgment on its claim against defendant husband in an action to recover a debt allegedly owed by defendants is dismissed as an appeal from an interlocutory order.

2. Loans— debtor—guarantor—guaranty contract

The trial court did not err by granting summary judgment in favor of defendant wife in an action to recover a debt allegedly owed by defendants, because: (1) plaintiff failed to produce evidence that defendant ever executed a loan document as a principal debtor; (2) the complaint alleges an action against defendant as a debtor and not as a guarantor of her husband's debt; (3) the pertinent 1994 document was not a valid guaranty contract since it failed to identify a debtor and does not contain the signature of a debtor; (4) plaintiff's alleged oral explanations to defendant of her liability as guarantor do not create an enforceable contract; and (5) plaintiff's affidavit is not admissible to supply elements missing from the 1994 document.

Appeal by Plaintiff from judgment entered 26 September 2002 by Judge Timothy L. Patti in Superior Court, Gaston County. Heard in the Court of Appeals 7 October 2003.

Pendleton & Pendleton, P.A., by Wesley L. Deaton, for the plaintiff-appellant.

R. Locke Bell, P.C., by R. Locke Bell, for defendants-appellees.

WYNN, Judge.

This appeal arises from a partial grant of summary judgment in an action by Plaintiff, R.B. Cronland Building Supplies, to recover a debt allegedly owed by Defendants Leon Sneed (a building general contractor), and his wife, Betsy Sneed. We affirm in part and dismiss in part.

[1] Preliminarily, we note that although the record appears to reflect an issue as to whether this appeal is interlocutory, we accept the trial court's certification under Rule 54 that this matter is ripe for review. Accordingly, we will address the merits of Betsy Sneed's appeal. However, Cronland Building Supplies' attempt to appeal from the denial of summary judgment on its claim against Leon Sneed is clearly interlocutory; accordingly, we summarily dismiss that part of the appeal. Thus, we review only the merits of the appeal from the grant of summary judgment in favor of Betsy Sneed.

[2] Regarding the appeal against Betsy Sneed, the record in this case shows that under an undated document entitled "Conditions of Credit Guaranty of Payment," Leon Sneed and his wife, Betsy Sneed signed

on the "Guarantor" lines. However, the document does not contain the name of the debtor, nor is there a signature over the "debtor" line of the document. Apparently, what Cronland Building Supplies sought to obtain with the document, was Betsy Sneed's guaranty of payment for any debts incurred by her husband, a general building contractor. We, however, uphold the trial court's grant of summary judgment in favor of Betsy Sneed for the following reasons.

First, the record shows that Cronland Building Supplies sued Betsy Sneed only as a principal debtor, alleging that she had primary liability for a debt owed to Cronland Building Supplies based upon the alleged contract. However, in this case, Cronland Building Supplies failed to produce evidence that Betsy Sneed ever executed as a principal debtor.[1] Consequently, Cronland Building Supplies failed to produce "a forecast of evidence" showing that it could establish a *prima facie* case at trial that Betsy Sneed was liable for the debt at issue. This basis suffices to support Betsy Sneed's entitlement to summary judgment on this issue.

Second, Cronland Building Supplies argues that Betsy Sneed is liable as a guarantor of her husband's debt. However, the complaint alleges an action against Betsy Sneed as a debtor, not a guarantor. It is well established that "[g]uarantors are not sureties; nor are they endorsers, . . . [t]he obligation of a surety is primary, while that of a guarantor is collateral." *Trust Co. v. Clifton*, 203 N.C. 483, 485, 166 S.E. 334, 335 (1932) (citation omitted). Thus, "[a] surety may be sued as a promisor with the principal debtor; a guarantor may not; his contract must be especially set forth or pleaded." *Id. See also Credit Corp. v. Wilson*, 12 N.C. App. 481, 486, 183 S.E.2d 859, 862 (1971) (holding that "Defendant's contract of guaranty is their own separate contract with plaintiff to pay the debts of [debtor] when due, if not paid by [debtor]. They are not in any sense parties to the note executed by [debtor]"). Since Cronland Building Supplies' complaint neither alleges that Betsy Sneed was a guarantor of her husband's debt nor specifically pleads or sets out a valid guaranty contract, summary judgment was appropriately entered on behalf of Betsy Sneed on this issue.

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1. "[T]he party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). However, "[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000) (citations omitted).

Finally, we point out that the document submitted by Cronland Building Supplies was not a valid guaranty contract. To support its claim against Betsy Sneed as a guarantor, Cronland Building Supplies submitted (1) a 1994 document signed by Betsy Sneed and her husband as guarantors for an unidentified debtor, but not signed by Cronland Building Supplies, and (2) the affidavit of an officer of Cronland Building Supplies averring that Leon Sneed had "inadvertently" failed to sign the contract as debtor, and that Cronland Building Supplies had orally "explained" to defendant that she was liable as a guarantor of her husband's debt.

"A *guaranty of payment* is an absolute promise by the guarantor to pay the debt at maturity if it is not paid by the principal debtor. The obligation of the guarantor is separate and independent of the obligation of the principal debtor, and the creditor's cause of action against the guarantor ripens immediately upon failure of the principal debtor to pay the debt at maturity." *Credit Corp. v. Wilson*, 281 N.C. 140, 145, 187 S.E.2d 752, 755 (1972) (citation omitted). Thus, rights against guarantors arise out of the guaranty contract and must be based on that contract. "Such an action is not a suit on the primary obligation which the guaranty contract secures, and the guarantor is not liable except under the terms of the guaranty contract." *Id.* (citation omitted).

In this case, Cronland Building Supplies argues that the 1994 document was a guaranty contract under whose terms Betsy Sneed is liable as a guarantor of her husband's debt. However, the contract fails to identify a debtor and does not contain the signature of a debtor. As such, that document does not constitute a valid guaranty contract.

Moreover, to be enforceable, a guaranty contract must be in writing. N.C.G.S. § 22-1 (2001). Therefore, Cronland Building Supplies' alleged oral "explanations" to defendant of her liability as guarantor do not create an enforceable contract. *See Smith v. Joyce*, 214 N.C. 602, 604, 200 S.E. 431, 433 (1939) (holding "to constitute an enforceable contract within the statute of frauds, the written memorandum, though it may be informal, must be sufficiently definite to show the essential elements of a valid contract").

Furthermore, we hold that Cronland Building Supplies' affidavit is not admissible to supply elements missing from the 1994 document. A guaranty contract is subject to the parol evidence rule which "prohibits the consideration of evidence as to anything which happened

prior to or simultaneously with the making of a contract which would vary the terms of the agreement." *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 709, 567 S.E.2d 184, 188 (2002) (citation omitted); *see also Wrenn v. Cotton Mills*, 198 N.C. 89, 90, 150 S.E. 676, 677 (1929). However, while parol evidence may be admitted to clarify contract ambiguity, *Robinson v. Benton*, 201 N.C. 712, 713, 161 S.E. 208, 209 (1931), it is not admissible to supply a missing component of a contract. *Rape v. Lyerly*, 287 N.C. 601, 615, 215 S.E.2d 737, 746 (1975). In this case, the contract was fatally defective, not ambiguous. Indeed, there are no terms whose meaning is unclear nor conditions precedent that need explanation. Thus, parol evidence is not admissible. *See Lewis v. Carolina Squire, Inc.*, 91 N.C. App. 588, 595, 372 S.E.2d 882, 886 (1988) (holding "[c]ourts should not under the guise of judicial construction supply key terms omitted by the parties").

In sum, we uphold the trial court's entry of summary judgment for Betsy Sneed. Additionally, we dismiss Cronland Building Supplies' attempt to appeal from the trial court's denial of summary judgment on its claims against Leon Sneed as interlocutory.

Affirmed in part, dismissed in part.

Judges TYSON and LEVINSON concur.

ROGER D. McALLISTER, SR., EMPLOYEE, PLAINTIFF v. WELLMAN, INC., EMPLOYER, SELF INSURED (SEDGWICK OF THE CAROLINAS, INC., ADMINISTRATOR), DEFENDANT

No. COA03-310

(Filed 6 January 2004)

Workers' Compensation— payment of medical treatment— *Hyler* benefits—res judicata

The Industrial Commission did not err in a workers' compensation case by denying defendant employer's motion to dismiss and by concluding that res judicata did not bar plaintiff's claims for additional medical benefits under *Hyler v. GTE Products Co.*, 333 N.C. 258 (1993), because while res judicata might bar relitigation of compensation for other loss, *Hyler* allows plaintiff to recover for new or additional medical ex-

penses even if there has been no material change in the employee's condition or in available medical treatments.

Appeal by defendant from opinion and award of the North Carolina Industrial Commission entered 19 November 2002 by Commissioner Laura Kranifeld Mavretic. Heard in the Court of Appeals 20 November 2003.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellee.

Jane C. Jackson and W. Mark Peck, for defendant-appellant.

TYSON, Judge.

Wellman, Inc. ("Wellman") appeals from the North Carolina Industrial Commission's (the "Commission") opinion and award, which concluded that Roger D. McAllister, Sr. ("plaintiff") was entitled to have Wellman pay for all his medical treatment arising from his injury under *Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993). We affirm.

I. Background

Plaintiff worked as a spinning operator for Wellman. On 9 June 1991, defendant suffered an injury to his lower back. Wellman accepted liability to compensate plaintiff for this injury, which was approved by the Commission. Plaintiff filed a second claim alleging an injury resulting from a fainting incident at Wellman on 26 June 1991. The Commission filed an opinion and award, which stated "[Wellman] shall pay all medical expenses incurred, or to be incurred, by plaintiff as a result of his injury by accident . . . ." Wellman did not appeal.

On 9 June 1999, the Commission denied benefits for plaintiff's claim for head and psychological injuries resulting from the accidents. The Commission's opinion and award stated, "plaintiff's claim for additional benefits based on the alleged disability arising from his initial back injury is barred by *res judicata* where the alleged disability was in existence at the time of the June 22, 1993 hearing before the Deputy Commissioner."

On 6 February 2001, plaintiff requested a hearing with the Commission to determine whether he was entitled to *Hyler* benefits for medical treatment for his back injury on 9 June 1991. Wellman

filed a motion to dismiss and contended that *res judicata* barred plaintiff's claim. The Commission denied Wellman's motion and awarded plaintiff compensation under *Hyler*.

II. Issue

The sole issue on appeal is whether the Commission erred in denying Wellman's motion to dismiss and concluding that *res judicata* did not bar plaintiff's claims for additional medical benefits.

III. *Res Judicata*

A. Standard of Review

Our review is to determine whether the Commission's findings of fact are supported by competent evidence and whether those findings support the Commission's conclusions of law. *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 619 (1991), *disc. rev. denied*, 330 N.C. 613, 412 S.E.2d 87 (1992). The Commission's conclusions of law, are reviewable *de novo*. *Grantham v. R. G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). The issue before us is a question of law. We must determine whether the Commission's findings support its conclusion that plaintiff's request for additional medical benefits under *Hyler* is not barred by *res judicata*.

> The doctrine of *res judicata* precludes relitigation of final orders of the Full Commission and orders of a deputy commissioner which have not been appealed to the Full Commission. The essential elements of res judicata are: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in the prior suit and the present suit; and (3) an identity of parties or their privies in both suits.

Bryant v. Weyerhaeuser Co., 130 N.C. App. 135, 138, 502 S.E.2d 58, 61, *disc. rev. denied*, 349 N.C. 228, 515 S.E.2d 700 (1998) (citation omitted). Here, a final judgment was obtained between the identical parties. We must determine whether the cause of action litigated and resolved in the 1999 opinion and award involved the same cause of action before the Commission in 2001.

B. *Hyler* Benefits

Our Supreme Court stated in *Hyler*, that "where . . . an injured employee's condition appeared stable but required monitoring to detect and prevent possible deterioration, medical expenses incurred

in monitoring the employee's condition would give 'relief' of the type that would require his employer to pay those expenses." 333 N.C. at 261, 425 S.E.2d at 700. In *Hyler*, the Court distinguished compensation for financial loss from medical expenses stating that the "overall intent of the Workers' Compensation Act [is] to allow recovery by employees for work-related injuries." *Id.* at 268, 425 S.E.2d at 704. Our Supreme Court held that medical expenses arising after the original order were allowable, without limitation as to time, even though these future medical expenses involved the same cause of action and same parties. *Id.* at 267, 425 S.E.2d at 704.

We note that following *Hyler*, the General Assembly significantly amended our statutes:

> *Hyler* overruled a seventeen-year old court of appeals [sic] decision that interpreted section 97-47 of the North Carolina General Statutes to apply a two-year statute of limitations to claims for medical compensation resulting from traumatic injuries.
>
> . . . .
>
> Hyler and those similarly situated were entitled to request compensation for ongoing medical expenses more than two years after their last payments. Employers and insurers justifiably became concerned that this new interpretation of the law exposed them to significantly increased liability. Insurers responded by raising rates, ostensibly to establish reserves to cover this new liability.
>
> New section 97-25.1 at least partially reverses *Hyler* by reimposing a two-year statute of limitations on reopening claims for medical compensation.

John Richard Owen, *The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance*,73 N.C. L. Rev. 2502, 2506, 2509-2510 (1995). N.C. Gen. Stat. § 97-25.1 became effective upon ratification on 5 July 1994, and provides that the right to medical expenses terminates two years after the last payment to plaintiff, unless plaintiff applies for additional medical benefits within that period. 1993 N.C. Sess. Laws ch. 679, § 11.1.

In 2001, plaintiff requested *Hyler* benefits for medical treatment for his back injury, which occurred on 9 June 1991, prior to the ratification of N.C. Gen. Stat. § 97-25.1. Because of the date of the injury, *Hyler* applies here. *Hyler* benefits were not at issue during the 1999

hearing. The award section of the opinion and award does not mention medical expenses, but instead refers to and denies "additional benefits." Plaintiff's request filed with the Commission in 2001 involves the issue of "medical expenses" for an admittedly compensable injury. While *res judicata* might bar relitigation of compensation for other loss, *Hyler* allows plaintiff to recover for "new or additional medical expenses, even if there has been no material change in the employee's condition or in available medical treatments." *Hyler*, 333 N.C. at 267, 425 S.E.2d at 704. This assignment of error is overruled.

IV. Conclusion

The Commission did not err in denying Wellman's motion to dismiss. *Res judicata* does not bar plaintiff from seeking medical expenses arising out of the compensable injury on 9 June 1991. The Commission's opinion and award is affirmed.

Affirmed.

Judges HUDSON and STEELMAN concur.

GWENDOLYN W. PHILLIPS, PLAINTIFF v. MARILYN OWENBY LEDFORD AND GEORGE RICHARD OWENBY, AS CO-ADMINISTRATORS OF THE ESTATE OF BENJAMIN JAY OWENBY, AND MARILYN OWENBY LEDFORD, GEORGE RICHARD OWENBY, CLAUDIA DIANNE HENDLEY, DOROTHY MARIE SHOFF, LINDA GAIL JONES, ARTHUR PAUL BARKER, TIMMY BARKER, RONNIE BARKER, SANDY BARKER RUSSELL, DONNIE OWENBY, LISA OWENBY SETZER, AS HEIRS OF THE ESTATE OF BENJAMIN JAY OWENBY DEFENDANTS

No. COA02-1605

(Filed 6 January 2004)

Intestate Succession— illegitimate child—adjudication or acknowledgment during lifetime required

The trial court did not err by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) in a declaratory judgment action seeking a determination that plaintiff illegitimate child was decedent's sole heir who was entitled to inherit from her father through this state's intestacy laws, because: (1) plaintiff's complaint did not include any claim that decedent was

adjudged to be her father or that decedent acknowledged himself to be plaintiff's father in a written instrument which was duly executed and filed as required by N.C.G.S. § 29-19(b)(1) and (2); (2) a positive DNA test is not enumerated in the statute as a method of meeting the requirements to legitimate a child; and (3) although plaintiff bases her appeal on the grounds that N.C.G.S. § 29-19 violates her equal protection and due process rights, the courts will avoid constitutional questions even if properly presented where a case may be resolved on other grounds.

Appeal by plaintiff from judgment entered 17 September 2002 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 17 September 2003.

Hyler & Lopez, P.A., by George B. Hyler, Jr. and Robert J. Lopez, attorneys for plaintiff.

James Michael Lloyd, P.A., by James Michael Lloyd, attorney for defendant.

TIMMONS-GOODSON, Judge.

Gwendolyn W. Phillips ("plaintiff") appeals from a trial court dismissal granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). For the reasons stated herein, we affirm the trial court's decision.

The facts of this case are as follows: Benjamin Jay Owenby ("decedent") died intestate in Buncombe County, North Carolina on 29 January 2002. At the time of his death, decedent was not married, not survived by parents, and had no children other than plaintiff. Plaintiff is the natural and biological daughter of decedent and Nancy Wilson Waldron. Decedent and Waldron were never married.

On 11 March 2002, the Buncombe County Estate Division opened decedent's estate. Marilyn Owenby Ledford and George Richard Owenby ("defendants"), were appointed co-administrators for the estate. Defendants are decedent's siblings.

Decedent had seven siblings, three of whom predeceased him. Two of the deceased siblings had children and the third deceased sibling had no children. The four surviving siblings and the children of the deceased siblings were named in the Application of Letters of Administration as the decedent's heirs and those persons entitled to share in the decedent's estate, and are also defendants in this action.

Born on 19 April 1972, plaintiff was not told that she was decedent's daughter until several years prior to decedent's death. After decedent was told that he was plaintiff's biological father, plaintiff and decedent were tested by a DNA genetic paternity testing laboratory which determined to a greater than 99% level of certainty that decedent could not be excluded as the father of the plaintiff. After the DNA testing, plaintiff and decedent developed a parent-child relationship. Decedent acknowledged to his family, friends, and the general public that he was plaintiff's father. Furthermore, decedent's siblings and their families were aware that plaintiff was decedent's daughter. However, decedent never legitimated plaintiff, and decedent was never adjudicated to be plaintiff's father during his lifetime.

On 17 June 2002, plaintiff filed this action pursuant to N.C. Gen. Stat. § 1-253, seeking a declaratory judgment that she is the sole heir of the decedent. Defendants filed a motion to dismiss which was granted, and an order of dismissal was entered on 17 September 2002. It is from this order that plaintiff now appeals.

Plaintiff's sole assignment of error is that the trial court improvidently granted defendants' motion to dismiss because the statute which stood as grounds for dismissal, N.C. Gen. Stat. § 29-19, as applied violates plaintiff's right to due process and equal protection under the North Carolina and United States Constitutions. Plaintiff believes that the statute lacks a substantial and legitimate relationship to the particular state interest that it purports to protect, and therefore is unconstitutional.

The first step in this Court's analysis is to consider the trial court's treatment of the motion to dismiss. On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review 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.' " *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) *quoting Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "The 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." *Id.* at 277-78 *citing Dixon v. Stewart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). In the present case, this Court must consider whether plaintiff's complaint, treated as if all the allegations therein are true, would meet the statutory require-

ment for an illegitimate child to inherit from her father through this state's intestacy laws. We hold that plaintiff's complaint does not meet this requirement.

The statute governing succession by, through and from illegitimate children states in pertinent part:

> For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from: (1) any person who has been finally adjudged to be the father of such child . . .; (2) any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer . . . and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

N.C. Gen. Stat. § 29-19(b)(1) and (2) (2001). "Absent the statute, an illegitimate child has no right to inherit from his or her putative father." *Hayes v. Dixon*, 83 N.C. App. 52, 54, 348 S.E.2d 609, 610 (1986) *citing Herndon v. Robinson*, 57 N.C. App. 318, 291 S.E.2d 305 (1982).

In her complaint, plaintiff asserts the following pertinent allegations:

17. Several years prior to the death of the Decedent, Benjamin Jay Owenby:

    a. Plaintiff learned that the Decedent was her father;

    b. Plaintiff and the Decedent developed a close and loving relationship;

    c. Decedent acknowledged and held to his family, his friends and the general public that he was the father of the Plaintiff;

    d. Decedent's siblings and their families were aware that the Plaintiff was the daughter of the Decedent.

18. Several years prior to the death of the decedent, the Plaintiff and the [D]ecedent were tested by a genetic paternity testing laboratory and it was determined to a greater than 99% level of certainty that the [D]ecedent could not be excluded as the father of the child.

Plaintiff's complaint did not include any claim that decedent was adjudged to be her father, or that decedent acknowledged himself to be plaintiff's father in a written instrument which was duly executed and filed. Although the North Carolina Supreme Court has recognized DNA profile testing to be generally admissible evidence as a reliable technique within the scientific community, *see State v. Pennington*, 327 N.C. 89, 101, 393 S.E.2d 847, 854 (1990), a positive DNA test is not enumerated in the statute as a method of meeting the requirements to legitimate a child.

"The statute mandates what at times may create a harsh result. It is not, however, for the courts but rather for the legislature to effect any change." *Hayes*, 83 N.C. App. at 54, 348 S.E.2d at 610. The allegations set forth in plaintiff's complaint do not satisfy the statutory requirement for an illegitimate child to inherit through the state's intestacy laws. Therefore, these allegations, even when treated as true, are not sufficient to state a claim upon which relief may be granted. For this reason, we conclude that the trial court properly granted defendants' motion to dismiss.

Plaintiff bases her appeal of the Rule 12(b)(6) dismissal on an argument that N.C. Gen. Stat. § 29-19 violates her equal protection and due process rights as afforded her by the North Carolina and United States Constitutions. Because we have determined that plaintiff's complaint does not state a claim upon which relief can be granted, we need not address whether the statute violates plaintiff's rights under the North Carolina and United States Constitutions. *See Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds."). The trial court properly granted defendants' motion to dismiss and therefore we decline to address the constitutional issues presented in this appeal.

No error.

Judges HUDSON and ELMORE concur.

OSHER v. RIDINGER

[162 N.C. App. 155 (2004)]

DAVID OSHER, PLAINTIFF v. JAMES H. RIDINGER, LOREN A. RIDINGER, MARTIN L. WEISSMAN, AND MARKET AMERICA, INC., DEFENDANTS

No. COA03-173

(Filed 6 January 2004)

Corporations— mergers—cash-out—exclusive remedy for inadequate price

Dissent and appraisal is the exclusive remedy for shareholders who are aggrieved by the price offered and the method used to set the price in a cash-out merger of a North Carolina corporation. A class-action complaint alleging breach of fiduciary duties by a board of directors during a buy-out was properly dismissed for failure to state a claim. N.C.G.S. § 55-13-02.

Appeal by plaintiff from judgment entered 13 December 2002 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 1 December 2003.

Lesesne & Connette, by Edward G. Connette, and Schiffrin & Barroway, LLP, by Gregory M. Castaldo, pro hac vice, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Pressly M. Millen, for defendant-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jenrigan, L.L.P., by Carl N. Patterson, Jr. and J. Mitchell Armbruster, on behalf of the North Carolina Biosciences Organization, the Council for Entrepreneurial Development, the Piedmont Entrepreneurs Network, and the Metrolina Entrepreneurial Council, amici curiae.

EAGLES, Chief Judge.

Plaintiff was a minority public shareholder of Market America, Inc. The individual defendants, James and Loren Ridinger and Martin Weissman, were the only members of Market America's board of directors. On or about 17 October 2001, the Ridingers, who at that time collectively owned 78% of the outstanding shares of common stock of Market America, announced their intention to acquire all of Market America's common stock that they did not already own for $8.00 per share in cash. Generally, the common stock has traded in the $4.00 to $5.00 range. Weissman joined the Ridingers in the buyout

group shortly after the proposal was made to Market America. The proposal called for Market America to merge with Miracle Marketing, a corporation completely owned by Mr. Ridinger. Market America issued a proxy statement that made the merger conditional upon the acceptance of a majority of the minority shareholders. A majority of the minority shareholders voted in favor of the merger, which was completed on or about 24 June 2002.

On 19 October 2001, plaintiff filed, individually and as a class action on behalf of all public shareholders of Market America, a complaint challenging the merger. Plaintiff filed an amended complaint on 4 November 2002 alleging breach of fiduciary duty by unfair dealing, unlawful coercion and unfair price. On 15 November 2002, defendants moved to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b) on the grounds that the plaintiff lacked standing and failed to state a claim on which relief can be granted. On 13 December 2002, the trial court dismissed the action. (Though the order notes that the court "[took] into consideration the Memorandum provided by Plaintiff and the materials provided by Defendants," the record is devoid of any additional memorandum or materials and it appears that the court did not consider anything that could have converted the motion to one for summary judgment.) Plaintiff appeals.

In our review of the trial court's dismissal of this action pursuant N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), we must consider the allegations of the plaintiff's complaint as true. *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 155, 461 S.E.2d 13, 14 (1995), *disc. review improvidently allowed*, 343 N.C. 118, 468 S.E.2d 58 (1996).

The plaintiff contends that the Ridingers began to investigate the possibility of "squeezing out" the minority shareholders by instituting a cash merger whereby the Ridingers would purchase the outstanding shares owned by the minority shareholders. A cash merger, also known as a "freeze-out" or "squeeze-out" merger, occurs when the majority shareholders of a corporation attempt to gain control of the corporation by "chasing out" the shares of the minority shareholders. *See* Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 24-09, at 24-17 and 24-18 (7th ed. 2002). When shareholders oppose these actions, N.C. Gen. Stat. § 55-13-02, the dissent and appraisal statute, provides that a shareholder may dissent from a plan of a merger proposed by the corporation or the majority

shareholders and obtain the fair value of his shares. *See* N.C. Gen. Stat. § 55-13-02(a) (2003).

Appraisal is the exclusive remedy for a shareholder who wishes to exercise a dissenter's rights. N.C. Gen. Stat. § 55-13-02(b) (2003) provides:

> A shareholder entitled to dissent and obtain payment for his shares under this Article may not challenge the corporate action creating his entitlement, including without limitation a merger solely or partly in exchange for cash or other property, unless the action is unlawful or fraudulent with respect to the shareholder or the corporation.

The statute does allow for remedies other than appraisal where dissatisfied shareholders can show the transaction was "unlawful" or "fraudulent."

This court has consistently concluded that where plaintiffs' complaints are essentially about the price received in a merger and the method by which the price was set, that plaintiffs have not sufficiently alleged an "unlawful" or "fraudulent" transaction. *Werner v. Alexander*, 130 N.C. App. 435, 502 S.E.2d 897 (1998); *IRA ex rel. Oppenheimer v. Brenner Companies, Inc.*, 107 N.C. App. 16, 419 S.E.2d 354, *disc. review denied*, 332 N.C. 666, 424 S.E.2d 401 (1992).

> [Although] a statutory appraisal remedy "may not be adequate . . . in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved[,]" . . . a "remedy beyond the statutory procedure is not available where the shareholder's objection is essentially a complaint regarding the price which he received for his shares."

Werner at 440, 502 S.E.2d at 901, quoting *Oppenheimer* at 20-21, 419 S.E.2d at 357-58.

Here, the plaintiff's allegations have similarities to those in *Oppenheimer* and *Werner*, and include the following allegations:

> 11. Abandoned and at the same time threatened by their Board, Market America's minority shareholders accepted the $8.00 per share proposal and the merger closed on or about July 24, 2002.

> As described below, plaintiff and the other minority shareholders have been injured *because $8.00 per share was not a fair price for their shares.*
>
> . . . .
>
> 54. On or about July 22, 2002, Market America's shareholders approved the merger and the merger closed on or about July 24, 2002. Market America's shareholders have been damaged *because the $8.00 merger price was grossly unfair and inadequate* . . . .
>
> . . . .
>
> 56. The $8.00 per share price was unilaterally set by Mr. Ridinger, the person who benefitted the most from cashing out Market America's minority shareholders for *a lowball price.*
>
> . . . .
>
> 70. Defendants' misleading representation pressured Market America's shareholders to accept the $8.00 per share price, denying them free choice. Plaintiff and the Class were wrongfully forced to vote for a merger *at an unfair price* . . . .
>
> . . . .
>
> 72. The price paid to the cashed-out minority stockholders was *entirely unfair and inadequate.*

(Emphasis added).

Plaintiff's complaint alleged breach of fiduciary duty on the part of the defendants as a result of unfair dealing, unlawful coercion and unfair price. Plaintiff has urged this court to adopt the "entire fairness" test for analyzing cash-out mergers announced in the Delaware Supreme Court's decision in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983). Both *Oppenheimer* and *Werner* discussed the *Weinberger* decision and did not adopt the "entire fairness" test. We are bound by N.C. Gen. Stat. § 55-13-02 and our decisions in *Oppenheimer* and *Werner*. Dissent and appraisal is the exclusive remedy for shareholders who are aggrieved by the price offered and the method by which the price is set in a cash-out merger of a North Carolina corporation. All of the allegations in plaintiff's complaint center around the plaintiff's allegation that the defendants engaged in a course of conduct designed to enable them to buy the shares of the minority at an unfair price. The plaintiff's com-

plaint has failed to adequately allege an unlawful or fraudulent transaction by the defendants. The trial court did not err in dismissing plaintiff's complaint.

Affirmed.

Judges MARTIN and LEVINSON concur.

STATE OF NORTH CAROLINA v. JOHN BOYD

No. COA03-37

(Filed 6 January 2004)

1. **Appeal and Error— failure to dismiss criminal charge—no motion at trial**

Defendant's contention that a charge of conspiracy to sell a controlled substance should have been dismissed was not reviewed on appeal because he did not move to dismiss at trial, although he did move to dismiss other charges.

2. **Sentencing— aggravating factors—acquittals of related offenses—facts proven**

The trial court properly considered the aggravating factor of involving a person under 16 when sentencing defendant for conspiracy to sell a controlled substance even though defendant was acquitted of contributing to the delinquency of a minor and of using a minor to commit a controlled substance offense. The court may consider any aggravating factors reasonably related to the purposes of sentencing which it finds proven by a preponderance of the evidence. The minor's age in this case was stipulated and it cannot be inferred from the acquittals that the jury found insufficient evidence to conclude that the co-conspirator was a minor.

Appeal by Defendant from judgment entered 13 August 2002 by Judge J. Gentry Caudill in Superior Court, Mecklenburg County. Heard in the Court of Appeals 28 October 2003.

Assistant Attorney General Martin T. McCracken, for the State

Robert W. Ewing, for the Defendant

WYNN, Judge.

From his conviction for Conspiracy to Sell a Controlled Substance, Defendant, John Boyd, argues on appeal that the trial court erred by failing to grant his motion to dismiss, and considering as an aggravating sentencing factor that he involved a person under 16 years of age in the commission of a crime. We find no error in Defendant's trial.

At trial, the State's evidence tended to show that on 25 October 2001, while conducting undercover drug buys, Charlotte Police Officers Eric Duft and Susan O'Donohue stopped two juveniles in the Colony Acres Drive neighborhood and asked for some "hard" or "rock"—slang terms for the drug crack cocaine. In response, Quintine Hampton, one of the youths, pointed across the street and yelled for "J.B." to come over to the car. Responding to Hampton, Defendant approached the officers' car. Officer Duft reiterated his desire to find some "hard," but before discussing the drug request, Defendant asked the officers whether they were police. Officer Duft denied being a police officer and assured Defendant he "just wanted to get hooked up." Apparently satisfied, Defendant told Officer Duft to pull his car over and wait while he went down the street to get "it."

The officers then observed Hampton and Defendant cross Colony Acres Drive before losing sight of them. After two or three minutes, Hampton returned alone and handed Officer Duft a clear plastic bag containing a rock of crack cocaine. Officer Duft paid Hampton with a marked twenty dollar bill. Thereafter, Defendant and Hampton were arrested separately.

After estimating that he had conducted approximately 200-300 similar undercover drug buy stings, Officer Duft testified that "it is common for more than one person to be involved in the [drug] transaction" and sometimes, "they will use a younger person to sell them [because] [t]here is less consequences for a juvenile than there is for an adult." The arresting officer testified that, when Defendant was apprehended, "He stated to me; and I, quote, 'I did not sell shit. All I did was get a piece of the rock.' " At the close of the State's evidence, defense counsel did not "care to be heard" on the conspiracy charge, but did move to dismiss all remaining charges; the motions were denied.

In his defense, Defendant denied the statement attributed to him by the arresting officer. Rather, Defendant testified that he was walk-

ing towards Hampton to warn him that Officers Duft and O'Donohue were police officers. When Defendant "couldn't catch [Hampton's] bicycle" he turned around to go home. Defendant maintained "I don't have nothing to do with it."

Ultimately, the jury convicted Defendant of Conspiracy to Sell a Controlled Substance but acquitted him of the remaining charges of Sale of a Controlled Substance, Contributing to the Delinquency of a Minor[1], and Employing and Using a Minor to Commit a Controlled Substance Offense.[2] The trial judge found one aggravating factor (that Defendant involved a person under the age of 16 in the commission of the offense) outweighed mitigating factors (that Defendant had a support system in the community and was gainfully employed) and sentenced Defendant in the aggravated range of 18 to 22 months imprisonment. Defendant appealed.

[1] Defendant first argues the trial court erred by denying his motion to dismiss the charge of Conspiracy to Sell a Controlled Substance. For procedural reasons, we disagree.

N. C. R. App. P. 10(b)(3) provides that "a defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action . . . ." The rules further provide that by presenting evidence after the close of the State's case, a defendant waives any previous motion to dismiss, and in order to preserve an insufficiency of the evidence argument for appeal, defendant must renew his motion to dismiss at the close of all evidence.

At the close of the State's case, the trial judge in the instant case asked defense counsel whether he cared to make "any motions for the defendant?" Defense counsel responded:

> Yes, Your Honor. I think, taking the evidence in the light most favorable to the state, their strongest case seems to be for conspiracy. And so, I don't care to be heard on that . . . I'll ask you to dismiss the sale, at the close of evidence.

---

1. N.C.G.S. § 14.316.1: "to knowingly or willfully cause, encourage or aid any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused or neglected."

2. N.C.G.S. § 90-95.4: "to hire or intentionally use a minor to violate G.S. § 90-95(a)(1)."

At the close of all evidence, Defense counsel renewed prior motions to dismiss: "We would rest and renew our motions to dismiss; and, readopt our arguments, special as they relate to the sale, conspiracy, contributing to the delinquency of a minor; and, the engaging a minor in drug trafficking." By that statement, defense counsel renewed his argument that he "didn't care to be heard" on the conspiracy charge because "their strongest evidence seems to be for conspiracy." Defense counsel did not avail himself of his opportunity to move to dismiss the conspiracy charge at the close of the State's evidence, and thus, he could not renew a nonexistent motion at the close of all evidence. Accordingly, we are precluded from reviewing the merits of Defendant's argument. *See State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 492 (1987) (holding that "a defendant who fails to make a motion to dismiss at the close of all the evidence may not attack on appeal the sufficiency of the evidence at trial."). We note, however, that even if this issue had been properly preserved for appeal, the evidence in the record sustains the trial court's denial of Defendant's motion to dismiss this charge.

[2] Defendant next argues that because Hampton's age was an element of the crimes for which he was acquitted, Contributing to the Delinquency of a Minor and Employing and Using a Minor to Commit a Controlled Substance Offense, the trial court erred by considering the sentencing aggravating factor that he "involved a person under 16 in the commission of a crime." We disagree.

In North Carolina, a trial court may consider any aggravating factors it finds proved by the preponderance of the evidence that are reasonably related to the purposes of sentencing. N.C.G.S. § 15A-1340l.4(a). N.C.G.S § 15A-1340.16(d)(13) allows a court to aggravate a defendant's sentence from the presumptive range when "defendant involve[s] a person under the age of 16 in the commission of the crime."

In *State v. Marley*, 321 N.C. 415, 424, 364 S.E.2d 133, 138 (1987), our Supreme Court stated that "once a defendant has been acquitted of a crime he has been set free or judicially discharged from an accusation; released from . . . a charge or suspicion of guilt." Therefore, our Supreme Court held "to allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." In *Marley*, the defendant had been tried for first degree murder upon the theory of premeditation and

deliberation. The jury found the defendant guilty of second degree murder. Thus, one can infer from the jury's verdict in *Marley* that the jury determined there was insufficient evidence of premeditation and deliberation.

In this case, it cannot be inferred from the jury's acquittal of Defendant on the contributing to the delinquency of a juvenile and employing and intentionally using a minor to commit a controlled substance offense charges that it found there was insufficient evidence to conclude beyond a reasonable doubt that Hampton was a minor. Indeed, the parties in this case stipulated Hampton was thirteen years old. Unlike Marley, where the difference between first degree murder and second degree murder was the jury "decided that there [was] not sufficient evidence to conclude beyond a reasonable doubt that defendant premeditated and deliberated the killing," *Marley*, 321 N.C. at 424, 364 S.E.2d at 138, in this case, we are unable to explain rationale behind the jury's verdict. Thus, by convicting Defendant of conspiracy to sell a controlled substance, the jury concluded that Johnny Boyd and Quintinie Hampton were conspirators. Therefore, we uphold the trial court's consideration as an aggravating sentencing factor that Defendant involved a person under the age of 16 in the commission of a crime.

No error.

Judges TIMMONS-GOODSON and ELMORE concur.

CLEVELAND E. COLEY, JR., AND WIFE SHARON COLEY, AND EDWIN DAVIS, PLAINTIFFS v. CHAMPION HOME BUILDERS CO. F/K/A CHB MERGER CORP., AND REDMAN HOMES, INC. F/K/A REDMAN MOBILE HOMES, INC., DEFENDANTS

No. COA02-1697

(Filed 6 January 2004)

Unfair Trade Practices— sale of mobile home tie-downs—allegations sufficient

Plaintiff's allegations of actual injury were sufficient to state a claim for unfair and deceptive acts in marketing soil anchor tie-downs for mobile homes.

Appeal by plaintiffs from judgment entered 22 August 2002 by Judge James R. Vosburgh in Pender County Superior Court. Heard in the Court of Appeals 15 September 2003.

Shipman & Hodges, L.L.P., by Gary K. Shipman and William G. Wright, and Ness Motley, P.A., by Edward B. Cottingham, Jr., for plaintiff-appellants.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by J. Alexander S. Barrett and J. Scott Hale, for defendant-appellee.

STEELMAN, Judge.

Plaintiffs appeal the order of the trial court dismissing their claim against defendant, Champion Home Builders Co., for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

This action was instituted by plaintiffs in the Superior Court of Pender County against defendants Champion Home Builders Co., Champion Enterprises, and Redman Homes, Inc. on 3 May 2001. On 5 June 2001, this action was removed to the United States District Court for the Eastern District of North Carolina. On 26 February 2002, the Honorable James C. Fox, Senior United States District Judge entered an order dismissing plaintiffs' complaint as to defendant Champion Enterprises, Inc. for lack of personal jurisdiction and allowing plaintiffs' motion to remand the case to the state courts of North Carolina. On 14 August 2002, defendants renewed their motion to dismiss before the Superior Court of Pender County. Prior to the hearing on the motion, plaintiffs voluntarily dismissed their claims against defendant Redman Homes, Inc. This left Champion Home Builders, Inc. (Champion) as the only remaining defendant. On 19 August 2002, the trial court dismissed plaintiffs' complaint as to Champion.

Plaintiffs' complaint and amended complaint assert a single cause of action against Champion for unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes. In addition to plaintiffs' individual claims, their complaint asserts a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure on behalf of similarly situated individuals.

In their complaint and amended complaint, plaintiffs make the following allegations: Champion manufactures mobile homes which are marketed and sold in North Carolina and other states. The United

States Department of Housing and Urban Development (HUD) promulgates regulations pertaining to the manufactured housing industry that require all mobile home manufacturers to designate in their consumer manual at least one method to support and anchor their mobile homes. The Commissioner of Insurance of the State of North Carolina is authorized to adopt rules to carry out the regulations adopted by HUD. N.C. Gen. Stat. § 143-146(e) (2003). The mobile home is anchored in order to prevent personal injury and property damage caused by movement of the mobile home during high winds.

Champion designates in its consumer manual that the "soil anchor tie-down system" is recommended for use on its homes. In addition, Champion manufactures its mobile homes with clips and corner straps to be used with a soil anchor tie-down system. The consumer manuals accompanying Champion's mobile homes direct purchasers of their homes to use the anchors and straps. Champion instructs retailers of its mobile homes to inform purchasers that the homes are safe and secure when installed with the soil anchor tie-down system, thereby promoting the sale of soil anchor tie-down systems. Consumers rely on these assertions when purchasing their mobile homes. Champion makes these recommendations despite knowledge of testing that indicates the soil anchor tie-down system is defectively designed and does not safely secure a mobile home in high winds. This testing was reported in well-known industry publications, government publications and publications maintained and indexed by the Manufactured Housing Institute.

Plaintiffs are each owners of mobile homes manufactured by Champion, which are secured to the ground by a soil anchor tie-down system. The soil anchor tie-down system specified for use with their mobile homes is "defective and unreasonably dangerous in that it does not meet the minimum resistance standards set forth by federal and state regulations." As a result of this defect, plaintiffs are exposed to the risk of personal injury and property damage during high winds. This risk is exacerbated by the fact that Champion has led plaintiffs to believe that their homes are safe and secure when the soil anchor tie-down system is in use. Plaintiffs have been damaged by purchasing a system that does not meet HUD standards, and they will incur expenses to procure a replacement system to properly secure their homes.

The sole issue argued by the parties in this appeal is whether plaintiffs have made a sufficient allegation of actual injury to survive a motion to dismiss for failure to state a claim upon which relief may

be granted. A motion to dismiss for failure to state a claim upon which relief may be granted challenges the legal sufficiency of a pleading. *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000). In ruling on a motion to dismiss under Rule 12(b)(6), a court must determine whether, taking all allegations in the complaint as true, relief may be granted under any recognized legal theory. *Taylor v. Taylor*, 143 N.C. App. 664, 668, 547 S.E.2d 161, 164 (2001).

Unfair or deceptive acts or practices in or affecting commerce are unlawful in North Carolina. N.C. Gen. Stat. § 75-1.1 (2003). To prevail on a claim for unfair and deceptive trade practices, plaintiffs must show: (1) an unfair or deceptive act or practice; (2) in or affecting commerce; (3) which proximately caused actual injury to plaintiffs. *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992). Thus, to recover damages, plaintiffs must prove they suffered actual injury as a result of defendant's unfair and deceptive act. *See Mayton v. Hiatt's Used Cars, Inc.*, 45 N.C. App. 206, 212, 262 S.E.2d 860, 864, *disc. rev. denied*, 300 N.C. 198, 269 S.E.2d 624 (1980).

Actual injury may include the loss of the use of specific and unique property, the loss of any appreciated value of the property, and such other elements of damages as may be shown by the evidence. *Poor v. Hill*, 138 N.C. App. 19, 34, 530 S.E.2d 838, 848 (2000). "The measure of damages used should further the purpose of awarding damages, which is 'to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.' " *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 233, 314 S.E.2d 582, 585, *disc. rev. denied*, 311 N.C. 751 321 S.E.2d 126 (1984) (quoting *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950)). Moreover, the treble damages provision of Chapter 75 was created in part because the remedies for fraud, breach of contract, and breach of warranty often were ineffective. *Canady*, 107 N.C. App. at 260, 419 S.E.2d at 602 (1992). Thus, "it would be illogical to hold that only those methods of measuring damages could be used" to determine the actual injury suffered by a Chapter 75 plaintiff. *Id.* (quoting *Bernard*, 68 N.C. App. at 232, 314 S.E.2d at 585).

In their complaint, plaintiffs allege they should be awarded "the costs that they have incurred to purchase and install the defective soil anchor/tie down system or . . . the costs [to] retro-fit their tie-down system to one that provides a safe and reliable method to secure the homes in severe weather conditions and meets the minimal govern-

mental standards." When viewed in the light most favorable to plaintiffs, this is a sufficient allegation of actual injury to state a claim for unfair and deceptive trade practices.

Because plaintiffs' complaint contains allegations that they suffered actual injury proximately caused by Champion's unfair and deceptive acts, the trial court erred in dismissing plaintiffs' claim. "It will be plaintiffs' substantial burden, as this case progresses, to provide sufficient evidence to support their claim that they have suffered actual injury as a result of [Champion's] actions. At this juncture, however, they are entitled to proceed with their claims." *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 37, 568 S.E.2d 893, 902-03 (2002), *cert. denied*, 157 L. Ed. 2d 310, — U.S. — (2003).

REVERSED.

Chief Judge EAGLES and Judge McCULLOUGH concur.

JOHN ALDEN LIFE INSURANCE COMPANY, PLAINTIFF v. NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANT

No. COA03-229

(Filed 6 January 2004)

Workers' Compensation— payment of medical expenses—equitable subrogation

Plaintiff health insurer's claim against the Insurance Guaranty Association (IGA) on behalf of an insolvent workers' compensation carrier for payment of an insured's medical expenses after a work-related heart attack constituted a claim for equitable subrogation for which the IGA was liable where plaintiff paid the medical expenses in good faith without knowledge that the heart attack was a compensable workers' compensation injury, and the health insurance policy excluded from coverage compensable workers' compensation injuries.

Appeal by Plaintiff from judgment entered 22 November 2002 by Judge Stafford G. Bullock in Superior Court, Wake County. Heard in the Court of Appeals 18 November 2003.

Allen Mills of Frederic E. Toms & Associates, P.L.L.C., for the Plaintiff.

Christopher J. Blake and Betsy Cooke of Moore & Van Allen, P.L.L.C., for the Defendant.

WYNN, Judge.

By this appeal, John Alden Life Insurance Company ("John Alden Insurance") seeks reversal of the trial court's summary judgment order dismissing all of its claims against North Carolina Insurance Guaranty Association ("Guaranty Association"). After careful review, we reverse and remand.

The facts giving rise to this case are not disputed. On 28 July 1997, David Nugent suffered a severe heart attack during the course of his employment at Republic Industries. To cover the cost of his extensive medical treatment, which included a heart transplant, Mr. Nugent submitted claims to his health insurance carrier, John Alden Insurance, and his employer's worker's compensation insurance carrier, Credit General Insurance Company ("Credit General"). Although the policy issued by John Alden Insurance specifically excluded from coverage compensable workers' compensation injuries, John Alden Insurance began paying for Mr. Nugent's medical care because it was unaware that Mr. Nugent's injury was work-related.

In the meantime, Credit General denied worker's compensation insurance coverage for Mr. Nugent's injuries. Mr. Nugent appealed to the North Carolina Industrial Commission and while the matter was pending, Credit General was declared insolvent. As a result, Guaranty Association became a party to Mr. Nugent's worker's compensation action. *See* N.C. Gen. Stat. § 58-48-5 (stating that the Guaranty Association was created to ensure North Carolina citizens "avoid financial loss . . . [as] policy holders because of the insolvency of an insurer.").

On 18 September 2001, the Industrial Commission issued an Order and Award, requiring that Guaranty Association "pay for all medical treatment as a result of the plaintiff's heart attack." Guaranty Association did not appeal from that decision; accordingly, it began paying for Mr. Nugent's medical care expenses. However, Guaranty Association refused to reimburse John Alden Insurance for the $722,335.62 expended on Mr. Nugent's care prior to the Industrial Commission's Order. In response, John Alden Insurance brought

the subject action against Guaranty Association to recover payments made for Mr. Nugent's medical care.

From the trial court's grant of summary judgment in favor of Guaranty Association, John Alden Insurance argues on appeal that the trial court erred because its claim for reimbursement arises from an entitlement for equitable subrogation. We agree.

Under N.C. Gen. Stat. § 58-48-35, the Guaranty Association "shall be obligated to the extent of the covered claims existing prior to the determination of insolvency." The statute defines covered claims as follows:

> 'Covered claim' means an unpaid claim . . . which . . . arises out of and is within the policy . . . as issued by an insurer, if such insurer becomes an insolvent insurer . . . 'Covered claim' shall not include any amount . . . due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation or contribution recoveries or otherwise.

N.C. Gen. Stat. § 58-48-20. Thus, under the plain language of the statute, Guaranty Association is not obligated to pay subrogation claims.

However, this Court has distinguished conventional subrogation claims from equitable subrogation claims:

> An insurer asserting a [conventional] subrogation claim rightfully paid damages for its insured, in the first instance, under its policy, but contends that another party is primarily liable for the damages. By contrast, an insurer asserting an equitable subrogation claim did not owe the claim, in the first instance; it was owed by another insurer who wrongfully refused to pay the claim.

North Carolina Ins. Guar. Ass'n v. Century Indem. Co., 115 N.C. App. 175, 190, 444 S.E.2d 464, 473 (1994) (citations omitted) (emphasis in original), *cert. denied*, 337 N.C. 696, 448 S.E.2d 532 (1994). In *Century*, this Court held Guaranty Association liable for Plaintiff's equitable subrogation claim and explained:

> This Court has stated that while conventional subrogation "arises from an express agreement of the parties," equitable subrogation "rests not on contract but on principles equity." Furthermore, this Court has held that equitable subrogation is a "remedy [which] is highly favored and liberally applied." We conclude that our

> General Assembly did not intend for the term "subrogation" to encompass equitable subrogation . . . .

Id. (Internal Citations omitted, emphasis in original.)

In this case, John Alden Insurance paid for Mr. Nugent's medical expenses in good faith, lacking knowledge that Mr. Nugent's heart attack was a compensable workers' compensation injury. Not until the Industrial Commission issued its Opinion and Award on 18 September 2001 did John Alden Insurance know Mr. Nugent's claim arose out of and as a result of his work at Republic Industries, and was thus specifically excluded from coverage under the explicit language of the policy's "Charges Not Covered" provision, which states:

> For treatment of any Injury or Illness that arises out of, or as the result of, any work for wage or profit, paid or payable under the Workers' Compensation Act; except that, this exclusion will not apply to:
>
> a. the sole proprietor, if the Employer is a proprietorship;
>
> b. a partner of the Employer, if the Employer is a partnership;
>
> c. an executive officer of the Employer, if the Employer is a corporation;
>
> for any treatment that results from Injury or Illness that arises out of or as a result of any work for the Employer and then only if he or she is not required to have coverage under any Workers Compensation Act or similar law and does not have such coverage.

[Appendix A, Health Insurance Policy, Rider p. 7, Policy p. 19]

Notwithstanding this exclusion under John Alden Insurance's policy, Guaranty Association asserts that "[d]uring those three and a half years that the worker's compensation claim was either not filed or denied, John Alden remained contractually and primarily obligated to pay the medical expenses of Mr. Nugent." We disagree. To the contrary, as in *Century*, John Alden Insurance presented an equitable subrogation claim based upon payments made for injuries that arose from an uncovered event—a work-related injury payable under the Workers Compensation Act. Since Mr. Nugent suffered from an injury compensable under the Workers Compensation Act, under the policy provided by John Alden Insurance, he was not entitled to coverage.

Accordingly, the trial court erred in granting Guaranty Association's motion for summary judgment. Indeed, under the facts of this case, we remand this matter to the trial court for entry of summary judgment in favor of John Alden Insurance.

Reversed and remanded.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

BILLY WENDELL BOLTON, PLAINTIFF v. JOHN W. CRONE, III AND GAITHER, GORHAM & CRONE, A PARTNERSHIP, DEFENDANTS

No. COA03-319

(Filed 6 January 2004)

Statutes of Limitation and Repose— legal malpractice—purchase of land

The trial court did not err in a legal malpractice case by granting defendants' motion for summary judgment and by dismissing with prejudice plaintiff's 11 September 2002 complaint arising out of legal services for the purchase of land, because: (1) plaintiff failed to make a specific denial to the receipt of two letters sent on 13 April and 26 April 2001 alleging plaintiff had notice of the restrictive covenants on commercial development, and thus, the averment was deemed admitted; (2) the reply to the averment affected the issue of plaintiff's notice of his cause of action against defendants and consequently the running of the statute of limitations; and (3) plaintiff's action was filed approximately seven months after the expiration of the three-year statute of limitations under N.C.G.S. § 1-15(c) which began to run on the date of closing on 12 February 1999.

Appeal by plaintiff from judgment dated 17 December 2002 by Judge Timothy S. Kincaid in Catawba County Superior Court. Heard in the Court of Appeals 19 November 2003.

Thomas C. Ruff, Jr.; and Richard H. Tomberlin, for plaintiff-appellant.

Poyner & Spruill LLP, by E. Fitzgerald Parnell, III and Rebecca B. Wofford, for defendant-appellees.

BRYANT, Judge.

Billy Wendell Bolton (plaintiff) appeals a judgment dated 17 December 2002 dismissing with prejudice his legal malpractice action against John W. Crone, III (defendant Crone) and the law firm of Gaither, Gorham & Crone (collectively defendants).

In his complaint filed on 11 September 2002, plaintiff alleged the following: He retained defendants for legal services in connection with his purchase of land in Catawba County, North Carolina. Plaintiff gave a copy of the purchase contract to defendant Crone and communicated to him plaintiff's intent to use the land as a commercial site for automobile sales. Defendant Crone failed to advise plaintiff before the closing of the real estate transaction, conducted on 12 February 1999, that the subject land was restricted to residential use only.

In response, defendants filed a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) or dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6). In support of their motion, defendants attached (1) a complaint and motion filed on 6 September 2001 for preliminary injunction by G. Scott Lail and others against plaintiff and (2) plaintiff's answer to the Lail complaint and motion.

In the Lail complaint and motion, paragraph 8 alleged: "[Plaintiff] was previously informed on two occasions that his use of the property was restricted to residential use only. . . . by way of letters sent to [plaintiff] first on April 13, 1999 and secondly on April 26, 2001." In his answer to the Lail complaint and motion, plaintiff stated: "Answering the allegations of Paragraph 8, it is admitted that certain individuals have advised [plaintiff] of their belief that he is prohibited from using the subject property for any purpose other than residential."

The trial court found plaintiff's action was filed approximately seven months after the expiration of the statute of limitations, which began to run on the date of closing, and dismissed the action with prejudice. The trial court did not state whether the dismissal was based on Rule 12(c) or Rule 12(b)(6).

The sole issue on appeal is whether the trial court properly dismissed plaintiff's action.

The basis of defendants' motion was that the complaint failed to state an actionable claim upon which relief could be granted due to the expiration of the statute of limitations. *See Reunion Land Co. v. Village of Marvin*, 129 N.C. App. 249, 250, 497 S.E.2d 446, 447 (1998) (" '[a] statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred' ") (citation omitted). Because defendants presented the complaint and reply from the Lail action, which were not excluded by the trial court, the motion is treated as one for summary judgment. *See* N.C.G.S. § 1A-1, Rule 12(b) (2001) ("on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment").[1] A motion for summary judgment is to be granted if "there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2001).

A legal malpractice action is subject to a three-year statute of limitations. N.C.G.S. § 1-15(c) (2001); *Garrett v. Winfree*, 120 N.C. App. 689, 692, 463 S.E.2d 411, 414 (1995). The action "accrue[s] at the time of . . . the last act of the defendant giving rise to the cause of action." N.C.G.S. § 1-15(c). However, if the claimant's loss is

> not readily apparent to the claimant at the time of its origin, and . . . is discovered or should reasonably be discovered by the claimant two or more years after . . . the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made.

Id.

The crucial question in the instant case is whether plaintiff's answer to paragraph 8 of the Lail complaint constituted an admission to being informed of the restrictive covenants by the first letter sent on 13 April 1999.

> Denials [to a pleading] *shall* fairly meet the substance of the averments denied[, and that w]hen a pleader intends in good faith to deny only a part of or a qualification of an averment, he *shall* specify so much of it as is true and material and shall deny only the remainder.

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1. At the hearing on the motion, plaintiff had the opportunity to present arguments against the motion, as required by Rule 12(b). *See* N.C.G.S. § 1A-1, Rule 12(b).

N.C.G.S. § 1A-1, Rule 8(b) (2001) (emphasis added). "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." N.C.G.S. § 1A-1, Rule 8(d) (2001). An answer, such as that of plaintiff to the Lail complaint, is a required responsive pleading. N.C.G.S. § 1A-1, Rule 7(a) (2001). The requirement of denials in Rule 8(d) applies to only material or relevant averments. *Connor v. Royal Globe Insur. Co.*, 56 N.C. App. 1, 6, 286 S.E.2d 810, 813 (1982).

In this case, the Lail complaint specifically alleged plaintiff had notice of the restrictive covenants by two letters, one of which was sent to plaintiff on 13 April 1999. At least at the time plaintiff received the Lail complaint, plaintiff had reason to question the existence of restrictive covenants on commercial development. The averment is material because, as this case itself shows, the reply to the averment affected the issue of plaintiff's notice of his cause of action against defendants and consequently the running of the statute of limitations in this case. *See* N.C.G.S. § 1-15(c). Plaintiff failed to make a specific denial to the receipt of the letters, and thus the averment was deemed admitted. *See* N.C.G.S. § 1A-1, Rule 8(b), (d); *Pierson v. Cumberland County Civic Ctr. Comm'n*, 141 N.C. App. 628, 634, 540 S.E.2d 810, 815 (2000) (" '[a]nything that a party to the action has done, said or written, if relevant to the issues and not subject to some specific exclusionary statute or rule, is admissible against him as an admission' ") (citations omitted). The malpractice action accrued at the time of the 12 February 1999 closing, the last act of defendant giving rise to the cause of action, and the action ran on 12 February 2002. *See* N.C.G.S. § 1-15(c). Because of the expiration of the statute of limitations, the trial court properly granted defendants' motion for summary judgment and dismissed with prejudice plaintiff's 11 September 2002 complaint.

Affirmed.

Judges CALABRIA and ELMORE concur.

IN RE FERRELL

[162 N.C. App. 175 (2004)]

IN RE JOHN R. FERRELL, JUVENILE

No. COA02-1617

(Filed 6 January 2004)

Juveniles— disposition order—findings insufficient

A juvenile disposition order changing custody from the mother to the father was not supported by appropriate findings and was remanded.

Appeal by Juvenile from the order entered 30 July 2002 by Judge Theodore S. Royster in District Court, Davidson County. Heard in the Court of Appeals 7 October 2003.

Susan J. Hall, for juvenile-appellant.

Attorney General Roy Cooper, by Assistant Attorney General J. Philip Allen, for the State.

WYNN, Judge.

From an adjudication of delinquency, the juvenile appeals from that part of the Disposition Order removing him from the custody of his mother and placing him in the custody of his father. Because we hold that the trial court failed to make findings of fact to support the change of custody, we set aside that part of the order and remand this matter to the trial court for further consideration on the issue of custody.

In August 2002, upon his admission of the charged offense of assault inflicting serious injury, the trial court adjudicated the juvenile as delinquent. At the time of the incident, the juvenile lived with his mother in Denton, North Carolina. The juvenile's biological father also lived in Denton, but the juvenile had not seen or spoken to his father since February of 2002 because of an alleged "falling out" with him.

At the hearing, the trial court reviewed a needs assessment report indicating the juvenile was at or above grade level, suspended three times, received eleven warnings and reprimands, and missed forty days[1] of class during his seventh grade year. The trial court questioned whether the father could do a better job getting the juvenile to

1. Twenty-one of the absences were excused absences.

school by putting the following questions to the juvenile court counselor, Tony Renegar:

THE COURT: It doesn't look like the mother has done a very good job if he missed 40 absences.

UNIDENTIFIED INDIVIDUAL: May I speak?

THE COURT: No, ma'am.

MR. RENEGAR: As far as the suitability of his father to provide a more structured environment, I'm not familiar with his father, I don't have enough information to make that recommendation. I've never met the father . . . One thing I would say in regards to school attendance . . . we make the referral to Family Services . . . [t]hey have after school programs [and] a structured day program.

After asking the juvenile's estranged father whether he was prepared to accept responsibility for his son, the trial judge stated and ordered:

> I think we need to get his [the Juvenile's] attention . . . I mean a fight is one thing but missing 40 days of school. I don't know why they didn't prosecute the mama in criminal court. I get them in from of me all the time when I'm in criminal court. Okay, Madam Clerk, right or wrong, good or indifferent, I'm going to go under 7B-2506(1)b, I'm going to place the juvenile in the custody of his father for twelve months.

On appeal, the mother and juvenile argue that the trial court abused its discretion in failing to make findings of fact in the dispositional order supporting the change of custody. We agree.

Although the trial court has discretion under N.C. Gen. Stat. § 7B-2506 (2001) in determining the proper disposition for a delinquent juvenile, *see In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395, 398-99 (2003),

> the trial court shall select a disposition that is designed to protect the public and to meet the needs and best interests of the juvenile, based upon:
>
> (1) The seriousness of the offense;
>
> (2) The need to hold the juvenile accountable;

(3) The importance of protecting public safety;

(4) The degree of culpability indicated by the circumstances of the particular case; and

(5) The rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

N.C. Gen. Stat. § 7B-2501(c). Moreover, "in choosing among statutorily permissible dispositions, the court shall select the most appropriate disposition both in terms of kind and duration for the delinquent juvenile." N.C. Gen. Stat. § 7B-2501(c). "The dispositional order shall be in writing and shall contain *appropriate* findings of fact and conclusions of law." N.C. Gen. Stat. § 7B-2512 (emphasis supplied).

In this case, the findings of fact in the dispositional order do not support the trial court's decision to transfer custody of the juvenile from the mother to the father. Furthermore, the evidence in the record fails to support finding that placement with the father would be in the juvenile's best interests. Indeed, the record indicates the juvenile had no contact with his father for approximately seven to eight months immediately prior to the assault for which the juvenile was on trial. Further, the court counselor did not recommend placement with the father and instead advised the court to utilize Family Services if the juvenile needed more structure during the day: "As far as the suitability of his father to . . . I've never met the father. One thing I would say in regards to school attendance . . . we make the referral to Family Services . . . [t]hey have after school programs [and] a structured day program."

From the record, it appears that trial court based the decision to award custody to the father solely on the juvenile's school absences. It is significant to note that the trial court made more extensive findings of fact in his August 19 order denying the juvenile's motion to reconsider the custody transfer, but those findings do not cure the dispositional order at issue today.

Since the transfer of custody was not supported by appropriate findings of fact in the dispositional order, we set aside that part of the trial court's order changing custody of the juvenile from his mother to his father.

Remanded.

Judges TYSON and LEVINSON concur.

CAMPBELL UNIVERSITY, INCORPORATED, PETITIONER v. HARNETT COUNTY AND THE HARNETT COUNTY BOARD OF ADJUSTMENT, RESPONDENTS

CAMPBELL UNIVERSITY, INCORPORATED, PETITIONER v. HARNETT COUNTY AND THE HARNETT COUNTY BOARD OF ADJUSTMENT, RESPONDENTS, AND RICHARD EASON, PHIL M. JUBY, PAULA HINTON, WILL TAYLOR AND ROBERT W. ROBERSON, INTERVENORS-RESPONDENTS

No. COA03-373

(Filed 6 January 2004)

Appeal and Error— multiple violations of appellate rules— combining two appeals in one brief—appeals dismissed

Intervenor's appeal was dismissed for numerous violations of the Rules of Appellate Procedure. Petitioner's appeal was dismissed because it failed to file an appellant's brief and thus foreclosed intervenors from filing an appellee's brief addressing petitioner's appeal.

Appeals by intervenor-respondents from order and judgment filed 19 November 2002 and by petitioner from order filed 2 October 2002 and amended order filed 4 October 2002 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 3 December 2003.

Johnson and Johnson, PA, by W.A. Johnson and Rebecca J. Davidson; and Robert C. Cogswell, Jr., for petitioner-appellant.

Dwight W. Snow for respondent-appellees.

Bain & McRae, by Edgar R. Bain; and Carolina Courtroom Lawyers, PLLC, by Richard T. Rodgers, Sr., for intervenor-respondent-appellants.

BRYANT, Judge.

Richard Eason, Phil M. Juby, Paula Hinton, Will Taylor, and Robert W. Roberson (collectively homeowner-intervenors) appeal an order and judgment entered 19 November 2002 in favor of Campbell University, Incorporated (petitioner). Petitioner in turn appeals an order entered 2 October 2002 allowing homeowner-intervenors to intervene and an amendment to the order allowing intervention entered 4 October 2002.

On 12 August 2003, petitioner filed with this Court a motion to dismiss homeowner-intervenors' appeal based on numerous violations of the North Carolina Rules of Appellate Procedure. Upon careful review of homeowner-intervenors' brief and their assignments of error, we agree that the gravity of the violations warrants dismissal of homeowner-intervenors' appeal. *See* N.C.R. App. P. 25(b); *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984) ("failure to follow the rules subjects an appeal to dismissal").

We further note that, with respect to its own appeal, petitioner failed to file an appellant's brief. Instead, petitioner discussed all the issues raised by the two separate appeals in its appellee's brief filed in response to homeowner-intervenors' appeal. *See* N.C.R. App. P. 13(a)(1), (c) ("[i]f an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed . . . on the court's own initiative"). This failure to file an appellant's brief, a violation in and of itself, served to foreclose homeowner-intervenors from filing an appellee's brief addressing petitioner's appeal. In the interest of fairness, we therefore deem it appropriate to also dismiss petitioner's appeal.

Dismissed.

Judges McCULLOUGH and ELMORE concur.

CASES WITHOUT PUBLISHED OPINIONS

ADAMS OUTDOOR ADVER. OF CHARLOTTE v. McCOY No. 02-1702	Wake (00CVS4650)	Reversed
BUZZANELL v. MILLER No. 02-1457	Buncombe (00CVD2106)	Affirmed
CONLON v. SELF No. 03-247	Cleveland (01CVS1852)	Affirmed
DILLARD v. MERCHANTS, INC. No. 03-126	Ind. Comm. (I.C. 706202)	Affirmed
HENLEY v. WAL-MART STORES, INC. No. 03-201	Randolph (01CVS1441)	Affirmed
IN RE CANSECO No. 03-206	Forsyth (00J360)	Reversed in part, affirmed in part
IN RE HUNTER No. 03-282	Nash (02J41)	Affirmed
IN RE McINTYRE No. 03-314	Forsyth (02J254)	Dismissed
IN RE STANFORD No. 03-444	Orange (01J132)	Affirmed
JONES v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 03-356	Wake (01CVS13907)	Reversed and remanded with instructions
KALNEN v. KALNEN No. 02-1691	New Hanover (98CVS1806)	Reversed and remanded
KAMPSCHROEDER v. BRUCE No. 03-308	Pender (01CVS5)	Reversed and remanded
KNOTT v. DIXIE-DENNING SUPPLY CO. No. 03-159	Beaufort (93CVD844)	Affirmed
McINTYRE v. FORSYTH CTY. DSS No. 03-231	Forsyth (02CVS1741)	Affirmed
MILLS v. STALLINGS No. 03-197	Craven (02CVD1675)	Dismissed
PHARMARESEARCH CORP. v. MASH No. 03-213	New Hanover (01CVS2281)	Affirmed

SPELLER v. AMERICAN HONDA FIN. CORP. No. 02-1629	Durham (99CVS4983)	Affirmed
STATE v. ANDERSON No. 03-544	Union (01CRS13211)	No error
STATE v. BAILEY No. 03-74	Durham (97CRS27856) (97CRS30112) (98CRS23026)	No error
STATE v. BELIN No. 03-683	Forsyth (01CRS58214)	No error
STATE v. BETHEA No. 03-141	Wake (00CRS35665) (00CRS35666)	No error
STATE v. BRANDON No. 03-227	Durham (00CRS65486) (00CRS65487) (00CRS65490) (00CRS65491) (02CRS2713)	No error
STATE v. BUTLER No. 03-186	New Hanover (99CRS27798)	No error
STATE v. CASSELL No. 03-7	Iredell (00CRS56546)	No error
STATE v. DURHAM No. 03-253	Guilford (01CRS86226)	No error
STATE v. ELLIOTT No. 03-342	Durham (01CRS18609) (01CRS46744)	No error
STATE v. HAMPTON No. 03-437	Durham (01CRS50906)	No error
STATE v. HOLMAN No. 02-1598	Forsyth (01CRS5702)	No error
STATE v. JOHNSON No. 03-341	Halifax (02CRS51563)	No prejudicial error
STATE v. LOCKAMY No. 03-508	Harnett (02CRS1736) (02CRS50103)	Remanded for resentencing
STATE v. LOCKLEAR No. 02-1696	Robeson (01CRS11322) (01CRS11324)	Vacate and remand

STATE v. McCOLLUM No. 03-63	Union (01CRS12480) (01CRS54111)	No error
STATE v. RANKIN No. 03-388	Rowan (01CRS9797) (01CRS57587) (01CRS57588) (01CRS57589) (01CRS57590)	No error
STATE v. ROBINSON No. 03-256	Halifax (00CRS7186) (01CRS2607)	Affirmed
STATE v. SHUFORD No. 03-92	Lincoln (99CRS3905) (99CRS6058)	No prejudicial error in trial. Remanded for correction of clerical errors
STATE v. SNOW No. 03-28	Rowan (01CRS52361)	No error
STATE v. SPEARMAN No. 03-12	Edgecombe (01CRS8698) (01CRS50914) (01CRS50915) (01CRS50963) (01CRS50964)	No error
STATE v. TROXLER No. 03-215	Guilford (01CRS102433)	No error
WALTERS v. NICOLAS No. 02-1543	Iredell (02CVS1519)	Affirmed in part, reversed in part
WOODWARD v. N.C. MGMT. CO. No. 03-27	Nash (93CVS2069)	Reversed and remanded

STATE OF NORTH CAROLINA v. BYRON WHITE, DEFENDANT

No. COA02-1641

(Filed 20 January 2004)

1. Sexual Offenses— sex offender registration requirements—knowledge—instruction

The trial court did not err in a case concerning a failure to comply with the sex offender registration requirements under N.C.G.S. § 14-208.11 by failing to instruct the jury that the State was required to prove defendant's knowledge of the requirements, because: (1) our Court of Appeals has already held that the State is not required to prove knowledge under N.C.G.S. § 14-208.11; and (2) the statute's legislative history also confirms that the legislature intended to create a strict liability offense.

2. Constitutional Law— due process—sex offender registration requirements—knowledge

Due process did not mandate that the trial court had to instruct the jury that the State was required to prove that defendant knew of his duty to register in a case concerning a failure to comply with the sex offender registration requirements under N.C.G.S. § 14-208.11, because: (1) the notice provisions of the registration act remove the statute from due process attacks under ordinary circumstances; (2) an oral explanation of the registration requirements to a defendant by a member of a sheriff's department provides actual knowledge enough to satisfy due process requirements for any reasonable and prudent man, and a detective in this case testified that he advised defendant of the registration requirements when defendant initially registered with the sheriff's department; and (3) defendant has not argued that he was incompetent or that the standards for a reasonable and prudent man are otherwise inapplicable to him.

3. Constitutional Law— ex post facto laws—sex offender registration requirements

The trial court did not err by failing to dismiss the charge of failure to comply with the sex offender registration requirements under N.C.G.S. § 14-208.11 on the basis that it was a violation of the constitutional prohibitions against ex post facto laws, because: (1) the United States Supreme Court has recently ruled that statutes such as N.C.G.S. § 14-208.11 are not impermissible

ex post facto laws; (2) the fact that the public disclosure provisions are contained in the same portion of the criminal code as the registration provisions does not justify a conclusion that the General Assembly intended the legislation to be punitive rather than a civil regulatory scheme; (3) any stigma flowing from the registration requirements is not due to public shaming, but arises from the dissemination of accurate information which is already public; (4) prior offenders are free to change jobs or move wherever they choose subject only to the indirect restraint of the registration requirements; (5) to hold that the mere presence of a deterrent purpose renders such sanctions criminal would severely undermine the government's ability to engage in effective regulation; (6) the Act's rational connection to a nonpunitive purpose is a most significant factor in the determination that the statute's effects are not punitive; (7) the penalty imposed for a violation of the registration requirements is irrelevant to the question of whether the requirements themselves constitute an unconstitutional ex post facto law; (8) the requirements of registering for ten years are not excessive in light of the General Assembly's nonpunitive objective; and (9) the General Assembly amended N.C.G.S. § 14-208.11 in 1998 to change the penalty for violation of the registration requirements from a Class 3 misdemeanor for a first conviction to a Class F felony, and defendant violated the requirements in 2001 which was three years after the change in the law.

Appeal by defendant from judgment entered 15 August 2002 by Judge Russell J. Lanier, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 13 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Amy L. Yonowitz, for the State.

Duncan B. McCormick, for the defendant-appellant.

GEER, Judge.

Defendant Byron White appeals from his conviction for failure to comply with the sex offender registration requirements set out in N.C. Gen. Stat. § 14-208.11 (2003). Defendant contends that the trial court erred in failing to instruct the jury that the State was required to prove defendant's knowledge of the requirements and that the trial court erred in failing to dismiss the charges as a violation of the con-

stitutional prohibitions against *ex post facto* laws. Because (1) this Court already has held that the State is not required to prove knowledge under N.C. Gen. Stat. § 14-208.11; (2) that statute does not, as applied to defendant, violate due process; and (3) the United States Supreme Court has recently ruled, *Smith v. Doe*, 538 U.S. 84, 155 L. Ed. 2d 164, 123 S. Ct. 1140 (2003), that statutes such as N.C. Gen. Stat. § 14-208.11 are not impermissible *ex post facto* laws, we find no error.

In 1995, North Carolina enacted the Amy Jackson Law, N.C. Gen. Stat. § 14-208.5 (2003) *et seq.* ("Article 27A"), requiring individuals convicted of certain sex-related offenses to register their addresses and other information with law enforcement agencies. The stated purpose of the law is to curtail recidivism because "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest." N.C. Gen. Stat. § 14-208.5.

Article 27A applies to all offenders convicted on or after 1 January 1996 and to all prior offenders released from prison on or after that date. 1995 N.C. Sess. Laws ch. 545, § 3. Under N.C. Gen. Stat. § 14-208.7(a) (2003), "[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides." North Carolina residents who are released from a penal institution must register with the sheriff of the county in which the offender resides "[w]ithin 10 days of release from a penal institution . . . ." N.C. Gen. Stat. § 14-208.7(a)(1). Registration must be maintained for ten years following release. N.C. Gen. Stat. § 14-208.7(a). Whenever a person required to register "changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a) (2003).

Before a convicted sex offender is released from a North Carolina penal institution, an official of the institution must notify him or her of the duty to register in the county where the person intends to reside. N.C. Gen. Stat. § 14-208.8(a)(1) (2003). The person required to register must sign a statement to verify receipt of the information or, if the person refuses to sign, the official must certify that the person was notified of his or her duty to register. *Id.*

In addition, each year on the anniversary of the person's initial registration date, the Division of Criminal Information, which maintains a central registry, is required to send a letter to the registrant at the last reported address to verify his or her address. N.C. Gen. Stat. § 14-208.9A(1) (2003). If within ten days of receipt the registrant fails to sign and return the letter verifying his or her current address, the sheriff's department must make a reasonable attempt to determine whether the person is residing at the registered address. N.C. Gen. Stat. § 14-208.9A(4) (2003).

At present, a person who violates the registration requirements is guilty of a Class F felony. N.C. Gen. Stat. § 14-208.11 (2003). Until 1 April 1998, however, "[a] person . . . who, knowingly and with the intent to violate the provisions of this Article, fail[ed] to register" was guilty of a Class 3 misdemeanor for a first conviction and a Class I felony for a subsequent conviction. N.C. Gen. Stat. § 14-208.11(a) (1996 Cum. Supp.).

Facts

In April 1996, defendant pled guilty to committing indecent liberties with a minor in 1995. He was sentenced to prison and released 19 March 1997. Defendant registered in New Hanover County on 21 March 1997, reporting his residence as an address in Wilmington. Detective Tim Karp of the New Hanover County Sheriff's Department testified he advised defendant at that time of the requirement that he notify the department within ten days of any address change and of the fact that failure to do so would constitute an offense for which he would be arrested.

On 26 April 1999, defendant provided the sheriff's department with notice of a change in his address. On 16 November 1999, the Division of Criminal Information sent a letter to defendant to verify his then current address. The sheriff's department subsequently received notification that defendant had not responded to the letter. Detective Karp recorded in department records that defendant's address was unknown and contacted defendant's probation officer.

On 14 March 2000, the sheriff's department was again notified that defendant had not responded to a letter seeking verification of his residence. Detective Karp again recorded defendant's address as being unknown. On 11 May 2001, defendant came to the sheriff's department to report a new address in Wilmington. Defendant was living at that address with his girlfriend, Shante Rowell. Ms. Rowell

testified that defendant had told her that he was required to sign papers showing a change of address every time he moved. Ms. Rowell and defendant subsequently moved to another address and defendant notified the sheriff's department of his new address.

In April 2001, defendant's relationship with Ms. Rowell ended and he moved out of her home. He failed to report his new address to the sheriff's department. On 11 July 2001, Ms. Rowell called the sheriff's department to report that defendant was no longer living at her home and on 12 July 2001, Ms. Rowell signed an affidavit verifying that fact. On 2 August 2001, a warrant was issued for defendant's arrest.

Defendant was indicted on 1 April 2002 for violating N.C. Gen. Stat. § 14-208.11 by failing to notify the sheriff of his change of address. At trial, defendant's attorney moved to dismiss the charge on the grounds that the State had failed to prove "the necessary element of actual knowledge of the duty to register," that the statute violated state and federal constitutional guarantees of due process, and that the statute constituted an unconstitutional *ex post facto* law. The trial court denied the motion.

Defendant's attorney subsequently requested that the court instruct the jury that "[t]he State is required to prove as an element to the offense that the Defendant had actual knowledge of the duty to register." In response to this request, the trial judge stated that he believed (incorrectly) that an "actual knowledge" requirement was included in the pattern jury instruction and that he would give the pattern instruction. Following the court's reading of the jury instructions, counsel for defendant pointed out that there had been no instruction on knowledge. The trial court decided to abide by the pattern instruction as written.

During deliberations, the jury submitted the following question to the trial court: "Should the jury consider whether the defendant knew he needed to register a change of address within 10 days or other specified times?" The judge responded,

> The answer to that is yes, and in determining what he knew, you may examine his conduct before and after his, you know, conviction. Remember the instruction I gave you on circumstantial evidence. Okay, does that answer your question?

When a juror asked the judge to repeat his answer, the judge responded, in pertinent part,

> I said, yes, you may, you know, it's sort of hard to expect to convict somebody of a felony without him knowing what his responsibilities are. However, you may determine what he knew by the conduct that he exhibited . . . .

Following the jury's verdict of guilty, the trial court found as a mitigating factor that defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense. The court found no aggravating factors. Defendant was sentenced to 20 to 24 months in prison.

I

[1] Although defendant acknowledges that N.C. Gen. Stat. § 14-208.11(a) does not expressly require the State to prove knowledge or intent, he argues that the General Assembly in fact intended such a requirement. Not only has this Court already held otherwise, the statute's legislative history also confirms that the legislature intended to create a strict liability offense.

> N.C. Gen. Stat. § 14-208.11(a)(2) provides in pertinent part:
>
> (a) A person required by this Article to register who does any of the following is guilty of a Class F felony:
>
> . . . .
>
> (2) Fails to notify the last registering sheriff of a change of address.

Thus, the statute on its face does not include any *mens rea* requirement. Based on this language, this Court already has held that knowledge is not an element of the offense: "[W]e note that the statute has no requirement of knowledge or intent, so as to require that the State prove either defendant knew he was in violation of or intended to violate the statute when he failed to register his change of address." *State v. Young*, 140 N.C. App. 1, 8, 535 S.E.2d 380, 384 (2000), *disc. review improvidently allowed*, 354 N.C. 213, 552 S.E.2d 142 (2001). *See also State v. Holmes*, 149 N.C. App. 572, 577, 562 S.E.2d 26, 30 (2002) ("To meet its burden under § 14-208.11(a)(2), the State must prove that: 1) the defendant is a sex offender who is required to register; and 2) that defendant failed to notify the last registering sheriff of a change of address.")

Despite *Young* and *Holmes*, defendant contends that the extensive notification procedures set forth in Article 27A, coupled with the

classification of a violation of the registration requirements as a felony, N.C. Gen. Stat. § 14-208.11, are sufficient to prove the legislature did not intend that the statute provide for a strict liability offense. We may not, however, revisit *Young* and *Holmes*.

The legislative history of N.C. Gen. Stat. § 14-208.11 also refutes defendant's argument. Prior to 1997, N.C. Gen. Stat. § 14-208.11 included a *mens rea* element, providing that only offenders "who knowingly and with intent to violate" the provision were subject to conviction. N.C. Gen. Stat. § 14-208.11(a) (1995). The legislature amended the statute in 1997 to remove this language. 1997 N.C. Sess. Laws ch. 516. When the General Assembly amends a statute, "the presumption is that the legislature intended to change the law." *State ex rel. Utilities Comm'n. v. Public Service Co.*, 307 N.C. 474, 480, 299 S.E.2d 425, 429 (1983). Thus, by deleting the specific intent requirement, the General Assembly expressed its intent to make N.C. Gen. Stat. § 14-208.11 a strict liability offense. We hold as a matter of statutory construction that N.C. Gen. Stat. § 14-208.11 does not require a showing of knowledge or intent.

II

[2] Alternatively, defendant argues that due process mandated that the State prove defendant knew of his duty to register. This Court recognized in Young that "although ignorance of the law is no excuse, and the statute at issue does not require the State to prove intent, due process requires that defendant have knowledge, actual or constructive, of the statutory requirements before he can be charged with its violation." 140 N.C. App. at 12, 535 S.E.2d at 386 (emphasis original).

Although defendant assigned error to the trial court's failure to grant his motion to dismiss based on his constitutional right to due process, he has abandoned that argument by not addressing it in his brief. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief . . . will be taken as abandoned."). Defendant limits his argument on appeal to the question whether the trial court erred in failing to give his requested instruction. "[A] court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Cheek*, 351 N.C. 48, 73, 520 S.E.2d 545, 560 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965, 120 S. Ct. 2694 (2000).

In *Young*, this Court held that the notice provisions of the registration act (N.C. Gen. Stat. §§ 14-208.8 and 14-208.11) remove the

statute from due process attacks "[u]nder ordinary circumstances." 140 N.C. App. at 8, 535 S.E.2d at 384. The Court also held that an oral explanation of the registration requirements to a defendant by a member of a sheriff's department provides " 'actual knowledge' enough to satisfy due process requirements for any reasonable and prudent man." *Id.* at 9, 535 S.E.2d at 385.

Here, Detective Karp testified that he advised defendant of the registration requirements when defendant initially registered with the New Hanover County Sheriff's Department. Defendant offered no contrary evidence. Under *Young*, this undisputed evidence was sufficient to satisfy due process for a reasonable and prudent man. Defendant has not argued that he was incompetent or that the standards for a reasonable and prudent man are otherwise inapplicable to him. *See id.* at 10, 535 S.E.2d at 385 (N.C. Gen. Stat. §§ 14-208.8 and 14-208.11 and oral notice from a sheriff's department are insufficient to provide notice for an incompetent sex offender). Given the constructive notice supplied by N.C. Gen. Stat. §§ 14-208.8 and 14-208.11, the actual notice supplied by Detective Karp, and the absence of any evidence of a lack of actual knowledge, the trial court was not obligated to give defendant's requested instruction on knowledge. *See also Holmes*, 149 N.C. App. at 577, 562 S.E.2d at 30 (when the evidence established that defendant, who was never adjudicated incompetent, had signed a notice advising him of the registration requirements, N.C. Gen. Stat. § 14-208.11 was "not unconstitutional as applied to defendant and *Young* is not applicable"); *Hatton v. Bonner*, 346 F.3d 938, 951 (9th Cir. 2003) (denying post-conviction relief when defendant presented no evidence that he lacked actual knowledge of registration requirement, did not contend that he lacked notice or misunderstood the requirement, and repeatedly registered until he moved to another state).

We need not reach the question whether the trial judge improperly expressed an opinion regarding defendant's knowledge during his charge to the jury. Since there was no requirement that the jury consider defendant's knowledge, the additional instruction, even if in error, was harmless to defendant. These assignments of error are overruled.

III

[3] The United States and the North Carolina Constitutions prohibit the enactment of *ex post facto* laws. *See* U.S. Const. art. I, § 10 ("No state shall . . . pass any bill of attainder, *ex post facto* law, or law

impairing the obligation of contracts . . . ."); N.C. Const. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no *ex post facto* law shall be enacted."). The prohibition against the enactment of *ex post facto* laws applies to:

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (quoting *Collins v. Youngblood*, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-39, 110 S. Ct. 2715 (1990)) (emphasis original), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795, 123 S. Ct. 882 (2003). "Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *Id.*

Defendant contends that the registration requirements set forth in N.C. Gen. Stat. § 14-208.5 *et seq.* constitute an *ex post facto* law because those requirements retroactively increase the punishment imposed as a result of his conviction in 1996 of the crime of indecent liberties. Defendant concedes, however, that the U.S. Supreme Court considered and rejected most of his arguments in *Smith v. Doe*, 538 U.S. 84, 155 L. Ed. 2d 164, 123 S. Ct. 1140 (2003), which held that Alaska's sex-offender registration law does not violate the *ex post facto* prohibition of the federal Constitution because the law established a civil, non-punitive regulatory regime intended to protect the public. As explained in greater detail below, we can find no meaningful distinction between Alaska's registration law and North Carolina's Article 27A and, therefore, hold that North Carolina's statute is not an unconstitutional *ex post facto* law.

In determining whether Alaska's sex-offender registration law violated the *ex post facto* clause, the Supreme Court noted that the framework for that inquiry is well established:

> We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Ibid.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980)).

Smith, 538 U.S. at 92, 155 L. Ed. 2d at 176, 123 S. Ct. at 1146-47. In summary, a court looks first at the intended purpose of the law. If the declared purpose was to enact a civil regulatory scheme, then the court determines whether either the purpose or effect is so punitive as to negate any intent to deem the scheme civil. In making this determination, " 'only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]' " *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100, 139 L. Ed. 2d 450, 459, 118 S. Ct. 488, 493 (1997)).

A. The Legislature's Intended Purpose

To determine the intent of the Alaska legislature in enacting its registration law, the Supreme Court first considered the statute's text and its structure. The Court noted that the Alaska legislature expressed its objective in the statutory text itself with the legislature (1) expressly finding that sex offenders pose a high risk of re-offending, (2) identifying the primary governmental interest as protecting the public from sex offenders, and (3) determining that release of information about sex offenders to public agencies and the public will assist in protecting public safety. *Id.* at 93, 155 L. Ed. 2d at 177, 123 S. Ct. at 1147 (citing 1994 Alaska Sess. Laws ch. 41, § 1). The Supreme Court concluded based on these provisions that the Alaska statute on its face expressed an intent to create a civil scheme designed to protect the public from harm. *Id.*

The North Carolina General Assembly made identical findings to those of the Alaskan legislature, but also expressly stated:

> the purpose of this Article [is] to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to

> require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C. Gen. Stat. § 14-208.5. Since the North Carolina statute's expression of purpose is indistinguishable from Alaska's, we likewise conclude that the North Carolina General Assembly has expressed an intent to establish a civil regulatory scheme to protect the public.

The offender in *Smith*, like defendant here, argued that the codification of the legislation in the State's criminal code suggested a punitive objective. The structure of the law is "probative of the legislature's intent" but "not dispositive" since "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Smith*, 538 U.S. at 94, 155 L. Ed. 2d at 178, 123 S. Ct. at 1148. Alaska's public disclosure procedures are codified within the state's "Health, Safety and Housing Code," while its registration provisions are codified within the state's criminal procedure code. Because Alaska's Code of Criminal Procedure contains many provisions that do not involve criminal punishment, the Supreme Court held that "[t]he partial codification of [Alaska's] Act in the State's criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive." *Id.* at 95, 155 L. Ed. 2d at 178, 123 S. Ct. at 1148.

North Carolina differs from Alaska in that its public disclosure and registration procedures are both codified within the criminal code. Nevertheless, like Alaska, North Carolina's criminal code "contains many provisions that do not involve criminal punishment," *id.*, such as procedures for issuing and obtaining a permit to carry a concealed handgun, N.C. Gen. Stat. §§ 14-415.11 through 14-415.16 (2003); regulations governing the posting of property, N.C. Gen. Stat. § 14-159.7 (2003); and the requirement that the Department of Health and Human Services obtain annual statistical summaries regarding lawful abortions, N.C. Gen. Stat. § 14-45.1 (2003). We do not believe that the fact that the public disclosure provisions are contained in the same portion of the criminal code as the registration provisions sufficiently distinguishes North Carolina's statute from Alaska's to justify concluding that the General Assembly, contrary to the purpose expressed in N.C. Gen. Stat. § 14-208.5, intended the legislation to be punitive rather than a civil regulatory scheme. *See State v. Mount*, 317 Mont. 481, 491, 78 P.3d 829, 837 (2003) ("Since, as we have already

stated, the declared purpose of the [Montana registration] Act is clearly nonpunitive, we conclude that the fact that the Act is codified in the code of criminal procedure does not, in and of itself, transform the Act's nonpunitive, civil regulatory scheme into a criminal one.").

B. The Effects of the Law

Having concluded that the legislature did not intend that the provisions of Article 27A be punitive, we next analyze whether the effects of the registration law are sufficiently punitive to make Article 27A an unconstitutional *ex post facto* law. The Supreme Court held that in analyzing the effects of the legislation, courts should consider the factors set out in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 660-61, 83 S. Ct. 554, 567-68 (1963). *Smith*, 538 U.S. at 97, 155 L. Ed. 2d at 179-80, 123 S. Ct. at 1149. The Court found the most relevant factors for registration laws to be "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Id.* at 97, 155 L. Ed. 2d at 180, 123 S. Ct. at 1149.

1. *Historical Treatment*

The Supreme Court noted that "[a] historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such." *Id.* Defendant's argument that public disclosure of the registration information subjects sex offenders to the traditional punishments of humiliation and ostracism is identical to the argument made and rejected by the Supreme Court in *Smith*. As the Court explained, any stigma flowing from the registration requirements is not due to public shaming, but arises from the dissemination of accurate information which is already public:

> Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. . . . In contrast to the colonial shaming punishments . . . the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

Id. at 98-99, 155 L. Ed. 2d at 181, 123 S. Ct. at 1150. With respect to the posting of information on the internet, an issue also raised by defend-

ant in this case, the Court held that "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender" and a search for information over the internet is analogous to a visit to an official archive of criminal records, only "more efficient, cost effective, and convenient for [the State's] citizenry." *Id.*, 123 S. Ct. at 1151. Defendant has not presented any argument why historical considerations should lead to a different conclusion with respect to North Carolina's legislation than the Supreme Court reached with respect to Alaska's statute. *See also Mount*, 317 Mont. at 492, 78 P.3d at 838 ("Any shame that [defendant] may experience results from his previous conviction, not from disclosure of that fact to the public. Indeed, [defendant's] conviction and sentence is already a matter of public record.").

2. *Affirmative Restraint or Disability*

Defendant contends that "[w]hile a sex offender is not restrained and is free to move without obtaining permission," the registration requirements still constitute a restraint on a prior offender's liberty. If, however, "the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 U.S. at 100, 155 L. Ed. 2d at 181, 123 S. Ct. at 1151. Article 27A imposes no actual restraint or limitation on an offender's movements. After the initial registration, Article 27A imposes no requirement that offenders ever again appear in person before law enforcement in order to comply with the registration requirements. Then, as defendant concedes, prior offenders are free to move wherever they choose subject only to the requirement that they update their address in writing within ten days of moving and verify their address annually. Furthermore, prior offenders are free to work wherever they choose with the sole caveat that certain offenders must provide the sheriff's department with information about their place of employment and/or the school they attend. N.C. Gen. Stat. § 14-208.7(a1).

North Carolina's Article 27A, like Alaska's law, "does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Smith*, 538 U.S. at 100, 155 L. Ed. 2d at 181, 123 S. Ct. at 1152. The Supreme Court held that Alaska's registration requirements "make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto* Clause." *Id.* at 102, 155 L. Ed. 2d at 183, 123 S. Ct. at 1152. We similarly hold that North Carolina's registration requirement imposes only an indirect restraint upon prior offenders rather than a punitive restraint.

3. *Traditional Aims of Punishment*

Defendant contends that Article 27A is punitive because it promotes the traditional objectives of punishment, such as deterrence, by publicly humiliating prior offenders. The United States Supreme Court held otherwise with respect to the Alaska statute. The Supreme Court reasoned that even if public notification will have a deterrent effect, "[a]ny number of governmental programs might deter crime without imposing punishment. To hold that the mere presence of a deterrent purpose renders such sanctions criminal . . . would severely undermine the Government's ability to engage in effective regulation." *Id.* (internal quotation marks omitted). Defendant makes no argument why this factor should be different for the North Carolina legislation.

4. *Rational Connection to a Nonpunitive Purpose*

The Supreme Court held in *Smith* that "[t]he Act's rational connection to a nonpunitive purpose is a 'most significant' factor in our determination that the statute's effects are not punitive." *Id.* Defendant in this case does not dispute that a rational connection exists.

5. *Excessiveness in Relation to Purpose*

Defendant focuses primarily on his claim that the State's registration scheme is excessive in relation to its purpose because a violation of the registration requirements is a Class F felony. The penalty imposed for a violation of the registration requirements is, however, irrelevant to the question whether the registration requirements themselves constitute an unconstitutional *ex post facto* law.

The Supreme Court recognized in *Smith* that the criminal prosecution arising out of a violation of the registration requirements has no *ex post facto* implications: "A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense." *Id.* at 101-02, 155 L. Ed. 2d at 182-83, 123 S. Ct. at 1152. The Class F felony penalty is not additional punishment imposed for the prior sex offense, but rather punishment for a new offense: violation of the registration requirements.

As defendant has recognized, it is not unusual for the General Assembly to designate as crimes failures to comply with civil regulatory schemes. *See, e.g.*, N.C. Gen. Stat. § 14-288.12 (2003) (violation of a municipal ordinance establishing a curfew during a state of emer-

gency is a Class 3 misdemeanor); N.C. Gen. Stat. § 14-322 (2003) (failure to pay child support is a Class 1 misdemeanor); N.C. Gen. Stat. § 14-415.1 (2003) (possession of a firearm by a felon is a Class G felony); N.C. Gen. Stat. § 105-236 (2003) (failure to file a state income tax return is a Class 1 misdemeanor). The fact that a violation of a civil regulatory provision such as the registration requirements leads to a harsh penalty is not pertinent to whether the registration requirements are additional punishment for the previously-committed sex offense. *See Russell v. Gregoire*, 124 F.3d 1079, 1088-89 (9th Cir. 1997) ("We emphasize that the crime of failing to register under the Act constitutes a separate offense. . . . It is hornbook law that no *ex post facto* problem occurs when the legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct took place after the law was passed."), *cert. denied*, 523 U.S. 1007, 140 L. Ed. 2d 321, 118 S. Ct. 1191 (1998); *Meinders v. Weber*, 2000 S.D. 2, 24, 604 N.W.2d 248, 259 (S.D. 2000) ("Any punishment flowing from the sex offender registration statutes comes from a failure to register, not from the past sex offense."); *State v. Cook*, 83 Ohio St. 3d 404, 421, 700 N.E.2d 570, 584 (1998) ("[T]he punishment is not applied retroactively for [a sexual offense] that was committed previously, but for a violation of law [the failure to register] committed subsequent to the enactment of the law."), *cert. denied*, 525 U.S. 1182, 143 L. Ed. 2d 116, 119 S. Ct. 1122 (1999).

The question for purposes of *ex post facto* analysis is whether additional punishment has been retroactively imposed on defendant for his conviction for indecent liberties. The proper analysis considers whether the registration requirements are excessive—in other words, whether the extent and duration of those requirements are greater than necessary to meet the legislature's purpose. Defendant has made no argument regarding the excessiveness of the registration requirements apart from the penalty imposed for a violation of those requirements. The Supreme Court in *Smith* found that lifetime registration requirements were not excessive. *Id.* at 104-05, 155 L. Ed. 2d at 184-85, 123 S. Ct. at 1153-54. Since North Carolina only requires registration for ten years, N.C. Gen. Stat. § 14-208.7, we hold that the registration requirements are not excessive in light of the General Assembly's nonpunitive objective.

6. *Totality of the Factors*

The Supreme Court held that its "examination of the Act's effect leads to the determination that respondents cannot show, much

less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme." *Smith*, 538 U.S. at 105, 155 L. Ed. 2d at 185, 123 S. Ct. at 1154. We likewise hold that the effects of North Carolina's registration law do not negate the General Assembly's expressed civil intent and that retroactive application of Article 27A does not violate the prohibitions against *ex post facto* laws.

IV

Defendant contends alternatively that the trial court violated the *ex post facto* provisions by sentencing him for a Class F felony rather than a Class 3 misdemeanor as the law provided in 1995 when he committed the offense of indecent liberties. Defendant has again overlooked the fact that his felony sentence was for the failure to register offense committed in 2001 and not for the indecent liberties offense committed in 1995.

The General Assembly amended N.C. Gen. Stat. § 14-208.11 in 1998 to change the penalty for violation of the registration requirements from a Class 3 misdemeanor for a first conviction to a Class F felony. Defendant violated the registration requirements in 2001, three years after the change in the law. The trial court therefore properly sentenced defendant as a Class F felon.

Although defendant argues that the sentence is excessive in comparison to sentences imposed for other offenses, such a contention is more properly asserted as a violation of the prohibition against cruel and unusual punishment contained in the Eighth Amendment. Because defendant failed to raise that issue before the trial court, we do not address it.

No error.

Chief Judge EAGLES and Judge HUNTER concur.

OAKWOOD ACCEPTANCE CORPORATION, LLC, PLAINTIFF v. DALTON RAY MASSENGILL; PHYLLIS TART MASSENGILL; DAVID WOMACK, TAX COLLECTOR FOR JOHNSTON COUNTY, NORTH CAROLINA; JOHNSTON COUNTY, NORTH CAROLINA, RAINBOW INVESTMENTS, L.L.C.; NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; NORTH CAROLINA DIVISION OF MOTOR VEHICLES, DEFENDANTS

No. COA02-706
No. COA02-1430

(Filed 20 January 2004)

1. Taxes— sale of mobile home—insufficient notice of sale—grossly inadequate sale price

The trial court did not err by setting aside the tax sale of a mobile home where the reference in the notice of sale to "Storage Location" without any accompanying address was not a sufficient designation of the place of sale under N.C.G.S. § 1-339.51, and the ultimate sale price was grossly inadequate.

2. Appeal and Error— standing—aggrieved party—necessity of appeal

Appeals from the dismissal of DMV from claims arising from the tax sale of a mobile home were themselves dismissed. Defendant Rainbow was not aggrieved by the decision, and plaintiff Oakwood did not appeal from that portion of the order. N.C.G.S. § 1-271.

3. Public Officers and Employees— suit against tax collector—individual capacity—notice insufficient

A complaint did not state a claim against the Johnston County Tax Collector (Womack) in his individual capacity where it did not provide sufficient notice that he was being sued individually.

4. Appeal and Error— issue moot—relief granted elsewhere

A portion of an appeal was moot where it sought relief granted elsewhere in the appeal.

5. Immunity— sovereign—no allegations of insurance or waiver

A negligence claim against a county arising from a tax sale was properly dismissed as barred by sovereign immunity where there were no allegations that the county purchased liability insurance or otherwise waived immunity.

6. Civil Rights— tax sale—no allegation of county policy or custom

A claim against a county under 42 U.S.C. § 1983 was properly dismissed where there was a claim only under respondeat superior and no allegation of an injury due to Johnston County's policy, custom, or usage or that it resulted from a decision by a person with final decision-making authority.

Appeals by plaintiff from order entered 14 March 2002 by Judge Knox V. Jenkins, in Johnston County Superior Court and by defendant Rainbow Investments, L.L.C., from order entered 22 May 2002 by Judge James R. Vosburgh, in Johnston County Superior Court. Heard in the Court of Appeals 15 September 2003.

Frederic E. Toms & Associates, P.L.L.C., by David A. Bridgman, for plaintiff.

Holland & O'Connor, P.L.L.C., by W. A. Holland, Jr., for defendant Rainbow Investments, L.L.C.

Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for defendants North Carolina Department of Transportation and North Carolina Division of Motor Vehicles.

J. Mark Payne, for defendants Johnston County and David Womack.

GEER, Judge.

This decision addresses two appeals arising from the same lawsuit challenging the tax sale of a mobile home in which plaintiff Oakwood Acceptance Corporation, LLC held a perfected security interest. Defendant Rainbow Investments, L.L.C., the purchaser of the mobile home at the tax sale, appeals from (1) the trial court's grant of partial summary judgment to Oakwood invalidating the sale and awarding Oakwood possession of the mobile home; and (2) the trial court's dismissal of Oakwood's claims against the North Carolina Department of Transportation and the Division of Motor Vehicles (collectively "the DMV"). Plaintiff Oakwood appeals from the trial court's dismissal of its claims against Johnston County and David Womack. Case No. COA02-706, plaintiff Oakwood's appeal, and Case No. COA02-1430, defendant Rainbow's appeal, were previously consolidated for hearing. They are now consolidated for decision.

We hold that the trial court properly found no genuine issues of material fact regarding the invalidity of the sale and, therefore, affirm the grant of partial summary judgment to Oakwood. As for the dismissal of the DMV, Rainbow does not have standing to appeal since it was not an aggrieved party with respect to that portion of the trial court's order. We also hold that the trial court properly dismissed the claims against Johnston County and Womack because Oakwood failed to allege a waiver of state law governmental immunity and failed to allege a basis for municipal liability under 42 U.S.C. § 1983.

Facts

On 12 November 1998, defendants Dalton Ray Massengill and Phyllis Tart Massengill purchased an Oakwood double-wide mobile home priced at $71,789.00. The Massengills financed the purchase with Oakwood for the principal sum of $76,766.22 plus interest and other charges. Oakwood perfected its security interest in the mobile home by filing with the DMV. When the Massengills defaulted on their payments, Oakwood accelerated their debt and repossessed the mobile home in September 2000 by changing the locks and posting notices.

Later in September, the Johnston County Tax Collector's Office levied upon and seized the Massengills' mobile home for non-payment of taxes due on the mobile home. Following the levy, the Johnston County Tax Collector's Office forwarded notice of the intended tax sale to the DMV, which in a letter dated 27 September 2000 acknowledged receipt of the notice and stated: "A reasonable attempt has been made to locate and notify the current owner and all recorded lienholders for all sales conducted under G.S. 44-A. Full disclosure of all liens is not guaranteed."

On 27 September 2000, the Johnston County Tax Collector's Office posted a notice of sale at the Johnston County Courthouse announcing that the sale of the Massengills' mobile home would take place on 18 October 2000 "at 11:00 at Storage Location." The notice provided no further information about the location of the sale.

Although Johnston County had valued and insured the mobile home at $50,000.00, Rainbow purchased it at the sale for only $5,000.00. Following payment to the County of the taxes and costs, less than $500.00 remained to satisfy the Massengills' debt to Oakwood.

In October 2001, Oakwood filed a complaint in Johnston County Superior Court asserting claims for (1) breach of contract against the Massengills; (2) declaratory judgment voiding the sale of the mobile home; (3) damages for negligence and under 42 U.S.C. § 1983 against "Tax Collector and Johnston County"; (4) possession against Rainbow; (5) unjust enrichment against Rainbow; (6) injunctive relief barring transfer by Rainbow of any interest in the mobile home; and (7) declaratory judgment that the "Tax Collector" and the DMV were required to provide actual notice to plaintiff that the mobile home had been seized for taxes owed. Defendants Johnston County and Womack filed a motion to dismiss under Rule 12(b)(6) and on 14 March 2002, Judge Knox V. Jenkins granted that motion. The order of dismissal specified that it was "final" as to the County and Womack and that "there is no just cause for delay of any appeal." On 4 April 2002, Oakwood appealed that order.

The remaining parties filed cross-motions for summary judgment with the DMV alternatively filing a motion to dismiss pursuant to Rules 12(b)(6), 12(c), and 12(h)(2). On 22 May 2002, Judge James R. Vosburgh granted Oakwood partial summary judgment as to defendant Rainbow, awarded plaintiff immediate possession of the mobile home, ordered the DMV to void the certificate of title issued to Rainbow and to reissue the title as it existed before the sale, dismissed all claims against the DMV, and awarded plaintiff $78,912.67 (less the net proceeds of any sale of the mobile home) as against the Massengills. The order stated: "This is a final and appealable order, and there is no just cause for delay." Rainbow appealed, contesting both the dismissal of the DMV and the partial summary judgment granted to Oakwood. Although Oakwood did not cross-appeal, it cross-assigned error as to the dismissal of the DMV.

Rainbow's Appeal

We address first Rainbow's appeal because it involves the primary question presented by this case: Whether the tax sale of the Massengills' mobile home was valid. As an initial matter, we note that Rainbow's appeal is interlocutory since the trial court only granted partial summary judgment to Oakwood. Because, however, the trial court appropriately certified the order under Rule 54 of the Rules of Civil Procedure, the appeal is properly before this Court. *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993).

I. The Grant of Partial Summary Judgment to Oakwood

[1] Rainbow contends that genuine issues of material fact exist precluding the grant of partial summary judgment to Oakwood. Specifically, Rainbow argues that there are issues of fact regarding whether an irregularity occurred in connection with the tax sale and whether Rainbow was a good faith purchaser for value.

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

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

Johnson v. Trustees of Durham Tech. Cmty. Coll., 139 N.C. App. 676, 681, 535 S.E.2d 357, 361, *app. dismissed and disc. review denied*, 353 N.C. 265, 546 S.E.2d 102 (2000) (citations omitted). The non-movant may not "rest upon the allegations of its pleading to create an issue of fact, even though the evidence must be interpreted in a light favorable to the nonmovant." *Smiley's Plumbing Co., Inc. v. PFP One, Inc.*, 155 N.C. App. 754, 761, 575 S.E.2d 66, 70, *disc. review denied*, 357 N.C. 166, 580 S.E.2d 698 (2003).

Johnston County and its Tax Collector acted pursuant to N.C. Gen. Stat. §§ 105-366 and 105-367 (2003) in levying upon and seizing the Massengills' mobile home. N.C. Gen. Stat. § 105-366 permits a taxing authority collecting unpaid taxes to proceed first against personal property, while § 105-367(a) provides: "The levy upon the sale of tangible personal property for tax collection purposes (including levy and sale fees) shall be governed by the laws regulating levy and sale under execution except as otherwise provided in this section."

In execution sales, a sale of personal property may take place "at any place in [the] county designated . . . in the notice of sale." N.C. Gen. Stat. § 1-339.44(c) (2003). Further, under N.C. Gen. Stat. § 1-339.51 (2003), "[t]he notice of sale shall . . . (2) [d]esignate

the date, hour and place of sale . . . ." By virtue of N.C. Gen. Stat. § 105-367(a), these requirements apply equally to the sale of personal property for non-payment of taxes.

Oakwood first challenges the validity of the sale on the grounds that the failure to provide it with actual notice violated the due process requirements of the federal and state constitutions, citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 77 L. Ed. 2d 180, 187, 103 S. Ct. 2706, 2711 (1983) (citations omitted) ("Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane* [*v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873, 70 S. Ct. 652, 657 (1950) (setting forth due process requirements)]."). Alternatively, Oakwood contends that the failure of the posted notice of sale to specify the actual location of the sale invalidated the sale. Because we hold that this omission when combined with the undisputed evidence of inadequacy of price justified the trial court's decision, we do not address Oakwood's constitutional argument.

Our Supreme Court has held with respect to foreclosure and execution sales:

> Nor is inadequacy of price alone sufficient to avoid the sale. But gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties.

Weir v. Weir, 196 N.C. 268, 270, 145 S.E. 281, 282 (1928) (citations omitted). The Court clarified this principle in *Swindell v. Overton*, 310 N.C. 707, 713, 314 S.E.2d 512, 516 (1984) (citations omitted):

> [I]t is the materiality of the irregularity in such a sale, not mere inadequacy of the purchase price, which is determinative of a decision in equity to set the sale aside. Where an irregularity is first alleged, gross inadequacy of purchase price may then be considered on the question of the materiality of the irregularity. Where inadequacy of purchase price is necessary to establish the

materiality of the irregularity, it must also appear that the irregularity or unusual circumstance caused the inadequacy of price.

These principles apply to tax sales. *Henderson County v. Osteen*, 28 N.C. App. 542, 552, 221 S.E.2d 903, 909 (1976) (failure to comply with notice requirements in tax foreclosure sales "open[s] the door to a successful attack of the tax sale" under *Weir*), *rev'd on other grounds*, 292 N.C. 692, 235 S.E.2d 166 (1977). *See also Henderson County v. Osteen*, 297 N.C. 113, 119, 254 S.E.2d 160, 164 (1979) ("A tax foreclosure under the statute applicable to this case is analogous to an execution sale.").

Rainbow argues that there was a disputed issue of fact as to the existence of any irregularity. Rainbow contends that the jury should have been allowed to decide whether the notice of sale's reference to "Storage Location" was a sufficient designation of the place of the sale under N.C. Gen. Stat. § 1-339.51. We hold that this issue, involving only a question of statutory construction, was a question of law for the trial court. *Ace-Hi, Inc. v. Dep't of Transp.*, 70 N.C. App. 214, 216, 319 S.E.2d 294, 296 (1984) (when case involves only "legal questions of . . . interpretation of statutes and regulations," it is ripe for summary disposition).

The General Assembly must have intended that a notice of sale contain greater specification of location than simply a reference to an unnamed "Storage Location" without any accompanying address. The purpose of requiring that sales occur " 'at prescribed times and places [is] so that all persons may know when and where to attend to purchase such property to be sold.' " *Bladen County v. Breece*, 214 N.C. 544, 547, 200 S.E. 13, 15 (1938) (quoting *Wortham v. Basket*, 99 N.C. 70, 71, 5 S.E. 401, 401 (1888)). Under an analogous statute, our Supreme Court has held "[t]he sole purpose in requiring that notice of the time and place of such sale be given the mortgagee is to afford him an opportunity to protect his rights in the [personal] property." *Habit v. Stephenson*, 217 N.C. 447, 449, 8 S.E.2d 245, 246 (1940). With respect to personal property, specification of an address in the notice of sale is particularly important since the sale may occur at any location in the county. N.C. Gen. Stat. § 1-339.44(c). If a notice of sale does not include a location identifiable on its face, then readers of the notice will have no idea where to go to attend the sale.

We hold that the phrase "Storage Location" without more does not meet the requirement of N.C. Gen. Stat. § 1-339.51 that the notice of sale designate the "place of sale." Such a notice fails to fulfill its

essential purpose of actually notifying potential purchasers where the sale is going to take place. The trial court did not, therefore, err in concluding that the notice of sale failed to comply with N.C. Gen. Stat. § 1-339.51.

The trial court also properly concluded that this irregularity was material under the facts of this case. As the Supreme Court has stated, our statutes regulating sales "contemplate a sale at which the thing sold will bring its fair value." *Pittsburgh Plate Glass Co. v. Forbes*, 258 N.C. 426, 429, 128 S.E.2d 875, 877 (1963). A public sale requires "that an opportunity be given for competitive bidding." 72 Am. Jur. 2d *State and Local Taxation* § 843 (2001). *See also Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977) (stating that purpose of notice is to enable taxpayer to attend sale and make sure property is not sold for grossly inadequate price). A failure to publicize where a sale will occur will have the likely effect of decreasing the number of potential bidders, the amount of competition, and thus the price. Potential effect and not actual effect is all that is required if the ultimate sales price is grossly inadequate: "Actuality of injury is not a prerequisite of relief. The potentialities of the error, considered in connection with the grossly inadequate price, compel the conclusion that the irregularity in the sale was material and prejudicial—sufficient in nature to justify the interposition of a court of equity." *Foust v. Gate City Sav. & Loan Ass'n*, 233 N.C. 35, 38, 62 S.E.2d 521, 523 (1950).

Since the undisputed evidence establishes the existence of an irregularity with the potential for decreasing the sales price, the next question becomes the adequacy of the price. The trial court found that the evidence was undisputed that the mobile home had a fair market value of $50,000.00 and that it sold for only $5,000.00 (or 10% of its value). The court concluded that this price was "grossly inadequate." Rainbow does not dispute in its brief either the finding regarding the market value or the court's conclusion regarding the adequacy of the price.

Instead, Rainbow argues that a question of fact exists as to whether it was a good faith purchaser for value. The claim that a party was a good faith purchaser for value is an affirmative defense. *Foust*, 233 N.C. at 38, 62 S.E.2d at 524. Rule 8(c) of the North Carolina Rules of Civil Procedure requires that a party specifically set forth in its answer any affirmative defenses. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2003). " 'Failure to raise an affirmative defense in the pleadings gen-

erally results in a waiver thereof.' " *Purchase Nursery, Inc. v. Edgerton*, 153 N.C. App. 156, 162, 568 S.E.2d 904, 908 (2002) (quoting *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998)). Rainbow failed to allege in its answer that it was a good faith purchaser for value. It has, therefore, waived that defense. *Id.* (refusing, in connection with summary judgment order, to allow defendant to argue affirmative defense not asserted in answer). *See also Swindell*, 310 N.C. at 715, 314 S.E.2d at 517 (defense of bona fide purchaser for value unavailable in connection with foreclosure sale when irregularity was apparent on the face of the advertisement of the sale).

Given the potential that the insufficient notice of sale had to depress the mobile home's sales price when combined with the gross inadequacy of the ultimate sales price, we hold that the trial court did not err in setting aside the sale.

II. The DMV's Dismissal

[2] Rainbow also attempts to appeal the trial court's dismissal of the DMV. Under N.C. Gen. Stat. § 1-271 (2003), "[a]ny party aggrieved may appeal . . . ." If, however, the order appealed " 'does not adversely affect the substantial rights of appellant, the appeal will be dismissed.' " *Childers v. Seay*, 270 N.C. 721, 725, 155 S.E.2d 259, 262 (1967) (quoting *Coburn v. Timber Corp.*, 260 N.C. 173, 175, 132 S.E.2d 340, 341 (1963)). *See also Culton v. Culton*, 327 N.C. 624, 626, 398 S.E.2d 323, 324 (1990) (where the appellant's rights have not been directly affected by the court's order, appellant is not a party aggrieved and has no standing to challenge the order on appeal and the appeal should be dismissed).

Since Rainbow asserted no claims against the DMV, Rainbow cannot be affected except in the most indirect fashion by the order dismissing Oakwood's claims against the DMV. *See Childers*, 270 N.C. at 726, 155 S.E.2d at 262 (when neither defendant had asserted a cross-claim, one defendant could not appeal ruling as to second defendant because "each was an adverse party to the plaintiff, only"); *Canestrino v. Powell*, 231 N.C. 190, 196, 56 S.E.2d 566, 571 (1949) (defendant was not an aggrieved party as to dismissal of complaint with respect to co-defendant). Here, the only party aggrieved by the dismissal of the DMV was Oakwood, but Oakwood did not appeal from that dismissal.

Oakwood has nonetheless attempted to cross-assign as error that dismissal. Cross-assignments of error are strictly limited to issues

that "deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 10(d). Since Oakwood's arguments regarding the trial court's dismissal of the DMV do not serve as an alternative basis for supporting the trial court's grant of summary judgment, they should have been the subject of a cross-appeal. *Lewis v. Edwards*, 147 N.C. App. 39, 51-52, 554 S.E.2d 17, 24-25 (2001) (when plaintiff cross-assigned error as to trial court's failure to award damages, "[p]laintiff's failure to appeal the trial court's order waives this Court's consideration of the matter on appeal"); *Wilson Realty & Constr., Inc. v. Asheboro-Randolph Bd. of Realtors, Inc.*, 134 N.C. App. 468, 473, 518 S.E.2d 28, 32 (1999) (rejecting party's cross-assignment of error regarding dismissal of claim because it did not serve as an alternative basis for supporting trial court's order granting summary judgment). By failing to appeal from the trial court's order dismissing the DMV, Oakwood has waived review of that portion of the order. Since Rainbow, the only party to appeal, was not aggrieved by the decision, we dismiss Rainbow's appeal from the portion of the order granting the DMV's motion to dismiss.

Oakwood's Appeal

Oakwood appealed from the trial court's order dismissing its claims against defendants Johnston County and David Womack. This appeal, also interlocutory, is before the Court based on the trial judge's Rule 54 certification.

A trial court considering a motion to dismiss for failure to state a claim must decide, taking all the plaintiff's allegations as true, whether the plaintiff is entitled to recover under some legal theory. *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000). A complaint may be dismissed pursuant to Rule 12(b)(6) when "(1) the complaint on its face reveals that no law supports a plaintiff's claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats a plaintiff's claim." *Governor's Club, Inc. v. Governor's Club Ltd. P'ship*, 152 N.C. App. 240, 253, 567 S.E.2d 781, 790 (2002), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003).

Oakwood asserted claims against both Johnston County and Womack for a declaratory judgment voiding the tax sale, for damages based on negligence, and for damages under 42 U.S.C. § 1983. We hold that the dismissal of Johnston County and Womack was proper.

I. Womack

[3] Before we can address whether Womack's dismissal was proper, we must first determine whether Oakwood sued him in his individual capacity, in his official capacity, or in both capacities. *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997). In a suit against a governmental employee in his official capacity, the plaintiff is seeking relief from the governmental entity that employs the defendant, while in a suit against that employee in his individual capacity, the plaintiff is seeking relief from the defendant as an individual. *Id.* The distinction is critical with respect to the availability and scope of immunity and the ability even to assert a cause of action.

As our Supreme Court pointed out almost six years ago:

> It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words "in his official capacity" or "in his individual capacity" after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity.

Mullis v. Sechrest, 347 N.C. 548, 554, 495 S.E.2d 721, 724-25 (1998). A problem occurs when, as here, the plaintiff does not follow the direction of the Supreme Court and fails to expressly indicate in which capacity the defendant has been sued.

To decipher the defendant's capacity,

> "[t]he crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities."

Meyer, 347 N.C. at 110, 489 S.E.2d at 887 (quoting Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State Law for Public Officials and Employees: An Update*, Loc. Gov't L. Bull. 67, at 7 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995).

Here, Oakwood is seeking to recover monetary damages for negligence and under 42 U.S.C. § 1983 for violation of its due process rights. The fact that damages are sought does not end the inquiry: "[I]f money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the governmental entity or from the pocket of the individual." *Mullis*, 347 N.C. at 553, 495 S.E.2d at 723-24. To do so, a court must review the allegations in the complaint and the course of the proceedings. *Id.*, 495 S.E.2d at 724.

As indicated above, the caption of the complaint does not directly specify whether Womack is sued individually or officially. It does, however, identify defendant as "David Womack, Tax Collector for Johnston County, North Carolina," suggesting an official capacity suit. The complaint does not set forth a claim for relief against Womack separately, but rather states claims collectively against Womack and Johnston County. As the Supreme Court noted in *Mullis*, such an approach is "indicative of plaintiff['s] intention to sue defendant . . . in his official capacity . . . ." *Id.*

Most importantly, when asserting the claims for relief, Oakwood does not identify defendant Womack by his name, but rather by the title of his office, "Tax Collector." For example, in Oakwood's third claim for relief for damages, Oakwood alleges:

> 42. Defendant Tax Collector had a duty to the Plaintiff and to the Massengills as the owners of the property to use diligence to obtain a fair and reasonable price for the mobile home before selling it.
>
> 43. Defendant Tax Collector failed to exercise diligence to obtain a fair and reasonable price for the mobile home and sold it for ten percent or less of its fair market value.
>
> 44. Upon information and belief, Defendant Tax Collector knew that the offer made by Rainbow for $5,000 was grossly inadequate and was grossly less than the fair market value of the mobile home.

> 45. As a result, Plaintiff has been damaged by the amount of the fair market value of the mobile home at the time of its seizure by the Tax Collector. In the event the home is ultimately recovered by the Plaintiff, the Plaintiff has been damaged in the amount the home has depreciated during the time it has been detained by Defendant Rainbow. Pursuant to 42 U.S.C. 1983, Plaintiff is entitled to be restored to the position it would have been in absent Defendants' wrongful and negligent conduct.

While the complaint does seek damages "jointly and severally" in the prayer for relief, a fact that ordinarily suggests an individual capacity suit, *Block*, 141 N.C. App. at 279, 540 S.E.2d at 420, Oakwood again focuses on Womack's title, seeking the relief "[a]gainst Johnston County and its Tax Collector, David Womack, jointly and severally . . . ." By referring to Womack by his title, Oakwood expresses an intent to sue the office and not Womack individually.

In *Mullis*, the Supreme Court also reviewed the course of the proceedings, noting that even after the defendants asserted a defense of governmental immunity, the plaintiffs did not attempt to amend their complaint to specify the capacity in which they were suing the individual defendant. 347 N.C. at 554, 495 S.E.2d at 724. The same is true here.

Based on our review of the pleadings and the course of the proceedings, we hold that the complaint is not sufficient to state a claim for relief against defendant Womack in his individual capacity. While the reference to joint and several liability provides some support for an individual capacity suit, it is not sufficient, in light of the other allegations and the course of the proceedings, to provide adequate notice to defendant Womack that he was being sued individually as opposed to officially. *Id.* ("Thus, in order for defendant . . . to have an opportunity to prepare a proper defense, the pleading should have clearly stated the capacity in which he was being sued.").

An official capacity suit, such as the one here, is "merely another way of pleading an action against the governmental entity." *Id.*, 495 S.E.2d at 725. *See also Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (official capacity claim under 42 U.S.C. § 1983 is only another way of pleading a claim against the governmental entity of which officer is an agent and "[t]hus, where the governmental entity may be held liable for damages resulting from its official policy, a suit naming public officers in their official capacity is redundant"). As a result, Oakwood's claims against Womack in his official

capacity as Johnston County's Tax Collector are identical to its claims against Johnston County and our analysis of the viability of the Johnston County claims applies equally to Womack.

II. Claims Against Johnston County

A. *Declaratory Judgment Claim*

[4] Oakwood sought a judgment, apparently against all defendants, "nullifying the sale of the mobile home by the Tax Collector and Johnston County for the reason that such sale was illegal, was not carried out in accordance with statutory requirements, and was accordingly void." Oakwood also sought a declaratory judgment that "the Defendant Tax Collector was required under the North Carolina Constitution to provide actual notice to the Plaintiff that the mobile home in which it had a secured interest and a property interest had been seized for taxes purportedly owed."

Because, in connection with Rainbow's appeal, we have affirmed the trial court's order declaring the sale void, this portion of Oakwood's appeal is moot and we need not address it. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Further,

> [w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

Dickerson Carolina, Inc. v. Harrelson, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994) (internal quotation marks omitted).

No party has argued on appeal that the trial court's grant of partial summary judgment to Oakwood is in any way ineffective in the absence of a claim against Johnston County and Womack. We therefore decline to address Oakwood's arguments regarding its entitlement to a declaratory judgment with respect to Johnston County and Womack.

B. *Negligence Claim*

[5] Oakwood's claim for damages based on negligence is barred by governmental immunity. Under North Carolina law, counties are en-

titled to governmental (or sovereign) immunity unless the county waives immunity or otherwise consents to be sued. *Dawes v. Nash County*, 357 N.C. 442, 445, 584 S.E.2d 760, 762 (2003). "Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity." *Meyer*, 347 N.C. at 104, 489 S.E.2d at 884.

While a county may waive immunity through the purchase of liability insurance, N.C. Gen. Stat. § 153A-435 (2003), "[i]n order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity." *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). "Absent such an allegation, the complaint fails to state a cause of action." *Id.* Since the complaint in this case does not include any allegations that the County has purchased liability insurance or otherwise waived its immunity, the trial court properly dismissed the negligence claim against the County.

C. *42 U.S.C. § 1983 Claim*

[6] The complaint also asserts a claim for damages under 42 U.S.C. § 1983 for violation of Oakwood's due process rights. While Oakwood relied upon the North Carolina constitution as a basis for voiding the sale, Oakwood did not seek damages under the state constitution and we do not, therefore, address whether Oakwood would have been entitled to pursue such a claim.

Oakwood correctly states that a county may be sued for damages under 42 U.S.C. § 1983 for violation of the federal constitution. Oakwood's complaint, however, fails to include the allegations necessary to state a § 1983 claim against a municipality such as a county.

The United States Supreme Court first held that a municipality is subject to suit under § 1983 in *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). *Monell* and the decisions that followed "[made] it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983." *Leatherman v. Tarrant County*, 507 U.S. 163, 166, 122 L. Ed. 2d 517, 523, 113 S. Ct. 1160, 1162 (1993).

Thus, contrary to Johnston County's contentions, it is not entitled to immunity from suit under § 1983. The County's reliance on *Faulkenbury v. Teachers' & State Employees' Retirement System*,

108 N.C. App. 357, 424 S.E.2d 420, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993) and *Corum v. Univ. of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431, 113 S. Ct. 493 (1992) is misplaced. Those cases recognized that states—as opposed to local governing bodies—may not be sued under § 1983 and are entitled to Eleventh Amendment immunity. Indeed, this distinction was noted by our Supreme Court in *Moore*, 345 N.C. at 365, 481 S.E.2d at 20: "In the present case, the Court of Appeals erroneously applied the holding of *Corum* to dismiss plaintiffs' claims against a municipality and its officials. Although a municipal government is a creation of the State, it does not have the immunity granted to the State and its agencies."

Nevertheless, *Monell* also held that a municipality "cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." 436 U.S. at 691, 56 L. Ed. 2d at 636, 98 S. Ct. at 2036 (emphasis original). Instead, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694, 56 L. Ed. 2d at 638, 98 S. Ct. at 2037-38.

In order to state a claim for relief against a local governing body, a plaintiff must allege a basis for liability under *Monell*: "Section 1983 plaintiffs seeking to impose liability on a municipality must, therefore, adequately plead and prove the existence of an official policy or custom that is fairly attributable to the municipality and that proximately caused the deprivation of their rights." *Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994) (reversing dismissal of complaint that alleged the existence of several municipal policies or customs). *See also McCormick v. City of Chicago*, 230 F.3d 319, 324 (7th Cir. 2000) (in order to survive a motion to dismiss, § 1983 plaintiff must allege that the municipality had an express policy or custom or usage or that the constitutional injury was caused by a person with final policymaking authority).

The complaint in this case does not allege a basis for liability under *Monell*. The complaint contains no allegation that Oakwood's injury was due to Johnston County policy, custom, or usage or that it resulted from a decision by a person with final policymaking authority for the County. A review of the allegations reveals only a claim based on *respondeat superior*. The trial court therefore properly dismissed Oakwood's claims under § 1983.

Conclusion

We affirm the trial court's orders granting partial summary judgment to Oakwood and dismissing the claims asserted against Johnston County and Womack. We dismiss Rainbow's appeal with respect to the DMV.

Affirmed in part and dismissed in part.

Chief Judge EAGLES and Judge MARTIN concur.

IN THE MATTER OF: DASHAUN SHEPARD DOB: 9-19-87; SHALITA SHEPARD DOB: 2-8-89; JARICO SHEPARD DOB: 7-6-90; ASIA SHEPARD DOB: 2-7-92

No. COA03-212

(Filed 20 January 2004)

1. Termination of Parental Rights— neglect—children left in foster care for more than twelve months without reasonable progress

The trial court did not err in a parental rights termination proceeding by concluding there was clear, cogent, and convincing evidence supporting the termination of respondent mother's parental rights under N.C.G.S. § 7B-1111(a)(2) on the ground that respondent left her children in foster care for more than twelve months without showing reasonable progress had been made to correct those conditions which led to the removal of her children, and by concluding that termination was in the best interests of the children, because: (1) respondent willfully left her children in the custody of DSS for a time period well beyond the statutory period of twelve months; (2) respondent has refused to acknowledge and treat the very conditions that led to her loss of custody and even refused to acknowledge the medical diagnosis of her children; and (3) any attempt to set up a visitation with the children by the diligence of DSS or the children's guardian ad litem was frustrated at respondent's own behest.

2. Guardian Ad Litem— incapable parents—competency

A guardian ad litem (GAL) statutorily assigned to respondent mother under N.C.G.S. § 1A-1, Rule 17 in a parental rights termi-

nation proceeding concerning parental incapability under N.C.G.S. § 7B-1111(a)(6) could testify as to her ward's parental capability and ultimately against the interest of her ward.

Appeal by respondent Crystal Shepard from an order entered 25 September 2002 by Judge Laurie Hutchins in Forsyth County District Court. Heard in the Court of Appeals 12 November 2003.

Robert W. Ewing for Crystal Shepard respondent appellant.

Assistant County Attorney Theresa A. Boucher, for Forsyth County Department of Social Services petitioner appellee; and Womble Carlyle Sandridge & Rice, PLLC, by Jason B. Buckland, for Guardian ad Litem petitioner appellee.

McCULLOUGH, Judge.

On 6 May 1996, the Forsyth County Department of Social Services (DSS) filed Juvenile Petitions pursuant to N.C. Gen. Stat. § 7A-517 (now N.C. Gen. Stat. § 7B-400), alleging Dashaun Shepard, aged nine, Shalita Shepard, aged seven, Jarico Shepard, aged five, Asia Shepard, aged four, and their two older siblings to be "dependent juveniles" as defined by N.C. Gen. Stat. § 7A-517(13) (now N.C. Gen. Stat. § 7B-101(9) (2001)). Dashaun, Shalita, Jarico, and Asia (the "Shepard Children" when referred to collectively) were taken into non-secure custody by DSS, adjudicated to be dependent, and remained in the custody of DSS until termination of their parental rights. All statutes under the juvenile code were complied with during this period of custody.

On 17 August 2001, a petition to terminate parental rights was filed as to these four juveniles, and after a hearing on 18 March 2002, the parental rights of Ms. Shepard were terminated. Three statutory grounds were found as the basis of termination, N.C. Gen. Stat. § 7B-1111(a)(2), (3) and (6). The trial court then found it was in the best interest of Dashaun, Shalita, Jarico, and Asia to have the parental rights of their mother terminated.

In the first portion of this opinion, we uphold the trial court's determination that there was clear, cogent, and convincing evidence supporting the termination of the parental rights on at least one of the alleged adjudicatory grounds in the termination proceeding. For the sake of clarity, we do so using only the undisputed evidence before this Court. In the second portion of the opinion, we consider the dis-

puted evidence set out in the testimony of the Guardian Ad Litem (GAL) statutorily assigned for Ms. Shepard in this case. Specifically we answer the question of whether such a GAL may testify as to their ward's parental capability, and ultimately against the interest of their ward as to the termination hearing. We conclude such a guardian may so testify.

I. Undisputed Facts Supporting Grounds for Termination

A. Facts and Procedure

The undisputed facts of this case are as follows: On 4 May 1996, Ms. Shepard was involuntarily committed to inpatient care at Forsyth/Stokes Mental Health Center with the preliminary diagnosis of bipolar disorder. The Shepard children came under the care of DSS as dependent juveniles. Non-secure custody was awarded to DSS on 6 May 1996, and with the exception of an unsuccessful trial placement of Dashaun and Jarico in the home of Ms. Shepard from October 1996 to March 1997, the children have lived continuously in the care provided by the DSS since that time.

In a 27 August 1996 juvenile order adjudicating the four children dependent juveniles, the court found as fact:

> 6. Crystal Shepard does not like her living environment at this time, and Jarico Shepard is having behavioral problems in the school setting.
>
> 7. Crystal Shepard appears to have difficulty raising six children as a single parent, compounded by her reluctance to accept assistance from community resources.
>
> 8. On May 4, 1996, Crystal Shepard was involuntarily committed for treatment and the preliminary diagnosis, upon admission was Bi-Polar disorder.

The order concluded as a matter of law that it was in the best interest of the Shepard children to remain in the custody of DSS. Pursuant to these conclusions, the court ordered:

> 2. All visitations shall be arranged and scheduled by the Forsyth County Department of Social Services.
>
> 3. Crystal Shepard shall seek out-patient therapy at Forsyth/Stokes Mental Health and shall follow all recommendations.
>
> . . . .

5. Crystal Shepard shall cooperate with all agencies providing services to this family.

. . . .

7. The Forsyth County Department of Social Services shall make all appropriate resources available to Crystal Shepard for the possible reunification of this family.

Between the period 27 August 1996, and DSS's petition for termination of parental rights, Ms. Shepard struggled to comply with the conditions of the order. Suzette Hager, the social worker for DSS assigned to the Shepard children, was charged with overseeing the visitation and mental health aspects of the order when she took on the Shepard children case in 1998. In the termination proceedings, Ms. Hager testified that, as of October of 1999, Ms. Shepard no longer welcomed Ms. Hager in her home despite her status as the Shepard children's social worker. Ms. Hager testified that the last time Ms. Shepard visited Dashaun and Jarico was 5 September 2000, and the last time she visited Shalita and Asia was 21 December 2000. Additionally, Ms. Hager testified as to the following:

> During that period of time in October of '98 we were able to get Mrs. Shepard to initiate a psychological . . . evaluation which she didn't complete.
>
> And there was also an effort to get her to obtain a psychiatric evaluation, which she went to the appointment but didn't cooperate with the testing, so both of those tests came back inconclusive. And that was the only treatment that she had had during the period of time that I've been involved in the case, other than her going to meet with Doctor Bosworth.

As the caseworker for the Shepard children, Ms. Hager testified as to the children's conditions as well: Dashaun had been diagnosed bipolar, Attention Deficit/Hyper Disorder (ADHD), and adjustment disorder with disturbance in mood and conduct. He had not complied with taking his medications, was taught in a self-contained classroom, and since 1998 had resided in a therapeutic foster home. Jarico had also been diagnosed as ADHD. He was on medication, was taught in a self-contained classroom, and since 1998 had resided in a therapeutic foster home. These boys lived in neighboring homes. Shalita had also been diagnosed with ADHD, and at the time of the termination hearing there were concerns she initiated or communicated auditory and visual hallucinations, and was being assessed for thought

process disorder. Asia struggles with adjustment disorder. The two girls lived in the same home.

Kim Nesbitt (GAL), for the Shepard children, testified in the termination proceeding that she began to oversee Ms. Shepard's visitations of the children in July of 2001. She did so when Ms. Shepard expressed problems with Ms. Hager's supervising. Ms. Nesbitt testified that she recommended twice a month visits with the girls, and once a month visits with the boys, but Ms. Shepard was to initiate such meetings. Ms. Shepard only made one direct phone call to Ms. Nesbitt in regard to such visits, and when Ms. Nesbitt tried to respond, her calls were not returned. Ms. Nesbitt had suggested a number of locations for the visitation to occur, her church being one, but Ms. Shepard could not agree on any of the offered locations.

The Forsyth County Juvenile Court ordered a psychological evaluation of Ms. Shepard to assess any progress since the 27 August 1996 juvenile order. The evaluation, dated 27 October 2000, conducted and written by Dr. Thomas Bosworth, was to include an assessment of her parenting and overall psychological functioning. As to both of these, his evaluation included the following:

> She admitted to not agreeing to allow one of the boys to be placed in a special class; first, because she could "sense" that it was not the right place for him, and, second, after she saw the classroom, she knew it was not the right place for him. She was also against her children being on medication, but she went along with it for fear that they would be removed if she refused to allow them to take the medication. She "knew" her sons did not need medication. Even now, she does not think her sons need medication . . . .
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> . . . .
>
> . . . Ms. Shepard reported that her mood has not been good for several years. She gets sad and depressed, but she tries not to pay any attention to it. She reported that her mind is not like it used to be. Things just come into her mind, and she has thoughts that bother her. There are times when she is "confused," such as when it seems like the TV is talking in a totally different language. There are times when she has heard voices outside her door, and when she goes to look, no one is there. She has seen "scary" things that others do not see, such as a part of a person sticking out of the ground. "People worry [her]." She feels like

> people mistreat her, and she gave several examples of when she has felt this way. She feels like she was put in jail based on a lie. When handcuffed, the policeman refuses to loosen the cuffs when she complains about them being too tight. In jail, she was put in a "foul cell."

In the summary of the evaluation he stated:

> Ms. Shepard suffers from severe psychological problems that have limited, and continue to limit, her ability to function adequately on her own, much less to function as a parent. Making matters worse is the fact that Ms. Shepard denies that she has any type of problem that would benefit from professional help. . . . It appears Ms. Shepard suffers primarily from having a paranoid personality disorder. Secondarily, she appears to have areas of distorted thinking, confusion, and even hallucinations. Ms. Shepard also appears to suffer from depression. . . .
>
> . . . .
>
> . . . With her disorder, however, she is not able to care for even one child in the most benign situation.
>
> . . . .
>
> Ms. Shepard's condition is not likely to improve. . . . One, Ms. Shepard does not see herself as having a problem that requires treatment. Two, paranoid people rarely trust anyone enough to get far enough along in treatment to see that it can be helpful. Three, there is not likely to be a medication that is effective enough in stabilizing her thinking, paranoia, and mood to make her want to continue to take it.

This report was of record for the termination proceeding. Dr. Bosworth later testified in the termination proceeding to reflect his evaluation.

Ms. Hager, Ms. Nesbitt, and Dr. Bosworth all testified that they believed it to be in the Shepard children's best interest to have Ms. Shepard's rights terminated.

B. Grounds for Termination/Children's Best Interest

[1] The order finding both the grounds for termination and that it is in the best interest of the children that Ms. Shepard's right be terminated was based on the statutory grounds of N.C. Gen. Stat. § 7B-1111(a)(2), (3) and (6). We hold that the evidence set out above

in this opinion supports a finding of clear, cogent, and convincing evidence that Ms. Shepard has

> willfully left the juvenile in foster care . . . for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C. Gen. Stat. § 7B-1111(a)(2). Therefore, we uphold the trial court's conclusion of law to terminate on this ground and that to do so was in the children's best interest.

1. Standard of Review

A petition for termination of parental rights must be carefully considered in light of all the circumstances and with the children's best interest firmly in mind. "Although severing parental ties is a harsh judicial remedy, the best interests of the children must be considered paramount." *In re Adcock*, 69 N.C. App. 222, 227, 316 S.E.2d 347, 350 (1984). Termination of parental rights is a two-step procedure. N.C. Gen. Stat. § 7B-1109 (2001); N.C. Gen. Stat. § 7B-1110 (2001). During the initial adjudication phase of the trial, the petitioner seeking termination must show by clear, cogent, and convincing evidence that grounds exist to terminate parental rights. *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997); N.C. Gen. Stat. § 7B-1111(b). A finding of any one of those grounds is sufficient to support termination of parental rights. *In re Williamson*, 91 N.C. App. 668, 678, 373 S.E.2d 317, 322-23 (1988). If the petitioner succeeds in establishing the existence of any one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111, the trial court moves to the second, or dispositional, stage, where it determines "whether it is in the best interests of the child to terminate the parental rights." *Young*, 346 N.C. at 247, 485 S.E.2d at 615. *See also* N.C. Gen. Stat. § 7B-1110(a); and *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001). However, so long as the court applies the different evidentiary standards at each of the two stages, there is no requirement that the stages be conducted at two separate hearings. *In re White*, 81 N.C. App. 82, 344 S.E.2d 36, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 470 (1986).

"The standard of review in termination of parental rights cases is whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re Clark*, 72 N.C. App. 118, 124, 323 S.E.2d 754,

758 (1984). We then consider, based on the grounds found for termination, whether the trial court abused its discretion in finding termination to be in the best interest of the child. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995). "Evidence heard or introduced throughout the adjudicatory stage, as well as any additional evidence, may be considered during the dispositional stage." *In re Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910.

2. Findings of Fact and Conclusions of Law

In the termination order, the trial court made the following findings of fact:

> 11. Crystal Shepard has willfully left Dashaun Jovan Shepard, Shalita Shuandae Patrice Douthit Shepard, Jarico Durand Joseph Douthit Shepard, and Asia Alea Tabya Douthit Shepard in foster care for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to removal of the children.
>
> . . . .
>
> 13. On August 15, 1996, Dashaun Shepard, Shalita Shepard, Jarico Shepard, and Asia Shepard were adjudicated to be Dependent juveniles. Crystal Shepard, the mother of the children was ordered to seek out patient therapy at Forsyth/Stokes Mental Health (now called Centerpoint Human Services) and cooperate with all agencies providing services to her family. She was additionally provided the opportunity to have regular supervised visitation with her children.
>
> 14. On February 13, 1997, Crystal Shepard was ordered to seek and follow through with therapy addressing her mental illness and maintain herself on medication as prescribed and all other therapeutic recommendations.
>
> 15. On May 7, 1998, the Forsyth County DSS was relieved by the Juvenile Court of its obligation to make efforts to reunify this family and instead the court adopted a plan by which Ms. Shepard could demonstrate directly to the Court that she has received a psychiatric evaluation and she is complying with all treatment recommendations including medication if pre-

scribed; that she is gainfully employed and maintaining an appropriate residence for herself and her children; that she has completed a series of parenting classes and she has attended any special classes which are recommended by her children's therapists to assist her in learning about her children's special needs; and that she has cooperate[d] with all Agencies involved with she and her children.

16. Crystal Shepard continues to be in denial of her mental health needs. Ms. Shepard has refused additional psychiatric evaluations and all therapeutic interventions deemed appropriate for her. Ms. Shepard also refuses to believe that her children have special needs and are in need of special services. Ms. Shepard has been uncooperative with efforts to provide services to herself or her children.

17. In 2000, Dr. Thomas Bosworth conducted a child custody evaluation regarding Crystal Shepard and her children. In his report dated October 27, 2000, Dr. Bosworth concluded that Ms. Shepard suffers from a paranoid personality disorder and she appears to have areas of distorted thinking, confusion and even hallucinations. Dr. Bosworth also concluded that Crystal Shepard was in no condition to take responsibility for her children. Dr. Bosworth also concluded that her condition is not likely to improve. Dr. Bosworth determined that in order for Ms. Shepard's condition to improve she would need a combination of counseling and medication. Crystal Shepard does not believe she needs either one.

18. Dr. Bosworth evaluated Ms. Shepard to have severe psychological problems which limit her ability to function on her own or parent her children. Based upon her diagnosis, Ms. Shepard is unlikely to seek out or continue in treatment.

19. Dr. Bosworth evaluated Jarico Shepard and Dashaun to also have severe mental health issues; which he determined that Crystal Shepard is unable to meet their mental health needs.

. . . .

23. Crystal Shepard last visited with her 4 children on September 4, 2000. Her last visit with Shalita and Asia Shepard was on December 21, 2000. Ms. Shepard provided no cards, gifts or letters for her children on Christmas, their birthdays or other significant holidays.

24. Ms. Crystal Shepard was awarded supervised visitation with her children by the Juvenile Court of Forsyth County. She never called the Forsyth County DSS to request a visit with the children and she never called to inquire as to the well-being of her children.

25. Ms. Kimberly Nesbitt is the Guardian ad Litem for the Shepard children. Beginning in July 2001, Ms. Nesbitt volunteered to coordinate and supervise visits between Crystal Shepard and her children on a monthly basis. From July to November 2001, Ms. Nesbitt received no calls from Ms. Shepard requesting visitation with her children. In November 2001, Ms. Shepard, through counsel, requested a visit with her children on either Thanksgiving Day or Christmas Day at their grandmother's house. Ms. Nesbitt declined to provide visitation on the holiday however offered to supervise a visit during the week of Christmas at DSS or SCAN. Ms. Shepard refused to visit at DSS or SCAN and Ms. Nesbitt offered to conduct the visit at her church, McDonald's or at the skating rink. Ms. Shepard declined such visitation. No visitation occurred during November or December 2001. In February 2002, Ms. Nesbitt approached Ms. Shepard at a Court hearing and again offered to supervise a visit. Ms. Shepard indicated that she wanted to visit her children at their schools but arrangements were never made for such visitation.

The trial court then concluded as a matter of law:

1. Grounds exist pursuant to N.C.G.S. 7B-1111(a)(2) . . . to terminate the parental rights of Crystal Shepard to the children Dashaun Jovan Shepard, Shalita Shuandae Patrice Douthit Shepard, Jarico Durand Joseph Douthit Shepard, and Asia Alea Tabya Douthit Shepard.

These findings are support by undisputed evidence of record and the transcript, as set out above in this opinion, evidence which we hold to be clear, cogent, and convincing.

"Willfulness" when terminating parental rights on the grounds of N.C. Gen. Stat. § 7B-1111(a)(2), is something less than "willful" abandonment when terminating on the ground of N.C. Gen. Stat. § 7B-1111(a)(7). *Nolen*, 117 N.C. App. at 697, 453 S.E.2d at 223. A finding of willfulness is not precluded even if respondent has made some efforts to regain custody of the children. *In re Becker*, 111 N.C. App.

85, 95, 431 S.E.2d 820, 826-27 (1993). Willfulness may be found where the parent, recognizing her inability to care for the children, voluntarily leaves the children in foster care. *In re Bishop*, 92 N.C. App. 662, 669, 375 S.E.2d 676, 681 (1989). In addition to finding that the parent has willfully left the children in foster care for more than twelve months, under N.C. Gen. Stat. § 7B-1111(a)(2) the trial court must also find that the parent has failed (1) to make reasonable progress in correcting the conditions which led to the removal of the children; and (2) to show positive response to DSS's diligent efforts to encourage the parent to strengthen the parental relationship to the children or to make and follow through with constructive planning for the future of the children. *In re Taylor*, 97 N.C. App. 57, 63-64, 387 S.E.2d 230, 233 (1990).

In the instant case, there is adequate evidence to hold Ms. Shepard was willful in leaving her children in the custody of DSS for a time period well beyond the statutory period of 12 months. Additionally, we hold the evidence clear, cogent, and convincing that Ms. Shepard has refused to acknowledge and treat the very conditions that led to her loss of custody, and even refused to acknowledge the medical diagnosis of her children. This indicates that, if returned to her custody, she would not pursue treatment for herself or even her children. Finally, any attempt to set up a visitation with the children by the diligence of DSS or the children's GAL was frustrated at Ms. Shepard's own behest, and we find this inexcusable. These findings are set out as excerpted above.

Based on the undisputed clear, cogent, and convincing evidence supporting the trial court's findings of fact and conclusions of law, we hold Ms. Shepard's parental rights terminated on the grounds of N.C. Gen. Stat. § 7B-1111(a)(2), and we need not consider any other grounds of termination found by the trial court. Furthermore, we do not find the trial court abused its discretion when finding it was in the best interest of the Shepard children to have their mother's parental rights terminated. The DSS caseworker for the children, the children's GAL, and a psychiatrist all testified that termination was in the children's best interest.

Finally, we note that Ms. Shepard, while preserving as error specific admissions of evidence by the trial court which she alleges provided the basis for termination on the grounds of N.C. Gen. Stat. § 7A-1111(a)(2), did not properly preserve as error the actual finding itself. Additionally she did not assign as error that it was in the best interest of the children to terminate her parental rights. While we

chose not to in this instance, we could have simply held these as admitted. N.C.R. App. P. 10(a) and 28(a) (2001).

II. Disputed Facts: Testimony by the GAL of Ms. Shepard

[2] While the analysis above is sufficient for us to affirm the termination of Ms. Shepard's parental rights, we next address the heart of her question on appeal. Ms. Shepard disputes the evidence offered in the testimony of the GAL statutorily assigned to her. She contends the GAL, Ms. Twanda Staley, should not have been permitted to testify against the interest of Ms. Shepard in the termination proceeding, and that this testimony is grounds for a new termination proceeding whether or not prejudice can be found. In this portion of the opinion we hold: Ms. Staley was free to testify as to all otherwise admissible evidence as the GAL for Ms. Shepard, including what she believes is in the best interest of Ms. Shepard; and that this testimony can be used as evidence to establish grounds for termination. We note that in the instant case the testimony was only gratuitous as there was clear, cogent, and convincing evidence to find at least one ground for termination without it.

A. Statutorily Mandated GAL

When DSS pursues termination on the grounds of parental "incapability" under N.C. Gen. Stat. § 7B-1111(a)(6), "[t]he parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. . . . [A] guardian ad litem *shall* be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent[.]" N.C. Gen. Stat. § 7B-1101 (2001) (emphasis added). On at least two occasions, this Court has ordered a new termination proceeding when the trial court failed to appoint a GAL for a parent whose parental rights were threatened on the ground of "incapability." *See In re Richard v. Michna*, 110 N.C. App. 817, 431 S.E.2d 485 (1993) (which held that, although there was no evidence that the respondent had been prejudiced by the failure of the trial court to appoint a guardian ad litem, the mandate of the statute must be observed, and a guardian ad litem must be appointed); *In re Estes*, 157 N.C. App. 513, 515, 579 S.E.2d 496, 499, *disc. review denied*, 357 N.C. 459, 585 S.E.2d 390 (2003) (where the allegations contained in the petition or motion to terminate parental rights tend to show that the respondent is incapable of properly caring for his or her child because of mental illness, the trial court is required to appoint a guardian ad litem to represent the respondent at the termination hearing.).

In this case, Ms. Shepard was properly assigned a GAL and an attorney, and this is undisputed.

B. Legal Duties of the GAL

Rule 17 of the North Carolina Rules of Civil Procedure sets out the duties of a GAL appointed under this section:

> Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules . . . . After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented[.]

N.C. Gen. Stat. § 1A-1, Rule 17(e) (2001). North Carolina case law offers little guidance as to our reading of Rule 17 and any specific duties of a GAL assigned to a parent-ward in a termination proceeding.

In *In re Montgomery*, 311 N.C. 101, 115, 316 S.E.2d 246, 255 (1984), our Supreme Court held that termination on the grounds of parental incapability to some mental condition or substance abuse on the grounds of N.C. Gen. Stat. § 7A-289.32(7) (now N.C. Gen. Stat. § 7B-1111(a)(6)) was constitutional. The court stated:

> A parent has a right to counsel and to appointed counsel in case of indigency, if not waived by the parent. The Act also provides for the appointment of a guardian ad litem to represent the parent who suffers a diminished mental capacity. We believe the provisions of this statute adequately assure respondents, and those similarly situated, *of procedural due process protection.*

Montgomery, 311 N.C. at 115, 316 S.E.2d at 255 (citations omitted) (emphasis added). Rule 17 and the case law addressing the duties of GALs assigned to alleged "incapable" parents suggest the role of the GAL as a guardian of procedural due process for that parent, to assist in explaining and executing her rights.

Ms. Shepard contends that by testifying against Ms. Shepard's interests as a parent in the termination proceeding, Ms. Staley did not fulfill her duties as a GAL and in fact breached the duties owed to her ward. Thus, Ms. Shepard claims this was equivalent to not being assigned the statutorily required GAL, and is grounds for a

new termination proceeding under the authority of *Estes* and *Richard*. We disagree.

The transcript shows Ms. Staley was assigned as the GAL in accord with N.C. Gen. Stat. § 7B-1101 approximately two months before the termination proceeding. Before the hearing, she met with Ms. Shepard on three separate occasions, totaling approximately three hours. It is clear from these meetings that Ms. Staley sought to protect the interest of Ms. Shepard and to make her understand the gravity of the termination proceeding. On direct examination by DSS, Ms. Staley stated:

> This has been a difficult case for me. I think the main problem that we're dealing with is that Mrs. Shepard doesn't believe that she has any problems. And what I suggested to her, because I didn't think she, she understood—or I wanted to make sure that she understood, that her mental health or her mental issues were at issue in this TPR proceeding.
>
> And I wanted to make sure that she understood that and that she understood that there was a possibility that if the Judge believed that and if she wasn't getting the help that had been recommended, that she could possibly lose her children.
>
> . . . .
>
> And so I asked her if I could find a black female therapist or psychologist that did not work for CenterPoint or did not work for the State of North Carolina, if she would be willing to talk to one of them. I told her I had two in mind, and if she would be willing to submit herself to talk to either one of these ladies, black females.
>
> . . . .
>
> I tried to explain to her that now that she was within the system, whether she thought it was right or wrong, what had happened to her and what had happened to her children, if she had a specific plan for herself.

Furthermore, the transcript reveals a number of instances where Ms. Staley and Ms. Shepard's attorney were working together during the course of the proceeding to protect the interest of Ms. Shepard.

Beyond this due process protection, there are no specifics as to the proper conduct of the GAL who is acting purely as a guardian and

not an attorney (thus falling outside of the North Carolina State Bar's Revised Rules of Professional Conduct). Furthermore, North Carolina courts now recognize all testimonial privileges through statute. *See* N.C. Gen. Stat. § 8-49, *et. seq.* (2001). There is no testimonial privilege that Ms. Shepard could raise to stop Ms. Staley from testifying, and we are not inclined to now adopt one in common law.

In *In re Farmer*, 60 N.C. App. 421, 299 S.E.2d 262, *disc. review denied*, 308 N.C. 191, 302 S.E.2d 243 (1983), at a competency hearing, we determined there was no authority to bar a GAL from testifying as to the competency of their ward:

> The essence of respondent's argument seems to be that allowing the guardian to testify as to the ward's incompetency is tantamount to compelling respondent to testify against herself. Respondent cites no authority to support this argument, but contends that "sound policy" should exclude such testimony. We are not aware of any restrictions on the competency of guardians *ad litem* as witnesses in trials involving their wards. *See* G.S. 8-49; G.S. 8-50; and 1 Brandis on North Carolina Evidence, §§ 53 and 54.

Id. at 424, 299 S.E.2d at 264. While *Farmer* concerned a competency hearing, we hold that its authority covers the question in this case. In fact, as a matter of policy, Ms. Shepard's case is less worrisome than concerns raised in *Farmer* as she is in a better position to rebut the testimony of Ms. Staley with her own, and further was likely of more sound mind not to disclose potentially damaging information to the GAL in the first place than the party found *incompetent* in *Farmer*.

Finally it should be noted that Ms. Shepard did not testify as a witness in the proceeding, and relied on calling Ms. Staley as a witness to represent her interests after the disputed testimony:

> Q: Here in the last few minutes, you and I have had a side bar conversation with Mrs. Shepard about whether she wants to speak on her behalf, is that correct?
>
> A: That is correct.
>
> Q: Okay. And would it be correct to say that she has expressed some reservations about being able to fully and appropriately articulate her position here today?
>
> A: That's correct.

Q: Would it be fair to say that to an extent, you know what her position is?

A: Yes.

Q: Okay. And we did agree that, more in the capacity of me calling you as her witness, you were willing to be her spokesperson, is that correct?

A: Yes, and she agreed to that. I think it was her suggestion.

From these statements it is fair to assume that, regardless of Ms. Staley's being called as a direct witness by DSS, her testimony would have been elicited for the purposes of being Ms. Shepard's "spokesperson" for the record. Ms. Staley's testimony then would have been subject to cross-examination by DSS, bringing to light the same evidence that DSS procured in their direct examination. This assumption is bolstered by the fact that other than Ms. Staley's testimony, Ms. Shepard called no witnesses.

In sum, we determined there to be clear, cogent and convincing evidence to terminate Ms. Shepard's parental rights as to these four children on the grounds of N.C. Gen. Stat. § 7B-1111(a)(2). Therefore, we need not address any other grounds found by the trial court. Additionally, we hold the evidence offered through the testimony of Ms. Shepard's GAL, Ms. Staley, is admissible and could have been used to meet the clear, cogent, and convincing standard as to any of the statutory grounds for termination.

Therefore, we affirm.

Affirmed.

Judges TYSON and BRYANT concur.

STATE OF NORTH CAROLINA v. PHILIP RAY DAWKINS, JR.

No. COA02-1637

(Filed 20 January 2004)

1. **Homicide— first-degree murder—no instruction on second-degree—invited error**

There was no plain error in the court not submitting second-degree murder to the jury in a first-degree murder prosecution where defendant sought to prevent just that.

2. **Evidence— hearsay—state of mind—other evidence admitted**

There was no error in the court admitting hearsay testimony in a first-degree murder prosecution where other testimony was admitted to the same effect or the evidence concerned the victim's state of mind. These statements explained the victim's conditions as shown in photographs and tended to disprove the nonabusive relationship defendant described. An express declaration of fear is not required.

3. **Homicide— first-degree murder—sufficiency of evidence**

A motion to dismiss a charge of first-degree murder for insufficient evidence was properly denied where fiber and blood evidence, items found with the body, the type of weapon used, and the location of the body linked defendant to the crime, and there was testimony that the marital relationship between defendant and the victim had deteriorated, that defendant had threatened the victim, and that she feared him. There was evidence of premeditation in threats to the victim, ill will, and efforts to conceal the body.

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

The short-form indictment for first-degree murder is constitutional.

On writ of certiorari by defendant to review judgment entered 3 June 1998 by Judge Marvin K. Gray in Stanly County Superior Court. Heard in the Court of Appeals 18 September 2003.

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

Cunningham, Dedmond, Petersen & Smith, L.L.P., by Bruce T. Cunningham, Jr., for the defendant-appellant.

CALABRIA, Judge.

Philip Ray Dawkins, Jr. ("defendant") seeks review of a judgment entered on a jury verdict of guilty for first-degree murder.[1] We find no error.

The State's evidence at trial tended to show the following: on 13 April 1995, Robert Beck ("Beck") discovered a body wrapped in a trash bag, towel, and blanket floating in the Blewett Falls Lake area. The body was also encircled with chains and ropes to which were attached weights and an anchor. The authorities retrieved the body from the water and subsequently determined the body was that of Wendy Dawkins ("victim"), defendant's wife. The autopsy revealed the victim had died as a result of a gunshot wound to the back of the head.

Defendant was indicted by the Richmond County Grand Jury for murder. The jury was given the option of finding defendant guilty of first-degree murder or not guilty. The jury found defendant guilty of first-degree murder, and the trial court sentenced defendant to life imprisonment without parole. Defendant argues the trial court (I) committed plain error by failing to submit second-degree murder; (II) improperly allowed hearsay evidence; (III) erred in denying defendant's motion to dismiss; and (IV) committed plain error in submitting first-degree murder to the jury when the bill of indictment did not allege all the elements of the offense.

I. Second-Degree Murder Charge

[1] Defendant asserts the trial court committed plain error by failing to submit the charge of second-degree murder to the jury after acknowledging that the evidence at trial could support either first- or second-degree murder.

In *State v. Williams*, 333 N.C. 719, 727-28, 430 S.E.2d 888, 892-93 (1993), our Supreme Court considered the effect of a defendant unequivocally indicating that he did not wish for the jury to be

1. Our review of the judgment is pursuant to a petition for writ of certiorari granted by this Court on 9 May 2002.

instructed on second-degree murder in response to the trial court's inquiry as to the parties' position on lesser-included offenses. In response, the trial court stated it would instruct only on first-degree murder and not submit second-degree murder to the jury. *Id.* In approving the trial court's response, the Supreme Court cited N.C. Gen. Stat. § 15A-1443(c) and *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992), and held the defendant was "not prejudiced by error resulting from his own conduct . . . [and] foreclosed any inclination of the trial court to instruct on the lesser-included offense of second-degree murder." *Id.*, 333 N.C. at 728, 430 S.E.2d at 893. As a result, the defendant was "not entitled to any relief and [would] not be heard to complain on appeal." *Id.*

The facts of the present case dictate the same outcome. The following exchange between the court and counsel for defendant took place during the charge conference:

> THE COURT: Appears to me from the evidence that the jury could find either [first-degree murder or second-degree murder].
>
> [ATTORNEY]: At the direction of the defendant in this case, I move the court not to charge down.

Later, the court clarified with the additional exchange:

> THE COURT: Do you . . . share the same view . . . as the State, that it ought to be first degree or not guilty?
>
> [ATTORNEY]: Yes, sir. The—the reasoning may be on a different plane, different plateau for different reasons. But we have had the opportunity to—to discuss that. . . . We've talked about that in connection with this case. We spent nine weeks in Richmond County in a motel down there. And that was the subject matter of a lot of conversation.
>
> THE COURT: Your client is in agreement with you with respect to the issues [of first-degree or not guilty]?
>
> [ATTORNEY]: He is. I believe he would say so.

In an abundance of caution, the trial court finally addressed defendant directly and asked him if his counsel's statements were true, and defendant responded, "Yes, sir. We have discussed it, and I am in full agreement with [him]." These exchanges make clear defendant sought to prevent the submission of the issue of second-degree murder to the jury. We will not entertain defendant's complaint that the

granting of his request prejudiced him, and this assignment of error is overruled.[2] *See State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (holding "a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review").

II. Hearsay

Defendant asserts the trial court erred in allowing certain portions of testimony by witnesses for the State because they were hearsay and violated defendant's right to confront his accusers because there was an absence of trustworthiness with respect to the hearsay statements at issue. Of course, where testimony falls within a "firmly rooted" hearsay exception, reliability is presumed. *State v. Fowler*, 353 N.C. 599, 615, 548 S.E.2d 684, 696 (2001). We examine each of the hearsay statements challenged.

A. Bonnie Thomas' Testimony

[2] Defendant asserts the trial court improperly allowed certain portions of Bonnie Thomas' ("Thomas") testimony. Thomas, the victim's aunt, testified defendant and the victim had obtained a new bedroom suite to replace the old one defendant and Laurie Harrington ("Harrington"), defendant's current wife, had shared because the victim would not sleep on the old one. Moreover, Thomas testified the victim stated she and defendant were not getting along because Harrington continued to call defendant.

"[O]ur Supreme Court has long held that when 'evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.' " *State v. Reed*, 153 N.C. App. 462, 466, 570 S.E.2d 116, 119, *disc. rev. denied*, 356 N.C. 622, 575 S.E.2d 521 (2002) (quoting *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984)). Defendant admitted he bought a new bed to satisfy the victim because the fact that he and Harrington had slept on it angered her. Defendant further admitted that continuing calls from Harrington caused tension between he and the victim, and the victim wanted defendant to force Harrington to stop calling, but defendant refused. In light of this testimony, we hold defendant waived his objection to this testimony.

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2. We also note that if we were to approve of defendant's argument, defendant would have the advantage of forcing the jury to convict him of first-degree murder or acquit him, and then, after a conviction occurred, overturning it if the outcome was unsatisfactory.

Thomas further testified that the victim gave her photographs showing the victim with a black eye. When the victim gave the photographs to Thomas, she told her "to keep them and if anything should happen, to give them to the police." Rule 803 states, in pertinent part, as follows: "[t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: (3) . . . A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . ." N.C. Gen. Stat. § 8C-1, Rule 803(3) (2001). "Where a state of mind, such as fear or alienation, is declared, the courts have consistently admitted statements made by the victim, usually reasoning that such a state of mind shows the relationship between the victim and the accused and is therefore relevant to the accused's possible motive." 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 217 (5th ed. 1998).

The victim's statements, accompanied by pictures showing her with a black eye, reflect the victim's fear of her uncertain future and her then-existing intent to plan for that future should "something happen." While the statement itself contains no express declaration of fear, we hold that the attendant circumstances give context to the victim's statement and clearly reflect the victim's fearful state of mind. Moreover, we note the victim went to her aunt and not her husband to ensure that photographs depicting her as physically abused reached the police. Under the circumstances, there was a sufficient relation to both the victim's state of mind and the status of her relationship with her husband to be admissible under the state of mind hearsay exception. Accordingly, this assignment of error is overruled.

B. Angie Wiggins' Testimony

Defendant asserts the trial court improperly allowed certain portions of Angie Wiggins' ("Wiggins") testimony. Wiggins was permitted to testify that the victim and defendant "got the bedroom suite because she was not going to sleep on the bed that was in the house previously because Philip's girlfriend Laurie had slept on it." As with Thomas' statements eliciting substantially the same facts, we need not address this argument since defendant testified to these facts, thereby waiving any objections to this testimony. *Reed*, 153 N.C. App. at 466, 570 S.E.2d at 119. This assignment of error is overruled.

C. Michelle Gardner's Testimony

Michelle Gardner ("Gardner") was allowed to testify that the victim told her she "thought [defendant] was going to kill her." Our

Supreme Court has consistently held that "a murder victim's statements that she fears the defendant and fears that the defendant might kill her are statements of the victim's then-existing state of mind and are 'highly relevant to show the status of the victim's relationship to the defendant.' " *State v. Hipps*, 348 N.C. 377, 392, 501 S.E.2d 625, 634 (1998) (quoting *State v. Crawford*, 344 N.C. 65, 76, 472 S.E.2d 920, 927 (1996) (citation omitted)); *see also State v. McHone*, 334 N.C. 627, 636-38, 435 S.E.2d 296, 301-02 (1993); *State v. Lynch*, 327 N.C. 210, 220-24, 393 S.E.2d 811, 817-19 (1990); *State v. Cummings*, 326 N.C. 298, 312-13, 389 S.E.2d 66, 74 (1990). This assignment of error is overruled.

D. Samuel Hamilton's Testimony

Defendant asserts the trial court erroneously allowed Samuel Hamilton ("Hamilton") to testify the victim told him that the defendant had told her he "had killed [a girl] in Rockingham, and buried her in a barn on his mother's property . . . in Rockingham." Hamilton further testified the victim told him when she later brought up the killing, defendant tried to throw her out of a moving vehicle and "told her if she ever mentioned [the killing] again, he'd kill her and put her in that same barn."

In *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990), our Supreme Court held the trial court correctly permitted a witness to testify about statements made by the decedent concerning several occasions that the "defendant had beaten her in the past and that [the] defendant had threatened to kill her if she tried to take back her children from him." *Id.*, 326 N.C. at 312, 389 S.E.2d at 74. The testimony was admissible because (1) it "related directly to [the decedent's] existing state of mind and emotional condition[,]" (2) it was "highly relevant" and directly related to "the status of her relationship with defendant prior to her disappearance[,]" and (3) the probative value of the evidence outweighed the possible prejudicial effect. *Id.*, 326 N.C. at 313, 389 S.E.2d at 74.

We find the statement in the instant case sufficiently similar to that in *Cummings* to compel the same outcome. Both challenged statements involved defendant inflicting physical abuse and threatening the victim's life if the victim repeated conduct that was displeasing to defendant. Such testimony was admissible under the holding in *Cummings* and was properly allowed by the trial court in the instant case. This assignment of error is overruled.

E. Alden Ford's Testimony

Defendant argues testimony by Alden Ford ("Ford") was improperly admitted. Ford testified he had seen bruises on the victim's arms, ribs, and legs and had seen the victim with black eyes. Ford then stated the victim had told him defendant "put them on her." Defendant objected and, after a conference outside the presence of the jury, the trial court allowed the testimony under N.C. Gen. Stat. § 8C-1, Rule 803(24) (2001).

In *State v. Walker*, our Supreme Court upheld the trial court's "admission into evidence of certain hearsay statements concerning defendant's prior physical assaults on the victim." *State v. Walker*, 332 N.C. 520, 534, 422 S.E.2d 716, 724 (1992). The in-court testimony of the victim's family and friends related "statements made by the victim to them indicating that defendant had [physically abused] her, causing the injuries they observed." *Id.* The Court admitted the testimony under the state of mind exception found in Rule 803(3), which applies to "statements made by the victim which may indicate the victim's mental condition by showing the victim's fears, feelings, impressions or experiences." *Id.*, 332 N.C. at 535, 422 S.E.2d at 725. The statements were admissible because "the victim's explanation of the origin of her cuts and bruises . . . tended to disprove the nonabusive relationship defendant described." *Id.*, 332 N.C. at 536, 422 S.E.2d at 725.

Moreover, as we stated in *State v. Mixion*, our Supreme Court has upheld, under Rule 803(3), the trial court's admission of "hearsay evidence that the victim had stated [the] defendant had previously beaten her and threatened her" despite the fact that "[t]he witnesses did not state that the victim had expressed any fear" because " 'the scope of the conversation . . . related directly to [the victim's] existing state of mind and emotional condition.' " *Id.*, 110 N.C. App. 138, 147-48, 429 S.E.2d 363, 368-69 (1993) (quoting *Cummings*, 326 N.C. at 313, 389 S.E.2d at 74). We also observed in *Mixion* that our Supreme Court has found that a "victim's statements to her son that defendant had threatened her 'revealed her then-existing fear of the defendant . . . .' " *Id.* (quoting *State v. Faucette*, 326 N.C. 676, 683, 392 S.E.2d 71, 74 (1990)). Thus, while the state of mind exception is most easily applicable when the challenged hearsay statement includes an express declaration of fear, such declarations are not absolutely required.

The hearsay testimony concerned previous statements by the victim indicating defendant had physically abused her. Defendant testi-

fied he had never physically assaulted the victim in any way either before or after they separated. As in *Walker* the statements explained the victim's condition as shown in the photographs and tended to disprove "the nonabusive relationship defendant described." Moreover, the statements cannot be excluded for want of express declarations of fear. We hold the statement was admissible under the state of mind exception to the hearsay rule because it related directly to the status of the victim and defendant's relationship and to the victim's state of mind and emotional condition. This assignment of error, accordingly, is overruled.

III. Motion to Dismiss

[3] "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.* " '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.' " *Id.* (quoting *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).

"First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Thomas*, 350 N.C. 315, 346, 514 S.E.2d 486, 505 (1999). Defendant asserts there was insufficient evidence that he was the perpetrator of the crime or that he acted with premeditation and deliberation.

Concerning defendant's first argument, that there was not sufficient evidence that defendant was the perpetrator of the crime, fibers found in the victim's hair and the towel and blanket in which she was wrapped were consistent with the carpet found in defendant's house in the master bedroom. There was no sign of forcible entry into defendant's house. Luminol testing revealed the presence of blood not belonging to defendant on his master bedroom carpet around the bed and toward the entrance of the bedroom. Red and black acrylic

fibers, consistent with the blanket in which the victim's body was wrapped, were found in defendant's boat. The anchor used in an attempt to weigh down the victim's body was identical to the one missing from defendant's boat. The victim's body was also weighed down with circular weights bearing the same serial number and having an identical appearance to missing weights that defendant received from his brother-in-law and that he usually kept on his boat. The victim was shot with a .32 caliber bullet, and defendant had owned a .32 Colt semi-automatic which he claimed he no longer owned but gave conflicting reports as to whether he sold the gun, lost it in a bet, or used it to pay a debt. The victim's body was found in the Blewett Falls Lake area, with which defendant was "very knowledgeable." We also note there was testimony that the victim and defendant's relationship had deteriorated, the victim feared defendant was going to kill her, and defendant had threatened to kill her. Viewing this sampling of the evidence presented at trial in the light most favorable to the State, we conclude there was sufficient evidence that defendant was the perpetrator of the crime.

Defendant also asserts there was insufficient evidence of premeditation and deliberation.

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Elliott, 344 N.C. 242, 267, 475 S.E.2d 202, 212 (1996) (internal citations omitted). "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693 (1986). In determining whether a killing was done with premeditation and deliberation, the jury may consider "the statements and conduct of the defendant before and after the killing" as well as "ill will or previous difficulties between the parties." *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). Additionally, our Supreme Court has also held that "unseemly conduct toward the victim's corpse, including concealment of the body" may be used to show premeditation and deliberation. *State v. Parker*, 354 N.C. 268, 280, 553 S.E.2d 885, 894-95

(2001). *See also State v. Rose*, 335 N.C. 301, 319, 439 S.E.2d 518, 527 (1994), *overruled on other grounds*, *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001) (holding that "evidence of an elaborate process" of removing and disposing of the victim's body was "evidence from which a jury could infer premeditation and deliberation").

Viewing the evidence in the light most favorable to the State, each of these factors has application in the instant case. Prior to the victim's death, defendant threatened to kill the victim. That there was both ill will and difficulties between defendant and the victim both is illustrated by the fact that there was fighting and conflict concerning the bedroom suite and tension due to defendant's continued contact with Harrington. Finally, there was evidence of an elaborate process of concealing the body by wrapping it in a towel, blanket, and trash bag; weighing the body down with weights and anchors; transporting the body to the Blewett Falls Lake area; and disposing of the laden body to sink after the victim had been killed. All of these factors were evidence from which the jury could permissibly infer premeditation and deliberation, and we hold that, in the light most favorable to the State, there was substantial evidence of the element of premeditation and deliberation. This assignment of error is overruled.

IV. Short-form Indictment

[4] Defendant asserts, for preservation of the issue, the question of whether the short-form indictment satisfies the requirements of the North Carolina and federal Constitutions. Our Supreme Court has upheld the constitutionality of the short-form murder indictment. *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000); *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000). Thus, we hold accordingly.

We have carefully considered defendant's remaining arguments and found them to be without merit.

No error.

Judges McGEE and HUNTER concur.

RICHARD ALLEN OVERTON, PLAINTIFF v. WILLIAM ROBERT PURVIS, DEFENDANT

No. COA01-1520-2

(Filed 20 January 2004)

1. Negligence— sudden emergency—request for instruction—denied

Defendant's request for an instruction on sudden emergency was properly denied where defendant did not establish that the emergency was not created by his own negligence.

2. Appeal and Error— Court of Appeals jurisdiction—defendant's appeal from denial of plaintiff's motion

The Court of Appeals had jurisdiction over defendant's appeal from the trial court's denial of plaintiff's motion for additur on a $7,000 verdict because defendant ultimately became liable for $32,120 in attorney's fees as part of costs under N.C.G.S. § 6-21.1 (fees may be taxed as costs where the judgment is $10,000 or less.).

3. Damages and Remedies— additur denied—no abuse of discretion

There was no abuse of discretion in the denial of a motion for additur where defendant consented to the additur, and the court made its decision only after considering plaintiff's motion, defendant's response, and the arguments of both counsel.

4. Costs— attorney fees—guidelines and findings

There was no abuse of discretion in the award of attorney fees where the court did not specifically consider all of the Washington guidelines, but no further findings were necessary under the circumstances. A finding as to the timing of a settlement offer was not necessary in light of the finding that no settlement offer was made, and this case did not involve superior bargaining power or unwarranted refusal.

5. Costs— attorney fees—no abuse of discretion

An award of attorney fees of $32,000 on a $7,000 verdict was not an abuse of discretion where the court considered detailed time and billing statements and the arguments of counsel.

6. Costs— attorney fees—findings—sufficiency

An award of attorney fees was supported by the findings.

7. Compromise and Settlement— proposal to open negotiations—not an offer

The record supports a finding that a negligence defendant made no offer to settle prior to the verdict. A statement by an insurance agent was more like a proposal to open negotiations within a range of values than an offer to settle.

8. Costs— expert witness fees—no subpoena

A trial court erred by awarding expert witness fees as costs where there was no finding that the witnesses were subpoenaed or support in the record for such a finding. N.C.G.S. § 7A-314(d).

9. Costs— expenses—not directly related to deposition

Certain itemized expenses were improperly included in costs assessed against defendant where the expenses were not directly related to the taking of a deposition.

Appeal by defendant from judgment entered 18 June 2001 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 14 October 2002. A divided panel of this Court reversed as to the first issue and, by opinion entered 17 December 2002, remanded the case to Superior Court with instructions to enter judgment for defendant. *See Overton v. Purvis*, 154 N.C. App. 543, 573 S.E.2d 219 (2002). The North Carolina Supreme Court reversed and, by opinion entered 2 October 2003, remanded to this Court for consideration of defendant's remaining assignments of error. *See Overton v. Purvis*, 357 N.C. 497, 586 S.E.2d 265 (2003).

The Blount Law Firm, P.L.L.C., by Marvin K. Blount, III, for plaintiff-appellee.

Walker, Clark, Allen, Grice & Ammons, L.L.P., by Jerry A. Allen and Gay P. Stanley, for defendant-appellant.

EAGLES, Chief Judge.

This case arises from judgment entered for plaintiff in a negligence action stemming from an automobile accident involving a pedestrian. Since a detailed summary of the facts giving rise to this appeal is set forth in our previous opinion, *Overton v. Purvis*, 154 N.C. App. 543, 573 S.E.2d 219 (2002), only a brief synopsis of the pertinent facts is required to provide context for the issues to be considered.

The evidence tended to establish that on 7 September 1996, while fox hunting with friends near Falkland, North Carolina, plaintiff entered and stood in the middle of Highway 222 to protect hunting dogs that were crossing the road in pursuit of a fox. While standing in the road, plaintiff saw defendant's truck round a bend in the road approximately 1000 feet away. Plaintiff remained in the road, first just watching defendant as he approached and later, waving his hands to get defendant's attention when it appeared defendant was not slowing down. Plaintiff remained in the roadway until defendant's truck was approximately 100-150 feet from him. Plaintiff was struck by defendant's truck as he attempted to get out of the roadway.

On appeal, defendant presented the following issues for review: (*I*) whether the trial court erred by instructing the jury on the doctrine of last clear chance; (*II*) whether the trial court erred by denying defendant's request for an instruction on the doctrine of sudden emergency; (*III*) whether the trial court erred by denying defendant's motion for judgment notwithstanding the verdict or for a new trial; (*IV*) whether the trial court erred by denying plaintiff's motion for additur; and (*V*) whether the trial court erred by awarding plaintiff costs and attorneys' fees. We now consider defendant's remaining assignments of error.

I.

Defendant first contends that the trial court erred by instructing the jury on the doctrine of last clear chance. Defendant argues that neither the first nor the third elements required to invoke the doctrine of last clear chance were sufficiently established. Although this Court's previous opinion only analyzed the sufficiency of the evidence to support the first element, our Supreme Court concluded that the issue of last clear chance was properly submitted to the jury in this case. *See Overton v. Purvis*, 357 N.C. 497, 586 S.E.2d 265 (2003). *See also Overton v. Purvis*, 154 N.C. App. 543, 573 S.E.2d 219 (2002) (THOMAS, J. dissenting). Accordingly, these assignments of error are overruled.

II.

[1] Defendant next contends that the trial court erred by denying his request for an instruction on the doctrine of sudden emergency. We disagree.

Before an instruction on the doctrine of sudden emergency may be given, the party asserting the doctrine must present substantial

evidence of two elements: (1) that an emergency situation existed; and (2) that the emergency was not created by the negligence of the party seeking the doctrine's protection. *Long v. Harris*, 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000). "In determining whether the substantial evidence test has been satisfied, 'the evidence must be considered in the light most favorable' to the party requesting the benefit of the instruction." *Id.* (quoting *Holbrook v. Henley*, 118 N.C. App. 151, 153, 454 S.E.2d 676, 678 (1995)).

Here, defendant testified that he first saw the hunters' vehicles parked along the side of the road when he was approximately 500 feet away from the accident scene. Defendant also saw Jay Womble, standing on the right side of the road, waving his arms "for [defendant] to stop." Although defendant could have stopped when he saw Jay Womble, he did not; instead, defendant "got over just a little bit," and proceeded on to the point where he ultimately struck plaintiff, who was standing in the road. In light of this evidence, we conclude that defendant failed to establish the second element required for an instruction on sudden emergency, *i.e.*, that the emergency was not created by defendant's own negligence. Accordingly, the trial court properly denied defendant's request for the instruction.

III.

Defendant next contends that the trial court erred by denying his motions for judgment notwithstanding the verdict and, in the alternative, for a new trial, based on the trial court's erroneous instruction on the issue of last clear chance. We disagree.

"On appeal our 'standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury.' " *Whitaker v. Akers*, 137 N.C. App. 274, 277, 527 S.E.2d 721, 724 (2000) (citation omitted). "[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. However, where the motion involves a question of law or legal inference, our standard of review is *de novo*." *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (citation omitted).

Here, our Supreme Court has already determined that the issue of last clear chance was properly submitted to the jury in this case. *See Overton v. Purvis*, 357 N.C. 497, 586 S.E.2d 265 (2003). Therefore, we conclude the trial court properly denied defendant's motions for judgment notwithstanding the verdict and for a new trial.

IV.

[2] Defendant next contends that the trial court erred by denying plaintiff's motion for additur. We disagree.

After the jury returned its verdict ($7,000), plaintiff moved pursuant to N.C. R. Civ. P. 59 for additur or, in the alternative, for a new trial on the issue of damages. In his response to plaintiff's motion, defendant consented to increasing the jury's verdict to $10,564.05; payment of pre- and post-judgment interest in the amount of $1,690.24; and payment of costs in the amount of $2,439.61. The trial court concluded that "the jury verdict [wa]s adequate" and denied plaintiff's motion.

As a preliminary matter, we note that this Court has subject matter jurisdiction over this issue. While the general rule is that "[o]nly a 'party aggrieved' has a right to appeal[,] . . . [a] 'party aggrieved' is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *Selective Ins. Co. v. Mid-Carolina Insulation Co.*, 126 N.C. App. 217, 219, 484 S.E.2d 443, 445 (1997) (citation omitted). Here, although the denial of plaintiff's motion for additur was initially favorable to defendant, the end result was that defendant ultimately became liable for payment of $32,120.00 in attorneys' fees. *See* G.S. § 6-21.1 (attorneys' fees may be taxed as costs where the judgment for recovery of damages is ten thousand dollars or less). Since defendant's rights have been directly and injuriously affected by the decision of the trial court, this Court has jurisdiction to consider this issue.

[3] "A ruling on a motion for additur or remittur is within the discretion of [the] trial judge." *Lazenby v. Godwin*, 40 N.C. App. 487, 496, 253 S.E.2d 489, 493 (1979). "[W]hen rulings are committed to the sound discretion of the trial court[,] they will be accorded great deference and will not be set aside unless it can be shown that they were arbitrary and not the result of a reasoned decision." *Albritton v. Albritton*, 109 N.C. App. 36, 42, 426 S.E.2d 80, 84 (1993). "The appellate courts will not supervise the lower court's judgment except in 'extreme circumstances.' " *Lazenby*, 40 N.C. App. at 496, 253 S.E.2d at 494 (quoting *Setzer v. Dunlap*, 23 N.C. App. 362, 363, 208 S.E.2d 710, 711 (1974)).

Here, defendant argues that his consent to the additur establishes an abuse of the trial court's discretion. We are unpersuaded. Careful

review of the record reveals that the trial court made its decision only after considering plaintiff's motion, defendant's response and arguments of both counsel. As nothing in the record before us indicates an abuse of discretion, we conclude the trial court properly denied plaintiff's motion for additur.

V.

Defendant's final contention is that the trial court erred by awarding plaintiff costs and attorneys' fees. We affirm in part and reverse in part.

The determination to award counsel fees is a matter within the discretion of the trial judge and will not be overturned absent a showing of abuse of discretion. *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 570, 551 S.E.2d 852, 855-56 (2001). However,

> [t]he discretion accorded the trial court in awarding attorney fees . . . is not unbridled. . . . [T]he trial court is to consider the entire record in properly exercising its discretion, including but not limited to the following factors: (1) settlement offers made prior to the institution of the action . . .; (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers; (3) whether defendant unjustly exercised "superior bargaining power"; (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose[]"; (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict; and the whole record.

Washington v. Horton, 132 N.C. App. 347, 351, 513 S.E.2d 331, 334-35 (1999) (citations omitted).

"If the trial court elects to award attorney fees, it must also enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Thorpe*, 144 N.C. App. at 572, 551 S.E.2d at 856. "The scope of appellate review is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *Id.* at 570, 551 S.E.2d at 855.

A. Washington Factors.

[4] Defendant first argues that the trial court abused its discretion by failing to consider each of the *Washington* factors. We disagree.

While a "[m]ere recitation by the trial court that it has considered all [the] *Washington* factors" without making additional findings of fact is inadequate, *id.* at 572, 551 S.E.2d at 857, "the trial court is not required to make detailed findings for each factor." *Id.* (citing *Tew v. West*, 143 N.C. App. 534, 546 S.E.2d 183 (2001)). The trial court must only make findings with respect to "those facts matching th[e] *Washington* factors apposite to the instant case." *Id.* at 573, 551 S.E.2d at 857.

Here, the trial court made nine findings of fact. The trial court specifically found that: no settlement offer was made prior to the institution of the action; no Rule 68 offer of judgment was made; and the judgment finally obtained was more favorable than the offer, since none was made. The trial court further found that, after careful consideration of "all the necessary factors and guidelines set forth in *Washington*" and "the entire record," an award of attorneys' fees was proper under the circumstances. On this record, we conclude no further findings were necessary. First, in light of the finding that no settlement offer was made, a finding as to the timing of a settlement offer would have been unnecessary. Second, this was neither a "superior bargaining power" nor an "unwarranted refusal" case; therefore, findings as to these factors were also unnecessary. Accordingly, this assignment of error is overruled.

B. Proportionality of Fees to Recovery.

[5] Defendant next argues that the trial court abused its discretion by awarding attorneys' fees in excess of $32,000 in a case where the plaintiff recovered only $7,000. We disagree.

"Abuse of discretion results where the court's ruling 'is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.' " *Thorpe*, 144 N.C. App. at 570, 551 S.E.2d at 855 (citations and internal quotation marks omitted). Here, plaintiff supported his motion for attorneys' fees with detailed time and billing statements, which are included in the record on appeal. The record indicates that the trial court considered these statements, together with argument from counsel, in determining whether and to what extent attorneys' fees were appropriate. We hold that these

statements are competent and sufficient to support the trial court's award and find no abuse of discretion.

C. Findings of Fact.

[6] Defendant next argues that the trial court's findings of fact fail to support its decision to award attorneys' fees. We disagree.

In addition to the *Washington* factors, "[i]f the trial court elects to award attorney fees, it must also enter findings of fact as to the time and labor expended, skill required, customary fee for like work, and experience or ability of the attorney based on competent evidence." *Thorpe*, 144 N.C. App. at 572, 551 S.E.2d at 856.

Here, the trial court specifically found:

5. The attorneys' fees requested are reasonable based on competent evidence including the time and labor expended by Plaintiff's counsel prior to and during trial; the skill exhibited by Plaintiff's counsel before the Court; the customary fee for like work; and the experience and ability of Plaintiff's counsel.

6. After careful review of hours and rates submitted to the Court, the Court finds that the hours expended by attorneys Marvin K. Blount, Jr., Ted Mackall, Jr., and Marvin K. Blount III on behalf of the Plaintiff in this action are reasonable in time and manner under the circumstances of this case, and at rates per hour that are reasonable in this area for this type of work by attorneys with their respective experience and expertise in personal injury law of this nature.

We have already concluded that the trial court's findings satisfied the requirements of *Washington*. Likewise, we have concluded that the statements of rates and hours that accompanied plaintiff's motion for attorneys' fees were competent to support the fees awarded by the trial court. In light of these conclusions, we hold that the above quoted findings are sufficient to support the trial court's award of attorneys' fees.

[7] Defendant next argues that the record fails to support the trial court's finding that "[d]efendant made no offer to settle prior to the verdict being received."

After conducting its own investigation, defendant's insurance carrier, North Carolina Farm Bureau Mutual Insurance Company ("Farm

Bureau"), denied liability for the accident. In December 1996, Farm Bureau's agent stated that "he would reconsider the denial if Plaintiff would settle th[e] case for litigation costs in the $3,000.00 to $8,000.00 range." Defendant contends that this compels the conclusion that he made an offer to settle. We disagree.

"An offer [of compromise] must be definite and complete[.] . . . [A] mere proposal intended to open negotiations which contains no definite terms but refers to contingencies to be worked out" cannot form the basis for an enforceable contract. *Seawell v. Continental Casualty Co.*, 84 N.C. App. 277, 279, 352 S.E.2d 263, 264 (1987). Moreover, "it must be made known to the purported offeree, in clear and unmistakable terms, that the act or promise is being offered as an offer to compromise." 15A Am.Jur.2d, *Compromise and Settlement* § 13, p. 735 (2000). Here, Farm Bureau's statement was more akin to a proposal intended to open negotiations within a range of values from $3,000 to $8,000 than an offer to settle the claim. The statement was indefinite and incomplete as to its terms and did not clearly purport to be an offer to compromise. Accordingly, this assignment of error is overruled.

Defendant next contends that there was no competent evidence in the record to support the trial court's findings that the "attorneys' fees requested" and the "hours expended" were reasonable. For the reasons set forth in sections *V.B. and V.C.* of this opinion, these assignments of error are overruled.

D. Costs.

Finally, defendant argues that the trial court erred by awarding as costs amounts not recoverable by statute or as provided by law. We agree.

After the jury returned its verdict, plaintiff moved for and was awarded costs in the amount of $5,595.55. Included within this amount were the following itemized expenses: (1) $1,210.41 for photocopies; (2) $48.53 for telephone calls; (3) $23.64 for photographs; (4) $93.80 for medical records and reports; (5) $1,434.90 for expert witnesses; (6) $270.98 for travel and meals; and (7) $1,378.85 for trial diagrams and exhibits.

G.S. § 6-20 allows the trial court to assess "costs" in its discretion. "[W]hile the decision to tax costs is not reviewable absent an abuse of discretion, the discretion to award costs is strictly limited by our

statutes." *Muse v. Eckberg*, 139 N.C. App. 446, 447, 533 S.E.2d 268, 269 (2000) (citation omitted). "The trial court . . . is prohibited from assessing costs in civil cases which are neither enumerated in section 7A-305 nor 'provided by law.' " *Crist v. Crist*, 145 N.C. App. 418, 424, 550 S.E.2d 260, 265 (2001) (citation omitted). Although the costs set forth in Article 28 of our General Statutes are "complete and exclusive," G.S. § 7A-320, " 'the authority of trial courts to tax deposition expenses as costs, pursuant to § 6-20, remains undisturbed.' " *Dep't of Transp. v. Charlotte Area Manufactured Housing, Inc.*, 160 N.C. App. 461, 467, 586 S.E.2d 780, 784 (2003) (quoting *Alsup v. Pitman*, 98 N.C. App. 389, 391, 390 S.E.2d 750, 751 (1990)).

1. Expert Witness Fees.

[8] G.S. § 7A-314(d) provides that "an expert witness . . . shall receive such compensation and allowances as the court, . . . in its discretion, may authorize." However, " 'only witnesses who have been subpoenaed may be compensated.' " *Holtman v. Reese*, 119 N.C. App. 747, 752, 460 S.E.2d 338, 342 (1995) (quoting *Brandenburg Land Co. v. Champion International Corp.*, 107 N.C. App. 102, 104-05, 418 S.E.2d 526, 528-29 (1992)). Here, the trial court made no findings that plaintiff's expert witnesses were subpoenaed and the record before us does not support such a finding. Therefore, plaintiff's expert witness fees were improperly included in the costs assessed against defendant.

2. "Other Costs."

[9] The itemized expenses numbered (1)-(4), (6) and (7) are not authorized by G.S. § 7A-305. Moreover, in order to be recoverable as deposition costs, these expenses must be "*directly* related to a deposition." *Muse v. Eckberg*, 139 N.C. App. 446, 447, 533 S.E.2d 268, 269 (2000). Where "the record on appeal fails to show conclusively that any of the expenses incurred . . . stemmed directly from a deposition[,]" the trial court's award of costs must be reversed. *Id.* at 448, 533 S.E.2d at 270. Here, the record fails to establish conclusively that any of these expenses were directly related to the taking of a deposition. Therefore, these items were improperly included in the costs assessed against defendant.

Since the trial court lacked authority to assess the foregoing expenses as costs, we reverse and remand for entry of an order not inconsistent with this opinion.

Affirmed in part, reversed in part.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. LEWIS EDWARD JACOBS, III, DEFENDANT

No. COA02-1668

(Filed 20 January 2004)

1. Search and Seizure— traffic stop—reasonable suspicion

A traffic stop was justified by reasonable suspicion, and the trial court correctly denied defendant's motion to suppress controlled substances seized in the subsequent search, where defendant's vehicle was slowly weaving within in its lane, touching the lane markers on each side, at 1:43 a.m.

2. Search and Seizure— investigatory detention—length reasonable

An investigatory detention following a traffic stop did not continue for an unreasonable time, and the trial court correctly denied defendant's motion to suppress controlled substances seized during the detention, where the officer was suspicious prior to the stop that defendant might be impaired, might be a murder suspect or have knowledge of the suspect, and might be involved in narcotics trafficking; defendant's responses to the officer's questions did not fully resolve the suspicions; and defendant was very nervous.

3. Search and Seizure— request for consent to search—reasonable suspicion not required

Reasonable suspicion is not required for an officer to request consent for a search. Furthermore, the search of this defendant's car (which led to the discovery of Ecstacy on defendant) is not tainted by unlawful detention and there is no showing that defendant's consent was not voluntary.

Appeal by defendant from order and judgment entered 30 July 2002 by Judge Orlando Hudson in Alamance County Superior Court. Heard in the Court of Appeals 13 October 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Gary R. Govert, for the State.

Daniel H. Monroe, for the defendant-appellant.

GEER, Judge.

Defendant Lewis Edward Jacobs, III, who pled guilty to several drug-related offenses, appeals from the trial court's denial of his motion to suppress evidence obtained in a search of his car and his person. Although defendant acknowledges that he consented to the search of his car and does not dispute that the officer had probable cause to search his person as a result of evidence obtained in the car search, defendant contends that the officer lacked reasonable suspicion to stop defendant's car and detain defendant for five minutes of questioning. Based on the totality of the circumstances, we disagree and affirm the trial court's order.

Only the State offered evidence at the hearing on defendant's motion to suppress. That evidence tended to show the following. At approximately 1:43 a.m. on 8 November 2001, Officer Chris Smith of the Burlington Police Department observed a car with a Tennessee license plate continuously weaving back and forth in its lane over a distance of three-quarters of a mile. There were several bars in the area where the officer spotted the car. Officer Smith checked the tags and learned that the vehicle was registered to Gary McCray of Johnson City, Tennessee. That fact caused Officer Smith concern for two reasons. First, the FBI and the Johnson City Police Department had notified the Burlington Police Department that a suspect in a Johnson City murder was now in Burlington. Second, Officer Smith had been advised by vice officers that a substantial amount of drug-trafficking occurred between Burlington and Johnson City. A week earlier, he had stopped another car with Johnson City tags and arrested the driver for possession of marijuana.

Officer Smith stopped defendant's car and called for back-up. He ordered defendant out of the car and conducted a pat-down search to ensure defendant was not armed. Defendant appeared to be the same age as the murder suspect. Officer Smith then asked defendant for his driver's license, which listed defendant's address as Durham, North Carolina. Officer Smith asked defendant who owned the car and defendant replied that it belonged to his brother, Gary McCray of Durham. Officer Smith then asked why the car was registered in Johnson City and why defendant and his brother had different last

names. Defendant could not give the officer an explanation for their different names and Officer Smith was never able to confirm that defendant and McCray were in fact brothers.

Officer Smith explained to defendant why he had stopped him and asked whether he knew the murder suspect. When defendant denied any knowledge of the man, Officer Smith asked defendant why he was in Burlington at that hour when he lived in Durham. Defendant claimed he was going to see a woman named Monica who lived on Maple Avenue near a particular apartment complex. He did not know her last name.

Officer Smith testified that during the questioning defendant "appeared to be nervous to me. . . . his hands wasn't [sic] shaking or his body wasn't shaking, but he just was kind of . . . antsy, just kind of moving around." Officer Smith asked defendant whether he had been arrested for or convicted of any charges and then checked for active warrants. After determining that there were no outstanding warrants against defendant, Officer Smith explained to defendant that he had information regarding the transport of drugs between Johnson City and Burlington and asked if defendant had any illegal drugs in his car. When defendant said that he did not, Officer Smith asked defendant for consent to search his car.

Defendant consented to the search and told Officer Smith that he had a large amount of money in the car, which defendant claimed was from the sale of a motorcycle. Officer Smith recovered a bundle of bills in a rubber band. Officer Smith noticed an odor of marijuana in the car and found loose tobacco. Based on his training and experience, Officer Smith believed the tobacco came from hollowed-out cigars used to smoke marijuana. When Officer Smith asked defendant about the tobacco and the smell of marijuana, defendant told him that someone had smoked marijuana in the car earlier in the day.

Officer Smith then conducted a search of defendant's person because, Officer Smith testified, "I had smelled the odor of marijuana in the vehicle that he was in; and he also admitted marijuana being inside the vehicle; and I was looking to see if he had any marijuana on his person." Officer Smith searched defendant's shirt pockets, pants pockets, socks, and shoes, but did not find anything. Officer Smith then instructed defendant to pull down his pants so that he could inspect defendant's underwear and crotch area. Officer Smith testified that defendant's hands started shaking as he pulled the "front part of his breeches out[.]" Officer Smith saw a plastic bag in defend-

ant's crotch area. He told defendant to pull his pants up and handcuffed defendant.

When Officer Smith asked defendant to identify the object in his crotch area, defendant claimed it was a bag of Viagra that he had received as partial payment for the motorcycle. Officer Smith retrieved the plastic bag, which contained pink pills, and located a second bag, also in defendant's crotch area, containing blue pills. Defendant claimed the blue pills were Viagra as well. All the pills were stamped; from his training, Office Smith recognized that the stamping likely indicated that the pills were methylenedioxymethamphetamine (MDMA), also known as Ecstasy. The officer also found a third bag containing marijuana. He then arrested defendant for possession of marijuana and MDMA.

Defendant was charged with two counts of trafficking in a controlled substance by possession of MDMA; one count of possession of MDMA with intent to manufacture, sell and/or deliver a controlled substance; misdemeanor possession of marijuana; maintenance of a car for the use, storage and/or sale of a controlled substance; and attaining the status of habitual felon. Defendant moved to suppress the evidence gathered during the search of the car and his person on the grounds that the search violated his rights under the federal and state constitutions and under the General Statutes. Following the trial court's denial of defendant's motion, defendant pled guilty to all the charges, including attaining the status of habitual felon, but reserved his right to appeal the trial court's order on his motion to suppress. The trial court sentenced defendant to 80 to 105 months in prison.

Review of a trial court's denial of a motion to suppress is strictly limited to a determination whether the trial court's findings of fact are supported by competent evidence and whether those findings support the trial court's ultimate conclusion of law. *State v. Thompson*, 154 N.C. App. 194, 196, 571 S.E.2d 673, 675 (2002). Defendant has not assigned error to any of the trial court's findings of fact; those findings are therefore binding on appeal. *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002).

I

[1] Defendant first challenges Officer Smith's stop of his car. Before a police officer may stop a vehicle and detain its occupants without a warrant, the officer must have a reasonable suspicion that criminal activity may be occurring. *State v. McArn*, 159 N.C. App. 209,

582 S.E.2d 371, 374 (2003) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911, 88 S. Ct. 1868, 1884 (1968)). "[R]easonable suspicion" requires that "[t]he stop . . . be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). All that is required is a "minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " *Id.* at 442, 446 S.E.2d at 70 (quoting *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10, 109 S. Ct. 1581 (1989)). A court must consider the totality of the circumstances in determining whether reasonable suspicion to make an investigatory stop existed. *Id.* at 441, 446 S.E.2d at 70. This Court reviews *de novo* a trial court's conclusion of law that a reasonable, articulable suspicion existed to justify a stop.

The trial court found that the stop occurred at 1:43 a.m. and that defendant's vehicle was "slowly weaving within its lane of travel touching the designated lane markers on each side" prior to the stop. Based on these findings, the court concluded that Officer Smith "had a reasonable, articulable suspicion to believe the operator of the vehicle was committing an implied consent offense." An implied consent offense refers to an impaired driving or alcohol-related offense. *See* N.C. Gen. Stat. § 20-16.2(a1) (2003). This Court has previously concluded that facts comparable to those found by the trial court are sufficient to establish reasonable suspicion.

In *State v. Watson*, 122 N.C. App. 596, 599, 472 S.E.2d 28, 30 (1996), a police officer observed the defendant driving on the dividing line of a two-lane highway near a nightclub. After the officer turned to follow the defendant's vehicle, the officer noticed the vehicle weaving back and forth within its lane for about 15 seconds. *Id.* at 598, 472 S.E.2d at 29. This Court held "that this evidence is sufficient to form a suspicion of impaired driving in the mind of a reasonable and cautious officer." *Id.* at 599-600, 472 S.E.2d at 30. Officer Smith's observation of defendant's weaving within his lane for three-quarters of a mile at 1:43 a.m. in an area near bars was sufficient to establish a reasonable suspicion of impaired driving. We find this case indistinguishable from *Watson* in that, although defendant's weaving within his lane was not a crime, that conduct combined with the unusual hour and the location was sufficient to raise a reasonable suspicion of impaired driving. *See also State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 221 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 809 (1990) (stop justified when defendant was driving

20 miles below speed limit and weaving within his lane); *State v. Bonds*, 139 N.C. App. 627, 629, 533 S.E.2d 855, 857 (2000) ("[D]efendant correctly points out that most North Carolina cases upholding investigatory stops in the context of driving while impaired have involved weaving within a lane or weaving between lanes.").

II

[2] Defendant next argues that the search of his car was unlawful despite his consent because the length of the investigatory detention was unreasonable. Defendant contends the detention should have ended when Officer Smith completed the pat-down search and determined there were no outstanding warrants against defendant.

Our Supreme Court has held that once an officer has lawfully stopped a person, the officer may further detain the person only if he has "reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot." *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999). It is, however, reasonable for an officer, following a lawful stop, to "ask the detainee questions in order to obtain information confirming or dispelling the officer's suspicions" that led to the stop. *Id.*

After reviewing the evidence and the trial court's findings, we conclude that several factors gave rise to reasonable suspicion that justified the brief further detention. First, prior to the stop, Officer Smith was suspicious that defendant might be impaired, that defendant might be a murder suspect or have knowledge of the murder suspect, and that defendant could be involved in drug trafficking. Prior to his request for permission to search defendant's car, Officer Smith spent three to five minutes asking defendant questions specifically focused on alleviating those concerns, as he was permitted to do. *Id.*

Defendant's responses to Officer Smith's questions did not fully resolve the officer's suspicions. As a result of his questions, Officer Smith learned that defendant was not the owner of the car, but Officer Smith could not confirm that defendant was authorized to drive the car because he could not verify that the registered owner was, in fact, defendant's brother. Further, Officer Smith could not resolve why defendant was driving a Johnson City, Tennessee car in the early hours of the morning in Burlington. Defendant could not even provide the last name or a precise address for the woman he

said he was visiting at 1:43 a.m. Finally, as the trial court found, Officer Smith observed that, during this brief questioning, defendant was "acting very nervous."

Other courts have found such circumstances sufficient to support a reasonable further detention. *See McClendon*, 350 N.C. at 637, 517 S.E.2d at 133 (defendant's extreme nervousness and failure to provide credible identification of car's owner were among factors giving rise to reasonable suspicion warranting detention of 15 to 20 minutes). *See also United States v. Purcell*, 236 F.3d 1274, 1280 (11th Cir.) (reasonable suspicion justified extending detention to ask additional questions when car rental agreement was not in driver's name and defendant was stopped in area where drug couriers operated), *cert. denied*, 534 U.S. 830, 151 L. Ed. 2d 38, 122 S. Ct. 73 (2001); *United States v. Perez*, 37 F.3d 510, 514 (9th Cir. 1994) (investigative detention warranted by defendant's nervousness, the fact defendant was not van's registered owner, the fact defendant was heading toward city known as a drug hub, and an inconsistency in one of defendant's answers); *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483-84 (10th Cir.) ("[T]he inability of a driver to offer proof that he is entitled to operate a vehicle, combined with inconsistent or incomplete information about ownership of the vehicle, his identity or his destination, will generally give rise to a reasonable suspicion justifying further questioning."), *cert. denied*, 511 U.S. 1095, 128 L. Ed. 2d 484, 114 S. Ct. 1862 (1994).

Defendant argues, however, that his nervousness was "the officer's primary stated reason [at trial] for continuing investigative detention" and that nervousness is "not sufficient to justify further investigative detention[.]" Although defendant points to *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998) as support for his position, the Supreme Court, one year later, clarified *Pearson*:

> [W]e did not mean to imply [in *Pearson*] that nervousness can never be significant in determining whether an officer could form a reasonable suspicion that criminal activity is afoot. Nervousness, like all other facts, must be taken in light of the totality of the circumstances. It is true that many people do become nervous when stopped by an officer of the law. *Nevertheless, nervousness is an appropriate factor to consider when determining whether a basis for a reasonable suspicion exists.*

McClendon, 350 N.C. at 638, 517 S.E.2d at 134 (emphasis added). Defendant's nervousness was, therefore, properly considered as one of several factors justifying further detention.

Even if further detention was justified, we must "examine whether the duration of that detention was reasonable." *Id.* at 639, 517 S.E.2d at 134. The trial court found that Officer Smith's detention of defendant lasted "around three to five minutes." Defendant did not assign error to this finding and it is, therefore, binding on appeal. Under the circumstances, we believe that such a brief detention was reasonable. *Id.* (approving detention for 15 to 20 minutes as "not unreasonable under the circumstances"). *See also United States v. Sharpe*, 470 U.S. 675, 688, 84 L. Ed. 2d 605, 617, 105 S. Ct. 1568 (1985) (20-minute stop not unreasonable when police acted diligently).

[3] Defendant argues alternatively that the State failed to establish that Officer Smith had sufficient reasonable suspicion to request defendant's consent for the search. No such showing is required. As this Court stated in *State v. Sanchez*, 147 N.C. App. 619, 626, 556 S.E.2d 602, 608 (2001) (quoting *State v. Munoz*, 141 N.C. App. 675, 683, 541 S.E.2d 218, 223, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001)), "[w]hen a defendant's detention is lawful, the State need only show 'that defendant's consent to the search was freely given, and was not the product of coercion,' " *disc. review denied*, 355 N.C. 220, 560 S.E.2d 358 (2002). *See also Schneckcloth v. Bustamonte*, 412 U.S. 218, 248, 36 L. Ed. 2d. 854, 875, 93 S. Ct. 2041 (1973) (State only required to show that consent was voluntarily given). According to a leading commentator, "[i]f a valid consent is obtained . . . there is no additional requirement of probable cause for the search. Indeed, there is no requirement of reasonable suspicion as a prerequisite to seeking consent." 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.1, at 597 n.8 (3d ed. 1996). Defendant has cited no authority that would require the State to establish reasonable suspicion prior to requesting consent to search.

As for the voluntariness of the consent, defendant's brief only includes a bald assertion that the consent to search defendant's car was involuntary. Defendant points to no facts and makes no legal argument to support any contention that the consent was involuntary. Nor did defendant claim at trial that his consent was involuntary.

Since the search of defendant's car was admittedly consensual and was not tainted by an unlawful detention and since defendant has made no showing that the consent was involuntary, we hold that the

search of defendant's car was lawful. Defendant does not further challenge the search of his person. We therefore hold that the trial court did not err in denying defendant's motion to suppress.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

JOSEPH C. DUNN, PLAINTIFF v. JEFF STEPHEN CUSTER AND CON-WAY TRUCKLOAD SERVICES, INC., DEFENDANTS

No. COA02-1672

(Filed 20 January 2004)

1. **Evidence— employment after accident—not speculative**

   There was no error in the denial of a new trial on damages from an auto accident based on defendant's contentions that testimony about plaintiff's employment as a dentist was speculative due to a medical condition existing before the accident.

2. **Evidence— auto accident—injuries of non-party**

   There was no error in denying a new trial to determine damages from an auto accident based on the admission of testimony about the injuries of another occupant of plaintiff's vehicle. The evidence was admitted for the limited purpose of proving the force of the impact.

3. **Evidence— extent of injuries and pain—non-expert testimony**

   The trial court did not err by denying defendant's motion for a new trial to determine damages from an auto accident based on the admission of testimony from another occupant of the vehicle about plaintiff's pain. The witness had known plaintiff for over thirty years, was aware of plaintiff's prior medical condition, was a passenger in the car on the day of the accident, and testified that plaintiff seemed to be in a lot of pain and was probably doing worse than the witness after the accident.

Appeal by defendants from order entered 31 July 2002 by Judge Charles C. Lamm, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 16 September 2003.

Adams, Hendon, Carson, Crow & Saenger, P.A., by George Ward Hendon, for plaintiff-appellee.

Cogburn, Goosmann, Brazil & Rose, P.A., by Frank J. Contrivo, Jr. and Andrew J. Santaniello, for defendants-appellants.

LEVINSON, Judge.

Defendants appeal from a jury trial held on the issue of damages, contending that the trial court erred in denying their motion for a new trial. We affirm.

I.

On 28 July 2000, Jeff Custer was driving a tractor-trailer owned by Con-Way Truckload Services, Inc. (defendants). Custer was an employee of Con-Way Truckload Services. Custer failed to reduce his speed in an area of traffic congestion caused by road construction, and he crashed into the rear of a sports-utility vehicle driven by Joseph Dunn (plaintiff). Dr. James Teague was riding as a passenger in plaintiff's vehicle at the time of the collision. Defendants admitted liability, and a jury trial was conducted on the issue of damages alone.

At trial, plaintiff presented evidence tending to show the following: Plaintiff was a licensed dentist who owned and operated his own practice from 1973 to 1997. In 1993 he began experiencing pain that radiated throughout his neck and both arms. Plaintiff sought treatment for his condition, and he was ultimately diagnosed as having multi-level degenerative cervical disk disease. Dr. Keith Maxwell, an orthopedic surgeon and plaintiff's treating physician, testified that "all the years that [plaintiff] performed dentistry, bending and stooping and looking in the mouths at awkward angles either precipitated or accelerated his degenerative disk disease in his neck." Plaintiff sold his private practice due to his worsening condition in 1997.

After taking a year off, plaintiff accepted a position as Director of the Buncombe County Health Department Dental Facility in September 1999, which permitted him to work on a part-time basis. In this position, plaintiff controlled his own hours, decided which patients he would treat, and performed all of the clinic's administrative duties. At the time of the accident, plaintiff was still employed by the health department.

In the summer of 2000, plaintiff was offered a part-time position with his friend, Dr. James Teague, a dentist in private practice. The

position entailed working approximately two days each week to help reduce Dr. Teague's patient load. Plaintiff and Dr. Teague agreed orally that plaintiff would receive thirty-five percent of what he produced and would not be responsible for any salary or overhead expenses. Prior to the accident, plaintiff had worked at Dr. Teague's office approximately 2-3 times. The day before the accident, plaintiff received his first paycheck for services he had rendered while in Dr. Teague's employ.

After the 28 July 2000 accident, plaintiff began experiencing numbness in his hands and could not hold dental instruments or feel the vibrations of instruments. Plaintiff's physician opined the motor vehicle accident exacerbated his condition and recommended that plaintiff cease working completely. Plaintiff resigned from the health department 7 September 2000 and terminated his employment with Dr. Teague.

During the trial, Dr. Teague testified that he was a passenger in plaintiff's vehicle at the time of the accident. Over defendants' objection, the trial court permitted Dr. Teague to testify about the force of the collision and the extent of the injuries he claimed to have suffered as a result of the accident:

Q: What did it do to you at the moment of impact?

A: Of course the seat back snapped, and obviously there was a lot of disorientation there. It took me some time to find my glasses, and I wasn't quite sure what was going on for a moment. I don't think I lost consciousness. I remember looking over the seats. As the backs of the seats snapped, they kind of rolled toward one another. Joe and I were kind of facing each other, and I remember Joe grabbing his neck and yelling, "Oh, my God; oh, my God." I remember trying to sit up and grabbing the steering wheel to try and keep us from getting into [sic] the car in front of us. As soon as I gathered my senses I remember my left leg, my calf being very sore.

[COUNSEL FOR DEFENDANT]: Object to any alleged injuries that this witness may have sustained.

[COUNSEL FOR PLAINTIFF]: It goes to the force of the impact.

COURT: Overruled. Briefly as it may go to the force of the impact.

A: I remember, of course, pain in my neck and abdomen. I remember when I got out of the car I had some numbness in, I think, my right hand. I guess that's the extent of it.

Plaintiff contended, and the trial court ruled, that Dr. Teague's injuries were relevant as to the force of the impact between defendants' tractor-trailer and plaintiff's vehicle.

Dr. Teague also provided a lay opinion, based on his observations, concerning the amount of pain that plaintiff was experiencing:

A: We were relating symptoms to each other and consoling each other in that hopefully we'll get better. I remember him being in a lot of pain. We both were in a lot of pain. I think his pain was more severe than mine. It was very difficult for me to function, certainly for—

[COUNSEL FOR DEFENDANT]: Objection.

COURT: Overruled.

A: —certainly for a week and into a second week. I felt like [plaintiff] was probably doing worse than I was.

Dr. Teague also indicated that plaintiff had trouble working as a result of his injuries. The trial court permitted Dr. Teague to testify that the income plaintiff would have earned with Dr. Teague had he not been impaired "would really be only limited by what [plaintiff] would like to do[,]" and that plaintiff would have "certainly" made more working for Dr. Teague than for the Heath Department.

Plaintiff also presented the testimony of an expert economist, Dr. Shirley Browning, Ph.D., who testified as to plaintiff's projected lost earnings. Dr. Browning testified that he based his analysis on plaintiff's employment with the health department and that he had not based his analysis "in any way" on the impact that working with Dr. Teague would have had on plaintiff's estimated earning potential.

Following the trial, the jury determined that plaintiff was entitled to recover $310,000.00 for his injuries. The trial court entered a judgment in this amount. Defendants filed a motion for a new trial pursuant to N.C.G.S. § 1A-1, Rule 59(a)(6),(7), and (8). The trial court denied defendant's motion.

II.

Defendants appeal the trial court's denial of their motion for a new trial, contending that the trial court abused its discretion by per-

mitting the jury to hear inadmissible, prejudicial evidence. Specifically, defendants argue the following evidence was erroneously admitted: (1) evidence concerning plaintiff's employment with Dr. Teague; (2) Dr. Teague's testimony about his own injuries sustained in the collision which injured plaintiff; and (3) Dr. Teague's opinion regarding the level of pain plaintiff was experiencing.

The relevant portions of N.C.G.S. § 1A-1, Rule 59(a) (2003) provide the following grounds for a new trial:

> (6) [e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
>
> (7) [i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
>
> (8) [e]rror in law occurring at the trial and objected to by the party making the motion. . . .

"The granting or denial of a motion . . . for a new trial is within the sound discretion of the trial judge. The ruling by a trial judge on a motion for a new trial is not subject to appellate review absent a 'manifest abuse of discretion.' " *Coletrane v. Lamb*, 42 N.C. App. 654, 656, 257 S.E.2d 445, 447 (1979) (quoting *Scott v. Trogdon*, 268 N.C. 574, 575, 151 S.E.2d 18, 18 (1966)).

III.

[1] Defendants' first argument on appeal concerns the evidence about plaintiff's "prospective" employment with Dr. Teague. Defendants contend such evidence was impermissibly speculative and was, therefore, (1) impermissibly presented to the jury, and (2) improperly incorporated into the expert opinion testimony of plaintiff's economist. We disagree.

Speculative damages are not properly admissible at trial:

> The amount of pecuniary damages is not presumed. The burden of proving such damages is upon the party claiming them to establish by evidence, (1) such facts as will furnish a basis for their assessment according to some definite and legal rule, and (2) that they proximately resulted from the wrongful act. If there is no evidence as to the extent of the pecuniary damage, there can be no recovery of substantial damages, where the elements of damage are susceptible of pecuniary admeasurement.

Short v. Chapman, 261 N.C. 674, 681-82, 136 S.E.2d 40, 46 (1964).

> [C]ompensation for lost earning capacity is recoverable when such loss is "the immediate and necessary consequence[] of [an] injury." In determining the appropriate amount of compensation for such loss, "[t]he age and occupation of the injured person, the nature and extent of his employment, the value of his services and the amount of his income at the time, whether from fixed wages or salary, are matters properly to be considered by the jury[,]" and "great latitude" is allowed in the introduction of such evidence. "The right of cross-examination provides the opposing party opportunity to challenge estimates of this nature[.]"

Curry v. Baker, 130 N.C. App. 182, 191-92, 502 S.E.2d 667, 674-75 (1998) (quoting *Smith v. Corsat*, 260 N.C. 92, 95-96, 131 S.E.2d 894, 897 (1963), and *Goble v. Helms*, 64 N.C. App. 439, 446, 307 S.E.2d 807, 812 (1983)).

In the present case, plaintiff began his employment with Dr. Teague before the 28 July 2000 accident and received his first paycheck in the amount of $1,200 on 27 July 2000, the day before the accident. Moreover, Dr. Teague and plaintiff testified that under the terms of their oral agreement, plaintiff would work on a part-time basis as his health would permit, and he would be paid thirty-five percent of what he produced. Kim Williamson, a dental assistant in Dr. Teague's office who served as plaintiff's assistant, testified that plaintiff began working before the accident and attempted to work between three and five times after the accident. We conclude evidence of the employment with Dr. Teague and the associated compensation was not impermissibly speculative and provided a proper basis from which the jury could determine what damages, if any, to award based upon plaintiff's loss of employment with Dr. Teague.

Defendants urge that, notwithstanding the testimony just discussed, the employment relationship between plaintiff and Dr. Teague was necessarily speculative given plaintiff's medical history. This is so, defendants argue, because physical discomfort related to his medical condition caused him to sell his dental practice in 1997; it follows, defendants contend, that plaintiff was unable to practice dentistry in 2000. However, the record supports a contrary interpretation.

The record shows that plaintiff sold his dental practice in 1997 because he was no longer able to work between eight and ten hours per day, and it would have been difficult to maintain his practice while working only three to four hours per day. After taking a year

off, in September 1998, plaintiff began working approximately two-and-one-half days per week for the Buncombe County Health Department. At the time of the accident in July 2000, plaintiff was still employed by the Buncombe County Health Department, and he was also working part-time with Dr. Teague. In support of this testimony, plaintiff entered his time sheets, paychecks and tax forms from 1998 through November 2000 into evidence. Collectively, this evidence indicates plaintiff was unable to work on a full-time basis in 2000, but could, however, work on a part-time basis. Accordingly, we conclude that evidence that plaintiff could perform dentistry services on a part-time basis in 2000 was not speculative, and it was a proper basis upon which the jury could determine an award of damages.

Defendants also allege that the "speculative" evidence regarding plaintiff's employment with Dr. Teague tainted the testimony of plaintiff's expert economist, Dr. Browning. Specifically, defendants argue that Dr. Browning's testimony was impermissibly premised on the assumption that plaintiff left the Buncombe County Health Department to pursue the employment opportunity offered by Dr. Teague. We find this contention to be without merit.

Dr. Browning testified that in conducting his analysis, he assumed the following:

> [Plaintiff] would continue to work on a part-time basis until age sixty-five; that he would not have left the health department to work for another dentist, a Dr. Teague, unless he could have anticipated earnings at least equal to what he would have earned had he stayed at the health department. That's based on a concept in economics called opportunity cost, that a person would not willingly move to a situation which would be worse in terms of income than that which they already had. So I used the health department as sort of a minimum baseline situation there. . . .

Thus, in formulating his expert opinion, Dr. Browning used "opportunity cost" as an indicator that plaintiff would not leave his present employment with the health department for a lesser-paying job. Based upon that assumption, Dr. Browning used plaintiff's earnings and work history with the health department as a baseline for determining plaintiff's loss of earnings.

Moreover, Dr. Browning explicitly testified that his opinion was based upon plaintiff's earnings from the health department and that he did not consider "in any way" the new opportunity plaintiff may

have had with Dr. Teague's private practice in the analysis he submitted. Defendants have not challenged the methodology by which Dr. Browning formulated his opinion.

We conclude that evidence about plaintiff's employment with Dr. Teague (1) was not impermissibly presented to the jury, and (2) did not improperly factor into the expert opinion elicited from Dr. Browning. Accordingly, the trial court was not required to grant defendants' motion for a new trial on the basis of these arguments.

IV.

[2] Defendants' second argument on appeal is that the trial court erroneously permitted Dr. Teague to testify about injuries that he sustained in the same accident which injured the plaintiff. The trial court accepted plaintiff's argument that Dr. Teague's injuries were relevant to help establish the force of the impact which injured plaintiff.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). Evidence of the force of the impact between vehicles may be relevant in determining the severity of the impact and therefore the gravity of plaintiff's injury. Although "the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the "abuse of discretion" standard which applies to rulings made pursuant to Rule 403. *State v. Alston*, 341 N.C. 198, 237, 461 S.E.2d 687, 708 (1995).

This Court recently addressed a similar issue in *Griffis v. Lazarovich, et al.*, 161 N.C. App. 434, 588 S.E.2d 918 (2003). The plaintiff in *Griffis* sought to elicit testimony from an occupant in the same vehicle that she was also injured. Apparently, plaintiff sought to show that another occupant was "injured to the same degree [as plaintiff]." *Id.* at 439, 588 S.E.2d at 922. In addressing the trial court's decision to exclude the testimony, this Court stated, "[w]e 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." *Id.* Our Court in *Griffis* ultimately concluded the plaintiff "failed to show any abuse of discretion in the trial court's refusal to admit this evidence." *Id. Griffis* does not stand for the proposition that evidence of another's injuries are *per se* irrelevant under any and all factual circumstances but merely reiterates that evidence is evaluated according to established standards of legal relevancy, Rule 401, and undue prejudice, Rule 403.

Accordingly, applying deferential review to the instant case, we hold the trial court did not err in admitting the contested testimony for the limited purpose of proving the force of the impact which injured plaintiff, and, further, the trial court did not abuse its discretion in failing to exclude it pursuant to Rule 403. This assignment of error is overruled.

V.

[3] Defendants' final argument is that Dr. Teague's opinion testimony regarding plaintiff's pain level was speculative and that such proof was required to be given by a medical expert. We disagree.

"The state of a person's mental and physical health, as derived from mere observation, is a proper subject for opinion testimony by a nonexpert." *Roberts v. Edwards*, 48 N.C. App. 714, 717, 269 S.E.2d 745, 747 (1980). In the present case, Dr. Teague had known plaintiff for over thirty years. Moreover, Dr. Teague testified he was aware of plaintiff's pre-accident medical condition and was a passenger in the car on the day of the accident. On these facts, the trial court did not err in permitting Dr. Teague to testify that plaintiff seemed to be in a lot of pain and that plaintiff was probably doing worse after the accident. This assignment of error is overruled.

The trial court did not abuse its discretion in denying defendants' motion for a new trial.

Affirmed.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. DAUNTE DEWAYNE MOORE, DEFENDANT

No. COA03-202

(Filed 20 January 2004)

1. **Evidence— hearsay—not offered for truth of matter asserted—explanation of actions**

The trial court did not err in a possession of drug paraphernalia, possession with intent to sell and deliver cocaine, and maintaining a place to keep controlled substances case by permitting deputies to testify that they went to a residence to talk with defendant after arresting a person with crack cocaine in her hand who had just left the residence even though defendant contends the testimony was inadmissible hearsay, because: (1) the deputies' testimony placed defendant in close proximity to the drugs; and (2) the challenged testimony was neither offered for the truth of the matter asserted nor offered as corroboration, but instead to explain the deputies' actions.

2. **Evidence— character—establishing elements of charged crimes**

The trial court did not err in a possession of drug paraphernalia, possession with intent to sell and deliver cocaine, and maintaining a place to keep controlled substances case by allowing a deputy's testimony that he had seen defendant at the pertinent residence on previous occasions even though defendant contends the testimony disclosed the deputy's familiarity with defendant and suggested that defendant had a prior record or bad character, because the challenged testimony was admissible to help establish the elements of the charged crimes.

3. **Drugs— possession of drug paraphernalia—motion to amend indictment—motion to dismiss**

The trial court erred by granting the State's motion to amend a possession of drug paraphernalia indictment by striking "a can designed as a smoking device" and replacing it with "drug paraphernalia, to wit: a brown paper container," and by denying defendant's motion to dismiss that charge, because: (1) the amendment constituted a substantial alteration of the indictment when common household items and substances may be classified as drug paraphernalia, and a defendant must be apprised of the item or substance in order to

amount a defense; and (2) no evidence of a can designed as a smoking device was presented.

4. Drugs— possession with intent to sell and deliver cocaine—instruction—constructive possession

The trial court erred by giving the jury an instruction on constructive possession of cocaine jointly with others, and thus, defendant's conviction for possession with intent to sell and deliver cocaine is reversed, because: (1) unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred; and (2) the State in this case was required to show other incriminating circumstances before constructive possession could be inferred when five individuals were found in or near the mobile home in which the drugs were found and two of the individuals were in close proximity to the drugs, the residence was owned by someone other than defendant, the warrant squad went to the residence in order to arrest someone other than defendant, and the only evidence of defendant's connection to the premises was a deputy's testimony that he had seen defendant at the residence on prior occasions.

5. Drugs— maintaining a place to keep controlled substances—failure to challenge conviction

Defendant's conviction and sentence for maintaining a place to keep controlled substances remains intact because defendant has not challenged this conviction and sentence on appeal.

Appeal by Defendant from judgment entered 14 November 2002 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 2 December 2003.

Attorney General Roy Cooper, by Assistant Attorney General D. David Steinbock, for the State.

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

WYNN, Judge.

By this appeal, Defendant, Daunte Dewayne Moore, presents the following issues for our consideration: Did the trial court erroneously (I) allow implied hearsay; (II) allow inadmissible character evidence; (III) deny Defendant's motion to dismiss and allow the State to amend

the drug paraphernalia indictment; and (IV) instruct the jury on constructive possession. After careful review, we vacate Defendant's conviction and sentences for possession of drug paraphernalia and possession with intent to sell and deliver cocaine.

On 12 January 2002, members of the Onslow County Sheriff's Department warrant squad were attempting to serve active warrants in Maysville, North Carolina. Deputies George Hardy and Jack Springs went to 145 Hadley Collins Road to serve a warrant; however, the individual was not there. Upon their arrival at this address, the deputies saw a small vehicle leaving the address which in their opinion looked suspicious. The deputies stopped the vehicle and questioned its occupants—an elderly white male and a young African-American female. During the conversation, the African-American female indicated she had been at the residence to visit her cousin "D.D." The young woman also opened her right hand which contained a rock of crack cocaine. Deputy Springs testified he knew "D.D." to be the street name for Defendant.

After the conversation with the vehicle occupants, the deputies went to the residence to speak with Defendant. After the officers talked briefly with Defendant at the residence's door, Defendant attempted to shut the door. The deputies grabbed Defendant and arrested him for resisting arrest. Thereafter, the deputies searched the residence. In plain view, the deputies found a brown paper envelope containing crack cocaine sitting on top of some insulation in an area where the paneling had been removed from the wall.

The deputies also found two other individuals in the residence. Upon searching Defendant's person, the deputies located $18.00 in his front pocket and $309 in his billfold. Deputy Springs testified he had seen Defendant at 145 Hadley Collins Road on several previous occasions.

Based upon this evidence, Defendant was found guilty of possession with intent to sell and deliver cocaine, possession of drug paraphernalia, and intentionally keeping and maintaining a place for controlled substances. The trial court sentenced Defendant to 10-12 months for the possession with intent to sell and deliver cocaine conviction and consecutive suspended sentences for possession of drug paraphernalia and maintaining a place for controlled substances. Defendant appeals.

[1] Defendant first contends the trial court erroneously allowed improper hearsay by permitting the deputies to testify that they went to the residence to talk with Defendant after arresting a person with crack cocaine in her hand who had just left the residence. We disagree.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001), and "is not admissible." N.C. Gen. Stat. § 8C-1, Rule 802 (2001). However, the statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statement was made. *State v. Potter*, 295 N.C. 126, 244 S.E.2d 397 (1978).

In support of his contention, Defendant cites *State v. Austin*, 285 N.C. 364, 204 S.E.2d 675 (1974) wherein our Supreme Court held it was reversible error to allow a motel registration card showing the name of the defendant charged with incest and the name of his daughter introduced into evidence. The Court stated that any attempt by the trial judge to restrict such evidence would not overcome the prejudicial effect of the evidence. However, *Austin* is distinguishable from the facts of this case. In *Austin*, the signature on the hotel registration card had not been authenticated and the significance of the registration card was highly prejudicial because it was the only evidence other than the daughter's testimony which bore directly upon the question of whether the defendant had had incestuous relations with her. Unlike *Austin*, in this case, the deputies' testimony placed Defendant in close proximity to the drugs. Moreover, the challenged testimony was neither offered for the truth of the matter asserted nor offered as corroboration; rather, the testimony was offered to explain the deputies' actions. Accordingly, we conclude the trial court did not erroneously admit the testimony.

[2] In his next argument, Defendant contends the trial court erroneously allowed character evidence in violation of N.C. Gen. Stat. § 8C-1, Rule 404. Under Rule 404, "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion."

Defendant contends the trial court erred in allowing Deputy Spring's testimony that he had seen Defendant at the 145 Hadley Collins residence on previous occasions. Defendant argues this testimony disclosed the deputy's familiarity with Defendant and sug-

gested that he had a prior record or bad character. However, the State contends the testimony was admissible to establish elements of the possession with intent to sell and deliver, maintaining a place to keep controlled substances and possession of drug paraphernalia charges. *See State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987) (possession of drug paraphernalia); *State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971) (possession with intent to sell and deliver); *State v. Alston*, 91 N.C. App. 707, 373 S.E.2d 306 (1988) (maintaining a place to keep controlled substances).

Under Rule 404, "even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Coffey*, 326 N.C. 268, 279, 389 S.E.2d 48, 54 (1990). As the challenged testimony was admissible to help establish the elements of the charged crimes, we conclude the trial court did not err in admitting Deputy Spring's testimony.

[3] Defendant next contends the trial court erroneously granted the State's motion to amend the drug paraphernalia indictment and denied Defendant's motion to dismiss. We agree.

N.C. Gen. Stat. § 15A-923(e) provides that "a bill of indictment may not be amended." Our Supreme Court has interpreted the term amendment under N.C. Gen. Stat. § 15A-923(e) to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, —— (1996).

> An indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in the event of conviction.

Snyder, 343 N.C. at 65-66, 468 S.E.2d at ——.

In this case, Defendant was charged with a violation of N.C. Gen. Stat. § 90-113.22 (2001) which provides:

> (a) It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to plant, propagate, culti-

> vate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, package, repackage, store, contain, or conceal a controlled substance which it would be unlawful to possess, or to inject, ingest, inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

According to Defendant's indictment, Defendant allegedly possessed "drug paraphernalia, to wit: a can designed as a smoking device." However, none of the evidence elicited at trial related to a can; rather, the evidence described crack cocaine in a folded brown paper bag with a rubber band around it. Thus, at the close of the State's evidence, Defendant moved to dismiss. Rather than dismiss the indictment, the trial court granted the State's motion to amend the indictment striking "a can designed as a smoking device" and replacing it with "drug paraphernalia, to wit: a brown paper container." In our opinion, this amendment constituted a substantial alteration of the indictment.

Under N.C. Gen. Stat. § 90-113.22, drug paraphernalia is not defined. Rather, one must refer to N.C. Gen. Stat. § 90-113.21 for guidance. Under G.S. 90-113.21, "drug paraphernalia means all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act . . . ." Thereafter, the provision lists several kinds of drug paraphernalia, including common household items such as blenders, bowls, containers, spoons, mixing devices, envelopes and storage containers. Because some of the items that could be considered drug paraphernalia are also common everyday items, the statute provides

> the following, along with all other relevant evidence, may be considered in determining whether an object is drug paraphernalia:
>
> (1) statements by the owner or anyone in control of the object concerning its use;
>
> (2) prior convictions of the owner or other person in control of the object for violations of controlled substances law;
>
> (3) the proximity of the object to a violation of the Controlled Substances Act;
>
> (4) the proximity of the object to a controlled substance;

(5) the existence of any residue of a controlled substance on the object;

(6) the proximity of the object to other drug paraphernalia;

(7) instructions provided with the object concerning its use;

(8) descriptive materials accompanying the object explaining or depicting its use;

(9) advertising concerning its use;

(10) the manner in which the object is displayed for sale;

(11) whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a seller of tobacco products or agricultural supplies;

(12) possible legitimate uses of the object in the community;

(13) expert testimony concerning its use;

(14) the intent of the owner or other person in control of the object to deliver it to persons whom he knows or reasonably should know intend to use the object to facilitate violations of the Controlled Substances Act.

As common household items and substances may be classified as drug paraphernalia when considered in the light of other evidence, in order to amount a defense to the charge of possession of drug paraphernalia, a defendant must be apprised of the item or substance the State categorizes as drug paraphernalia. Accordingly, we conclude the amendment to the indictment constituted a substantial alteration of the charge set forth in the indictment. Moreover, as no evidence of "a can designed as a smoking device" was presented, we conclude the trial court erroneously denied Defendant's motion to dismiss.

[4] Finally, Defendant contends the trial court erroneously gave the jury an instruction on constructive possession of cocaine jointly with others. We agree.

"Constructive possession exists when the defendant while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics." *State v. Butler*, 356 N.C. 141, 146, 567 S.E.2d 137, 140 (2002). "Where such [drugs] are found on the premises under the control of the accused this fact, in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on the charge of unlawful pos-

session." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). However, "unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

In this case, five individuals were found in or near the mobile home in which the drugs were found. Upon the sheriff deputies' arrival, an elderly white male and young African-American female were observed leaving the residence's driveway in a vehicle. Upon questioning these individuals, the sheriff deputies noticed a rock of crack cocaine in the female's right hand. Inside of the mobile home, Defendant and another man were located. Defendant opened the front door and the other man was found in the back bedroom. Finally, a white female was observed on the scene. However, none of the deputies could testify as to whether the female came from inside or outside of the mobile home. Thus, two of the five individuals were in close proximity to the drugs—Defendant, who opened the front door, and the other man, who was found in the back bedroom at the end of the hallway in which the drugs were found.

Thus, the State was required to show other incriminating circumstances before constructive possession could be inferred. In this case, the residence was owned by someone other than Defendant—a woman who was not present during any of the activity on the day in question. Moreover, the warrant squad went to the residence in order to arrest someone other than Defendant. Upon their arrival, as many as five people were found in or near the residence. During the search of the mobile home, to which the deputies indicated Defendant consented, the deputies did not find any documents or other items tying Defendant to the residence. The only evidence of Defendant's connection to the premises was Deputy Jack Spring's testimony that he had seen Defendant at the residence on prior occasions. However, Deputy Springs was not aware of who else lived there and he testified that other people associate there.

The State also indicates Defendant's attempt to flee from the deputies, $327.00 of U.S. currency on his person, and the African-American female's testimony that she was there to see her cousin, D.D., whom Deputy Springs indicated was Defendant's street name, constituted incriminating circumstances from which one could infer constructive possession. However, the evidence indicates Defendant did not attempt to flee the officers. Upon answering the door, the officers asked to talk with Defendant about narcotics activity. Defendant

indicated he did not want to talk to police and tried to close the door. The officers then prevented Defendant from closing the door, grabbed him and threw him on the ground and arrested him. When Defendant attempted to close the door, he was not under arrest, was not the subject of an arrest warrant and was under no obligation to talk to police. Indeed, the trial court dismissed Defendant's resist, obstruct and delay charge. Moreover, there is no evidence Defendant struggled with the officers before the officers handcuffed him as the State contends in its brief. Finally, $327.00 in U.S. currency, without more, is not a significant amount of money from which one can infer constructive possession of drugs. As there was insufficient evidence of incriminating circumstances, we conclude the trial court erred in instructing the jury on constructive possession.[1] *See State v. King*, 99 N.C. App. 283, 288, 393 S.E.2d 152, 155 (1990) (where this Court identified three typical situations [in which constructive possession has been established] regarding the premises where drugs were found: (1) some exclusive possessory interest in the defendant and evidence of defendant's presence there, (2) sole or joint physical custody of the premises of which defendant is not an owner; and (3) in an area frequented by defendant, usually near defendant's property). Accordingly, because we similarly conclude there was insufficient evidence of Defendant's actual possession of the cocaine, we vacate Defendant's conviction and sentence for possession with the intent to sell and deliver cocaine. *See State v. Diaz*, 155 N.C. App. 307, ——, 575 S.E.2d 523, 528 (2002) (stating a defendant has actual possession of a substance if it is on his person, he is aware of its presence and either by himself or with others, he has the power and intent to control its disposition or use).

[5] In sum, we vacate Defendant's conviction for possession of drug paraphernalia and the suspended sentence of 120 days, and reverse his conviction for possession with intent to sell and deliver cocaine and the active sentence of 10 to 12 months. However, Defendant's conviction and sentence for maintaining a place to keep controlled substances remains intact as Defendant has not challenged this conviction and sentence on appeal.

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1. The State also references statements made by the African-American female regarding the amount of money she spent, $18.00, in purchasing the drugs as evidence of incriminating circumstances. However, this testimony was not presented to the jury and, in any event, could not be used for the truth of the matter asserted. Indeed, the State argued before the trial court that it was referencing the young woman's testimony to explain the subsequent actions of the sheriff deputies and not for the truth of the matter asserted.

Vacated in part, reversed in part.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. JAMES E. LEWIS

No. COA03-263

(Filed 20 January 2004)

1. **Appeal and Error— preservation of issues—criminal history—objection not renewed—no objection to other evidence**

A cocaine defendant waived the right to appeal evidence that one of the officers knew him from the county jail when he did not renew his objection when the question was asked again and did not object to later evidence about defendant's criminal history.

2. **Drugs— sale of cocaine—acting in concert—evidence sufficient**

The evidence was sufficient to allow a jury to reasonably infer that defendant acted in concert to sell cocaine.

3. **Criminal Law— prosecutor's argument—misstatement of fact**

There was no error in a cocaine prosecution where the prosecutor in his closing argument misstated something said by an accomplice. The evidence supported the prosecutor's interpretation of the evidence, and the misstatement did not deny defendant due process.

4. **Indictment and Information— habitual felon—amendment—date and county**

Defendant's motion to quash an habitual felon indictment was properly denied, and there was no error in allowing the State to amend the indictment, where the original incorrectly stated the date and county of a prior conviction, but correctly stated the type of offense and the date of the offense. Defendant was sufficiently notified of the conviction used to support habitual felon status.

Appeal by defendant from judgment entered 13 March 2002 by Judge Jack W. Jenkins in Beaufort County Superior Court. Heard in the Court of Appeals 3 December 2003.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John P. Scherer II, for the State.

Mary Exum Schaefer for defendant-appellant.

HUNTER, Judge.

James E. Lewis ("defendant") appeals a judgment based upon jury verdicts convicting him of possession with the intent to sell or deliver cocaine and the sale or delivery of cocaine, as well as being an habitual felon. For the reasons stated herein, we conclude the trial court did not err.

The State presented the following evidence at trial: On 26 September 2002, the Beaufort County Sheriff's Department conducted an undercover drug campaign. Investigator Russell Davenport ("Investigator Davenport") participated in the campaign as a surveillance officer. In that role, he was to operate a van, watch drug transactions, maintain a video camera to tape the transactions, and monitor audio transmitters in an undercover police car. Detective Matthew Heckman ("Detective Heckman") of the New Bern Police Department also participated in the campaign by driving the wired undercover car in an attempt to make crack cocaine purchases.

Detective Heckman and his partner initially went to the Mimosa Trailer Park to purchase crack cocaine, but were unsuccessful. Next, they drove to Washington Arms Apartments and parked in the apartment lot. Once there, the officers noticed a red pick-up truck flashing its lights at them. The driver of the truck, Timothy Jennette ("Jennette"), pulled alongside the officers and asked, "what [are you] looking for[?]" Detective Heckman responded that they were looking for about sixty dollars worth of crack cocaine, to which Jennette responded, "follow me." During that conversation, defendant sat silently in the passenger's side of Jennette's truck. As the officers followed Jennette, they radioed the Beaufort County investigators about the potential drug purchase.

The officers followed Jennette and defendant back to the Mimosa Trailer Park. Jennette got out of his truck and, upon approaching the undercover car, asked the officers for the money so that he could obtain the drugs from another location. When Detective Heckman

refused, Jennette signaled for defendant. Defendant exited the truck, grabbed a circular saw out of the truckbed, walked over to Jennette, and sat the saw on the ground. Jennette said that the saw, used as collateral, and defendant would stay with the officers while Jennette went to get the drugs. Detective Heckman handed the money to Jennette, and Jennette left.

Thereafter, defendant introduced himself to the officers as "James." Defendant told the officers he had not been out of prison long and showed them his Department of Correction identification card. Defendant also told the officers that he and Jennette had seen that no one was willing to sell the officers drugs when they first arrived at the trailer park so he and Jennette had followed the officers when they left. When asked where Jennette had gone to obtain the crack cocaine, defendant responded from "the trailer where you were just at." Defendant further stated, "I tried to stay out of this drug game . . . but I don't give a f—k about it. I just got out of prison."

The officers and defendant conversed for approximately ten minutes before Jennette returned with three tin foil wraps. Detective Heckman opened them and, based on his training and experience, determined the substance contained therein was crack cocaine. Jennette then provided his phone number to Detective Heckman and offered to sell the officers more drugs in the future. Both vehicles left the parking lot, and the officers met up with Investigator Davenport at a predetermined location. The investigator ran a field test on the substance and discovered it tested positive for cocaine. A subsequent test of the substance revealed it contained 0.3 grams of crack cocaine.

Jennette's testimony on behalf of the State generally corroborated the evidence already offered by the State as to the events that occurred in the officers' presence. Jennette also testified that prior to seeing the officers, he had asked defendant to ride somewhere with him. Jennette saw the officers' car when he stopped to visit some friends in Mimosa Trailer Park. Curious to find out what the car occupants wanted, Jennette followed them, and defendant accompanied him. After learning of the officers' desire to purchase drugs, Jennette testified that he told defendant, "I'm going to get something out of this deal." By that statement, Jennette was referring to some crack cocaine that he and defendant could smoke together, something they had done on several prior occasions. Jennette further testified that while he and defendant did subsequently smoke crack cocaine that he kept from the officers, defendant (1) got no money from the deal, (2)

did not have physical possession over the crack cocaine, and (3) was not present when Jennette initially asked the officers for the money. However, Jennette testified that defendant was present when the officers first asked to buy crack cocaine and that Jennette was receiving no deal for his testimony. Defendant presented no evidence. Additional facts pertinent to this appeal are included as necessary in analyzing defendant's arguments.

I.

[1] Defendant initially argues that he is entitled to a new trial because the trial court erred in permitting Investigator Davenport to testify that he knew defendant from the county jail. Defendant takes issue with the following portion of the State's direct examination of Investigator Davenport:

> Q. During [Detective Heckman's conversation with Jennette], were you able to see in the truck?
>
> . . . .
>
> A. I was able to see Timothy Jennette—and, of course, I only know [defendant] as Scooby and I knew him prior to that when I was a jailer in '93. I used to work in the jail.
>
> MR. RADER: Objection.
>
> THE COURT: On what grounds?
>
> MR. RADER: Your Honor, I think it's—prejudicial here—a prejudicial nature would outweigh anything probative.
>
> THE COURT: Sustained.
>
> Q. Have you had much contact with the Defendant?
>
> A. I know the Defendant from working in the county jail.

Defendant contends the admission of this irrelevant and highly prejudicial evidence should have been stricken from the record and the jury instructed to disregard it. We disagree.

The transcript clearly indicates that defendant did not renew his objection when Investigator Davenport testified a second time that he knew defendant from the county jail. Further, testimony regarding defendant's criminal history was also admitted into evidence, without objection, when Detective Heckman later testified that defendant showed the officers his Department of Corrections identification

card and said that he had just gotten out of prison. Thus, defendant's failure to renew his objection or object to the admissibility of the later offered evidence by Detective Heckman resulted in him waiving the right to raise this argument on appeal. *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989).

II.

[2] Defendant argues his convictions should be vacated because the trial court erred in denying his motion to dismiss all the charges against him due to insufficiency of the evidence. We disagree.

In order to survive a motion to dismiss in a criminal action, the trial court must view the evidence in the light most favorable to the State, drawing every reasonable inference in favor of the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The evidence considered must be "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). Whether the evidence presented is substantial is a question of law for the court. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956). "[T]he rule for determining the sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981) (citations omitted).

In the instant case, defendant was charged with (1) possession with the intent to sell or deliver cocaine, and (2) the sale or delivery of cocaine. To survive a motion to dismiss these charges, "the State must present substantial evidence of (1) defendant's possession of the controlled substance, and (2) his intent to sell or distribute it[,]" as well as the actual sale or distribution of the controlled substance. *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72-73 (1996); N.C. Gen. Stat. § 90-95(a) (2003). At trial, the State's theory was that defendant acted in concert with Jennette to commit the crimes for which he was charged.

> To act in concert means to act in conjunction with another according to a common plan or purpose. It is unnecessary to show that defendant committed "any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to

constitute the crime pursuant to a common plan or purpose to commit the crime."

State v. Sams, 148 N.C. App. 141, 145, 557 S.E.2d 638, 641 (2001) (citation omitted) (quoting *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979)), *appeal dismissed and disc. review denied*, 355 N.C. 352, 562 S.E.2d 429 (2002).

When taken in the light most favorable to the State, the evidence reasonably supports the conclusion that defendant acted in conjunction with Jennette to possess and sell crack cocaine. Defendant was sitting in the truck beside Jennette when Jennette spoke with the officers about their desire to purchase crack cocaine. Defendant brought over collateral, i.e. the saw, and waited with the officers while Jennette took the officers' money to purchase the drugs. Defendant told the officers that he and Jennette had watched the officers' unsuccessful attempts to buy drugs and had decided to follow them. Defendant also knew where Jennette was getting the crack cocaine and smoked some of it with Jennette following the sale. At no time while defendant was engaged in these acts did he appear confused about what was going on or why he was present. In fact, defendant even told the officers that he had "tried to stay out of this drug game" but no longer gave "a f—k about it."

Nevertheless, defendant contends that, as this Court held in *State v. Yancey*, 155 N.C. App. 609, 612, 573 S.E.2d 243, 245 (2002), *disc. review denied*, 356 N.C. 694, 579 S.E.2d 99 (2003), we should conclude that "[a]lthough the evidence against defendant tends to show that defendant was a drug *user*, none of the evidence conclusively establishes that defendant . . . conspired to [possess and subsequently sell] the drugs" to the officers. In *Yancey*, this Court vacated judgment and awarded a new trial to the defendant after determining that the only definitive evidence linking him to drug trafficking was a drug dealer's inadmissible testimony that the defendant (a customer of the drug dealer's) was an "asset" to the dealer's drug trade. *Id.* at 611-13, 573 S.E.2d at 245-46. However, unlike *Yancey*, this case does not involve whether inadmissible character evidence was prejudicial, but whether a first-hand account of defendant's participation in the sale of crack cocaine by Detective Hackman and Jennette sufficiently supported the denial of defendant's motion to dismiss. We conclude that there was sufficient evidence offered to allow a jury to reasonably infer that defendant acted in concert with Jennette. Thus, the trial court did not err in denying the motion to dismiss all the charges.

III.

[3] Next, defendant argues the trial court erred in failing to intervene during the prosecutor's jury argument. Specifically, during the State's direct examination of Jennette, the prosecutor asked:

> Q. Okay. You had—did you have any conversation [with defendant] in the truck on your way [leading the officers back] to Mimosa Trailer Park?
>
> A. No more than I said, *I'm* going to get something out of this deal.

(Emphasis added.) Thereafter, the prosecutor stated during closing argument:

> MR. SCHMIDLIN: . . . Jennette told them—told the Defendant, *we're* going to get something out of this. He had a conversation right before that with the undercover officer—
>
> MR. RADER: Objection, Your Honor.
>
> THE COURT: It's duly noted. Please be careful, Mr. Schmidlin. You may proceed.

(Emphasis added.) Defendant contends that since the evidence failed to establish his participation in the possession and sale of crack cocaine, the prosecutor's misstatement in the closing argument may have resulted in the jury finding defendant guilty as charged. However, defendant does not include any argument or citation of authority in his brief supporting this argument. Failure to do so has been deemed as a defendant abandoning that particular argument. *See State v. Bonney*, 329 N.C. 61, 82, 405 S.E.2d 145, 157 (1991). Nevertheless, a consideration of the merits of defendant's argument establishes the trial court did not err.

> It is well settled that arguments of counsel rest within the control and discretion of the presiding trial judge. In the argument of hotly contested cases, counsel is granted wide latitude. While it is not proper for counsel to "travel outside the record" and inject his or her personal beliefs or other facts not contained within the record into jury arguments, or place before the jury incompetent or prejudicial matters, counsel may properly argue all the facts in evidence as well as any reasonable inferences drawn therefrom.

State v. Worthy, 341 N.C. 707, 709, 462 S.E.2d 482, 483 (1995) (citations omitted). Inappropriate arguments of counsel will justify a new trial if those arguments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998).

Based on his interpretation of the evidence, the prosecutor in the case *sub judice* argued that defendant actively participated and benefitted in the drug sale. The evidence previously discussed supports that interpretation, especially in light of evidence that Jennette and defendant both smoked the drugs that Jennette had not given to the officers following the sale. Therefore, the prosecutor's misstatement did not result in a denial of defendant's due process or an error by the trial court.

IV.

[4] Finally, defendant argues the trial court erred in denying his motion to quash the habitual felon indictment and permitting the State to amend that indictment. The relevant facts establish that the State moved and was allowed to correct the second conviction set forth in the habitual felon indictment, which mistakenly noted the date and county of defendant's probation revocation, instead of the date and county of defendant's previous conviction for breaking and entering. Moreover, there was also a mistake as to the county seat, which the trial court acknowledged.

N.C. Gen. Stat. § 14-7.3 (2003) provides in part:

> An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

Additionally, "[a] bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2003). An " ' "amendment" is "any change in the indictment which would substantially alter the charge set forth in the indictment." ' " *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984).

Here, although the habitual felon indictment incorrectly stated the date and county of defendant's conviction, it correctly stated the

type of offense for which defendant was convicted and the date of that offense. "It is well established that an indictment is sufficient under the Habitual Felons Act if it provides notice to a defendant that he is being tried as a recidivist." *State v. Williams*, 99 N.C. App. 333, 335, 393 S.E.2d 156, 157 (1990). The indictment at issue sufficiently notified defendant of the particular conviction that was being used to support his status as an habitual felon. Defendant had previously stipulated to that conviction and did not argue he lacked notice of the hearing at trial. Accordingly, the State's requested corrections to the indictment did not constitute an amendment and thus, the trial court did not err in denying defendant's motion to quash.

No error.

Judges McGEE and GEER concur.

JAMES L. McINERNEY AND ELIZABETH B. McINERNEY, PLAINTIFFS V. PINEHURST AREA REALTY, INC., A NORTH CAROLINA BUSINESS CORPORATION, DEFENDANT

No. COA03-149

(Filed 20 January 2004)

1. Appeal and Error— standing—appeal from favorable judgment—alternate grounds for judgment

Defendant lacked standing and its appeal was dismissed where it attempted to appeal from a judgment holding that it had committed an unfair trade practice but that its conduct had not caused actual injury to plaintiffs. Defendant's assignments of error are more properly considered cross-assignments of error.

2. Unfair Trade Practices— amending restrictive covenants—claim dismissed

A trial court's dismissal of an unfair trade practices claim was upheld, even though its decision rested on other grounds, where plaintiffs were homeowners and defendant the subdivision developer, plaintiffs attempted to gather support for amending the restrictive covenants to reduce defendant's influence, and defendant preemptively amended the covenants to remove the voting provision which plaintiff wished to exercise. Plaintiffs agree that the covenants in effect when they purchased their

property gave defendant a unilateral right to amend and have not pointed to a public policy or law implicated by defendant's amendment. Without some showing by plaintiffs of a reason they should not be held to the bargain they made when they purchased their property, the underlying dispute does not come within the ambit of N.C.G.S. § 75-1.1.

Appeal by plaintiffs and cross-appeal by defendant from judgment entered 19 July 2002 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 27 October 2003.

James L. McInerney and Elizabeth B. McInerney, pro se, plaintiffs-appellants.

Van Camp Meacham & Newman, P.L.L.C., by Michael J. Newman, for defendant-appellant.

GEER, Judge.

Plaintiff homeowners James L. McInerney and Elizabeth B. McInerney brought suit *pro se* alleging that defendant Pinehurst Area Realty, Inc., the developer of the community where plaintiffs own a home, committed an unfair trade practice by amending the Declaration of Protective Covenants governing the properties in that community. After a bench trial, the trial court entered judgment in favor of defendant. Although we disagree with the basis for the trial court's decision, we affirm on the ground that the acts proven by plaintiffs do not constitute unfair trade practices within the meaning of N.C. Gen. Stat. § 75-1.1 (2003).

Since this appeal involves a bench trial, the trial court's findings of fact are conclusive on appeal if there is substantial evidence to support them. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *McConnell v. McConnell*, 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002) (quoting *Union Transfer and Storage Co. Inc. v. Lefeber*, 139 N.C. App. 280, 533 S.E.2d 550 (2000)). Appellate review of the trial court's conclusions of law is *de novo*. *Id.*

In 1980, defendant purchased the Midland Country Club ("MCC"), a private retirement community in Pinehurst, North Carolina. On 21 January 1985, defendant recorded a "Declaration of Protective

Covenants" subjecting the MCC property to certain real covenants. The Declaration provided, in pertinent part:

> Declarant . . . reserves the right to file in the Office of the Register of Deeds of Moore County, North Carolina supplementary "Declarations of Protective Covenants". The Declarant further reserves the right to file in the Office of the Register of Deeds of Moore County, North Carolina, supplementary or additional "Amendments to Declarations of Protective Covenants", and these Protective Covenants may be modified, changed or stricken from the land by vote of the Owners of 75% of all units in said subdivision.

Plaintiffs purchased a residence at MCC on 2 February 1985 expressly subject to the 21 January 1985 Declaration of Protective Covenants. Mr. McInerney, who is an attorney, testified: "We were represented by an attorney, by a local attorney, but I also personally reviewed those covenants, found some items that were objectionable, mildly objectionable, but not . . . a deal breaker, so to speak. And so I went ahead, executed the purchase agreement, and subsequently purchased the property, received a warranty deed which also stated that the property was subject to the restrictive covenants."

Twelve years later, in 1997, Mr. McInerney unsuccessfully met with defendant in an attempt to seek modification of one of the covenants. In spring 1999, Mr. McInerney decided that the covenants were drawn too heavily in favor of defendant and that "it was time to level the playing field." He initiated an effort to persuade 75% of the property owners to vote to amend the 1985 Protective Covenants to eliminate defendant's right to amend unless defendant had obtained agreement from 75% of the property owners.

On 2 June 1999, shortly after learning of Mr. McInerney's efforts, defendant recorded an "Amendment to Declaration of Protective Covenants" that deleted the provision in paragraph 9 allowing the MCC owners to modify the Protective Covenants by a vote of 75% of their membership. Defendant had not ever previously attempted to amend the 1985 Protective Covenants. The trial court found "[t]hat the motive and intent of the Defendant in the recordation on June 2, 1999 of the document titled Amendment to Declaration of Protective Covenants was in direct response to the Plaintiffs' initiatives to seek amendment of the Protective Covenants by a vote of 75% of the property owners" and "[t]hat the intent of the Defendant . . .

was to exercise exclusive control over any amendments to the Protective Covenants[.]"

Subsequently, Mr. McInerney met with representatives of defendant on multiple occasions in an attempt to resolve matters. He testified: "In each of those meetings we emphasized that reinstatement of owners' right to amend was an absolute show-stopper, that there was no other way we could settle our dispute. In all cases that reinstatement was declined; hence the need for this litigation." On 3 November 2000, however, defendant recorded a Supplementary Declaration of Protective Covenants that restored in some respects, but not all, the right of 75% of the owners to modify or change the Protective Covenants.

On 26 April 2001, Mr. McInerney filed a complaint alleging that defendant's 2 June 1999 recordation of the amendment was an unfair trade practice in violation of N.C. Gen. Stat. §§ 75-1.1 *et seq.* Because the property was a tenancy by the entirety, the trial court allowed a motion to amend made at trial to add Mrs. McInerney as a plaintiff.

Following a bench trial at the 15 July 2002 session of Moore County Superior Court, the trial court dismissed plaintiffs' action and entered judgment in favor of defendant on 19 July 2002. Although the trial court concluded that defendant's recordation of the 1999 amendment was an "unfair act" and that defendant had "engaged in conduct which amounted to an inequitable assertion of its power[,]" it also concluded that plaintiffs had "failed to demonstrate that the Defendant's conduct proximately caused actual injury to the Plaintiffs[.]" Both plaintiffs and defendant appealed from the judgment.

Plaintiffs assign error to the trial court's finding of fact that "the Plaintiffs have failed to present any evidence of actual injury[,]" and to the court's conclusion of law that "the Plaintiffs have failed to demonstrate that the Defendant's conduct proximately caused actual injury to the Plaintiffs." Defendant, on the other hand, seeks to uphold the judgment, but challenges the trial court's conclusions that defendant's amendment was an "unfair act" and that defendant "engaged in conduct which amounted to an inequitable assertion of its power."

[1] As a preliminary matter, we note that because defendant prevailed at trial, it does not have standing to appeal. Only a "party

aggrieved" may appeal from a trial court's judgment. N.C. Gen. Stat. § 1-271 (2003); N.C.R. App. P. 3(a). When, as here, a defendant prevailed below and the judgment from which the defendant appeals "is that the plaintiff recover nothing of them. . . . they are not parties aggrieved and may not appeal." *Bethea v. Town of Kenly*, 261 N.C. 730, 732, 136 S.E.2d 38, 40 (1964). We note that defendant's assignments of error are more properly considered cross-assignments of error under N.C.R. App. P. 10(d) (allowing a party to cross-assign as error "any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.").

[2] Under the Unfair and Deceptive Trade Practices Act ("Chapter 75"), "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a). To establish a claim under Chapter 75, a plaintiff must prove: (1) an unfair or deceptive act or practice or an unfair method of competition; (2) in or affecting commerce; (3) which proximately caused actual injury to the plaintiff or to his business. *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998), *disc. review improvidently granted*, 351 N.C. 41, 519 S.E.2d 314 (1999).

The trier of fact decides whether the defendant committed the alleged acts, but the court decides as a matter of law whether those facts constitute an unfair or deceptive trade practice. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988). We need not address plaintiffs' arguments regarding actual injury because we hold, as defendant has argued, that the acts proven by plaintiffs are not unfair practices within the meaning of N.C. Gen. Stat. § 75-1.1.

Our Supreme Court has held that a practice is "unfair" under Chapter 75 "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Alternatively, "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980), *overruled on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988).

Plaintiffs' contention that defendant acted unfairly is not based on any argument by plaintiffs that defendant's 1999 amendment violated law or public policy apart from Chapter 75:

> THE COURT: Well, what statute or State or federal constitutional provision do you suggest [defendant's amendment] violates?
>
> MR. McINERNEY: Chapter 75-1.1 of the North Carolina Statutes which proclaims that unfair or deceptive acts or practices in or affecting commerce are declared unlawful. . . .
>
> . . . .
>
> THE COURT: . . . . Let me ask you this question, Mr. McInerney: Do you contend that the conduct of the defendants violates any other law or constitutional right other than what you contend in Chapter 75?
>
> MR. McINERNEY: No, Your Honor. . . . [Defense counsel] makes great use of the word "unfettered" in describing [defendant's] right to amend the covenants. That is not an unfettered right. By the terms and on the face of the covenants its [sic] unfettered, but any contract—I suppose it's actually considered in the nature of a contract—any contract does not permit illegal, unlawful actions. And so that right is not unfettered. As [defendant's expert witness] testified, it is—there are certain things that simply may not be done.
>
> THE COURT: Well, that would involve constitutional violations.
>
> MR. McINERNEY: Well, those are constitutional violations, yes. . . . I don't contend it's a constitutional matter. What I contend is that this is a violation of Chapter 75 which precludes unfair acts in business or commerce.

At trial, Mr. McInerney agreed with defendant that the 1985 Declaration of Protective Covenants gave defendant a unilateral right to amend the Protective Covenants and that the Protective Covenants contained no exceptions to that right.

On appeal, plaintiffs likewise do not argue that defendant's actions constituted a breach of contract or violated any public policy apart from Chapter 75's prohibition against "unfair" acts. Plaintiffs

appear to argue instead that even though they agree that the 1985 Declaration permitted defendant to amend the Protective Covenants, defendant's action in doing so was "unfair" because it was an inequitable exercise of defendant's power. Defendant was, however, exercising a right that plaintiffs agree was authorized under the 1985 Declaration.

Our Supreme Court recently recognized that parties to a restrictive covenant "may structure the covenants, and any corresponding enforcement mechanism, in virtually any fashion they see fit." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 401, 584 S.E.2d 731, 735 (2003). It is not for the courts to rewrite the parties' agreement should one of the parties, at a later date, desire a change, as this Court pointed out in *Rosi v. McCoy*, 79 N.C. App. 311, 314, 338 S.E.2d 792, 794 (1986), *aff'd in part and modified in part on other grounds*, 319 N.C. 589, 356 S.E.2d 568 (1987):

> [P]laintiffs agreed to accept the deed subject to the right of the developers to modify or amend any of the restrictions. This right appeared in the restrictions in unambiguous language. The developers have exercised that right and have amended the restrictions on defendants' property. The rights of the parties must be determined by the agreement they voluntarily made, and plaintiffs cannot now be judicially relieved of an improvident bargain which provided for such amendments.

Since plaintiffs, when purchasing their property, agreed to defendant's right to amend, there can be nothing "unfair" in defendant's subsequent exercise of that right. *See Tar Heel Indus., Inc. v. E. I. DuPont de Nemours & Co.*, 91 N.C. App. 51, 57, 370 S.E.2d 449, 452 (1988) ("No Chapter 75 claim exists against [defendant] for exercising its right to terminate the contract.").

Although plaintiffs contend that defendant's contractual rights were "not unfettered," noting that defendant could not exercise its rights in a racially discriminatory manner or in breach of other restrictive covenants, plaintiffs have not pointed to any public policy or law that the amendment in this case implicates. Despite the expansive language of Chapter 75, North Carolina courts and federal courts applying North Carolina law "have consistently recognized that § 75-1.1 does not cover every dispute between two parties." *Hageman v. Twin City Chrysler-Plymouth, Inc.*, 681 F. Supp. 303, 306-07 (M.D.N.C. 1988). Without some showing by plaintiffs of a reason why they should not be held to the bargain they made when they

purchased their property, the underlying dispute in this case does not come within the ambit of N.C. Gen. Stat. § 75-1.1.

Although its decision rested on other grounds, the trial court properly dismissed plaintiffs' claim. Therefore, we affirm. *See State ex rel. East Lenoir Sanitary Dist. v. City of Lenoir*, 249 N.C. 96, 99, 105 S.E.2d 411, 413 (1958) ("If the correct result has been reached, the judgment should not be disturbed even though the court may not have assigned the correct reasons for the judgment entered.").

Affirmed, as to plaintiffs' appeal.

Dismissed, as to defendant's cross-appeal.

Chief Judge EAGLES and Judge HUNTER concur.

BARRY S. MOORE, EMPLOYEE, PLAINTIFF v. FEDERAL EXPRESS, EMPLOYER SELF-INSURED (RSKCO., INC., ADMINISTERING AGENT), DEFENDANTS

No. COA03-291

(Filed 20 January 2004)

1. Workers' Compensation— injury by accident—pre-existing back condition

The Industrial Commission did not err in a workers' compensation case by finding and concluding that plaintiff employee suffered an injury by accident from a 3 April 1997 incident, because: (1) although there may have been some causal connection to plaintiff's original 1992 injury, plaintiff's current back problems were a result of the 3 April 1997 incident, which substantially aggravated his pre-existing back condition; (2) the pain plaintiff experienced from the 3 April 1997 incident was different and substantially more severe than from the original 1992 back injury; (3) plaintiff's 3 April 1997 injury directly resulted from the incident in which a customer dropped one end of a computer box; and (4) plaintiff's injury was the result of a specific traumatic event occurring in the course of plaintiff's employment, and not simply a change in his condition that was a natural consequence of his prior injury.

2. Workers' Compensation— credit—disability payments

The Industrial Commission's determination in a workers' compensation case that defendants were entitled to a credit for disability insurance benefits received by plaintiff is remanded for further findings of fact, because: (1) there was evidence presented from which the Commission could have calculated the amount of credit to be awarded to defendants; and (2) the record was insufficient to determine the effect of the credit awarded to defendants on the subrogation requirement under the disability plan.

3. Workers' Compensation— attorney fees—sanctions

The Industrial Commission erred in a workers' compensation case by failing to make a ruling on whether plaintiffs were entitled to an award for sanctions and attorney fees against defendants for an unreasonable denial of plaintiff's claim, and this case is remanded for a determination on this issue.

Appeal by plaintiff from orders entered 14 June 2002 and 24 October 2002 and by defendants from an opinion and award entered 14 June 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 December 2003.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff-appellant.

Brooks, Stevens & Pope, P.A., by Robert S. Welch and Joy H. Brewer, for defendant-appellants.

HUNTER, Judge.

Federal Express ("FedEx") and RSKCO., Inc. (collectively "defendants") appeal from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("the Commission") filed 14 June 2002 awarding Barry S. Moore ("plaintiff") workers' compensation benefits. Plaintiff appeals from the same opinion and award and further appeals from an order filed 24 October 2002 denying his motion for reconsideration. Although we affirm the Commission's award of benefits, we remand this case to the Commission for further findings as to the amount of credit to be awarded to defendants and whether plaintiff is entitled to sanctions.

The Commission found the following facts, to which neither party assigns error.[1]

> 2. Plaintiff was initially employed by [FedEx] in 1989 as a courier . . . . On 1 April 1992, plaintiff sustained an admittedly compensable injury to his back while working in that capacity. . . . Plaintiff was initially treated for this back injury by Dr. Theodore M. Pitts . . . Dr. Pitts diagnosed low back sprain, lumber internal disc derangement, and pain associated with bilateral spondylosis and spondylolisthesis, and recommended epidural steroid injections.
>
> 3. Because plaintiff's condition did not improve with conservative treatment, Dr. Pitts recommended a spinal fusion surgery. Plaintiff was advised by Dr. Pitts that even with the recommended surgery his back condition would never be normal again, and that he would need to be careful with his activities in the future.
>
> 4. Plaintiff underwent a spinal fusion surgery performed by Dr. Stephen Grubb [on] 2 June 1994. . . . Dr. Pitts opined that because of the surgery, and the 1 April 1992 back injury, plaintiff would be at an increased risk for a new back injury or change of condition . . . .
>
> 5. Subsequent to his surgery in 1994, plaintiff returned to work for [FedEx] as a Customer Service Representative, . . . (CSR). . . . As a CSR, plaintiff worked at a counter in a shipping facility where he received packages. Plaintiff's duties . . . included greeting customers, assisting customers with packages, moving freight, answering the phone, and working on problem packages. The packages plaintiff worked with in this capacity weighed as much as seventy-five (75) pounds.
>
> 6. On 3 April 1997, while working as a CSR, plaintiff was assisting a customer loading a boxed computer into an automobile. In this process, the customer inadvertently dropped their end of the box, requiring plaintiff to suddenly bear the full weight of the computer. As the result, plaintiff experienced the immediate onset of a sharp pain in the left side of his back. . . .
>
> . . . .

1. These findings are thus deemed binding on appeal. *See Watson v. Employment Security Comm.*, 111 N.C. App. 410, 412, 432 S.E.2d 399, 400 (1993).

8. Following his 3 April 1997 injury . . . [o]n 14 August 1998, plaintiff underwent a discography which revealed problems at the L4-L5 and L5-S1 levels. . . .

The Commission also made the following findings, to which defendants assign error but as to which they present no argument to this Court.[2]

7. During the period between his 1992 back injury and resulting surgery, and the incident on 3 April 1997, plaintiff has experienced periodic [flare]-ups of back pain. . . . However, the credible evidence of record supports a finding that the pain plaintiff experienced at the time of, and following the 3 April 1997 incident was different, and substantially more severe.

. . . .

9. During his deposition, Dr. Grubb opined that it was more likely than not that the 3 April 1997 work related incident significantly aggravated plaintiff's pre-existing, non-disabling back condition. Additionally, Dr. Grubb explained that there was a clinical difference in the condition of plaintiff's back before and after that incident. As for plaintiff's periodic flare-ups, Dr. Grubb testified that each occurrence prior to 3 April 1997 was temporary, and had resolved through conservative treatment. . . .

10. Dr. Pitts testified that . . . assuming that the plaintiff did injure his back at work in April 1997, . . . plaintiff's subsequent back problems most likely would be the result of the work related incident on that date, although there was some degree of causal relationship with plaintiff's 1 April 1992 injury, and resulting surgery.

. . . .

12. In preparation for his 10 October 1998 surgery, plaintiff was evaluated by Dr. Brenda Sue Waller, who practices with Dr. Grubb . . . . Dr. Waller has opined that the 3 April 1997 incident was probably causally related to the recurrence of plaintiff's back injury. Additionally, although Dr. Waller was unable to differentiate the 3 April 1997 incident from other flare-ups, she was of the

2. Thus, these assignments of error are deemed abandoned, *see Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 924, 563 S.E.2d 235, 242-43 (2002), and these findings are also binding on appeal.

opinion that the incident in question substantially aggravated plaintiff's back condition.

13. Plaintiff has also received treatment . . . from Dr. Virginia W. Pact, a neurologist. . . . On the issue of causation, Dr. Pact opined that the 3 April 1997 incident substantially aggravated plaintiff's pre-existing, non-disabling back condition.

Based upon these evidentiary findings, the Commission made the ultimate finding of fact, which defendant has preserved for appellate review:

14. The credible evidence of record supports a finding that on 3 April 1997, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant in the form of a specific traumatic incident of the work assigned. Additionally, the credible evidence of record supports a finding that plaintiff's 3 April 1997 injury by accident in the form of a specific traumatic incident substantially aggravated his pre-existing back condition . . . .

The Commission also found that "[i]t is undisputed that plaintiff received short term disability and long term disability benefits from an employer funded plan."

From its findings of fact the Commission concluded as a matter of law that plaintiff had sustained an injury by accident arising out of and in the course of his employment, which substantially aggravated his pre-existing back condition, and that plaintiff was entitled to workers' compensation benefits as a result. The Commission, however, further concluded that defendants were entitled to a credit for short term and long term disability benefits paid to plaintiff.

The issue from defendant's appeal is whether (I) the Commission erred by finding and concluding that plaintiff suffered an injury by accident from the 3 April 1997 incident. The issues from plaintiff's appeal are whether: (II) the Commission erred in concluding defendants were entitled to a credit for disability insurance benefits received, and (III) the Commission erred by not awarding plaintiff sanctions and attorneys' fees against defendants for an unreasonable denial of plaintiff's claim.

I.

[1] Defendants contend that the Commission's findings of fact were not supported by sufficient evidence and do not support the conclu-

sions of law. Defendants do not, however, challenge the evidentiary findings of the Commission, but rather first argue that the evidence supported additional or alternate findings of fact in support of their defense. Although defendants assert that the Commission failed to consider their evidence, they produce no support in the record for this contention. Furthermore, " '[t]he Commission chooses what findings to make based on its consideration of the evidence[, and this] [C]ourt is not at liberty to supplement the Commission's findings[.]' " *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 644, 566 S.E.2d 807, 810 (2002) (quoting *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998)). As such, the Commission did not err by not making evidentiary findings in support of defendants' position.

Defendants further challenge the Commission's ultimate finding of fact and conclusion of law that the 3 April 1997 incident constituted an injury by accident, which substantially aggravated plaintiff's pre-existing back condition. Defendants contend that the evidence supports an ultimate finding and conclusion that plaintiff's back injury constituted a change of condition resulting from plaintiff's first back injury in 1992. The distinction between whether plaintiff's injury was a separate injury by accident or a change in condition is significant because defendants contend plaintiff is time barred from an award of benefits for a change of condition stemming from his 1992 back injury.

"In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, [an appellate court] is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). A back injury arising out of and in the course of employment and as the direct result of a specific traumatic incident of the work assigned is to be construed as an "injury by accident" under the Workers' Compensation Act. N.C. Gen. Stat. § 97-2(6) (2003). Events occurring contemporaneously, during a cognizable time period, and which cause a back injury constitute a specific traumatic incident. *See Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118-19 (1988). Aggravation of a pre-existing condition caused by a work-related injury is compensable under the Workers' Compensation Act. *See Smith v. Champion Int'l*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (1999). On the other hand, "[a] change of condition . . . , is a substantial change in physical capac-

ity to earn wages, occurring after a final award of compensation, that is different from that existing when the award was made." *Bailey*, 131 N.C. App. at 654, 508 S.E.2d at 835. In order to recover for a change of condition, a plaintiff is required to prove that the change in condition is a natural consequence of the original injury. *See id.*

In this case, the medical evidence presented and the Commission's evidentiary findings of fact establish that although there may have been some causal connection to plaintiff's original 1992 injury, plaintiff's current back problems were a result of the 3 April 1997 incident, which substantially aggravated his pre-existing back condition. Additionally, the Commission found that the pain plaintiff experienced from the 3 April 1997 incident was different and substantially more severe than from the original 1992 back injury. Furthermore, plaintiff's 3 April 1997 injury directly resulted from the incident in which the customer dropped one end of the computer box.

Therefore, plaintiff's injury was the result of a specific traumatic incident occurring in the course of plaintiff's employment, and not simply a change in his condition that was a natural consequence of his prior injury. Thus, the Commission's findings of fact are supported by competent evidence and those findings of fact support the Commission's conclusions of law. Accordingly, the Commission did not err in awarding plaintiff workers' compensation benefits.

II.

[2] Plaintiff contends that the Commission erred in concluding that defendants are entitled to a credit for disability payments received by plaintiff.

"The decision of whether to grant a credit is within the sound discretion of the Commission." *Shockley v. Cairn Studios Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002). As such, the decision by the Commission to grant or deny a credit to the employer for payments previously made will only be reversed for an abuse of discretion. *Id.* "N.C. Gen. Stat. § 97-42 'is the only statutory authority for allowing an employer in North Carolina any credit against workers' compensation payments due an injured employee.' " *Cox v. City of Winston-Salem*, 157 N.C. App. 228, 236, 578 S.E.2d 669, 675 (2003) (quoting *Effingham v. Kroger Co.*, 149 N.C. App. 105, 119, 561 S.E.2d 287, 296 (2002)). Section 97-42 provides in part:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the

> terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation.

N.C. Gen. Stat. § 97-42 (2003).

> In this case the Commission found:
>
> It is undisputed that plaintiff received short term disability and long term disability benefits from an employer funded plan. However, insufficient evidence exists upon which to enter a finding regarding the exact dates these benefits were paid, or the exact amounts.

From this finding, the Commission concluded that "[d]efendant[s are] entitled to a credit for short term and long term disability benefits paid to plaintiff."

At a hearing before the deputy commissioner, defendants presented evidence that long and short term disability payments had been made. During this evidence, plaintiff's counsel, in response to the deputy commissioner's question as to whether he had any argument as to the amount of any credit, stated, "I don't have any basis to argue with him, I don't believe, Your Honor." Defendants also introduced documents which appear to show long and short term disability payments made to plaintiff between dates in 1998 to 1999. Subsequently, in a motion to the Commission for reconsideration, plaintiff included a copy of a reimbursement agreement in which plaintiff agreed to reimburse defendants for disability payments made to him upon receipt of workers' compensation benefits. Plaintiff argued in the motion for reconsideration, and now on appeal, that plaintiff's award may be subject to both a credit to defendants based upon the disability payments made and a subrogation requirement under the disability policy, resulting in a double deduction from plaintiff's award.

In this case, because there was evidence presented from which the Commission could have calculated the amount of credit to be awarded to defendants, we remand for further findings on that issue, however, the Commission may take any additional evidence it deems necessary. Furthermore, the record at this point is insufficient for this Court to determine the effect of the credit awarded to defendants on the subrogation requirement under the disability plan. Therefore, we also remand this case to the Commission for further findings of fact,

and if necessary the taking of further evidence, on the issue of the amount of credit, if any, to be awarded defendants in light of the subrogation requirement of the disability insurance plan, under which payments were made to plaintiff. *See Cox*, 157 N.C. App. at 237, 578 S.E.2d at 676. If the Commission determines that the disability insurance plan requires full subrogation, notwithstanding any credit awarded, no credit should be awarded. If, on the other hand, any credit awarded to defendants would serve to satisfy any subrogation claim in whole or in part, the Commission may, in its discretion, award a credit.

III.

[3] Plaintiff also contends that the Commission erred by not awarding him sanctions and attorneys' fees under N.C. Gen. Stat. § 97-88.1. Where the issue is properly raised before the Commission, it is error for the Commission to fail to rule on whether sanctions should be awarded under N.C. Gen. Stat. § 97-88.1. *Whitfield v. Lab. Corp.*, 158 N.C. App. 341, 358, 581 S.E.2d 778, 789 (2003). In this case, the record evidences no ruling by the Commission on the issue of sanctions, and we must remand this case for a determination of this issue. *Id.*

Affirmed in part; remanded in part.

Judges McGEE and GEER concur.

CHARLENE R. HEADLEY, AS ADMINISTRATRIX OF THE ESTATE OF LARRY STEPHEN HEADLEY, PLAINTIFF v. JENNIFER LYNN WILLIAMS, DEFENDANT

No. COA03-284

(Filed 20 January 2004)

1. Wrongful Death— directed verdict—contributory negligence

The trial court erred in a wrongful death case arising out of a motor vehicle accident by granting a directed verdict in favor of defendant on the ground that decedent was contributorily negligent based upon the changed opinion of a highway trooper, because: (1) all of the evidence presented through testimony about the night of the accident leads to an inference that the collision occurred in decedent's lane of travel; (2) all of the physical

evidence of a collision was located in decedent's lane of travel; (3) a witness testified that prior to the accident, decedent had been maintaining a safe speed and had been operating his motorcycle normally; (4) there was evidence that defendant was driving without contact lenses; (5) the only evidence that decedent may have been contributorily negligent was based upon the trooper's change of opinion in the months following the accident, and it was up to the jury to resolve the conflicts in the evidence; and (6) taking the evidence in the light most favorable to plaintiff shows a reasonable inference can be drawn that defendant, who was possibly not wearing her required corrective lenses, crossed the center line as she rounded a curve and struck the rear of decedent's motorcycle, sending the motorcycle spinning and causing decedent's death.

2. Evidence— subsequent DWI conviction—credibility

The trial court did not abuse its discretion in a wrongful death case arising out of a motor vehicle accident by excluding evidence of defendant's subsequent unrelated DWI conviction, because: (1) the trial court concluded that the probative value as to the credibility of defendant from this evidence was substantially outweighed by its prejudicial nature; and (2) a trial court's ruling on a motion in limine is not final, and thus, the trial court can reconsider its preliminary ruling if defendant takes the stand in the new trial.

3. Trials— decision to bifurcate—abuse of discretion standard

Although the decision to bifurcate a trial in furtherance of convenience or to avoid prejudice is left to the discretion of the trial court, a single trial of the negligence and damages issues is recommended in this wrongful death case on remand, and if the trial court exercises its discretion to sever the issues, it should enter findings and conclusions which establish that severance is appropriate. N.C.G.S. § 1A-1, Rule 42(b).

Appeal by plaintiff from judgment entered 19 November 2002 by Judge Hal G. Harrison and cross-appeal by defendant from an order entered 16 December 2002 by Judge A. Moses Massey in Watauga County Superior Court. Heard in the Court of Appeals 19 November 2003.

Horack, Talley, Pharr & Lowndes, P.A., by Neil C. Williams, for plaintiff-appellant.

Davis & Hamrick, L.L.P., by Kent L. Hamrick, for defendant-appellant.

HUNTER, Judge.

Charlene R. Headley ("plaintiff"), as Administratrix of the Estate of Larry Stephen Headley ("Headley"), appeals from a directed verdict entered against her on 19 November 2002. Jennifer Lynn Williams ("defendant") cross-appeals from the denial of her motion to be awarded the costs of the action. Because plaintiff presented sufficient evidence to withstand a directed verdict, we reverse and remand.

On 20 June 2000, plaintiff filed a complaint alleging the wrongful death of Headley, plaintiff's husband, caused by defendant's negligence. Prior to beginning the trial of this case on 4 November 2002, the trial court ordered the trial bifurcated into the issues of liability and damages. The trial court also granted defendant's motion *in limine* and excluded evidence that defendant had been convicted of Driving While Impaired ("DWI") in a matter unrelated to this case.

Plaintiff's evidence presented at trial tends to show that on the evening of 29 November 1999, Headley was riding a motorcycle heading in a southeasterly direction on Castle Ford Road in Watauga County, North Carolina. Defendant was operating a motor vehicle headed in the opposite direction on the same road. At some point as both vehicles negotiated a curve in the road they collided. Headley was thrown from his motorcycle and was later found lying in a ditch on the side of the road. He was taken to Watauga Medical Center where he was pronounced dead as a result of chest and abdominal trauma suffered in the accident. Other than defendant, there were no surviving eyewitnesses to the collision.

Christopher Mason ("Mason") testified that he was driving behind Headley on Castle Fork Road on the night of the accident. He followed Headley through a series of "S" shaped curves, where he would temporarily lose sight of Headley and then regain sight on the other side of the curve. Mason was driving at about 30-35 miles per hour and maintaining a consistent distance between himself and Headley, although he noticed that he was actually gaining ground on Headley. Mason stated that Headley seemed to be driving at a safe speed and

operating his motorcycle normally. Mason followed Headley for approximately a mile and a half. As Mason came out of a curve, he saw what appeared to be a flashing light ahead of him and defendant's vehicle stopped directly in front of him in his lane of travel. Mason, upon seeing scrape marks in the road, later realized the flashing light he saw was Headley's motorcycle spinning down the road. Mason testified that he observed debris from the collision in Headley's lane of travel and scrape marks from the spinning motorcycle. Mason also testified that he had occasion to look inside defendant's vehicle as he was asking the State Trooper if he could leave, and witnessed three or four open and empty beer bottles on the floorboard of the passenger side of the vehicle.

Doug Garland, a trooper with the State Highway Patrol ("Trooper Garland"), testified he was called to the scene of the accident. Trooper Garland observed that the front portion of defendant's car was in Headley's lane of travel with the left front portion near the white fog line. He also observed damage to the left front portion of defendant's vehicle. Headley's motorcycle was located seventy feet further up the road from defendant's vehicle in Headley's lane of travel and was laying on its left side. The motorcycle was damaged at the rear. Field sketches made at the scene by Trooper Garland on the night of the accident indicate that defendant crossed the center line leaving skid marks. These field sketches also indicate that Headley's motorcycle skidded past defendant's car and spun around leaving scratch marks in the road. Trooper Garland noted at least two gouge marks in Headley's lane of travel. He testified that these marks can be indicative of where a collision occurred as they are caused by metal from vehicles being forced downward into the road surface from the force of a collision. On the night of the accident, based on his investigation of the crash scene, Trooper Garland was of the opinion that the accident was caused by defendant crossing the center line and striking Headley's motorcycle.

Trooper Garland also testified that he noticed defendant had a restriction on her driver's license requiring her to wear corrective lenses. As part of his investigation, Trooper Garland asked to see if defendant was wearing contact lenses. Defendant replied that she thought she had cried one out. Defendant did not have a contact lens in either eye. On cross-examination, Trooper Garland stated that his opinion of how the accident occurred changed following the night of the accident and he now believed the accident occurred because Headley had crossed the center line. On redirect examination, how-

ever, Trooper Garland admitted he was unable to pinpoint the point of impact, but instead could only indicate a general area in which the impact likely occurred.

Plaintiff also read into evidence a deposition taken of defendant prior to trial, in which she admitted telling Trooper Garland that she had cried out her contact lenses. Defendant also stated in her deposition that she had those lost contacts replaced just a week or so after the accident by Dr. Jack Lawrence ("Dr. Lawrence") from Watauga Eye Center. Dr. Lawrence testified that he was an optometrist and that defendant had been a patient of his, but that he had not seen her since 1996 when he had ordered her contact lenses, which she never returned to collect. At the close of plaintiff's evidence, the trial court granted a directed verdict for defendant based upon the testimony of Trooper Garland on the ground that the evidence established Headley was contributorily negligent as a matter of law.

The issues are whether the trial court: (I) erred in directing a verdict for defendant on the ground of Headley's contributory negligence; (II) abused its discretion in excluding evidence of defendant's subsequent DWI conviction; and (III) properly bifurcated the trial on the issues of liability and damages. The sole issue on defendant's cross-appeal is (IV) whether the trial court properly denied defendant's motion for costs.

I.

[1] Plaintiff first contends the trial court erred in granting a directed verdict for defendant on the ground that plaintiff was contributorily negligent based upon the changed opinion of Trooper Garland. We agree.

"A motion for directed verdict tests the sufficiency of the evidence to take [a] case to the jury." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993). In ruling on a directed verdict motion, a trial court "must examine all of the evidence in a light most favorable to the nonmoving party, and the nonmoving party must be given the benefit of all reasonable inferences that may be drawn from that evidence." *Id.* at 214-15, 436 S.E.2d at 825. " 'If there is more than a scintilla of evidence supporting each element of the plaintiff's case, the directed verdict motion should be denied.' " *Stamm v. Salomon*, 144 N.C. App. 672, 679, 551 S.E.2d 152, 157 (2001) (quoting *Little v. Matthewson*, 114 N.C. App. 562, 565, 442 S.E.2d 567, 569 (1994)). " 'In deciding the motion, the trial court must treat [plaintiff's] evidence as

true, considering the evidence in the light most favorable to [plaintiff] and resolving all inconsistencies, contradictions and conflicts for [plaintiff], giving [plaintiff] the benefit of all reasonable inferences drawn from the evidence.' " *Cobb v. Reitter*, 105 N.C. App. 218, 221, 412 S.E.2d 110, 111 (1992) (quoting *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350 (1990)).

"A directed verdict for defendant on the ground that plaintiff was contributorily negligent is proper only if the evidence establishes the contributory negligence of the plaintiff as a matter of law." *Id.* at 221, 412 S.E.2d at 112. "In determining whether plaintiff is contributori[ly] negligent as a matter of law, 'the question is whether the evidence establishes plaintiff's negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom.' " *Id.* (quoting *Screaming Eagle Air, Ltd. v. Airport Comm. of Forsyth County*, 97 N.C. App. 30, 37, 387 S.E.2d 197, 201 (1990)). "A directed verdict based on plaintiff's contributory negligence is not proper 'when other reasonable inferences may be drawn or when there are material conflicts in the evidence.' " *Id.* at 222, 412 S.E.2d at 112 (quoting *Stancil v. Blackmon*, 8 N.C. App. 499, 502, 174 S.E.2d 880, 882 (1970)).

At the outset, we note that this case was previously before this Court after the trial court granted summary judgment for defendant. *See Headley v. Williams*, 150 N.C. App. 590, 563 S.E.2d 630 (2002). In reversing the trial court's summary judgment ruling this Court stated:

> Based upon our review of the evidentiary materials in the record before us, we conclude there are genuine issues of fact which are material to the questions of whether defendant was negligent and whether such negligence was a proximate cause of the accident. There was evidence that decedent had been operating his motorcycle within the speed limit and entirely within his travel lane for some distance before the collision, and there was no evidence of any condition of the roadway which may have caused him to lose control in the vicinity where the collision occurred. Immediately after the collision, defendant's car was found at rest across the center line of the roadway in decedent's lane of travel; decedent's motorcycle came to rest in its proper travel lane. Decedent was found in a ditch to the right side of his travel lane. There are differing inferences which may be drawn from the various skid and gouge marks found at the scene and from the damage to the motorcycle and to defendant's automobile; although the opinions

> of the reconstruction witnesses based upon the physical evidence are admissible as helpful to a jury in understanding such evidence, the weight and credibility to be given to those opinions is for the jury. Finally, there was evidence that defendant was driving in violation of the restriction on her driver's license requiring that she wear corrective lenses.
>
> Considering the evidence in a light most favorable to the plaintiff as the non-moving party, as we are constrained to do, we cannot unequivocally say there is no genuine issue of material fact such that defendant is entitled to judgment as a matter of law. Since the evidence raises genuine issues of fact as to whether decedent's death was proximately caused by negligence on the part of defendant, we hold summary judgment dismissing plaintiff's claim was error.

Id. at 593, 563 S.E.2d at 632-33 (citations omitted). Although we recognize that a denial of a summary judgment motion does not bar a subsequent directed verdict, *see Edwards v. Northwestern Bank*, 53 N.C. App. 492, 495, 281 S.E.2d 86, 88 (1981), in this case, the same factual questions remain. All of the evidence presented through testimony about the night of the accident leads to an inference that the collision occurred in Headley's lane of travel. Further, all of the physical evidence of a collision was located in Headley's lane of travel. This included evidence of gouge marks in the road in Headley's lane of travel, which Trooper Garland stated could be indicative of where a collision occurred, and debris from the vehicles. Trooper Garland's sketches of the scene show that defendant skidded into Headley's lane. Defendant's car was stopped in Headley's lane of travel and in fact, Trooper Garland testified that, based on the evidence at the scene, his initial impression was that the accident was caused by defendant. Mason testified that prior to the accident, Headley had been maintaining a safe speed and had been operating his motorcycle normally. There also remains evidence that defendant was driving without contact lenses. Furthermore, the only evidence that Headley may have been contributorily negligent is based upon Trooper Garland's change of opinion in the months following the accident. Although this evidence is admissible as helpful to a jury, it is up to the jury to resolve the conflicts in the evidence.

Thus, taking the evidence in the light most favorable to plaintiff and resolving all conflicts and inconsistencies in plaintiff's favor, the reasonable inference to be drawn from this evidence is that defendant, who was possibly not wearing her required corrective

lenses, crossed the center line as she rounded the curve and struck the rear of Headley's motorcycle sending the motorcycle spinning and causing Headley's death. Accordingly, the trial court erred in directing a verdict for defendant and this case must be remanded for a new trial.

II.

[2] Plaintiff also argues that exclusion of defendant's subsequent unrelated DWI conviction was error. Plaintiff contends this evidence was admissible to impeach defendant's credibility under Rule 609 of the North Carolina Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 609 (2003). Although evidence of a DWI conviction is generally admissible under Rule 609, *see State v. Gregory*, 154 N.C. App. 718, 722, 572 S.E.2d 838, 840-41 (2002), a trial court's decision to exclude evidence under Rule 403, because its probative value is substantially outweighed by the danger of unfair prejudice, is reviewed on appeal only for an abuse of discretion, *see State v. Ferguson*, 105 N.C. App. 692, 695, 414 S.E.2d 769, 771 (1992). In this case, the trial court found that the probative value as to the credibility of defendant from the evidence that defendant was convicted of DWI in an unrelated matter subsequent to the accident was substantially outweighed by its prejudicial nature. We conclude the trial court did not abuse its discretion. We note, however, that a trial court's ruling on a motion *in limine* is not final, but rather interlocutory and subject to modification. *Nunnery v. Baucom*, 135 N.C. App. 556, 566, 521 S.E.2d 479, 486 (1999). Thus if defendant, in the new trial, takes the stand, the trial court is permitted to reconsider its preliminary ruling.

III.

[3] Plaintiff also challenges the trial court's decision to bifurcate the trial. The decision to bifurcate a trial in furtherance of convenience or to avoid prejudice is left to the discretion of the trial court. *See In re Will of Hester*, 320 N.C. 738, 741-42, 360 S.E.2d 801, 804 (1987). We, however, conclude that this case is analogous to *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E.2d 193 (1982), in which this Court observed:

> While severance is discretionary, the rule provides for exercise of that discretion only "in furtherance of convenience or to avoid prejudice." G.S. 1A-1, Rule 42(b). The comment to the rule indicates that it was enacted in view of "the multisided law suit made possible by these rules" for the purpose of "guard[ing] against the occasion where a suit of unmanageable size is thrust

on the court." G.S. 1A-1, Rule 42(b) comment. That is not the situation presented here.

Id. at 149, 298 S.E.2d at 196. Just as in that case, on remand "a single trial of the negligence and damages issues is recommended. If the [trial] court exercises its discretion to sever the issues, it should enter findings and conclusions which clearly establish that severance is appropriate." *Id.* at 150, 298 S.E.2d at 196.

IV.

On cross-appeal, defendant contends it was error to deny her motion to award her the costs of the action. As we reverse the directed verdict, however, we do not address this issue.

Reversed and remanded.

Judges McGEE and GEER concur.

STATE OF NORTH CAROLINA v. TERESA WATSON JORDAN

No. COA03-184

(Filed 20 January 2004)

1. Accomplices and Accessories— accessory after the fact— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of accessory after the fact to voluntary manslaughter, because the State proved the three elements that: (1) the principal committed the manslaughter; (2) defendant gave personal assistance to the principal to aid in his escaping detection, arrest, or punishment; and (3) defendant knew that the principal committed the felony.

2. Evidence— impeachment—reversed conviction

The trial court did not err in an accessory after the fact to voluntary manslaughter case by excluding evidence of the principal husband's significantly higher sentence after his jury trial in comparison to the sentence later imposed pursuant to a plea agreement even though defendant contends it prevented her from impeaching the principal's testimony, because: (1) the effect of a

reversal is to overturn a conviction, and N.C.G.S. § 8C-1, Rule 609 does not envision the usage of convictions that either have not come to fruition or have become nullities; and (2) although defendant attempted to raise a constitutional claim in her brief, she failed to include it in her assignments of error.

3. Evidence— testimony—privileged matter—attorney-client relationship

The trial court did not err in an accessory after the fact to voluntary manslaughter case by allowing the State to question her regarding alleged privileged matter between defendant and an attorney, because: (1) defendant's answers indicate that there was no attorney-client relationship between defendant and her husband's attorney; and (2) defendant did not reveal the content of any communication between herself and her husband's attorney, as defendant did not recall speaking to the attorney, and if she did, could not remember what she said.

4. Criminal Law— prosecutor's argument—personal beliefs

The trial court did err in an accessory after the fact to voluntary manslaughter case by allowing the State to reference during closing arguments the impact of the evidence on the decision of the principal's attorney to pursue a plea for his client, because: (1) the State simply raised the reasonable question inferred from the evidence adduced at trial; and (2) this question was not an injection of personal beliefs and matters outside the record.

Appeal by defendant from judgment dated 29 August 2002 by Judge Hal G. Harrison in Watauga County Superior Court. Heard in the Court of Appeals 12 November 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General E. Burke Haywood, for the State.

William D. Auman for defendant-appellant.

BRYANT, Judge.

Teresa Watson Jordan (defendant) appeals a judgment dated 29 August 2002 entered consistent with a jury verdict finding her guilty of being an accessory after the fact to voluntary manslaughter.

On 16 August 1999, defendant was indicted for being an accessory after the fact to the murder on 14 January 1999 of Christopher

Pendley by Kenneth Ray Jordan (Jordan), defendant's husband. At trial, the evidence revealed that Jordan had been previously tried and found guilty by a jury of voluntary manslaughter for having shot and killed Pendley while Pendley was a guest in his home. The Court of Appeals reversed Jordan's conviction and granted him a new trial. *See State v. Jordan*, 149 N.C. App. 838, 562 S.E.2d 465 (2002). Jordan subsequently pled guilty to voluntary manslaughter. When defense counsel attempted to question Jordan regarding the sentence he had received based on the jury trial, the trial court sustained the State's objection to this line of questioning. Jordan testified that according to the plea agreement he had entered, he received the minimum sentence for which he was eligible. In addition, Jordan had agreed to make a statement to Detective Mark Shook. Jordan further testified that he and defendant had been separated since his incarceration on 16 May 2000.

Jordan explained that on the evening of 13 January 1999, he, defendant, Pendley, and Monique Harmon, another guest, were in the home he shared with defendant where they consumed alcohol, marijuana, and Xanax. Jordan shot Pendley after seeing Pendley and defendant together in the living room. Jordan accused Pendley of "being with [his] wife," and an altercation started that ended with a fatal gunshot wound to Pendley's neck. After the shooting, defendant suggested to Jordan and Harmon "we could make it look like a rape." Jordan testified that he never saw Pendley rape defendant and that he did not shoot Pendley because Pendley was trying to rape his wife. Harmon also testified that Pendley's body was fully clothed when she saw his body lying on the floor after the shooting.

Richie Greene, defendant's friend, testified that, in the early morning hours of 14 January 1999, defendant and Jordan came to his residence and woke him up. Defendant told Greene that Jordan had shot someone and asked Greene what she should do. When asked by the State if defendant ever told Greene why Jordan had shot someone, Greene stated "she said she was being raped." Greene did not observe any injuries on defendant or tears in her clothing. The only thing Greene noted were defendant's eyes, which were swollen from crying. Sherry Rominger, Greene's girlfriend, was also present during this visit and testified defendant had stated that Jordan "shot a guy" who "was trying to rape her."

According to Laraye Rudisill, a certified sexual assault nurse examiner at the Emergency Department of the Watauga County Medical Center, defendant arrived at the hospital on 14 January 1999

teary-eyed and told her she had been sexually assaulted by Pendley, her husband's friend, until Jordan had found them and "kicked [Pendley] off." Rudisill prepared an evidence kit that included defendant's shirt, which defendant claimed Pendley had ripped off during the assault. As part of her physical examination of defendant, Rudisill noted bruises on defendant's left cheek, shoulder, and arm, a red mark on defendant's right chest, and a small fracture to her nose.

Detective Shook with the Watauga County Sheriff's Office interviewed defendant at the hospital. Initially, defendant notified Detective Shook that Scott Casey, an attorney who represented Jordan, told her not to talk to him. After some initial hesitation, defendant then told the detective that Pendley had forced her to the living room floor and pulled off all her clothes after Jordan had left to buy some beer. Pendley had pulled off his jeans and "started trying to penetrate her with his hands and penis." Defendant was not sure whether he actually penetrated her. When Jordan came home, he fought with Pendley for a few minutes and then went down the hall to get his gun. The gun went off as Pendley grabbed its barrel. Thereafter, defendant and Jordan left the house.

Lisa Ann Watkins, a housekeeper at an inn defendant checked into after the shooting, testified that she found several shirt buttons on the floor of the room defendant had occupied. Watkins later handed the buttons over to the police when they came to look at the room. Jonathan Dilday, special agent with the North Carolina State Bureau of Investigation, compared the collected buttons, which "appear[ed] to have been torn off," and the thread remaining on them to the buttons on the shirt the police had received from defendant and concluded that the buttons "could have originated from the . . . shirt" because he could "see no difference in the material."

Defendant testified in her defense, stating that Pendley had started taking a sexual interest in her and she had been wrestling with him on the living room floor until Jordan found them. Pendley then put on his shorts and started walking down the hall with Jordan as the two men argued. Defendant ran outside and suddenly heard a gunshot.

The issues are whether the trial court erred in: (I) denying defendant's motion to dismiss; (II) excluding evidence of Jordan's sentence following his conviction by jury; (III) allowing questions regarding privileged matter; and (IV) allowing the State

to speculate during its closing argument regarding the conduct of Jordan's attorney.

I

[1] In ruling on a motion to dismiss, the court must determine whether there is substantial evidence of each essential element of the offense charged and whether defendant was the perpetrator of that offense. *State v. Abraham*, 338 N.C. 315, 328, 451 S.E.2d 131, 137 (1994). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* The court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it and resolving any contradiction in the evidence in its favor. *Id.* In order to convict defendant of being an accessory after the fact to voluntary manslaughter, the State must prove that: (1) Jordan, the principal, committed the manslaughter; (2) defendant gave personal assistance to Jordan to aid in his escaping detection, arrest, or punishment; and (3) defendant knew that Jordan committed the felony. *See State v. Barnes*, 116 N.C. App. 311, 316, 447 S.E.2d 478, 480 (1994); N.C.G.S. § 14-7 (2001).

In this case, Jordan testified that he pled guilty to the voluntary manslaughter of Pendley, thus satisfying the first element. As to the second element of the offense, Jordan and Harmon testified that defendant had suggested evading punishment for the offense by claiming that Pendley had attempted to rape her. On the day of the fatal shooting, defendant told Greene and his girlfriend that Jordan had shot Pendley because he was trying to rape her. Greene did not observe any tearing on defendant's clothes when he saw her that day, and the buttons found at the inn indicate defendant's shirt was not torn until after Pendley's death. In addition, defendant went to the hospital where she told the examining nurse that she had been sexually assaulted and thereafter reported the incident to the police. Although defendant testified at trial that Pendley had indeed attempted to rape her, " 'contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.' " *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citation omitted). Finally, there was evidence defendant knew that Jordan had shot Pendley. By her own testimony, defendant admitted to having heard a gunshot after seeing Jordan and Pendley arguing, and Greene and Rominger testified that defendant came to their home in the early morning hours of 14 January 1999 and told them Jordan had shot someone.

Accordingly, there was substantial evidence as to each essential element of the offense charged, and the trial court properly denied defendant's motion to dismiss.

II

[2] Defendant next contends the trial court erred in excluding evidence of Jordan's significantly higher sentence after his jury trial in comparison to the sentence later imposed pursuant to the plea agreement, as this prevented defendant from impeaching Jordan's testimony. We disagree.

Rule 609 of the North Carolina Rules of Evidence provides that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony . . . shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C.G.S. § 8C-1, Rule 609(a) (2001). The determinative factor in this case is whether Jordan's reversed conviction may be used for impeachment under Rule 609.

A reversal is defined as "[a]n appellate court's overturning of a lower court's decision." *Black's Law Dictionary* 1320 (7th ed. 1999). In the legal context, "overturn" means "[t]o invalidate." *The American Heritage College Dictionary* 976 (3d ed. 1993). Hence, the effect of a reversal is to overturn a conviction, thereby invalidating it. As Rule 609 does not envision the usage of convictions that either have not come to fruition or have become nullities, the trial court did not err in denying defense counsel's attempt to elicit testimony from Jordan regarding his reversed sentence. *See State v. Corey*, 199 N.C. 209, 211, 153 S.E. 923, 924 (1930) ("the reversal of [a] judgment has the force and effect of a verdict of 'not guilty' "); *State v. Johnson*, 128 N.C. App. 361, 369, 496 S.E.2d 805, 810 (1998) (where the defendant's case was dismissed, his two arrests could not be used for impeachment purposes).

With respect to her discussion on this assignment of error, defendant also raised a constitutional argument in her brief not contained in her assignments of error included in the record on appeal. As the scope on appeal is limited to the assignments of error noted in the record, we do not address this argument. *See* N.C.R. App. P. 10(a).

III

[3] Defendant further asserts that the trial court erred in allowing the State to question her regarding privileged matter.

> It is a well-established rule in this jurisdiction that when the relationship of attorney and client exists, all confidential communications made by the latter to his attorney on the faith of such relationship are privileged and may not be disclosed. A privilege exists if (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.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981).

In this case, defendant takes issue with the following exchange during the State's recross-examination of defendant:

> Q: Ma'am, when was it after you left [Jordan's] mother's house, when was it you went to the lawyer?
>
> A: I believe his mother took me up there the next day.
>
> Q: You told the people there when you talked to Ms. Rudisill that you had already talked to a lawyer and the lawyer told you not to turn the shirt over to them.
>
> A: That was [Jordan's] attorney, Scott Casey. I don't recall speaking to him, but I probably did speak to him at the Sheriff's Department.
>
> Q: So, you had already consulted with a lawyer?
>
> A: Yes.
>
> . . . .
>
> Q: So, when you got [to the Sheriff's Department], you talked to a lawyer about the story you were going to tell about the rape?
>
> [DEFENDANT]: Objection.
>
> A: I don't recall what was said at the Sheriff's Department, I was still under the influence of Xanax[.]
>
> [STATE]: That is all.

Defendant's answers clearly indicate that there was no attorney-client relationship between defendant and Jordan's attorney. Moreover, defendant did not reveal the content of any communica-

tion between herself and Jordan's attorney, as defendant did not recall speaking to the attorney and, if she did, could not remember what was said. Therefore, no attorney-client privilege was implicated by the State's line of questioning and the trial court properly allowed defendant's testimony.

IV

[4] Finally, defendant contends the trial court erred in allowing the following statement by the State during its closing argument:

> We know then she went to other people, other friends and told them she had been raped. We know that . . . Jordan told you there was no rape, Monique Harmon told you there was no rape. We know that . . . Jordan tendered a plea of Guilty to Voluntary Manslaughter. I wonder if his lawyer would have brought him in here and ple[]d him guilty to Voluntary Manslaughter if there had been any evidence at all that he had shot a man trying to rape his wife.

Defendant argues the State's reference to the impact of the evidence on the decision of Jordan's attorney to pursue a plea for his client constituted an improper injection of personal beliefs and an argument based on matters outside the record. We disagree.

Our Courts have held "that it is improper for counsel to inject their personal beliefs or facts outside the record into jury arguments. However, counsel may argue all the facts in evidence as well as any reasonable inferences drawn therefrom." *State v. Williams*, 350 N.C. 1, 28, 510 S.E.2d 626, 644 (1999) (citation omitted). In the case *sub judice*, the State simply raised the reasonable question, inferred from the evidence adduced at trial, why Jordan's attorney would have allowed his client to enter a plea agreement to voluntary manslaughter if defendant had indeed been the victim of an attempted rape and there thus existed a possible defense for his actions. As this question was not an injection of personal beliefs and matters outside the record, this assignment of error is overruled.

No error.

Judges McCULLOUGH and TYSON concur.

NORTH CAROLINA BOARD OF MORTUARY SCIENCE, PLAINTIFF v. CROWN MEMORIAL PARK, L.L.C., DEFENDANT

No. COA02-1562

(Filed 20 January 2004)

Constitutional Law— pre-need funeral sales—due process and equal protection

The trial court erred by finding that portions of the statutory scheme governing pre-need sales of caskets violated due process and equal protection. Seeking to protect pre-need consumer funds for funeral merchandise is a legitimate interest, and the means chosen are rationally related to achieving that interest. N.C.G.S. § 90-210.67(a) (2001).

Appeal by plaintiff from judgment entered 5 June 2002 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2003.

Allen and Pinnix, P.A., by M. Jackson Nichols and Angela Long Carter, for plaintiff-appellant.

Erwin and Eleazer, P.A., by Fenton T. Erwin, Jr. and L. Holmes Eleazer, Jr., for defendant-appellee.

CALABRIA, Judge.

The North Carolina Board of Mortuary Science (the "Board") appeals the trial court's judgment finding portions of North Carolina's statutory distinction regarding the pre-need[1] sale of caskets to be violative of the due process clause and the equal protection clause of the Constitution of the United States and provisions of Article I, Sections 1 and 19 of the North Carolina Constitution. We reverse.

The Board is an entity created under the provisions of Chapter 90 of the North Carolina General Statutes to regulate the practice of funeral service in North Carolina. N.C. Gen. Stat. § 90-210.18(b) (2001). The practice of funeral service includes, in part, "engaging in

1. Sales of funeral merchandise can be roughly categorized into two broad categories: (1) at-need sales or sales upon the death of a decedent and (2) pre-need sales which are connected "with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed." N.C. Gen. Stat. § 90-210.60(5) (2001). Only casket sales that are pre-need are governed by the Board.

making arrangements for funeral service, selling funeral supplies to the public or making financial arrangements for the rendering of such services or the sale of such supplies." N.C. Gen. Stat. § 90-210.20(k) (2001). While there is no statutory definition for "funeral supplies," the pre-need sale of caskets is a sale of funeral supplies requiring licensure by the Board under N.C. Gen. Stat. § 90-210.67(a) (2001), which states, in part, that "any person who offers to sell or sells a casket, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of in the casket, shall first comply with the provisions of this Article."

Crown Memorial Park, L.L.C. ("defendant") is licensed by the North Carolina Cemetery Commission created under the provisions of Article 9 of Chapter 65 of the North Carolina General Statutes. Pursuant to its licensure, defendant is authorized to sell cemetery merchandise; however, what constitutes cemetery merchandise is also undefined in the statutes. Defendant, a cemetery owner and operator, sells gravesites, crypts, urns, markers, and niches. At issue in this case is defendant's pre-need sale of the "Crown Royal casket system." The Crown Royal casket system is comprised of two caskets. The outer or presentation casket is decorative and used during the wake, funeral service and committal service. The inner casket or burial container is a polypropylene casket which holds the body of the deceased. It is not visible when inserted in the presentation casket prior to the wake and is removed after the committal service at the time of burial. Thus, consumers purchase only the inner burial container by choosing the Crown Royal casket system. By retaining and using the presentation casket with multiple inner caskets, defendant is able to reduce costs yet provide a decorative and attractive display until the deceased is buried. Upon full payment of the system, a consumer may take possession of the inner casket at any time but can only use the outer casket at the time of the wake, presentation service, and committal service.

In May 2000, the Board filed suit contending, *inter alia*, defendant had not secured a license from the Board and was, therefore, impermissibly engaged in the sale of pre-need caskets by selling the Crown Royal casket system. Defendant alleged and the trial court concluded that the restriction of pre-need casket sales to licensed funeral establishments and their employees was not rationally related to the State's interest in protecting its citizens, impermissibly discriminated against defendant, and unreasonably deprived defendant of the right to engage in business. The trial court concluded

portions of N.C. Gen. Stat. § 90-210.67(a) were unconstitutional because "[t]here [was] no reasonable distinction between the pre-need sale of caskets by licensed funeral establishments and the pre-need sale of caskets by licensed cemeteries that are willing to be licensed for pre-need sales and to submit to regulation of such sales." The Board appeals.

I. Substantive Due Process

"Under North Carolina jurisprudence, state 'due process' is governed by Section 19 of the Constitution of North Carolina, which provides that '[n]o person shall be deprived of his life, liberty, or property, but by the law of the land.' " *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 671, 509 S.E.2d 165, 175 (1998) (quoting N.C. Const. art. I, § 19). Our Supreme Court often considers the "law of the land" and "due process of law" to be synonymous.[2] *Id.*; *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 213, 258 S.E.2d 444, 448 (1979). The Board and defendant agree that the challenged statutory provisions are purely economic regulations which "need only satisfy the rational basis level of scrutiny to withstand both the due process and equal protection challenges." *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 358, 542 S.E.2d 668, 674 (2001). *See also State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994); *In Re Appeals of Timber Companies*, 98 N.C. App. 412, 420, 391 S.E.2d 503, 508 (1990). "[T]he two-fold constitutional inquiry under both the North Carolina and United States Constitutions is the same: (1) Does the regulation have a legitimate objective; and (2) if so, are the means chosen to implement that objective reasonable?" *Meads*, 349 N.C. at 671, 509 S.E.2d at 175. Under the rational basis test, the law in question is presumed to be constitutional. *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 536, 571 S.E.2d 52, 59 (2002); *Barnhill Sanitation Service v. Gaston County*, 87 N.C. App. 532, 539, 362 S.E.2d 161, 166 (1987).

With regard to the first prong, the Board asserts that the government has a legitimate interest in protecting consumers' funds and investments in pre-need funeral merchandise from unfair and deceptive trade practices within the funeral industry. Widespread abuses in the pricing of funeral services and products in the funeral industry

2. While synonymous and treated as such in this case, our Supreme Court has clearly stated that "Section 19 relief against unreasonable and arbitrary state statutes [may be available] in circumstances where relief might not be obtainable under the Fourteenth Amendment to the United States Constitution[.]" *Meads*, 349 N.C. at 671, 509 S.E.2d at 175 (citing *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985)).

prompted the Federal Trade Commission ("FTC") to promulgate regulations in the early 1980's for consumer protection against unfair and deceptive trade practices. *See* FTC Funeral Industry Practices Rule, 16 C.F.R. § 453 (2003). Primarily, these regulations addressed certain practices by funeral providers, including, *inter alia*, "bundling," or charging non-declinable fees, and requiring consumers to purchase items they did not desire to buy. *Id.* Because part of the Board's statutory duties is the enforcement of FTC regulations, *see* N.C. Gen. Stat. § 90-210.25(e)(1)(j) (2001), the Board asserts there is a legitimate governmental interest sufficient to satisfy the first prong of the rational basis test. We disagree.

The purpose of the FTC regulations was to promote the availability of pricing information and prevent abusive practices by the funeral industry including bundling and the charging of improper fees. FTC Funeral Industry Practices Rule, 16 C.F.R. § 453. However, the Board cannot assert the statutory language at issue enforces FTC regulations because those regulations do not address and are not concerned with the funeral industry's handling of funds paid by the consumer in pre-need sales. That interest is sufficiently distinct from the purpose of the FTC regulations to disallow the government's *carte blanche* justification of regulations concerning any aspect of the funeral industry.

The Board asserts, in the alternative, that the risks presented to consumers' funds for pre-need funeral merchandise sales justifies governmental regulation. Our Supreme Court has held that a business may be regulated where there is "some 'distinguishing feature in the business itself or in the manner in which it is ordinarily conducted, the . . . probable consequence of which, if unregulated, is to produce substantial injury to the public peace, health, or welfare.' " *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 65, 366 S.E.2d 697, 699 (1988) (quoting *State v. Harris*, 216 N.C. 746, 758-59, 6 S.E.2d 854, 863 (1940)). Defendant sells pre-need caskets by using a retail installment contract. Pre-need purchasers pay either the entire amount in full or in installments. Where caskets are delivered when needed instead of at the time of payment, the Board regulates the sale as a pre-need sale. The Board asserts N.C. Gen. Stat. § 90-210.67(a) is justified to protect the consumer in such sales. The Board contends this is so because "any other approach puts the consumer at risk; because, they don't have the merchandise."

Generally, in installment sales contracts, the time of performance is the time when the amount due and owing is paid in full. However,

in the installment sales contracts at issue in the case *sub judice*, the actual time of performance awaits the death of the beneficiary[3] of the products and services to be rendered.[4] As a result, performance may be triggered before, at, or years after the time the customer has paid the amount due in full. Because of this inherent flux concerning when the beneficiary may die (and, therefore, when the performance of the parties under the retail sales contracts may occur), we find the pre-need sale of funeral merchandise sufficiently distinct from other businesses to permit governmental regulation. Moreover, we recognize the State's legitimate interest in protecting the investments of its citizens who purchase expensive funeral services and goods potentially years in advance of delivery. Accordingly, the State may take reasonable measures to effectuate the protection of that interest.

The remaining issue to be decided is whether the means implemented by our Legislature are rationally related to achieving its legitimate interest. The regulatory scheme applied to practitioners of funeral services includes the following safeguards: (1) licensure pursuant to N.C. Gen. Stat. § 90-210.67(a); (2) deposit and application requirements for pre-need funeral funds pursuant to N.C. Gen. Stat. § 90-210.61(a) (2001); (3) written, Board-approved pre-need funeral merchandise contracts pursuant to N.C. Gen. Stat. § 90-210.62 (2001); and (4) recordation and auditing requirements pursuant to N.C. Gen. Stat. § 90-210.68 (2001). We find the protections resulting from governmental oversight enabled by the recordation, monitoring, and fund-handling requirements of this statutory scheme sufficiently self-evident to obviate the need for further exposition or analysis. Moreover, we note the protections extended to consumer funds on pre-need funeral merchandise, secured by this commonly used licensing scheme, are sufficiently beneficial when balanced against the resulting burdens imposed on those wishing to engage in activities requiring licensure to withstand scrutiny under the rational basis test. *Poor Richard's, Inc.*, 322 N.C. at 66, 366 S.E.2d at 700. Accordingly, we hold seeking to protect pre-need consumer funds for funeral merchandise is a legitimate interest, and the means chosen are rationally related to achieving that interest.

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3. Beneficiary is intended to refer to the person for whose death the services and products are to be provided.

4. We are cognizant of defendant's claim that a purchaser of the Crown Royal casket system is entitled to take possession of the inner casket upon full payment; however, the system defendant sells includes not only ownership of the inner casket, but also use of the outer casket, which becomes available only from the time of the beneficiary's wake until the time of the beneficiary's burial.

Defendant's remaining arguments challenge the statutory scheme on the basis that it could be more comprehensive or better tailored to meet the espoused goal. Alternatively, defendant contends these statutory restrictions are premised upon an ulterior motive to protect licensed funeral establishments from legitimate competition in an "anti-consumer" fashion. Both of these arguments fail. Regarding defendant's first remaining argument, we note that, under the rational relation test, it is immaterial whether this Court or an individual could devise a more precise or perfect fit between the espoused goal and the means chosen to effectuate that goal. *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 229, 134 S.E.2d 364, 369 (1964).[5] The two need only be reasonably related, and our holding makes clear that they are. Regarding defendant's second remaining argument, even if we interpret the surrounding circumstances as capable of supporting defendant's assertion that there was an ulterior motivation so as to make the statute otherwise unconstitutional, we would be constrained from doing so. *See Jacobs v. City of Asheville*, 137 N.C. App. 441, 443, 528 S.E.2d 905, 907 (2000) (observing statutes enacted by the legislature are presumed constitutional and will be upheld as such unless the party challenging the legislation shows unmistakably, clearly, and positively that it is unconstitutional); *Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 206 (1974) (stating "[w]here a statute . . . is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality").

II. Equal Protection

> When a governmental classification does not burden the exercise of a fundamental right, or operate to the peculiar disadvantage of a suspect class, [the equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement] that the governmental classification bear some rational relationship to a conceivable legitimate interest of government.

Barnhill Sanitation Service v. Gaston County, 87 N.C. App. 532, 539, 362 S.E.2d 161, 166 (1987) (citing *State v. Greenwood*, 280 N.C. 651, 656, 187 S.E.2d 8, 11-12 (1972); *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983)). As our previous discussion makes clear, there

5. We note the opinion in *Hunter* is more expressly tailored to an equal protection analysis; however, our Supreme Court made clear (by using the analysis in the opinion to determine both the equal protection and due process challenges) that the opinion was equally applicable to both.

is a rational relationship between consumer protection and limiting the pre-need sale of funeral merchandise to licensed funeral home directors for purposes of monitoring how funds for such products and services are handled. Accordingly, we hold the statutory language does not violate defendant's equal protection rights. The judgment of the trial court is reversed.

Reversed.

Judges McGEE and HUNTER concur.

GILBERT J. STANLEY AND WIFE DOROTHY H. STANLEY, PLAINTIFFS V. BILLY ROGER LAUGHTER, DEFENDANT

No. COA03-49

(Filed 20 January 2004)

1. Easements— dedication—plat recordation

The trial court did not err in a trespass, injury to real property, and negligence case by granting defendant's motion for a directed verdict and by finding that the recording of a plat constituted a dedication of the sixty-foot wide easement to all purchasers from Sardonyx, because defendant's deed conveying the 1.46 acre tract specifically referred to the plat map containing the sixty-foot wide easement, and thus, the map became a part of the deed as if it were written therein.

2. Easements— cutting and removing of trees and shrubs

The trial court did not err in a trespass, injury to real property, and negligence case by failing to grant damages for the value of the trees and shrubbery defendant cleared on a sixty-foot wide easement, because: (1) defendant was entitled to use the entire sixty-foot wide easement, and the thirty-feet of the sixty-foot wide easement running along the southern boundary of defendant's 1.46 acre tract was covered in trees and shrubs making it impassible; and (2) defendant was free to remove the trees and shrubs to open the easement and use it for its intended purpose of ingress, egress, and regress from his 1.46 acre tract.

Appeal by plaintiffs from judgment entered 2 July 2002 by Judge Zoro Guice in Polk County Superior Court. Heard in the Court of Appeals 15 October 2003.

Baiba Bourbeau, for plaintiffs-appellants.

Hamrick, Bowen, Mebane, Greenway & Lloyd, LLP, by James M. Bowen, for defendant-appellee.

TYSON, Judge.

Gilbert J. Stanley and Dorothy H. Stanley ("plaintiffs") appeal the trial court's judgment granting Billy Laughter's ("defendant") motion for directed verdict at the close of plaintiffs' evidence and dismissing the case with prejudice. We affirm.

I. Background

Sardonyx Investments, Inc. ("Sardonyx") purchased a 118.62 acre tract of land from Fulton and Ruth Roper ("Ropers"). The Ropers retained an easement, sixty-foot wide, running through a portion of the northern section of the property sold to Sardonyx. Sardonyx subdivided 111.87 acres of the original 118.62 into six tracts of land, labeled Lots "A" through "F," to create the Stirrup Downs Development ("development") by survey dated 25 April 1989, and revised 29 May 1989. Sardonyx recorded a plat entitled, "Sardonyx Investments, Inc." in the Polk County Registry on 3 June 1989. All six tracts of land are subject to the Declaration of Restrictions ("declaration") recorded on 6 October 1992.

The remaining acreage, a 1.46 acre tract and a 5.29 acre tract, was not included in this subdivision. The 1.46 acre tract is located on the northern section of the original 118.62 acre tract and the 5.29 acre tract is located on the southern section. Both of these properties directly adjoin North Carolina Highway 9 ("Highway 9").

Sardonyx established a thirty-foot (30) wide access road to the development known as Stirrup Downs Road ("the road") on the plat. The road begins at Highway 9 and continues into the development. The road runs concurrently with the southern portion of the sixty-foot wide easement. Each of the six subdivided tracts of land is subject to and has a right of ingress, egress, and regress along the road. The declaration requires each property owner of Lots A through F to pay one-sixth of the cost of maintaining the road. The declaration makes no reference to the 1.46 acre tract or the 5.29 acre tract retained by Sardonyx.

All of the land derives from a common source of title. Sardonyx conveyed to plaintiffs a 14.32 acre tract designated as Lot E of the recorded plat by deed recorded on 7 December 1992. The deed was expressly conveyed subject to the thirty-foot wide and the sixty-foot wide easements. Sardonyx conveyed to defendant a 16.65 acre tract designated as Lot F on the recorded plat. This lot was subject to the same easements as plaintiffs' lot. Sardonyx also conveyed the 1.46 acre tract of land to defendant's predecessors-in-title, John and Joyce Hart ("Harts"), and described the tract by incorporating the recorded plat map by reference. Defendant subsequently purchased this tract on 17 July 1999. No express language in the deed of the 1.46 acre tract granted the Harts use of the sixty-foot wide easement or the thirty-foot wide road. The deed, however, specifically referenced the plat map containing the easements. No language made the 1.46 acre tract subject to the declaration.

The plat clearly shows that the northern boundary of plaintiffs' property runs to the middle of the sixty-foot wide easement and stops at the road. This line is labeled as line "C-D" on the plat map. There is a thirty-foot strip of land that runs from the northern portion of the road to the southern boundary of defendant's 1.46 acre tract. This thirty-foot strip lies on the opposite side of the road from plaintiffs' land and is contained within the boundaries of the sixty-foot wide easement. When defendant purchased Lot F on 17 July 1999, this thirty-foot strip of land contained a thick screen of trees and shrubs. Plaintiffs were provided privacy and seclusion from the other properties by these trees and anticipated that these trees would remain in place when they purchased Tract E.

During July of 2000, defendant removed the trees and shrubbery from his land and the thirty-foot strip of land in order to gain access to the sixty-foot wide easement from his 1.46 acre tract. In September of 2000, plaintiffs spoke to defendant's lawyer concerning the trees and shrubbery removed from the thirty-foot strip of land. On 2 October 2000, plaintiffs notified defendant that defendant was not to use the land for access to the sixty-foot wide easement and demanded compensation for the trees and shrubs cut on the strip. Plaintiffs filed suit against defendant alleging trespass, injury to real property, and negligence. At trial, defendant moved for directed verdict at the close of plaintiffs' evidence. Defendant's motion was granted and plaintiffs' cause of action was dismissed. Plaintiffs appeal.

II. Issues

The issues are whether the trial court erred in: (1) granting defendant's motion for directed verdict and finding that the recording of the plat constituted a dedication of the sixty-foot wide easement to all purchasers from Sardonyx Investments, Inc. and (2) failing to grant damages for the value of the trees and shrubbery removed by defendant.

III. Dedication by Reference to Plat Map

[1] Plaintiffs contend that the trial court erred in granting defendant's motion for directed verdict and finding that the recording of the plat constituted a dedication of the sixty-foot wide easement to benefit all property shown on the recorded plat including the 1.46 acre tract owned by defendant. We disagree.

"The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence to take the case to the jury." *Freese v. Smith*, 110 N.C. App. 28, 33, 428 S.E.2d 841, 845 (1993). "A motion for directed verdict, requires that the trial court consider the evidence in the light most favorable to the non-movant, and determine whether the evidence is sufficient as a matter of law to be submitted to the jury." *Town of Highlands v. Edwards*, 144 N.C. App. 363, 366, 548 S.E.2d 764, 766 (2001). Only where the evidence, when considered in that light, is insufficient to support a verdict in the plaintiff's favor should defendant's motion for a directed verdict be granted. *Snow v. Power Co.*, 297 N.C. 591, 596, 256 S.E.2d 227, 231 (1979). If there is more than a scintilla of evidence in the non-movant's favor, the motion must be denied. *Freese*, 110 N.C. App. at 33-34, 428 S.E.2d at 845.

Our Supreme Court, in *Wofford v. Highway Commission*, stated the general rule of dedication by plat reference and held,

> where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to public use, and the purchaser of the lot or lots acquires the right to have all and each of the streets kept open.

263 N.C. 677, 683, 140 S.E.2d 376, 381 (1965). Our Supreme Court further held,

> [i]t is a settled principle that if the owner of land, located within or without a city or town, has it subdivided and platted into lots

> and streets, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, and all of them, to the use of the purchasers, and those claiming under them, and of the public.
>
> . . . .
>
> [W]here lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into subdivisions of streets and lots, such streets become dedicated to the public use, and the purchaser of a lot or lots acquires the right to have all and each of the streets kept open; and it makes no difference whether the streets be in fact opened. . . . There is a dedication, and, if they are not actually opened at the time of the sale, they must be kept at all times free to be opened as occasion may require . . . .

Insurance Co. v. Carolina Beach, 216 N.C. 778, 785-86, 7 S.E.2d 13, 18-19 (1940) (internal citations omitted).

In *Collins v. Land Co.*, our Supreme Court held,

> a map or plat, referred to in a deed, becomes a part of the deed as if it were written therein, and that, therefore, the plan indicated on the plat is to be regarded as a unity, and the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat, or map, kept open.

128 N.C. 563, 565-66, 39 S.E. 21, 22 (1901).

Sardonyx recorded a plat containing a sixty-foot wide easement running from Highway 9 to the eastern edge of Tract F, owned by defendant, and entirely along the southern boundary of the 1.46 acre tract also owned by defendant. The deed conveying Tract E to plaintiffs contained a specific reference to the plat map and the sixty-foot wide easement. Sardonyx expressly reserved the right in plaintiffs' deed to use the easement for itself, "its successors and assigns together with Grantees, their heirs, assigns and all others having a like right to use the same." Sardonyx's deed conveying Tract F to defendant also referenced this recorded plat dedicating the sixty-foot wide easement.

Further, the initial deed conveying the 1.46 acre tract of land from Sardonyx to the Harts in 1995 specifically refers to the recorded plat containing the sixty-foot wide easement. The Harts conveyed the 1.46 acre tract to William Wayne Burgess ("Burgess") in 1998, specifically referring to the original plat with the sixty-foot wide easement. When

the 1.46 acre tract was conveyed from Burgess to defendant in 1999, the deed again specifically referenced the recorded plat map identifying the sixty-foot wide easement.

The trial court granted defendant's motion for a directed verdict and concluded that: (1) the trees and underbrush were within the sixty-foot wide easement as shown by the recorded plat, (2) the plat was referenced in all deeds, and (3) the recording of the plat constituted a dedication of the roads to the owners purchasing property from Sardonyx. As defendant's deed conveying the 1.46 acre tract specifically referred to the plat map containing the sixty-foot wide easement, the map became a "part of the deed as if it were written therein." *Id.* Considering the evidence in the light most favorable to plaintiffs, the trial court properly granted defendant's motion for directed verdict. Plaintiffs' assignment of error is overruled.

IV. Damages

[2] Plaintiffs contend that the trial court erred in not granting damages for the value of the trees and shrubbery defendant cleared on the sixty-foot wide easement. We disagree.

As we held earlier, defendant gained access to the sixty-foot wide easement through dedication, and his deed specifically referenced the original plat map. The general rule states:

> [i]t is not necessary to the dedication of streets, squares, parks, or alleys shown in a subdivision plat, that they be opened.
>
> . . . .
>
> Where the dedication is created by the sale of lots with reference to a plat showing streets, parks, or alleyways, each purchaser has the right to have any that are not opened kept in such manner that they are free to be opened to their *full length and width.*

9 Strong's N.C. Index 4th Dedication § 10 (1991) (emphasis supplied) (quoting *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E.2d 458 (1954); *Lee v. Walker*, 234 N.C. 687, 68 S.E.2d 664 (1951); *Insurance Co.*, 216 N.C. 778, 7 S.E.2d 13 (1940)). In *Insurance Co.*, our Supreme Court cited a long list of cases and held that where a street is dedicated by the sale of lots with reference to a plat showing it as being ninety-nine feet wide, the purchasers of the lots with reference to the original plat have the right to have the land remain so that the streets may be opened to their full width. 216 N.C. at 787-88, 7 S.E.2d at 20.

Here, defendant acquired the right to use the entire sixty-foot wide easement. It is apparent that the thirty-feet of the sixty-foot wide easement running along the southern boundary of defendant's 1.46 acre tract was covered in trees and shrubs making it impassible. As defendant was entitled to use the entire sixty-foot wide easement, he was free to remove the trees and shrubs, open the easement, and use it for its intended purpose of ingress, egress, and regress from his 1.46 acre tract. *Id.* Plaintiffs' assignment of error is overruled.

V. Conclusion

Plaintiffs failed to show that the trial court erred in granting defendant's motion for directed verdict and in finding that the recording of the plat constituted a dedication of the sixty-foot wide easement to all purchasers from Sardonyx. Plaintiffs failed to show that the trial court erred in failing to grant damages for cutting and removing the trees and scrubs from the easement. The trial court's judgment is affirmed.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

IN THE MATTER OF: ADOPTION OF DAVID LEE SHULER, MINOR CHILD

No. COA02-1607

(Filed 20 January 2004)

1. **Appeal and Error— interlocutory appeal—adoption proceeding—substantial right**

An interlocutory appeal arising from an adoption was properly before the Court of Appeals because the decision affected the fundamental rights of petitioner as a parent.

2. **Adoption— consent of father not required—ambiguous acknowledgment of paternity**

Petitioner's failure to unambiguously acknowledge paternity of his son prior to the filing of an adoption petition was sufficient to support the trial court's conclusion that petitioner's consent was not required for the adoption. N.C.G.S. § 48-3-601(2)(b)(4).

Appeal by respondent from judgment entered 31 June 2002 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 13 October 2003.

Michael E. Ciochina, for petitioner-appellee.

Kay S. Murray, for respondent-appellant.

No brief filed on behalf of Judith Shuler Nelson, respondent-appellee.

GEER, Judge.

Respondent James Burgess appeals the trial court's order denying his motion to dismiss the petition of Christopher and Talenna Tipton for adoption of Mr. Burgess' son, David Lee Shuler, and finding that Mr. Burgess' consent was not required for the adoption to proceed. Because competent evidence in the record supports a finding that Mr. Burgess failed to unconditionally acknowledge paternity prior to the filing of the adoption petition, we affirm.

Mr. Burgess, the child's biological father, and Judith Shuler Nelson, the biological mother, entered into an intimate relationship sometime prior to February 2001. Ms. Nelson learned she was pregnant in March 2001. Although Ms. Nelson was married to another man, she was not living with her husband at that point.

The evidence is disputed as to whether Mr. Burgess and Ms. Nelson lived together during the first part of her pregnancy. They broke off their relationship in June 2001 and Mr. Burgess had little or no contact with Ms. Nelson until shortly before their child was born on 30 October 2001.

Mr. Burgess was present at David's birth, but he told nurses and a hospital worker completing the birth certificate that he was only "a friend" of Ms. Nelson. The word "refused" appears in the space on David's birth certificate where the father's name is supposed to be listed. When Ms. Nelson was asked who had "refused," she testified that it was Mr. Burgess "because when they filled the birth certificate out, they wanted to know . . . if he was the father about putting his name on it."

On 14 November 2001, Ms. Nelson gave David to Christopher and Talenna Tipton. Ms. Tipton is Ms. Nelson's cousin. Ms. Nelson informed Mr. Burgess that she had given their child away, although the evidence is disputed as to what precisely she told him.

The Tiptons filed a petition for adoption in Buncombe County on 13 December 2001. On 28 February 2002, Mr. Burgess filed an answer and motion to dismiss the adoption petition based on his refusal to consent to the adoption.

On 30 April 2002, the court held a hearing on Mr. Burgess' motion to dismiss at which the parties offered evidence on the issue whether Mr. Burgess' consent was required under N.C. Gen. Stat. § 48-3-601 (2003). The trial court found that Mr. Burgess had failed to acknowledge paternity prior to the filing of the petition for adoption, had failed to prove that he provided reasonable and consistent support within his financial means before the filing of the petition, and had failed to establish that he regularly visited or communicated, or attempted to visit or communicate, with Ms. Nelson or David during her pregnancy and after David's birth. Based on these findings, the court denied Mr. Burgess' motion to dismiss and ordered that "the Petition for Adoption may proceed and be finalized." Mr. Burgess appeals from that order.

[1] Contrary to Rule 28 of the Rules of Appellate Procedure, Mr. Burgess has not included in his brief a statement of the grounds for appellate review. While under N.C. Gen. Stat. § 48-2-607(b) (2003) (allowing parties to adoption proceedings to appeal by filing notice pursuant to N.C. Gen. Stat. § 1-279.1), Mr. Burgess has the right to appeal the order denying his motion to dismiss, this appeal is from an interlocutory order. Because, however, the decision below eliminates "the fundamental right" of Mr. Burgess, as a parent, "to make decisions concerning the care, custody, and control of [his] children," *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003), the order affects a substantial right and Mr. Burgess' appeal from that order is properly before this Court pursuant to N.C. Gen. Stat. § 1-277(a) (2003).

[2] Adoption proceedings are heard by the court without a jury. N.C. Gen. Stat. § 48-2-202 (2003). " 'Our scope of review, when the Court plays such a dual role, is to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts.' " *In re Adoption of Cunningham*, 151 N.C. App. 410, 412-13, 567 S.E.2d 153, 155 (2002) (quoting *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984)). This Court is bound to uphold the trial court's findings of fact if they are supported by competent evidence, even if there is evidence to the contrary. *In re*

Adoption of Byrd, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd on other grounds*, 354 N.C. 188, 552 S.E.2d 142 (2001). Finally, in reviewing the evidence, we defer to the trial court's determination of witnesses' credibility and the weight to be given their testimony. *Leak v. Leak*, 129 N.C. App. 142, 150, 497 S.E.2d 702, 706, *disc. review denied*, 348 N.C. 498, 510 S.E.2d 385 (1998).

We note that Mr. Burgess specifically assigned error only to the trial court's findings of fact 2, 4, and 7. Although Mr. Burgess does include an assignment of error stating that "[t]he findings of fact as set forth in the trial court's Judgment were inconsistent with the evidence presented at trial[,]" such a broadside assignment of error is not sufficient to comply with N.C.R. App. P. 10(c)(1) and preserve for review objections to the unspecified findings of fact. *Anthony v. City of Shelby*, 152 N.C. App. 144, 146, 567 S.E.2d 222, 224 (2002).

As a result, the findings of fact not specifically assigned as error are " 'presumed to be supported by competent evidence and are binding on appeal.' " *First Union Nat'l Bank v. Bob Dunn Ford, Inc.*, 118 N.C. App. 444, 446, 455 S.E.2d 453, 454 (1995) (quoting *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982)). Those findings of fact are sufficient to support the trial court's conclusion of law that Mr. Burgess' "consent to the adoption is not required." Nevertheless, we choose to suspend our rules and review the arguments presented in Mr. Burgess' brief.

N.C. Gen. Stat. § 48-3-601 specifies the individuals whose consent is required prior to the granting of a petition to adopt a minor child. The parties agree that subsection (2)(b)(4)(II) of N.C. Gen. Stat. § 48-3-601 governs this case. Under that subsection, the consent of "[a]ny man who may or may not be the biological father of the minor" is required if he:

> 4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and
>
> . . . .
>
> II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or

> communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both . . . .

N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II). A putative father "must have satisfied the three prerequisites stated, prior to the filing of the adoption petition, in order for his consent to be required. . . . Under the mandate of the statute, a putative father's failure to satisfy *any* of these requirements before the filing of the adoption petition would render his consent to the adoption unnecessary." *In re Adoption of Byrd*, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001) (emphasis added).

Mr. Burgess therefore bore the burden of proving, *id.* at 198, 552 S.E.2d at 149, that before the Tiptons filed the petition, he (1) acknowledged paternity of David, (2) provided reasonable and consistent support for Ms. Nelson during or after pregnancy, or support for David, or both, commensurate with his financial means, and (3) regularly visited or communicated, or attempted to visit or communicate, with Ms. Nelson and David. Although we do not believe the trial court made adequate findings of fact regarding the issues of reasonable and consistent support and regular communication, we affirm the trial court's judgment because the record contains competent evidence supporting the trial court's finding that Mr. Burgess failed to acknowledge paternity prior to the filing of the petition for adoption. That finding standing alone is sufficient to support the court's conclusion of law that Mr. Burgess' consent was not required.

The Supreme Court held in *Byrd* that a putative father's acknowledgment of paternity may be verbal or written, or demonstrated by the putative father's conduct. *Id.* at 194, 552 S.E.2d at 147. Regardless of how paternity is acknowledged, that acknowledgment must, under *Byrd*, be made "unconditionally" and the putative father must "unequivocally express[] his desire to be the child's father and a part of [the child's] life." *Id.* at 195, 552 S.E.2d at 147. As the Supreme Court held, "[t]he interests of the child and all other parties are best served by an objective test that requires unconditional acknowledgment . . . ." *Id.* at 198, 552 S.E.2d at 149.

In this case, although Mr. Burgess signed an affidavit acknowledging his paternity on 15 December 2001, that document is irrelevant to this appeal because it was signed after the petition for adoption was filed. Under N.C. Gen. Stat. § 48-3-601(2)(b)(4), Mr. Burgess' acknowledgment must have occurred prior to the filing of the petition for adoption.

With respect to Mr. Burgess' actions prior to the filing of the petition, petitioners offered evidence that Mr. Burgess declined to acknowledge paternity at the hospital immediately after David's birth by falsely stating that he was merely "a friend" and by refusing to be listed as the child's father on the birth certificate. Despite evidence that Mr. Burgess did, on other occasions, acknowledge paternity verbally, this denial—at the time of the child's birth and at a point when Mr. Burgess believed himself to in fact be the father of the child—demonstrates that Mr. Burgess' acknowledgment was not unconditional and unequivocal. Mr. Burgess' arguments regarding the credibility of this evidence, including evidence as to why he did not acknowledge paternity at the hospital, were issues for the trial court to determine. *Leak*, 129 N.C. App. at 150, 497 S.E.2d at 706. Competent evidence therefore exists to support the trial court's finding that Mr. Burgess failed to acknowledge paternity within the meaning of N.C. Gen. Stat. § 48-3-601(2)(b)(4).

The trial court's finding of a lack of acknowledgment of paternity is sufficient to support that court's conclusion that Mr. Burgess' consent was not required. *Byrd*, 354 N.C. at 198, 552 S.E.2d at 149 (affirming decision that consent not required when father failed to satisfy one of the specific requirements of N.C. Gen. Stat. § 48-3-601(2)(b)(4)(II)). Because of this conclusion, we need not address Mr. Burgess' remaining arguments on appeal.

Affirmed.

Chief Judge EAGLES and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. ROBERT L. BROWN

No. COA02-1673

(Filed 20 January 2004)

Sexual Offenses— taking or attempting to take indecent liberties with a child—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charges of taking or attempting to take indecent liberties with a child, because: (1) the conversations between defendant and the victim were neither sexually graphic and explicit nor

were they accompanied by other actions tending to show defendant's purpose was sexually motivated; (2) nothing in the record indicated defendant's actions emanated from a desire or purpose to arouse or gratify sexual desire; and (3) the scope of taking indecent liberties has never encompassed innuendo and intimation unaccompanied by other indicia of defendant's motivation.

Appeal by defendant from judgment entered 24 July 2002 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 9 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

Samuel L. Bridges, for defendant-appellant.

CALABRIA, Judge.

Robert L. Brown ("defendant") appeals from a judgment entered in Lee County Superior Court upon a jury verdict finding him guilty of taking or attempting to take indecent liberties with a child.[1] We find the evidence insufficient to show defendant took or attempted to take indecent liberties and reverse.

On 20 February 2001, a thirteen-year-old child ("V.V.") was signed into the Hillcrest Youth Shelter (the "shelter") by her mother due to family discord and conflict in the home. During the intake, her mother agreed to accept aftercare services and signed a consent form allowing someone from the shelter to come to the house or call after V.V.'s discharge. Defendant, who was in his late forties, was the shelter's aftercare coordinator when V.V. was admitted. Defendant was responsible for meeting with families and establishing relationships with them in order to provide services for children and their families after the children were discharged from the shelter. V.V. remained at the shelter for approximately thirty days. By the time V.V. was discharged, defendant had moved to a new job position: program assistant. As program assistant, defendant was no longer responsible for making home visits or contacts outside the shelter; however, it was not a violation of his job description to contact children who had been released from the program.

1. The jury verdict correctly tracks the language of N.C. Gen. Stat. § 14-202.1(a)(1) (2003), which encompasses both taking or attempting to take indecent liberties with a child. For ease of reference, we will simply refer to the charge as taking indecent liberties with a child.

Since no other person had been designated to provide post-discharge services for V.V., defendant continued to contact V.V. by phone and personally visited V.V. on one occasion. Frequently, defendant indicated he would like to take V.V. out to eat or spend time with her. V.V. testified that, while defendant stated he wanted to kiss her on one occasion, he never attempted to do so. Eventually, V.V. became uncomfortable talking to defendant. Around 10 June 2001, V.V. followed the advice of her foster mother and taped a conversation between her and defendant. The taped conversation revealed a number of inappropriate comments by defendant including comments on how she looked, comments indicating he would like to see her, and comments concerning his feelings towards her and how he perceived her feelings towards him.

V.V. turned over the recording of defendant's conversation with her to the Lee County Sheriff's Department. The director of the shelter listened to the taped conversation, notified defendant of the conversation, and discharged him from the shelter. The State charged defendant with taking indecent liberties with a child in violation of N.C. Gen. Stat. § 14-202.1(a)(1).

At the close of the State's case, defendant moved to dismiss the charge of taking indecent liberties with a child. The trial court denied defendant's motion. Defendant offered no evidence and renewed the motion to dismiss, which the trial court again denied. The jury convicted defendant of taking or attempting to take indecent liberties with a child. Since defendant had no prior criminal record, the court sentenced defendant to a minimum term of twenty months and a maximum term of twenty-four months. The court suspended the sentence and placed defendant on supervised probation for thirty months. As a special condition of his probation, defendant was to serve 120 days as an active term. Defendant appeals, asserting the trial court erred in (I) failing to grant his motion to dismiss; (II) failing to give his requested special instructions regarding attempt; and (III) allowing the introduction of Rule 404(b) evidence by the State. Because we find the trial court should have granted defendant's motion to dismiss at the close of the evidence, we do not reach defendant's second and third assignments of error.

Defendant asserts the trial court erred by denying his motion to dismiss because the State failed to present sufficient evidence that he took indecent liberties with a child. "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.' " *Id.* (citation omitted). "If, however, when the evidence is so considered it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

North Carolina General Statutes § 14-202.1 (2003) provides, in part, as follows:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire . . . .

Where a defendant moves to dismiss charges brought under N.C. Gen. Stat. § 14-202.1(a)(1), the State must present substantial evidence of the following elements:

> (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987). We find the State's evidence regarding the final element, defendant's purpose, insufficient to support the offense charged.

> The evil the legislature sought to prevent in [the context of taking indecent liberties] was the defendant's performance of any

> immoral, improper, or indecent act in the presence of a child for the purpose of arousing or gratifying sexual desire. Defendant's purpose for committing such act is the gravamen of this offense; the particular act performed is immaterial.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990) (internal quotation marks omitted). Accordingly, in applying the statute, our courts have focused on defendant's purpose (arousing or gratifying sexual desire) in light of the particular sexual act in which defendant has engaged. *See State v. Every*, 157 N.C. App. 200, 206, 578 S.E.2d 642, 648 (2003) (quoting *State v. Hicks*, 79 N.C. App. 599, 603, 339 S.E.2d 806, 809 (1986)) (observing "[t]he breadth of conduct that has been held violative of the statute indicates a recognition by our courts of 'the significantly greater risk of psychological damage to an impressionable child from overt sexual acts . . . .' ").

In many cases concerning conduct alleged to constitute taking indecent liberties, it has been unnecessary to closely examine whether the challenged conduct by defendant was motivated by the purpose of arousing or gratifying sexual desire. The conduct in those cases obviated extensive discussion regarding the purpose of the act. *See, e.g., State v. Slone*, 76 N.C. App. 628, 334 S.E.2d 78 (1985) (defendant placed his hand underneath a twelve-year-old victim's softball shorts and fondled her); *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986) (defendant exposed himself and placed his hand on his penis within several feet of a child); *State v. Bowman*, 84 N.C. App. 238, 352 S.E.2d 437 (1987) (defendant laid on top of victim with his pants unzipped, kissed her, and touched her "pee pee"); *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990) (defendant engaged in various forms of sexual relations with his seven-year-old daughter and his nine-year-old stepson).

Recently, this Court expanded the scope of what constitutes indecent liberties when we addressed two issues relevant to the case at bar: (1) whether mere words can constitute the taking of indecent liberties with a child, and (2) whether conversations between a defendant and a victim over the phone are sufficient to establish constructive presence for the offense. *State v. Every*, 157 N.C. App. at 204-09, 578 S.E.2d 642, 647-49 (2003). We answered both questions in the affirmative. *Id.*

Our holding in *Every* stands for the proposition that repeated, graphic, and explicit sexual conversations over the phone concurrent

with indicia of masturbation is sufficient to allow a jury to conclude such actions amount to taking indecent liberties. As with previous cases, an extended discourse on the defendant's purpose or motivation in *Every* would have been superfluous. Defendant's acts of masturbation during the conversation, as well as the nature of the language employed in the conversations, made his purpose self-evident. Both of those factors, however, are absent in the instant case: the conversations were neither sexually graphic and explicit nor were they accompanied by other actions tending to show defendant's purpose was sexually motivated. In short, nothing in the record indicates defendant's actions emanated from a desire or purpose to arouse or gratify sexual desire. The State would have us conjecture that there could be no other motivation by defendant engaging in conversations which could be read to include sexual innuendo; however, our courts have repeatedly held mere speculation or suspicion to be insufficient when considering the propriety of a motion to dismiss. *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720.

While we emphatically affirm that defendant's conduct is not condoned by this Court or encouraged by the prevailing mores and standards of our society, the scope of taking indecent liberties has never encompassed innuendo and intimation unaccompanied by other indicia of defendant's motivation, nor do we feel it was intended to apply to defendant's actions in the instant case. Our holding does not reflect the opinion that defendant's conduct could not be made culpable by the Legislature if it determines criminal liability is appropriate. However, no previous case has applied taking indecent liberties to acts analogous to those found in the instant case, and we decline to enlarge the scope of the offense in this manner. Accordingly, we hold there was insufficient evidence that defendant took or attempted to take indecent liberties with V.V., and the trial court erred in failing to dismiss the charge at the close of the evidence.

Reversed.

Judges McGEE and HUNTER concur.

STATE OF NORTH CAROLINA v. ANTHONY FERNANDO MATTHEWS

No. COA02-1690

(Filed 20 January 2004)

1. Jury— *Batson* challenge—failure to show discriminatory intent

The trial court did not err in a robbery with a dangerous weapon case by denying defendant's *Batson* challenges to the State's use of its peremptory challenges to excuse two female African-American jurors, because: (1) the strike of one of the jurors was based on a legitimate hunch; (2) although striking the other potential juror from the jury pool based on the fact that another attorney exercised a peremptory challenge against her in a previous unrelated case without further explanation from the challenging attorney does not articulate a legitimate reason that is reasonably specific and related to the particular case being tried, it does not rise to the level of demonstrating discriminatory intent; and (3) defendant's argument that there were other prospective jurors who gave answers similar to the two excused jurors does not provide an adequate basis for ascribing error to the trial court's finding that the State's use of its peremptory challenges was not a violation of *Batson*.

2. Robbery— with dangerous weapon—indictment—identity of victim

An indictment for armed robbery sufficiently identified the target of the robbery where it alleged that defendant committed the offense by threatening a store employee with a knife and taking twenty dollars worth of merchandise from the store.

Appeal by defendant from judgment entered 6 February 2002 by Judge W. Osmond Smith in Wake County Superior Court. Heard in the Court of Appeals 17 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General Tammera S. Hill and Special Deputy Attorney General T. Lane Mallonee, for the State.

Irving Joyner, attorney for defendant.

TIMMONS-GOODSON, Judge.

Anthony Fernando Matthews ("defendant") appeals his conviction for robbery with a dangerous weapon. For the reasons stated herein, we find no error in the trial court's judgment.

The pertinent procedural history of this case is as follows: During jury selection at trial, the State peremptorily challenged prospective jurors Sandra Haney ("Haney") and Raecheal Weaver ("Weaver"). The defense counsel objected to their removal, noting that defendant, Haney and Weaver were all African-Americans and contended that the challenges were racially motivated. Defense counsel argued that "[n]othing stuck out as anything that would give rise to a reason to excuse them, therefore we're left with something that's [sic] on its face would deprive [defendant] of having two to three members on the panel that are African-American." The State responded stating that because there remained one African-American prospective juror, "I don't think I should have to answer to that." Based on the exchange, the trial court denied defendant's objection, asserting that defendant failed to make a *prima facie* showing of discrimination. The court reserved the right to revisit the issue pending further jury selection.

After the State chose twelve jurors, eleven of whom were Caucasian and one of whom was African-American, the court *sua sponte* reconsidered the State's use of its peremptory challenges and ruled "that without a showing of any intention or a showing of any discrimination . . . there is a *prima facie* basis shown by the defendant in his allegations of discrimination based on [*Batson v. Kentucky*, 476 U.S. 79 (1986)] and that 100 percent of the State's challenge [sic] were directed to black females and leaving only one black female on the jury." The court then gave the State the opportunity to "rebut the *prima facie* showing and present any reason . . . to show that the peremptory challenges were not motivated by racial [sic] discriminatory or unconstitutional purposes."

The State offered that Weaver was challenged because when asked if she ever sat on a jury, she stated that she was once excused from a jury during voir dire and therefore he decided to excuse her from this case "for the reason that some other lawyer at another point in time . . . exercised a peremptory challenge as far as she goes." As for Haney, the State challenged her because she lived in the vicinity of the crime at issue in the case but was not familiar with the particular store that was robbed. In his response to the State's explanation,

defense counsel pointed out that there were other potential jurors who stated that they were previously called for jury duty but were not chosen, and that the State did not challenge them. The defendant also noted that Haney was the only prospective juror who the State chose to focus on her residential proximity to the crime. The trial court ultimately overruled defendant's objection, having determined that the State "expressed valid, articulable reasons for the exercise of peremptory challenges not based on race." It is from this ruling that defendant appeals.

The issues presented on appeal are whether (I) the trial court erred by denying defendant's *Batson* challenges; and (II) the robbery with a dangerous weapon indictment was fatally defective.

[1] For issues arising under *Batson v. Kentucky*, 476 U.S. 79 (1986), *modified*, *Powers v. Ohio*, 499 U.S. 400 (1991), trial courts must apply a three-step test to determine whether the State's peremptory challenges of prospective jurors are purposefully discriminatory. First, the defendant must successfully establish a *prima facie* case of purposeful discrimination. *Batson*, 476 U.S. at 96. If the *prima facie* case is not established, then the peremptory challenges will stand. If the *prima facie* case is established, however, the burden shifts to the prosecutor to offer a race-neutral explanation for each peremptory challenge at issue. *Id.* at 97. If the prosecutor fails to rebut the *prima facie* case of racial discrimination with race-neutral explanations, then the peremptory challenges are not allowed. If the prosecutor does rebut the *prima facie* case with race-neutral explanations, the defendant has a right of surrebuttal to show that the prosecutor's explanations were merely pretextual. *State v. Peterson*, 344 N.C. 172, 176, 472 S.E.2d 730, 732 (1996), *citing State v. Spruill*, 338 N.C. 612, 631, 452 S.E.2d 279, 288 (1994), *cert. denied* 516 U.S. 834 (1995). If the trial court finds that the race-neutral reasons are not pretextual, the peremptory challenges are allowed. If the trial court finds, however, that the race-neutral explanations are pretextual, it follows that the peremptory challenges at issue are purposefully discriminatory; they are therefore not allowed.

The trial court's determination is given deference on review because it is based primarily on first-hand credibility evaluations. *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000). "Appellate courts must uphold the trial court's findings of fact unless they are 'clearly erroneous.' " *State v. Cofield*, 129 N.C. App. 268, 275-76, 498 S.E.2d 823, 829 (1998), *quoting State v. Barnes*, 345 N.C.

184, 210, 481 S.E.2d 44, 48 (1997). We cannot find clear error in the fact-finder's decision where the fact-finder chooses one of two permissible views of the evidence. *Id.*, *citing Hernandez v. New York*, 500 U.S. 352, 369 (1991). "This standard allows for reversal only when a 'reviewing court on the entire evidence [is] left with the definite and firm conviction that a mistake has been committed.' " *Id.*

In the present case, the fact that the State only used its peremptory challenges to strike African-American jurors was deemed sufficient by the trial court to establish a *prima facie* case of discrimination. "A *prima facie case* 'need only show that the relevant circumstances raise an inference that [counsel] used peremptory challenges to remove potential jurors solely because of their race.' " *Colfield*, 129 N.C. App. at 276, 498 S.E.2d at 829, *citing State v. Quick*, 341 N.C. 141, 144, 462 S.E.2d 186, 188 (1995). Relevant circumstances include repeated use of peremptory challenges against prospective jurors of a particular race such that it tends to establish a pattern of strikes, and the attorney's acceptance rate of potential jurors of this race. *Id.* The State is allowed six peremptory challenges per defendant in a criminal case. N.C. Gen. Stat. § 15A-1217 (2003). In the case at bar, the State chose to exercise two of its six peremptory challenges, and both against African-American jurors.

In response to the court's ruling, the State argued that Weaver was challenged because she was removed from a jury pool in a previous case. The State asserted that Haney was challenged because her statement that she lived in the neighborhood where the robbery occurred but did not know of the particular store that was robbed raised concerns about her level of awareness. In *Colfield*, this Court held that the challenging attorney's

> explanations need not 'rise to the level justifying a challenge for cause,' and need not be 'persuasive, or even plausible.' *Barnes*, 345 N.C. at 209, 481 S.E.2d at 57. In fact, the challenges may be based on [the challenging attorney's] 'legitimate hunches and past experience.' *Id.* [Counsel] must, however, articulate 'legitimate race-neutral reasons that are clear, reasonably specific, and related to the particular case to be tried.' *State v. Peterson*, 344 N.C. 172, 176, 472 S.E.2d 730, 732 (1996). 'Unless a discriminatory intent is inherent in [the challenging attorney's] explanation, the reason offered will be deemed race neutral at this secondary stage of the inquiry.' *Hernandez*, 500 U.S. at 360.

Colfield, 129 N.C. App. at 277, 498 S.E.2d at 830.

We hold that while the State's challenge against Haney may have been based on a legitimate hunch, the basis for the challenge against Weaver is not sufficiently related to the case at bar. In our opinion, striking a potential juror from a jury pool because another attorney exercised a peremptory challenge against her in a previous unrelated case without further explanation from the challenging attorney in the present case does not articulate a legitimate reason that is reasonably specific and related to the particular case to be tried. Arbitrary as this explanation is, however, under our existing case law we are compelled to hold that it does not rise to the level of demonstrating discriminatory intent. *See e.g. State v. Harden*, 344 N.C. 542, 558, 476 S.E.2d 658, 666 (1996) (Concluding no discriminatory intent where the State excused a potential juror because she was "young and immature").

After the State offers its race-neutral explanation, the trial court must consider that explanation as well as the defendant's surrebuttal to the State's argument to determine whether the State's explanation is pretextual. *Colfield*, 129 N.C. App. at 279, 498 S.E.2d at 831. This Court held in *Colfield* that "even if answers of a prospective juror of one race who is later peremptorily excused are similar to those of a juror of another race who is not challenged, 'this state of circumstances in itself does not necessarily lead to a conclusion that the reasons given by [the challenging attorney] were pretextual.' " *Id.*, *quoting Barnes*, 345 N.C. at 212, 481 S.E.2d at 59. Thus, defendant's argument that there were other prospective jurors who gave answers similar to Haney and Weaver does not provide an adequate basis for ascribing error to the trial court's finding that the State's use of its peremptory challenges was not in violation of *Batson*. Because we are unable to conclude that there is clear error in the trial court's decision, we overrule this assignment of error.

[2] Defendant next argues that the State's indictment was fatally defective in that it fails to properly identify the target of the robbery. We disagree.

North Carolina General Statute §15A-924(a)(5) (2003) requires that an indictment describe the crime charged "with sufficient precision to apprise the defendant . . . of the conduct which is the subject of the accusation." "[T]he purpose of an indictment is to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial." *State v. Thrift*, 78 N.C. App. 199, 201, 336 S.E.2d 861, 862 (1985).

The person in the store at the time of the robbery was an employee and not the owner of the store. The indictment in pertinent part reads as follows:

> . . . the defendant . . . unlawfully, willfully, and feloniously did steal, take and carry away and attempt to steal, take and carry away another's personal property, to wit: two twelve packs of Bud Light beer, having an approximate value of twenty dollars ($20), from the person, presence and place of business of Zaka Ullah. The defendant committed this act by means of assault having in his possession and with the use and threatened use of a knife, a dangerous weapon whereby the life of Zaka Ullah was endangered and threatened.

Although the relationship of the robbery victim to the store that was robbed raises a question of fact, it does not raise any doubt as to the crime being charged, nor does it hinder defendant's ability to prepare his defense. The indictment alleges that defendant committed the offense by threatening Ullah with a knife and taking twenty dollars worth of merchandise from the store. The evidence tendered by the state was consistent with the allegations contained in the indictment. This assignment of error is overruled.

No error.

Judges HUDSON and ELMORE concur.

CHARLES E. FINKEL, PLAINTIFF-APPELLEE v. KAROL FINKEL, DEFENDANT-APPELLANT

No. COA02-1456

(Filed 20 January 2004)

1. Divorce— equitable distribution—disability insurance payments—separate property

There was evidence to support the trial court's finding in an equitable distribution action that disability benefits received post-separation were separate property. The focus is on the nature of the wages being replaced and the benefits do not become marital because the source of the premiums was marital.

2. Appeal and Error— assignment of error—favorable judgment

An assignment of error was insufficient for review where defendant requested an unequal distribution in her favor, received that distribution, and then alleged that the trial court erred by not providing an equal distribution.

3. Divorce— equitable distribution—weight of distributional factors

The trial court in an equitable distribution action is not required to reveal the exact weight given to each distributional factor on which evidence is presented.

Appeal by defendant from judgment dated 1 March 2002 by Judge Robert S. Cilley in District Court, Transylvania County. Heard in the Court of Appeals 28 August 2003.

H. Paul Averette for plaintiff-appellee.

Charles W. McKeller for defendant-appellant.

McGEE, Judge.

Karol Finkel (defendant) and Charles E. Finkel (plaintiff) were married on 11 March 1973, separated on 15 August 1999, and divorced on 10 October 2000. During the marriage, plaintiff practiced dentistry for a professional association doing business as Charles E. Finkel, D.D.S., P.A. The professional association was dissolved in 1991 and the assets were distributed to the parties. Beginning in January 1991, plaintiff received benefits from two disability insurance policies totaling $17,000 per month due to a somatic condition, dysthymia, which is characterized as chronic mild depression. Premiums for the insurance policies were paid by the professional association. Under both disability policies, plaintiff could continue to receive monthly benefits so long as he remained disabled and did not return to work in the field of dentistry.

Plaintiff filed a complaint on 28 January 2000 seeking a divorce from bed and board, as well as equitable distribution. Defendant filed a counterclaim on 27 March 2000 for alimony, post separation support, an interim distribution of marital property, and she also sought an unequal distribution of marital property in her favor.

Judgment was entered on 1 March 2002 on the parties' equitable distribution claims. The trial court made extensive findings of fact

regarding the assets of the parties, including the classification of income from plaintiff's disability insurance policies as separate property. The trial court considered that income as a distributional factor and ultimately distributed the property in favor of defendant. The trial court awarded $452,349.50 in marital property to defendant and $430,652.50 in marital property to plaintiff. Only the issue of equitable distribution is the subject of this appeal. Defendant appeals.

[1] In defendant's first assignment of error, she argues the trial court erred in classifying as separate property the disability benefits received by plaintiff after the date of separation. It is defendant's contention that the benefits are best characterized as marital property and therefore subject to distribution. After careful consideration of defendant's argument, we are not persuaded and find that this assignment of error is without merit.

Under our equitable distribution statute, upon application of a party, the trial court determines what is the marital property and divisible property of the parties. N.C. Gen. Stat. § 50-20(a) (2001). Initially, " '[the] party claiming that property is marital has the burden of proving beyond a preponderance of the evidence' that the property was acquired: by either or both spouses; during the marriage; before the date of separation; and is presently owned." *Fountain v. Fountain*, 148 N.C. App. 329, 332, 559 S.E.2d 25, 29 (2002) (quoting *Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1992) (citations omitted)). Once a party meets this burden, the burden shifts to the other party to show by a preponderance of the evidence that the property is best characterized as separate. *Lilly*, 107 N.C. App. at 486, 420 S.E.2d at 493.

A variety of methods have been adopted by different jurisdictions to aid in determining whether property is appropriately classified as separate, marital, or divisible. *See Johnson v. Johnson*, 117 N.C. App. 410, 412, 450 S.E.2d 923, 925 (1994). Our Supreme Court rejected a mechanistic, more literal approach to the classification of property in equitable distribution actions and instead adopted the analytic approach in reviewing classification of personal injury awards. *Johnson v. Johnson*, 317 N.C. 437, 451, 346 S.E.2d 430, 438 (1986). Under the analytic approach, the pertinent question is what are the benefits or proceeds at issue intended to replace. *See Johnson*, 317 N.C. at 446-47, 346 S.E.2d at 435. Courts that have adopted the analytic approach in classifying property for the purpose of equitable distribution have " 'consistently held that the portion of [a personal injury] award representing compensation for non-economic losses—

i.e., personal suffering and disability—is the separate property of the injured spouse; the portion of an award representing compensation for economic loss . . . during the marriage . . . is marital property.' " *Johnson*, 117 N.C. App. at 412, 450 S.E.2d at 925 (quoting *Johnson*, 317 N.C. at 447-48, 346 S.E.2d at 436); *see also Cooper v. Cooper*, 143 N.C. App. 322, 545 S.E.2d 775 (2001) (utilizing the analytic approach, Social Security benefits are disability benefits intended to replace loss of earning capacity and are thus separate property).

Applying the reasoning of the Supreme Court, our Court held that "disability retirement benefits" which were intended to replace the recipient's loss of earning capacity due to disability were the separate property of that spouse. *Johnson*, 117 N.C. App. at 414, 450 S.E.2d at 926. In *Johnson*, we asked "whether the benefits that plaintiff received were truly disability benefits or were retirement benefits (compensation for economic loss)." *Id.* at 412, 450 S.E.2d at 925. Our Court's decision in *Johnson* is on point as to the issue before our Court in the present case.

Courts in a majority of other states have elected to follow the analytic approach in classifying disability benefits received after separation as separate property. *See Hatcher v. Hatcher*, 933 P.2d 1222 (Ariz. Ct. App. 1996); *Holman v. Holman*, 84 S.W.3d 903 (Ky. 2002); *Chance v. Chance*, 694 So. 2d 613 (La. Ct. App. 1997); *Sherman v. Sherman*, 740 S.W.2d 203 (Mo. Ct. App. 1987); *Gann v. Gann*, 620 N.Y.S.2d 707 (N.Y. Sup. Ct. 1994), *aff'd*, 649 N.Y.S.2d 154 (N.Y. App. Div. 1st Dep't 1996) ; *Gragg v. Gragg*, 12 S.W.3d 412 (Tenn. 2000); *In re Marriage of Brewer*, 976 P.2d 102 (Wash. 1999) (post-dissolution disability insurance benefits are separate property of the disabled spouse regardless of whether marital funds paid the premiums).

In the case before us, the scope of review is limited to whether there was any competent evidence to support the findings of the trial court that the disability benefits received post-separation were separate property. *See Taylor v. Taylor*, 92 N.C. App. 413, 417, 374 S.E.2d 644, 646 (1988). The trial court's findings will only be upset if "the decision was unsupported by reason and could not have been the result of a competent inquiry." *Crowder v. Crowder*, 147 N.C. App. 677, 681, 556 S.E.2d 639, 642 (2001). Therefore, findings of fact are deemed conclusive if they are "supported by any competent evidence in the record." *Id.*

The trial court, citing our decision in *Johnson* regarding retirement disability benefits, found that the disability benefits received by

plaintiff, from and after the date of separation, were the separate property of plaintiff. As noted in *Johnson*, the better practice would have been for the trial court to expressly state that the disability benefits were due to plaintiff's own disability and were for the purpose of replacing his loss of earning capacity. *Johnson*, 117 N.C. App. at 413, 450 S.E.2d at 926. However, we find that the evidence presented at trial was sufficient to support the trial court's finding that plaintiff's benefits received post-separation were his separate property.

There are two disability insurance policies in this case; one maintained by Jefferson-Pilot Corporation (Jefferson-Pilot policy) and the other by Unionmutual Stock Life Insurance Company of America (Unionmutual policy). The Jefferson-Pilot policy, originally issued by Chubb Life, is self-described as an "income replacement policy." This policy was conditionally renewable up to plaintiff's seventy-second birthday. The Unionmutual policy, calling itself a "disability income policy," agrees to pay a monthly benefit for total disability for so long as plaintiff remains totally disabled until he reaches age sixty-five. It is evident from the language of both policies that the monthly benefit contains no retirement component and the policies are for the purpose of compensating plaintiff for his loss of health and earning capacity due to disability.

Both policies permit plaintiff to continue to receive the monthly benefit even if he finds employment in a field other than dentistry. We find these policy stipulations to be irrelevant for the purposes of classification of the property. The disability benefits received by plaintiff replace his post-separation loss of earning capacity as a dentist. He is unable to work as a dentist as long as he remains disabled.

Defendant emphasizes that the premiums were paid by the professional association, which was a marital asset prior to its dissolution. Thus, defendant argues that because the source of the premiums was marital in origin and those premiums served to deplete the marital assets, the proceeds of the disability insurance policies should be marital as well. We note that there are other forms of personal injury compensation, such as Social Security disability benefits, that have a similar source of funds, yet are deemed separate property. *See Cooper*, 143 N.C. App. 322, 545 S.E.2d 775. The monthly benefits do not lose their classification as separate property because the source of the premiums was marital. In assessing the status of disability benefits in equitable distribution actions, the analytic approach mandates the focus be directed at what is the nature of the wages being replaced.

Furthermore, as this Court noted in *Johnson*, "[p]ublic policy supports our holding that benefits which are truly 'disability' benefits should be the separate property of the disabled spouse." *Johnson*, 117 N.C. App. at 414, 450 S.E.2d at 927. To hold otherwise would be to deprive the disabled spouse of a means of future support, particularly where that spouse is likely to have a greater need for the benefits.

[2] Defendant also assigns error to the trial court's failure to "equally divide the marital assets of the parties in the absence of a finding or conclusion that an equal division was not equitable and without identifying the weight assigned to each distributional factor found."

As a general rule, the party who prevails at trial may appeal where the judgment is less favorable than that party thinks is just. *Casado v. Melas Corp.*, 69 N.C. App. 630, 635, 318 S.E.2d 247, 250 (1984). However, in this case defendant requested an unequal distribution in her favor and received an unequal distribution in her favor. Yet, she alleges the trial court erred in failing to provide an *equal distribution*. Thus, defendant argues that the trial court erred because it should have provided a judgment less favorable to her.

N.C.R. App. P. 10(c)(1) provides that an assignment of error "is sufficient if it directs the attention of the appellate court to the particular error about which the question is made." Accordingly, we find that the first half of defendant's second assignment of error is insufficient for this Court to review.

[3] The later half of defendant's second assignment of error faults the trial court for failing to indicate the weight it allotted to each distributional factor considered. It is within the trial court's discretion to determine the weight attributed to any of the N.C. Gen. Stat. § 50-20(c) factors on which evidence was presented. *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 250, 502 S.E.2d 662, 665, *disc. review denied*, 349 N.C. App. 528, 526 S.E.2d 174 (1998), *aff'd*, 350 N.C. 375, 514 S.E.2d 89 (1999). "It is not required that the trial court make findings revealing the exact weight assigned to any given factor." *Id.* We find no merit in defendant's argument.

Affirmed.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. DONALD RAY CATHEY, DEFENDANT

No. COA03-260

(Filed 20 January 2004)

1. **Larceny— indictment—owner of property—substantial alteration**

The trial court erred by allowing the State to amend a fatally defective larceny indictment that listed the owner of the property as "Faith Temple Church of God" instead of "Faith Temple Church—High Point, Incorporated," because: (1) a bill of indictment is fatally defective if it does not allege that an incorporated legal entity is a corporation or the name of the legal entity does not import that it is a corporation; and (2) the owner of the property in question is an essential element of larceny.

2. **Appeal and Error— preservation of issues—plain error analysis**

Although defendant contends the trial court committed plain error in a larceny, felonious breaking and entering, and resisting a public officer case by allegedly punishing defendant for exercising his right to a trial by jury, this issue is dismissed because: (1) plain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence; and (2) defendant failed to raise an objection to properly preserve this issue for appeal.

3. **Criminal Law— motion to view crime scene—photographs—diagram**

The trial court did not abuse its discretion in a larceny, felonious breaking and entering, and resisting a public officer case by overruling defendant's motion for view of the crime scene, because the jury had an opportunity to see three photographs of the pertinent church and its surroundings as well as a diagram of the crime scene.

4. **Evidence— article search—foundation—plain error analysis**

The trial court did not commit plain error in a larceny, felonious breaking and entering, and resisting a public officer case by failing to intervene ex mero motu when testimony of an officer regarding an article search performed by him and his K-9 partner was admitted allegedly without a proper foundation because even assuming it was error to admit the testimony,

the absence of the error would not have resulted in a different verdict when the police officers and the pastor of the church testified the items identified by the pastor of the church were inside the church prior to the larceny and were found outside of the church soon after defendant's apprehension.

Appeal by defendant from judgment entered 1 August 2002 by Judge John O. Craig, III, in Superior Court, Guilford County. Heard in the Court of Appeals 2 December 2003.

Attorney General Roy Cooper, by Assistant Attorney General Joyce S. Rutledge, for the State.

Anne Bleyman for the defendant-appellant.

WYNN, Judge.

By this appeal, Defendant, Donald Ray Cathey, presents the following issues for our consideration: Whether the trial court (I) erroneously allowed the State to amend a fatally defective larceny indictment; (II) committed plain error in punishing Defendant for exercising his right to a trial by jury in violation of his state and federal constitutional rights; (III) abused its discretion by overruling Defendant's motion for view of the crime scene; and (IV) committed plain error in failing to intervene *ex mero motu* in admitting testimony without a proper foundation. After careful review, we conclude the larceny indictment was fatally defective and the trial court erred in allowing an amendment of said indictment; otherwise, we find no error in the proceedings below.

The pertinent facts indicate that on 29 April 2001, local police officers responded to an alarm at the Faith Temple Church of God—High Point, Incorporated in High Point, North Carolina. Upon arrival, Officer Chris Wolanin and Lieutenant Larry Stroud observed a suspect, about ten feet away from the church, carrying a large black bag. The officers were unable to see the suspect's face. After the officers shined a flashlight on the suspect, the suspect stopped, went into a line of bushes that ran parallel to the church and ran away. Thereafter, Officer Brian McMillan pursued an individual whom Lieutenant Stroud illuminated with a flashlight. After a short pursuit, Defendant was arrested. Later, the officers recovered a black plastic bag and a boxed ceiling fan from the thicket. None of the latent fingerprints matched Defendant.

Following his convictions at a trial by jury, the trial court sentenced Defendant to imprisonment terms of 7 to 9 months for felonious breaking and entering; 7 to 9 months for felonious larceny to be served consecutively; and 30 days for resisting a public officer. Defendant appeals.

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[1] On appeal, Defendant first contends the trial court erroneously allowed the State to amend a fatally defective larceny indictment as such amendment constituted a substantial alteration in violation of N.C. Gen. Stat. § 15A-923(e). We agree.

It is well established that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). The purpose of an indictment is to give a defendant notice of the crime for which he is being charged. *State v. Coker*, 312 N.C. 432, 323 S.E.2d 343. Our General Statutes state that "a bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2001), which has been interpreted by our Supreme Court to mean that "an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994).

In this case, the felonious larceny indictment stated:

> And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did steal, take and carry away one (1) Sharp VCR, one (1) Table Lamp, one (1) Ceiling Fan, and one (1) Fur Coat, *the personal property of Faith Temple Church of God*, such property having a value of two hundred and thirty five dollars ($235.00), pursuant to the commission of the felonious breaking and entering described in the charges above.

(Emphasis supplied) (R. p. 4). Defendant contends this indictment was fatally defective because it did not allege ownership of the property in a legal entity capable of owning property. Although commonly known as Faith Temple Church of God, the church is incorporated as "Faith Temple Church—High Point, Incorporated."

"An indictment for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective." *State v. Roberts*, 14 N.C. App.

648, 649, 188 S.E.2d 610, 611-12 (1972). As indicated in *Roberts*, if a bill of indictment does not allege that an incorporated legal entity is a corporation or the name of the legal entity does not import that it is a corporation, the indictment is fatally defective. Thus, the indictment in the case *sub judice*, was fatally defective.

The State argues, however, that our Supreme Court's recent decisions in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003) and *State v. Watts*, 357 N.C. 366, 584 S.E.2d 740 (2003) indicate that defects in an indictment do not deprive a court of its power to adjudicate a case. However, these cases are limited to short-form murder indictments and do not change the indictment requirements delineated in N.C. Gen. Stat. § 15A-924. Indeed, in *Hunt*, our Supreme Court stated:

> Unlike a short-form indictment, the indictment in *Lucas* was not exempt from the statutory requirement, pursuant to N.C.G.S. § 15A-924, that indictments must state every element of the crime charged.

Hunt, 357 N.C. at 273, 582 S.E.2d at —. As the owner of the property in question is an essential element of larceny, the larceny indictment in this case did not comply with the provisions of N.C. Gen. Stat. § 15A-924(a)(5). *See State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (stating the essential elements of larceny are: (1) taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property).

The State also argues that because "Faith Temple Church—High Point, Incorporated" is commonly known as "Faith Temple Church of God," the indictment was sufficient to apprise Defendant of the charges against him and to prevent subsequent prosecution of Defendant for the same offense. In support of its argument, the State relies upon *State v. Grant*, 104 N.C. 908, 10 S.E. 554 (1889) and *State v. Bell*, 65 N.C. 313 (1871), which stand for the proposition that in a larceny indictment, "if the owner may have a name by reputation, and if it is proved that he is as well known by that name as any other, a charge in the indictment in that name will be sufficient." *Grant*, 104 N.C. at 910, 10 S.E. at 555; *Bell*, 65 N.C. at 314. However, in *Grant* and *Bell*, our Supreme Court addressed larceny indictments alleging the property was owned by a natural person, and are, therefore, inapposite to indictments purporting to charge a defendant with larceny of a legal entity. As indicated by our Supreme Court in *State v. Thornton*, 251 N.C. 658, 662, 111 S.E.2d 901, 904 (1960), a

larceny indictment which does not indicate the legal entity is a corporation or the name of the legal entity does not import a corporation is fatally defective.

In this case, the trial court allowed the State to amend the larceny indictment to read "Faith Temple Church—High Point, Incorporated" rather than "Faith Temple Church of God." Following established case law, we are compelled to hold this amendment constituted a substantial alteration of the indictment and was therefore prohibited by N.C. Gen. Stat. § 15A-923(e). Accordingly, the trial court should have dismissed the larceny indictment.

[2] Defendant next contends the trial court committed plain error in punishing Defendant for exercising his right to a trial by jury in violation of his state and federal constitutional rights. "However, plain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000). As Defendant did not raise this objection in the proceedings below, this issue is neither properly preserved nor subject to appellate review. *See* N.C. R. App. P. 10(b)(1).

[3] Next, Defendant contends the trial court committed error and abused its discretion by overruling Defendant's motion for view of the crime scene in violation of Defendant's state and federal rights. Pursuant to N.C. Gen. Stat. § 15A-1229, whether the trial judge allows a jury to view a crime scene is within the trial judge's discretion. *See also State v. Simpson*, 327 N.C. 178, 193, 393 S.E.2d 771, 780 (1990). In this case, the trial court indicated it did not want to allow the viewing of the crime scene because (1) it would slow the trial by several hours and there were other matters on the trial calendar, (2) it was extremely hot outside which would make the jurors uncomfortable, and (3) logistically, it could not be accomplished easily. Therefore, the trial court indicated it would prefer the use of several crime scene photos. The record indicates the jury had an opportunity to see three photographs of the church and its surroundings and a diagram of the crime scene. Under these facts we hold the trial court did not abuse its discretion in denying a viewing of the crime scene. *See id.* (finding no abuse of discretion occurred in denying a viewing of the crime scene where the jurors were able to see photographs and diagrams and had the aid of witness testimony).

[4] Finally, Defendant argues the trial court committed plain error in failing to intervene *ex mero motu* in admitting testimony of Officer

Terrance Garrison without a proper foundation in violation of Defendant's state and federal rights. Officer Terrance Garrison testified regarding an article search performed by him and his K-9 partner. Defendant contends that as a proper foundation, the officer was required to testify about the canine's ability to perform the tasks in question, i.e., locate articles.

Under plain error analysis, "the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986). In this case, even assuming it was error to admit Officer Garrison's testimony, we conclude the absence of the error would not have resulted in a different verdict. In this case, the police officers and the pastor of the church testified the items identified by the pastor of the church were inside of the church prior to the larceny and were found outside of the church soon after Defendant's apprehension. Accordingly, we conclude plain error was not committed in admitting Officer Garrison's testimony.

In sum, we vacate Defendant's conviction on the charge of larceny but find no error in his convictions on the charges of felonious breaking and entering, and resisting a public officer.

Vacated in part, no error in part.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

IN THE MATTER OF: MILLER, A MINOR CHILD

No. COA02-1580

(Filed 20 January 2004)

Termination of Parental Rights— subject matter jurisdiction— standing

The proceedings to terminate respondent mother's parental rights were a nullity and the order is therefore vacated, because the trial court lacked subject matter jurisdiction over the case based on the fact that the Department of Social Services (DSS) lacked standing to file a petition for termination of parental rights when at the time of the filing of the petition DSS did not have custody of the child. N.C.G.S. § 7B-1103(a).

Appeal by respondent from orders entered 9 August 2002 and 5 September 2002 by Judge R. Les Turner in Wayne County District Court. Heard in the Court of Appeals 27 October 2003.

No brief filed on behalf of petitioner-appellee, Wayne County Department of Social Services.

Rebekah W. Davis, for respondent-appellant.

No brief filed on behalf of the guardian ad litem.

GEER, Judge.

Respondent Tomiko Shanntell Miller, the mother of four-year-old Devante TyQuez Miller, appeals from the termination of her parental rights. We conclude that the Wayne County Department of Social Services ("DSS") lacked standing to file a petition for termination of parental rights because, at the time of the filing of the petition, DSS did not have custody of the child. We therefore vacate the district court's order terminating Ms. Miller's parental rights for lack of subject matter jurisdiction.

Facts

In April 2001, DSS received a telephone call from an individual who claimed that respondent had given Devante to Larry and LaSonya Jackson so that the Jacksons could adopt him. Later that month, DSS filed a petition alleging that Devante was neglected and dependent. Although an order does not appear in the record, the court at some point granted custody of Devante to DSS. On 18 June 2001, the district court entered an order adjudicating Devante as neglected and dependent, continuing custody of the child with DSS, and authorizing DSS to place him in the Jacksons' home.

Following a permanency planning hearing on 25 October 2001, the court in an order filed 1 February 2002 found that "Lasonya and Larry Jackson are fit and proper persons to have custody of the juvenile" and ordered "[t]hat the custody of Devante Miller is placed with Lasonya and Larry Jackson." The guardian ad litem ("GAL") who had previously been appointed to represent the interests of Devante was relieved of her duties. In subsequent orders, the district court continued to grant custody of Devante to the Jacksons.

On 1 March 2002, DSS filed a petition to terminate the respondent mother's parental rights (the "TPR petition"). On 7 May 2002, respondent answered the petition, denying the allegations of aban-

donment and neglect. The court appointed an attorney advocate to represent Devante on 22 May 2002, but did not appoint a new GAL.

On 11 July 2002, the court held an adjudicatory hearing on the TPR petition. The court appointed a GAL on 29 July 2002 and held a dispositional hearing on the TPR petition on 8 August 2002. The court entered an order on 9 August 2002 finding that grounds to terminate respondent's parental rights existed. On 5 September 2002, the court entered an order terminating respondent's parental rights. Respondent filed notice of appeal on 10 September 2002.

Respondent has raised several assignments of error in this appeal, including a contention that DSS lacked standing to initiate a proceeding to terminate her parental rights since DSS did not have custody of the minor child. Standing is jurisdictional in nature and "[c]onsequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." *In re Will of Barnes*, 157 N.C. App. 144, 155, 579 S.E.2d 585, 592, *disc. review denied, appeal dismissed*, 357 N.C. 460, 587 S.E.2d 94 (2003). Because we agree that DSS lacked standing, we need not reach respondent's remaining assignments of error.

"Standing is a requirement that the plaintiff [has] been injured or threatened by injury or [has] a statutory right to institute an action." *In re Baby Boy Scearce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986). In North Carolina, the General Assembly has prescribed by statute who has standing to file a TPR petition. N.C. Gen. Stat. § 7B-1103(a) provides:

> (a) A petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may *only* be filed by one or more of the following:
>
> (1) Either parent seeking termination of the right of the other parent.
>
> (2) Any person who has been judicially appointed as the guardian of the person of the juvenile.
>
> (3) *Any county department of social services, consolidated county human services agency, or licensed child-placing agency to whom custody of the juvenile has been given by a court of competent jurisdiction.*

(4) *Any county department of social services, consolidated county human services agency, or licensed child-placing agency to which the juvenile has been surrendered for adoption by one of the parents or by the guardian of the person of the juvenile, pursuant to G.S. 48-3-701.*

(5) Any person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion.

(6) Any guardian ad litem appointed to represent the minor juvenile pursuant to G.S. 7B-601 who has not been relieved of this responsibility.

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes.

N.C. Gen. Stat. § 7B-1103(a) (2003) (emphasis added). This Court observed that the predecessor statute, containing language virtually identical to the current statute, "limit[ed] the persons or agencies who may petition for termination of parental rights." *In re Manus*, 82 N.C. App. 340, 342, 346 S.E.2d 289, 291 (1986) (citing former N.C. Gen. Stat. § 7A-289.24).

DSS did not identify a factual basis for its standing in the petition. Under the circumstances of this case, only N.C. Gen. Stat. § 7B-1103(a)(3) potentially applies. Under that subsection, DSS may file a TPR petition only if a court has given DSS custody of the juvenile. *See also Manus*, 82 N.C. App. at 342-43, 346 S.E.2d at 291 ("A county department of social services, to whom custody of a child has been given by court order, has standing to maintain such an action.").

At the time DSS filed its petition on 1 March 2002, DSS no longer had custody of Devante. The order filed on 1 February 2002 as a result of a permanency planning hearing on 25 October 2001 stated that "the custody of Devante Miller is placed with Lasonya and Larry Jackson." Because DSS no longer had custody of the child, DSS lacked standing, under the plain language of N.C. Gen. Stat. § 7B-1103(a), to file a petition to terminate respondent's parental rights.

A North Carolina court has subject matter jurisdiction only if the petitioner or plaintiff has standing. *Sarda v. City/County of Durham Bd. of Adjustment*, 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003).

Further, "[i]f a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *State v. Linemann*, 135 N.C. App. 734, 739, 522 S.E.2d 781, 785 (1999). *See also Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964) ("A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.").

Here, because the trial court lacked subject matter jurisdiction over the case, the proceedings to terminate respondent's parental rights were a nullity. We therefore vacate the order from which respondent appeals.

Vacated.

Chief Judge EAGLES and Judge HUNTER concur.

CASES WITHOUT PUBLISHED OPINIONS

COCKRELL v. LEMAIRE No. 03-327	Wilson (00CVS1190)	No error
ELDER v. ELDER No. 03-372	Moore (99CVD985)	Affirmed
IN RE EAKER No. 03-362	Caldwell (01J26)	Affirmed
IN RE HARDWICK No. 03-279	Buncombe (01J134)	Affirmed
IN RE LUTZ No. 03-75	Catawba (97J277) (97J278)	Reversed
McGUIRE v. CHAREST No. 02-1538	Cabarrus (01CVD1180)	New trial
SCARBOROUGH v. DILLARD'S, INC. No. 03-358	Mecklenburg (01CVD6496)	Reversed
STATE v. DRIVER No. 03-103	Edgecombe (99CRS11094)	New trial
STATE v. GILMORE No. 02-1593	Wake (02CRS13946)	No error
STATE v. GODFREY No. 03-295	Onslow (00CRS58621)	Affirmed
STATE v. LAMBERT No. 03-345	Pasquotank (96CRS5357)	Vacated in part, remanded for resentencing
STATE v. MASON No. 02-1677	Carteret (02CRS1060) (02CRS50010)	Reverse and remand
STATE v. OLSEN No. 03-112	Columbus (01CRS50743)	No error
STATE v. OWENS No. 03-144	Guilford (99CRS101723)	No error
STATE v. REED No. 99-1574-2	Catawba (97CRS10058) (97CRS10059)	No error
STATE v. SISK No. 03-317	Rutherford (99CRS7358)	No error

STATE v. WATSON No. 03-105	New Hanover (01CRS12195) (01CRS12196)	No error
WIGGINS v. WIGGINS No. 03-238	Wake (94CVD4728)	Affirmed
WILLIAMSON v. SHOE SHOW, INC. No. 03-42	Ind. Comm. (I.C. 740372) (I.C. 947099) (I.C. 975034)	Affirmed

CLAUDE M. VIAR, JR., CO-ADMINISTRATOR OF THE ESTATE OF MEGAN RAE VIAR, DECEASED, AND CO-ADMINISTRATOR OF THE ESTATE OF MACEY LAUREN VIAR, DECEASED, PLAINTIFF v. N.C. DEPARTMENT OF TRANSPORTATION, DEFENDANT

No. COA03-25

(Filed 3 February 2004)

Tort Claims Act— negligence—motor vehicle accident—failure to install median barrier on highway

The Industrial Commission erred in a case brought under the Tort Claims Act by concluding that plaintiff failed to show that the North Carolina Department of Transportation (NCDOT) was negligent when it did not install a median barrier on the section of I-85 highway where the pertinent motor vehicle accident took place, because: (1) the Industrial Commission's findings of fact were inadequate to support its conclusion that defendant's actions in delaying construction of the proposed median barrier were reasonable with regard to maintaining safe transportation; (2) the Industrial Commission misapplied the law in its consideration of the monetary cost of installing a median barrier when it failed to reflect consideration of cost in the context of the risk of harm and the likely severity of harm; (3) the Industrial Commission's findings of fact failed to address plaintiff's central contention alleging negligence in NCDOT's delay after it made its initial discretionary decision about when, where, and on what prioritization schedule to install the barriers; (4) the Industrial Commission's findings of fact failed to address the risk of injury as related to the presence or absence of median barriers; (5) the public duty doctrine has never been applied to shield NCDOT from acts of negligence, and the construction and maintenance of the state highway system is not an exercise of the NCDOT's discretionary authority conferred upon it by statute; and (6) dismissal of this appeal for technical appellate rule violations would amount to manifest injustice.

Judge TYSON dissenting.

Appeal by plaintiffs from opinion and award entered 20 August 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 October 2003.

DeVore, Acton, & Stafford, P.A., by Fred W. DeVore, III, for plaintiff-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for defendant-appellee.

LEVINSON, Judge.

On 12 June 1997 Megan and Macey Viar were killed in a motor vehicle accident occurring in Rowan County, North Carolina, on Interstate Highway 85 (I-85). Melissa Viar, the decedents' sister, was driving south on I-85 in a heavy rainstorm when she lost control of her car, hit another southbound vehicle, went across the grass median separating the north and southbound lanes, and collided with a tractor-trailer truck. Her younger sisters died instantly, and Melissa suffered serious injuries.

On 6 March 1998 Claude Viar, father of the decedents and plaintiff herein, filed an affidavit with the Industrial Commission under the North Carolina Tort Claims Act, N.C.G.S. § 143-291 *et seq.*, stating a claim for negligence against the N.C. Department of Transportation (NCDOT). Plaintiff alleged his daughters' deaths were proximately caused by the absence of a guard rail or median barrier between the north and southbound lanes of I-85. Plaintiff's affidavit was later amended to allege negligence on the part of one or more of the following employees of NCDOT: Garland Garrett, Jr., Larry Goode, B.G. Jenkins, Jr., Don Morton, J. Don Goins, Douglas Waters, and Tom Shearin, "or any other state employee who would have been responsible for not placing median barriers in the stretch of I-85 in Rowan County where this accident occurred." Plaintiff's claim was heard before a deputy commissioner of the Industrial Commission in May of 2000, and on 20 November 2000 the deputy commissioner issued an opinion denying plaintiff's claim. Plaintiff appealed to the Full Commission, which reviewed his claim on 17 December 2001. On 20 August 2002 the Industrial Commission issued an opinion and award affirming the decision of the deputy commissioner and denying plaintiff's claim. The Commission concluded that plaintiff had failed to show that NCDOT was negligent in not installing a median barrier on the section of highway where the accident took place. Plaintiff appeals from this opinion and award, and presents one argument on appeal: that the Industrial Commission erred by failing to find that the NCDOT's negligence in not installing median barriers in the section of I-85 where the accident occurred was the proximate cause of the decedents' death.

Standard of Review

Plaintiff's negligence claim was brought under the Tort Claims Act, N.C.G.S. § 143-291. "The Tort Claims Act was enacted in order to enlarge the rights and remedies of a person who is injured by the negligence of a State employee who was acting within the course of his employment. Pursuant to [N.C.G.S. § 143-291(a)], the [Industrial] Commission has exclusive jurisdiction to hear claims falling under this Act." *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 792-93 (1998) (citing *Wirth v. Bracey*, 258 N.C. 505, 508, 128 S.E.2d 810, 813 (1963)).

The Tort Claims Act directs the Industrial Commission to determine whether the plaintiff's claim "arose as a result of the negligence of any officer, employee, . . . or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where . . . a private person, would be liable to the claimant in accordance with the laws of North Carolina." N.C.G.S. § 143-291 (2003). Accordingly, " '[b]efore an award of damages can be made under the Tort Claims Act, there must be a finding of a negligent act by an officer, employee, servant or agent of the State.' " *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 100, 576 S.E.2d 345, 351 (2003) (quoting *Taylor v. Jackson Training School*, 5 N.C. App. 188, 191, 167 S.E.2d 787, 789 (1969). The plaintiff has the burden of proof on the issue of negligence. *Bailey v. N.C. Dept. of Mental Health*, 2 N.C. App. 645, 651, 163 S.E.2d 652, 656 (1968).

The NCDOT is liable under the Tort Claims Act for the negligence of its employees. *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 100, 576 S.E.2d 345, 351 (2003). Under current law, the State is liable for negligent omissions, as well as negligent actions. *Phillips v. N.C. Dept. of Transportation*, 80 N.C. App. 135, 136-37, 341 S.E.2d 339, 340-41 (1986). Further, liability does not require that the negligence of an employee be the sole proximate cause of injury. *Trust Co. v. Board of Education*, 251 N.C. 603, 609, 111 S.E.2d 844, 849 (1960).

On appeal, this Court "is limited to 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." *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001) (citations omitted). The Commission's findings of fact are conclusive on appeal if supported by any competent evidence, notwithstanding the presence of other evidence that might have supported a contrary

finding. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 793 (1998). "However, the findings of fact of the Industrial Commission are conclusive on appeal only when supported by evidence, and the Court, on appeal, may review the evidence to determine as a matter of law whether there is any evidence tending to support the findings." *Vause v. Equipment Co.*, 233 N.C. 88, 93, 63 S.E.2d 173, 177 (1951) (citing *Hildebrand v. Furniture Co.*, 212 N.C. 100, 193 S.E. 294 (1937)).

"The determination of negligence, proximate cause and contributory negligence requires an application of principles of law to the determination of facts. These are, therefore, mixed questions of law and fact and so are reviewable on appeal from the commission, the designations 'Finding of Fact' or 'Conclusion of Law' by the commission not being conclusive." *Martinez v. Western Carolina University*, 49 N.C. App. 234, 239, 271 S.E.2d 91, 94 (1980) (citing *Brown v. Board of Education*, 269 N.C. 667, 153 S.E.2d 335 (1967)). In the instant case, we conclude that the Industrial Commission's legal conclusions are based upon erroneous application of the law to the facts, and are not supported by its findings of fact.

Plaintiff's evidence established the following uncontested facts: In 1993, NCDOT completed a study of the relationship between median barriers on interstate highways and accidents in which a vehicle crosses the median strip (cross-median accidents) on interstate highways. The NCDOT study reviewed over 2900 accidents occurring between 1988 and 1991, and concluded that (1) cross-median accidents account for only 3% of interstate accidents but 32% of fatalities; (2) cross-median accidents are "steadily increasing" in number and severity, are three times as likely as other accidents to result in death, and caused 105 fatalities during the study period; (3) the number of cross-median accidents is not associated with impaired driving or with high driving speeds; and that (4) guardrails or median barriers installed in the median strip would prevent many, if not most, of these fatal cross-median interstate accidents in North Carolina. The 1993 NCDOT study identified the 24 sections of interstate highway with the greatest number of cross-median accidents, and prioritized these locations with regards to the installation of median barriers.

Neither relevant industry standard publications nor state and federal regulations required that median barriers be installed. Thus, the absence of median barriers did not place NCDOT in violation of statutory law or national road design standards. However, as a

result of its study, NCDOT officials decided that median barriers should be installed at 24 locations on N.C. interstate highways. NCDOT ranked these 24 locations in the order of priority for installation of guardrails.

Funding for NCDOT construction is allocated by the State legislature, and supplemented by certain federal funds. Funding is a complex process, requiring that NCDOT obtain input from various citizen and government groups, prioritize its projects, allocate resources, and coordinate projects when appropriate. The cost of adding a median barrier to the Rowan County I-85 location was estimated at $1,344,000.00, with annual maintenance estimated to be over $200,000. With all these factors in mind, NCDOT decided in 1993 to stagger the installation of median guardrails at the 24 identified locations over a five year period.

In 1994, the first of these 24 median barriers was completed, on I-40 between Raleigh and Research Triangle Park (RTP). There have been no fatal cross-median accidents on this segment of I-40 since the median barrier was installed. The section of I-85 where the accident at issue herein occurred (the "Rowan County I-85 location") was initially ranked number seven, but after median barriers were installed on I-40, the section of I-85 where the accident took place moved up to sixth place in the priority list. In 1993, NCDOT anticipated that the area of the Rowan County I-85 location would be widened during the five year time frame or shortly thereafter. To avoid installing temporary barriers that would need to be removed during construction, NCDOT decided to incorporate the addition of guardrails into this larger construction project, "unless additional accidents require earlier action." In 1995, following "several severe accidents" on this stretch of road, NCDOT reduced the speed limit in the stretch of I-85 where the accident occurred from 65 to 55 mph. As of the date of the accident, the I-85 widening project had not yet been funded, and NCDOT had not installed a median barrier along the Rowan County I-85 location.

Between January, 1994 and June, 1997 there were ninety-six (96) additional deaths resulting from cross-median interstate accidents on North Carolina's interstate highways. During this time period NCDOT did not install median barriers at any of the remaining 23 locations identified in the 1993 study. The accident that claimed the lives of the Viar girls occurred on 12 June 1997. Within a few weeks of the accident, funding was provided to install guardrails at all 23 highway segments chosen by NCDOT in 1993 for installation of median barriers.

The gravamen of plaintiff's evidence was that (1) the NCDOT was negligent in failing to install a median barrier at the Rowan County I-85 location within four years of its decision to do so, and that (2) the installation of median barriers almost immediately after the accident demonstrated that the resources to do so were available.

The defendant did not present any evidence at the hearing.

The Industrial Commission entered an order denying plaintiff's claim on the basis that plaintiff had failed to prove negligence. In its order, the Commission made 58 findings of fact. Findings 1 through 12 set out the facts surrounding the accident. Specifically, findings 6, 8, 9, and 10, state the following:

> 6. North Carolina Highway Patrol Trooper D.R. Brackman . . . affirmed there was extremely heavy rain on this evening. [He] stated it was one of the heaviest rains he could ever remember.
>
> . . . .
>
> 8. Trooper Brackman found the Viar vehicle had originally traveled in the outside of two (2) southbound lanes on I-85. Trooper Brackman also found the Viar vehicle struck another vehicle in the inside southbound lane of the divided highway causing both vehicles to enter the median.
>
> 9. This portion of I-85 is a straight and level road.
>
> 10. Trooper Brackman determined the Viar vehicle had then continued across the median and had been broadsided on the passenger side by a northbound tractor-trailer.

Findings 13 through 18 discuss the 1993 NCDOT study, NCDOT's decision to install median barriers at 24 locations, and its decision to incorporate the Rowan County I-85 median barrier with a planned widening of I-85. Findings 19 through 23 establish that NCDOT was not required by law to install median barriers, and was not in violation of nationally recognized road design standards by not having median barriers. Findings 24 through 35 set out in general terms the hierarchy and roles of certain NCDOT officials in NCDOT's decisions regarding what projects to undertake; these findings also outline the general procedures and policies governing NCDOT funding. Findings 36 through 56 set out the general considerations relevant to funding of NCDOT projects by the State legislature, and outline the general procedures that are followed by NCDOT in obtaining funding for road

work. Findings of fact 57 and 58 are more properly termed conclusions of law, and state the following:

> 57. The North Carolina Department of Transportation has the authority, duty and responsibilities to plan, design, locate, construct and maintain the existing public highways in the State of North Carolina.
>
> 58. The standard of care applicable to this case is negligence. The defendant's duty to the general public, including plaintiffs, is to plan, design, locate, construct and maintain the public highways in the State of North Carolina with reasonable care. The defendant is not strictly liable for every person injured on the roads subject to its jurisdiction. Several factors are relevant to defendant's performance of these duties including, but not limited to, funding limitations, coordination of construction projects, and implementation of alternative means to effect the safety of the public highways. Defendant has asserted that its decisions concerning the improvement of I-85, in the area of the accident in question, were reasonable and prudent because of limitations on funding, a desire to coordinate the installation of guardrails with the widening of the highway from four to six or eight lanes. In addition, defendant sought to make this stretch of road safer by reducing the speed limit from 65 miles per hour to 55 miles per hour. Although there was evidence that guardrails would have been prudent, the greater weight of the evidence is that defendant's actions in prioritizing the various installation of median guardrail projects, allocation of highway improvement funds due to budgetary constraints, coordination of the guardrails with other construction, and reduction in traffic speed were reasonable and prudent steps to effectuate the safety of the public on the highway in question. Therefore, the defendant did not breach its duty to the general public, and to plaintiff, and was not negligent.

On this basis the Industrial Commission ruled that plaintiff was not entitled to recover from NCDOT.

"Under the Tort Claims Act negligence, contributory negligence and proximate cause . . . are to be determined under the same rules as those applicable to litigation between private individuals." *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972) (citation omitted). Accordingly, we first review certain relevant common law principles of negligence law. The most basic of these is that:

> The essence of negligence is behavior creating an unreasonable danger to others. To establish actionable negligence, 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) (citing W. Prosser, Handbook of the Law of Torts § 31 (5th ed. 1984), and *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984)). In this regard, the NCDOT has a duty "to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods[.]" N.C.G.S. § 143B-346 (2003). Evidence of remedial measures, although "not admissible to prove negligence or culpable conduct" nonetheless is admissible "for other purposes such as 'proving ownership, control, or feasibility of precautionary measures, if those issues are controverted[.]' " *Smith v. N.C. Dept. of Nat. Resources*, 112 N.C. App. 739, 746, 436 S.E.2d 878, 883 (1993) (quoting N.C.G.S. § 8C-1, Rule 407). Further, a defendant's notice of a source of danger is also relevant to the question of whether NCDOT was negligent in failing to prevent the particular harm. *Gordon v. Highway Commission*, 250 N.C. 645, 647, 109 S.E.2d 376, 377-78 (1959).

We conclude that in the instant case the Industrial Commission's findings of fact fail to support its conclusion of law. We further conclude that the Industrial Commission failed to make findings of fact on certain crucial and material issues, and that it misapplied the law in its consideration of the monetary cost of installing a median barrier.

First, the Industrial Commission's findings of fact were inadequate to support its conclusion that defendant's actions in delaying construction of the proposed median barrier were reasonable with regard to maintaining safe transportation. Although the Commission made numerous findings, the majority of the findings are overly general or lack appropriate context. For example, the Commission found that the projected construction costs of the proposed median barrier were "$1,340,000.00 with annual maintenance costs of $245,549.00." Findings related to the Department of Transportation's annual budget, funding availability for the specific site, the likelihood of median accidents, and the likelihood of harm caused by such accidents

would help provide some appropriate context. Without such findings to provide an economic context, a bare recital of the projected costs of construction and maintenance of the median barrier is meaningless. Other findings by the Commission, outlining DOT procedures for implementing transportation projects and the requisite funding processes associated therewith, are similarly inadequate in their generality, and do not support a conclusion that defendant's delay in constructing the median barrier was reasonable.

We conclude next that, in addition to making generally insufficient findings of fact, the Industrial Commission erred in its analysis of the monetary cost of installing a median barrier. "Traditionally, courts have distinguished between negligence claims based on affirmative acts and those based on omissions." *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 553-54, 543 S.E.2d 920, 926 (2001) (citing David A. Logan and Wayne A. Logan, North Carolina Torts § 1.20, at 8 (1996)). Plaintiff herein alleged that NCDOT was negligent by omission, or failure to take actions necessary for the exercise of reasonable care. Thus, common law standards applicable to claims of negligent omission have particular relevance to our decision. In this regard, the Industrial Commission's conclusion that NCDOT was not negligent was based in large part on its consideration of the *monetary* cost of installing median barriers, and the Commission's assessment of various economic factors and considerations that shape NCDOT's budgetary decisions. We conclude that the Commission erred in its evaluation of this issue.

Generally speaking, a negligent omission is "the omission or failure to do that which a reasonable prudent person . . . would do[.]" *Billings v. Trucking Corp.*, 44 N.C. App. 180, 182, 260 S.E.2d 670, 672 (1979). In its determination of whether a party negligently failed to take the reasonable precautions to prevent harm, the Industrial Commission is *not* necessarily required to assess the financial aspects of a negligence claim. *See, e.g., Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 95, 576 S.E.2d 345, 348 (2003) (upholding an opinion regarding defendant's negligence that did not address the cost to NCDOT of installing warning signs). However, where, as here, the Commission makes at least twenty findings related to the financial cost to defendant, the Commission must *properly* assess the economic burden on defendant in assessing reasonable care.

The long-standing common law rule is that the economic cost of preventative measures is relevant to the issue of the failure to use

reasonable care only if it is evaluated *in connection with* the likelihood of the injury occurring in the absence of preventative measures, and of the severity of harm that would result from the injury:

> [T]he basic approach to negligence law outlined by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), essentially defines negligence as the unreasonable balancing of the cost of safety measures against the risk of accidents. See id. at 173 (explaining that 'if the probability [of an accident] be called P; the injury, L; and the burden [of adequate precautions], B; liability depends upon whether B is less than L multiplied by P: i.e., whether B<PL').

Smith v. WAMTA, 290 F.3d 201, 215 (4th Cir. 2002) (Michael, Circuit Judge, concurring in part and dissenting in part), *cert. denied*, 537 U.S. 950, 154 L. Ed. 2d 296 (2002). Another case from the 4th Circuit noted that "a person's duty to prevent injuries from an accident 'is a function of three variables: (1) The probability that (the accident will occur); (2) the gravity of the resulting injury, if (it) does; (3) the burden of adequate precautions.' " *Pruitt v. Allied Chemical Corp.*, 523 F. Supp. 975, 978 n.11 (E.D. Vir. 1981) (quoting *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)). This venerable framework for analyzing the conventional negligence standard has also been discussed in at least one N.C. case:

> Learned Hand proposed his famous cost-benefit equation in an effort to distinguish between risks which were worth taking and those which were not. . . . n3 Hand described the duty of an actor to protect against resulting injuries as being a function of three variables: (1) the probability (P) of injury occurring, (2) the gravity (L) of resulting injury, and (3) the burden (B) of adequate precautions. Hand described this relationship algebraically as an inquiry as to whether B<PL.

Johnson v. Ruark Obstetrics, 327 N.C. 283, 312 n.3, 395 S.E.2d 85, 102 n.3 (1990) (Justice Meyer, dissenting) (citing *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947)).

Consideration of the economic cost or burden of precautions in relation to the likelihood and degree of risk is consistent with the general rule that negligence is the failure to take reasonable care:

> There are various ways in which courts formulate the negligence standard. The . . . most precise is . . . whether the burden of precaution is less than the magnitude of the accident, if it occurs,

> multiplied by the probability of occurrence. . . . This is the famous 'Hand Formula'[.] . . . Illinois courts do not cite the Hand Formula but instead define negligence as failure to use reasonable care, a term left undefined. But as this is a distinction without a substantive difference, we have not hesitated to use the Hand Formula[.] . . .

McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1556-57 (7th Cir. 1987). The same principle has also been articulated as follows:

> The test for determining whether a risk is unreasonable is . . . the result of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the cost of the precaution he must take to avoid the risk.

Frelow v. St. Paul Fire & Marine Ins., 631 So. 2d 632, 635 (La. Ct. App. 1994).

We conclude, based upon relevant common law principles of negligence law, that proper consideration of the financial cost of preventing an injury requires that the fact-finder assess the economic cost *in conjunction with* both the *likelihood* of the risk occurring and the *degree of harm* that would result. In doing so, we note that the Industrial Commission need not employ the precise "Hand formula" in its determination. Accordingly, a fact-finder does not consider the dollar amount of preventative measures in a vacuum, for without consideration of the severity and likelihood of the risk to be prevented, the fact-finder cannot evaluate whether the expenditure would be reasonable.

In the instant case, the Industrial Commission's opinion does not reflect consideration of cost in the context of the risk of harm and the likely severity of harm. The Industrial Commission based its conclusion that NCDOT had exercised reasonable care primarily upon an extensive recitation of the general factors and circumstances pertaining to NCDOT's funding and budgetary considerations. However, nothing in the Industrial Commission's opinion indicates that the dollar amount was evaluated *in the context of the likelihood of an accident occurring at the Rowan County I-85 location and the degree of harm that might be caused by such an accident.* We emphasize that the Industrial Commission is not required to evaluate the financial cost of preventative measures in every case. However, inasmuch as the Industrial Commission's order is premised, at least in part, on this basis, the economic burden must be assessed in rela-

tion to the other factors discussed above. We conclude that the Industrial Commission erred by relying in part upon consideration of "funding limitations" and "budgetary constraints" without assessing these in connection with the likelihood of a fatal accident occurring if median barriers were not installed. Because we cannot tell the extent to which the Commission's opinion is based on this factor, the case must be remanded.

Finally, we conclude that the Industrial Commission failed to make findings of fact addressing issues material to its decision. "The Commission is the sole fact finding agency in cases in which it has jurisdiction . . . [S]pecific findings by the Commission with respect to the crucial facts, upon which the question of plaintiff's right to compensation depends, are required." *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 127-28, 162 S.E.2d 619, 620 (1968) (citation omitted).

In *Martinez v. Western Carolina University*, 49 N.C. App. 234, 271 S.E.2d 91 (1980), the plaintiff alleged that certain State employees had negligently "fail[ed] to obtain timely and adequate examination, diagnosis and treatment of claimant's injuries." This Court held:

> [T]he issue of whether [defendants were] . . . negligent in failing to obtain timely and adequate examination, diagnosis and treatment of claimant's injuries. . . . engenders three distinct findings which must be made: (1) was there an unreasonable delay . . . (2) if so, was the delay caused by [defendants]? and (3) if so, was the delay a proximate cause of plaintiff's injury? . . . [T]he commission's finding that 'the defendant's employees . . . were guilty of no negligent conduct proximately causing damage to Martinez' is not sufficient to meet its duty to make specific findings as to each material fact upon which the rights of the parties depend.

Id. at 240, 242, 271 S.E.2d at 94-95.

In the instant case, the Industrial Commission's findings of fact fail to address plaintiff's central contentions—that *after* NCDOT made its initial prioritizing decisions, it was negligent not to install a median barrier during the following four years, given (1) failure of the expected funding for widening of I-85 to materialize, (2) the continued accidents in that location, (3) the demonstrated success in reducing or eliminating fatalities that was observed when I-40 got medians, and (4) the availability of funds, as evidenced by NCDOT's

installation of median barriers after the accident. Thus, the thrust of plaintiff's argument—that the *delay* was unreasonable—was not addressed in the Industrial Commission's findings of fact. Plaintiff alleged negligence in NCDOT's delay *after* it made its initial discretionary decision about when, where and on what prioritization schedule to install the barriers. The Industrial Commission's findings of fact and conclusions of law fail to address this issue.

As discussed above, there also are no findings of fact pertinent to the risk of injury as related to the presence or absence of median barriers. This is relevant to assessment of reasonable care, even absent financial considerations. The findings of fact include only one potentially relevant statement about risk: that there are "more head-on crashes on two lane roads."

The dissent contends the Department of Transportation cannot be held liable to plaintiff under the public duty doctrine. We note that the NCDOT has not raised this issue on appeal. Moreover, the public duty doctrine has never been applied to shield the NCDOT from acts of negligence. *See, e.g., Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 588 S.E.2d 42 (2003) (noting that the NCDOT may have a duty to install a stop sign if the evidence establishes that NCDOT knew or should have known that an intersection was hazardous, the breach of which duty gives rise to a cause of action under the Torts Claim Act); *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. at 101, 576 S.E.2d at 351-52 (affirming the Commission's finding that the DOT negligently failed to maintain a railroad crossing, in dereliction of its statutory duty to do so); *Phillips v. N.C. Dept. of Transportation*, 80 N.C. App. 135, 138, 341 S.E.2d 339, 341 (1986) (stating that the NCDOT's "duty to maintain the right-of-way necessarily carried with it the duty to make periodic inspections" and concluding that the NCDOT could be found negligent based on implied notice of a hazardous condition on the right-of-way). Further, the construction and maintenance of the state highway system is not an exercise of the NCDOT's "discretionary authority so conferred upon it by statute" as asserted by the dissent. *See Guyton v. Board of Transportation*, 30 N.C. App. 87, 90, 226 S.E.2d 175, 177 (1976) (holding that the defendant Board of Transportation did not abuse its authority when it excavated and removed a highway adjacent to the plaintiffs' property, where the North Carolina General Statutes specifically granted the defendant discretionary authority to take such action "when in its judgment the public good require[d] it").

We also disagree with the dissenting opinion's conclusion that this appeal must be dismissed for failure to comply with the Rules of Appellate Procedure. While the failure to comply with the appellate rules subjects an appeal to dismissal, *Steingress v. Steingress*, 350 N.C. 64, 511 S.E.2d 298 (1999), this Court may suspend or vary the requirements of the rules to "prevent manifest injustice," N.C.R. App. P. 2, or "as a matter of appellate grace." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 288, 266 S.E.2d 812, 814 (1980). The dissenting opinion cites *Shook v. County of Buncombe*, 125 N.C. App. 284, 480 S.E.2d 706 (1997), in support of dismissal. In *Shook*, the appellant's brief presented "a number of interwoven and complicated issues, amidst a record on appeal of three volumes and seven hundred and sixty-seven (767) pages." *Id.* at 286, 480 S.E.2d at 707. The Court explained that such

> circumstances highlight why our appellate rules are a necessity. When we are presented with an appeal such as the instant one, the rules are not merely ritualistic formalisms, but are essential to our ability to ascertain the merits of an appeal. Furthermore, the appellate rules promote fairness by alerting both the Court and appellee to the specific errors appellant ascribes to the court below.

Id.

In this case, the dissenting opinion does not assert that the rules violations by plaintiff impede comprehension of the issues on appeal by the appellee or this Court, or that the appellate process has been otherwise frustrated. Nor does the record support such a conclusion. Unlike *Shook*, the record here is not lengthy, nor are the issues complicated. The violations are technical rather than substantive, and are not so egregious as to warrant dismissal. *See, e.g., N.C. Farm Bureau Mut. Ins. Co. v. Allen*, 146 N.C. App. 539, 542, 553 S.E.2d 420, 422 (2001) (electing to review the appellant's case on its merits, although appellant failed to reference his assignments of error on appeal); *Fletcher v. Dana Corporation*, 119 N.C. App. 491, 493-94, 459 S.E.2d 31, 33 (1995) (granting review pursuant to Rule 2, although appellants violated appellate rules by "merely cit[ing] to portions of the Commission's Opinion without setting forth a basis for error"); *Symons Corp. v. Insurance Co. of North America*, 94 N.C. App. 541, 543, 380 S.E.2d 550, 552 (1989) (stating that, "[a]lthough defendant in this case did not technically follow the rules by failing to list specific page numbers where exceptions could be found in the record and did not set out these exceptions in the brief, we do not find these omis-

sions so egregious as to invoke dismissal"). Plaintiff has presented a compelling appeal warranting reversal, the merits of which were orally argued before this Court. Dismissal of such appeal for technical appellate rules violations would amount to a manifest injustice.

In sum, the Industrial Commission failed to make adequate findings to support its conclusion that the NCDOT's actions were reasonable, erred by relying on an improperly conducted assessment of the financial cost of installing median barriers, and failed to make necessary findings of fact. Accordingly, the opinion and award of the Industrial Commission must be reversed and this matter remanded for additional findings of fact and further proceedings not inconsistent with this opinion.

Reversed.

Judge WYNN concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

I respectfully dissent from the majority's holding to reverse the Industrial Commission's opinion and award. Plaintiff failed to comply with the appellate rules of this Court. I vote to dismiss this appeal or, in the alternative, to affirm the Commission on the merits of the appeal.

I. Standard of Review

The North Carolina Department of Transportation ("NCDOT") is subject to a suit to recover damages for death caused by its negligence only as is provided in the Tort Claims Act. *Davis v. Highway Commission*, 271 N.C. 405, 156 S.E.2d 685 (1967). That Act states in part, "[t]he Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee . . . under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." N.C. Gen. Stat. § 143-291(a) (2003).

Our Court has previously ruled on the standard of review for tort claims from the Commission. "Under the Tort Claims Act, 'when considering an appeal from the Commission, our Court is limited to 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.' " *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 97, 576 S.E.2d 345, 349 (2003) (quoting *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002)); *see* N.C. Gen. Stat. § 143-293 (2003).

II. Preserving Issues for Appellate Review

A. Assignments of Error

"[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a) (2003). The record reveals plaintiff's unnumbered assignments of error as follows:

> The North Carolina Industrial Commission erred by disallowing the deposition testimony of Dr. Larry R. Goode (the former Secretary of Transportation and a defendant in the Viar actions); Norris Tolson (the current Secretary of Transportation); James M. Lynch (Branch Manager of the Traffic Engineering and Safety Systems Branch of the Department of Transportation and an author of the State's Across Median Accident Study) taken in *Hallum v. North Carolina Department of Transportation* (TA 15455) and *Jones v. North Carolina Department of Transportation* (TA 15601). These cases with nearly identical fact circumstances and identical legal issues pertaining to the willful refusal of the respondents to install median barriers in deadly stretches of North Carolina interstates after an acute need for the barriers had been identified by the Department of Transportation's own investigation.
>
> Record, p. —— [sic]
>
> The North Carolina Industrial Commission, in its majority opinion, committed reversible error by not finding the named respondents negligent in the deaths of the minor petitioners for not installing median barriers on a deadly stretch of Highway I-85 after the Department of Transportation found an acute need for the barriers approximately 8 years earlier.
>
> Record, p. —— [sic]

Plaintiff failed to cite any pages in the record under either of his assignments of error.

On appeal, plaintiff argues the Commission's opinion and award should be reversed. We must first consider whether the Commission's findings of fact are supported by competent evidence. *Smith*, 156 N.C. App. at 97, 576 S.E.2d at 349. Our review is further limited by the North Carolina Rules of Appellate Procedure, which require the appellant to assign error as follows:

> questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions *if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question* made regarding each such issue or finding or legal conclusion based thereon.

N.C.R. App. P. 10(c)(3) (2003) (emphasis supplied).

Our Supreme Court has ruled:

> [w]here 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. Furthermore, the scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal. The Court of Appeals erred in reversing the trial court on an issue not properly presented for appeal by exception or assignment of error.

Koufman v. Koufman, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991) (internal citations omitted).

Since plaintiff failed to assert error to any of the Commission's findings of fact, the Commission's findings are binding on our Court and we must conclude they are supported by competent evidence. *Id.* Plaintiff also failed to reference the record in violation of N.C.R. App. P. 10(c)(3) (2003). This Court should not address plaintiff's assignments of error, and this appeal should be dismissed. *See Shook v. County of Buncombe*, 125 N.C. App. 284, 286, 480 S.E.2d 706, 707 (1997) ("[T]he rules are not merely ritualistic formalisms, but are essential to our ability to ascertain the merits of an appeal. Furthermore, the appellate rules promote fairness by alerting both the Court and appellee to the specific errors appellant ascribes to the court below.").

B. Plaintiff's Arguments on Appeal

In order to reach the merits of plaintiff's argument and reverse the Commission's opinion and award, this Court is limited to the issues properly presented for appeal. N.C.R. App. P. 10(a) (2003); *see Koufman*, 330 N.C. at 97-98, 408 S.E.2d at 731. In addition to the rule violations in plaintiff's assignments of error discussed above, his brief also fails to adhere to the North Carolina Rules of Appellate Procedure.

Plaintiff's brief sets forth only one "question presented" to this Court: whether the NCDOT's failure to install median barriers was a proximate cause of the death of the Viar sisters. In making his arguments, plaintiff cites "Assignment of Error No. 1" and solely cites to the pages in the record containing a dissenting opinion from the Commission's opinion and award. Citing only to the dissenting opinion violates the appellate rules and is insufficient to identify "the pages at which [the assignments of error] appear in the printed record on appeal." N.C.R. App. P. 28(b)(6) (2003).

Plaintiff's question presented and arguments on that issue do not correspond to the first assignment of error. Plaintiff's brief does not address the Commission's failure to admit certain deposition testimony from other cases as set forth as error in the first assignment of error. Although plaintiff cites "Assignment of Error No. 1" in his brief, none of his arguments relate in any manner to the substance of plaintiff's first assignment of error. Appellate "[r]eview is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned." N.C.R. App. P. 28(a) (2003). Plaintiff has abandoned his first assignment of error concerning the deposition testimony from other cases.

Regarding his second assignment of error, plaintiff does not cite or refer to "Assignment of Error No. 2" in his brief. "A party may not present for the first time in an appellate brief a question raising issues of law not set out in the assignments of error contained in the record on appeal." *Branch Banking and Trust Co. v. Staples*, 120 N.C. App. 227, 231, 461 S.E.2d 921, 925, *disc. rev. denied*, 342 N.C. 190, 463 S.E.2d 233 (1995); *see Shook*, 125 N.C. App. at 286, 480 S.E.2d at 707 (appellant's failure to properly assign error on appeal is fatal and his appeal is dismissed). Plaintiff failed to cite to his second assignment of error and failed to specify or argue any error in any conclusions of law within the Commission's opinion and award. Not only did plain-

tiff improperly make assignments of error, but he also failed to properly argue the portions assigned as error. This appeal is not properly before us and should be dismissed.

III. Negligence

Since the majority's opinion reaches the merits of this appeal, I also dissent from the result reached in that opinion.

A. Standard of Review

Our Supreme Court has explained the role of appellate courts in cases appealed from the North Carolina Industrial Commission. The Court ruled, "on appeal, an appellate court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation omitted). Plaintiff did not take exception to any findings of fact, thus limiting our review solely to a question of "whether the Commission's findings of fact justify its conclusions of law and decision." *Fennell*, 145 N.C. App. at 589, 551 S.E.2d at 490 (citation omitted).

After concluding that "[t]here was no negligence on the part of any named Officer, voluntary servant or agent of the State . . . which proximately caused plaintiffs['] injuries," the Commission applied N.C. Gen. Stat. § 143-291 (2003).

> Under [N.C. Gen. Stat. § 143-291], "negligence is determined by the same rules as those applicable to private parties." 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."

Woolard v. N.C. Dept. of Transportation, 93 N.C. App. 214, 217, 377 S.E.2d 267, 269, *cert. denied*, 325 N.C. 230, 381 S.E.2d 782 (1989) (quoting *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988)). I agree with the Commission's conclusion that plaintiff failed to prove the NCDOT breached its duty or that any purported breach of duty by the NCDOT proximately caused the deaths of the Viar sisters.

B. Findings of Fact

The majority's opinion concludes the Commission failed to make adequate findings of fact. Specifically, the majority's opinion suggests several "findings" the Commission should have included to "provide some appropriate context" such as, the NCDOT's annual budget, funding availability, and the degree of harm caused by median accidents. I disagree. As further explained below, I would conclude the Commission's findings adequately support its conclusion that the NCDOT did not negligently cause the death of the Viar sisters.

Additionally, under the Tort Claims Act,

> the burden of proof as to this [negligence] issue was on the plaintiff. Evidence is usually not required in order to establish and justify a finding that a party has failed to prove that which he affirmatively asserts. It usually occurs and is based on the absence or lack of evidence.

Bailey v. Dept. of Mental Health, 2 N.C. App. 645, 651, 163 S.E.2d 652, 656 (1968). Here, the Commission concluded that plaintiff failed to prove negligence by the NCDOT. Following *Bailey*, the majority's opinion's criticism of the lack of findings resulted from plaintiff's failure to meet his burden to prove negligence.

C. Public Duty Doctrine

In its answer to plaintiff's affidavit and claim for damages, the NCDOT asserted the public duty doctrine as a defense. The issue was also raised and argued during oral arguments before this Court. Our Supreme Court has held that the public duty doctrine applies to causes of action under the Tort Claims Act:

> The general common law rule provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals. *Because the governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence for a failure to carry out its statutory duties. Absent a duty, there can be no liability.*

Stone v. N.C. Dept. of Labor, 347 N.C. 473, 482, 495 S.E.2d 711, 716, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998) (internal citations omitted) (emphasis supplied).

The NCDOT possesses the statutory authority to plan, design, locate, construct, and maintain the system of public highways in this

State. N.C. Gen. Stat. § 143B-346 (2003); *Equipment Co. v. Hertz Corp.*, 256 N.C. 277, 123 S.E.2d 802 (1962).

> The [NCDOT] is vested with broad discretion in carrying out its duties and responsibilities with respect to the design and construction of our public highways. The policies of the Board of Transportation and the Department of Transportation and the myriad discretionary decisions made by them as to design and construction are not reviewable by the judiciary "unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse."

Hochheiser v. N.C. Dept. of Transportation, 82 N.C. App. 712, 717-18, 348 S.E.2d 140, 143 (1986), *aff'd*, 321 N.C. 117, 361 S.E.2d 562 (1987) (quoting *Guyton v. North Carolina Board of Transp.*, 30 N.C. App. 87, 90, 226 S.E.2d 175, 177 (1976)).

In deciding whether to install median barriers along certain portions of our state highway and interstate system, the NCDOT must use its discretion, is limited by budget considerations, and must economically coordinate construction projects. Here, the Commission reviewed the NCDOT's decision and the actions taken by the NCDOT to make the portion of Interstate 85 where the accident occurred safer. The Commission concluded the NCDOT's actions were reasonable. The Commission's findings of fact, unchallenged by plaintiff, support this conclusion. Specifically, the Commission found as fact:

16. The task force preparing the [Interstate Across Median Accident Survey] recommended corrective action be delayed [on this stretch of I-85 where this accident occurred] until other projects were constructed unless additional accidents required earlier action because this project was within the physical limits of construction of other projects and because of financial restrictions. Therefore, construction was scheduled late in the programmed seven-year (7) period.

17. In September 1993, it was anticipated that the widening of I-85, including the area in question, would occur within seven (7) years or by 1999.

18. The North Carolina Department of Transportation could not fund and build all twenty-four (24) sites immediately. Decisions were made to install a median barrier at this site and others at the time when future work was done

rather than to install something and have to remove it with the expansion.

. . . .

20. Based upon the 1989 and 1996 versions of the American Association of State Highway and Transportation Roadside Design Guide, the 30[-foot] median fell into the category in which *median barriers for new construction were optional regardless of traffic volume. The guide only requires the need for a barrier be evaluated using the best engineering judgment.* (emphasis supplied).

21. Ellis King [plaintiff's expert witness] did not testify the highway failed to meet standards at the time of construction and admitted that the 30-foot median fell into the optional area of the chart of the Roadway Design Guide upon which he relied in this testimony. Dr. King did not know if the funds were available or what other projects may have been competing for funding. Dr. King indicated a guardrail would not have prevented the initial impact on the other southbound vehicle and that a barrier would have put the Viar vehicle in the path of another southbound vehicle.

. . . .

27. Other projects may be more deserving of immediate attention than the stretch of I-85 in question.

. . . .

31. Funding for the barriers had been allocated in the Transportation Improvement program which covers seven (7) years.

. . . .

34. Expected funding for this widening project did not become available.

. . . .

50. Requests for improvements are referred to the Policy and Programming Group of the North Carolina Department of Transportation under the transportation improvement program. This program has been in place since the 1970s.

51. It is normal that many more requests for improvements are made than there is money to underwrite the requests.

The Commission further found that the section of Interstate 85 where the accident occurred was constructed in the 1950s and that there are no federal guidelines or state regulations requiring periodical review to determine if the median barrier will be required. While no legal authority or engineering guidelines required bringing an older facility up to a new standard or to modify it due to traffic increases, the NCDOT sought to make this portion of Interstate 85 safer by reducing the speed limit from sixty-five miles per hour to fifty-five miles per hour prior to the accident.

The NCDOT did not owe a specific duty to plaintiff and cannot be held liable under the public duty doctrine where the Commission concluded it acted reasonably and within its statutory and discretionary authority.

D. Proximate Cause

In addition to failing to prove the NCDOT owed a specific duty or that it breached any duty, plaintiff has not shown that the NCDOT's failure to erect median barriers proximately caused the death of the Viar sisters.

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Woolard, 93 N.C. App. at 218, 377 S.E.2d at 270 (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)). The evidence shows the accident occurred at night, around 9:00 p.m., and during "extremely heavy rain." The Viar vehicle was traveling south on Interstate 85, when it crossed the center median and collided with a large truck traveling in the northbound lane. Plaintiff offered no evidence tending to show that the Viar sisters could or would have survived the accident had median barriers been in place. Dr. Ellis King, plaintiff's own witness, was qualified as an expert in traffic safety and testified that: (1) guardrails do not always stop vehicles; (2) a barrier could have put the Viar vehicle

back into the path of another southbound vehicle; and (3) interstates without median barriers are still safer than two-lane roads.

Competent evidence presented before the Commission supports its findings of fact and conclusions of law. Presuming plaintiff had successfully shown that the NCDOT owed plaintiff an individualized duty and breached that duty, the Commission correctly concluded that the NCDOT's failure to erect median barriers was not a proximate cause of the death of the Viar sisters.

IV. Conclusion

Plaintiff failed to except to any of the Commission's findings of fact or conclusions of law. These findings are binding upon this Court on appeal. Plaintiff also failed to properly assign error or argue its assignments of error contained in the record in violation of the North Carolina Rules of Appellate Procedure. "Our rules are mandatory, and in fairness to all who come before this Court, they must be enforced uniformly." *Shook*, 125 N.C. App. at 287, 480 S.E.2d at 708. Our Courts have long recognized a strict requirement that appeals should be dismissed for "failure to comply with the rules." *Pruitt v. Wood*, 199 N.C. 788, 792, 156 S.E. 126, 128 (1930); *see In re Lancaster*, 290 N.C. 410, 424, 226 S.E.2d 371, 380 (1976) ("Ordinarily our legal system operates in an adversary mode. One incident of this mode is that only those who properly appeal from the judgment of the trial divisions can get relief in the appellate divisions. This can be a strict requirement."). I dissent from the majority's opinion and vote to dismiss this appeal.

Despite plaintiff's multiple and egregious rule violations, the majority's opinion ignores all violations and reaches the merits of this appeal. The deaths of these two young sisters and the serious injuries to the surviving sister are tragic and engender great sympathy for the family. However, considering our standard of review and the Commission's findings of fact that are binding upon this Court, I vote to affirm the Commission's opinion and award on the merits of the appeal. I respectfully dissent.

IN RE MASHBURN

No. COA02-1547

(Filed 3 February 2004)

1. **Evidence— hearsay—report of abuse—nonhearsay purposes—not used in findings**

Testimony by a county DSS employee about a report containing statements by a child concerning alleged sexual abuse of her by her stepfather did not constitute inadmissible hearsay in a child abuse proceeding against the child's mother and stepfather where the testimony was admitted to explain the origin of the DSS investigation and to rebut the contention that the child's allegations were fabricated. Furthermore, even if testimony by the witness that the alleged acts occurred "multiple times" constituted impermissible hearsay, the admission of this testimony was not prejudicial because the trial court did not rely thereon in making its findings and conclusions.

2. **Evidence— threat to victim—hearsay—other evidence—not prejudicial**

Testimony by an employee of the county DSS about a threat to a child sexual abuse victim if she spoke of the abuse was hearsay, but was not prejudicial because there was other substantial evidence of the abuse and neglect.

3. **Evidence— hearsay—not considered for truth of matter**

A hearsay statement regarding the sexual abuse of a child was not considered for the truth of the matter, but to provide context and history to the DSS interaction with the abuser.

4. **Evidence— hearsay—sexual abuse of another—corroboration**

Testimony by a DSS investigator from another county relating a granddaughter's statements about sexual abuse of her by her grandfather was not inadmissible hearsay but was properly admitted for corroboration in a proceeding for the abuse of the grandfather's stepdaughter by the grandfather and the child's mother.

5. **Evidence— hearsay—medical diagnosis—ordinary course of business**

The testimony of a pediatrician about a child sexual abuse victim was admissible under the medical diagnosis and ordinary course of business exceptions to the hearsay rule.

6. Evidence— hearsay—statements to mental health professional

Statements of child sexual abuse victims to a mental health professional were made for the purpose of diagnosis and treatment and were admissible.

7. Child Abuse and Neglect— sufficiency of evidence

The evidence of neglect and abuse was sufficient to deny a motion to dismiss.

8. Child Abuse and Neglect— dispositional evidence—admitted at adjudication—one set of findings

There was no prejudicial error from the receipt of dispositional reports and testimony during a hearing to adjudicate the abuse and neglect of children. There was substantial evidence upon which the court could conclude that the children were abused and neglected, and the court used one set of findings to support both the adjudication and dispositional orders.

9. Child Abuse and Neglect— expert testimony—credibility of child

Expert testimony about whether sexual abuse was likely to have occurred did not improperly bolster the credibility of the minor child. Neither doctor testified that the abuse in fact occurred or that the child was being truthful, there was no showing that the court did not understand the difference between testimony that symptoms were present and testimony that abuse occurred, and there was no showing that the court thought that the testimony bolstered the child's credibility.

10. Evidence— expert testimony—foundation

There was a proper foundation for medical testimony in a child abuse and neglect case.

Judge TYSON concurring in part and dissenting in part.

Appeal by Margaret and Paul Mashburn from Adjudication and Dispositional Order entered 25 June 2001 by Judge Marvin Pope in District Court, Buncombe County. Heard in the Court of Appeals 9 September 2003.

Peter Wood for Margaret Mashburn.

Paul Pooley for Paul Eugene Mashburn.

Judy N. Rudolph for the Guardian Ad Litem.

John C. Adams for the Department of Social Services.

WYNN, Judge.

This appeal arises from the trial court's order finding two children, a ten-year-old male and a fifteen-year-old female, were abused and neglected by their parents—Margaret Mashburn (natural parent of both children) and Paul Eugene Mashburn (step-parent of the female child and natural parent of the male child). In her appeal, Margaret Mashburn argues the trial court erred by admitting hearsay testimony and denying her motion to dismiss. In his appeal, Paul Mashburn argues the trial court erred by considering dispositional reports and testimony during the adjudication hearing, and admitting improper expert opinion testimony. After careful review, we affirm.

In its Order, the trial court found "that [the female child] disclosed that Paul Mashburn committed a sexual act on her." The trial court further found "that Paul Mashburn denies the sexual abuse of [the female child]; confirmed sexual allegations made in Arkansas to which he pleaded *nolo contendre*[1]; . . .[and] admitted that he used a paddle on the bottoms of [the male child's] feet as a discipline measure" when the child was about five years old. The trial court further found: "When Margaret Mashburn was told of the sexual abuse of [the female child] during a meeting at the Buncombe County Department of Social Services, she slammed her hand down on the table; denied any abuse; and, stated that [the female child] has been lying for years about abuse."

In its factual findings, the trial court fully incorporated the children's child medical examinations, in which Dr. Cynthia Brown opined "that it is highly likely that the [female child] was sexually abused." During one examination, Dr. Brown detected in [the female child] "a bacterial infection that was likely the result of a sexual act [but that] penetration is not required for a vaginal infection such that [the female child] presented."

The medical examination revealed that the male child was "reluctant to have a genital examination, but disclosed that he was spanked with a black paddle [on the bottoms of his feet] by Paul Mashburn."

The trial court also incorporated the report of the children's therapist, Dr. Rusty Harris who testified that "[the male child] . . . is three years developmentally disabled . . . that [he] soils his

1. The Court refused to consider reports regarding the Arkansas plea, but did take note of an additional, unrelated case against Paul Mashburn pending in Yancey County regarding his alleged abuse of his grandchildren.

pants after visits with his mother[2] . . . and that it is not in [his] best interest to be returned to the home because there is no acknowledgment by the parents of wrongdoing in the harsh discipline they inflicted on the child."

As to the female child, Dr. Harris testified, and the trial court found as fact that "[the female child] displays sexually reactive behaviors . . . that it is not in [her] best interest to be returned to the home as Margaret Mashburn does not believe the abuse occurred and cannot protect the child from further abuse by Mr. Mashburn."

Based on these and other facts, the trial court concluded, as a matter of law, that "[the female child] is a physically and sexually abused and neglected child pursuant to N.C.G.S. § 7B-101(1)(15) in that [she] was sexually abused by Paul Mashburn . . . the child's mother was aware of previous allegations of sexual abuse of [the female child] and did not protect the child from further abuse; the child did not receive the proper care and supervision from her mother and lived in an apartment injurious to her welfare due to harsh discipline and sexual abuse."

The Court similarly found as a matter of law that the male child "is a physically abused and neglected child . . . in that; discipline with a paddle on the sole's of a child's feet is most inappropriate and cruel punishment; that he did not receive proper care and supervision from his mother and lived in an environment injurious to his welfare due to harsh discipline by his mother and Paul Mashburn and he lived in a home where his sibling had been sexually abused by Paul Mashburn."

The trial court concluded that since "continuation of the minor children in the home would be contrary to the welfare of the minor children; the children's placement and care are the responsibility of the Buncombe County Department of Social Services," which it relieved of reunification responsibilities for either child with Paul Mashburn and the female child with Margaret Mashburn.

From these factual and legal conclusions and the resulting removal of both children from the care of the custodial parents, Margaret and Paul Mashburn, both parents appeal.

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2. "The trial court found that Ms. Mashburn informed her son, during one visit, that she loved him so much that when she found out that he would not be returning to the home soon, she went into her bedroom, put a gun to her head, and that the only thing that prevented her from being successful was intervention by Paul Mashburn."

I. Margaret Mashburn's Appeal

[1] In her appeal, Margaret Mashburn first argues the trial court erroneously permitted Linda Sweat, Debbie McKinney, Dr. Cynthia Brown and Rusty Harris, Ph.D., to testify about the children's hearsay statements describing instances of sexual abuse, in violation of N.C. Gen. Stat. 8C-1, Rule 802 (providing that the out-of-court statements of a declarant, made for the truth of the matter asserted, are inadmissible hearsay).

Margaret Mashburn first contends the following testimony was improperly admitted over counsel's objection because it contained inadmissible hearsay:

> The report was that the child had allegedly been molested by her stepfather . . . . There were allegations that she might have been pregnant, so I went to the school and interviewed her. She subsequently disclosed to me that she had been molested on a night in November . . . of 2000 . . . . She had woken up during the night to find Paul Mashburn on top of her, his pants down around his knees, her nightgown up around her stomach, and that he was rubbing his genitals against her pubic area.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. However, out of court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Carroll*, 356 N.C. 526, 542, 573 S.E.2d 899, 910 (2002).

The record on appeal shows that Linda Sweat of the Buncombe County DSS, investigates allegations of child abuse by reading abuse and neglect reports and interviewing the parties involved in the report. On March 2, 2001, Ms. Sweat reviewed a report about the children at issue and commenced an investigation into the allegations by interviewing the female child at her school. Thus, while the statements at issue were made by an out-of-court declarant—the female child—such statements would be outside the scope of Rule 802 if offered for a non-hearsay purpose. Therefore, Ms. Sweat's description of the report, containing the female child's description of the stepfather's abuse of her, would not constitute inadmissible hearsay because it explained why the Buncombe County DSS commenced an investigation and was also offered to rebut the implication that the female child fabricated abuse allegations.

Margaret Mashburn also contends the following testimony elicited from Ms. Sweat was improperly admitted because it contained inadmissible hearsay:

> Q: All right. Did that report indicate how often the alleged acts occurred?
>
> A: No, but in the course of the investigation I found that it happened multiple times.
>
> Q: All right. Did your investigation reveal whether or not either minor child had been threatened if they disclosed these events?
>
> A: Yes.
>
> Q: All right. What was the nature of that?
>
> A: What I understood was that [the female child] was told that she would be beaten to death . . . Paul Mashburn told her that.

As to this testimony, we initially note that the trial court's findings of fact and conclusions of law show that the trial court did not include any references to multiple instances of sexual abuse. Thus, even assuming the "multiple times" testimony constituted impermissible hearsay, no prejudicial error was committed as the trial court did not rely upon such statements in rendering its findings of fact and conclusions of law.

[2] However, in Finding of Fact 4, the trial court stated "Mr. Mashburn later told [the female child] that if she ever told about the incident he would beat her to death." Our review of the transcript indicates that Ms. Sweat learned this information during the course of her investigation and not during the initial interview that lead to the investigation. Moreover, there is no indication that this statement was entered for anything other than for the truth of the matter asserted. After careful analysis, we conclude that this testimony was not admissible under any hearsay exceptions. Accordingly, it was error for the trial court to admit this statement and to rely upon it in rendering its Findings of fact and conclusions of law. However, because the allegations of abuse and neglect were supported by substantial evidence, we conclude the erroneous admission of Ms. Sweat's testimony was harmless.

[3] In her final argument regarding Ms. Sweat, Margaret Mashburn challenges the following testimony regarding Paul Mashburn's granddaughters:

> One of Rachel's—or both of Rachel's daughters, who are five and six years old, disclosed sexual—a lot of sexual activity. The youngest one also disclosed specifically that she often is tickled by her grandfather.
>
> Q: Who is her grandfather?
>
> A: Paul Mashburn. And she demonstrated on a doll that she is tickled in the crotch.

After reviewing the record and transcript, we conclude the trial court did not consider this testimony for the truth of the matter asserted. Indeed, Finding of Fact 5 stated:

> That the Court did not consider records from Arkansas and Oklahoma as submitted by the Buncombe County Department of Social Services, but will find that a pending case is open with the North Carolina Yancey County Department of Social Services on [the] grandchildren of Paul Mashburn. [One granddaughter] disclosed sexualized behaviors at school; [the other granddaughter] disclosed the "crotch tickle" whereby Mr. Mashburn tickled her vaginal area; the allegations from [one granddaughter] were substantiated and the investigation on [the other granddaughter] continues. The Buncombe County Department of Social Services has had numerous reports on Paul Mashburn between 1994 and 1999, but none were substantiated.

As the findings of fact indicate Ms. Sweat's testimony regarding Paul Mashburn's alleged abuse of his granddaughters was not considered for the truth of the matter asserted; but rather, to provide the history and context of the Department of Social Service's interaction with Paul Mashburn, we conclude it was not error for the trial court to admit such testimony.

[4] In her next argument, Margaret Mashburn contends the following testimony from Ms. Debbie McKinney constituted inadmissible hearsay:

> In an interview with [a granddaughter] she reported that she liked to go to her grandparents' home, that she liked to sit in Grandpa's chair and that she liked to sit in Grandpa's lap, and she liked it when he tickled her . . . She described the tickling as starting with her chest area and she moved down towards her vaginal area.

Ms. McKinney, of the Yancey County DSS, investigates neglect and abuse allegations. Yancey County opened an investigation regarding abuse allegations against Paul Mashburn around the same time as the beginning of the Buncombe County investigation. Our review of the transcript indicates Ms. McKinney's testimony related to the nature of Yancey County's investigation, which was not yet complete. Such testimony was not entered for the truth of the matter asserted; but rather, served as corroboration of Ms. Sweat's testimony regarding Paul Mashburn's history with the Department of Social Services. Indeed, during Ms. Sweat's testimony regarding the Yancey County investigation, Margaret Mashburn's counsel objected to its admissibility. In response, the attorney for DSS indicated they would be offering Ms. McKinney's testimony as corroboration. Accordingly, the trial court did not err in admitting Ms. McKinney's testimony.

[5] Margaret Mashburn next contends the trial court erred by allowing the hearsay testimony of Dr. Cynthia Brown, an expert pediatrician.[3] Dr. Brown performed a child medical exam on the female child on March 13, 2001. As part of the child exam in cases of abuse, the female child was also interviewed by "the nurse in our program who has been trained to do these medical histories." The Health Center maintains a transcript of such interviews in the ordinary course of business. During direct examination, Dr. Brown confirmed that before the female child's interview:

> [I]t is explained to the child that it is important for the physician to know everything about the child. We also document their understanding of that concept, their understanding of the difference between telling the truth and telling lies, so that they understand that what they tell us will aid us in doing our physical examination.

Over objections, Dr. Brown recounted a portion of the female child's interview:

> [The female child] disclosed that her stepfather would come into her room and get on top of her and move around. She said the first time she recalled this happening she was around seven. That was right before she moved up there and she knew she was about to turn eight. She disclosed that he also had touched her breasts. She recalled that the last time this had happened had been in the previous November. She expressed concern about being pregnant or having infections. She also noted that when this happened the

3. Both parties stipulated that Dr. Brown was an expert in pediatric medicine.

> last time she felt wetness and pointed to her—above her genital area down to between her thighs. She also noted that it hurt to pee after this event. She also disclosed that she had been tested for this previously when she was younger and that the test was negative, and that since that time her mother had not believed her about any of this.

Our review of Dr. Brown's testimony reveals that it was admissible under the medical diagnosis exception to the rule against hearsay. In *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663, (2000) our Supreme Court held that statements made for the purposes of medical diagnosis and treatment can be admissible even if hearsay under Rule 803(4) if two inquiries are satisfied:

> First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

Hinnant, 351 N.C. at 289, 523 S.E.2d at 670-71. "Some factors to consider in determining whether a child had the requisite intent are whether an adult explained to the child the need for treatment and the importance of truthfulness; with whom and under what circumstances the declarant was speaking; the setting of the interview; and the nature of the questions." *State v. Bates*, 140 N.C. App. 743, 745, 538 S.E.2d 597, 599 (2000).

In this case, the statements made for the purpose of medical treatment were reasonably related to that treatment. When asked if "she knew why she was here," the female child answered: "Because I was molested by my stepdad, to see if I've been messed with." The female child discussed her abuse in a clear effort to obtain a diagnosis corroborating that she had indeed been "messed with." Her statements concerning her step father "on top of her" explained her concern about pregnancy and are reasonably related to procuring testing for pregnancy and sexually transmitted diseases. Thus, we uphold the trial court's admission of these statements under the medical diagnosis exception to the hearsay rule.

Nonetheless, Margaret Mashburn argues that "the most compelling reason for disallowing the statements is that the statements were not made to the witness." We are not persuaded. While Dr.

Brown did not personally conduct the interviews of the children, and she testified to the content of both these interviews, DSS offered and this Court accepts that these statements are admissible under the ordinary course of business hearsay exception. *In re Smith*, 56 N.C. App. 142, 148, 287 S.E.2d 440, 444 (1982) ("While it is true that the witnesses had no firsthand knowledge . . . when they assumed responsibility of the case, each had familiarized herself with the case history of the client based on the records kept by the department of social services . . . admissible under the business records exception to the hearsay rule.")

[6] Margaret Mashburn next argues that the trial court should have excluded the testimony of Dr. Rusty Harris, a mental health professional. Dr. Harris testified that the male child "said he was struck with an object, sometimes with a fist, like a knuckle thing, sometimes just popped on the head." Dr. Harris further testified that the female child said Paul Mashburn's abuse of her "went from digital penetration until she says somewhere around ten or eleven that there was intercourse."

Again, the children's statements to Dr. Harris were made for the purpose of diagnosis and treatment. In fact, Dr. Harris diagnosed the children with a myriad of mental health problems, including borderline post traumatic stress syndrome and developmental delay. As a result, he recommended a course of treatment for the juveniles. In short, because the medical diagnosis exception to the hearsay rule applies to the statements of mental health expert Dr. Harris, we uphold the trial court's admission of Dr. Harris' statements.

Thus, with the exception of Ms. Sweat's testimony regarding Paul Mashburn's threat against the female child, we conclude the trial court did not err in admitting Ms. Sweat's, Ms. McKinney's, Dr. Brown's and Dr. Harris's testimony regarding statements made by the minor children. As to the erroneous admission of the threat, we conclude the error was non-prejudicial and does not warrant a new trial. The testimony of Dr. Brown and Dr. Harris provided sufficient evidence of child abuse.

[7] In her second argument on appeal, Margaret Mashburn contends the trial court erred by denying her motion to dismiss at the close of evidence. We disagree. "In testing the sufficiency of the evidence at the close of . . . evidence, the standard is whether there is substantial evidence to support the allegations of the petition, viewing the evidence in the light most favorable to petitioner, and giving petitioner

the benefit of every reasonable inference to be drawn from the evidence." *In re Cusson*, 43 N.C. App. 333, 335, 258 S.E.2d 858, 860 (1979). "The test is whether there is substantial evidence to support the petitioner's allegations." *In re Gleisner*, 141 N.C. App. 475, 478, 539 S.E.2d 362, 364 (2000).

In this case, the record contains evidence supporting the trial court's denial of the motion to dismiss. For example, from the evidence in the child medical and psychological examinations, one could reasonably infer that abuse caused the male child's extreme, unnatural fear of genital exams and scoldings. Likewise, the female child's confusion about what constitutes sex and her fear of sexually transmitted diseases, as well the physical presence of a vaginal bacterial infection support an inference that the female child was sexually abused by her father and neglected by her mother. Moreover, Margaret Mashburn admittedly knew Paul Mashburn punished the male child by paddling him on the bottom of his feet and she knew about her husband's alleged sexual abuses of her daughter and his grandchildren. Nonetheless, the record shows that she denied that the abuse had occurred and stated that the female child had been lying. In light of the evidence supporting the trial court's judgment, we uphold the trial court's denial of her motion to dismiss.

II. Paul Mashburn's Appeal

[8] In his appeal, Paul Mashburn first argues that the trial court committed prejudicial error by receiving and considering dispositional reports and testimony during the adjudication hearing, in contravention of N.C. Gen. Stat. § 7B-808. We disagree.

Paul Mashburn contends the trial court received testimony of a dispositional nature during the adjudicatory phase of the proceedings. In particular, Paul Mashburn indicates that certain testimony from Dr. Brown, Dr. Harris and Ms. Harrison was related to the best interests of the minor children and not whether the children were abused or neglected as defined by statute. While we conclude that it was improper for the trial court to consider such testimony during adjudication and to incorporate the testimony into its findings of fact, we conclude Paul Mashburn has not demonstrated the trial court used the testimony for purposes other than determining an appropriate disposition. *See In re Barkley*, 61 N.C. App. 267, 271, 300 S.E.2d 713, 716 (1983) (indicating that it must be shown that the trial court considered dispositional evidence for purposes other than determining an appropriate disposition.)

First, in this case, there was substantial evidence upon which the trial court could conclude the minor children were abused and neglected. Second, in the judgment, the trial court rendered one set of findings of fact. Thereafter, in the same judgment, the trial court rendered its adjudicatory and dispositional conclusions of law. Thus, the findings of fact were used to support both the adjudication and dispositional orders. Accordingly, we conclude the trial court did not improperly consider dispositional evidence in determining whether the children were abused and neglected.

[9] Paul Mashburn next argues that the trial court committed prejudicial error by allowing expert opinion testimony, in contravention of N.C. Gen. Stat. § 8C-1, Rule 702. Specifically, Mr. Mashburn contends the trial court allowed Dr. Rusty Harris and Dr. Cynthia Brown to provide unreliable and improper expert opinion testimony to establish the credibility of the minor child. We disagree.

Defendant relies upon our Supreme Court's opinion in *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) which held: "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility."

At the hearing in this case, Dr. Brown, a qualified expert in pediatric medicine, stated: "It's my opinion that she [the female child] is highly likely to have been a victim of child sexual abuse." As to statements provided by Dr. Harris, although Defendant contends Dr. Harris stated he clinically believed the female child's allegations were truthful, our review of the record does not reveal such a statement. Thus, neither doctor testified sexual abuse *in fact* occurred nor stated the female child was being truthful.

Moreover, in this Court's opinion in *In re Morales*, 159 N.C. App. 429, 433-34, 583 S.E.2d 692, 695 (2003) we stated:

> In a jury trial, the distinction between an expert witness' testifying (a) that sexual abuse in fact occurred or (b) that a victim has symptoms consistent with sexual abuse is critical. A jury could well be improperly swayed by the expert's endorsement of the victim's credibility. In a bench trial, however, we can presume, unless an appellant shows otherwise, that the trial court understood the distinction and did not improperly rely upon an expert witness' assessment of credibility.

In this case, Mr. Mashburn has not argued the trial court misunderstood the distinction and our review of the trial court's order indicates that the trial court did not treat the expert testimony as an endorsement of the female child's credibility. Thus, even assuming the expert testimony was an impermissible endorsement of the female child's credibility, Mr. Mashburn has not shown the trial court considered the testimony to bolster the female child's credibility.

[10] Mr. Mashburn also contends neither Dr. Harris nor Dr. Brown had a proper foundation for their opinions. We disagree. In rendering the opinion that the female child was "highly likely to have been a victim of child sexual abuse," the record indicates Dr. Brown considered evidence showing that the child had been physically abused and had contracted the vaginal bacterial infection gardenorala vaginalis. While it is true that the infection may be contracted by means other than sexual contact, Dr. Brown testified that this infection is "seen mostly as a result of sexual activity" and could be transmitted by "genital-to-genital contact without penetration." Moreover, Dr. Brown testified that in forty percent of the examinations after a perpetrator had confessed to penetration, the child still had a completely normal genital exam. Accordingly, we conclude Dr. Brown had a proper foundation upon which to render her opinion.

Similarly, we find Dr. Harris's testimony unproblematic. Dr. Harris had seen the female child for eighteen therapy sessions, which included individual, family and group therapy. Dr. Harris also testified that due to the sexual reactivity issues in the female child's case, a female therapist worked with the female child in group and several individual sessions. In total, Dr. Harris was personally involved in 14 out of 20 hours of therapeutic services.

Moreover, even assuming Dr. Harris testified he clinically believed the female child was truthful in her allegations, the trial court did not rely upon such an opinion in its order. Finding of Fact 8 which addresses Dr. Harris's testimony merely recites the number of therapy sessions, disclosures made by the female child in therapy, and his recommendations for the female child's treatment. Accordingly, we hold the trial court did not erroneously admit the expert opinions of Dr. Harris and Dr. Brown.

Affirmed.

Judge LEVINSON concurs in the result only.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part and dissenting in part.

I concur in affirming the trial court's order regarding Mr. Mashburn. I respectfully dissent from the majority's holding regarding Mrs. Mashburn. No evidence was presented to show that Mrs. Mashburn abused or neglected her children.

Mrs. Mashburn's parental rights are separate and distinct from those of Mr. Mashburn. The trial court erred by considering evidence of Mr. Mashburn's abuse and neglect to determine whether Mrs. Mashburn abused or neglected her children.

I. Hearsay Evidence

Mrs. Mashburn contends the trial court erred in admitting hearsay evidence regarding the instances of sexual abuse. I note that Mr. Mashburn does not argue on appeal that the trial court erred in admitting this testimony. Appellate review is limited to those assignments of error set out in the record on appeal and properly presented and discussed in the party's brief. Questions not properly raised and presented are deemed abandoned. *See* N.C.R. App. P. 10(a) (2003); N.C.R. App. P. 28(a) (2003); *see also In re Faircloth*, 153 N.C. App. 565, 576, 571 S.E.2d 65, 73 (2002).

Rule 801(c) defines hearsay 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." N.C.R. Evid. 801(c) (2003). Hearsay is inadmissible, unless it falls under an exception provided by statute or the North Carolina Rules of Evidence. N.C.R. Evid. 802 (2003).

A. Statements to Buncombe County and Yancey County DSS

Mrs. Mashburn contends the trial court erred by allowing Buncombe County DSS employee Linda Sweat to testify regarding specific instances of sexual abuse to the female child. Ms. Sweat received a report of abuse and neglect and began investigating the substantive matter of this report. She was allowed to testify, over Mrs. Mashburn's objection, about the contents of the report that she used to begin her investigation:

> The report was that the child had allegedly been molested by her stepfather. There were allegations that she might have been preg-

> nant, so I went to the school and interviewed her. She subsequently disclosed to me—that she had been molested . . . .

The majority's holding concludes that this testimony was offered for a non-hearsay purpose to explain why Buncombe County DSS began an investigation and to rebut the implication that the female child had fabricated the abuse allegations. I disagree. The report did not contain the female child's description of the stepfather's abuse as the majority's holding concludes. Ms. Sweat testified that "[the female child] had woken up during the night to find Paul Mashburn on top of her . . . rubbing his genitals against her pubic area." The trial transcript shows that Ms. Sweat did not learn this information regarding the alleged act until after she received the report, went to the school, and interviewed the female child. Ms. Sweat's testimony describing the sexual act that the female child disclosed during the investigation was offered to prove the truth of the matter asserted—that the alleged sexual abuse did occur. The trial court erred in admitting this testimony against Mrs. Mashburn.

Mrs. Mashburn also assigns error to the trial court allowing Ms. Sweat to testify, over Mrs. Mashburn's objection, that the female child "was told that she would be beaten to death . . . . Paul Mashburn told her that." The majority's holding properly recognizes that this testimony was offered for the truth of the matter asserted and is not admissible under any hearsay exceptions. The majority's holding concludes, however, that it was harmless error to admit the proffered testimony. I disagree. It was prejudicial against Mrs. Mashburn for the trial court to admit and consider this testimony. Although she is not implicated by this hearsay, the trial court did not exclude this testimony when it ruled on Mrs. Mashburn's parental rights.

Mrs. Mashburn also asserts prejudice in the trial court's error of allowing Ms. Sweat to testify regarding alleged sexual abuse by Mr. Mashburn to his granddaughters:

> [B]oth of [Paul Mashburn's grandchildren], who are five and six years old, disclosed sexual—a lot of sexual activity. The youngest one also disclosed specifically that she often is tickled [in the crotch] by her grandfather.

The majority's holding concludes the trial court did not consider this testimony for the truth of the matter asserted, but rather to show the history and context of DSS's interaction with Mr. Mashburn. The majority's holding also concludes that it was not error for Ms. Debbie

McKinney, with Yancey County DSS, to testify regarding the same sexual abuse allegations against Mr. Mashburn because Ms. McKinney's testimony was offered to corroborate Ms. Sweat's testimony. Bootstrapping hearsay upon hearsay is inadmissible and constitutes error.

In finding of fact number five, the trial court indicated that it considered the substance of the testimony and found "that a pending case is open with the North Carolina Yancey County Department of Social Services on [grandchildren of Paul Mashburn]. [One granddaughter] disclosed sexualized behaviors at school; [another granddaughter] disclosed the 'crotch tickle' whereby Mr. Mashburn tickled her vaginal area . . . ." The substance of Ms. McKinney's testimony regarding the grandchildren's statements was offered to prove the truth of the matter asserted. This testimony does not fall within any hearsay exception to be admitted or considered against Mrs. Mashburn.

The trial court erred in considering this hearsay testimony to find abuse or neglect by Mrs. Mashburn. Ms. Sweat's testimony was not offered to show the history and context of DSS interaction. Ms. McKinney's testimony was not offered to corroborate the "history and context" of DSS's interaction with Mr. Mashburn and does not show abuse or neglect by Mrs. Mashburn.

B. Statements to Dr. Cynthia Brown

Mrs. Mashburn argues the trial court erred in allowing Dr. Cynthia Brown ("Dr. Brown") to testify that the female child "disclosed that she had been tested for [sexual abuse] previously when she was younger and that the test was negative, and that since that time her mother had not believed her about any of this."

The majority's holding concludes this testimony is admissible under the medical diagnosis exception to the rule against hearsay. I disagree. "The veracity of the declarant's statements to the physician is less certain where the statements need not have been made for purposes of promoting treatment or facilitating diagnosis in preparation for treatment." *State v. Hinnant*, 351 N.C. 277, 286, 523 S.E.2d 663, 669 (2000) (quoting *Morgan v. Foretich*, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., concurring in part and dissenting in part)). Further, "[i]f the declarant's statements are not pertinent to medical diagnosis, the declarant has no treatment-based motivation to be truthful." *Hinnant*, 351 N.C. at 289, 523 S.E.2d at 670.

Dr. Brown's statement, "since that time her mother had not believed her" was not "reasonably pertinent to medical diagnosis or treatment." *Id.* at 288, 523 S.E.2d at 670. The trial court erred by considering Dr. Brown's statement regarding the female child's statements about what Mrs. Mashburn "believed." This inadmissible hearsay was blatantly prejudicial and is the sole "evidence" of neglect by Mrs. Mashburn.

I concur in the majority's resolution of the other assignments of error as they relate to Mr. Mashburn. As it related to Mrs. Mashburn, I would hold that the trial court erred in: (1) permitting and considering testimony concerning the female child's statements and Mr. Mashburn's statements to DSS, (2) considering hearsay evidence of Mr. Mashburn's alleged abuse to his grandchildren, and (3) allowing Dr. Brown's testimony of the female child's hearsay statement regarding what Mrs. Mashburn "believed."

II. Motion to Dismiss

Mrs. Mashburn contends the trial court erred in denying her motion to dismiss at the close of evidence. I conclude there was no evidence properly admitted to support a finding or conclusion of abuse or neglect to either the female or male child by Mrs. Mashburn. "Whether a child is neglected or abused is a conclusion of law." *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999). Abuse or neglect must be proven by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2003). 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. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2003). Our Courts require a showing of some physical, mental, or emotion impairment caused by the parents' failure to provide proper care, supervision, or discipline before adjudicating a juvenile neglected. *In re Stumbo*, 357 N.C. 279, 283, 582

S.E.2d 255, 258 (2003) (citation omitted). "Our review of the numerous cases where 'neglect' or a 'neglected juvenile' has been found shows that the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *Id.*

An abused juvenile is:

Any juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;

d. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first-degree rape, as provided in G.S. 14-27.2; second degree rape as provided in G.S. 14-27.3; first-degree sexual offense, as provided in G.S. 14-27.4; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178 and G.S. 14-179; preparation of obscene photographs, slides, or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1, regardless of the age of the parties;

e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others; or

f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

N.C. Gen. Stat. § 7B-101(1) (2003).

Here, DSS failed to produce any properly admitted evidence that Mrs. Mashburn abused or neglected either of her children. No evidence showed that Mrs. Mashburn was aware of, participated in, or condoned the abuse. Instead, evidence showed that the female child had previously exaggerated reports of sexual abuse and that she often lied as a result of her personality disorder. Upon her daughter's allegation of sexual abuse, Mrs. Mashburn immediately responded by taking her daughter to a physician and disclosed the allegation.

A medical examination of the female child showed no physical evidence of abuse, other than a vaginal infection often present in women who are not sexually active. A medical examination of the male child failed to disclose any physical evidence of abuse. Mrs. Mashburn testified that her daughter had come to her with reports of sexual abuse only one time previously. Mrs. Mashburn immediately took her daughter to be tested and treated. The report was negative and the daughter informed Mrs. Mashburn that she had lied about the incident. Mrs. Mashburn testified that she had never seen Mr. Mashburn hit the male child on his feet or engage in any inappropriate discipline of the children. She also testified that after either child was disciplined by Mr. Mashburn, she would immediately check the children for injury. Mrs. Mashburn did not neglect or abuse either of her children. She acted as any responsible parent would have acted. Mrs. Mashburn is losing her children solely because of Mr. Mashburn's actions and being considered "guilty" by association.

The evidence failed to show any abuse of or neglect by Mrs. Mashburn to her children. The evidence indicated Mr. Mashburn was the only perpetrator and that Mrs. Mashburn had no knowledge of his abusive practices. The trial court erred by failing to dismiss the petition against Mrs. Mashburn.

III. Separate Adjudication

Neither the trial court nor the majority's opinion examines the evidence separately for each parent. A fatal flaw in the trial court's order is its failure to make separate findings of fact and conclusions of law for Mr. Mashburn and Mrs. Mashburn during the adjudication stage. N.C. Gen. Stat. § 7B-807 (2003) requires that "[t]he adjudicatory order shall . . . contain appropriate findings of fact and conclusions of law."

The adjudicatory order lists the findings of fact, including the erroneous findings based on inadmissible hearsay discussed above, and then makes separate conclusions of law for the female and male child. The trial court does not clearly state what evidence or facts it relied on to adjudicate whether Mrs. Mashburn abused or neglected her children. The trial court erred by using evidence of Mr. Mashburn's abuse or neglect to find that Mrs. Mashburn abused and neglected either her daughter or son.

Our Courts have long recognized the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000)). Here, the trial court violated Mrs. Mashburn's parental and constitutional rights by considering evidence of Mr. Mashburn's abuse and neglect erroneously admitted against Mrs. Mashburn and concluding that she abused and neglected her children. Each parent holds separate and distinct parental rights and is entitled to a separate adjudication. Evidence of one parent's abuse or neglect cannot be bootstrapped to support allegations against the other parent without showing complicity with or other independent clear and convincing evidence of abuse or neglect by the other parent.

IV. Conclusion

We all agree the trial court erred in admitting and considering hearsay evidence regarding allegations of Mr. Mashburn's abuse and neglect. I conclude Mrs. Mashburn's parental rights were prejudiced by allowing this testimony into evidence. The trial court erred by failing to dismiss the petition against Mrs. Mashburn on her motion. I vote to reverse the trial court as to the charges of abuse and neglect by Mrs. Mashburn on her two children. I respectfully dissent.

ASSOCIATED INDUSTRIAL CONTRACTORS, INC., PLAINTIFF v.
FLEMING ENGINEERING, INC., DEFENDANT

No. COA02-1720

(Filed 3 February 2004)

1. Negligence— surveying—standard of care

Plaintiff's offer of testimony of a surveyor with ten years experience who was employed by defendant was sufficient to

establish the standard of care in a claim for negligent surveying. Moreover, expert testimony is not required where the trier of fact is able to decide the issues based on common knowledge and experience.

2. Negligence— surveying—judicial notice of statutes

Judicial notice of statutes was not error in a bench trial on a negligent surveying claim where the findings indicate that the court viewed the statutes as setting forth the nature of defendant's profession. Any error in regarding certain statutes as setting a specific standard of care was harmless because plaintiff presented sufficient evidence of the standard of care and because the standard of care was within the common knowledge and experience of the trial court.

3. Negligence— surveyors—evidence sufficient

There was sufficient evidence to find a surveyor negligent in a bench trial, despite evidence to the contrary.

Judge EAGLES dissenting.

Appeal by defendant from judgment entered 31 May 2002 and order entered 17 June 2002 by Judge John O. Craig, III, in Rockingham County Superior Court. Heard in the Court of Appeals 13 October 2003.

Parker, Poe, Adams & Bernstein, L.L.P., by R. Bruce Thompson, II, and Heather N. Oakley, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Allen C. Smith and C.J. Childers, for defendant-appellant.

GEER, Judge.

Defendant Fleming Engineering, Inc. ("Fleming"), a surveying company, appeals from the trial court's judgment following a bench trial in favor of plaintiff Associated Industrial Contractors, Inc. ("AIC"), a general contractor that hired defendant in connection with the construction of a building addition. It was Fleming's responsibility to perform a survey that would pinpoint the location for columns forming the framework of the addition in order to ensure that the addition's walls would be completely square. After Fleming completed the survey and AIC began construction, AIC discovered that the line of columns forming the south wall of the structure was not

parallel to the north wall, but rather was skewed. The central issue at trial was whether Fleming negligently misidentified the location for the columns or whether AIC improperly placed the columns after the center points for the columns had been correctly set by Fleming. We hold that the record contains sufficient evidence to support the trial court's determination that Fleming was the negligent party.

Honda hired AIC to build an addition to the west of an existing building at its facility in Swepsonville, North Carolina. Because an overhead crane needed to travel on rails from the existing building through the addition, the new structure (approximately 80 feet wide by 120 feet long) had to be perfectly square with the main building. The plans for the addition called for ten columns, five on the north side of the addition and five on the south side. Each column was to be held in place by a base plate with anchor bolts that had been lowered into a footing. Footings already existed for the two columns closest to the main building, but the location of each of the remaining eight columns needed to be determined by surveying.

AIC decided that it needed to hire a professional surveying firm to locate the columns because the acceptable tolerances for the columns were so tight as a result of the column's base plate design and the crane running from the main building into the addition. AIC supervisors had determined that each column could be no more than one-eighth of an inch out of alignment. AIC employees did not believe that they could use conventional methods to survey the location of the columns with the necessary accuracy because there were several existing buildings closely surrounding the construction site and because constant wind interfered with their attempts to identify the column center points with a plumb bob, one of the traditional techniques. AIC concluded that a professional surveyor, using electronic devices, was needed to ensure accurate placement of the columns.

In late December 2000, AIC hired Fleming to perform the survey. Fleming surveyor Johnny Register, Jr. met with AIC construction superintendent Lanny Joyce to review the architectural plans and AIC's requirements, including the location and distance between the columns and the need to have the building precisely square.

AIC called Mr. Register as a witness and he described in detail how he performed the survey. He did not work alone, but rather brought another Fleming employee, John Davis, with him to act as his "instrument man." They worked with an electronic transit, a device equipped with a scope that has a zoom focus allowing the person

operating it to see string lines on a plumb bob a "couple of hundred feet away[.]" In addition, it has an LCD screen that reports the angle that the person has rotated and distances that are being measured. Mr. Davis operated the electronic transit while Mr. Register marked with nails both the center points for the columns and offset points. According to Mr. Register, they were supposed to ensure that each of the column center points was on a straight 180° angle line extending out from established points on the existing building. The north and south lines of column center points were supposed to be parallel and the corners of the addition were required to be 90° angles.

Mr. Davis operated the electronic transit to check the distances for the placement of each nail at a center point and to check the necessary angles. Mr. Register then placed the nails; in the process, he used a plumb bob with his body blocking the wind. Although Mr. Register testified that Mr. Davis was the "instrument man," Mr. Register reported that he "did look back through the instrument to confirm straight lines through most of these points."

With respect to the offset points, Mr. Register knew that AIC would be required to excavate the footers for the columns and, as a result, remove the nails at the center points. The purpose of the offset points was to enable AIC to accurately recreate the center points originally set by the Fleming survey. The parties do not dispute that this is a conventional approach. They do dispute, however, whether Mr. Register, after completing the survey, recommended to AIC that it have a second survey performed to ensure that the center points were properly restored.

Mr. Register finished surveying the project on 22 December 2000. When AIC construction superintendent Joyce attempted to check Mr. Register's work by using a tape measure, it appeared to be accurate although he was unable to complete his check because excavation equipment had been parked along one of the lines.

In order to relocate the center points after the footers had been dug, AIC employees attached nylon strings to the offset point nails and pulled them taut. The point where the strings intersected indicated the center point for each column. On the south column line, AIC employees successfully completed the footers for three columns and recreated the center points using the offset points that Mr. Register had specified. When they started work on the fourth column, however, they realized that part of a concrete slab was extending into the area for the footer and would have to be removed. The "batter

board" containing the offset nail set by Mr. Register was attached to the concrete slab and had to be moved. The "batter board" was moved back and a string attached to the original offset nail was extended back to the new "batter board" using a technique, according to AIC employees, designed to maintain the proper alignment so that AIC would be able to recreate the center point for the final column accurately. The AIC employee who performed the work described the technique as "the old way of doing it, but it's still the best way." AIC's manager for the Honda project, Scott Flanigan, claimed, "We move [batter boards] all the time. . . . It is not [a] significant . . . event for them to call and say, Scott, we're moving a batter board."

After AIC had installed the columns and crossbeams, AIC began erecting joists on top of the columns. While setting the first joist, AIC discovered that the column at the southwest corner of the addition was 5¾ inches out of line so that the joist extended beyond the column. AIC then checked each of the remaining columns. They found that the columns along the north side of the addition were all set correctly, but that four columns on the south line were off: one column by 5¾ inches, one by 4⅜ inches, one by 2¾ inches, and one by 1¾ inches. As a result, as Mr. Register admitted, the south line of columns "was in a straight line at a skew . . . ." The building was not square. Plaintiff had to reposition the columns at a cost of $23,000.00.

AIC sued Fleming alleging that Fleming negligently performed its survey and that, as a proximate result of Fleming's negligence, AIC had to incur the cost of replacing the columns in the proper position. Defendant counterclaimed for the amount of $436.25 that it alleged AIC owed for completion of the survey.

Following a bench trial, the trial court found "by the greater weight of the evidence, that the Defendant miscalculated the location of the columns along the south wall" and that this failure proximately caused damages to plaintiff AIC in the amount of $23,000.00. The court deducted the amount of $436.00 owed by AIC to Fleming from the award and entered judgment in the amount of $22,564.00. Fleming has appealed from that judgment.

I

[1] We first address whether the trial court should have granted defendant's Rule 41(b) motion to dismiss based on AIC's failure to present expert testimony as to the standard of care applicable to

Fleming. Generally, a surveyor or civil engineer is required to exercise "that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances, and if he fails in this respect and his negligence causes injury, he will be liable for that injury." *Davidson & Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 668, 255 S.E.2d 580, 585, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979). AIC was thus required to prove that Fleming failed to exercise that degree of care which a surveyor of ordinary skill and prudence would exercise under similar circumstances.

The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit "is to see if this defendant's actions 'lived up' to that standard . . . ." *Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570 (1994), *aff'd per curiam*, 340 N.C. 102, 455 S.E.2d 160 (1995). Ordinarily, expert testimony is required to establish the standard of care. *Bailey v. Jones*, 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993).

Here, plaintiff did not tender any witnesses as experts. Plaintiff did, however, offer the testimony of Mr. Register, Fleming's surveyor with ten years of surveying experience. Mr. Register described in great detail what Fleming was hired to do and how he and his assistant were supposed to accomplish their responsibilities. He explained how they were supposed to use the electronic transit device; each step that the operator of the device, Mr. Davis, was required to take; what each step was expected to achieve; what they could do to double-check their results; and what the result should have been if they performed as anticipated. This testimony was sufficient to establish the standard of care. *State v. Linney*, 138 N.C. App. 169, 183, 531 S.E.2d 245, 256 ("whether or not a witness has been formally tendered as an expert is not controlling" if the witness may appropriately be considered an expert based on qualifications), *disc. review dismissed and appeal dismissed*, 352 N.C. 595, 545 S.E.2d 214 (2000). *See also Noell v. Kosanin*, 119 N.C. App. 191, 196, 457 S.E.2d 742, 745 (1995) (holding expert testimony not required to defeat summary judgment in medical malpractice suit because defendant doctor's admissions were sufficient to establish the standard of care).

Moreover, expert testimony " 'is not required . . . to establish the standard of care, failure to comply with the standard of care, or prox-

imate cause, in situations where [the trier of fact], based on its common knowledge and experience, is able to decide those issues.' " *Erler v. AON Risks Servs., Inc.*, 141 N.C. App. 312, 318, 540 S.E.2d 65, 69 (2000) (quoting *Little*, 114 N.C. App. at 567, 442 S.E.2d at 570-71), *disc. review denied*, 548 S.E.2d 738 (2001). Defendant does not argue that complexity precludes application of the common knowledge exception. Instead, defendant urges that the exception should only apply when professional conduct is "grossly negligent." This Court has previously held, however, that the "common knowledge" exception applies either when (1) the professional's conduct is grossly negligent; or (2) the actions are " 'of such a nature that the common knowledge of laypersons is sufficient to find the standard of care required, a departure therefrom, or proximate causation.' " *Little*, 114 N.C. App. at 567-68, 442 S.E.2d at 571 (quoting *Bailey*, 112 N.C. App. at 387, 435 S.E.2d at 792).

While we have not located any North Carolina decisions that present circumstances similar to this case, other jurisdictions confronted with analogous facts have applied the "common knowledge" exception. In a case that mirrors this one, the Supreme Court of Nevada held that expert testimony was not necessary to establish the standard of care required of a surveyor hired to pinpoint the location of caissons that were to form the foundational support for an addition to a hotel. *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982) (per curiam). After the caissons were drilled, it was discovered that several had been incorrectly placed and the plaintiff had to reposition them. The Nevada Supreme Court noted that the surveyor was "provided plans and specifications that reflected the location and dimensions of the caissons" and that the survey "emanated from existing, fixed monuments, the accuracy of which is not in doubt." Location of the caissons did not require "complex calculations or necessitate[] the reliance upon untrustworthy data such that accuracy could not be expected from performance done in a workmanlike manner." *Id.* at 115, 642 P.2d at 1087. In affirming the trial court's refusal to instruct the jury on expert testimony regarding the standard of care, the appellate court held:

> It is well settled that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons. Where, as in the instant case, the service rendered does not involve esoteric knowledge or uncertainty that calls for the professional's judgment, it is not

> beyond the knowledge of the jury to determine the adequacy of the performance.

Id. (citation omitted). *See also Paragon Engineering, Inc. v. Rhodes*, 451 So.2d 274 (Ala. 1984) (expert testimony not required to establish the standard of care for a surveyor where non-expert testimony at trial was sufficient to assist the jury in deciding whether the site of a retention basin was accurately laid out with stakes by the defendant surveyor).

In this case, we hold that the nature of Fleming's actions fell within the "common knowledge" exception to the requirement that experts testify as to the requisite standard of care. It is within the common knowledge of a trier of fact that a surveyor hired to pinpoint columns for a rectangular building site that must be precisely square must accurately mark column locations so as to result in two sets of parallel lines connected by four 90° angles. As in *Daniel*, understanding this task "does not involve esoteric knowledge or uncertainty that calls for the professional's judgment" nor is it "beyond the knowledge" of the trier of fact as to whether lines and angles staked by a surveyor were straight and square. 98 Nev. at 115, 642 P.2d at 1087. Given that the survey at the Honda facility started from predetermined, fixed points and the sole task was to define straight lines and 90° angles, this is a case in which "accuracy could . . . be expected from performance done in a workmanlike manner." *Id.*

Defendant points to *Delta Envtl. Consultants of North Carolina, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 510 S.E.2d 690, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999), in which a company with contaminated soil and groundwater alleged that an environmental consulting firm negligently performed remedial work. After reviewing the transcripts and exhibits, this Court concluded that the consulting firm's work in delineating the scope of contamination was beyond the common knowledge of the jury and required expert testimony. *Id.* at 168, 510 S.E.2d at 696. Understanding the complex area of environmental consulting and pollution remediation is not analogous to understanding whether a surveyor hired to ensure that a building was square is required to plot out straight lines and 90° angles. We hold that the question whether defendant Fleming breached its standard of care was within the common knowledge and experience of the trial judge in this case.

II

[2] Defendant next challenges the trial court's findings of fact taking judicial notice of various statutes relating to the practice of engineering and land surveying. The trial court found:

> 3. Under Rule 201(b) and (c) of the North Carolina Rules of Evidence, this Court takes judicial notice of N.C.G.S. § 89C-3(6)(a) and N.C.G.S. § 89C-3(7)(a)(4), relating to the practice of engineering and land surveying such that the Defendant was engaged in providing professional services which require special knowledge of mathematical, physical and engineering sciences and the observation of construction for the purposes of assuring compliance with the drawings and specifications together with setting [or] resetting survey reference points.
>
> 4. Under N.C.G.S. §89C-3 and 89C-2, the Defendant, as a regulated professional engineer and surveyor, had a legal duty to safeguard the property of the public. In this case, the Defendant was to render its services in a professional adequate and workmanlike manner, in light of Plaintiff's evidence that its employees did not feel competent in performing the work themselves. The Court finds that the Defendant failed to meet its legal duty and failed to meet the standard of care created by N.C.G.S. § 89C-2 and N.C.G.S. § 89C-3.

We believe that these findings indicate that the trial court viewed the statutes as setting forth the nature of defendant's profession. *See Greene v. Pell & Pell, L.L.P.*, 144 N.C. App. 602, 604, 550 S.E.2d 522, 523 (2001) (in a professional negligence case, plaintiff must show "(1) the nature of the defendant's profession; (2) the defendant's duty to conform to a certain standard of conduct; and (3) a breach of the duty proximately caused injury to the plaintiffs"). For example, the trial court cited N.C. Gen. Stat. § 89C-3(7)(a)(4), which includes in its definition of a land surveyor's occupation the act of "[d]etermining, by the use of the principles of land surveying, the position for any . . . reference point[.]" N.C. Gen. Stat. § 89C-3(7)(a)(4) (2003).

To the extent that Finding of Fact 4 suggests that N.C. Gen. Stat. §§ 89C-2, -3 (2003) create a specific standard of care, we agree with Fleming that the trial court erred in relying on those statutes. Any error was, however, harmless since AIC presented sufficient evidence of defendant's standard of care by offering the testimony of Mr.

Register and because the pertinent standard of care was within the common knowledge and experience of the trial judge.

III

[3] Defendant argues that, even apart from the absence of expert testimony, the evidence is insufficient to support the trial court's finding that it was negligent. The trial judge's findings of fact are conclusive on appeal if supported by competent evidence, even if the record contains evidence to the contrary. *Huff v. Autos Unlimited, Inc.*, 124 N.C. App. 410, 413, 477 S.E.2d 86, 89 (1996), *cert. denied*, 346 N.C. 279, 487 S.E.2d 546 (1997). Our examination of the record reveals that competent evidence supported the trial court's finding that Fleming was negligent.

It is undisputed that the south line of columns, although virtually straight, was skewed, *i.e.*, not parallel to the north line, which was a precise 180° line extending from the main building. AIC argued that Fleming's employees had erred in making the calculations described by Mr. Register when it came to the south wall. Fleming contended to the contrary that the south columns were correctly placed when Mr. Register and his assistant completed the survey and became misaligned when AIC moved the batter board and recreated the center points. The parties agree that either AIC or Fleming was responsible for the error.

In support of its claim that the error was committed by Fleming, AIC offered the testimony of its project manager, Scott Flanigan. Mr. Flanigan is a structural engineer and has been licensed as a professional engineer. At the time of his testimony, he had overseen nearly 30 projects. Mr. Flanigan testified that the south columns were "in a straight line. Again, if it was an error that we made—if we just placed the columns willy-nilly, I'd expect one column to be up, one to be down, another one to be down, another one to be back up." Mr. Register confirmed that "they was [sic] in a straight line at a skew" extending out from the established point on the main building.

In response to Fleming's suggestion that the error occurred when AIC moved one of the batter boards, Mr. Flanigan and other witnesses testified that three of the south columns were already placed based on the Fleming offset points when the board was moved and that only the fourth column could have been affected by the moving of the batter board. Yet, the evidence established that all four columns were misaligned.

Fleming points to two pieces of evidence that it contends conclusively establish that it was not negligent. First, it claims that "Mr. Register was able to confirm that the lines were straight by flopping the transit without moving the base. This allowed him to confirm the one-hundred eighty (180) degree angles between the points on either side of his equipment." The evidence does not, however, establish conclusively that Mr. Register did confirm the accuracy of the work. Mr. Register testified that his assistant was operating the transit device (also called "the instrument") while Mr. Register was putting the nails into the ground:

> Q Would you set the points in the ground, or would Mr. Davis set the points in the ground?
>
> A He ran the instrument. I set the points, but also I did look back through the instrument to confirm straight lines *through most of these points.*

(Emphasis added) Although Mr. Davis was thus the person responsible for establishing the lines and angles, he did not testify. While Mr. Register's testimony indicates that he checked Mr. Davis' work for "most of these points," that testimony would permit a finding that he did not check all points. Since Mr. Register never testified that he confirmed that the south line of columns was a 180° straight line, his testimony cannot establish that the figures were accurate on the south line. Although Mr. Register did testify, as defendant states, about the technique for double-checking 180° angles, he never testified that he, as opposed to Mr. Davis, performed that check or that he had personal knowledge of the result.

Second, Fleming argues that AIC's construction superintendent Lanny Joyce checked Mr. Register's work after the survey was completed and Mr. Joyce's measurements indicated that the center points were within the permitted 1/8 of an inch tolerance. AIC, however, offered evidence that Mr. Joyce was using a tape measure, which could not provide precise measurement because "[w]ith a tape measure, . . . in temperature you've got all kinds of different things, how much the tape shrinks because of the weather, moisture, temperature. It's only as accurate as you can get it." Mr. Register confirmed that he did not use a tape when he did the survey because the electronic transit is "a whole lot more precise." AIC has argued that the whole point of having Fleming perform the survey was because AIC could not achieve measurements within the necessary tolerance using conventional means. The parties' competing argu-

ments on the weight to be given Mr. Joyce's measurements were for the trier of fact to resolve.

The trial judge was entitled to draw the inference that since the line was straight but not at the correct angle and since all four columns on the south line were misaligned rather than just the one affected by the moved batter board, Fleming was more likely than not the source of the error. The standard of review is dispositive. Even though Fleming presented evidence that AIC was responsible for misplacement of the columns, a determination of the weight and credibility of evidence was the responsibility of the trial court as the fact finder. *Cartin v. Harrison*, 151 N.C. App. 697, 703, 567 S.E.2d 174, 178, *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). Because the record contains competent evidence supporting a finding that Fleming was negligent, the trial court's findings are conclusive despite the existence of evidence to the contrary. *Huff*, 124 N.C. App. at 413, 477 S.E.2d at 89.

Affirmed.

Judge HUNTER concurs.

Chief Judge EAGLES dissents with separate opinion prior to 30 January 2004.

EAGLES, Chief Judge, dissenting.

Because the plaintiff failed to establish the standard of care required to be exercised by a land surveyor, I respectfully dissent.

A land surveyor "does not . . . undertake to insure the correctness of his findings," 11 Am. Jur. Proof of Facts 2d 405; rather, a surveyor is only "required to exercise that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances . . . ." *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 668, 255 S.E.2d 580, 585, *disc. review denied*, 298 N.C. 295, 259 S.E.2d 911 (1979). It is the general rule that expert testimony is required to establish the requisite standard of care. *Bailey v. Jones*, 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993). Ordinarily, this requires the plaintiff's expert to "testify as to generally accepted surveying practices to prove that the defendant did not perform his survey . . . according to the standards followed by an ordinarily prudent surveyor in similar circumstances." 11 Am. Jur.

Proof of Facts 2d 407. The only exception to this rule is where the "common knowledge and experience of the [fact finder] is sufficient to evaluate compliance with a standard of care . . . ." *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 168, 510 S.E.2d 690, 695-96, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 71 (1999).

I am unpersuaded that Mr. Register's own testimony was sufficient to establish the requisite standard of care. Although Mr. Register was certainly qualified to testify as an expert in this area, *see State v. Linney*, 138 N.C. App. 169, 183, 531 S.E.2d 245, 256-57 (witness may testify as an expert if qualified even though not formally tendered as an expert witness), *appeal dismissed and disc. review denied*, 352 N.C. 595, 545 S.E.2d 214 (2000), his testimony failed to establish the applicable standard of care. I disagree with the majority's characterization of Mr. Register's testimony: While Mr. Register testified extensively as to the process *he* went through to establish and verify the locations of the support columns, his testimony was limited to the procedure that he *in fact* followed, not the procedure he was "supposed" to follow. My review of the record reveals no testimony on the part of Mr. Register as to (1) what would constitute generally accepted surveying practices under similar circumstances, or (2) that the procedure he followed failed to comport with those standards. Plaintiff's evidence also included the testimony of Scott Flanigan and Lanny Joyce. Although both of these witnesses arguably were qualified to testify as experts in this field, neither testified as to either generally accepted surveying practices or that Mr. Register failed to perform the survey according to those standards. Consequently, I would conclude that plaintiff's expert testimony failed to establish the requisite standard of care.

I am also unpersuaded that this case falls within the "common knowledge" exception to the general rule requiring expert testimony. "[T]he application of the 'common knowledge' exception has been reserved for those situations where professional conduct is so grossly negligent that a layperson's knowledge and experience make obvious the shortcomings of the professional." *Delta Env. Consultants*, 132 N.C. App. at 168, 510 S.E.2d at 696. The majority, relying on *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 642 P.2d 1086 (1982) and *Paragon Engineering, Inc. v. Rhodes*, — Ala. —, 451 So.2d 274 (1984), concludes that the "common knowledge" exception is applicable under these circumstances. Notwithstanding the facial similarity between these cases

and the facts presented here, these cases are readily distinguishable and do not support the application of the "common knowledge" exception to this case.

First, a careful reading of *Paragon* reveals that the only issue before that court was whether the testimony of "several witnesses, who were not professional surveyors," was sufficient to support the conclusion that the defendant was negligent in staking a survey site. *Paragon*, — Ala. at —, 451 So.2d at 274. The Court found that although none of plaintiff's witnesses were "expert[s] in the technical sense," *i.e.* professional land surveyors, three of plaintiff's witnesses were competent to testify as experts by virtue of their knowledge and experience. *Id.* at —, 451 So.2d at 276. The *Paragon* court ultimately concluded that the testimony of these witnesses was sufficient to support the jury's conclusion. *Id.* at —, 451 So.2d at 277. Because *Paragon* was based on application of the general rule, rather than the "common knowledge" exception, it is of little instructional value here.

Moreover, *Daniel* involves an action for breach of contract filed against the defendant surveyor when defendant improperly pinpointed the location of caissons designed to support a structure. The issue before the court was whether "expert testimony [wa]s required to prove the breach of duty." *Daniel*, 98 Nev. at 115, 642 P.2d at 1087. The *Daniel* court, applying the "common knowledge" exception, answered in the negative. *Id.*

Daniel is distinguishable in two significant respects: First, the underlying action in *Daniel* was for breach of contract, not negligence. Insofar as the holding in *Daniel* is based on an "implied [contractual] duty to perform in a workmanlike manner," *id.*, rather than the duty to exercise reasonable care under the circumstances, the reasoning of *Daniel* is inapposite to this case. *See Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E.2d 580 (1979) (distinguishing actions based on contract from those based on negligence and refusing to impose contractual duties not "expressly assumed" under the terms of the contract).

Second, it is undisputed that here the conditions and strict tolerances necessitated employing the knowledge, skill and judgment of a professional surveyor. That was not the case in *Daniel*. *See id.* (noting "[t]here [wa]s nothing in the record to indicate that the survey required complex calculations . . . ."). I would conclude that this factual discrepancy is sufficient alone to distinguish *Daniel* and make the "common knowledge" exception inapplicable.

Even strict adherence to accepted surveying principles will, in some cases, yield inaccurate measurements. *See e.g.* 11 Am. Jur. Proof of Facts 2d 403-05, §§ 2-3. Therefore, application of the "common knowledge" exception must turn on something more than the ultimate result. The better reasoned approach, which is more directly related to the negligence standard, is to apply the "common knowledge" exception only where the surveyor was so grossly negligent in the *manner* in which he performed his professional services that his shortcomings as a professional are readily apparent to a layperson. Examples would include misreading plans and specifications, the taking of faulty measurements, or errors in recording data that, if pointed out and corrected, would yield accurate results. These are the types of errors that would be readily apparent to a layperson, without the need for explanation of complex principles by an expert in that profession. Since there is no evidence in the record that implicates any of these kinds of errors, I would conclude that expert testimony was necessary to determine whether defendant exercised the degree of care that an ordinarily prudent surveyor would have exercised under similar circumstances.

Accordingly, I would hold that plaintiff failed to establish the applicable standard of care and the trial court improperly denied defendant's motion to dismiss.

STATE OF NORTH CAROLINA v. LUDY FERNANDO ESCOTO AND JOSE LUIS RAMOS

No. COA03-70

(Filed 3 February 2004)

1. Criminal Law— motion to sever trial—joinder of cases

The trial court did not err in a first-degree burglary, multiple first-degree kidnapping, and double robbery with a dangerous weapon case by denying a defendant's motion to sever the trial and by joining the cases of the two defendants even though an inmate testified about what the other defendant said about the events in question while incarcerated, because: (1) the *Bruton* rule and N.C.G.S. §15A-927(c)(1) do not apply when both the inmate and the codefendant testified and were subject to cross-examination by defendant; (2) our state has a strong policy favor-

ing the consolidated trials of defendants accused of collective criminal behavior; (3) N.C.G.S. § 15A-927(c)(2) grants the trial court wide discretion in determining severance, and the trial court did not abuse that discretion; (4) defendants do not present conflicting defenses; and (5) even assuming it was error to deny the motion to sever, such error was not prejudicial in light of the other evidence against defendant.

2. Evidence— testimony of jailmate—relevancy

The trial court did not err in a first-degree burglary, multiple first-degree kidnapping, and double robbery with a dangerous weapon case by failing to exclude the testimony of a codefendant's jailmate, because: (1) the testimony was relevant since it tended to prove that defendant and his codefendant concocted a scheme to avoid liability for their criminal actions; and (2) defendant failed to demonstrate how this testimony was so unfair that a different result at trial would have been likely.

3. Constitutional Law— double jeopardy—kidnapping—armed robbery—restraint

The trial court did not violate a defendant's double jeopardy rights by failing to dismiss the kidnapping charges related to two of the victims even though defendant was charged with armed robbery for those two victims as well, because there was sufficient restraint of both victims beyond that inherent in the armed robbery to submit both charges to the jury.

4. Criminal Law— prosecutor's argument—defendant coached to lie by attorney

The trial court did not err in a first-degree burglary, multiple first-degree kidnapping, and double robbery with a dangerous weapon case by overruling a defendant's objection to a portion of the district attorney's closing argument stating that defendant had been coached to lie by his attorney, because: (1) the trial court gave a curative instruction; and (2) there is no case law entitling defendant to a new trial based on the alleged cumulative effect of this argument and the testimony of the codefendant's jailmate.

5. Appeal and Error— preservation of issues—failure to present issue at trial

Although defendant contends he was not advised of his rights under the Vienna Convention upon his arrest, the record

contains no evidence that defendant presented this issue at the trial court and the question is therefore not properly before the Court of Appeals.

6. Kidnapping— motion to dismiss—sufficiency of evidence—presence of victims in house

The trial court did not err by denying a defendant's motions to dismiss the charges of kidnapping of two of the victims, because the presence of the two victims in the house at the time of the burglary was sufficiently proven.

7. Robbery— armed—motion to dismiss—sufficiency of evidence—prayer for judgment continued

The trial court did not err by denying a defendant's motions to dismiss the charges of armed robbery, because: (1) no final judgment has been entered as to the convictions for armed robbery when a prayer for judgment continued was entered for both of these charges; and (2) if the State moves the trial court to impose judgment on those charges and the court does impose judgment, defendant may raise the objection in an assignment of error on appeal.

8. Appeal and Error— appealability—no final judgment entered

Although defendant contends the robbery indictments were fatally defective since they failed to sufficiently describe the subject property, this assignment of error is dismissed because no final judgment has been entered on these charges.

9. Burglary; Kidnapping— indictment—particular felony intended

The indictments used to charge defendant with burglary and kidnapping were not defective even though they failed to specify the particular felony intended, because: (1) burglary and kidnapping indictments need not allege the specific felony a defendant intended to commit at the time of the criminal act; and (2) an indictment couched in the language of the statute is sufficient to charge the statutory offense.

Appeal by defendants from judgments entered 24 May 2002 by Judge James C. Spencer, Jr. in Superior Court, Alamance County. Heard in the Court of Appeals 30 October 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar and Assistant Attorney General Sharon Patrick-Wilson, for the State.

Daniel F. Read and Maria J. Mangano for defendant-appellant Ludy Fernando Escoto; Paul M. Green for defendant-appellant Jose Luis Ramos.

McGEE, Judge.

Defendants Ludy F. Escoto (Escoto) and Jose Luis Ramos (Ramos) (collectively defendants) were tried jointly and each was found guilty on 24 May 2002 of one count of first degree burglary in violation of N.C. Gen. Stat. § 14-51, five counts of first degree kidnapping in violation of N.C. Gen. Stat. § 14-39, and two counts of robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87. The trial court found defendants to have a prior record level I, and sentenced defendants to a minimum term of sixty months and a maximum term of eighty-one months, active imprisonment, for the burglary conviction and the five kidnapping convictions, to run consecutively. Prayer for judgment was entered for each of the armed robbery convictions. Defendants appeal.

The evidence at trial tended to show that on 31 March 2001, at approximately 8:00 p.m., defendants and three other men went to the home of Maria Carrera (Carrera) and Antonio Munoz (Munoz) in Burlington, North Carolina. Martin Arrollo (Arrollo), Juan Manual Garduno (Garduno), Librada Pagan (Pagan), and Angela Espana (Espana) were also present in the house. The men entered the home and forced five victims onto the floor with guns and restrained them using tape, shoelaces, and telephone cord. The men also placed tape over the mouths of the victims, searched their pockets, and took $700.00 from Arrollo. In addition, Escoto directed the other men to unhook a stereo. After being disconnected, the stereo was moved a short distance but not removed from the home. Defendants and the other three men also searched the house for drugs and money. Arrollo testified that both he and Munoz were hit by someone during the robbery. Munoz testified that he was kicked by someone other than defendants.

The sixth victim present at the house, Carrera, had seen the approaching men on the home security system and was able to escape from the house undetected. Carrera stopped a woman in a passing car and asked her to call the police. When the police arrived,

defendants were arrested but the other three men involved were not apprehended. Money was seized from Ramos and one semiautomatic rifle was recovered.

Defendants testified at trial that they were not aware of the true reason they were going to the house until they were on their way to Burlington. Escoto testified he was under the impression they were going to a construction job. He testified that one of the other men involved threatened to kill him, his girlfriend, and his child if he did not participate in the robbery. Ramos testified he thought they were going to a dance club in Burlington. He said "they put the gun on me and had me tie the people up." Ramos continued his testimony by explaining why he was afraid not to participate in the robbery.

I. Ludy Fernando Escoto

[1] We first note defendant has failed to present an argument in support of assignments of error numbers three and six and they are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). Defendant's first two assignments of error relate to the joinder of defendant's cases with those of co-defendant Ramos and the subsequent admission of testimony over defendant's objection. Defendant argues he was denied a fair trial by the trial court's overruling his objection to joinder of his case with Ramos. Defendant's objection is based on the fact that Michael Williamson (Williamson), an individual confined with Ramos in jail, was able to testify to what Ramos told him about the events in question. Defendant argues that had his case not been joined with Ramos' case, the testimony of Williamson would have been irrelevant and inadmissible in defendant's trial. However, the following testimony regarding what Ramos told Williamson, which defendant argues bore heavily on his own credibility, was admitted over defendant's objection:

> So he got caught up in the room. He seen the blue lights bouncing off the wall. Said he wiped down the gun, the AK-47, threw it up under the bed, and tried to run out the house and get in the car. The police was already there. So he had told them a story that they had forced him, they had forced him to do that. And he said that was the way he could try to play it off to make it, I guess make his case look like that he didn't have nothing to do with it.

Defendant argues that by implication, it is probable that the jury found that he participated knowingly and willingly rather than being

threatened as he had testified. Defendant argues this testimony prejudiced him such that he was denied a fair trial.

Objections to joinder and severance in criminal cases are governed by N.C. Gen. Stat. § 15A-927(c) (2003). Subsection (c)(1) pertains to a situation where a co-defendant makes an out-of-court statement which references the defendant but is not admissible against the defendant. In such a case, the State must do one of the following: (1) conduct a joint trial where the statement is not admitted; (2) conduct a joint trial where the statement is admitted after all references to the defendant have been omitted; or (3) conduct a separate trial of the objecting defendant. However, in the case before us, subsection (c)(1) is not applicable.

> G.S. 15A-927(c)(1) codifies substantially the decision in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), which held that the receipt in evidence of the confession of one codefendant posed a substantial threat to the other codefendant's Sixth Amendment right of confrontation and cross-examination because the privilege against self-incrimination prevents those who are implicated from calling the defendant who made the statement to the stand.

State v. Johnston, 39 N.C. App. 179, 182, 249 S.E.2d 879, 881 (1978), *disc. review denied*, 296 N.C. 738, 254 S.E.2d 179 (1979). In the case before us, both Williamson and Ramos testified and were subject to cross-examination by defendant. Thus, the *Bruton* rule and subsection (c)(1) do not apply. *Johnston*, 39 N.C. App. at 183, 249 S.E.2d at 881. *See also State v. Fox*, 274 N.C. 277, 291, 163 S.E.2d 492, 502 (1968); *State v. Rasor*, 319 N.C. 577, 582, 356 S.E.2d 328, 332 (1987).

Defendant secondarily relies on N.C. Gen. Stat. § 15A-927(c)(2) which pertains to situations other than those governed by subsection (c)(1) and "requires the court to grant severance whenever it is necessary to promote or achieve a fair determination of guilt or innocence." *Rasor*, 319 N.C. at 581, 356 S.E.2d at 331. "A trial court's ruling on such questions of joinder or severance, however, is discretionary and will not be disturbed absent a showing of abuse of discretion." *State v. Carson*, 320 N.C. 328, 335, 357 S.E.2d 662, 666-67 (1987). "The 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.' " *Carson*, 320 N.C. at 335, 357 S.E.2d at 667 (quoting *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985)).

In the case before us, the trial court did not abuse its discretion in denying the motion to sever. "Our state has a 'strong policy favoring the consolidated trials of defendants accused of collective criminal behavior.' " *State v. Roope*, 130 N.C. App. 356, 364, 503 S.E.2d 118, 124, *disc. review denied*, 349 N.C. 374, 525 S.E.2d 189 (1998) (quoting *State v. Barnes*, 345 N.C. 184, 222, 481 S.E.2d 44, 64-65, *cert. denied*, *Chambers v. North Carolina*, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), *cert. denied*, *Barnes v. North Carolina*, 523 U.S. 1024, 140 L. Ed. 2d 473 (1998)).

The cases relied upon by defendant are all distinguishable. *State v. Gonzalez*, 311 N.C. 80, 94, 316 S.E.2d 229, 237 (1984) is not relevant because error was found based on N.C. Gen. Stat. § 15A-927(c)(1), the subsection which is not applicable to this case. *State v. Pickens*, 335 N.C. 717, 725, 440 S.E.2d 552, 556-57 (1994) is distinguishable because it involved co-defendants who had irreconcilable defenses such that the jury could infer guilt based on this conflict alone. However, in the case before us, defendants do not present conflicting defenses. Lastly, *State v. Hucks*, 323 N.C. 574, 581, 374 S.E.2d 240, 245 (1988) is also distinguishable because in *Hucks*, one of the co-defendants entered a guilty plea but the trial court refused to sever the cases. Again, those facts are not similar to the case before us. In light of the wide discretion accorded the trial court in determining severance, we find assignment of error number one to be without merit.

Even assuming it was error to deny the motion to sever, such error was not prejudicial.

> The differences in evidence from one codefendant to another ordinarily must result in a conflict in the defendants' respective positions at trial of such a nature that, in viewing the totality of the evidence in the case, the defendants were denied a fair trial. However, substantial evidence of the defendants' guilt may override any harm resulting from the contradictory evidence offered by them individually.

Barnes, 345 N.C. at 220, 481 S.E.2d at 63-64 (citations omitted). For example, in *State v. Littlejohn*, 340 N.C. 750, 756, 459 S.E.2d 629, 632-33 (1995), the Supreme Court held that assuming that admission of a co-defendant's confession was error, it was harmless beyond a reasonable doubt in light of the other evidence against the defendant.

Similarly, in the case before us, there is significant evidence supporting defendant's guilt. Defendant admits going to the Burlington

house and participating in the robbery. Although defendant argues he was forced to participate, Arrollo testified that defendant "came armed into the house. He also participated, telling us to get on the ground. He was one of the most aggressive, because he was one of the ones that hit us most when we were on the ground." Arrollo further testified that defendant "would tell the others to hurry, like giving them orders" and that defendant did not seem afraid and was not threatened by anyone during the robbery. Further, he testified that defendant "was one of the most aggressive ones" and "he was the one who hit us the most, and he was the one who told the others to unhook the electrical equipment and to take them out." Similarly, Munoz testified that defendant was "giving orders" and that he never saw anyone threaten defendant. Further, in response to being asked whether defendant ever seemed afraid, Munoz responded, "[o]n the contrary. He would, he would threaten all of us." In light of this evidence, any error committed was harmless beyond a reasonable doubt.

[2] In addition to arguing that severance should have been granted, defendant argues the testimony of Williamson should have been excluded either for lack of relevance under N.C. Gen. Stat. § 8C-1, Rule 401 or for its prejudicial nature under N.C. Gen. Stat. § 8C-1, Rule 403. Although "a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). " 'Relevant 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." N.C. Gen. Stat. § 8C-1, Rule 401 (2003). In the case before us, Williamson's testimony was relevant because it tended to prove that defendant and his co-defendant concocted a scheme to avoid liability for their criminal actions.

Further, the testimony should not have been excluded on the basis of N.C. Gen. Stat. § 8C-1, Rule 403 which provides for the 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." N.C. Gen. Stat. § 8C-1, Rule 403 (2003). "The determination to exclude evidence on these grounds is left to the sound discretion of the trial court." *State v. Mickey*, 347 N.C. 508, 518,

495 S.E.2d 669, 676, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998). " 'A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Mickey*, 347 N.C. at 518, 495 S.E.2d at 676 (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

> "The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded."

State v. Smith, 155 N.C. App. 500, 508, 573 S.E.2d 618, 624 (2002), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 287 (2003) (quoting *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citations omitted)). Defendant simply argues this testimony may have impermissibly motivated the jury to conclude that defendant faked coercion and duress simply because Ramos admitted to doing so. Defendant fails to demonstrate how this testimony was so unfair that a different result at trial would have been likely. Accordingly, assignment of error number two is without merit.

[3] Defendant next argues the trial court erred in denying defendant's motions to dismiss the charges against him of kidnapping Arrollo and Munoz. "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. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "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) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citations omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpe-

trator of it, the motion should be allowed." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117.

Defendant argues he was subjected to double jeopardy because both kidnapping and armed robbery charges were submitted to the jury concerning Arrollo and Munoz. Defendant claims submission of both was error because the restraint and removal of Arrollo and Munoz were an integral part of the armed robbery. "Kidnapping is the unlawful, nonconsensual confinement, restraint or removal from one place to another of a person for the purpose of committing specified acts that are set forth in N.C. Gen. Stat. § 14-39 (2001)." *State v. Jones*, 158 N.C. App. 498, 501, 581 S.E.2d 103, 106, *cert. denied*, 357 N.C. 465, 586 S.E.2d 462 (2003). However, the North Carolina Supreme Court has "recognized that 'certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim' and has held that restraint 'which is an inherent, inevitable feature of [the] other felony' may not be used to convict a defendant of kidnapping." *State v. Allred*, 131 N.C. App. 11, 20, 505 S.E.2d 153, 158-59 (1998) (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)).

> The key question here is whether the kidnapping charge is supported by evidence from which a jury could reasonably find that the necessary restraint for kidnapping "exposed [the victim] to greater danger than that inherent in the armed robbery itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent."

State v. Pigott, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)). "Evidence that a defendant increased the victim's helplessness and vulnerability beyond what was necessary to enable the robbery or rape is sufficient to support a kidnapping charge." *State v. Muhammad*, 146 N.C. App. 292, 295, 552 S.E.2d 236, 237 (2001).

In the case before us, there was sufficient restraint of both Arrollo and Munoz beyond that inherent in the armed robbery to submit both charges to the jury. Arrollo testified that pistols were put into his face and he and the others were thrown to the floor, made to lie face down, and had tape placed around their hands and over their mouths. Arrollo further testified that he was struck by the robbers and that defendant was the man who "hit us the most." Similarly, Munoz testified that he had a gun pointed at his head

and was "strapped" with shoelaces and tape and was placed face down on the floor.

Taken together, these actions constituted restraint beyond what was necessary for the commission of robbery with a dangerous weapon. Defendant cites cases with egregious facts as examples of when this Court and our Supreme Court have found that sufficient additional restraint is present to submit both charges to the jury. However, there are also a number of cases with more subdued facts where our Courts have held that additional restraint is present. *See State v. Beatty*, 347 N.C. 555, 495 S.E.2d 367 (1998) (holding that there was no kidnapping where the victim was forced to go inside the restaurant and held at gunpoint during the robbery but was not harmed or otherwise moved; but that there was a kidnapping where a second victim was forced to lie on the floor with his wrists and mouth bound with duct tape and then kicked twice in the back); *Pigott*, 331 N.C. 199, 415 S.E.2d 555 (sustaining the kidnapping conviction where the defendant bound the victim's hands and feet); and *Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (upholding the kidnapping conviction where the defendant bound both rape victims' hands). Accordingly, assignment of error number four is without merit.

[4] Defendant next argues the trial court erred in overruling defendant's objection to a portion of the district attorney's closing argument where the district attorney argued to the jury that defendant had been coached to lie by his attorney. We note that " '[p]rosecutors are granted wide latitude in the scope of their argument.' " *State v. Jordan*, 149 N.C. App. 838, 842, 562 S.E.2d 465, 467 (2002) (quoting *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987)). "As a general rule, improper argument of counsel is cured by the court's action in cautioning counsel to confine argument to matters in evidence and cautioning the jury not to consider it." *State v. Paul*, 58 N.C. App. 723, 725, 294 S.E.2d 762, 763, *disc. review denied*, 307 N.C. 128, 297 S.E.2d 402 (1982). "Defendant is entitled to a new trial only if the impropriety is shown to be prejudicial." *Id.*

In the case before us, the trial court instructed the jury as follows:

> To the extent that the District Attorney's argument contained any implication, whether intended or not, that any inconsistencies in those statements resulted from the defendant having been coached by his attorney, that argument would be improper, and

you are instructed to disregard and not consider any such implication, and to draw no such inference from that portion of the District Attorney's argument.

Despite this curative instruction, defendant argues that the cumulative effect of the district attorney's argument and the testimony by Williamson combined to prejudice his defense. However, defendant cites no authority for entitlement to a new trial based on such a cumulative effect. In light of this curative instruction, assignment of error number five is overruled.

[5] Defendant's final argument is based on the fact that defendant was not advised of his rights under the Vienna Convention upon his arrest. The record contains no evidence that defendant presented this issue to the trial court and the question is therefore not properly before this Court. *See* N.C.R. App. P. 10(b)(1) and *Buckingham v. Buckingham*, 134 N.C. App. 82, 91, 516 S.E.2d 869, 876, *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999).

II. Jose Luis Ramos

[6] We note that defendant has failed to present an argument in support of assignments of error numbers one and three through ten, and they are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6). Defendant first argues the trial court erred in denying his motions to dismiss the charges of kidnapping of Espana and Pagan. Defendant asserts that denial of the motions was error because Espana and Pagan were not sufficiently identified as being present at the house when the burglary occurred.

"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." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Vause*, 328 N.C. at 236, 400 S.E.2d at 61 (quoting *Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169). "The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *King*, 343 N.C. at 36, 468 S.E.2d at 237 (citations omitted).

> Under N.C.G.S. § 14-39, a defendant commits the offense of kidnapping if he: (1) confines, restrains, or removes from one place to another; (2) a person; (3) without the person's consent; (4) for the purpose of facilitating the commission of a felony, doing serious bodily harm to the person, or terrorizing the person.

State v. Mann, 355 N.C. 294, 302, 560 S.E.2d 776, 782, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In the case before us, the presence of Espana and Pagan in the house at the time of the burglary was sufficiently proven to withstand defendant's motions to dismiss. When asked who lived with him at the Burlington house on 31 March 2001, Arrollo answered: "Manuel Garduno, Antonio Munoz, Mari[a] [Carrera], Librada [Pagan], Angela [Espana] and another friend[] who is not here these days." The next question asked by the State pertained to what Arrollo was doing around 9:00 p.m. on 31 March and who was in the house. Arrollo responded, "Maria was there, the ones I mentioned." In light of the close sequence of questions, it is obvious Arrollo was including all the individuals he had recently mentioned as living in the home. Significantly, both Espana and Pagan were included in the list of the individuals Arrollo testified were present. Once Arrollo identified Pagan and Espana as being present in the house at the time of the burglary, witnesses who subsequently testified simply referred to them generically. For example, Carrera testified that Martin [Arrollo], Tony [Munoz], Manuel [Garduno], and "the other two victims, the two girls" were in the house at the time of the burglary. Additionally, when Munoz was asked with whom he lived in the Burlington house in March 2001, Munoz testified as follows: "My wife, Maria [Carrera]. My friend, Martin [Arrollo], Manuel [Garduno], and the other two girls that were visiting." In light of the fact that no other girls besides Espana and Pagan had been mentioned, Munoz was clearly referring to them.

In addition to testimony by Arrollo, Carrera, and Munoz, defendant testified that five people were in the living room watching television when he and the other men entered the house. He again testified that five people were present and that he was told to "tie them up." Defendant made another reference to the girls when he testified that "[e]verybody was on the ground; and the two girls, they were, they were also laying down there. And they were crying." Thus, although Espana and Pagan did not testify at trial and were only referred to by their first names once and thereafter only generically, there was sufficient evidence for a reasonable mind to conclude that Espana and Pagan were present at the time of the burglary. Accordingly, assignment of error number two is overruled.

[7] With respect to assignment of error number two, defendant also argues the trial court erred in denying his motions to dismiss the two armed robbery charges. Although the trial court did not dismiss the charges, the trial court did enter a prayer for judgment continued for each of the charges at sentencing. "A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." N.C. Gen. Stat. § 15A-1444(a) (2003). N.C. Gen. Stat. § 15A-101(4a) (2003) states that "[p]rayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment." *See also State v. Jones*, 151 N.C. App. 317, 326, 566 S.E.2d 112, 118 (2002), *disc. review denied*, 356 N.C. 687, 578 S.E.2d 320, *cert. denied*, — U.S. —, 157 L. Ed. 2d 76 (2003); *State v. Southern*, 71 N.C. App. 563, 566, 322 S.E.2d 617, 619 (1984), *aff'd*, 314 N.C. 110, 331 S.E.2d 688 (1985).

In this case, no final judgment has been entered as to the convictions for armed robbery; therefore, our Court is unable to address this assignment of error under the circumstances in this case. Nevertheless, should the State move the trial court to impose judgment on the convictions of armed robbery and the trial court does impose judgment, defendant may raise the objection in an assignment of error on appeal. *Jones*, 151 N.C. App. at 326, 566 S.E.2d at 118 (our Court refused to address defendant's argument that the trial court erred in allowing the State's motion to amend the larceny indictment by changing the name of the alleged victim because prayer for judgment continued had been entered on the felonious larceny conviction). *See also State v. Maye*, 104 N.C. App. 437, 439-40, 410 S.E.2d 8, 10 (1991) (our Court refused to address defendant's argument that the trial court erred in "entering judgment and sentencing him" for drug convictions because the trial court had unconditionally continued prayer for judgment for the convictions at issue).

[8] Defendant next argues that the burglary, kidnapping, and robbery indictments were fatally defective and hence failed to confer jurisdiction on the trial court. With respect to the robbery indictments, defendant argues the indictments failed to sufficiently describe the subject property. However, as stated above, our Court is unable to address this assignment of error since no final judgment has been entered. *Jones*, 151 N.C. App. at 326, 566 S.E.2d at 118. *See also Maye*, 104 N.C. App. at 439-40, 410 S.E.2d at 10.

[9] Regarding the burglary and kidnapping indictments, defendant argues the indictments were defective since they failed to specify the

particular felony intended. The burglary indictment charges that defendant "broke and entered with the intent to commit a felony therein." The kidnapping indictments charge that defendant committed the acts "for the purpose of [] facilitating the commission of a felony, or facilitating the flight following the defendant's participation in the commission of a felony."

Our Supreme Court has held that burglary and kidnapping indictments need not allege the specific felony a defendant intended to commit at the time of the criminal act. *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985) (kidnapping); *State v. Worsley*, 336 N.C. 268, 280-81, 443 S.E.2d 68, 73-74 (1994) (burglary), *State v. Roten*, 115 N.C. App. 118, 121-22, 443 S.E.2d 794, 796 (1994) (burglary). Defendant acknowledges these decisions but argues a United States Supreme Court case subsequent to these North Carolina cases mandates a different result. Defendant cites *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), contending that "charging every essential element of a crime in the indictment is required by the U.S. Constitution." However, the Supreme Court actually held that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' " *Apprendi*, 530 U.S. at 476, 147 L. Ed. 2d at 446 (quoting *Jones v. United States*, 526 U.S. 227, 243, n. 6, 143 L. Ed. 2d 311, 326, n. 6 (1999)).

Apprendi is distinguishable because it deals with a defendant who was charged with an initial crime which was then subjected to sentence enhancement based on the fact that the defendant had committed a hate crime. However, a hate crime had not been alleged in the indictment. The facts of the case before us are not similar to *Apprendi*, so reliance on *Apprendi* is misplaced. Further, following *Apprendi*, our Supreme Court has continued to recognize that "[a]s a general rule, 'an indictment couched in the language of the statute is sufficient to charge the statutory offense.' " *State v. Lucas*, 353 N.C. 568, 584, 548 S.E.2d 712, 724 (2001) (quoting *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998)). Accordingly, this assignment of error is without merit.

No error.

Judges HUDSON and CALABRIA concur.

STATE OF NORTH CAROLINA v. MORRIS SKINNER, DEFENDANT

No. COA 02-1707

(Filed 3 February 2004)

1. Sentencing— aggravating factors—assault—age of victim

The trial court correctly found the aggravating factor of old age under the Fair Sentencing Act as it then existed when sentencing defendant for assault. There was evidence that the victim was elderly and that defendant took advantage of her condition when he assaulted her.

2. Sentencing— aggravating factors—larceny—age of victim

The trial court erred by using the victim's age (76) as an aggravating factor for larceny under the then existing Fair Sentencing Act. The victim did not know that anything had been taken until told by a deputy, and her age was not related to the larceny.

3. Criminal Law— requested instruction—eyewitness identification—given in substance

There was no error in not giving a requested instruction on eyewitness identification in an assault and larceny prosecution where the instructions given contained the substance of the requested instruction.

4. Larceny— instruction—lapsus linquae

There was no plain error in a larceny final mandate from the omission of "knew" from the element that defendant knew that he was not entitled to take the property. The court had instructed the jury correctly on all six elements of larceny in the body of the charge.

5. Larceny— instruction—taking after breaking or entering

There was no error in a larceny instruction stating that the property was taken from the building "after" a breaking or entering rather than "pursuant to" a breaking or entering.

6. Larceny— sufficiency of evidence—unconscious victim

The was sufficient evidence of larceny, and the court correctly denied a motion to dismiss, where the victim put a pocketbook containing money on a table on her return home; she

went outside, came back in, and was struck on the head by defendant; when the victim was found, the pocketbook had been moved and no longer contained money; and no other person had entered the home.

7. Evidence— competency of witness—unconscious assault victim

There was no plain error in an assault and larceny prosecution in allowing the victim to testify that defendant had taken $75 from her. She saw defendant in her house when she had the money in her pocketbook, defendant struck her and left, and the money was found to be missing.

8. Assault— type of weapon—fatal variance

There was a fatal variance between an assault indictment and the evidence where the indictment alleged that defendant attacked the victim with his fists while the evidence was that he used a hammer or an iron pipe.

On Writ of Certiorari to review judgments entered 26 January 1995 by Judge W. Russell Duke, Jr. in the Superior Court in Bertie County. Heard in the Court of Appeals 17 September 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert O. Crawford, III, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant.

HUDSON, Judge.

On 3 October 1994, defendant Morris Skinner was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and for felonious breaking or entering and felonious larceny. The cases were tried at the 23 January 1995 criminal session of superior court in Bertie County. A jury convicted defendant on all three charges. In each case, the trial judge found one aggravating factor—that the victim was very old—and one mitigating factor—that the defendant had no prior criminal record. The trial judge sentenced defendant under the Fair Sentencing Act to the statutory maximum terms of imprisonment of 20 years for the assault, 10 years for the breaking or entering, and 10 years for larceny, with the sentences to run consecutively.

Defendant did not appeal. On 1 April 2002, defendant filed a petition for writ of certiorari with this Court, which we granted on 9 April 2002.

The State introduced evidence at trial tending to show that on 5 August 1994, at approximately 5:00 p.m., Lucy Heckstall, a 76-year-old widow, returned to her home in Windsor following a visit to her eye doctor. She put her pocketbook on the kitchen table and went out to shut her chicken coop. When she walked back in her house, she was struck on her head seven or eight times with what may have been a hammer. Mrs. Heckstall testified that the person who struck her was the defendant, Morris Skinner, and further that $75 in cash was missing from her pocketbook.

Mrs. Heckstall staggered into her den where she slipped and fell, hitting her head on a chair. At approximately 8:00 p.m., Mrs. Heckstall's neighbor, Diane Williams, came to the house and discovered her covered in blood. Ms. Williams asked Mrs. Heckstall who had hurt her and she replied, "the Skinner boy." Ms. Williams called for emergency assistance, and also called another neighbor, Cora Smallwood, who immediately came over.

EMS arrived and took Mrs. Heckstall to Bertie Memorial Hospital. The Sheriff's deputy looked in her pocketbook and told her the money was gone. She was then transferred to Pitt County Memorial Hospital where she was treated for multiple lacerations of her scalp, and for left and right side skull fractures. Mrs. Heckstall also suffered from post-traumatic amnesia or memory loss. Gradually she improved over the next three to four weeks and, when her memory improved, she was able to recall that she was attacked by "the Skinner boy."

Officers from the Bertie County Sheriff's Department arrived on the scene at approximately 8:30 p.m. Deputy Milton Morris and Sergeant Donald Cowan followed a set of footprints leading away from Mrs. Heckstall's house in a northerly direction through Cora Smallwood's backyard to the residence of Johnny Mack Bond. At about 10:00 p.m., the officers knocked on the door, and defendant answered. Defendant told the officers that he had been there alone and asleep all day since getting home from work at 8:00 a.m., and he claimed not to have left the residence all day.

Ms. Smallwood's granddaughter, Stephanie Cooper, was visiting at her grandmother's house on the evening of 5 August 1994. At about

6:00 p.m., she saw a black male running across the backyard away from Ms. Heckstall's house. The man was wearing a light colored t-shirt and dark pants.

Diane Williams, the other neighbor, saw the defendant twice on the afternoon of 5 August 1994. First, she saw him walking past her house toward the pool hall, and later she saw him getting out of a car at his girlfriend's house. Ms. Williams said that, at the time, defendant was wearing dark pants and a white t-shirt.

After Mrs. Heckstall identified defendant as her attacker, Sgt. Cowan obtained a warrant and arrested defendant. Defendant gave a voluntary statement, which differed from the statement he gave the night of the incident. This time, defendant claimed that after he got off from work, he drank some beer with a friend in Rich Square, then went to Johnny Mack Bond's house at about 11:00 a.m. He said that he and his girlfriend walked to Buck Riddick's pool hall in the afternoon, then returned to the house. Defendant also stated that he went to Ms. Smallwood's residence later that afternoon to pick up some clothing he had left there, and then returned home and went to bed. Defendant acknowledged that he had been wearing a pair of black stonewashed jeans and a white t-shirt that afternoon.

Defendant took the stand in his own defense, and his testimony tended to show that he got home from work at approximately 1:00 p.m. after running errands. He walked to Buck Riddick's pool hall a little before 5:00 p.m. About one hour later, he got a ride back to Johnny Mack Bond's house where his girlfriend was staying, and then went to bed. At trial, defendant claimed he was wearing a pair of acid-washed gray jeans and a blue sweatshirt that day, and denied all charges against him.

Analysis

I.

[1] Defendant first argues that the trial court erred in sentencing him under the then-existing Fair Sentencing Act by finding as an aggravating factor in all counts that "[t]he victim was very old." N.C. Gen. Stat. § 15A-1340.4(j) (1993) (repealed by Act of July 24, 1993, ch. 538, sec. 14, 1993 N.C. Sess. Laws 2318, current version at N.C. Gen. Stat. § 15A-1340.16(d)(11)). Defendant contends that the aggravating factor was not supported by the evidence and was erroneous as a matter of law, entitling him to a new sentencing hearing. We agree in part.

The age of a victim may be considered as an aggravating factor when it appears the defendant took advantage of the victim's relative helplessness to commit the crime or that the harm from the assault was worse because of the age or condition of the victim. *State v. Monk*, 63 N.C. App. 512, 523, 305 S.E.2d 755, 762 (1983).

> There are at least two ways in which a defendant may take advantage of the age of his victim. First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. In either case, the defendant's culpability is increased.

State v. Thompson, 318 N.C. 395, 398, 348 S.E.2d 798, 800 (1986). The underlying policy for this statutory aggravating factor (formerly G.S. § 15A-1340.4(a)(1)(j)) was to "discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity." *State v. Mitchell*, 62 N.C. App. 21, 29, 302 S.E.2d 265, 270 (1983).

Here, the evidence was sufficient to establish that the victim was elderly and vulnerable and that defendant took advantage of her condition when he assaulted her. Mrs. Heckstall was a 76-year-old widow living alone. The evidence also established that the defendant was a neighbor of Mrs. Heckstall and had known her his entire life. Mrs. Heckstall's age made it unlikely she could flee or fend off defendant's attack, and also complicated her recovery following the attack. Her physician testified that older people tend to have more memory deficits following head trauma than do younger people. Mrs. Heckstall indeed had profound memory deficits following that attack, in that she could not remember information that was common knowledge or information concerning her own life. Thus, the trial court did not err in finding this aggravating factor in connection with the assault.

[2] However, defendant argues that the victim's age has no bearing on her vulnerability to larceny, citing *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986). There, our Supreme Court held that the defendant's sentence for larceny was improperly aggravated by evidence of the victim's age (87) and infirmity, because her age was "totally unrelated to the crime of felonious larceny." *Id.* at 625, 340

S.E.2d at 325. The State does not discuss *Ledford* and we see no meaningful distinction between it and the case here, where the victim of the larceny did not even know anything had been taken until the Sheriff's deputy on the scene told her, after the fact. Indeed, the victim testified that: "And he (the deputy) walked in the kitchen where all that blood was and he looked at my pocketbook. He said there ain't nare a penny in here." Thus, we must vacate the sentence for larceny in case number 94-CRS-2420 and remand for a new sentencing hearing.

II.

[3] Defendant next argues that the trial court erred by refusing to give a requested jury instruction concerning eyewitness identification. We disagree.

Our Supreme Court recently held that:

> When a defendant makes a written request for an instruction that is timely, correct in law, and supported by the evidence, the trial court must give such an instruction. However, the trial court is not required to give a requested instruction verbatim, so long as the instruction actually provided adequately conveys the substance of the requested instruction.

State v. Lucas, 353 N.C. 568, 578, 548 S.E.2d 712, 719-20 (2001) (internal citations omitted). Thus, our duty is to determine whether the trial court's instructions were correct in law and adequately conveyed the substance of defendant's request.

Here, the defendant requested the following instruction:

> Ladies and Gentlemen, I instruct you that the State has the burden of proving the identity of the Defendant, Morris Skinner, as perpetrator of the crimes charged beyond a reasonable doubt. This means that you, the Jury, must be fully satisfied and entirely convinced that the Defendant, Morris Skinner, was the perpetrator of the crimes charged before you may return a verdict of guilty.
>
> In examining the testimony of the witness, Lucy Heckstall, as to her observations allegedly made on August 5, 1994, you should consider the capacity of the witness to make such an observation through her senses, the opportunity the witness had to make the observation, and the details of the observation, such as the lighting conditions at the scene, the amount of time the witness had to view the perpetrator, as well as any other condition or circum-

stance which might have aided or hindered the witness in making her observation.

I further instruct you that the identification by the witness, Lucy Heckstall, is just like any other witness in that you should assess the credibility of Lucy Heckstall in the same way as you assess the credibility of any other witness; that is, in determining the adequacy of her observation and her capacity to observe. You may take these things into account in your consideration of the credibility of Lucy Heckstall.

As I have earlier instructed you, the State must prove beyond a reasonable doubt that the Defendant, Morris Skinner, was the perpetrator of the crimes charged. If, after weighing all of the testimony, you are not fully satisfied or entirely convinced that the Defendant, Morris Skinner, was the perpetrator of the crimes charged, it would be your duty to return a verdict of not guilty.

The trial court denied defendant's requested instruction, and proceeded to instruct the jury, in pertinent part, as follows:

You are the sole judge of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your own every day affairs.

As applied to this trial, these tests may include the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interests, bias or partiality the witness may have; the apparent understanding and fairness of the witness; whether the witness' testimony is reasonable and whether the witness' testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given to any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence.

***

> I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you the jury must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crimes charged before you may return a verdict of guilty.

It is clear from a reading of the instructions as a whole, that although the trial judge did not give the requested instructions verbatim, he gave them in substance. Thus, we overrule this assignment of error.

III.

[4] Next, defendant argues that the trial court erred in its final mandate in the larceny charge regarding the fifth element of larceny. We disagree.

The trial court correctly instructed the jury on the fifth element of larceny "that the defendant knew that he was not entitled to take the property." However, the court inadvertently omitted the word "knew" from the final mandate portion of the charge. The court charged in its mandate as follows:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant took and carried away another person's property without that person's consent and that he was not entitled to take it and intended at that time to deprive that person of it's [sic] use permanently and that the defendant took the property from a building after a breaking or entering, it would be your duty to return a verdict of guilty of felonious larceny.

We first note that defendant failed to object to this instruction before the jury retired to deliberate, thus we review for plain error. *See* N.C. R. App. P. 10(b)(2) and 10(c)(4). Under plain error review, defendant must show that "absent the error the jury probably would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

Our Supreme Court has repeatedly held that "a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction." *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994). In *State*

v. Roseboro, 344 N.C. 364, 474 S.E.2d 314 (1996), the defendant argued that he was prejudiced where the trial court instructed the jury that there were six elements of the crime of felonious larceny, but in listing and describing the elements in the body of the charge, omitted the fifth element. However, in its final mandate, the trial court correctly and fully instructed as to all six elements. Our Supreme Court held that "the omission of the fifth element of felonious larceny in the body of the jury charge did not create internally contradictory instructions. The jury was, through the final mandate, fully instructed as to all six elements of felonious larceny; thus, the instructions were only, 'at most, incomplete at one important point.' " *Id.* at 378, 474 S.E.2d at 322 (quoting *State v. Stevenson*, 327 N.C. 259, 266, 393 S.E.2d 527, 530 (1990)).

Here, the trial judge correctly instructed the jury regarding the elements of larceny, and the misstatement in the mandate portion of the charge was not brought to the attention of the trial judge when made or before the jury retired to consider its verdict. Viewing the charge as a whole, we conclude that the jury was fully instructed as to all six elements of larceny, and as in *Roseboro*, the instructions were only, "at most, incomplete at one important point." *Id.* We do not believe this omission constitutes plain error.

IV.

[5] Defendant next argues that the trial court erred in its instructions to the jury in defining the sixth element of larceny in that the trial court instructed that "the property was taken from the building *after* a breaking or entering" rather than "pursuant" to a breaking or entering. We disagree.

In *Roseboro*, our Supreme Court held that "the trial court correctly and fully instructed [the jury] . . . that in order to find defendant guilty of felonious larceny, the jury must find that defendant . . . took and carried away another person's property . . . from a building *after* a breaking and entering." *Id.* at 377, 474 S.E.2d at 321. (citing N.C.P.I.—Crim. 214.32 (1985), now N.C.P.I—Crim. 216.30) (emphasis added). Thus, the trial court did not err in giving this instruction.

V.

[6] Next, defendant argues that the trial court erred in denying his motion to dismiss the larceny charge based upon the sufficiency of the evidence. We disagree.

In ruling on a defendant's motion to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."*Id.* at 66, 296 S.E.2d at 652; *see also*, *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986). Our Courts have repeatedly noted that "[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citations omitted); *see also, State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585-86 (1994). "If all the evidence, taken together and viewed in the light most favorable to the State, amounts to substantial evidence of each and every element of the offense and of defendant's being the perpetrator of such offense, a motion to dismiss is properly denied." *Mercer*, 317 N.C. at 98, 343 S.E.2d at 892 (citations omitted).

The essential elements of larceny are that the defendant (1) took the property of another; (2) carried it away; (3) without the consent of the owner; and (4) with the intent to deprive the owner of it permanently. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). Defendant cites *State v. Moore*, 312 N.C. 607, 324 S.E.2d 229 (1985) for the proposition that the evidence disclosed no more than an opportunity for defendant or others to have taken the victim's money. However, in *Moore*, the victim discovered that her wallet was missing two hours after her encounter with the defendant. During that time, her purse, from which the wallet was taken, was left unattended in a store whose back door was unlocked. The court found that anyone in the vicinity of the store, which was located in a high crime area, would have had the opportunity to steal the wallet. *Id.* at 613, 324 S.E.2d at 233.

Here, the State's evidence showed that the Mrs. Heckstall placed her pocketbook containing the money on her kitchen table upon returning to her home, then went outside to tend to her chickens. When she walked back into her house, defendant struck her in the head seven or eight times, and then left. When Mrs. Heckstall was dis-

covered that evening, her pocketbook had been moved to a chair near the den and there was no money in it. There is no evidence that anyone other than defendant entered her house or had an opportunity to steal her money. Thus, taken in the light most favorable to the State, there was sufficient evidence of each element of the crime as charged and of defendant being the perpetrator. This assignment of error is overruled.

VI.

[7] Defendant next argues that the trial court committed plain error by allowing Mrs. Heckstall to testify that the defendant took $75 dollars from her, contending that Mrs. Heckstall was not competent to testify to such matters. We disagree.

Defendant did not object to this testimony at trial. Therefore, we review for plain error. *See State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

The evidence presented tends to show that Mrs. Heckstall saw defendant in her house when she returned from tending to her chickens. At the time, she had $75 in her pocketbook. Defendant struck her on the head seven or eight times then left. After defendant left, the $75 was missing from her purse. This evidence, circumstantial though it may be, is sufficient to support the jury's conclusion that defendant stole the $75 from Mrs. Heckstall. Thus, we cannot conclude that this is the exceptional case where the claimed error is so fundamental that justice could not have been done.

VII.

[8] Finally, defendant argues that the trial court erred by denying his motion to dismiss the assault charge where there was a fatal variance between the indictment and the evidence presented at trial regarding the type of deadly weapon used in the assault. We find merit in this argument.

An indictment need only allege the ultimate facts constituting each element of the criminal offense. *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977). Evidentiary matters need not be alleged. *Id.*

The essential elements of the crime of assault with a deadly weapon with intent to kill inflicting serious injury are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, and (5) not resulting in death. *State v. Reid*, 335 N.C. 647, 654, 440 S.E.2d 776, 780 (1994). "Where it is charged that an assault has been made with a deadly weapon, the character of the weapon must be averred." *State v. Rorie*, 252 N.C. 579, 582, 114 S.E.2d 233, 236 (1960). In *Palmer*, our Supreme Court stated that:

> it is sufficient for indictments or warrants seeking to charge a crime in which on of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon.

Id. at 639-40, 239 S.E.2d at 411 (emphasis in original). While we recognize that "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage," *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972), "[w]hether an indictment is sufficient on its face is a separate issue from whether there is a variance between the indictment and the evidence presented at trial, although both issues are based upon the same concerns: . . . to insure that the defendant is able to prepare his defense against the crime with which he is charged, and to protect the defendant from another prosecution for the same incident." *State v. Norman*, 149 N.C. App. 588, 594, 562 S.E.2d 453, 457 (2002).

"A variance occurs where the allegations in an indictment, although they may be sufficiently specific on their face, do not conform to the evidence actually established at trial." *Id.* In order for a variance to warrant reversal, the variance must be material. *Id.* A

variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged. *Id.* Citing *Palmer*, the State concedes that the indictment is sufficient if it names the weapon and either expressly states that it is a deadly weapon or alleges facts which would show that it is a deadly weapon, but argues that any variance here was not material.

The indictment here states in pertinent part the following:

> the defendant . . . unlawfully, willfully and feloniously did assault Lucy Heckstall with his hands, a deadly weapon and used as a deadly weapon, by hitting the seventy six year old woman in the head with his hands causing her to strike her head against a hard object resulting in serious injury. The assault was intended to kill and resulted in serious injury requiring emergency medical treatment and hospitilization . . . .

Evidence presented at trial tended to show that the deadly weapon used was a hammer or some sort of iron pipe. Indeed, the investigating officers testified that they searched the area behind Mrs. Heckstall's house for a weapon, and Dep. Morris testified that the weapon that caused Mrs. Heckstall's wounds "appeared to me like it was a hammer." Likewise, Mrs. Heckstall testified that the weapon was a "piece of iron or hammer or something." There was no evidence that tended to establish that defendant's hands were used as the deadly weapon.

"The defendant in a criminal action may raise the question of variance between the indictment and the proof by a motion of nonsuit." *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962). Here, the defendant moved to dismiss the assault charge on this ground at the close of the State's evidence and renewed his motion at the close of all the evidence. We hold that while the indictment may have been sufficient on its face to charge the alleged crime, there existed a fatal variance between the indictment and the evidence introduced at trial, and defendant's motion to dismiss should have been granted. "Where the indictment and the proof are at variance, as is the case here, the trial court should dismiss the charge stemming from the flawed indictment and grant the State leave to secure a proper bill of indictment." *State v. Abraham*, 338 N.C. 315, 341, 451 S.E.2d 131, 144 (1994). We, therefore, arrest judgment as to defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury in case number 94-CRS-1908 and remand this matter to the trial court for further proceedings.

Conclusion

For the foregoing reasons, we arrest judgment in case number 94-CRS-1908 and remand for further proceedings. We also vacate the judgment in 94-CRS-2420 and remand for a new sentencing hearing, in which the aggravating factor that the victim was "very old" is not applied to the larceny conviction.

94-CRS-1908 (Assault with a deadly weapon with intent to kill inflicting serious injury)—Judgment arrested; remanded.

94-CRS-2420 (Felonious breaking or entering and felonious larceny)—Judgment vacated; remanded for new sentencing.

Judges TIMMONS-GOODSON and ELMORE concur.

STATE OF NORTH CAROLINA v. ROBERT STEVENSON DOISEY

No. COA03-119

(Filed 3 February 2004)

1. Criminal Law; Prisons and Prisoners— securing attendance of incarcerated defendant—not a speedy trial motion

N.C.G.S. § 15A-711 does not guarantee a prisoner the right to a speedy trial within a specified period of time, and this defendant's request under the statute should not have been treated as a speedy trial motion. A prosecutor complies with the statute by making a written request to secure defendant's presence at the trial within six months of defendant's request that he do so, whether or not the trial actually takes place during the statutory period. This case was remanded for a determination of whether the prosecutor complied with the statute; the Attorney General's assumption of the case was subject to defendant's previously filed request and no further service was necessary.

2. Constitutional Law— speedy trial—no prejudice from delay

A defendant's constitutional right to a speedy trial was not violated by a two-year delay between the offenses and trial where defendant did not show that the delay in any way hampered his

ability to present a defense and did not show neglect or wilfulness by the prosecution.

3. Assault— instructions—boxcutter as dangerous weapon

An instruction in an assault prosecution that a boxcutter was a deadly weapon as a matter of law was supported by the testimony of the officers attacked by defendant.

Appeal by defendant from judgment entered 28 June 2002 by Judge Dwight L. Cranford in Halifax County Superior Court. Heard in the Court of Appeals 1 December 2003.

Attorney General Roy Cooper, by Assistant Attorney General Mary D. Winstead, for the State.

Paul Pooley for defendant-appellant.

LEVINSON, Judge.

Robert Doisey (defendant) appeals from convictions of assault with a deadly weapon on a government official. We find no error in part and reverse and remand in part.

The pertinent facts are as follows: In 1997, defendant was sentenced to a prison term of 339 to 416 months following conviction of first degree statutory sex offense. Defendant subsequently filed a motion for appropriate relief. On 16 December 1999 a hearing on defendant's motion was conducted at the Halifax County courthouse. Following the hearing, the trial court denied defendant's motion and ordered him returned to custody. The present charges arose from a disturbance that occurred as law enforcement officers were attempting to return defendant to a jail cell.

Two officers, Sgt. Andrew Pittman and Lt. Wes Tripp of the Halifax County Sheriff's Department, escorted defendant to the jail elevator. At the elevator, Pittman was briefly distracted by the need to use a key in the elevator; he then turned around and saw defendant trying to cut his own throat with a razor attached to a box-cutter or utility knife. When the officers tried to retrieve the box-cutter, defendant began shouting that he would not return to prison and urging the officers to shoot him. Sgt. Eddie Buffaloe, Detective William Wheeler, and probation officer Rodney Robertson joined the effort to subdue defendant, who had meanwhile dashed out the door of the courthouse. Each time the officers approached the defendant, he lunged at them with the razor, shouting at them to shoot him. After

several minutes, the disturbance was quelled when Sgt. Buffaloe shot defendant in the leg, enabling the officers to restrain defendant, confiscate the razor knife, and restore order.

On 5 June 2000 defendant was indicted on six counts of assault with a deadly weapon on a government officer and one count of felonious escape. Following a jury trial, defendant was convicted of three counts of assault with a deadly weapon on a government officer, for the assaults on Tripp, Pittman, and Buffaloe, and was acquitted of the other charges. He was sentenced to a consolidated term of 34 to 41 months for the three assaults, to be served at the expiration of the prison sentence for which he was already incarcerated. Defendant appeals.

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[1] Defendant presents three arguments on appeal. He argues first that the trial court erred by denying his motion for dismissal of the charges against him on the grounds that the prosecutor failed to comply with the provisions of N.C.G.S. § 15A-711 (2003). Resolution of this issue requires analysis of G.S. § 15A-711, which provides in pertinent part:

> § 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed:
>
> (a) When a criminal defendant is confined in a penal or other institution . . . and his presence is required for trial, the prosecutor may make written request . . . for temporary release of the defendant to . . . [a] law-enforcement officer who must produce him at the trial. The period of the temporary release may not exceed 60 days. . . .
>
> . . . .
>
> (c) A defendant who is confined in an institution . . . pursuant to a criminal proceeding and who has other criminal charges pending against him may, by written request filed with the clerk of the court where the other charges are pending, require the prosecutor prosecuting such charges to proceed pursuant to this section. A copy of the request must be served upon the prosecutor in the manner provided by the Rules of Civil Procedure, G.S. 1A-1, Rule 5(b). If the prosecutor does not proceed pursuant to subsection (a) within six months from the date the request is filed with the clerk, the charges must be dismissed.

G.S. § 15A-711(a) and (c).

G.S. § 15A-711 has sometimes been characterized as a "speedy trial" statute. However, since the 1989 repeal of North Carolina's speedy trial statutes, N.C.G.S. § 15A-701 *et seq.*, a defendant's right to a speedy trial arises under the U.S. Constitution, *State v. Joyce*, 104 N.C. App. 558, 568, 410 S.E.2d 516, 522 (1991), and the North Carolina Constitution, *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000). Therefore, although certain cases decided during the tenure of the State speedy trial statute may suggest otherwise, G.S. § 15A-711 does not guarantee an imprisoned criminal defendant the right to trial within a specific time. Rather, the statute requires that, within six months of a prisoner's properly filed request, the prosecutor "proceed pursuant to subsection (a)." Subsection (a) in turn directs the prosecutor to "make written request . . . for temporary release of the defendant." G.S. § 15A-711(a). Accordingly, the North Carolina Supreme Court has held that "the essential requirement of the statute, [is] that the defendant be temporarily released from the correctional institution and returned to the custody of an appropriate local law enforcement officer within six months of filing the request." *State v. Pickens*, 346 N.C. 628, 648, 488 S.E.2d 162, 173 (1997) (citing *State v. Dammons*, 293 N.C. 263, 267, 237 S.E.2d 834, 837 (1977)). In *Dammons*, the Court held that G.S. § 15A-711 required the prosecutor to "proceed . . . not to trial but to request a defendant's temporary release for trial." *Dammons*, *id.* Therefore, the charges against the defendant are not required to be dismissed merely because defendant's trial does not occur within a particular timeframe. *Dammons*, *id.* (no violation of statute where defendant's "trial was initially scheduled to begin . . . within the 60-day[s] . . . authorized for a temporary release[, but] . . . the trial was continued [and] defendant was presumably returned to the custody of the [DOC]"). *See also State v. Turner*, 34 N.C. App. 78, 85, 237 S.E.2d 318, 322-23 (1977):

> The State complied with G.S. 15A-711(a) within the six-month limitation. The fact that the trial was not until 1 November 1976 was not a violation of this provision. The State *proceeded* within the six-month limitation when it made the request for the defendant[.]

We conclude that G.S. § 15A-711 does not guarantee a prisoner the right to a "speedy trial" within a specified period of time. We further conclude that a prosecutor complies with the statute by making a written request to secure defendant's presence at trial within six months of the defendant's request that he do so, whether

or not the trial actually takes place during the statutory period of six months plus the sixty days temporary release to local law enforcement officials.

Against this backdrop, we next consider the facts of the instant case. Defendant was indicted on 5 June 2000. On 27 July 2000 defendant filed a request for the prosecutor to proceed pursuant to G.S. § 15A-711, and a motion for dismissal of charges based on alleged violation of defendant's U.S. constitutional right to a speedy trial. On 20 September 2000 a hearing was conducted on defendant's motion before Judge Cy A. Grant, Sr. We conclude that at the hearing on 20 September 2000, the trial court misapplied G.S. § 15A-711.

First, the underlying premise—that defendant's request under G.S. § 15A-711 constituted a "motion" subject to review by the trial court—was erroneous. The defendant submitted his request to the trial court for a ruling, and on 23 October 2000 the trial court ruled that "Defendant's Request for a Speedy Trial . . . is denied." As previously discussed, defendant's request should not have been treated as a demand for "speedy trial." Moreover, the statute provides no basis either for the defendant's submission of his request to the trial court, or for the trial court's entry of an order purporting to "deny" the request. G.S. § 15A-711(c) does not require a defendant to, *e.g.*, "apply to the trial court" or "file a motion seeking" that the prosecutor comply with the statute. Rather, the statute sets out a prisoner's statutory right to formally request that the prosecutor make a written request for his return to the custody of local law enforcement officers in the jurisdiction in which he has other pending charges.

Secondly, at the start of the hearing on 20 September 2000, the prosecutor stated—and defense counsel and the trial court apparently accepted this as accurate—that after a defendant files a request under G.S. § 15A-711, he "must be tried within sixty days" or else the charges must be dismissed. The remainder of the hearing was conducted under the misapprehension that the clock "was running" on defendant's "motion for a speedy trial." As discussed above, this was error. The only time period that began to run with the filing of defendant's request was for the prosecutor to write to the Department of Corrections seeking defendant's temporary return to Halifax County.

On 23 October 2000, the trial court entered an order denying defendant's July, 2000, motion to dismiss charges for violation of his U.S. constitutional right to a speedy trial; "denying" his request under G.S. § 15A-711; and "order[ing] that the office of the District Attorney

. . . [be] prohibited from handling the prosecution of the Defendant in the above captioned cases" and "that the prosecution of these matters be handled by the Attorney General." Although the Attorney General's office ultimately prosecuted the case, the trial court's order requiring the Attorney General to handle the case was vacated on 17 November 2000.

We next consider defendant's second set of motions. On 27 September 2000, before the trial court entered its orders denying defendant's request under G.S. § 15A-711 and directing the Attorney General to prosecute the case, the defendant filed a new motion pursuant to G.S. § 15A-711. This motion was filed with the clerk of court, and served on the district attorney.

Preliminarily, we address the State's argument that the defendant's request was not properly served on the prosecutor because he served it on the Halifax County District Attorney's office, rather than on the Attorney General. It is true that the "failure to serve a section 15A-711(c) motion on the prosecutor as required by the statute bars relief for a defendant." *State v. Pickens*, 346 N.C. 628, 648, 488 S.E.2d 162, 173 (1997).

In the instant case, as of the 20 September 2000 hearing, the Halifax County District Attorney had not even contacted the Attorney General concerning the case, nor sought his approval to delegate the prosecution to a member of the Special Prosecution Division. The record thus fails to support the proposition that, as of 20 September 2000, when the Attorney General had not been informed of a potential request to prosecute the case, the District Attorney's office was no longer a proper party to accept service of defendant's notice pursuant to G.S. § 15A-711(c). " 'No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself.' " *Griffith v. Griffith*, 38 N.C. App. 25, 28, 247 S.E.2d 30, 33 (1978) (quoting *United States v. Curry*, 47 U.S. 106, 110, 12 L. Ed. 363, 365 (1847)).

On 27 September 2000, when defendant served his second notice on the prosecutor of his request under G.S. § 15A-711(c), there had been no formal transfer of authority for the case to the Attorney General. We conclude that the defendant properly served the prosecutor with the request under G.S. § 15A-711. The record indicates that

at some time thereafter the Attorney General agreed to prosecute this case. However, we find unreasonable the suggestion that, upon the Attorney General's agreement to assist a local District Attorney with the prosecution of a case, a G.S. § 15A-711 request previously filed would need to be re-served on the Attorney General. Instead, the Attorney General's office assumes the prosecution of the case subject to a previously filed G.S. § 15A-711 request.

Defendant was tried in July, 2002. At the beginning of the trial, the court denied defendant's motion to dismiss for failure of the prosecutor to comply with his requests under G.S. § 15A-711. At no time in the present case has the trial court properly considered defendant's motion to dismiss on its merits. We further conclude that the current record is inadequate to allow this Court to resolve this issue.

The appropriate inquiry upon a motion to dismiss for failure to comply with G.S. § 15A-711 is whether the prosecutor made a written request for defendant's transfer to a local law enforcement facility within six months after defendant files his request. However, the record on appeal does not indicate what proceedings, if any, were conducted between November, 2000 and May, 2002, when the case was calendared for trial. In addition, we cannot determine from the record what, if anything, the prosecutor did to comply with defendant's requests under G.S. § 15A-711. Nor is it evident at what junctures, if any, defendant was in the physical custody of Halifax County subsequent to the G.S. § 15A-711 requests, something that might impact the necessity of making a written request for the return of defendant from another facility. All these deficiencies in the record are likely a function of misinterpretations of G.S. § 15A-711, specifically: (1) that a request under the statute constitutes a "motion" subject to the trial court's approval or denial, and (2) that a request under G.S. § 15A-711 guarantees a defendant a "speedy trial" within sixty days or some other specific time period, after which charges must be dismissed if the trial has not taken place.

We conclude that the trial court's denial of defendant's motion to dismiss as a result of violations of G.S. § 15A-711 must be reversed and remanded for a new hearing. The trial court should determine whether the prosecutor complied with the provisions of G.S. § 15A-711. Given the current posture of this appeal, we have no occasion to comment on the impact, if any, of a prosecutor's reliance upon an order "denying" a G.S. § 15A-711 request in a subsequent motion to dismiss for failure to comply with the statute.

[2] In the interests of judicial economy, and in recognition of the possibility that the trial court will determine that the prosecutor complied with G.S. § 15A-711, we elect to review defendant's remaining two arguments. Defendant argues next that the State violated his U.S. Constitutional right to a speedy trial. We disagree.

On 24 July 2000, 26 September 2000, and 18 June 2002 defendant filed motions to dismiss under N.C.G.S. § 15A-954 (2003) for the alleged violation of his right to a speedy trial under the N.C. and U.S. Constitutions. Under G.S. § 15A-954(a)(3):

> (a) The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> . . . .
>
> (3) The defendant has been denied a speedy trial as required by the Constitution of the United States and the Constitution of North Carolina.

In its determination of whether there has been a violation of the defendant's Sixth Amendment right to a speedy trial, the trial court must consider the following: "(1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice resulting from the delay." *Pickens*, 346 N.C. at 649, 488 S.E.2d at 174 (quoting *State v. McCollum*, 334 N.C. 208, 231, 433 S.E.2d 144, 156 (1993)). Further:

> [N]one of the four factors identified above [is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.

Barker v. Wingo, 407 U.S. 514, 533, 33 L. Ed. 2d 101, 118 (1972). Thus, "length of the delay is not *per se* determinative of whether a speedy trial violation has occurred." *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994).

Regarding the determination of whether the defendant has been prejudiced by delay, the North Carolina Supreme Court has noted that a speedy trial serves " '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.' " *State v. Spivey*, 357 N.C. 114, 122, 579 S.E.2d 251, 256 (2003) (quoting *Webster*, 337 N.C. at 680-81, 447 S.E.2d at 352).

Further, the defendant "must show actual, substantial prejudice." *Id.* (citation omitted).

In the instant case, almost two years passed between the date of the offenses and trial, during which time defendant several times asserted his constitutional right to a speedy trial. However, this is not dispositive, and must be balanced "against defendant's failure to show actual or substantial prejudice resulting from the delay[.]" *State v. Goldman*, 311 N.C. 338, 345, 317 S.E.2d 361, 365 (1984). Defendant alleges prejudice only in his suffering "anxiety and concern," but does not assert that the delay in any way hampered his ability to present a defense to the charges. We also note that, regardless of the speed with which the State prosecuted the instant offenses, defendant would still be serving an unrelated 30 to 40 year sentence.

Defendant also argues that the State "failed to offer any reasons" for the delay in bringing him to trial. However, the defendant "has the burden of showing that the reason for the delay was the neglect or willfulness of the prosecution." *Webster*, 337 N.C. at 679, 447 S.E.2d at 351. Defendant has not met this burden. Upon balancing the relevant factors, we conclude that defendant's constitutional right to a speedy trial was not violated. This assignment of error is overruled.

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[3] Finally, defendant argues that the trial court erred by instructing the jury that a box-cutter is a deadly weapon as a matter of law.

Defendant was convicted of felonious assault on a law enforcement officer with a deadly weapon, in violation of N.C.G.S. § 14-34.2 (2003), which provides in pertinent part that:

> [A]ny person who commits an assault with a firearm or any other deadly weapon upon an officer or employee of the State . . . in the performance of his duties shall be guilty of a Class F felony.

"[A]n essential element of the offense of assault with a deadly weapon on a government official is the use of a firearm or other deadly weapon to commit the assault." *State v. Brogden*, 137 N.C. App. 579, 581, 528 S.E.2d 391, 392 (2000). "A dangerous or deadly weapon 'is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm.' " *State v. Wiggins*, 78 N.C. App. 405, 406, 337 S.E.2d 198, 199 (1985) (quoting *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981)). "If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending

to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict." *State v. Palmer*, 293 N.C. 633, 643, 239 S.E.2d 406, 413 (1977).

However, if the " 'alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . *is one of law, and the Court must take the responsibility of so declaring.*' " *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 470 (1986) (quoting *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737, 737 (1924)) (jury properly instructed that box cutter held to victim's throat was deadly weapon *per se*). Under appropriate factual circumstances, a box-cutter may be such a weapon. *State v. Adams*, 156 N.C. App. 318, 323-24, 576 S.E.2d 377, 381 (evidence that defendant tried to cut victim's face with utility knife "supports the trial judge's instruction that a box cutter is a deadly weapon *per se*"), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 698 (2003).

In the present case, Sgt. Pittman testified that defendant had "lunge[d] at" the law enforcement officers "like he was going to cut [them]." Lt. Tripp testified that defendant "faced [him] and lunged and swiped at [his] midsection with the box cutter actually hitting [his] shirt" and that he was "scared." Tripp also testified that defendant "charg[ed at Sgt.] Buffaloe with the box-cutter" and continued to "charge" at him even after Buffaloe backed up. Sgt. Buffaloe testified that defendant was within six feet of him and "would lunge towards us and swing the box-cutter at us and attempt to cut us." At some point during the disturbance, Buffaloe lost his footing and slipped to one knee as defendant continued to advance on him and "raised the box cutter over his head." We conclude that the officers' testimony supported the trial court's instruction to the jury that the razor knife was a deadly or dangerous weapon as a matter of law. This assignment of error is overruled.

For the reasons discussed above, we remand for a new hearing on defendant's motion to dismiss for violation of the provisions of G.S. § 15A-711. We find no other error in defendant's trial.

Reversed and remanded in part, no error in part.

Chief Judge Eagles concurred prior to 31 January 2004.

Judge MARTIN concurs.

JAMES H. SLAUGHTER, TRUSTEE OF THE FREEMAN C. SLAUGHTER AND GENEVIEVE P. SLAUGHTER CHARITABLE REMAINDER TRUST, FREEMAN C. SLAUGHTER, AND GENEVIEVE P. SLAUGHTER, PLAINTIFFS v. J. TODD SWICEGOOD, RAYMOND JAMES & ASSOCIATES, INC., RAYMOND JAMES FINANCIAL SERVICES, INC., THE ESTATE OF ROBERT LEE SAUNDERS, SAMUEL T. GOFORTH, AND SAUNDERS & GOFORTH, ATTORNEYS AT LAW, P.A., DEFENDANTS

No. COA03-171

(Filed 3 February 2003)

1. Appeal and Error— appealability—interlocutory order—denial of motion to compel arbitration—substantial right

Although the denial of a motion to compel arbitration is an appeal from an interlocutory order, the right to arbitrate a claim is a substantial right which may be lost if review is delayed and the order is therefore immediately appealable.

2. Arbitration— motion to compel—validity of arbitration agreement

The trial court did not err in an action arising out of the mishandling of a trust by denying defendants' motion to compel arbitration and by concluding that no arbitration agreement existed between the parties even though a customer agreement allegedly required all plaintiffs to submit their claims to arbitration, because defendants failed to meet their burden of proof to show that a valid agreement existed between the parties when: (1) an affidavit submitted generally describing the process for entering customer agreements and other documents did not indicate that the affiant witnessed defendant former trustee's signing of the customer agreement and did not explain why the customer agreement was scanned into the filing system eleven years after it was allegedly signed; and (2) although defendants submitted an affidavit by another witness in support of their motion for reconsideration which stated that the affiant saw defendant former trustee sign the customer agreement, this affidavit was not before the trial court when it heard the motion to compel arbitration, and thus, it cannot be considered by the Court of Appeals.

3. Appeal and Error— appealability—interlocutory order—denial of motion for reconsideration

Although defendants contend the trial court erred in an action arising out of the mishandling of a trust by denying defendants' motion to reconsider the 31 October 2002 order that denied

defendants' motion to compel arbitration, this assignment of error is dismissed because: (1) defendants failed to offer any grounds justifying appellate review of the 3 January 2003 order denying the motion for reconsideration; and (2) it is the appellants' burden to present appropriate grounds for the Court of Appeals' acceptance of an interlocutory appeal.

4. Trusts— standing—individual capacity

The trial court erred in an action arising out of the mishandling of a trust by failing to dismiss plaintiffs' claims in their individual capacity, because: (1) the common law rule provides that any injury to the property placed in a trust may only be redressed by the trustee, and plaintiffs do not fit within any exception to the common law rule to allow plaintiffs to sue as beneficiaries; and (2) there is no support for plaintiffs' contention that the status of settlors, standing alone, provides them with standing.

Appeal by defendants from orders entered 31 October 2002 and 3 January 2003 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 1 December 2003.

Forman, Rossabi, Black, P.A., by Amiel J. Rossabi, for plaintiff-appellees.

Hunton & Williams, by Scott M. Ratchick and Amy K. Alcoke, pro hac vice, for defendant-appellants.

LEVINSON, Judge.

J. Todd Swicegood, Raymond James & Associates, Inc. (RJA), and Raymond James Financial Services, Inc. (RJFS) appeal from the trial court's 31 October 2002 order (1) denying their motion to compel arbitration, and (2) refusing to dismiss plaintiffs Freeman and Genevieve Slaughters' individual claims. Defendants Swicegood, RJA, and RJFS (collectively defendants) also appeal from the trial court's 3 January 2003 order denying their motion to reconsider the 31 October 2002 order. The remaining defendants named in the complaint (the Estate of Robert Lee Saunders, Samuel T. Goforth and Saunders and Goforth, P.A.) are not parties to this appeal. We affirm in part, reverse in part and dismiss in part.

In 1989, plaintiffs Freeman and Genevieve Slaughter (the Slaughters) consulted with attorney Robert Saunders for retirement and estate planning. Defendant Saunders advised the Slaughters to

create a charitable remainder unitrust to provide maximum financial benefit to their estate. On 7 October 1989 the Slaughters established the Freeman C. Slaughter and Genevieve P. Slaughter Charitable Remainder Trust (the Trust). Defendant Saunders was appointed as trustee. The Slaughters transferred title to approximately 155 acres of real property to the Trust. The Trust sold the real property in December 1989 and collected the proceeds of the sale in installment payments over several years. The Trust agreement required that the Slaughters be paid a sum equal to fourteen percent of the Trust's value each year. Upon the death of both Freeman and Genevieve Slaughter, the Trust's remainder would be distributed to Duke University Medical Center.

Defendant Saunders initially invested the Trust assets with Interstate Johnson Lane, Co. Saunders placed the Trust funds in an account with defendant RJA on 7 December 1990. Defendant J. Todd Swicegood served as an investment advisor and managed the Trust account with RJA. Swicegood is an employee of defendant RJA, which is a subsidiary of defendant RJFS. When establishing the Trust's RJA account, defendant Saunders, as trustee, allegedly signed a Raymond James Customer Agreement (Customer Agreement) that contained the following clause:

> The undersigned client agrees, and by carrying an account for the undersigned client you agree, that all controversies [that] may arise between us concerning any transaction or the construction, performance of breach of this or any other agreement between us pertaining to securities or other property, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration. Any arbitration shall be in accordance with the rules, then applying, of either the National Association of Securities Dealers, Inc., New York Stock Exchange, Inc., American Stock Exchange, Inc., or where appropriate, the Chicago Board Options Exchange, Inc., as I elect.

Defendant Swicegood discouraged the Slaughters from being involved personally in the management of the trust assets. He assured the Slaughters on several occasions that the trust investments were doing well.

The Slaughters were informed in early November 1999 that defendant Saunders was critically ill. Saunders died on 8 November 1999. Before his death, Saunders resigned as trustee of the Trust and appointed defendant Swicegood as a successor trustee on 27 October 1999.

The Slaughters were notified in early 2001 that defendant Swicegood had transferred the Trust funds to an annuity account. Swicegood explained that the transfer would protect the Trust's assets from the falling prices of the stock market. Freeman and Genevieve Slaughter became concerned about defendant Swicegood's management of the Trust account and attended several meetings with him.

On 9 July 2001, defendant Swicegood, at the Slaughters' request, resigned as trustee and appointed James H. Slaughter as trustee. The files relating to management of the trust were presented to Trustee Slaughter in disarray, including unopened correspondence and overdue bills from the Internal Revenue Service. Trustee Slaughter contacted defendant Swicegood on 29 August 2001 by certified mail to request that the Trust account be closed.

Trustee Slaughter, on behalf of the Trust, sued all defendants on theories of fraud, negligent misrepresentation, breach of fiduciary duty, negligence, breach of contract, unfair and deceptive trade practices, securities violations, civil conspiracy and demanded an accounting of trust funds. Freeman and Genevieve Slaughter joined the lawsuit in their individual capacities. Defendants Swicegood, RJA and RJFS moved to dismiss the Slaughters' individual claims for lack of standing. Additionally, defendants moved to compel arbitration of plaintiffs' claims. The trial court denied both motions in an order filed 31 October 2002. Defendants' motion for reconsideration was denied by the trial court in an order filed 3 January 2003. Defendants appeal.

Defendants first argue that the trial court erred in finding that no arbitration agreement existed. Defendants contend that the Customer Agreement, signed by defendants Swicegood and Saunders, contained an agreement requiring all plaintiffs to submit their claims to arbitration. Plaintiffs deny that a valid arbitration agreement exists and question the authenticity of the Customer Agreement.

[1] As an initial matter, we note that the denial of a motion to compel arbitration is interlocutory in nature. *See Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001). However, this Court has held that " '[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable.' " *Boynton v. ESC*

Med. Sys., Inc., 152 N.C. App. 103, 106, 566 S.E.2d 730, 732 (2002) (quoting *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999)).

[2] If a party claims that a dispute is covered by an agreement to arbitrate but the adverse party denies the existence of an arbitration agreement, the trial court shall determine whether an agreement exists. *See* N.C.G.S. § 1-567.3 (2001). "The question of whether a dispute is subject to arbitration is an issue for judicial determination." *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (citing *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 89 L. Ed. 2d 648 (1986)). This determination involves a two-step analysis requiring the trial court to "ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.' " *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990)).

A dispute can only be settled by arbitration if a valid arbitration agreement exists. N.C.G.S. § 1-567.2 (2001). "[T]he party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes." *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992); *see Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 120, 535 S.E.2d 397, 400 (2000). "The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (citing *Routh*, 108 N.C. App. at 272, 423 S.E.2d at 794), *disc. review denied*, 356 N.C. 167, 568 S.E.2d 611 (2002). However, the trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal. *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678; *Brevorka v. Wolfe Constr., Inc.*, 155 N.C. App. 353, 356, 573 S.E.2d 656, 659 (2002), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 385 (2003).

Here, the trial court found that defendants failed to prove that a valid arbitration agreement existed between the parties. Defendants, as the parties seeking to compel arbitration, held the burden of proof. Defendant Saunders purportedly signed the Customer Agreement on 7 December 1990. Saunders was deceased at the time of the motion hearing and was therefore unavailable to testify. Freeman and Genevieve Slaughter submitted affidavits stating they were not aware that the Trust account was subject to an arbitration agreement.

Defendants submitted an affidavit by Mary Raver, an employee of defendant RJFS, stating that the Customer Agreement was scanned into the Raymond James electronic filing system on 28 December 2001. Raver's affidavit generally described the process for entering customer agreements and other documents in the RJFS computer system. This affidavit did not indicate that she witnessed Saunders sign the Customer Agreement and did not explain why the Customer Agreement was scanned into the filing system eleven years after it was allegedly signed. Defendants did not present any evidence whatsoever concerning, *e.g.*, the general business practices surrounding the signing of similar customer agreements, or whether it was the usual policy of RJA advisors to require prospective clients to sign such agreements before providing investment advice and other services. We note that defendants submitted an affidavit by defendant Swicegood in support of their motion for reconsideration. In this affidavit, Swicegood stated that he witnessed Saunders sign the Customer Agreement. Because Swicegood's affidavit was not before the trial court when it heard the motion to compel arbitration, it cannot be considered by this Court in determining whether the court erred in refusing to find a binding arbitration agreement.

Defendants' motion to compel was based upon the validity of the arbitration agreement contained within the Customer Agreement. On these facts, the trial court could properly find that there was not a binding arbitration agreement. The trial court's findings of fact are supported by competent record evidence and support its conclusion that no arbitration agreement existed between the parties. This assignment of error is overruled.

[3] Defendants further argue that the trial court erred by denying their motion to reconsider the 31 October 2002 order.

The order denying the motion to compel arbitration is interlocutory in nature. Defendants' brief states that the original order filed 31 October 2002 and the order denying the motion to reconsider were both interlocutory orders. Defendants contend that the 31 October order denying the motion to compel arbitration affected a substantial right and should be reviewed on appeal. However, defendants failed to offer any grounds justifying appellate review of the 3 January 2003 order denying the motion for reconsideration.

The North Carolina Rules of Appellate Procedure require a statement asserting grounds for appellate review:

> When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C.R. App. P. 28(b)(4). " '[I]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]' " *Thompson*, 140 N.C. App. at 121, 535 S.E.2d at 401 (quoting *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 162, 519 S.E.2d 540, 543 (1999)); *see Munden v. Courser*, 155 N.C. App. 217, 574 S.E.2d 110 (2002). The Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567 (1984). As a result of defendants' failure to argue why this Court should review the 3 January 2003 interlocutory order, we dismiss this assignment of error.

[4] Defendants also contend that Freeman and Genevieve Slaughters' claims should have been dismissed because they do not have standing to sue individually. Defendants argue that Trustee James Slaughter's lawsuit on behalf of the Trust adequately represents Freeman and Genevieve Slaughters' individual interests as beneficiaries. The Slaughters contend that they have standing to sue individually resulting from defendant Swicegood's direct representations to them as settlors and beneficiaries of the Trust. On the facts presented in this case, the Slaughters' argument is unpersuasive.

The North Carolina Rules of Civil Procedure require that "[e]very claim shall be prosecuted in the name of the real party in interest." N.C.G.S. § 1A-1, Rule 17(a) (2003). "A real party in interest is 'a party who is benefited or injured by the judgment in the case' and who by substantive law has the legal right to enforce the claim in question." *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 249, 314 S.E.2d 801, 802 (1984) (quoting *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 18-19, 234 S.E.2d 206, 209 (1977)). A party has standing to initiate a lawsuit if he is a "real party in interest." *See Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) (citing *Krauss v. Wayne County*

DSS, 347 N.C. 371, 373, 493 S.E.2d 428, 430 (1997)). A motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003). An appellate court should review a trial court's order denying a motion for failure to state a claim "to determine 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760, 529 S.E.2d 693, 694 (2000) (quoting *Shell Island Homeowners Ass'n. Inc. v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999)).

This Court has recognized that when an individual grantor places his property in an active trust, the grantor's legal title to that property passes to the trustee. *See In Re Estate of Washburn*, 158 N.C. App. 457, 581 S.E.2d 148 (2003); *Lentz v. Lentz*, 5 N.C. App. 309, 168 S.E.2d 437 (1969); *Mast v. Blackburn*, 248 N.C. 231, 102 S.E.2d 812 (1958). The common law rule provides that any injury to the property placed in a trust may only be redressed by the trustee. That rule is summarized as follows:

> The trustee has a title (generally legal title) to the trust property, usually has its possession and a right to continue in possession, and almost always has all the powers of management and control which are necessary to make the trust property productive and safe. Any wrongful interference with these interests of the normal trustee is therefore a wrong to the trustee and gives him a cause of action for redress or to prevent a continuance of the improper conduct. Although the beneficiary is adversely affected by such acts of a third person, no cause of action inures to him on that account. The right to sue in the ordinary case vests in the trustee as a representative.
>
> . . . .
>
> In the absence of special circumstances, the beneficiary is not eligible to bring or enforce these causes of action which run to his trustee. Thus in the usual case he cannot sue a third person to recover possession of the trust property for himself or the trustee, or for damages for conversion of or injury to the trust property, or for recovery of its income or to compel an agent of the trustee to account, or to enjoin a threatened injury to trust property by a third person.

George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 869 at 112-13, 115-17 (rev. 2d ed. 1995).

Several exceptions to the common law rule barring individual lawsuits by beneficiaries have been recognized. When the beneficiary is in actual physical possession of trust property, he can sue for injury to the possession or to enjoin a disturbance of possession of the property. *See* Bogert, § 869 at 117; Restatement (Second) of Trusts § 281. If a conflict of interest arises between the trustee and a beneficiary, or between two beneficiaries, a beneficiary has standing to sue individually. *See* Bogert, *Law of Trusts*, § 593 at 422 (rev. 2d ed. 1980). Also, if the trustee refuses or fails to initiate a meritorious lawsuit against a third party, the beneficiary may file a cause of action to protect his own interests. *See* Bogert, § 869 at 118-21. This exception to the common law rule is outlined in the Restatement (Second) of Trusts, § 282:

> (1) Where the trustee could maintain an action at law or suit in equity or other proceeding against a third person if the trustee held the property free of trust, the beneficiary cannot maintain a suit in equity against the third person, except as stated in Subsections (2) and (3).
>
> (2) If the trustee improperly refuses or neglects to bring an action against the third person, the beneficiary can maintain a suit in equity against the trustee and the third person.
>
> (3) If the trustee cannot be subjected to the jurisdiction of the court or if there is no trustee, the beneficiary can maintain a suit in equity against the third person, if such suit is necessary to protect the interest of the beneficiary.

Restatement (Second) of Trusts, § 282. North Carolina has not expressly adopted § 282, although our Supreme Court has recognized the Restatement (Second) of Trusts as persuasive authority. *See Fortune v. First Union Nat. Bank*, 323 N.C. 146, 149, 371 S.E.2d 483, 484 (1988). Several jurisdictions have adopted § 282 to prevent lawsuits by individual beneficiaries unless subsection (2) or (3) applies. *See Orentreich v. Prudential Insurance Co.*, 275 A.D.2d 685, 713 N.Y.S.2d 330 (2000) (holding that only trustee could seek rescission of insurance policies owned by trust); *Pillsbury v. Karmgard*, 22 Cal. App. 4th 743 (1994) (holding that a beneficiary did not have standing to sue unless beneficiary showed that trustee's refusal to bring lawsuit against third party was negligent or improper); *Anderson v. Dean*

Witter Reynolds, Inc., 841 P.2d 742 (Utah Ct. App. 1992) (holding that beneficiary had standing to sue when trustee failed to bring lawsuit against brokerage firm that distributed assets in violation of trust agreement); *Axelrod v. Giambalvo*, 472 N.E.2d 840 (Ill. App. Ct. 1984) (applying Restatement (Second) of Trusts § 282 to hold that plaintiff trust beneficiaries did not have standing to sue former trustee for breach of fiduciary duty when successor trustee withdrew complaint filed on behalf of the trust); *Appollinari v. Johnson*, 305 N.W.2d 565 (Mich. Ct. App. 1981) (holding that beneficiaries' guardian did not have standing to sue a third party because the trustee held title to trust assets).

North Carolina courts have granted beneficiaries standing to sue individually for breach of fiduciary duty against current trustees who allegedly mismanaged trust funds. *See Fortune*, 323 N.C. 146, 371 S.E.2d 483. The *Fortune* holding is consistent with Section 282 of the Restatement (Second) of Trusts and the common law "conflict of interest" exception allowing a lawsuit by the beneficiary.

Freeman and Genevieve Slaughter contend that their status as settlors of the Trust provides them with standing to sue individually. The Slaughters offer no support for their contention that the status of settlor, standing alone, provides them with standing. Consistent with prior holdings, title to property placed in a trust passes to the trustee. The Slaughters' argument that they have standing because they were the settlors of the Trust fails.

Freeman and Genevieve Slaughter also argue that they have standing to sue as beneficiaries. However, the facts presented in the instant case do not fit within any exception to the common law rule to allow the Slaughters standing to sue as beneficiaries. Here, individual beneficiaries and the successor trustee are suing a former trustee, now a third party to the Trust, simultaneously. Trustee Slaughter issued the complaint on behalf of all plaintiffs, with identical claims against all defendants. The plaintiffs' complaint fails to differentiate between the alleged harm done to the Trust, the harm to the charitable remainder beneficiary and any injury to the Slaughters as individual beneficiaries. Freeman and Genevieve Slaughter do not claim that Trustee Slaughter's lawsuit on behalf of the Trust will fail to repair any injury accruing to them as individual beneficiaries. They fail to allege any conflict of interest between the charitable and lifetime beneficiaries or between the beneficiaries and Trustee Slaughter. No party disputes that the trial court had jurisdiction over all defendants. Trustee Slaughter did not refuse or neglect to bring an

action against defendants to protect the Trust. Taking all of the allegations in the complaint as true, Freeman and Genevieve Slaughter failed to allege any facts that would allow them to sue individually under an exception to the common law rule barring individual claims by beneficiaries. Accordingly, we hold that the trial court erred in concluding that the Slaughters had standing to pursue their individual claims against defendants.

We affirm the portion of the 31 October 2002 order denying the motion to compel arbitration and reverse the portion allowing Freeman and Genevieve Slaughters' individual claims against defendants.

Affirmed in part; reversed in part; dismissed in part.

Chief Judge EAGLES concurred prior to 31 January 2004.

Judge MARTIN concurs.

NORTH CAROLINA FORESTRY ASSOCIATION, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY, AND THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION AND ITS NPDES COMMITTEE, RESPONDENTS, AND THE SIERRA CLUB AND DOGWOOD ALLIANCE

No. COA01-1329-2

(Filed 3 February 2004)

1. Administrative Law— final agency decision—timeliness

Petitioner waived its argument concerning the timeliness of a final agency decision (and whether the ALJ decision was therefore adopted) by failing to object even though it was notified of and participated in an agency hearing held after the time for issuing the final decision had run.

2. Environmental Law— stormwater permit—NPDES Committee—final agency decision

The National Pollutant Discharge Elimination System Committee of the Environmental Management Commission was properly delegated the authority to render a final agency decision under N.C.G.S. § 143-215.3(a)(4).

3. Administrative Law— standard of review—not clearly delineated

The superior court order upon review of a final agency decision was remanded where the Court of Appeals could not determine whether the superior court applied the appropriate standard to each issue.

Appeal by petitioner and respondents from order entered 27 March 2001 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 August 2002. A divided panel of this Court reversed for lack of standing by opinion filed 12 November 2002. *See N.C. Forestry Ass'n v. N.C. Dep't. of Env't. and Natural Res.*, 154 N.C. App. 18, 571 S.E.2d 602 (2002). The North Carolina Supreme Court reversed this Court and, by opinion filed 5 December 2003, remanded to this Court for consideration of petitioner's remaining assignments of error. *See N.C. Forestry Ass'n v. N.C. Dep't. of Env't. and Natural Res.*, 357 N.C. 640, 588 S.E.2d 880 (2003).

Hunton & Williams, by Charles D. Case, Craig A. Bromby, Jeff F. Cherry, and Julie Beddingfield, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy General Jill B. Hickey, for respondent-appellees.

Southern Environmental Law Center, by Donnell Van Noppen, III and Sierra Weaver for intervenors-appellees.

TYSON, Judge.

I. Facts

This Court originally heard this appeal and issued a majority opinion from a divided panel holding that plaintiff lacked standing. *N.C. Forestry Ass'n v. N.C. Dep't. of Env't. and Natural Res.*, 154 N.C. App. 18, 571 S.E.2d 602 (2002). The Supreme Court reversed that opinion and remanded this case to this Court for a ruling on the remaining issues. *N.C. Forestry Ass'n v. N.C. Dep't. of Env't. and Natural Res.*, 357 N.C. 640, 588 S.E.2d 880 (2003).

North Carolina Forestry Association ("petitioner") appeals the exclusion of wood chip mills from coverage under Stormwater General Permit No. NCG210000 issued by the North Carolina Department of Environment and Natural Resources, through its director of the Division of Water Quality ("respondent DENR").

Respondent DENR issued General Permit No. NCG210000 in April, 1998, which included some segments of the timber products industry, but excluded wood chip mills, logging, wood preserving, and cabinet-making segments of the industry. As part of this permit, respondent DENR allowed wood chip mills, which had applied for and obtained coverage under former General Permit No. NCG040000 before it expired, to remain covered under the expired permit. Only new or expanding wood chip mills were required to apply for "individual" permits.

On 1 June 1998, petitioner filed a Petition for Contested Case Hearing pursuant to N.C. Gen. Stat. § 150B-23 seeking administrative review of the decision. In an order filed 17 November 1998, the Administrative Law Judge ("ALJ") denied respondents' motion to dismiss petitioner's claims and allegations involving exclusion of wood chip mills from coverage under General Permit No. NCG210000. Both petitioner and respondents moved for summary judgment. The ALJ recommended that summary judgment be entered in favor of petitioner. The ALJ concluded that respondent DENR lacked statutory authority to consider secondary water quality impacts (sedimentation and erosion) of wood chip mills when it determined to exclude them from General Permit No. NCG210000.

On 13 October 1999, a hearing was held before the National Pollutant Discharge Elimination System Committee ("NPDES") of the Environmental Management Commission ("EMC") for a final agency decision. The EMC is a commission of respondent DENR. *See* N.C. Gen. Stat. § 143B-282 (2001). The EMC neither heard nor received new evidence after receiving the recommended decision from the ALJ. The EMC held that summary judgment should be granted in favor of respondents as petitioner lacked standing to bring its claims. In the alternative, the EMC ruled that respondent DENR "did not exceed its authority or jurisdiction, act erroneously, fail to act as required by law or rule, fail to use proper procedure, or act arbitrarily or capriciously in its decision to exclude wood chip mills from coverage under NPDES Stormwater General Permit No. NCG210000."

Petitioner sought judicial review of the EMC's final agency decision made by the EMC pursuant to N.C. Gen. Stat. § 143-215.5 and N.C. Gen. Stat. § 150B-43 *et seq.* Respondents filed motions to strike material that petitioner attached to its amended petition and brief in support of its argument for standing. Respondents argued that the additional material was not part of the record before the ALJ, not considered by EMC, and not appropriate for judicial notice.

Petitioner subsequently filed a motion to correct the record and a motion to present additional evidence with respect to petitioner's standing. The superior court entered an order on 27 March 2001, and did not consider nor rule upon respondents' motions to strike, petitioner's motion to correct the record, and petitioner's motion to present additional evidence.

The superior court found that the EMC timely rendered its final agency decision and that the ALJ's recommended decision did not become the final agency decision. The superior court also found petitioner to be a "person aggrieved" under N.C. Gen. Stat. § 150B-22, "based on the existing record," and reversed that portion of the final agency decision as "affected by error of law."

The superior court affirmed in part the final agency decision, concluding that the Director of the Division of Water Quality, acting under a delegation of authority from the EMC, has the "absolute power to issue or not to issue a general permit for any class of activities." The superior court did not reach nor rule upon the issues regarding the authority of EMC to consider secondary water quality impacts.

II. Issues

The remaining issues to be addressed on remand to this Court are whether the superior court: (1) erred in concluding that the EMC's final agency decision was timely, (2) applied the correct standard of review in determining that respondent had "absolute power" under the statute, (3) applied the correct standards of statutory construction in determining respondent's statutory authority, (4) erred in failing to address whether respondent failed to act as required by law, (5) erred in failing to address whether respondent acted arbitrarily and capriciously and without substantial evidence in support of its decision to exclude wood chip mills from General Permit No. NCG210000, and (6) erred in failing to rule on motions to correct and supplement the record.

We affirm in part, vacate in part, and remand the order of the superior court for further proceedings.

III. Final Agency Decision

A. Timeliness

[1] Petitioner argues that the final agency decision of the EMC was not issued in a timely manner as required by N.C. Gen. Stat.

§ 150B-44 and that the NPDES Committee does not have statutory authority to render a final agency decision for the EMC. Petitioner contends that the recommended decision of the ALJ in favor of petitioner became the final agency decision. We disagree.

The statute as it then existed provided in pertinent part:

> An agency that is subject to Article 3 of this Chapter and is a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 90 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision. Failure of an agency subject to Article 3A of this Chapter to make a final decision within 180 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or, if the case was heard by an administrative law judge, by the administrative law judge.

N.C. Gen. Stat. § 150B-44 (1999) (the General Assembly amended the time requirements effective 1 January 2001). In *Occanceechi Band of the Saponi Nation v. North Carolina Comm'n of Indian Affairs*, this Court interpreted the time limits of N.C. Gen. Stat. § 150B-44 to be self-executing. 145 N.C. App. 649, 551 S.E.2d 535, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 575 (2001). The plain language of N.C. Gen. Stat. § 150B-44 provides that "an agency subject to Article 3 of this chapter has 90 days from the day the official record is received by the Commission or 90 days after its regularly scheduled meeting, whichever is longer, to issue its final decision in the case." *Id.* at 653, 551 S.E.2d at 538. The first ninety (90) days may be extended for an additional ninety days under two specific circumstances: "(1) by agreement of the parties and (2) for good cause shown." *Id.* (citing N.C. Gen. Stat. § 150B-44). We held that "the statute is clear that if a final decision has not been made within these time limits the agency is considered to have adopted the ALJ's recommended decision." *Id.* (citation omitted).

At bar, it is undisputed that the EMC received the recommended decision and official record from the Office of Administrative

Hearings on 4 May 1999, and that its next regularly scheduled meeting was 13 May 1999. Initially, EMC had to issue its final decision on or before 11 August 1999, under the first ninety day time limit. On 14 July 1999, EMC notified the parties in writing that the matter would be scheduled for hearing at either the 13 October or 14 October 1999, EMC meeting. No objection was made to this schedule.

Sometime after 11 August 1999, the chairman of EMC, by order entered *nunc pro tunc* to 10 August 1999, extended the time period for making a final agency decision for the additional ninety days. This order recited that the hearing of the matter was scheduled for a decision at the 14 October 1999, meeting for "good cause shown." The parties received the order on 27 August 1999. Petitioner did not object either to the hearing date or the order extending the time limit and participated in the hearing held on 13 October 1999, without objection. With the extension, EMC's deadline to issue its final decision became 9 November 1999. The final agency decision was issued on 5 November 1999.

Petitioner contends that an "after the fact extension" by an order *nunc pro tunc* is not provided for under N.C. Gen. Stat. § 150B-44. We do not address the issue of whether an agency may extend the time limits under N.C. Gen. Stat. § 150B-44 in this manner. Petitioner raised its timeliness argument for the first time on appeal in the superior court and has waived any objection to the extension.

> A litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible [sic].

Nantz v. Employment Sec. Comm'n of N.C., 28 N.C. App. 626, 630, 222 S.E.2d 474, 477, *aff'd*, 290 N.C. 475, 226 S.E.2d 340 (1976) (citing *First-Citizens Bank and Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969)). Petitioner waived the timeliness argument when it was notified of, participated in, and failed to object until after the EMC hearing. That portion of the superior court's order affirming the timeliness of EMC's final agency decision is affirmed.

B. Delegation of Authority

[2] Petitioner further argues that the NPDES Committee does not have statutory authority to render a final agency decision for the EMC. Petitioner contends that N.C. Gen. Stat. § 150B-36(b) requires

that a final agency decision in a contested case be made by the agency, and that the NPDES Committee is not an "agency" as that term is defined in the statute. We disagree. *See* N.C. Gen. Stat. § 150B-2(1a) (2001) (Agency is defined as "an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch.").

The Congress of the United States authorized the Environmental Protection Agency ("EPA") to establish effluent limitations for pollutants and toxic waste discharges by industry, agricultural operations, and public and private waste treatment facilities. All public and private organizations that discharge wastes through point sources are required to obtain a NPDES permit. 33 U.S.C. § 1342 (1994). Individual states were authorized to assume responsibility for administration of the NPDES permit system upon enacting state statutory authorization and application to the EPA. 33 U.S.C. § 1342(b) (1994).

Our General Assembly amended the Water and Air Resources Act in order to obtain state administration of the NPDES permit system. 1973 N.C. Sess. Laws, c. 1262, s. 23. N.C. Gen. Stat. § 143-211(a) (2001) states the public policy underlying the Water and Air Resources Act is "to provide for the conservation of its water and air resources." The statute confers upon DENR authority "to administer a complete program of water and air conservation, pollution abatement and control . . ." and states that "the powers and duties of the [EMC] and the [DENR] be construed so as to enable the Department and Commission to qualify to administer federally mandated programs of environmental management . . . ." N.C. Gen. Stat. § 143-211(c) (2001).

N.C. Gen. Stat. § 143-215.3(a)(4) (2001) grants the EMC the power "[t]o delegate such of the powers of the [EMC] as the [EMC] deems necessary to one or more of its members, to the Secretary or any other qualified employee of the [DENR]." Pursuant to this statutory provision and federal regulations, EMC adopted Resolution 74-44 which appointed, a five member committee, in lieu of the full EMC, to hear appeals of decisions or orders of designated hearing officers regarding NPDES permits. Committee members are also required to comply with federal requirements for membership contained in 40 C.F.R. 123.25 (formerly 40 C.F.R. 124.94). As a result, the NPDES Committee, consisting of five members of the EMC, was properly

delegated the authority to render a final agency decision concerning petitioner's appeal.

Petitioner contends that EMC Resolution 74-44 is invalid. Petitioner argues the resolution preceded adoption of N.C. Admin. Code tit. 15A, r.2A.0007(a) creating the NPDES Committee and that the resolution has not been readopted by EMC or incorporated into the rule. The General Assembly specifically conferred upon EMC the statutory authority to delegate those powers it deemed necessary. *See* N.C. Gen. Stat. § 143-215.3 (2001). The statute as it existed in 1974 provided the same authority to delegate as the present statute. We see no need to require EMC to readopt or pass a new resolution absent a change in the statute that confers such authority. This assignment of error is overruled.

IV. Standard of Review

[3] Petitioner argues that the superior court misinterpreted N.C. Gen. Stat. § 143-215.1 as granting respondent DENR "absolute power to issue or not to issue a general permit for any class of activities whatsoever." Petitioner asserts that the superior court failed to apply the proper standard of review of a final agency decision that petitioner contends was arbitrary and capricious. We agree.

Petitioner initially argues that *de novo* review applies to all issues but subsequently argues that respondents' final agency decision should be reviewed under an arbitrary and capricious standard. Judicial review of an administrative agency decision is governed by the North Carolina Administrative Procedure Act, codified at Chapter 150B of the North Carolina General Statutes. *Henderson v. North Carolina Dep't. of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988).

The superior court is authorized to reverse or modify an agency's final decision,

> if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2001). The proper standard of review by the superior court is determined by the particular issues presented on appeal. *ACT-UP Triangle v. Commission for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. North Carolina Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)). If the petitioner contends the final agency decision is affected by an error of law, *de novo* review is the proper standard of review under N.C. Gen. Stat. § 150B-51(b)(1)-(4). *Dillingham v. North Carolina Dep't. of Human Resources*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999). If petitioner contends the final agency decision was not supported by substantial evidence under N.C. Gen. Stat. § 150B-51(b)(5), arbitrary and capricious, or an abuse of discretion under N.C. Gen. Stat. § 150B-51(b)(6), the whole record test is the proper standard of review. *Id.* The reviewing court may be required to utilize both standards of review if warranted by the nature of the issues raised on appeal. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993).

These standards of review are distinct. *De novo* review requires the court to "consider a question anew, as if not considered or decided by the agency previously" and to "make its own findings of fact and conclusions of law" rather than relying upon those made by the agency. *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000) (citation omitted). On the other hand, "[t]he 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. "Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion." *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991) (citation omitted).

This Court's scope of appellate review of a superior court order regarding a final agency decision is limited to examination of the trial

court's order for error of law. *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19. "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (citations omitted).

Petitioner asserts that the final agency decision exceeded statutory authority and was arbitrary and capricious. The superior court was required to employ both a *de novo* review for errors of law and a whole record review to determine whether the final agency decision was arbitrary and capricious. The order initially states that the court "considered the record, the briefs of all parties and the oral arguments of the parties." The order then states that it is based on the "existing record." Later, the order reverses conclusions of law denominated as numbers one and two of the final agency decision, stating that these conclusions "are affected by error of law." This later language implies the superior court conducted a *de novo* review. There are no findings of fact and no delineation by the superior court between when it applied a *de novo* or whole record review. This Court is unable to ascertain what standard of review was utilized and whether the superior court applied the appropriate standard of review to each allegation and conclusion of law. Judicial review under any standard is meaningless if, as the court found, an agency has "absolute power." Except as previously affirmed, the remaining portion of the superior court's order is vacated and remanded for delineation and application of the appropriate standard of review of petitioner's claims. *See Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527-28, *disc. rev. denied*, 353 N.C. 280, 546 S.E.2d 397 (2000) ("The trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.").

V. Summary

The portion of the superior court's order regarding the timeliness of respondents' final agency decision and the delegation of authority to the NPDES Committee is affirmed. We vacate and remand the remainder of the order to the superior court to: (1) characterize the remaining issues before the court, (2) clearly delineate the standard of review used, (3) resolve each motion or issue raised by the parties, and (4) enter findings of fact and conclusions of law thereon consistent with this opinion.

Affirmed in part, vacated in part, and remanded.

Judges WYNN and MARTIN concur.

GEORGE P. HUNTER, JR. AND ANNETTE HUNTER IN THEIR INDIVIDUAL CAPACITIES, AND AMY S. HUNTER, MICHAEL S. HUNTER, AND G. PATRICK HUNTER III, AS TRUSTEES OF THE CHARLOTTE INSURANCE TRUST AGREEMENT, PLAINTIFFS-APPELLANTS V. THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, CONSOLIDATED PLANNING, INC., ROBERT M. BALL, TODD H. DICKENS AND LANG MACBAIN, DEFENDANTS-APPELLEES

No. COA02-1533

(Filed 3 February 2004)

1. **Fraud— purchase of life insurance—motion to dismiss—sufficiency of allegations**

The trial court erred by dismissing plaintiffs' common law fraud claim arising out of the purchase of a "second to die" life insurance policy because plaintiffs have alleged facts which could support a finding of fraudulent concealment of material facts.

2. **Fraud— constructive fraud—motion to dismiss—sufficiency of allegations**

The trial court did not err by dismissing plaintiffs' constructive fraud claim arising out of the purchase of a "second to die" life insurance policy because: (1) plaintiffs failed to allege the requisite facts and circumstances which created a fiduciary relationship between the parties; and (2) the complaint failed to assert a sufficient allegation that defendants sought to benefit themselves.

3. **Fraud— negligent misrepresentation—motion to dismiss—sufficiency of allegations**

The trial court erred by dismissing plaintiffs' negligent misrepresentation claim arising out of the purchase of a "second to die" life insurance policy, because plaintiffs' complaint sufficiently alleged that defendants negligently misrepresented material information, defendants supplied false information for the guidance of plaintiffs, and that plaintiffs justifiably relied to their detriment on information prepared without reasonable care by one who owed the relying party a duty of care.

4. Unfair Trade Practices— purchase of life insurance—motion to dismiss—sufficiency of allegations

The trial court erred by dismissing plaintiffs' unfair and deceptive trade practices claim arising out of the purchase of a "second to die" life insurance policy, because: (1) proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices; and (2) plaintiffs have alleged facts which, if proven, could support a finding of fraud.

5. Statutes of Limitation and Repose— fraud—constructive fraud—negligent misrepresentation—unfair trade practices

Plaintiffs' claims for fraud, constructive fraud, negligent misrepresentation, and unfair and deceptive trade practices arising out of the purchase of a "second to die" life insurance policy are not time-barred by the pertinent three-year statutes of limitation for fraud, constructive fraud, and negligent misrepresentation, or the four-year statute of limitation for unfair and deceptive trade practices, even though plaintiffs waited twelve years from the date the policy was purchased to sue because: (1) a cause of action based on fraud or mistake does not accrue until the injured party discovers the facts constituting fraud, plaintiffs did not discover the fraud until January 2001, and plaintiffs filed suit on 25 April 2002; (2) although defendants contend plaintiffs should have discovered the alleged fraud or misrepresentation upon receipt of the policy based on the disclaimer and the information about payments, plaintiffs' complaint is based on the allegation that defendants used illustrations defendants knew were false at the time of sale to induce plaintiffs to purchase the policy rather than alleging that they only had to pay a certain number of premiums; and (3) determining when plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be resolved by the jury.

6. Pleadings— motion to amend complaint—dismissal

The trial court did not abuse its discretion by denying plaintiffs' motion to amend their complaint prior to dismissal in an action arising from the purchase of a "second to die" life insurance policy, because: (1) plaintiffs did not file a motion for leave to amend until almost an hour after the trial court had entered the N.C.G.S. § 1A-1, Rule 12(b)(6) dismissal; (2) although plaintiffs contend they requested leave to amend in their brief in opposition to defendants' motions to dismiss, those briefs

were not included in the record and are thus not before the Court of Appeals for review; (3) plaintiffs' oral offer that they would be willing to amend the petition and get more facts at the Rule 12(b)(6) hearing was not sufficient for leave to amend; and (4) the denial was not prejudicial when certain claims in plaintiffs' complaint were sufficient to proceed upon without the amendment.

Appeal by plaintiffs from order entered 22 July 2002 by Judge Richard D. Boner in Superior Court, Mecklenburg County and from order entered 14 August 2002 by Judge Albert Diaz in Superior Court, Mecklenburg County. Heard in the Court of Appeals 11 September 2003.

Pinto Coates Kyre & Brown, P.L.L.C., by Paul D. Coates and Brady A. Yntema; and Martin, Drought & Torres, Inc., by G. Wade Caldwell, for plaintiffs-appellants.

Ellis & Winters LLP, by Matthew W. Sawchak and Paul K. Sun, Jr., for defendant-appellee The Guardian Life Insurance Company; and Sharpless & Stavola, P.A., by Lynn E. Coleman, for defendants-appellees Consolidated Planning, Inc., Robert M. Ball, Todd H. Dickens and Lang MacBain.

McGEE, Judge.

George P. Hunter, Jr. and Annette Hunter in their individual capacities, and Amy S. Hunter, Michael S. Hunter, and G. Patrick Hunter III, as trustees of the Charlotte Insurance Trust Agreement, (hereinafter referred to collectively as plaintiffs) filed suit on 25 April 2002 against The Guardian Life Insurance Company of America (Guardian), Consolidated Planning, Inc. (Consolidated), Robert M. Ball (Ball), Todd H. Dickens (Dickens), and Lang MacBain (MacBain) (hereinafter referred to collectively as defendants). Guardian filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 9(b) on 30 May 2002; Consolidated, Dickens, and MacBain filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 7(b)(1) and 12(b)(6) on 24 June 2002; and Ball filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 7(b)(1) and 12(b)(6) on 12 July 2002. A hearing on the motions to dismiss was held on 15 July 2002. At this hearing, plaintiffs orally stated to the trial court that "if the Court was concerned that we had not pled enough specific facts, we would be willing to amend the petition and get more facts." The trial

court, in an order entered 22 July 2002, granted each defendant's 12(b)(6) motion to dismiss on the sole ground that plaintiffs' complaint disclosed facts that necessarily defeated plaintiffs' claims.

Plaintiffs filed a written motion for leave to amend their complaint on 22 July 2002, less than an hour after the order granting defendants' motions to dismiss was filed. The trial court conducted a hearing on 13 August 2002 and denied plaintiffs' motion for leave to amend in an order entered 14 August 2002.

Plaintiffs appeal the 22 July 2002 order granting defendants' Rule 12(b)(6) motions to dismiss and the 14 August 2002 order denying plaintiffs' motion for leave to amend.

Plaintiffs George P. Hunter, Jr. and Annette Hunter purchased a "second to die" life insurance policy from defendants in October 1990. They allege defendants sold the policy to them using financial illustrations showing that annual premiums of $38,836.92 were required for eleven years in order for the policy to become self-sustaining if dividends remained at the level indicated in the illustrations. Plaintiffs did not allege that they were guaranteed that only eleven payments would be required since the illustrations suggested that dividend payments could fluctuate. Rather, they allege that defendants knew when they sold the policy to plaintiffs that the dividend payment projections in the illustrations were not sustainable and would be reduced over the next several years.

Plaintiffs first argue the trial court erred in dismissing plaintiffs' claims for common law fraud, constructive fraud, negligent misrepresentation, and unfair and deceptive practices.

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review 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."

Block v. County of Person, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). "The 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*, 141 N.C. App. at 277-78, 540 S.E.2d at 419.

I. Fraud

[1] "The elements of fraud are: '(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *McGahren v. Saenger*, 118 N.C. App. 649, 654, 456 S.E.2d 852, 855, *disc. review denied*, 340 N.C. 568, 460 S.E.2d 318-19 (1995) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). "In order to survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint for fraud must allege with particularity all material facts and circumstances constituting the fraud." *Carver v. Roberts*, 78 N.C. App. 511, 513, 337 S.E.2d 126, 128 (1985).

> While the facts constituting the fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used. "It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts."

Id. (quoting *Manufacturing Co. v. Taylor*, 230 N.C. 680, 686, 55 S.E.2d 311, 315 (1949)).

Applying the foregoing rules to the allegations contained in plaintiffs' complaint, we find the complaint sufficient to state a claim for fraudulent concealment of material facts. Plaintiffs allege defendants sold them the life insurance policy using financial illustrations based on dividend payment projections that could fluctuate. However, plaintiffs specifically allege defendants knew, at the time of the sale, that these dividend payment projections would not be met. This allegation satisfies the first three requisite elements: (1) concealment of a material fact, (2) reasonably calculated to deceive, and (3) made with intent to deceive. "Fraudulent intent need not be specifically alleged if there are facts alleged from which a fraudulent intent may be reasonably inferred." *Carver*, 78 N.C. App. at 513, 337 S.E.2d at 128. Regarding the fourth element, it can be inferred from plaintiffs' purchase of the policy that they were, in fact, deceived by the failure of defendants to disclose this information. Finally, plaintiffs allege that dividend payments were subsequently lowered, resulting in the payment of additional premiums. Thus, plaintiffs were damaged by this concealment. Since plaintiffs have alleged facts which could support a finding of fraud, the trial court erred in dismissing plaintiffs' fraud claim.

II. Constructive Fraud

[2] "A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981). "Constructive fraud differs from actual fraud in that 'it is based on a confidential relationship rather than a specific misrepresentation.' " *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Terry*, 302 N.C. at 85, 273 S.E.2d at 678-79). "A constructive fraud complaint must allege facts and circumstances '(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *State Ex Rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). "Further, an essential element of constructive fraud is that 'defendants sought to benefit themselves' in the transaction." *State Ex Rel. Long*, 129 N.C. App. at 445, 499 S.E.2d at 798 (quoting *Barger*, 346 N.C. at 667, 488 S.E.2d at 224). "Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823, *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002).

In the case before us, regarding the relationship between the parties, plaintiffs merely allege "[t]here existed a confidential and fiduciary relationship between the parties to this transaction and the Defendants took advantage of their position of trust to the harm of the Plaintiffs and induced the Plaintiffs to continue the policy." Plaintiffs fail to allege the requisite "facts and circumstances" which created this relationship. Although "[t]he very nature of constructive fraud defies specific and concise allegations," in light of the relevant case law, the cursory allegations in the case before us are not sufficient to withstand a motion to dismiss. *Terry*, 302 N.C. at 85, 273 S.E.2d at 679.

Terry is instructive on the sufficiency of allegations. *Terry* involved a defendant who took advantage of his dying brother by inducing him to sell his portion of a business at an inadequate price. The complaint was sufficient because it described the family relationship, the business dealings between the two and the increased role the defendant had near his brother's death. *Terry*, 302 N.C. at 86, 273 S.E.2d at 679. The complaint did much more than simply say "[t]here existed a confidential and fiduciary relationship" as was done in the instant case. When compared to *Terry*, the allegations

in the case before us do not contain enough detail to withstand a motion to dismiss.

In addition, the complaint in this case fails to assert a sufficient allegation that defendants sought to benefit themselves. The complaint merely states that defendants "failed to perform according to such fiduciary and confidential relationship in the best interest of the Plaintiff[s], and performed in the best interest of the Defendants, damaging the Plaintiffs as outlined herein." In *Sterner v. Penn*, 159 N.C. App. 626, 583 S.E.2d 670 (2003), the plaintiff alleged that the defendants acted as brokers and accepted her money establishing a relationship of trust and confidence. This Court did not decide if those allegations were adequate to establish the necessary relationship. Instead, we affirmed the dismissal of the complaint on the ground that the plaintiff did not adequately allege that the defendants sought to benefit themselves through the relationship. *Sterner*, 159 N.C. App. at 632, 583 S.E.2d at 674. The plaintiff had only alleged the defendants financially benefitted through commissions on sales. *Id.*

> Moreover, "payment of a fee to a defendant for work done by that defendant does not by itself constitute sufficient evidence that the defendant sought his own advantage." *NationsBank of N.C. v. Parker*, 140 N.C. App. 106, 114, 535 S.E.2d 597, 602 (2000) (holding that where plaintiff alleged that the defendant "took advantage of his position of trust and benefitted from his actions in that he was paid for his services," such an allegation by itself was insufficient to show that the defendant sought his own advantage).

Id.

The allegation in *Sterner* concerning how the defendants benefitted is more specific than the analogous allegation in the case before us. The trial court did not err in dismissing the constructive fraud claim.

III. Negligent Misrepresentation

[3] North Carolina "expressly recognizes a cause of action in negligence based on negligent misrepresentation." *Stanford v. Owens*, 46 N.C. App. 388, 395, 265 S.E.2d 617, 622, *disc. review denied*, 301 N.C. 95 (1980). In *Brinkman v. Barrett Kays & Assocs., P.A.*, 155 N.C. App. 738, 741, 575 S.E.2d 40, 43 (2003) (quoting Restatement (Second) of Torts § 552 (1977)), our Court employed the Restatement 2d definition of negligent misrepresentation in holding that

> "(1) [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991).

Applying the foregoing rules to the allegations contained in plaintiffs' complaint, we find the complaint sufficiently states a claim for negligent misrepresentation. Plaintiffs allege that defendants negligently misrepresented material information and

> supplied false information for the guidance of the Plaintiffs, causing damages to the Plaintiff[s], by the Plaintiffs' justifiable reliance upon the information provided by the Defendants, and the Defendants failed to exercise reasonable care or competence in obtaining or communicating the information or in presenting the information or in producing or determining premium payment information that would be required to enable the policy to become self sustaining, and the Plaintiffs reasonably relied upon the Defendants' actions, harming the Plaintiffs as outlined herein.

These allegations are sufficient to withstand a Rule 12(b)(6) motion to dismiss and the trial court erred in dismissing this claim.

IV. Unfair and Deceptive Practices

[4] "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001). "Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices." *Webb v. Triad Appraisal and Adjustment Service, Inc.*, 84 N.C. App. 446, 449, 352 S.E.2d 859, 862 (1987). Since plaintiffs have alleged facts which, if proven, could support a finding of fraud, they have also alleged facts

which could support a finding of unfair and deceptive practices. Therefore it was error for the trial court to dismiss plaintiffs' claim for unfair and deceptive trade practices.

V. Statute of Limitations

[5] Defendants argue plaintiffs' claims are time-barred because plaintiffs waited twelve years from the date the policy was purchased to sue. We find this argument to be without merit.

The statute of limitations for fraud, constructive fraud, and negligent misrepresentation is three years. N.C. Gen. Stat. § 1-52 (2003). The limitations period for an unfair and deceptive practices claim is four years. N.C. Gen. Stat. § 75-16.2 (2003). "A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985). Regarding claims based on fraud or mistake, the cause of action does not accrue until the injured party discovers the facts constituting the fraud. N.C. Gen. Stat. § 1-52(9) (2003). "The Supreme Court of our State has held in numerous cases that in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence." *Calhoun v. Calhoun*, 18 N.C. App. 429, 432, 197 S.E.2d 83, 85 (1973). In the case before us, plaintiffs did not discover the fraud until January 2001 when they were informed that additional premium payments would be required. Plaintiffs filed suit on 25 April 2002, within both applicable limitations periods.

Defendants further argue plaintiffs should have discovered the harm upon receipt of the policy because of the disclaimer and the information about payments until second death contained in the policy. Defendants argue that *Underwood v. Northwestern Mutual Life Ins. Co.*, 149 N.C. App. 979, 563 S.E.2d 309, *disc. review denied*, 356 N.C. 176, 569 S.E.2d 281 (2002), an unpublished opinion, is controlling on the statute of limitations issue. In *Underwood*, this Court affirmed the trial court's dismissal of a fraud and negligent misrepresentation claim based on the statute of limitations. In *Underwood*, the plaintiff's claim derived from the allegation that he was promised he would only have to pay premiums for nine years while the actual policy stated otherwise. Consequently, this Court held the plaintiff should have discovered the fraud or misrepresentation when he received the policy. We distinguish *Underwood* on the ground that plaintiffs in the case before us are not alleging they were promised

they only had to pay a certain number of premiums. Rather, plaintiffs' complaint is based on the allegation that defendants used illustrations defendants knew were false at the time of the sale to induce plaintiffs to purchase the policy. Due to the differing allegations, *Underwood* is not controlling. Further, determining "[w]hen plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be resolved by the jury." *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 304-05, 271 S.E.2d 385, 392 (1980). In their complaint, plaintiffs allege they only recently discovered the acts of defendants and could not have discovered, with reasonable diligence, such acts until then. This allegation is sufficient to withstand a Rule 12(b)(6) motion to dismiss.

[6] Plaintiffs also allege the trial court erred in refusing to permit plaintiffs to amend their complaint prior to dismissal. N.C. Gen. Stat. § 1A-1, Rule 15(a) (2003) provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party." "A motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

Plaintiffs cite *Zenobile v. McKecuen*, 144 N.C. App. 104, 109, 548 S.E.2d 756, 759, *disc. review denied*, 354 N.C. 75, 553 S.E.2d 214 (2001), as standing for the proposition that it is reversible error for a trial court to rule on a motion to dismiss before ruling on a plaintiff's motion for leave to amend. However, in *Zenobile*, the plaintiffs filed a motion for leave to amend on 30 August 1999 and the trial court did not grant the motion to dismiss until 23 March 2000. Thus, the trial court had almost seven months to rule on the motion but failed to do so. In contrast, in the case before us, plaintiffs did not file a motion for leave to amend until almost an hour after the trial court had entered the Rule 12(b)(6) dismissal on 22 July 2002. Although plaintiffs argue they requested leave to amend in their brief in opposition to defendants' motions to dismiss on 10 July 2002, said brief was not included in the record and is not before this Court to review. Further, plaintiffs' oral offer that they "would be willing to amend the petition and get more facts" at the Rule 12(b)(6) hearing is not a sufficient request for leave to amend. Accordingly, under these facts, it was not error for the trial court to deny plaintiffs' motion for leave to amend. In any event, the trial court's denial was not prejudicial because cer-

tain claims in plaintiffs' complaint addressed above are sufficient to proceed upon without the amendment.

Affirmed in part; reversed and remanded in part.

Judges HUNTER and CALABRIA concur.

IN THE MATTER OF: DANIEL GLENN GRIFFIN, JUVENILE

No. COA02-1592

(Filed 3 February 2004)

Juveniles— delinquency—first-degree sexual offense—fatal variance between petition and evidence

The Court of Appeals exercised its discretionary authority under N.C. R. App. P. 2 and determined that a juvenile order adjudicating respondent a delinquent for commission of first-degree sexual offense and the subsequent dispositional order should be vacated because a fatal variance existed between the juvenile petition and the evidence upon which respondent was adjudicated delinquent, including that: (1) the petition alleged only sexual offense by force against the victim's will; (2) there was no evidence presented at the adjudicatory hearing which tended to show respondent committed forcible sexual offense; and (3) the hearing transcript indicates the trial court adjudicated respondent a juvenile first-degree sex offender based on the respective ages of respondent and the victim, despite the petition's failure to allege either the victim's age or the difference in age between respondent and the victim.

Appeal by respondent from juvenile adjudication order entered 12 February 2002 by Judge Shirley H. Brown in Buncombe County District Court and from juvenile disposition order entered 14 June 2002 by Judge Bradley B. Letts in Haywood County District Court. Heard in the Court of Appeals 28 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for the State.

James L. Goldsmith, Jr. for respondent-appellant.

Appellate Defender Staples Hughes and Assistant Appellate Defender Matthew D. Wunsche, amicus curiae.

ELMORE, Judge.

Daniel Glenn Griffin (respondent) appeals from juvenile orders adjudicating him delinquent for commission of first-degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4, and imposing a probationary sentence. Respondent brings forth a single assignment of error, asserting the trial court erred by denying his motion to suppress a statement respondent gave to the detective investigating this case. However, we do not address this issue because we conclude that a fatal variance existed between the juvenile petition filed herein and the evidence upon which respondent was adjudicated delinquent, in that (1) the petition alleged *only* sexual offense "by force against the victim's will;" (2) there was no evidence presented at the adjudicatory hearing which tended to show respondent committed *forcible* sexual offense; and (3) the hearing transcript indicates the trial court adjudicated respondent a juvenile first-degree sex offender based on the respective *ages* of respondent and the victim, despite the petition's failure to allege either the victim's age or the difference in age between respondent and the victim. This fatal variance between the juvenile petition and the evidence upon which respondent was adjudicated delinquent compels us to vacate the adjudication and disposition orders.

Evidence presented at the adjudicatory hearing tended to show that respondent, who was then twelve years old, respondent's sixteen-year-old half-brother, and the victim, then four, spent the weekend of 10 November 2000 at their grandmother's home. Respondent and the victim were cousins. The victim's mother testified that upon returning home, the victim told her that respondent "stuck his [penis] in [the victim's] butt." Respondent's half-brother testified that on the weekend in question he heard the victim say respondent had "licked [the victim's penis] and stuck [respondent's penis] in [the victim's] butt." Dr. Cindy Brown examined the victim on 13 November 2000 and noted redness around his anal opening, which she testified was "consistent with penetration" but could also be caused by poor hygiene. During an interview with Detective Preston Hunnicutt of the Buncombe County Sheriff's Department on 16 November 2000, respondent stated that he "licked [the victim] on his private" and "stuck [respondent's] private in [the victim's] butt."

On or about 1 October 2001, a juvenile petition was filed seeking adjudication of respondent as delinquent pursuant to N.C. Gen. Stat. § 7B-1501(7) (2003). The petition alleged only that on or about 10 November 2000, in Buncombe County, respondent, then 12 years old, "unlawfully, willfully, and feloniously engage[d] in a sex offense with [the victim] by force against the victim's will." At the adjudicatory hearing on 12 February 2002, after the close of the State's evidence, the following exchange took place between respondent's trial counsel, the prosecutor, and the trial court:

BY MR. WILLIAMS [Respondent's trial counsel]:

> Your Honor, at this time I would like to make a motion to dismiss. . . . Having reviewed the juvenile petition, it is clear that the—it clearly states . . . that the juvenile Daniel Griffin did unlawfully and willfully engage in a sex offense with [the victim] by force against the victim's will. The petition alleges force, and I don't believe the Court can find any evidence as to force that has been presented on record this morning or this afternoon.
>
> . . . .

BY THE STATE:

> Your Honor . . . . Guilty of first degree sex offense is (inaudible) who is a child under the age of 13—and if he's 12 years old, he's four years older than the victim—(inaudible). The statute is clear, 14-27.4, also in terms of amending a petition when it does not change the nature of offense [sic] alleged. (Inaudible) It does not change the nature of the offense as alleged. . . . This case petition is valid. There is no error in the petition.
>
> . . . .

BY THE COURT:

> Are you making a motion to amend the petition at this time?

BY THE STATE:

> If that's the case, the State would amend just the language that said "with [the victim]." We would delete "by force against the victim's will" in terms of that case, Judge. But in terms of—in 70.2400, the amendment—the petition could be amended when the amendment does not change the nature of the offense alleged. (Inaudible) In this case it does not change the nature of the offense.

BY THE COURT:

Nor does it seem to change the—I mean, he had notice all along that this is what the offense was concerning.

BY THE STATE:

The offense was concerning 14-27.4, first degree sexual offense. It's an "or." It's not an "and." So the State does not have to elect to proceed under one or the other. It could go with both. . . .

. . . .

BY MR. WILLIAMS:

. . . . There are two theories refined in [N.C. Gen. Stat. § 14-27.4]. One is—one concern is age. I'll point out in the petition there is nothing as to [the victim's] age representing [sic] therein. . . . There hasn't been one iota of evidence presented that any force was used. . . . The petition should [be] dismissed.

BY THE COURT:

Are you telling me that until today when the case went for trial that you had no idea the victim was a four-year-old child and a cousin of your client? Is that what you're telling me? You keep talking about no notice. . . . So you're not—you're acknowledging that you had discovery and information about this case, that it involved a four-year-old child?

BY MR. WILLIAMS:

I'm just—I'm just asking the Court to take notice of the procedures.

BY THE COURT:

And I'm asking you a question. Did you have notice that it involved a four-year-old child?

BY MR. WILLIAMS:

We certainly had cause to believe that it was a four-year-old child.

BY THE COURT:

Did you have—did you receive any discovery from the State such as a C and E and your client's statement and statements made by other?

BY MR. WILLIAMS:

Yes.

BY THE COURT:

Okay. Your motion to dismiss is denied. Will there be evidence for your client?

. . . .

After respondent declined to present any evidence, the trial court again denied respondent's renewed motion to dismiss and proceeded to hear the State's closing argument, as follows:

BY THE STATE:

. . . . I'll argue first in this case, Judge, there are instructions on this offense. . . . First, the defendant engages in a sexual act with the victim. . . . Second, (inaudible) the victim was a child under the age of 13. Third, at the time the defendant—in this case the juvenile defendant was at least 12 years old and was four years older than the victim. In this case, Judge, we have—every element has been satisfied in this case. . . . Under 14.27.41 [sic], a sexual act has occurred with a victim who is a child under the age of 12 and a defendant—excuse me—a juvenile of at least 12 years old and at least four years older than—that's the evidence from the State, Judge. . . . The fact that the sexual offense of someone that is 12 years old uses his influence over a person who's four is why our statutes have these types of laws in them. . . . The State would ask you to find him delinquent beyond a reasonable doubt.

. . . .

Thereafter, the trial court ruled from the bench as follows:

BY THE COURT:

. . . . In this matter, after hearing all of the evidence and arguments of counsel, this Court finds beyond a reasonable doubt that on November 10, 2000, Daniel Griffin, who was then a 12-year-old child having a date of birth of 9-2-88, did commit a sex offense upon the body of [the victim], who was a four-year-old child having a date of birth 9-16-96, the sex offense consisting of licking the private part of that child as well as penetrating the

> anus of that child with his penis, and adjudicates him delinquent by reason of committing a first degree sexual offense. . . .
>
> . . . .

By written order entered the same day as the adjudicatory hearing, using the "Juvenile Adjudication Order" form promulgated by the Administrative Office of the Courts, the trial court made the following findings of fact and conclusions of law:

> That the juvenile through his attorney denies the allegations alleged in the petition filed October 1, 2001. The Court finds after hearing the evidence presented that the juvenile did commit the act alleged and finds him to be delinquent by reason of felony sex offense in violation of G.S. 14-27.4, felony class B1.

From this order and the subsequent disposition order entered 14 June 2002, respondent appeals.

At the outset we note that respondent, by choosing to assign error only to the trial court's denial of his motion to suppress respondent's statement to Detective Hunnicutt, has not raised on appeal the issue of whether a fatal variance existed between the petition and the evidence upon which respondent was adjudicated delinquent. This issue has instead been presented by the Appellate Defender's *amicus curiae* brief, the filing of which was authorized by N.C.R. App. P. 28(i) and allowed by this Court's 10 October 2003 order. While N.C.R. App. P. 10(a) provides that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal," we are mindful that N.C.R. App. P. 2 vests this Court with the authority to "suspend or vary the requirements or provisions of any of [the Rules of Appellate Procedure] in a case pending before it upon application of a party or upon its own initiative" in order "[t]o prevent manifest injustice to a party[.]" In light of the potential for manifest injustice if the issue raised by the Appellate Defender's *amicus* brief—i.e., whether there existed a fatal variance between the petition's allegations and the evidence presented at the adjudication hearing, such that respondent was adjudicated delinquent for commission of a crime that was not properly charged in the petition—is not addressed, we hereby exercise our authority pursuant to N.C.R. App. P. 2 and consider the "fatal variance" issue.[1]

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1. We note that the certificate of service accompanying the *amicus* brief indicates a copy was properly served upon the assistant attorney general represent-

"Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity." *State v. Drummond*, 81 N.C. App. 518, 520, 344 S.E.2d 328, 330 (1986) (quoting *In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969)). We have previously stated that a valid bill of indictment is necessary in order to properly obtain jurisdiction over a criminal defendant charged with a felony. *State v. Poole*, 154 N.C. App. 419, 422, 572 S.E.2d 433, 436 (2002), *cert. denied*, 356 N.C. 689, 578 S.E.2d 589 (2003). N.C. Gen. Stat. § 14-27.4(b) (2003) provides that any person who commits a first-degree sexual offense "is guilty of a Class B1 felony." The pleading in felony cases is an indictment, unless there is a waiver, in which case the pleading is an information. *See* N.C. Gen. Stat. § 15A-923(a) (2003). "A criminal pleading must contain . . . . [a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2003). Similarly, the petition in a juvenile action serves as the pleading, *see* N.C. Gen. Stat. § 7B-1801 (2003), and a petition alleging delinquency must "contain a plain and concise statement . . . asserting facts supporting *every element* of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the *conduct which is the subject of the allegation*." N.C. Gen. Stat. § 7B-1802 (2003) (emphasis added). Therefore, a petition in a juvenile action serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged.

As noted above, the juvenile petition in the present case alleged only that respondent, then 12 years old, "unlawfully, willfully, and feloniously engage[d] in a sex offense with [the victim] by force against the victim's will." Pursuant to N.C. Gen. Stat. § 14-27.4,

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ing the State on appeal, and that the State, though permitted by our appellate rules to do so, chose not to file a reply brief to the *amicus* brief. *See* N.C.R. App. P. 28(i) ("Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties.")

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.4(a) (2003).

After a thorough review of the record and transcript, we conclude that the State has failed to bring forth any evidence that respondent "engage[d] in a sex offense with [the victim] by force against the victim's will," as alleged in the juvenile petition. There was simply no evidence presented that respondent either used or threatened physical force against the victim, as is required for conviction of first-degree sexual offense under N.C. Gen. Stat. § 14-27.4(a)(2). Instead, we conclude from our examination of the transcript that the State's contention that respondent committed first-degree sex offense was based entirely on the *relative ages* of respondent and the victim, as provided in N.C. Gen. Stat. § 14-27.4(a)(1). Where the illegality of sexual activity is based upon the relative ages of the parties, age is an essential element of the offense. *State v. Locklear*, 138 N.C. App. 549, 531 S.E.2d 853, *disc. review denied*, 352 N.C. 359, 544 S.E.2d 553 (2000). A juvenile petition which purports to charge first-degree sexual offense based on the ages of the parties is fatally defective if it does not allege the ages of both the victim and the defendant. *In re Jones*, 135 N.C. App. 400, 409, 520 S.E.2d 787, 792 (1999). As noted above, the petition in the present case contained no allegations as to the victim's age or the difference in age between respondent and the victim.

The juvenile adjudication order which is the subject of this appeal states, in broad terms, that the trial court "finds [respondent]

to be delinquent by reason of felony sex offense in violation of G.S. 14-27.4, felony class B1." However, we conclude from our examination of the hearing transcript that the trial court determined respondent committed a first-degree sexual offense based solely on the relative ages of respondent and the victim, rather than, as alleged in the petition, on use of force by respondent to overcome the victim's will. The trial court denied respondent's motion to dismiss after establishing that respondent's trial counsel was aware of the victim's age. Moreover, the trial court's oral ruling from the bench contained specific findings regarding the ages of both respondent and the victim, but lacked any findings concerning use of force by respondent.

For the reasons stated above, the juvenile order adjudicating respondent delinquent and the subsequent dispositional order are vacated.

Vacated.

Judges WYNN and TIMMONS-GOODSON concur.

CVS PHARMACY, INC. D/B/A CVS PHARMACY, PETITIONER v. NORTH CAROLINA BOARD OF PHARMACY, RESPONDENT

No. COA02-1643

(Filed 3 February 2004)

1. Administrative Law— final agency decision—standard of review—whole record test

The trial court acted within its authority under N.C.G.S. § 150B-51(b), properly employed the whole record test, and made relevant findings of fact which were supported by the record when it affirmed respondent Board of Pharmacy's final decision in three cases where pharmacists employed by petitioner dispensed the wrong medications.

2. Pharmacists— pharmacies—disciplinary authority of Board of Pharmacy

Respondent Board of Pharmacy did not exceed its authority by attempting to reprimand, regulate, and limit the operations of three pharmacies of CVS pursuant to N.C.G.S. § 90-85.38

involving three cases where pharmacists employed by petitioner dispensed the wrong medications even though "reprimand" is not listed as a permissible discipline under subsection (b) pertaining to permitees and was listed in subsection (a) pertaining to licensees, because: (1) a reversal of the lower court on the basis that the Board of Pharmacy is limited to the statutory list would probably have the result of increasing petitioner's punishment; and (2) the Board of Pharmacy has the discretion to select a lesser punishment in accord with reason when the permitee has violated the statute.

3. Pharmacists— pharmacies—permitee liable for employees

Respondent Board of Pharmacy did not unlawfully use in its adjudications a policy that CVS is presumptively liable for the acts of its pharmacists and other employees for three cases where pharmacists employed by petitioner dispensed the wrong medications, because the Board has no need to employ such a presumption when the permitee pharmacy is held liable for the actions of the pharmacists it employs.

4. Pharmacists; Constitutional Law— Board of Pharmacy— due process—specific identified errors

Respondent Board of Pharmacy's final decisions in three cases where pharmacists employed by petitioner dispensed the wrong medications did not violate petitioner's due process rights based on alleged unlawful procedures, because: (1) the Board made concise findings that specific, identified dispensing errors were made by pharmacists employed by petitioner rather than employing a policy that when more than 150 prescriptions have been filled by a pharmacist on a given day, it is presumed that the pharmacy should be sanctioned when the pharmacist makes an error; (2) the findings that a dispensing error was committed were sufficient to warrant the conclusions of liability; and (3) the Board issued a notice of hearing for each case in order to give petitioner an opportunity to appear and be heard.

5. Pharmacists— dispensing wrong medications—final agency decision—arbitrary and capricious standard

Respondent Board of Pharmacy's final decisions in three cases where pharmacists employed by petitioner dispensed the wrong medications were not arbitrary and capricious, because: (1) the Board, through its investigation and hearings, factually established the dispensing errors in each case; and (2) it is not

arbitrary and capricious to hold a pharmacy responsible for the errors of its pharmacists who are engaged in the conduct and operation of the pharmacy.

Appeal by petitioner from order and judgment entered 13 September 2002 by Judge Ripley E. Rand in Wake County Superior Court affirming the final decisions of the North Carolina Board of Pharmacy entered 19 March 2001. Heard in the Court of Appeals 17 September 2003.

Strickland, Harris & Hilton, P.A., by Nelson G. Harris for petitioner-appellant.

Bailey & Dixon, L.L.P., by Carson Carmichael, III and Anna Baird Choi for respondent-appellee.

ELMORE, Judge.

CVS Pharmacy, Inc. (petitioner) brought a petition for judicial review in the Wake County Superior Court of three final decisions of the North Carolina Board of Pharmacy (Board of Pharmacy). The final decisions concerned three separate instances of pharmacists who were employed by the petitioner dispensing the wrong medications. Two of the pharmacists involved had been practicing for ten years or more with no prior complaints. Each of the three pharmacists filled more than 150 prescriptions during the respective shifts in which the errors were made.

The first decision of the Board involved Permit 6748, held by the CVS in Raeford, North Carolina. At the Raeford CVS, on 15 April 1998, Jacqueline Buller tendered a prescription for Cortisporin Opthalmic Solution and was erroneously dispensed Neo/Polymyxin Ear Solution the next day. The pharmacist on duty that day (Walter Coley) worked from 9:00 a.m. to 9:00 p.m. and filled 288 prescriptions. He had been licensed for twenty-five to thirty years and never previously been the subject of complaints or disciplinary action. The Board ordered the following: 1) a reprimand of CVS; 2) that CVS "shall not allow pharmacists to dispense prescription drugs at such a rate per hour or per day as to pose a danger to the public health or safety;" 3) that CVS submit a written statement to the Board signed by the current pharmacists that they have read and understand the patient counseling rule.

The second decision involved Permit 6799, held by the CVS in Wake Forest, North Carolina. At that CVS, on 8 November 1999,

Linda Barlow tendered a prescription for methotrexate 2.5mg to Pharmacist Randy Ball and was erroneously dispensed amitriptyline 25mg. On 18 October 1999, Pharmacist Ball erroneously dispensed 48 units of prednisone 5mg and 48 units of prednisone 10mg in a 10mg box on a prescription for prednisone 5mg. Pharmacist Ball was the only pharmacist on duty on 18 October, when he filled 347 prescriptions during a twelve hour shift, and was one of two pharmacists on duty on 8 November, when 328 prescriptions were filled (he filled approximately 162). He had been licensed for ten to fifteen years with no prior complaints or disciplinary action. The Board ordered: 1) that CVS be cautioned regarding its "failure to comply with the Board's patient counseling rule;" 2) that CVS's permit be suspended for one day, which order was suspended for three years on condition that:

> a) . . . [CVS] shall not allow pharmacists to dispense prescription drugs at such a rate per hour or per day as to pose a danger to the public health or safety.
>
> b) [CVS] shall submit to the Board . . . a written statement signed by the current pharmacists . . . [that they have read and understand the] . . . patient counseling rule[.] . . .
>
> c) [CVS] shall comply with the laws governing practice of pharmacy . . . .
>
> d) [CVS] shall comply with the regulations of the Board.

The third decision involved Permit 6559 in Burlington, North Carolina. On 30 October 1999, Dee Snow tendered a prescription for penicillin vk 250mg and was erroneously dispensed albuterol sulfate 2mg. Pharmacist A. Broughton Sellers, Jr. was on duty on 30 October from 8:00 a.m. to 3:00 p.m., when he dispensed 215 prescriptions. The Board gave CVS a reprimand in that case.

On 19 March 2001 the Board of Pharmacy entered final decisions in all three cases, as noted above. CVS filed a petition for judicial review in the superior court on 19 April 2001. The superior court, considering all three cases together, heard arguments in open court, reviewed the entire record, and affirmed the Board of Pharmacy. The petitioner now brings this appeal.

I.

[1] We first determine the proper standard of review. The North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 et seq., governs both superior court and appellate court review of

administrative agency decisions. *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 446 S.E.2d 383 (1994). N.C. Gen. Stat. 150B-51 governs the scope of the superior court's review of final agency decisions. N.C. Gen. Stat. § 150B-51(b), as amended effective 1 January 2001, provides:

> (b) Except as provided in subsection (c) of this section, in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51 (2003).

According to the language in 150B-51, the standard of review by the superior court seems to be unchanged in a case like this one, which has not first been heard by an Administrative Law Judge. Our appellate review of the superior court, however, is governed by 150B-52, which provides: "The scope of review to be applied by the appellate court under this section is the same as for other civil cases." This language was previously construed by the case of *Tay v. Flaherty*, 90 N.C. App. 346, 368 S.E.2d 403 (1988):

> When an appellate court is reviewing the decision of another court—as opposed to the decision of an administrative agency—the scope of review to be applied by the appellate court under G.S. § 150A-52 is the same as it is for other civil cases. That is, we must determine whether the trial court committed any errors of law.

Tay v. Flaherty, 90 N.C. App. 346, 348, 368 S.E.2d 403, 404, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 556 (1988).

This is one of the first cases of this nature our Court has considered which is governed by the most recent revisions of the Administrative Procedures Act. We note that most of the revisions pertain to those cases which are reviewed by an Administrative Law Judge and are thus not relevant to the case at bar, which was decided by a professional licensing board. We discern no practical difference between the expressed scope of review in 150B-52, i.e., determining errors of law, and the standard of review under the previous version of chapter 150B.

For purposes of this appeal, we must first determine whether the superior court acted within its authority as defined by 150B-51(b). The lower court stated in its order:

> The proper standard of review of an agency decision is determined by the nature of the error asserted in judicial review. For an asserted error of law or procedure, the review of the Court is *de novo*. . . . For an asserted error of fact, the review of the Court is the "whole record" test, which requires the Court to examine the entirety of the record to determine whether the agency's decision is supported by substantial evidence (and therefore affirmed) or whether it is arbitrary and capricious (and therefore reversed). . . . N.C. Gen. Stat. § 150B-51(b)(5), (6).

See Bashford v. N.C. Licensing Bd. for General Contractors, 107 N.C. App. 462, 420 S.E.2d 466 (1992); *In re McCollough v. N.C. State Bd. of Dental Examiners*, 111 N.C. App. 186, 431 S.E.2d 816, *disc. review denied*, 335 N.C. 174, 436 S.E.2d 381 (1993).

The superior court then made findings that the final decisions of the Board of Pharmacy that CVS had violated N.C. Gen. Stat. § 90-85.38(a)(9) were

> supported by competent, material, and substantial evidence, and are not otherwise erroneous . . . are not in excess of the statutory authority or jurisdiction of the Board . . . [are not] arbitrary and capricious . . . are not in violation of any constitutional provisions, and were not a product of unlawful procedure . . . are not affected by any other error of law . . . [and] are upheld.

The superior court employed the proper standard of review under 150B-51, and made relevant findings of fact which were supported by

the record. We therefore affirm the superior court's judgment, affirming the Board of Pharmacy. We will address the appellant's assignments of error in turn.

II.

[2] The first assignment of error on appeal pertains to whether the Board of Pharmacy exceeded its authority by attempting to reprimand, discipline, regulate and limit the operations of three pharmacies of CVS. We agree with the superior court that the Board of Pharmacy did not exceed its authority.

Under North Carolina law, the Board may discipline the permitee (pharmacy) for the unlawful acts of its employees (the pharmacists) while engaged in the conduct and operation of the pharmacy, although the permitee does not authorize the unlawful acts and did not have actual knowledge of the activities. This is particularly true of a corporate permitee which can act only through its officers, agents, and employees. *Sunscript Pharmacy Corp. v. N.C. Bd. of Pharmacy*, 147 N.C. App. 446, 454, 555 S.E.2d 629, 634 (2001), *disc. review denied*, 355 N.C. 292, 561 S.E.2d 506 (2002).

Section 90-85.2 et seq. of the General Statutes comprises the North Carolina Pharmacy Practice Act. Section 90-85.38 outlines the disciplinary authority of the Board of Pharmacy. That section provides:

> § 90-85.38. Disciplinary authority[:]
>
> (a) The Board may, in accordance with Chapter 150B of the General Statutes, issue a letter of reprimand or suspend, restrict, revoke, or refuse to grant or renew a license to practice pharmacy, or require licensees to successfully complete remedial education if the licensee has done any of the following:
>
> . . .
>
> (9) Been negligent in the practice of pharmacy.
>
> (b) The Board, in accordance with Chapter 150B of the General Statutes, may suspend, revoke, or refuse to grant or renew any permit for the same conduct as stated in subsection (a).

N.C. Gen. Stat. § 90-85.38 (2003).

Although the petitioner notes that "reprimand" is not listed as a permissible discipline under subsection (b) pertaining to permitees,

and was listed in subsection (a) pertaining to licensees, we are not compelled that the omission is significant. In construing statutes courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results. *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978). Since a reversal of the lower court on the basis that the Board of Pharmacy is limited to the statutory list would probably have the result of increasing the petitioner's punishment, we consider that an untoward result. The Board has the discretion to select a lesser punishment in accord with reason when the permitee has so clearly violated the statute. We therefore affirm the superior court, upholding the Board's final decision.

III.

[3] Next, the petitioner argues that the Board unlawfully used, in its adjudications, a policy that CVS is presumptively liable for the acts of its pharmacists and other employees. This assignment of error is without merit.

The Board has no need to employ such a presumption when, under the decision in *Sunscript Pharmacy*, the permitee pharmacy is held liable for the actions of the pharmacists it employs as explained above. *Sunscript Pharmacy*, 147 N.C. App. 446, 454, 555 S.E.2d 629, 634.

IV.

[4] The petitioner next contends that the Board's final decisions were based upon unlawful procedure. The petitioner argues that two of the procedures were unlawful: the use of a "150 policy", and that the Board's failure to make adequate findings of fact to support its conclusions of law have procedurally disadvantaged CVS. We find this assignment of error to also be without merit.

Petitioner argues that the Board of Pharmacy in its final decision improperly used a policy that when more than 150 prescriptions have been filled by a pharmacist on a given day, it is presumed that the pharmacy should be sanctioned when the pharmacist makes an error. Petitioner bases this argument on the constitutional guarantees of due process and notice. *See Parker v. Stewart*, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

As noted above, our decision in the *Sunscript Pharmacy* case held that a pharmacy is liable for the errors of its pharmacists committed while engaged in the conduct and operation of the pharmacy. *Sunscript Pharmacy*, 147 N.C. App. at 454, 555 S.E.2d at 634. It is therefore unnecessary for the Board to adopt such a presumption in order to hold the petitioner liable. In fact in its three final decisions, the Board made no finding concerning the "150 policy," nor did it make any findings concerning the number of prescriptions filled during the days each error was committed. In each case, the Board made concise findings that specific, identified dispensing errors were made by pharmacists employed by the petitioner. Petitioner has not contested those findings on appeal. In the decisions concerning permits numbered 6748 and 6799, the Board made identical conclusions of law that "[i]n accordance with 21 N.C.A.C. 46.1811, [Petitioner] shall not allow pharmacists to dispense prescription drugs at such a rate per hour or per day as to pose a danger to the public health or safety." Because the Board did not need a presumption in order to find and conclude the errors and the resulting punishments, there was no due process violation. The findings that a dispensing error was committed were sufficient to warrant the conclusions of liability.

The Board also issued a notice of hearing for each case, which notices are included in the record on appeal. Each gives notice of the charges against CVS and gives notice of the date of hearing when petitioner would have an opportunity to appear and be heard. We discern no due process violations on the part of the Board.

V.

[5] The petitioner lastly argues that the Board's final decisions were arbitrary and capricious. The Board, through its investigation and hearings, factually established the dispensing errors in each case, which are not disputed on appeal. According to our holding in *Sunscript Pharmacy*, it is not arbitrary and capricious to hold a pharmacy responsible for the errors of its pharmacists who are engaged in the conduct and operation of the pharmacy. Since the petitioner's argument is centered on the premise that the pharmacy is not liable for its employee's acts, that argument is meritless as against our decision in *Sunscript Pharmacy*. We therefore affirm the superior court which affirmed the final decision of the Board of Pharmacy.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

JOHN MALLOY, D/B/A THE DOGWOOD GUN CLUB, PLAINTIFF v. ROY A. COOPER, III, ATTORNEY GENERAL FOR THE STATE OF NORTH CAROLINA; DAVID R. WATERS, DISTRICT ATTORNEY FOR THE 9TH PROSECUTORIAL DISTRICT; DAVID S. SMITH, SHERIFF OF GRANVILLE COUNTY; STATE OF NORTH CAROLINA, DEFENDANTS

No. COA00-898-2

(Filed 3 February 2004)

Animals; Constitutional Law— vagueness—animal cruelty—domestic and feral pigeons

N.C.G.S. § 14-360 (an animal cruelty statute) was unconstitutionally void for vagueness as applied to plaintiff's contemplated shooting of feral pigeons because a person of ordinary intelligence would not be able to determine whether a particular pigeon was domestic or feral or whether shooting that pigeon violated the statute.

Appeal by plaintiff and defendants from order entered 9 May 2000 by Judge James C. Spencer, Jr. in the Granville County Superior Court. Heard in the Court of Appeals 7 June 2001; by decision filed 4 September 2001, the Court of Appeals reversed the superior court. *Malloy v. Easley*, 146 N.C. App. 66, 551 S.E.2d 911 (2001). Heard in the Supreme Court 15 April 2002; by decision 28 June 2002 the Supreme Court reversed and remanded to the Court of Appeals for decision on the merits. *Malloy v. Cooper*, 356 N.C. 113, 565 S.E.2d 76 (2002). Heard on remand by a panel of the Court of Appeals reconstituted per order 24 July 2002.

Tharrington Smith, L.L.P., by Roger W. Smith; Greenberg Traurig, L.L.P., by C. Allen Foster, for plaintiff.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General John J. Aldridge, III, for defendants.

Parker, Poe, Adams & Bernstein, L.L.P., by Cynthia L. Wittmer, on behalf of the North Carolina Network for Animals; Justice for Animals; the Fund for Animals, Inc.; and the Human Society of the United States, amici curiae.

HUDSON, Judge.

In an order entered 9 May 2000, the trial court ruled in favor of John Malloy, d/b/a The Dogwood Gun Club ("plaintiff") in part and in favor of Roy A. Cooper, III, the Attorney General of the State of North

Carolina, David R. Waters, District Attorney for the 9th Prosecutorial District, David S. Smith, Sheriff of Granville County, and the State of North Carolina (collectively "defendants") in part. From that order, defendants appeal and plaintiff cross-appeals. On remand from the Supreme Court, because both the misdemeanor and felony provisions of the North Carolina cruelty to animals statute are unconstitutionally vague as applied to the facts of this case, we affirm the trial court in part and reverse in part.

I.

Background

On 3 March 1999, plaintiff filed a complaint seeking (1) an injunction enjoining defendants from enforcing G.S. § 14-360 against plaintiff, (2) a judgment declaring that G.S. § 14-360 violates plaintiff's substantive due process rights because its enforcement directly deprives him of his right to earn a livelihood through the lawful use of his land, and (3) judgment declaring that G.S. § 14-360 is unconstitutional because it is impermissibly vague. The factual background was summarized by the Supreme Court as follows.

> Plaintiff is a resident of Granville County, North Carolina, and owns an unincorporated business operating under the name "Dogwood Gun Club." Twice a year plaintiff sponsors a pigeon shoot, known as "The Dogwood Invitational," on his private land in Granville County. Plaintiff has sponsored, organized, and operated the pigeon shoots since 1987. Contestants participate by invitation only, and each contestant pays $275.00 per day to participate. According to plaintiff's response to interrogatories, the pigeon shoot is conducted as follows: "Each contestant faces a ring. Inside the ring are a number of boxes which are opened on cue. An individual ferel [sic] pigeon flies from a particular box. The feral pigeon serves as a target at which the contestant shoots." The last two pigeon shoots conducted before institution of this action utilized approximately 40,000 pigeons each. Pigeons that are killed by the contestants are buried, whereas pigeons that are merely injured are "dispatched promptly" and buried. Plaintiff claims to have spent $500,000 in capital improvements to his land to further the pigeon shoots and further claims that the pigeon shoots provide approximately fifty percent of his net income.

Malloy v. Cooper, 356 N.C. 113, 114, 565 S.E.2d 76, 77 (2002).

On 11 March 1999, the trial court allowed plaintiff's motion for a preliminary injunction to prevent defendants from prosecuting plaintiff for cruelty to animals under G.S. § 14-360, until resolution on the merits of plaintiff's declaratory judgment action.

In the order entered 9 May 2000, the trial court addressed defendants' motion to dismiss and motion for summary judgment and for dissolution of the preliminary injunction. First, the trial court denied the motion to dismiss, noting that "the plaintiff will not be able to conduct the 'Flyer' or pigeon shoot which has provided him with income unless he and those persons who participated are willing to subject themselves to criminal prosecution. For those reasons, the [trial court] does have jurisdiction to hear the case."

Second, the trial court declared subsection (a) unconstitutional, stating the following: "The portion of the statute declaring the commission of a Class 1 misdemeanor by any person who wounds, injures or kills any living vertebrate animal of the designated classes . . . is too vague and over broad and therefore fails to comply with constitutional due process standards of certainty." Next, the trial court declared the felony provisions of the statute constitutional, stating that "[t]he remaining [felony] portions of the statute, while perhaps not models of drafting clarity, are not sufficiently deficient as to fail to meet constitutional due process standards." Finally, the trial court issued a permanent injunction to prevent defendants from prosecuting plaintiff under the misdemeanor provisions of G.S. § 14-360(a), and dissolved the preliminary injunction preventing defendants from prosecuting plaintiff for a felony under G.S. § 14-360(b).

On appeal, defendants argued that the trial court's denial of their motion to dismiss for lack of subject matter jurisdiction was error. In our first decision, we agreed, holding that plaintiff's allegations were not sufficient to confer subject matter jurisdiction pursuant to the Declaratory Judgment Act, G.S. § 1-253 to -267 (1999). *Malloy v. Easley*, 146 N.C. App. 66, 69, 551 S.E.2d 911, 913 (2001), *rev'd sub nom.*, 356 N.C. 113, 565 S.E.2d 76 (2002). We held that, while plaintiff was threatened with prosecution if he held another pigeon shoot, factual issues remained that would determine whether plaintiff violated the statute. *Id.* Plaintiff petitioned the North Carolina Supreme Court for discretionary review, which was allowed. The Supreme Court reversed, holding plaintiff's allegations that an "imminent prosecution" would interfere with his right to use his property to earn a living were sufficient to confer subject matter jurisdiction and that the trial court properly denied the motion to dismiss. *Malloy*, 356 N.C. at

120, 565 S.E.2d at 81. The Supreme Court remanded the case to us "for [a] decision on the merits of the underlying action." *Id.*

II.

Analysis

Plaintiff alleges that all of G.S. § 14-360 is unconstitutional due to vagueness. Upon such a challenge to a statute, we are bound to indulge every presumption in favor of the constitutionality of the statute. *State v. Matthews*, 270 N.C. 35, 43, 153 S.E.2d 791, 797 (1967).

The United States Supreme Court and the North Carolina Supreme Court have adopted similar tests for determining whether a statute is unconstitutionally vague. *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). "[A] statute is unconstitutionally vague if it either: (1) fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'; or (2) fails to 'provide explicit standards for those who apply [the law].' " *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972)). Although a statute must satisfy both prongs of this test, "impossible standards of statutory clarity are not required by the constitution." *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969), *affirmed*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971). As long as a "statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met." *Id.*

" 'It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.' " *State v. Barker*, 138 N.C. App. 304, 306, 531 S.E.2d 228, 229 (2000) (quoting *United States v. Mazurie*, 419 U.S. 544, 550, 42 L. Ed. 2d 706, 713 (1975)). Here, plaintiff does not contend that enforcement of the cruelty to animals statute impinges on his protected First Amendment rights, and thus we undertake our review of this case only upon the facts as presented in the materials before the trial court. Thus, we address the constitutionality of G.S. § 14-360, as applied to the plaintiff's proposed pigeon shoot.

G.S. § 14-360 provides:

> (a) If any person shall intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance,

or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal, every such offender shall for every such offense be guilty of a Class 1 misdemeanor.

(b) If any person shall maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill, or cause or procure to be tortured, mutilated, maimed, cruelly beaten, disfigured, poisoned, or killed, any animal, every such offender shall for every such offense be guilty of a Class I felony. However, nothing in this section shall be construed to increase the penalty for cockfighting provided for in G.S. 14-362.

(c) As used in this section, the words "torture", "torment", and "cruelly" include or refer to any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death. As used in this section, the word "intentionally" refers to an act committed knowingly and without justifiable excuse, while the word "maliciously" means an act committed intentionally and with malice or bad motive. As used in this section, the term "animal" includes every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings. However, this section shall not apply to the following activities:

(1) The lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, except that this section shall apply to those birds exempted by the Wildlife Resources Commission from its definition of "wild birds" pursuant to G.S. 113-129(15a).

(2) Lawful activities conducted for purposes of biomedical research or training or for purposes of production of livestock, poultry, or aquatic species.

(2a) Lawful activities conducted for the primary purpose of providing food for human or animal consumption.

(3) Activities conducted for lawful veterinary purposes.

(4) The lawful destruction of any animal for the purposes of protecting the public, other animals, property, or the public health.

G.S. § 14-360 (2001).

Plaintiff first contends that it is unclear whether the cruelty to animals statute even applies to his proposed pigeon shoot. Specifically, plaintiff argues that the statute is vague in that it exempts "[t]he lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, except that [the statute] shall apply to those birds exempted . . . from [the] definition of 'wild birds' pursuant to G.S. 113-129(15a)." G.S. § 14-360(c)(1).

Under the authority granted to it under G.S. § 113-129(15a), the Wildlife Resources Commission ("WRC") has exempted from its jurisdiction and regulation "the domestic pigeon (Columba livia)." N.C. Admin. Code tit. 15A, r. 10B.0121 (July 2003). Plaintiff argues that it is unclear whether the exemption for domestic pigeons applies to feral pigeons, which are also designated *Columba livia*. *Webster's New Collegiate Dictionary* provides several definitions for "feral" including: "wild animal" and "having escaped from domestication and become wild." *Webster's New Collegiate Dictionary* 456 (9th ed. 1991).

Defendants argue that the term "domestic pigeon" as used in the WRC regulation, includes feral and wild pigeons, as well as those commonly referred to as domestic pigeons, and have submitted an affidavit from David Cobb, a Ph.D. wildlife biologist, to support this argument. We are not persuaded of the merit of this argument.

The forecast of evidence, including the expert affidavits and other materials, reveals that although pigeons may be denominated as either "domestic" or "feral", the two categories are genetically identical. The domestic pigeon was introduced into the United States as a domesticated bird and used as a passenger and homing bird, as well as for other purposes. Feral pigeons descend from domestic pigeons that escaped captivity and have now returned to a wild state and exhibit feral characteristics due to different degrees of human control and habitation. A plain reading of the regulation exempting "domestic pigeons (Columba livia)" from the definition of "wild birds" indicates the WRC intended to exclude only domestic pigeons of the species *Columba livia* and not their wild, or feral, brethren. Under this reading, feral pigeons remain under the jurisdiction and regulation of the WRC, and are exempt from the cruelty to animals statute, while domestic pigeons are not.

The Cobb affidavit and others indicate that, while people commonly refer to pigeons as domestic and feral, the two groups are in

fact not distinct. According to the affidavits, domestic and feral pigeons are genetically identical, and indistinguishable to the layperson in any other way. Dr. Cobb explains this lack of distinction as follows:

> 9. There have been no genetic differences shown between domestic and feral pigeons. With current genetic techniques, we can now differentiate between any two individuals within Columba livia, whether wild, feral or domestic, but we cannot distinguish individuals genetically regarding to which of the three forms the individual belongs. . . .[W]ild, feral and domestic pigeons are genetically the same and do not constitute three distinct types.
>
> ***
>
> 16. There is no scientifically accepted use of *common names* with scientific names. Scientists do not use common names because of just the type of confusion exemplified in this case.

Legislators and the general public, however, *do* use common names and can become confused. We do not believe that a person of ordinary intelligence, without such scientific background, would be able to determine whether a particular pigeon is domestic or feral, or to determine whether shooting that pigeon is a violation of the statute. Had the WRC intended to use the term "domestic pigeon" to include wild and feral pigeons as well, it certainly could have done so, but it did not.

The statute and regulation as written fail to give a person a reasonable opportunity to know whether shooting particular pigeons is prohibited, and fails to provide standards for those applying the law, as required by the North Carolina Supreme Court and United States Supreme Court. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. National Dairy*, 372 U.S. 29, 32-33, 9 L. Ed. 561, 565, *reh'g denied*, 372 U.S. 961, 10 L. Ed. 2d 13 (1963); *see also*, *State v. Martin*, 7 N.C. App. 532, 173 S.E.2d 47 (1970) (Regulation making it unlawful to "snag" a fish held unconstitutionally void for vagueness because usage common among fisherman could not necessarily be understood by judges with the duty to apply it). Therefore, we hold that G.S. § 14-360, in its entirety, is unconstitutionally void for vagueness, as applied to plaintiff's contemplated pigeon shoot.

Thus, we remand for entry of an order which allows plaintiff's motion for summary judgment as to both G.S. § 14-360(a) and (b), and which permanently enjoins the defendants from enforcement of those provisions against the plaintiff.

Affirmed in part; reversed in part.

Judges MARTIN and HUNTER concur.

JAMES A. HARRIS, PLAINTIFF-APPELLEE v. PATRICIA F. HARRIS, DEFENDANT-APPELLANT

No. COA02-1722

(Filed 3 February 2004)

1. **Divorce— equitable distribution—interest on distributive award—correction of award**

   There was no abuse of discretion in modifying a qualified domestic relations order to reflect the intent of the parties by deleting language referring to interest from a distributive award from a retirement plan, or by ordering a refund of an amount paid by the plan under that language.

2. **Divorce— equitable distribution—distributive award from retirement plan—interest not included**

   There was no error in not including interest on an amount paid from a retirement plan under a qualified domestic relations order. The court made clear that this was a distributive award (which is a sum certain and does not include gains and losses) to be paid from a retirement account, and not a distribution of the retirement account.

Appeal by defendant from order entered 4 June 2002 by Judge William B. Reingold and cross appeal by plaintiff from order dated 27 August 2002 by Judge Laurie L. Hutchins in District Court, Forsyth County. Heard in the Court of Appeals 9 October 2003.

David B. Hough for plaintiff-appellee.

Lennard D. Tucker for defendant-appellant.

McGEE, Judge.

Plaintiff filed a complaint for absolute divorce on 12 January 2000. Defendant filed an answer and counterclaim on 16 March 2000, that included a claim for equitable distribution. In a reply to the counterclaim, plaintiff requested a hearing on equitable distribution. The case was heard at the 4 September 2001 session of District Court in Forsyth County. The parties advised the trial court that they had resolved by stipulation all of the issues in the case. The terms of their agreement and stipulations were read into the record by the attorneys representing the parties. The trial court signed an equitable distribution consent judgment dated 26 September 2001.

Paragraph fourteen of the equitable distribution consent judgment provided for a distributive award by plaintiff to defendant with the following language:

> In order to effectuate the equitable distribution of the marital property of the parties as set forth herein, the Plaintiff shall pay as a distributive award to the Defendant the sum of Eighty-one Thousand Dollars ($81,000.00) and shall be paid by way of a distribution to the Defendant from the Plaintiff's R.J. Reynolds Capital Investment Plan. This Court shall enter an appropriate Qualified Domestic Relations Order to effectuate this transfer of retirement funds from the Plaintiff to the Defendant.

The trial court signed a qualified domestic relations order (QDRO) dated 26 September 2001 to effectuate the distributive award from plaintiff's R.J. Reynolds Capital Investment Plan. The QDRO contained the following language in paragraph five regarding the distributive award:

> From the benefits which would otherwise be payable to the Participant under the Plan, the Participant assigns to the Alternate Payee, and the Alternate Payee shall receive from the Plan, a benefit equal to $81,000.00, plus gains and/or losses earned on that amount from January 9, 1999 up to and including the last day of the month preceding the date of distribution of the benefit payable hereunder.

Plaintiff provided the plan administrator with a copy of the order on 28 September 2001 and informed the plan administrator that the parties intended for the order to be a QDRO. The Benefits Administration Committee of the R.J. Reynolds Capital Investment Plan issued a check to defendant in the gross amount of $100,750.31

on 25 October 2001. Plaintiff filed a motion dated 17 December 2001 to modify the QDRO, pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. Plaintiff alleged that the equitable distribution consent judgment only allowed defendant to receive $81,000.00. However, the resulting QDRO from plaintiff's Capital Investment Plan, which included the language "plus gains and/or losses," directed that defendant receive $100,750.31. Accordingly, plaintiff sought a refund from defendant of $19,750.31, plus interest. Defendant filed an objection to the motion to modify the QDRO on 4 February 2002.

The trial court entered an order on 4 June 2002 stating that plaintiff, pursuant to Rule 60(b), was entitled to a modification of the QDRO to eliminate the words "plus gains and/or losses earned on that amount from January 9, 1999 up to and including the last day of the month preceding the date of distribution of the benefit payable hereunder." Defendant was also ordered by the trial court to immediately refund to plaintiff, on or before 4 July 2002, the sum of $19,750.31, plus interest. Defendant appeals from this 4 June 2002 order.

Plaintiff filed a motion for show cause and contempt dated 24 July 2002, alleging that as of 15 July 2002, defendant had made no deposit to plaintiff's Capital Investment Plan. A hearing was held on 19 August 2002. The trial court entered an order dated 27 August 2002, denying plaintiff's motion since the trial court did not have jurisdiction in that defendant had already filed notice of appeal of the 4 June 2002 order. Plaintiff filed notice of appeal on 26 September 2002 from this denial.

"The purpose of Rule 60(b) is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. Generally, the rule is liberally construed." *Carter v. Clowers*, 102 N.C. App. 247, 254, 401 S.E.2d 662, 666 (1991) (citation omitted). "A trial court's ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion. The trial court's findings of fact are conclusive on appeal, if supported by competent evidence. However, those conclusions of law made by the court are reviewable on appeal." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616, *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998) (citations omitted). "Abuse of discretion is shown only when 'the challenged actions are manifestly unsupported by reason.' " *Blankenship v. Town & Country Ford, Inc.*, 155 N.C. App. 161, 165, 574 S.E.2d 132, 134 (2002), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 384 (2003) (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)).

[1] Defendant first argues the trial court erred when it modified the parties' QDRO on the basis of mutual mistake under Rule 60(b). At the outset, we note the trial court did not necessarily rely on mutual mistake in granting the relief. The order merely stated that "the Plaintiff, pursuant to Rule 60 (b) of the North Carolina Rules of Civil Procedure, remains entitled to a modification of the QDRO entered in this case." In addition to mistake, Rule 60(b) provides relief from judgment for a number of reasons, including the following:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60 (2003).

The unique facts of the case before us fall within the confines of Rule 60(b)(6).

> Rule 60(b)(6) is equitable in nature and authorizes the trial court to exercise its discretion in granting or denying the relief sought. The rule empowers the court to set aside or modify a final judgment, order or proceeding whenever such action is necessary to do justice under the circumstances. The test for whether a judgment, order or proceeding should be modified or set aside under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted.

Howell v. Howell, 321 N.C. 87, 91, 361 S.E.2d 585, 587-88 (1987) (citations omitted).

In the case before us, the trial court noted the following in its findings of fact in the order to modify the QDRO:

> 5. In the resulting QDRO entered by this Court on September 27, 2001, *the Court inadvertently and mistakenly* ordered that the Defendant receive $81,000 from the Plaintiff's R.J. Reynolds Capital Investment Plan, plus "gains and/or losses earned on that amount from January 9, 1999 up to and including the last day of the month preceding the date of distribution of the benefit payable hereunder" (emphasis added).

Previously, in the equitable distribution consent judgment, the trial court had ordered that "[p]laintiff shall pay the sum of Eighty-one Thousand Dollars ($81,000.00) by way of a transfer from the Plaintiff's R.J. Capital Investment Plan pursuant to a Qualified Domestic [Relations] Order which shall be entered by this Court." The additional "gains and/or losses" language was mistakenly inserted into the resulting QDRO.

The facts of this case make relief under Rule 60(b)(6) appropriate. Defendant received an additional $19,750.31 to which she was not entitled simply due to the wording in the QDRO. The evidence supports the conclusion that both parties intended that plaintiff only receive a set amount of $81,000.00 through the distributive award. In fact, the equitable distribution consent judgment awarded the R.J. Reynolds Capital Investment Plan wholly to plaintiff. Similarly, the judgment awarded the Teachers' & State Employees' Retirement System Plan to defendant. Neither party was awarded any interest whatsoever in the other's retirement plan. Plaintiff was simply ordered to pay defendant $81,000.00 as a distributive award to make the division equitable. In this case, the money for the award was ordered to come from plaintiff's R.J. Reynolds Capital Investment Plan. The fact that the money for the award originated from a retirement plan is immaterial. The origin of the money does not transform an ordinary distributive award into a division of a retirement plan whereby the payee can reap the benefits of subsequent gains.

Furthermore, defendant's reliance on *Stevenson v. Stevenson*, 100 N.C. App. 750, 398 S.E.2d 334 (1990), is misplaced. *Stevenson* involved the modification of a consent judgment which resolved multiple issues between the parties who were divorcing. The plaintiff and the defendant had agreed that the plaintiff would have sole possession of the marital home and would receive an additional sum if the value of the house was less than the value of defendant's profit-

sharing plan. *Stevenson*, 100 N.C. App. at 751, 398 S.E.2d at 335. The formula for assessing the value of the home, which was read into the record, was to include a certain deduction based on a loan. However, after multiple revisions, the formula in the written consent judgment failed to include that particular deduction. *Id.* The trial court granted a Rule 60(b) motion to correct the consent judgment to reflect the agreement of the parties. *Stevenson*, 100 N.C. App. at 751, 398 S.E.2d at 336. However, this Court vacated the trial court's judgment because there was no showing of fraud, lack of consent, or mistake. *Stevenson*, 100 N.C. App. at 752, 398 S.E.2d at 336.

The case before us is distinguishable. In *Stevenson*, the parties initially read the agreement into the record on 31 May 1988. Thereafter, the agreement was "altered many times by both parties" before a final draft was submitted to the court and filed on 6 July 1988. *Stevenson*, 100 N.C. App. at 753, 398 S.E.2d at 337. In contrast, in the case before us, the equitable distribution consent judgment was dated 26 September 2001. Likewise, the QDRO was also dated 26 September 2001. Unlike *Stevenson*, there was only a single draft of the QDRO. The parties did not create multiple drafts with revisions. Rather, the two documents were dated the same day. The consent judgment directed simply that defendant receive a distributive award in the amount of $81,000.00. Due to inadvertence, the provision in the QDRO effectuating the award included the language concerning gains and losses. Such a result was not intended. Because the facts in *Stevenson* are distinguishable from those before this Court, *Stevenson* is not controlling. The trial court did not abuse its discretion in modifying the QDRO to reflect the true intent of the parties. Accordingly, we overrule this assignment of error.

Defendant next argues the trial court did not have authority to modify the QDRO pursuant to Rule 60(a). As already noted, the trial court based its order to modify the QDRO on Rule 60(b). Therefore, defendant improperly relies on Rule 60(a) to argue error by the trial court. Accordingly, this assignment of error is overruled.

[2] Defendant also argues that the method used in the QDRO, whereby gains and losses on the pension plan are considered, is proper under North Carolina law. Defendant cites *Allen v. Allen*, 118 N.C. App. 455, 455 S.E.2d 440 (1995) for the proposition that an award of a retirement account must include gains and losses on the prorated portion of the benefit vested at the date of separation. Under the version of N.C. Gen. Stat. § 50-20(b)(3) in effect in 1995, awards of

vested pension, retirement, and other deferred compensation benefits were required to "include gains and losses on the prorated portion of the benefit vested at the date of separation." The same requirement is mandated in the current equitable distribution statutes; however, the provision is now set forth in N.C. Gen. Stat. § 50-20.1(d) (2003).

Defendant's argument that this method is proper under North Carolina law is accurate if an actual retirement account is being divided. However, in the case before us, an entire account is not being divided. Rather, funds from plaintiff's R.J. Reynolds Capital Investment Plan are being used to effectuate an $81,000.00 distributive award from plaintiff to defendant. A distributive award is "payments that are payable either in a lump sum or over a period of time in fixed amounts. . . ." N.C. Gen. Stat. § 50-20(b)(3) (2003). A distributive award is a sum certain and does not include gains and/or losses. The trial court made it clear that a distributive award was involved in this case. In the order to modify the QDRO, the trial court noted that the provision pertaining to the distributive award in the equitable distribution judgment was a "directive" that "constituted a distributive award which was being paid out of a retirement fund. This said distributive award did ***not*** represent a division or a distribution of an existing retirement plan." Based on this finding of fact, this assignment of error is overruled.

Defendant's final argument addresses plaintiff's cross-assignment of error. However, plaintiff has failed to present an argument in support of this cross-assignment of error. Accordingly, pursuant to N.C.R. App. P. 28(b)(6), this cross-assignment is deemed abandoned.

Affirmed.

Judges HUNTER and CALABRIA concur.

HARRY E. STETSER, DALE E. NELSON, AND MICHAEL DE MONTBRUN, AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. TAP PHARMACEUTICAL PRODUCTS INC.; ABBOTT LABORATORIES; TAKEDA CHEMICAL INDUSTRIES, LTD.; JOHNSON & JOHNSON; ETHICON ENDO-SURGERY, INC.; INDIGO LASER CORPORATION; DAVID JETT; CHRISTOPHER COLEMAN; SCOTT HIDALGO; AND EDDY JAMES HACK, DEFENDANTS

No. COA03-180

(Filed 3 February 2004)

Jurisdiction— personal—general—specific

The trial court erred by denying the motion of defendant Japanese corporation to dismiss based on lack of personal jurisdiction in a class action conspiracy case involving the alleged fraudulent marketing, pricing, and sales scheme of a cancer treatment drug, because there was not a sufficient basis for finding specific or general jurisdiction including that: (1) there was no basis for specific jurisdiction when plaintiffs failed to provide specific facts showing that defendant agreed to perform unlawful conduct even assuming a conspiracy theory of jurisdiction; and (2) there was no basis for general jurisdiction when defendant has not been authorized to do business in North Carolina and has not maintained any offices here, defendant has not manufactured, sold, or shipped any goods in North Carolina, defendant does not own real property, has no telephone number, and does not have a mailing address, and defendant's peripheral contacts do not establish general jurisdiction under the totality of circumstances.

Appeal by defendant from order entered 17 October 2002 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 29 October 2003.

Marvin K. Blount, Jr., and Marvin K. Blount, III; and Kline & Specter, P.C., by Donald E. Haviland, Jr., Terri Anne Benedetto, and Louis C. Ricciardi for plaintiff appellees.

Ellis & Winters LLP, by Richard E. Ellis and Matthew W. Sawchak, for Takeda Chemical Industries, Ltd., defendant appellant.

McCULLOUGH, Judge.

This case arises out of an order denying defendant Takeda's motion to dismiss for lack of personal jurisdiction entered 17 October

2002. The pertinent facts are as follows: Plaintiffs are three North Carolina residents who purchased Lupron as part of their treatment for prostate cancer. Defendant Takeda Chemical Industries, Inc. (Takeda) is a Japanese corporation headquartered in Osaka, Japan. Plaintiffs allege that Takeda, TAP Pharmaceutical Products, Inc. (TAP), Abbott Laboratories, and other defendants violated various laws in connection with the marketing and pricing of Lupron in the United States. Plaintiffs allege that defendants were involved in a conspiracy consisting of a fraudulent marketing, pricing, and sales scheme to defraud Lupron patients.

Takeda manufactures Lupron in Japan, but it does not design, manufacture, package, sell, ship, or distribute Lupron in North Carolina. Under a license granted by Takeda, Lupron is marketed by a separate corporation located in Illinois, and sold in the United States by TAP's subsidiary, TAP Pharmaceuticals, Inc. Takeda indirectly owns 50% of TAP's stock. Abbott owns the other 50%. TAP maintains its own headquarters, has its own bank account, files its own taxes, holds regular Board of Directors meetings, and hires and fires its own personnel. TAP also runs its daily activities without instruction from Takeda.

From 1992 through December 2001, Takeda was not licensed or registered to do business in North Carolina. It did not own or lease land or maintain an address or telephone number in the state. Takeda did not manufacture any products, sell any goods, or earn any income from business in North Carolina. It did not even have a registered agent for service of process in North Carolina. Prior to January 2001, Takeda did have a subsidiary in North Carolina known as Takeda Vitamin and Food U.S.A., Inc. (TVFU). Although TVFU manufactured bulk vitamins, it had no involvement with Lupron.

Takeda did not have employees permanently assigned to work in the United States, but it did "second" employees to American subsidiaries from time to time. "Secondment" is a customary practice among Japanese corporations with foreign subsidiaries. Through this practice, an employee of the parent works for a period of time as an employee of the subsidiary. The United States subsidiary supervises the seconded employee and controls the manner in which the employee fulfills his or her responsibilities to the subsidiary. Takeda also maintained one bank account in Wilmington, North Carolina, for the purpose of settling accounts related to seconded employees. This account was closed by September of 1998.

Plaintiffs filed this class action suit on 31 December 2001, alleging a number of claims based on the sale and marketing of Lupron. On 17 October 2002, the trial court denied Takeda's motion to dismiss for lack of personal jurisdiction. Defendant appeals. On appeal, defendant argues that the trial court erred because there was no basis for general or specific jurisdiction. We agree and reverse the decision of the trial court.

When jurisdiction is challenged, plaintiff has the burden of proving that jurisdiction exists. *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 629-30, 394 S.E.2d 651, 654 (1990). In this case, the trial court made no findings of fact, and neither party made such a request. "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18, *disc. review denied, appeal dismissed*, 353 N.C. 261, 546 S.E.2d 90 (2000). This Court has articulated the standard for determining personal jurisdiction:

> The determination of personal jurisdiction is a two-part inquiry. The trial court first must examine whether the exercise of jurisdiction over the defendant falls within North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, and then must determine whether the defendant has sufficient minimum contacts with North Carolina such that the exercise of jurisdiction is consistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

Better Business Forms, Inc. v. Davis, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995). Takeda does not argue that it is beyond the reach of North Carolina's long-arm statute. Therefore, we must consider the remaining issue of due process.

To comply with due process, there must be minimum contacts between the nonresident defendant and the forum so that allowing the suit does not offend traditional notions of fair play and substantial justice. *Tom Toggs, Inc., v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945)). "[T]here must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws;

the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice." *Id.*

There are two kinds of personal jurisdiction: general and specific. A court may exercise specific jurisdiction only "[w]here the controversy arises out of the defendant's contacts with the forum state." *Id.* at 366, 348 S.E.2d at 786. The test for general jurisdiction is more stringent. *Id.* A court may exercise general jurisdiction where the cause of action is unrelated to defendant's activities with the forum state if there are "continuous and systematic" contacts between the defendant and the forum state. *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219. With these principles in mind, we consider whether there was specific or general jurisdiction in this case.

A. Specific Jurisdiction

A court may exercise specific jurisdiction only "[w]here the controversy arises out of the defendant's contacts with the forum state." *Tom Toggs, Inc.*, 318 N.C. at 366, 348 S.E.2d at 786. The alleged injuries must arise out of activities defendant "purposefully directed" toward the state's residents. *Id.*

Plaintiffs advance a conspiracy theory of personal jurisdiction alleging that defendants are subject to jurisdiction because defendants and their co-conspirators took steps to harm North Carolina residents. "Under the conspiracy theory of jurisdiction, a conspirator who has few contacts with a state may nonetheless be subject to the state's jurisdiction if substantial acts in furtherance of the conspiracy were performed in the state and the conspirator knew or should have known that these acts would be performed." *Hanes Companies, Inc. v. Ronson*, 712 F. Supp. 1223, 1229 (M.D.N.C. 1988). Two federal decisions from North Carolina apply the theory. *Id.*; *Gemini Enterprises, Inc. v. WFMY Television Corp.*, 470 F. Supp. 559, 565 (M.D.N.C. 1979). However, the Fourth Circuit has not adopted the conspiracy theory. *Boon Partners v. Advanced Financial Concepts, Inc.*, 917 F. Supp. 392, 397 (E.D.N.C. 1996). These diverging outcomes indicate a division among our federal courts and perhaps some reticence in implementing the theory. In reviewing our state's jurisprudence, it does not appear that our Supreme Court has ever adopted this theory and has instead relied on a more traditional analysis.

Even if we were to consider the conspiracy theory in this case, plaintiffs' conclusory allegations would be insufficient because plaintiffs have failed to provide specific facts showing that Takeda agreed

to perform unlawful conduct. Plaintiffs' alleged injuries arise from the marketing and sales of Lupron. However, a senior Takeda employee, Kenji Yagi, stated in his affidavit that "Takeda has no involvement in the marketing or sale of Lupron . . . to customers in the United States" and "Takeda has not engaged in activities relating to sales or marketing of Lupron to customers in North Carolina." Plaintiffs do not contest this assertion, but argue that Takeda is subject to jurisdiction due to the actions taken by TAP, or in the alternative, Takeda's own actions involving a subsidiary.

Plaintiffs also mention an agreement between the United States Attorney for the District of Massachusetts (the Government) and Takeda. In this Side Letter Agreement, Takeda promised to cooperate in a government investigation of TAP in exchange for a promise not to prosecute Takeda. Since Takeda made no admissions, entered no plea, and was never charged with any wrongdoing, it would be improper to use this agreement to imply misconduct by Takeda. Nothing in this letter represents any action taken by Takeda in North Carolina. Finally, we note that our decision on this issue is consistent with the conclusion reached by the Multidistrict Litigation Panel which considered nearly identical allegations. *In Re Lupron Marketing And Sales Practices Lit.*, 245 F. Supp. 2d 280 (2003). In its ruling, the panel upheld jurisdiction for Illinois because TAP is located there, but in Massachusetts, Alabama, and Minnesota, it found no basis for jurisdiction based on conclusory allegations of a conspiracy: "Assuming, however, that the conspiracy theory of jurisdiction could, in an appropriate factual context, pass federal constitutional scrutiny, due process requires more than a bare allegation of the existence of a conspiracy." *Id.* at 294. For these reasons, there was not a sufficient basis for our exercising specific jurisdiction in this case.

B. General Jurisdiction

A court may exercise general jurisdiction where the defendant's activities are unrelated to the forum state as long as defendant maintains "continuous and systematic" contacts. *Bruggeman*, 138 N.C. App. at 617, 532 S.E.2d at 219. Courts consider a number of factors in this analysis, but no single factor is determinative; rather, the totality of the circumstances must be examined to determine whether the defendant's contacts are continuous and systematic. *Occidental Fire & Cas. v. Continental Ill. Nat'l Bk.*, 689 F. Supp. 564, 567 (E.D.N.C. 1988). "Whether the type of activity conducted

within the state is adequate to satisfy the due process requirements depends upon the facts of the particular case." *Ash v. Burnham Corp.*, 80 N.C. App. 459, 461, 343 S.E.2d 2, 3, *aff'd*, 318 N.C. 504, 349 S.E.2d 579, 580 (1986).

In this case, Takeda has not been authorized to do business in North Carolina, and it has not maintained any offices here. Takeda has not manufactured, sold, or shipped any goods in North Carolina. It does not own real property, has no telephone number, and does not have a mailing address. The only other contacts between Takeda and North Carolina are a few "seconded" employees and one bank account in Wilmington which was closed three years before the instant case was filed. We conclude that these peripheral contacts do not establish general jurisdiction under the totality of the circumstances. Since the contacts with North Carolina are so attenuated, the defendant would not " 'reasonably anticipate being haled into court' " here. *Tom Toggs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (citation omitted). Indeed, significantly greater contacts by nonresident defendants have been held insufficient to provide a basis for general jurisdiction. For example, a boiler manufacturer used independent contractors to solicit orders in North Carolina and advertised in magazines that reached North Carolina. *Ash*, 80 N.C. App. at 461-62, 343 S.E.2d at 3-4. Nevertheless, this Court found that "these contacts with North Carolina [were] not so 'continuous and systematic' as to warrant the exercise of *in personam* jurisdiction." *Id.* at 462, 343 S.E.2d at 4. Finally, since the test for general jurisdiction is more stringent than the test for specific jurisdiction, we conclude that general jurisdiction has not been established in this case.

After a careful review of the record and the arguments of the parties, we conclude that there was not a sufficient basis for finding specific or general jurisdiction. Thus, the trial court's order denying defendant's motion to dismiss for lack of personal jurisdiction is

Reversed.

Judges TYSON and BRYANT concur.

JESSIE BILL CHILDRESS, EMPLOYEE, PLAINTIFF v. FLUOR DANIEL, INC, EMPLOYER, AND KEMPER INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA03-107

(Filed 3 February 2004)

1. Workers' Compensation— motion to withdraw or stay opinion—subrogation lien

The Industrial Commission did not err in a workers' compensation case by denying defendants' motion to withdraw or to stay the effect of the opinion and award of the full Commission on the basis of defendants' subrogation claims, because: (1) a final award has not yet been entered in this matter, and thus, the Industrial Commission does not have jurisdiction over defendants' subrogation claim; and (2) until the award becomes final, jurisdiction over defendants' subrogation claim lies with the superior court.

2. Workers' Compensation— permanent injury award—lung damage

The Industrial Commission did not abuse its discretion in a workers' compensation case by awarding plaintiff employee $40,000 for his lung damage even though defendant contends the lungs are but a single organ entitling a maximum award of $20,000 for permanent injury to the lungs, because this award was appropriate under N.C.G.S. § 97-31(24) when there was competent medical evidence to support the findings regarding the significance of each organ to the body's general health and well-being.

3. Workers' Compensation— disability—proof not required

The Industrial Commission did not err in a workers' compensation case by holding that a disability need not be proven in order for N.C.G.S. § 97-31(24) to apply.

Appeal by defendants from Opinion and Award entered 16 April 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 29 October 2003.

Edward L. Pauley, Mona Lisa Wallace, and M. Reid Acree, Jr., for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Hatcher Kincheloe and Jason Cline McConnell, for defendant-appellant.

STEELMAN, Judge.

Defendants (Fluor Daniel, Inc., and Kemper Insurance Company) appeal an Opinion and Award of the North Carolina Industrial Commission awarding plaintiff (Jessie Bill Childress) forty thousand dollars ($40,000) for permanent injury to his lungs and an additional twenty thousand dollars ($20,000) for permanent injury to his colon. For the reasons discussed herein, we affirm.

The relevant facts as found by the Full Commission are as follows. Plaintiff was employed by Daniel International Corporation (Fluor Daniel's predecessor in interest) at the DuPont Facility in Brevard, North Carolina during 1975-78. During that time, Daniel International's workers' compensation carrier for the DuPont facility was American Motorists Insurance Company (now Kemper Insurance).

Plaintiff was exposed to asbestos while working at the Dupont facility, and he did not suffer subsequent exposure. Plaintiff presented expert medical testimony that he had colon cancer and asbestosis in both lungs. This testimony causally linked each of these conditions to plaintiff's exposure to asbestos.

On 8 May 1997, plaintiff filed a Form 18B alleging asbestosis, an occupational disease, and seeking workers' compensation benefits from defendants. Plaintiff later amended his Form 18B to include a claim for colon cancer. Defendants denied liability.

At hearings before two deputy commissioners, defendants moved for an order to compel plaintiff to disclose amounts of any third-party settlements received by plaintiff. These motions were denied.

On 16 April 2002, the Full Commission entered its Opinion and Award in this matter. The Commission awarded plaintiff the sum of twenty thousand dollars ($20,000) for permanent injury to his colon, twenty thousand dollars ($20,000) for permanent injury to his left lung, and twenty thousand dollars ($20,000) for permanent injury to his right lung. Each of these awards was made pursuant to N.C. Gen. Stat. § 97-31(24) (2001). The Commission further directed that defendants pay all medical expenses incurred or to be incurred by plaintiff as a result of his asbestosis and colon cancer.

On 6 May 2002, defendants moved that the Commission withdraw its Opinion and Award. The basis of this motion by defendants was "to protect [defendants'] rights against payment for which a credit is

due pursuant to consummated third-party settlements." By order filed 20 August 2002, the Full Commission denied defendants' motion. Defendants gave notice of appeal to this Court on 25 September 2002.

On appeal of an Opinion and Award by the Industrial Commission, this Court is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Evidence tending to support the plaintiff's claim is to be viewed 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), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). If there is any evidence in the record to support a finding of fact, it is conclusive on appeal, even if there is substantial evidence to the contrary. *Id.*

[1] In their first assignment of error, defendants argue the Commission erred in denying defendants' motion to withdraw or to stay the effect of the Opinion and Award of the Full Commission. We disagree.

"The purpose of the North Carolina Workers' Compensation Act is not only to provide a swift and certain remedy to an injured worker, but also to ensure a limited and determinate liability for employers." *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997). The Act was not intended to provide the employee with a windfall by recovering from both his employer and a third-party tortfeasor. *Id.* For this reason, the Act provides for subrogation by employers of recovery from third parties. N.C. Gen. Stat. § 97-10.2 (2001). However, the Industrial Commission only acquires jurisdiction over subrogation issues after a workers' compensation claim is settled or a final award has been entered. N.C. Gen. Stat. § 97-10.2(f)(1).

An employer's right to a subrogation lien exists at the outset of a workers' compensation case. *See Radzisz*, 346 N.C. at 89, 484 S.E.2d at 569. Moreover, an employer's subrogation lien is not waived by failure to settle or obtain a final award prior to payment of third-party settlement proceeds. *Id.* However, the employer's right to subrogation does not vest until the workers' compensation case is settled or an award becomes final. *See Davis v. Weyerhaeuser Co.*, 96 N.C. App.

584, 588, 386 S.E.2d 740, 742 (1989) (stating that since defendant-employer had not made any payments to plaintiff, defendant-employer was not yet entitled to a credit based on the third-party settlement). The Industrial Commission does not have jurisdiction over the employer's subrogation claim until an award "final in nature" is entered. N.C. Gen. Stat. § 97-10.2(f)(1).

Rather, section 97-10.2(j) governs subrogation prior to entry of a final award:

> [I]n the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge . . . to determine the subrogation amount. . . . [T]he judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.

N.C. Gen. Stat. § 97-10.2(j). However, after "an award final in nature in favor of the employee has been entered by the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party . . . shall be disbursed by order of the Industrial Commission . . . ." N.C. Gen. Stat. § 97-10.2(f)(1).

A final award has not yet been entered in this matter. Although the Full Commission entered an Opinion and Award on 16 April 2002, that award was appealed by the defendants to this Court. Thus, the award is not final in nature, and the Industrial Commission does not have jurisdiction over defendants' subrogation claim. *See id.* Until the award becomes final, jurisdiction over defendants' subrogation claim lies with the superior court. N.C. Gen. Stat. § 97-10.2(j). Therefore, the Industrial Commission correctly refused to stay the effect of its Opinion and Award on the basis of defendants' subrogation claims. This assignment of error is without merit.

[2] In their second assignment of error, defendants argue the Industrial Commission erred in awarding plaintiff forty thousand dollars ($40,000) for his lung damage. We disagree.

The Workers' Compensation Act "schedule of injuries" provides:

> In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensa-

> tion is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000).

N.C. Gen. Stat. § 97-31(24). Defendants argue that plaintiff's lungs are but a single organ and that plaintiff is entitled to a maximum award of $20,000 for permanent injury to his lungs. In *Aderholt v. A.M. Castle Co.*, 137 N.C. App. 718, 724, 529 S.E.2d 474, 478, *cert. denied*, 352 N.C. 356, 544 S.E.2d 546 (2000), the plaintiff was awarded forty thousand dollars ($40,000) for permanent damage to his lungs, twenty thousand dollars ($20,000) per lung. This Court upheld the award, stating that the record revealed "competent medical evidence to support the Commission's findings regarding the significance of each organ to the body's general health and well-being." *Id.* at 724, 529 S.E.2d at 479. Moreover, the Court held that "the organs were important within the meaning of section 97-31(24) and that the amounts awarded for each were proper and equitable." *Id.*

In this case, the Full Commission found that plaintiff suffered permanent injury to "three important internal organs; to wit: his lungs, in the form of permanent and irreversible loss of lung function, and his colon, in the form of permanent and irreversible loss of colon function." An award under section 97-31(24) "will not be overturned on appeal absent an abuse of discretion" by the Full Commission. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986). Finding no abuse of discretion, we conclude that an award of forty thousand dollars for permanent damage to both of plaintiff's lungs was appropriate under section 97-31(24). This assignment of error is without merit.

[3] In defendants' third assignment of error, they assert the Industrial Commission erred in holding that a disability need not be proven in order for section 97-31(24) to apply. We disagree.

Section 97-31 is a schedule of injuries that allows for compensation even if a claimant does not demonstrate loss of wage-earning capacity. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52 (1985). "Losses included in the schedule are conclusively presumed to diminish wage-earning ability." *Id.* at 575, 336 S.E.2d at 52-53. Thus, the Industrial Commission may enter an award pursuant to section 97-31 without finding that the employee is disabled. *Id.* at 576, 336 S.E.2d at 53; *Davis v. Weyerhaeuser Co.*, 132 N.C. App. 771, 776, 514 S.E.2d 91, 94 (1999).

Defendants incorrectly argue that this principle was overruled by *Wilkins v. J.P. Stevens & Co.*, 333 N.C. 449, 426 S.E.2d 675 (1993). In dicta, the *Wilkins* Court wrote that "[f]or any physical impairment, including that caused by an occupational disease, to be compensable under the Act, it must be shown that the impairment has caused the claimant to have an incapacity for work." *Id.* at 453, 426 S.E.2d at 678. However, the plaintiff in that case was actually denied benefits not because he failed to prove a disability, but because his disability resulted from non-occupational causes. *Id.* at 454-55, 426 S.E.2d at 678-79. Thus, *Harrell* was not overruled by *Wilkins* and plaintiff need not show he was disabled in order to receive compensation under section 97-31(24). This assignment of error is without merit.

AFFIRMED.

Judges MARTIN and HUDSON concur.

ROBERT Y. PURCELL, AND WIFE, MARY PURCELL, PLAINTIFFS v. OSCAR C. DOWNEY, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANTS

No. COA03-347

(Filed 3 February 2004)

Insurance— UIM—stacked policies—one at statutory minimum liability amount

UIM coverage was not available where one of the two involved policies was not above the statutory minimum liability amount. N.C.G.S. § 20-279.21(b)(4).

Appeal by defendants from judgment entered 30 December 2002 by Judge Abraham Penn Jones in Person County Superior Court. Heard in the Court of Appeals 19 November 2003.

Currin & Dutra, L.L.P., by Lori A. Dutra and Amy R. Edge, for plaintiffs-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio and Christopher R. Kiger, for defendants-appellants.

ELMORE, Judge.

Defendant State Farm Mutual Automobile Insurance Company (State Farm) contends the trial court erred in denying its motion for summary judgment and granting summary judgment in favor of plaintiffs Robert and Mary Purcell in a declaratory judgment action to determine whether underinsured motorist (UIM) coverage was available to plaintiffs under two automobile insurance policies issued by State Farm. We agree, and therefore reverse the trial court's order.

The parties stipulated to the following facts: on 29 June 1997, plaintiffs were seriously injured when their motorcycle was struck by a vehicle operated by defendant Oscar Downey (Downey). Plaintiffs' injuries were proximately caused by the accident, and plaintiffs suffered damages in excess of $125,000.00 each. Downey's vehicle was insured by North Carolina Farm Bureau Insurance Company (Farm Bureau) under a policy which provided liability coverage to Downey in the amount of $100,000.00 per person/$300,000.00 per accident. Pursuant to a "Settlement Agreement with Primary Liability Carrier Only/Covenant Not to Enforce Judgment" executed by each plaintiff, Farm Bureau paid plaintiffs $100,000.00 each, representing the single per person limits of the liability coverage it provided to Downey. At the time of the accident, plaintiffs owned two policies of automobile insurance issued by State Farm, policy numbers 157-2910-E30-33P (Policy One) and 161-9221-F13-33D (Policy Two). Plaintiffs paid separate premiums to State Farm for Policy One and Policy Two and were current in their payments on both policies at the time of the accident. Policy Two insured the motorcycle on which plaintiffs were riding when the accident occurred. Policy One insured plaintiffs' three automobiles.

The record evidence tends to show that Policy One, the policy insuring plaintiffs' three automobiles, provided liability and UIM coverage with limits in the amount of $100,000.00 per person/$300,000.00 per accident. Plaintiffs purchased Policy One in 1980. Policy Two, a minimum limits policy insuring the motorcycle plaintiffs were operating when injured, was purchased in 1990 and provided liability coverage with limits in the amount of $25,000.00 per person/$50,000.00 per accident, with no stated UIM coverage. State Farm provided plaintiffs with a "Selection/Rejection Form" which Robert Purcell signed on 5 December 1991, purportedly rejecting UIM coverage on Policy Two.

Plaintiffs filed their declaratory action on 28 June 2000, seeking a determination that (1) Policy One and Policy Two provided UIM coverage to them at the time of the accident; (2) the limits of the UIM coverage provided by the two State Farm policies should be aggregated, or "stacked;" and (3) as a result, plaintiffs are now entitled to receive an additional $25,000.00 apiece from State Farm in UIM coverage. In other words, plaintiffs contend that Policy One has UIM limits of $100,000.00 per person/$300,000.00 per accident, that Policy Two has UIM limits of $25,000.00 per person/$50,000.00 per accident, and that the UIM limits of Policies One and Two should be stacked to provide plaintiffs with total UIM coverage in the amount of $125,000.00 per person/$350,000.00 per accident. Plaintiffs thus argue they are entitled to receive a total of $50,000.00 in UIM coverage from State Farm, in addition to the $200,000.00 they have already received from Farm Bureau in payment of the "per person" limits of the liability coverage Farm Bureau provided to Downey.

The parties filed cross-motions for summary judgment, and the trial court heard their motions on 4 June 2001. From an order entered 30 December 2002 granting summary judgment in plaintiffs' favor and denying State Farm's cross-motion for summary judgment, State Farm appeals.

State Farm contends that the trial court improperly denied its motion for summary judgment and instead granted summary judgment in plaintiffs' favor because the trial court should have determined, as a matter of law, that Policy Two did not provide any UIM coverage to plaintiffs which could subsequently be stacked with the UIM coverage provided by Policy One. Specifically, State Farm argues that pursuant to N.C. Gen. Stat. § 20-279.21(b)(4), UIM coverage is not available with Policy Two because Policy Two provides only the statutorily mandated minimum limits of liability coverage. For the reasons discussed herein, we agree.

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) (2003). In a declaratory action where, as here, there is no substantial controversy as to the facts disclosed by the evidence, either party may be entitled to summary judgment, since the legal significance of those facts is the only matter in controversy. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972). The party moving for summary judgment bears the burden of

establishing the lack of a triable issue of fact. *Pierce Concrete, Inc. v. Cannon Realty & Construction Co.*, 77 N.C. App. 411, 412, 335 S.E.2d 30, 31 (1985).

In order to determine "whether insurance coverage is provided by a particular automobile liability insurance policy, careful attention must be given to the type of coverage, the relevant statutory provisions, and the terms of the policy." *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 142, 400 S.E.2d 44, 47, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). The type of coverage at issue in the present case is UIM coverage, and the relevant statute is N.C. Gen. Stat. § 20-279.21(b)(4). Section 20-279.21(b)(4), which provides that an automobile owner's liability insurance policy:

> Shall . . . provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner.

N.C. Gen. Stat. § 20-279.21 (b)(4) (2003). At the time of the accident, section 20-279.21(b)(2) established the minimum limits for an automobile liability insurance policy as:

> twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of injury to or destruction of property of others in any one accident[.]

N.C. Gen. Stat. § 20-279.21(b)(2) (1997). Moreover, section 20-279.21(b)(4) further provides that:

> if a claimant is an insured under the [UIM] coverage on separate or additional policies, the limit of [UIM] coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's [UIM] coverages as determined by combining the highest limit available under each policy[.]

N.C. Gen. Stat. § 20-279.21 (b)(4) (2003). UIM coverage allows recovery by the insured where, as here, the tortfeasor has insurance, but

the tortfeasor's coverage is insufficient to fully compensate the injured party. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). However, our appellate courts have repeatedly construed section 20-279.21(b)(4) "to require a policyholder to maintain liability coverage that is above the statutory minimum in order to be eligible for UIM coverage." *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 253, 552 S.E.2d 186, 190 (2001), *disc. review denied*, 356 N.C. 438, 572 S.E.2d 788 (2002); *see also Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 147, 400 S.E.2d 44, 50, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991) ("Under § 20-279.21(b)(4), UIM coverage may be obtained only if the policyholder has liability insurance in excess of the minimum statutory requirement[.] . . ."); *Morgan v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 200, 205, 497 S.E.2d 834, 837, *aff'd*, 349 N.C. 288, 507 S.E.2d 38 (1998) ("[S]ince the policy in question only provided the minimum statutory-required coverage of $25,000/$50,000, the policy was not required to provide UIM coverage under section 20-279.21(b)(4).").

In the present case, of the two automobile insurance policies owned by plaintiffs and issued by State Farm, only Policy Two provided liability coverage for the motorcycle involved in the accident. Our appellate courts have allowed interpolicy stacking of UIM coverages where the vehicle involved in the accident was listed on only one of the policies, reasoning that "[t]he statutory scheme for liability insurance is primarily vehicle oriented while . . . UIM insurance is essentially person oriented." *Smith*, 328 N.C. at 148, 400 S.E.2d at 50; *see also Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 272, 274, 405 S.E.2d 370, 371 (1991), *aff'd*, 332 N.C. 109, 418 S.E.2d 221 (1992). However, in both *Smith* and *Bass*, unlike the instant case, *each* of the multiple policies which were held to provide stackable UIM coverages were written at limits that exceeded the statutorily-required minimum liability amount.

In the present case, the declarations page for Policy One indicates that both liability and UIM coverage with limits in the amount of $100,000.00 per person/$300,000.00 per accident were provided by that policy. By contrast, the declarations page for Policy Two indicates this policy provided liability coverage with limits *equal to* the statutorily-required minimum amount of $25,000.00 per person/$50,000.00 per accident, with no stated UIM coverage. Thus, under section 20-279.21(b)(4), no UIM coverage was available with Policy Two, since that policy only provided liability coverage in an

amount that did not exceed the statutorily-required minimum limits. *Smith*, 328 N.C. at 147, 400 S.E.2d at 50; *Pinney*, 146 N.C. App. at 253, 552 S.E.2d at 190; *Morgan*, 129 N.C. App. at 205, 497 S.E.2d at 837. Moreover, the validity of plaintiffs' purported 1991 rejection of UIM coverage on Policy Two is immaterial to this analysis "because plaintiff was not purchasing a policy written at limits that exceeded the minimum limits of $25,000/$50,000, [and] UIM coverage was not actually available" when the purported rejection was made. *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 682, 544 S.E.2d 807, 809, *disc. review denied*, 353 N.C. 728, 552 S.E.2d 163, (2001) (stating that because the policy at issue provided only the statutorily-required minimum limits for bodily liability coverage at the time the purported rejection was signed, the policyholder was not eligible for UIM coverage at that time, and the policy was not then subject to section 20-279(b)(4)).

We hold that because Policy Two is a minimum limits policy which by its terms was not "written at limits that exceed" the minimum financial responsibility amounts set forth by Section 20-279.21(b)(2), Section 20-279.21(b)(4) mandates that as a matter of law, UIM coverage is not available to plaintiffs under Policy Two. Consequently, we conclude that there is no additional UIM coverage available to be stacked with the $100,000.00 of UIM coverage provided to each plaintiff by Policy One, which is equal to the amount already paid to each plaintiff under the tortfeasor's exhausted liability policy. We therefore reverse the trial court's order and remand with instructions to enter an order granting summary judgment in favor of State Farm.

Reversed and remanded.

Judges BRYANT and CALABRIA concur.

TESHA V. CHERRY AND BRIDGETTE D. ALLEN, CO-ADMINISTRATRIX OF THE ESTATE OF CRAIG G. ALLEN, PLAINTIFFS V. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., DEFENDANT

No. COA03-14

(Filed 3 February 2004)

Insurance— automobile—commercial policy—piercing the corporate veil

The trial court erred in an action arising out of an automobile accident by granting summary judgment in favor of plaintiffs against defendant insurance company based on the erroneous conclusion that plaintiffs were entitled to coverage under a commercial policy of insurance issued by defendant insurance company to a corporation owned and operated by the driver of the pickup truck involved in the collision, because: (1) the insurance policy covered solely owned and temporary substitute vehicles of the insured company, and the pertinent truck did not fall under these exclusions in the subject policy; (2) the driver of the truck was neither an insured nor was the truck he was driving a covered vehicle; and (3) plaintiffs' propounded application of the doctrine of piercing the corporate veil is rejected.

Appeal by defendant from judgment entered 17 October 2002 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 16 October 2003.

Taylor Law Office, by W. Earl Taylor, Jr., for plaintiffs-appellees.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Mary McHugh Webb and Heather R. Waddell, for defendant-appellant.

CALABRIA, Judge.

On 10 February 2001, Paul Bryan Jump ("Jump") and William Craig Herring ("Herring") were returning from a field trial competition for foxhounds. Jump was operating Herring's 2000 Chevrolet truck when it collided with a vehicle operated by Craig G. Allen ("Allen"), who was killed as a result of injuries sustained in the accident.

On the date of the accident, Jump was an "insured" under a personal automobile policy issued by State Farm Mutual Automobile Insurance Company ("State Farm") to his wife. State Farm

tendered the policy limits available under this policy to plaintiffs. In addition, plaintiffs accepted the policy limits tendered under Herring's automobile liability insurance on the 2000 Chevrolet truck driven by Jump.

The issue in this case is whether plaintiffs are entitled to coverage under a commercial policy of insurance (the "subject policy") issued by State Farm to B&L Mobile Repair, Inc. ("B&L"), a corporation owned and operated by Jump. On 29 August 2001, Tesha V. Cherry and Bridgette D. Allen, co-administratrix of Allen's estate, brought a declaratory judgment action to determine the rights and responsibilities of the parties.

State Farm moved for summary judgment on plaintiffs' claims pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, asserting the subject policy did not provide coverage to Jump as an "insured" or to the vehicle he operated as an insured vehicle. Plaintiffs asserted the corporate veil of B&L should be pierced and the corporate form disregarded so as to provide coverage to Jump as the insured. After examining the insurance contract and hearing oral arguments, the trial court denied State Farm's summary judgment motion and granted summary judgment to plaintiffs. State Farm appeals.

"Summary judgment is designed to 'ferret out those cases in which there is no genuine issue as to any material fact and in which, upon such undisputed facts, a party is entitled to judgment as a matter of law.' " *Cameron & Barkley Co. v. American Insurance Co.*, 112 N.C. App. 36, 39, 434 S.E.2d 632, 634 (1993) (quoting *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 698-99, 179 S.E.2d 865, 867 (1971)). "The construction and application of insurance policy provisions to undisputed facts is a question of law, properly committed to the province of the trial judge for a summary judgment determination." *Certain Underwriters at Lloyd's London v. Hogan*, 147 N.C. App. 715, 718, 556 S.E.2d 662, 664 (2001).

We begin by setting forth several well-settled principles governing the construction of insurance policies. " '[A]n insurance policy is a contract and its provisions govern the rights and duties of the parties thereto[.]' " *Id.* (quoting *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986)). " '[A]s with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued.' " *Id.* (quoting *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978)). "The

parties' intent may be derived from the language employed in the policy." *Rouse v. Williams Realty Bldg. Co.*, 143 N.C. App. 67, 69, 544 S.E.2d 609, 612 (2001).

> In determining the meaning of the language used in an insurance policy, the following general rules of construction apply: "Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein."

Hogan, 147 N.C. App. at 718-19, 556 S.E.2d at 664-65 (quoting *Woods*, 295 N.C. at 505-06, 246 S.E.2d at 777); *see also Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000). With these principles in mind we turn to the subject policy to see whether the vehicle being operated at the time of the accident was a covered vehicle under the policy or whether Jump was a person to whom the policy provided coverage as an insured.

I. Covered Vehicles

There is no dispute the 2000 Chevrolet truck was not a vehicle covered by the subject policy issued to B&L. Liability insurance is vehicle-oriented rather than person-oriented, *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 148, 400 S.E.2d 44, 50 (1991); *Haight v. Travelers/Aetna Property Casualty Corp.*, 132 N.C. App. 673, 679, 514 S.E.2d 102, 106 (1999), and we have upheld exclusions that limit "liability coverage to personal injury or property damage arising out of the ownership, maintenance or use of the covered vehicle." *Haight*, 132 N.C. App. at 679, 514 S.E.2d at 106.

The subject policy provided State Farm would pay, on behalf of the insured, any amount the insured was legally obligated to pay as damages due to bodily injury or property damage covered if "caused

by an occurrence and arising out of the ownership, maintenance or use, . . . of an owned automobile or of a temporary substitute automobile . . . ." An owned automobile was defined, in pertinent part, as one "owned by the named insured and described in the declarations[.]" In the instant case, the subject policy set forth two owned automobiles, a 1992 Dodge truck used primarily by Jump for business purposes and a 1983 Toyota truck used by Jump to get to and from work and around town. Neither of these trucks were the trucks driven by Jump at the time of the accident.

The subject policy also provided coverage for temporary substitute automobiles. This category included any "automobile not owned by the named insured or any resident of the same household, while temporarily used with the permission of the owner as a substitute for an owned automobile when withdrawn from normal use for servicing or repair or because of its breakdown, loss, or destruction[.]" Herring's 2000 Chevrolet truck driven by Jump could not be considered a temporary substitute vehicle since it was not being used as a replacement for an owned automobile withdrawn from normal use. Accordingly, the exclusions in the subject policy preclude the conclusion that it provided coverage for the vehicle driven by Jump in the instant case.

II. Piercing the Corporate Veil

Plaintiffs ask this Court to pierce the corporate veil of B&L, the named insured. Plaintiffs assert that once the corporate veil is pierced, B&L would have no legal independent existence from Jump; therefore, Jump would be construed as the insured under the subject policy at the time of the accident in which Allen was killed. We find plaintiffs' proposed use of the doctrine of piercing the corporate veil misplaced.

"[T]he doctrine that a corporation is a legal entity distinct from the persons composing it is a legal fiction devised to serve the ends of justice." *Atlantic Tobacco Co. v. Honeycutt*, 101 N.C. App. 160, 164, 398 S.E.2d 641, 643 (1990). The doctrine of disregarding a corporation's separate and independent existence is commonly referred to as piercing the corporate veil, and we do not invoke it lightly. *Department of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 68, 576 S.E.2d 341, 344, *appeal dismissed by*, 357 N.C. 504, ___ S.E.2d ___ (2003). *Accord Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 37, 560 S.E.2d 817, 829, *disc. rev. denied*, 356 N.C. 164, 568 S.E.2d 196 (2002) (quoting *Dorton v. Dorton*, 77 N.C. App. 667, 672, 336

S.E.2d 415, 419 (1985)) (noting that piercing the corporate veil is " 'a drastic remedy' and 'should be invoked only in an extreme case where necessary to serve the ends of justice' "). "Piercing the corporate veil of a corporation allows a plaintiff to impose legal liability for a corporation's obligations, or for torts committed by the corporation, upon some other company or individual that controls and dominates the corporation." *Id.*

Plaintiffs have not asserted Jump has dominated or controlled B&L for the purpose of imposing the legal liability of B&L's obligations on Jump and thereby reach Jump's individual assets. Rather, plaintiffs ask this Court to disregard B&L's separate corporate identity under the doctrine of piercing the corporate veil for the purpose of reaching State Farm's coverage. Granting plaintiffs' request would be tantamount to rewriting the terms of the subject policy by requiring State Farm, B&L's liability insurance provider, to cover someone other than the named insured. Plaintiffs have cited no authority supporting the application of piercing the corporate veil in this manner, and we decline to adopt it.

In summary, the insurance policy by State Farm covered solely owned and temporary substitute vehicles of B&L, the insured. Jump was neither an insured, nor was the truck he was driving a covered vehicle. We reject plaintiffs' propounded application of the doctrine of piercing the corporate veil. Accordingly, the trial court erred in granting summary judgment in favor of plaintiffs against State Farm. The judgment of the trial court is reversed, and the case is remanded with instructions to enter summary judgment for State Farm.

Reversed and remanded with instructions.

Judges McGEE and HUDSON concur.

STATE OF NORTH CAROLINA v. GREGORY LYNN EVANS

No. COA02-1719

(Filed 3 February 2004)

1. **Sexual Offenses— indecent liberties—statutory sex offense—sexual activity by a custodian—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charges of indecent liberties with a child, statutory sex offense, and sexual activity by a custodian, because there was both direct and circumstantial evidence that these crimes were committed.

2. **Sexual Offenses— indecent liberties—statutory sex offense—sexual activity by a custodian—instructions**

The trial court did not commit plain error in an indecent liberties with a child, statutory sex offense, and sexual activity by a custodian case by its failure to instruct the jury on the elements of each offense for each date that the crime charged allegedly occurred, because: (1) the trial court took care to instruct the jury that the charge for each individual count of a particular offense was identical, and that the same law applies for each charge; and (2) there was no reasonable possibility that had the trial court specifically instructed the jury on the same offense for each date alleged, a different result would have ensued.

3. **Constitutional Law— cruel and unusual punishment—presumptive range of sentencing**

The sentence inposed upon defendant for indecent liberties with a child, statutory sex offense, and sexual activity by a custodian was not cruel and unusual based on the fact that the victim was a few months shy of her sixteenth birthday, which was the threshold age for the charges, because: (1) North Carolina courts have consistently held that when a punishment does not exceed the limits fixed by the statute, the punishment cannot be classified as cruel and unusual in a constitutional sense; and (2) the trial court imposed a prison term within the presumptive range of sentences pursuant to N.C.G.S. § 15A-1340.17(c).

Appeal by defendant from judgment entered 23 January 2002 by Judge Ronald E. Spivey in Guilford County Superior Court. Heard in the Court of Appeals 12 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Sarah Ann Lannom, for the State.

Haakon Thorsen for the defendant.

TIMMONS-GOODSON, Judge.

Gregory Lynn Evans ("defendant") appeals his convictions of indecent liberties with a child, statutory sex offense, and sexual activity by a custodian. 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: At the time of the incidents in question, the victim in this matter was a fifteen year old adolescent (hereinafter identified as "C.S."). In 2000, C.S. was hospitalized at Moses Cone Behavioral Center ("Moses Cone") on more than one occasion. While C.S. was a patient at Moses Cone, defendant, who was employed as a mental health technician, engaged in sexual activity with C.S. After C.S. was discharged from Moses Cone, defendant telephoned her home several times to establish contact outside of the hospital, and to discourage her from telling her mother about their relationship.

C.S.'s mother subsequently filed a lawsuit against Moses Cone and three felony criminal charges were brought against defendant. Following a jury trial, defendant was convicted of taking indecent liberties with a child, statutory sex offense and sexual activity by a custodian, and sentenced to a term of 18¾ to 23¼ years. It is from these convictions that defendant now appeals.

The issues presented on appeal are whether (I) there was sufficient evidence presented at trial to convict defendant of the charges; (II) the court committed plain error in its instructions to the jury; and (III) the court committed plain error in sentencing defendant.

[1] Defendant first argues that there was insufficient evidence that he committed the offenses to warrant a conviction. Defendant contends that because the only direct evidence of sexual activity is C.S.'s uncorroborated testimony, the evidence raises only a suspicion or conjecture that an offense was committed, and therefore his motion to dismiss should have been granted. We disagree.

In ruling on a motion to dismiss based on insufficiency of the 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). In *State v. Malloy*, our Supreme Court held that when the evidence is sufficient only to raise a suspicion or conjecture as to the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). However, even circumstantial evidence has been considered sufficient to elevate a claim above mere suspicion or conjecture and thus to overcome a motion to dismiss. *See State v. Wilson*, 354 N.C. 493, 521-22, 556 S.E.2d 272, 290-91 (2001) *overruled on other grounds by State v. Millsaps*, 356 N.C. 556, 572 S.E.2d 767 (2002).

Defendant was charged with taking indecent liberties with a child, statutory sex offense, and sexual activity by a custodian. The elements of these crimes are as follows:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either: (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1 (2003).

> A defendant is guilty of [statutory sexual offense] if the defendant engages in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

N.C. Gen. Stat. § 14-27.7A(a) (2003).

> . . . if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal inter-

course or a sexual act with such victim, the defendant is guilty of a Class E felony. Consent is not a defense to a charge under this section.

N.C. Gen. Stat. § 14-27(a) (2003).

In the present case, C.S. testified to specific sexual acts in which she and defendant engaged while she was a patient at Moses Cone. Additionally, there was evidence presented in the form of testimony from C.S.'s mother and sister that C.S. told them about her interactions with defendant, and that they heard firsthand telephone conversations between C.S. and defendant regarding specific instances of sexual activity. Hence, there was both direct and circumstantial evidence that these crimes were committed. We conclude that in the light most favorable to the State this evidence elevates the claims against defendant to more than a mere suspicion. Therefore, the trial court properly denied defendant's motion to dismiss the charges of indecent liberties with a child, statutory sex offense, and sexual activity by a custodian.

The next two assignments of error require the Court to consider the jury instructions and sentencing under a plain error standard. Plain error is defined in *State v. Odom* 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.' " 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)). "The purpose of jury instructions is to enable the jury to decide certain disputed facts, and then to apply governing principles of law to those facts." *State v. Moore*, 311 N.C. 442, 459, 319 S.E.2d 150, 163 (1984).

[2] Defendant assigns error to the failure of the trial court to instruct the jury on each charge for each date that the crime charged allegedly occurred. We disagree.

Defendant complains that while he was charged with committing the offenses of taking indecent liberties with a minor, statutory sex offense and sexual activity by a custodian on 28 May, 29 May, 31 May, and 2 June 2000, the judge only instructed the jury on the elements of each crime as it pertains to the events that occurred on one particular date. The court instructed the jury on the crimes of Indecent Liberties with a Child alleged to have occurred on 28 May 2000, Statutory Sex Offense alleged to have occurred on 29 May

2000, and Sexual Activity by a Custodian alleged to have occurred on 29 May 2000.

Assuming *arguendo* that the trial court's failure to specifically instruct the jury as to the elements of each offense on each date of the alleged offenses was error, it was not plain error. Judge Spivey took care to instruct the jury that the charge for each individual count of a particular offense was identical, and that the same law applies for each charge. In his charge to the jury, Judge Spivey stated:

> [What] I will do is give you the substantive law on each of the crimes alleged and then at the end of all the evidence when I send you back to deliberate on your verdict, I'll send you a verbatim copy of the law as it applies to each of those three crimes that are alleged on those dates.

This Court concludes that there is no reasonable possibility that, had the trial court specifically instructed the jury on the same offense for each date alleged, a different result would have ensued. We therefore overrule this assignment of error.

[3] In his final assignment of error, defendant argues that his convictions should be vacated because the penalty imposed is cruel and unusual. We disagree.

Defendant was sentenced to a total of 18¾ to 23¼ years for indecent liberties with a child, statutory sex offense, and sexual activity by a custodian. He argues that because C.S. was a few days shy of her sixteenth birthday, the threshold age for the indecent liberties and statutory sex offense charges, the punishment imposed for those crimes violates the Eighth Amendment prohibition against cruel and unusual punishment. This assignment of error has no merit.

North Carolina courts have consistently held that when a punishment does not exceed the limits fixed by the statute, the punishment cannot be classified as cruel and unusual in a constitutional sense. *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998).

In the case sub judice, the trial court imposed a prison term within the presumptive range of sentences pursuant to N.C.G.S. § 15A-1340.17(c). We hold that the sentence imposed against defendant is not cruel and unusual punishment in that it did not exceed the limits fixed by the governing statute. Accordingly, this assignment of error is overruled.

No error.

Judges WYNN and ELMORE concur.

A. RICHARD MONTEITH D/B/A ARM ENTERPRISES, PLAINTIFF v. WILLIAM JOHN KOVAS, DEFENDANT

No. COA02-1493

(Filed 3 February 2004)

Judgments— default—untimely answer

The trial court erred by striking defendant's motion for removal and defendant's answer as untimely and then entering a default judgment for plaintiff. A default judgment may not be entered after an answer has been filed, even if the answer is untimely.

Appeal filed by defendant from order entered 8 May 2002 by Judge Hal G. Harrison in Jackson County Superior Court. Heard in the Court of Appeals 27 August 2003.

Coward Hicks & Siler, P.A., by William H. Coward for the plaintiff-appellee.

Philo & Spivey, P.A., by David C. Spivey for the defendant-appellant.

ELMORE, Judge.

This case arose out of an oral contract for the installation of a septic system and plumbing work on a cottage. The work was done but never paid for. The company that performed the work sued defendant cottage-owner William John Kovas for payment. Default judgment was entered against the defendant in the sum of $8,809.66, with interest at the legal rate of 8%. Defendant appeals from the order of the trial court striking defendant's Motion for Removal and defendant's Answer.

After the complaint was filed, defendant obtained a thirty-day extension of time to answer. At the expiration of the thirty days, the parties stipulated to another extension of time to file an answer or other responsive pleading. On the date the extension was set to

expire, 8 November 2001, the defendant filed a motion to remove the case. On 18 March 2002, plaintiff filed a motion to strike the motion to remove and a motion for entry of default judgment. Plaintiff served notice of hearing for 6 May 2002 on 21 March 2002. On 6 May 2002, defendant filed an answer and the hearing was held. The trial court ordered that the motion to remove and the answer be stricken as untimely filed, and entered a default judgment for the plaintiff. Defendant appeals.

Defendant first assigns error to the trial court's granting of a default judgment in light of the fact that defendant had filed an answer prior to entry of default judgment. We agree.

This case directly parallels the case of *Moore v. Sullivan*, 123 N.C. App. 647, 473 S.E.2d 659 (1996), in which the defendants filed a late answer on the very morning of the hearing on the default judgment motion against them. The trial court in that case, as in this one, struck their answer and filed an entry of default against them, retaining jurisdiction to later determine damages. In the case at bar, the trial court entered a default judgment, a final order disposing of the case. Regardless of that distinction, the outcome is the same. "After an answer has been filed, even if the answer is untimely filed, a default may not be entered." *Id.* at 649, 473 S.E.2d at 660 (citations omitted). In accord with that decision, we reverse.

Because this issue is dispositive, we do not reach the defendant's other assignments of error.

Reversed and remanded.

Judges TIMMONS-GOODSON and HUNTER concur.

CASES WITHOUT PUBLISHED OPINIONS

BASS v. SILOAM BAPTIST CHURCH No. 03-410	Person (99CVS625)	Affirmed
BAZZARI v. SAMARA No. 03-413	Orange (00CVS766)	Dismissed
BEATENHEAD v. LINCOLN CTY. No. 02-1610-2	Lincoln (01CVS784)	Affirmed as to defendant Eaddy and reversed as to the remaining defendants
CITICORP VENDOR FIN., INC. v. FITNESS PLUS OF BURLINGTON, INC. No. 02-1451	Wake (01CVD11753)	Affirmed
ELLIOTT v. BIRTH No. 02-1520	Lee (98CVD471)	Affirmed
ELLIOTT v. BIRTH No. 02-1521	Lee (98CVD473)	Affirmed
GATTIS v. ROYSTER No. 02-1723	Durham (01CVS1025)	Affirmed
IN RE BROWN No. 03-346	Davie (99J3) (00J56) (00J58) (00J59) (00J60)	Affirmed
IN RE DUFFY No. 03-115	Cumberland (01J391)	Affirmed
JONESBORO UNITED METHODIST CHURCH v. MULLINS-SHERMAN ARCHITECTS, L.L.P. No. 03-273	Lee (02CVS410)	Affirmed
MAGALDI v. BELVERD No. 03-113	Cabarrus (01CVD1747)	Affirmed in part, reversed in part, and remanded
REID v. PHILLIPS No. 03-194	Ashe (02CVS225)	Affirm
SCHMOKER v. LAND No. 03-265	Granville (01CVS908)	Affirmed
STATE v. HAMILTON No. 03-262	Mecklenburg (02CRS205767)	No error

	(02CRS205768) (02CRS205769) (02CRS205770) (02CRS205771)	
STATE v. HORNER No. 02-1748	Orange (98CRS1364)	No error
STATE v. KING No. 03-142	Davidson (98CRS15196)	No error
STATE v. PICON No. 03-325	Cherokee (01CRS50306) (01CRS50307)	No error
STATE v. RIVERA No. 03-168	Onslow (01CRS56301) (01CRS56302) (01CRS56303) (01CRS56305)	No error
STATE v. SHANNON No. 03-343	Mecklenburg (01CRS13082) (01CRS13083)	No error
STATE v. SMITH No. 03-299	Robeson (01CRS50360)	No error
STATE v. UNDERWOOD No. 02-1692	Forsyth (01CRS61002)	No error
STATE v. VELAZQUEZ No. 03-68	Pitt (01CRS52301) (01CRS52417) (01CRS52771) (01CRS55294) (01CRS56338)	No error in trial. New sentencing hearing.
STATE v. WATLINGTON No. 03-2	Forsyth (01CRS39721) (01CRS62233)	No error
SUTTON v. MISSION ST. JOSEPH'S HOSP. No. 02-1698	Ind.Comm. (I.C. 057576)	Affirmed
WEST v. McBANE-BROWN, INC. No. 03-15	Ind. Comm. (I.C. 982867)	Affirmed
WILLIAMS v. CHARLOTTE COPY DATA, INC. No. 03-332	Catawba (01CVS400)	No error
WILLIAMS v. ESTATE OF GRIMES No. 03-122	Durham (02CVS755)	Dismissed

GIBBS v. MAYO

[162 N.C. App. 549 (2004)]

JERRY GIBBS, LARRY GIBBS, GARY BARNETTE, ROLAND STOTESBERRY, MATTIE BERRY, ANNA MAE GIBBS, CHARLES GIBBS, REBECCA GIBBS, REGINA GIBBS, ALISON ELLIS, GARY ELLIS, BARBARA MEEKINS, MACLYN GIBBS, ELLIS GIBBS, JAMES GIBBS, MARK DODGE, MARY GIBBS, BARBARA SPENCER, SHERLIN SPENCER, JOHN HERINA, PEGGY GRANT, GLENN JARVIS, ODESA JARVIS, AND CALVIN B. DAVIS, INDIVIDUALLY AND ON BEHALF OF HYDE COUNTY, PLAINTIFFS V. TROY LANE MAYO, D. SCOTT COBLE, WAYNE TEETER, BARBARA DEESE, WILLIE GIBBS, CALVIN GIBBS, JR., AND NORTH CAROLINA COUNTIES LIABILITY AND PROPERTY INSURANCE POOL FUND, DEFENDANTS

No. COA03-290

(Filed 17 February 2004)

1. **Public Officials and Employees— chairman of county commissioners—contracts for renovations—conflict of interest law—personal benefit**

The trial court abused its discretion by failing to grant plaintiffs' motion for judgment notwithstanding the verdict on the issue of damages toward defendant chairman of the board of county commissioners individually arising out of contracts for renovations to the courthouse and health department entered into with a separate individual although the chairman and his employees actually performed all of the work because: (1) the conflict of interest law under N.C.G.S. § 14-234(a) provides that an elected official entrusted with the business of others cannot be allowed to make such business an object of pecuniary profit to himself; and (2) defendant must suffer the loss incident upon his breach and is required to return to the county the full amount of monies he received from both contracts as he was an elected commissioner and entered into these contracts for his own benefit in direct violation of the conflict of interest law of North Carolina.

2. **Public Officials and Employees— county commissioners—contracts for renovations—conflict of interest law—knowledge**

Although the trial court did not abuse its discretion by denying plaintiffs' motion for judgment notwithstanding the verdict on the issue of damages toward defendant remaining board of county commissioners arising out of contracts for renovations to the courthouse and health department entered into with a separate individual when the chairman and his employees actually

performed all of the work, the trial court abused its discretion by failing to grant the remaining commissioners' motions for directed verdict, because: (1) there is no evidence in the record that the remaining commissioners entered into any contract for their own benefit or that they were privately interested in this contract or the profits therefrom; (2) none of the remaining commissioners received any individual benefit from this contract nor did they receive any financial gain; and (3) knowledge alone is not enough to trigger liability under the conflict of interest law.

3. Damages and Remedies— punitive damages—bifurcated issue

The trial court did not err by dismissing plaintiffs' punitive damages claim ex mero motu in a case where the issue of punitive damages was bifurcated, because: (1) the evidence plaintiffs relied upon to prove the compensatory damages claim was identical to the evidence they would have relied on to prove their punitive damages claim; (2) plaintiffs introduced the totality of their evidence during the compensatory damages portion of the trial to establish liability; (3) the only new evidence plaintiffs may have presented in the punitive damages stage was the amount of punitive damages they sought; and (4) the trial court properly ruled that plaintiffs could not prevail on the punitive damages issue based on the evidence, particularly since defendant was required to disgorge the entire amount of monies he received from two projects.

4. Public Officials and Employees— conflict of interest—evidence of reasonable value inadmissible

The trial court erred by permitting defendants to question witnesses concerning the costs incurred and reasonable value of work done by defendant chairman of county commissioners in performing the work on the courthouse and health department projects, because: (1) the jury found that defendant violated North Carolina's conflict of interest law by entering into these contracts as an elected commissioner; and (2) defendant is liable for the full amount of monies received for the projects.

5. Costs— attorney fees provided by county—defense of county commissioners

The trial court erred by refusing to allow evidence of attorney fees expended by the county for the defense of defendant county commissioners, because: (1) defendant chairman of county com-

missioners' actions were outside the scope of his office meaning he was not entitled to have the county provide for his defense under N.C.G.S. § 160A-167(a); and (2) the remaining commissioners' actions, combined with their knowledge of defendant chairman's actions, raise questions as to whether they were within the scope of their office.

6. Evidence— hearsay—unavailable witness—statements against interest—catchall exception

The trial court did not abuse its discretion by refusing to admit the testimony of a former county manager made at an earlier hearing in a different case and statements made to an SBI agent after the former county manager asserted his Fifth Amendment privilege against self-incrimination, because: (1) although the former county manager was unavailable under N.C.G.S. § 8C-1, Rule 804(a)(1) based on his invocation of the right against self-incrimination, his statements did not fall within the exceptions under Rule 804(b)(1) when the issues from the previous case from which plaintiffs wanted to introduce testimony were far different from the issues here; (2) his statements during his deposition and testimony did not meet the N.C.G.S. § 8C-1, Rule 804(b)(3) statements against interest exception when he avoided any and all incriminating statements against himself by repeatedly asserting his Fifth Amendment privilege against self-incrimination; and (3) the statements were not admissible under the N.C.G.S. § 8C-1, Rule 804(b)(5) catchall exception when the motivation for his statements was to exculpate himself from any wrongdoing by attempting to blame it on the board of commissioners, and the statements did not meet the circumstantial guarantees of trustworthiness when he was strongly motivated to protect his own interests.

7. Constitutional Law— assertion of Fifth Amendment privilege against self-incrimination—prejudicial effect of speculation

Although the trial court erred by permitting a former county manager to repeatedly plead his Fifth Amendment privilege against self-incrimination when the probative value of his testimony did not substantially outweigh the prejudicial effect of allowing the jury to improperly speculate and draw inappropriate conclusions from the witness's assertion of his right, defendants failed to show prejudicial error when other substantial evidence showed that defendant chairman of the board of commissioners

entered into the pertinent contracts in violation of the conflict of interest law, that defendant received virtually all the benefits of these contracts, and that the other commissioners were aware of these actions.

8. Public Officers and Employees— county commissioners— wrongfully spent public funds—directed verdict

The trial court erred by denying defendant remaining county commissioners' motions for directed verdict for plaintiffs' claims under N.C.G.S. § 128-10 and under the common law arising out of an action to recover wrongfully spent public funds against municipal officers, because: (1) N.C.G.S. § 128-10 requires that for a person to be liable under this statute, he must be an official liable on his bond, and the statute was not intended to include the type of insurance contract at bar; (2) there is no common law claim since elected officials could potentially risk their personal assets every time they voted on a controversial issue or exercised their political judgment in the expenditure of public funds, and actions to recover wrongfully spent public funds against municipal officers are statutory; and (3) defendants did not violate North Carolina's conflict of interest law.

Appeals by plaintiffs and defendants Troy Lane Mayo, D. Scott Coble, Wayne Teeter, Barbara Deese, and Willie Gibbs from orders and judgment entered 20 August 2002 by Judge William C. Griffin, Jr., in Hyde County Superior Court. Heard in the Court of Appeals 20 November 2003.

Carter, Archie, Hassell & Singleton, L.L.P., by Sid Hassell, Jr., and Davis & Davis, by Geo. Thomas Davis, Jr., for plaintiffs-appellants.

The Twiford Law Firm, P.C., by Edward A. O'Neal and David R. Pureza, for defendant-appellee/cross-appellant Troy Lane Mayo.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr., and Lars P. Simonsen, for defendants-appellees/cross-appellants D. Scott Coble, Wayne Teeter, Barbara Deese, and Willie Gibbs.

TYSON, Judge.

The individually listed plaintiffs (collectively, "plaintiffs") are residents and taxpayers of Hyde County. They appeal from the 20 August 2002 orders denying their motions for a judgment notwithstanding the

verdict and new trial. Plaintiffs also appeal from the judgment entered 20 August 2002. Troy Lane Mayo ("Mayo"), D. Scott Coble ("Coble"), Wayne Teeter ("Teeter"), Barbara Deese ("Deese"), and Willie Gibbs ("Gibbs") (collectively "defendants") were duly elected members of the Hyde County Board of Commissioners (the "Board"). They cross-appeal from the judgment entered 20 August 2002.

I. Background

In 1997, the Board became aware of deteriorating physical conditions of the Hyde County Courthouse ("courthouse"). The walls in the tax office on the first floor had pulled away from the ceiling and the floor had become "bouncey." Moisture had caused books, papers, and furniture to mildew and mold, creating an odor and health hazard. Around October 1997, the County Manager, Jeff Credle ("Credle") crawled under the courthouse to inspect the deteriorating conditions. Credle videotaped the conditions and showed the video at the October meeting of the Board. Substantial rotting of the wood structure and ponding of water in the crawlspace were evident on the video. At this meeting, Mayo agreed to seek a contractor to perform the needed repairs to the courthouse. At this time, Mayo was one of two licensed contractors in Hyde County. No entry was made of Mayo speaking with a contractor in the Board's November 1997, meeting minutes.

In April 1998, all offices and employees located in the courthouse moved out of the building. Mayo and his workers began tearing out the floors and some of the walls of the courthouse. At its May 1998, meeting, the Board adopted a resolution declaring an emergency situation and determined that immediate action was needed to correct the problems at the courthouse. Mayo, Chairman of the Board, abstained from voting on this resolution.

Several months after Mayo began work on the courthouse, the Board adopted a resolution approving $97,000.00 to be spent on the courthouse renovations. The resolution limited the cost to not exceed $97,000.00, unless the Board approved the additional expenditures prior to the work being done. The Board never sought competitive bids for the work on the courthouse. The Board entered into a written contract with Calvin C. Gibbs, Jr. ("Calvin Gibbs") (no relation to Commissioner Gibbs), through Mayo, to perform extensive renovation work on the courthouse for this amount. However, Mayo and his employees actually performed all of the renovations of the courthouse. Coble and Teeter testified that they were aware that Mayo was

doing the work and would receive payments for the work even though Hyde County's contract had been executed with Calvin Gibbs. Deese and Gibbs testified they thought Mayo would be supervising the work and Calvin Gibbs was actually performing the work. None of the commissioners, except Mayo, received any money or individual benefit from the courthouse project. The total cost of the finished courthouse project reached $179,410.42. None of the Board's minutes from their meetings show that any of this additional work and costs were approved after the Board's original authorization of $97,000.00. On 7 September 1999, the Board adopted a unanimous resolution amending the appropriation from $97,000.00 to $179,410.42. Of that sum, $167,783.28 was received by Mayo.

In the latter part of 1997, the Board also became aware of the deteriorating condition of the Hyde County Health Department building ("health department"). The wood around the windows and doors was rotted and the vinyl siding was in a dilapidated state. Moisture was also causing mold and mildew problems. The Board instructed Credle to secure informal bids to repair the health department. On 8 December 1997, B.T. Glover, a licensed general contractor, provided a bid in the amount of $37,000.00. On 8 January 1998, the Board received a bid from Calvin Gibbs in the amount of $35,900.00. On 30 July 1998, the Board, again through Mayo, entered into a contract with Calvin Gibbs to perform work on the health department. The contract provided that the cost would not exceed $35,900.00, unless the Board approved the additional work before it was done. As with the courthouse renovations, Teeter and Coble knew that Mayo would be performing the work. Deese and Gibbs testified they were not aware that Mayo would be directly involved. The cost of the finished health department totaled $110,386.42. Mayo performed all of the work and received all of this money.

The press began investigating the actions surrounding both projects. The County Auditor asked and was told by Credle that Mayo was not involved in these projects. On 25 August 2000, plaintiffs made written demand on the Board to recoup the money paid to Mayo for the work done on both projects. On 18 November 2000, the Board declined to take any action on this matter. Plaintiffs brought suit to recover the money paid to Mayo. Defendants' motions for directed verdict were denied. The jury returned a verdict against all defendants in the amount of $25,167.49 for the courthouse project and $16,557.96 for the health department project. Plaintiffs moved for a judgment notwithstanding the verdict and a new trial on the

issues of damages. The trial court denied both motions and dismissed *ex mero motu* plaintiffs' punitive damages claims. Plaintiffs and defendants appeal.

II. Issues

Plaintiffs contend that the trial court erred in: (1) refusing to hold defendants liable as a matter of law and in not granting plaintiffs' motions on the issue of damages, (2) dismissing plaintiffs' punitive damage claim, (3) permitting defendants to mention and question witnesses concerning the costs and reasonable value of the work incurred by Mayo in performing the work on the courthouse and health department, (4) refusing to allow evidence concerning attorney's fees paid by Hyde County for the defense of this action, and (5) refusing to admit the testimony of Credle from an earlier hearing.

Defendants contend in their cross-appeals that the trial court erred in: (1) denying their motions for directed verdict, (2) prohibiting evidence concerning the costs and reasonable value of the work done on the courthouse and health department and refusing to instruct the jury that they should consider the costs and reasonable value of the work done on the courthouse and health department, and (3) allowing Credle to repeatedly assert and plead his Fifth Amendment right against self-incrimination in the presence of the jury.

III. Judgment Notwithstanding the Verdict on the Issue of Damages

[1] Plaintiffs contend that the trial court erred in not granting their motion for judgment notwithstanding the verdict ("JNOV") on the issue of damages.

This Court applies an abuse of discretion standard of review for a trial court's denial of a motion for JNOV. *Railway Co. v. Fibres, Inc.*, 41 N.C. App. 694, 702, 255 S.E.2d 749, 754 (1979).

At the time relevant to this action, North Carolina's conflict of interest law provided in part:

> (a) If any person appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making

> such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor.

N.C. Gen. Stat. § 14-234(a) (2001). Our Supreme Court in *Insulation Co. v. Davidson County*, interpreted the meaning of this statute and stated that,

> [t]he General Assembly . . . in adopting this Act . . . made the condemnation of the transactions embraced within the terms thereof a part of the public policy of the State so as to remove from public officials the temptation to take advantage of their official positions to "feather their own nests" by letting to themselves or to firms or corporations in which they are interested contracts for services, materials, supplies, or the like.

243 N.C. 252, 254, 90 S.E.2d 496, 497-98 (1955).

> Not only will [the Court] declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself . . . but it will also deny recovery on a *quantum meruit* basis. In entering into such contract a public official acts at his own peril and must suffer the loss incident upon his breach of his public duty. He may look in vain to the courts to aid him in his efforts to recoup his losses, due to the invalidity of the contract, on the grounds the public agency which he serves has been enriched by his misconduct.

Id. at 255, 90 S.E.2d at 498. The Court explained that "[t]his law was enacted to enforce a well-recognized and salutary principle, both of the moral law and of public policy, that he who is entrusted with the business of others can not be allowed to make such business an object of pecuniary profit to himself." *Id.* at 254, 90 S.E.2d at 498 (quoting *State v. Williams*, 153 N.C. 595, 599, 68 S.E. 900, 902 (1910)).

> The application of the rule may in some instances appear to bear hard upon individuals who have committed no moral wrong; but it is essential to the keeping of all parties filling a fiduciary character to their duty, to preserve the rule in its integrity, and to apply it to every case which justly falls within its principle.

Williams, 153 N.C. at 599, 68 S.E. at 902 (quoting Dillon's Municipal Corporations, Vol. 1, 4 Ed., sec. 444).

"No man ought to be heard in any court of justice who seeks to reap the benefits of a transaction which is founded on or arises out of

criminal misconduct and which is in direct contravention of the public policy of the State." *Insurance Co.*, 243 N.C. at 255, 90 S.E.2d at 498. "[T]he doors of the courts are closed to any individual, or firm in which he is financially interested, who engages in a transaction which comes within the language of the statute." *Id.*

Here, the jury returned verdicts finding that Mayo violated the conflict of interest law of North Carolina with regards to both projects. The jury also found that the other commissioners unlawfully and knowingly permitted Mayo to evade the conflict of interest law. The jury further found that Mayo had received $25,167.49 for the courthouse project and $16,507.96 for the health department project. Mayo actually received $167,783.28 in connection with the courthouse renovation and $110,386.42 for his work on the health department project.

It is undisputed that Mayo was the Chairman of the Board when he entered into a contract with Hyde County, through Calvin Gibbs, to renovate the courthouse and the health department. Although the contract was ostensibly made with Calvin Gibbs, Mayo and his employees did all of the work on both projects and were paid virtually all of the money for each of the projects. It is also undisputed that the other commissioners knew about Mayo's actions in different degrees. None of these other commissioners, however, entered into any contract with Hyde County nor received any individual benefit or financial gain from these contracts. None of the four other commissioners were interested in or received any private benefit from the contract entered into by Mayo apart from that which all Hyde County citizens received. As Mayo was an elected county commissioner when he entered into these contracts, his actions fell within the purview of North Carolina's conflict of interest law.

Our Supreme Court has stated, "[i]n entering into such contract a public official acts at his own peril and must suffer the loss incident upon his breach of his public duty." *Id.* We hold Mayo "must suffer the loss incident upon his breach" and is required to return to Hyde County the full amount of monies he received from both contracts as he was an elected commissioner and entered into these contracts for his own benefit in direct violation of the conflict of interest law of North Carolina. *Id.* The trial court erred in failing to grant plaintiffs' motion for JNOV on the issue of damages towards Mayo individually.

[2] The trial court properly denied plaintiffs' motion for JNOV on the issues of damages against the remaining commissioners. The conflict of interest law states that for a commissioner to be liable for violating this law he must enter into a contract for his "own benefit . . . or be in any manner concerned or interested in making such contract, or in the profits thereof . . . ." N.C. Gen. Stat. § 14-234(a). There is no evidence in the record that shows the remaining commissioners entered into any contract for their own benefit or that they were privately interested in this contract or the profits therefrom. None of the remaining commissioners received any individual benefit from this contract nor did they receive any financial gain. These commissioners merely knew, some more than others, that Mayo was doing the work on these projects. Knowledge alone is not enough to trigger liability under the conflict of interest law.

The trial court properly denied plaintiffs' motion regarding the remaining four commissioners and erred in not granting the remaining commissioners' motions for directed verdict.

IV. Punitive Damages

[3] Plaintiffs contend that the trial court erred in dismissing their punitive damage claim *ex mero motu*. We disagree.

In proving liability for punitive damages, a plaintiff must prove by clear and convincing evidence the existence of one or more of the aggravating factors such as fraud, malice, or willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (2003). Where the issue of punitive damages is bifurcated, as it was here, "evidence relating *solely* to punitive damages shall not be admissible" in the compensatory damages portion of the trial. N.C. Gen. Stat. § 1D-30 (2003) (emphasis supplied). Nothing in this statute prevents a plaintiff from presenting all of their evidence of liability for punitive damages. *Id.*

Here, plaintiffs' evidence to prove punitive damages was not solely related to their punitive damages claim. The record shows that the evidence plaintiffs relied upon to prove the compensatory damages claim was identical to the evidence they would have relied on to prove their punitive damages claim. Plaintiffs introduced the totality of their evidence during the compensatory damages portion of the trial to establish liability. The only new evidence plaintiffs may have presented in the punitive damages stage was the amount of punitive damages they sought.

After hearing all of plaintiffs' evidence, the trial court ruled that plaintiffs could not prevail on the issue of punitive damages based on this evidence and dismissed the punitive damages claim *ex mero motu*. The trial court's dismissal of the punitive damages claim was appropriate, particularly in light of our earlier holding requiring Mayo to disgorge the entire amount of monies he received from both projects. Plaintiffs' assignment of error is overruled.

V. Evidence Regarding Costs and Reasonable Value of Work Done

[4] Plaintiffs contend that the trial court erred in permitting defendants to question witnesses concerning the costs incurred by Mayo in performing the work on the courthouse and health department projects.

At trial, defendants repeatedly attempted to elicit testimony regarding payments Mayo made to other people for the work done on the courthouse and health department projects. The trial court sustained certain objections by plaintiffs, but on numerous occasions allowed this evidence to be considered by the jury. Mayo was paid $167,783.28 in connection with the courthouse renovation and $110,386.42 for his work on the health department project. The jury's verdict found that Mayo kept fifteen percent of the total costs, or $25,167.49, for the courthouse project and $16,557.96 for the health department project.

As previously stated, our Supreme Court has held that it will declare void and unenforceable any contract of this type, deny recovery on a *quantum meruit* basis, and the public official must suffer any loss due to his breach of public duty. *Insulation Co.*, 243 N.C. at 255, 90 S.E.2d at 498. "[T]his Court will not recognize or permit any recovery bottomed on the criminal conduct of a public official." *Id.*

The jury found that Mayo violated North Carolina's conflict of interest law by entering into these contracts as an elected commissioner. Mayo "may look in vain to the courts to aid him in his efforts to recoup his losses." *Id.* As we earlier held Mayo to be liable for the full amount of monies received for the projects, the trial court erred in allowing evidence concerning the reasonable value of the work Mayo performed on the courthouse and health department to be presented to the jury. *Id.*

Defendants also assign as error the trial court's refusal to allow other evidence of the reasonable value of work done and

costs incurred by Mayo. We previously held that the trial court erred in allowing defendants to present evidence pertaining to the costs and reasonable value of work done on the courthouse and health department projects by Mayo. Defendants' assignment of error is overruled.

VI. Attorney's Fees

[5] Plaintiffs contend that the trial court erred in refusing to allow evidence of attorney's fees expended by Hyde County for the defense of defendants. We agree.

N.C. Gen. Stat. § 160A-167(a) (2003) permits a county to provide for

> the defense of any civil or criminal action or proceeding brought against [a commissioner] either in his official or in his individual capacity, or both, on account of any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of his employment or duty as an employee or officer of the . . . county . . . .

The General Assembly has specifically provided that "[t]he board of commissioners shall supervise the maintenance, repair and use of all county property." N.C. Gen. Stat. § 153A-169 (2003). Commissioners also have the responsibility for determining what is a "necessary expense" for the county. *Wilson v. Holding*, 170 N.C. 352, 356, 86 S.E. 1043, 1045 (1915). "The building of a courthouse is a necessary county expense, and the board has full power, in their sound discretion, to repair the old one or to erect a new one, and in order to do so they may contract such debt as is necessary for the purpose." *Jackson v. Commissioners*, 171 N.C. 379, 382, 88 S.E. 521, 523 (1916).

Here, the remaining commissioners' actions, alone of expending public funds for the renovation of the courthouse and health department, were consistent with the course and scope of their office. *Id.* The remaining commissioners sought advice from the Hyde County Attorney concerning their actions, voted consistently with the needs of Hyde County's facilities, and realized no personal benefit from the contracts. However, their actions combined with their judgment and knowledge of Mayo's actions raise questions whether their conduct was within the course and scope of their office, even though these actions and knowledge do not rise to the level of violating the conflict of interest law. The trial court should have allowed plaintiffs to

present evidence of the attorney's fees spent by Hyde County in defending the charges against all the commissioners.

Mayo's actions were unquestionably outside the scope of his office. Mayo was not entitled to have Hyde County provide for his defense under N.C. Gen. Stat. § 160A-167(a). Mayo's actions far exceeded merely voting that the courthouse and health department were in need of repair. The record shows he abstained from voting on the initial courthouse funding. Mayo, while Chairman of the Board, performed all of the work called for by these contracts and received virtually all of the benefits of these contracts. Mayo's actions clearly exceeded what was allowed or required by his duties as commissioner and arose outside the course and scope of his office.

The trial court should have allowed plaintiffs to present evidence of the attorney's fees spent by Hyde County in defending the charges against all of the commissioners. Mayo's actions were clearly outside the purview of N.C. Gen. Stat. § 160A-167. The remaining commissioners' actions, combined with their knowledge of Mayo's actions, raise questions as to whether they were within the scope of their office. The trial court's decision to allow or deny recovery of attorney's fees after hearing the plaintiffs' evidence lies in its discretion. *See* N.C. Gen. Stat. § 6-21.1 (2003); *see also Callicutt v. Hawkins*, 11 N.C. App. 546, 181 S.E.2d 725 (1971).

VII. Testimony of Credle

[6] Plaintiffs contend that the trial court erred in refusing to admit the testimony of Credle, former County Manager of Hyde County, made at an earlier hearing in a different case and statements made to an SBI agent, after Credle asserted his Fifth Amendment privilege of self-incrimination.

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." *Sloan v. Miller Building Corp.*, 128 N.C. App. 37, 45, 493 S.E.2d 460, 465 (1997). Under an abuse of discretion standard, we defer to the trial court's discretion and will reverse its decision "only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Here, the trial court refused to allow plaintiffs to present prior testimony of Credle from an earlier case. Plaintiffs contend that the evidence was admissible under Rule 804(a)(1) and Rule 804(b)(1) of

the North Carolina Rules of Evidence. Rule 804(a)(1) permits the admission of certain statements by a declarant who is unavailable, while Rule 804(b)(1) provides that testimony given at another hearing or at a deposition is admissible if the party against whom it is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. N.C. Gen. Stat. § 8C-1, Rule 804(a)(1) and Rule 804(b)(1) (2003).

In *Pleasant Valley Promenade v. Lechmere, Inc.*, the plaintiff filed a complaint against the defendants seeking injunctive relief only. 120 N.C. App. 650, 655-56, 464 S.E.2d 47, 52-53 (1995). Depositions of two witnesses were conducted as part of discovery. *Id.* Subsequently, the plaintiff amended his complaint to seek the recovery of damages against defendant. *Id.* at 659, 464 S.E.2d at 53. At trial, the plaintiff sought to introduce the two depositions, previously taken, under Rule 804(b)(1) due to the witnesses unavailability. *Id.* at 659, 464 S.E.2d at 55. This Court held that the depositions were inadmissible under Rule 804(b)(1) because defendants did not have a similar motive to rebut a "non-existent damages claim." *Id.*

Here, Credle was unavailable under Rule 804(a)(1) as he invoked his right against self-incrimination under the Fifth Amendment. Credle's statements, however, do not fall within the exceptions under Rule 804(b)(1). The issues from the previous case from which plaintiffs wanted to introduce testimony were far different from the issues here.

In the previous case, plaintiffs did not seek to recover monetary damages, but rather sought copies of the minutes of closed sessions of the Board's meetings. Defendants had no personal stake in the previous case. In the present case, plaintiffs sought to recover from defendants substantial monetary damages and each commissioner faced personal liability. Plaintiffs' arguments are overruled.

Plaintiffs also contend that Credle's statements should be admitted under Rule 804(b)(3) as statements against interest. This exception allows for the introduction of

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

N.C. Gen. Stat. § 8C-1, Rule 804 (b)(3) (2003).

Credle's statements during his deposition and testimony do not meet this exception, as Credle avoided any and all incriminating statements against himself by repeatedly asserting his Fifth Amendment privilege against self-incrimination. The statements were not so contrary to Credle's "pecuniary or proprietary interest" that he would not have made them unless they were true. *Id.*

Further, the statements made by Credle to SBI agent D.G. Whitford do not fall within this exception since they are not sufficiently incriminating to Credle. The statements mainly reflect Credle's belief that the commissioners were aware of and consented to Mayo's actions in entering into the contracts to perform work on the courthouse and the health department. These statements do not meet the requirements of Rule 804(b)(3) as they are not "so far contrary" to Credle's interests that he would not have made them unless they were true to make them reliable and admissible under this hearsay exception. *Id.*

Plaintiffs also contend that these statements should be allowed under Rule 804(b)(5), the "catch-all" exception. This Rule excepts from the hearsay rule

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(5) (2003).

> [I]n weighing the "circumstantial guarantees of trustworthiness" of a hearsay statement for purposes of Rule 803(24), the trial judge must consider among other factors (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.

State v. Triplett, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986).

Here, Credle's motivation for making these statements was to exculpate himself from any wrongdoing by attempting to put blame on the Board. Credle had strong personal incentives to inculpate the defendants and to exculpate his own culpability. Credle's statements do not meet the "circumstantial guarantees of trustworthiness" because he was strongly motivated to protect his own interests.

Plaintiffs have failed to show that the trial court abused its discretion in refusing to allow them to introduce Credle's prior statements. Plaintiffs' assignment of error is overruled.

[7] Defendants also contend that the trial court erred in permitting Credle to repeatedly plead his Fifth Amendment privilege against self-incrimination.

This Court held, in *State v. Stanfield*,

> [T]here are two difficulties that may arise when a witness is presented and then refuses to testify by asserting his Fifth Amendment privilege. The first is that it permits the party calling the witness to build or support his case out of improper speculation or inferences that the jury may draw from the witness' exercise of the privilege, which cannot be adequately corrected by trial court instruction. The second concern is that it encroaches upon the constitutional right to confrontation because the presentation of the exercise of the privilege cannot be tested for relevance or value through cross-examination. As a result of these difficulties, the trial judge must weigh a number of factors in striking a balance between the competing interests. Such a balancing will be left to the discretion of the trial court in determining whether the probative value of the proffered evidence is substantially outweighed by the danger of unfair prejudice in accordance with Rule 403 of the Rules of Evidence.

134 N.C. App. 685, 692-93, 518 S.E.2d 541, 546 (1999) (quoting *State v. Pickens*, 346 N.C. 628, 639, 488 S.E.2d 162, 167-68 (1997)). Allowing a witness to repeatedly plead his Fifth Amendment right in the presence of the jury "is a practice so imbued with the 'potential for unfair prejudice' that a trial judge should closely scrutinize any such request." *Pickens*, 346 N.C. at 639, 488 S.E.2d at 168 (quoting *U.S. v. Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980)).

Here, the trial court allowed plaintiffs to call Credle as a witness and overruled defendants' numerous objections to Credle being allowed to repeatedly assert his Fifth Amendment privilege. Plaintiffs

presented no strong reason or support for why Credle should be allowed to be called as a witness when it was known he would assert his Fifth Amendment privilege. The probative value of Credle's "testimony" did not substantially outweigh the prejudicial effect of allowing the jury to improperly speculate and draw inappropriate conclusions from it.

Defendants, however, fail to show that they suffered any prejudice as a result of this error. "It is well-established that the burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error." *State v. Milby,* 302 N.C. 137, 142, 273 S.E.2d 716, 720 (1981). "The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction . . . ." *Id.* Based on other substantial evidence showing that Mayo entered into these contracts illegally, that he received virtually all the benefits of these contracts, and that the other commissioners were aware of these actions, the trial court's error was not prejudicial to defendants' case. Defendants' assignment of error is overruled.

VIII. Defendants' Motions for Directed Verdict

[8] Defendants cross-appeal and assign as error the trial court's failure to grant their motions for directed verdict.

Plaintiffs brought a cause of action against the commissioners under N.C. Gen. Stat. § 128-10 and also asserted common law claims. Defendants contend that plaintiffs had no cognizable claim under either N.C. Gen. Stat. § 128-10 or at common law.

N.C. Gen. Stat. § 128-10 (2003) states:

> When an official of a county, city or town is liable upon his bond for unlawfully and wrongfully retaining by virtue of his office a fund, or a part thereof . . . any citizen and taxpayer may . . . recover from the delinquent official the fund so retained. Any county commissioners . . . who fraudulently, wrongfully and unlawfully permit an official so to retain funds shall be personally liable therefor . . . .

Further, this Court has stated,

> [w]ithout an official who is "liable on his bond," as well as commissioners who refuse to take action against that official, no action arises under this section. The statute specifically identifies the narrow circumstances and persons that could be

> held liable for retaining funds by virtue of their office, and only allows for liability on the part of commissioners when and if they fail to recover the wrongfully held funds from the bonded officer.

Bardolph v. Arnold, 112 N.C. App. 190, 195, 435 S.E.2d 109, 113 (1993).

Plaintiffs assert that the coverage issued by the North Carolina Counties Liability and Property Insurance Pool Fund ("the Fund") constitutes a bond contract and makes defendants liable under N.C. Gen. Stat. § 128-10. In North Carolina, "insurance and suretyship are not synonymous terms," but rather "involve different functions, relationships, rights and obligations." *Henry Angelo & Sons, Inc. v. Prop. Development Corp.*, 63 N.C. App. 569, 574, 306 S.E.2d 162, 165-66 (1983). "Insurance is '[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.' " *Id.* at 574, 306 S.E.2d at 166 (quoting Black's Law Dictionary 943 (rev. 4th ed. 1968)). In contrast, "[a] surety is one 'who engages to be answerable for the debt, default or miscarriage of another.' " *Id.* (quoting Pingrey, Treatise on the Law of Suretyship and Guaranty (2) (1901)). A contract of suretyship requires three parties, the principal, the surety, and the promisee, while the insurance contract requires only two parties, the indemnitor and the indemnitee. *Casualty Co. v. Waller*, 233 N.C. 536, 538, 64 S.E.2d 826, 828 (1951).

Here, the insurance policy covering defendants bears no similarity to the surety bond. First, the insurance contract is between two parties: the Fund and Hyde County. Second, there is no specific agreement involving named employees as is stated in a public official's bond. Third, in the event that a covered loss occurs, the Fund is required to pay the loss and is not entitled to seek recovery from Hyde County or its employees.

The language of N.C. Gen. Stat. § 128-10 requires that for a person to be liable under this statute he must be an "official liable on his bond." N.C. Gen. Stat. § 128-10 (2003). This statute was not intended to include the type of insurance contract at bar. Defendants do not meet the requirements set forth in N.C. Gen. Stat. § 128-10. Plaintiffs have no cause of action under this statute. The trial court erred in not granting defendants' motion for directed verdict regarding plaintiffs' cause of action under N.C. Gen. Stat. § 128-10.

Plaintiffs also asserted a common law cause of action. Under *Bardolph*, this Court stated "if there is a common law claim . . . elected officials could potentially risk their personal assets every time they voted on a controversial issue or exercised their political judgment in the expenditure of public funds." 112 N.C. App. at 193, 435 S.E.2d at 112. We went on to hold that "actions [to recover wrongfully spent public funds] against municipal officers are statutory, the statute providing the basis for the action as well as procedural requirements." *Id.* (quoting *Flaherty v. Hunt*, 82 N.C. App. 112, 115, 345 S.E.2d 426, 428, *disc. rev. denied*, 318 N.C. 505, 349 S.E.2d 859 (1986)).

As plaintiffs have no statutory or common law claim against the commissioners and in light of our earlier holding that the remaining commissioners, with the exception of Mayo, did not violate North Carolina's conflict of interest law, the trial court erred in not granting their motions for a directed verdict on this issue as well. The trial court properly denied Mayo's motion for a directed verdict as his actions directly violated North Carolina's conflict of interest law causing the contracts to become void and unenforceable. *Bardolph*, 112 N.C. App. at 194, 435 S.E.2d at 112-13; *see Insulation Co.*, 243 N.C. at 255, 90 S.E.2d at 498; *see also* N.C. Gen. Stat. § 14-234 (2001).

IX. Conclusion

The trial court erred in not granting plaintiffs' motion for JNOV on the issues of damages as to Mayo only and in allowing evidence pertaining to the reasonable value of work done and costs incurred by Mayo. The trial court erred in not allowing plaintiffs to present evidence of attorney's fees paid by Hyde County in defending the charges against all defendants. Plaintiffs failed to show that the trial court erred in dismissing their punitive damages claims *ex mero motu*.

Although the better practice is to not allow a witness to repeatedly assert his Fifth Amendment privilege over objection, defendants failed to show any prejudice in the trial court's error in allowing Credle to repeatedly assert this privilege in the presence of the jury. Plaintiffs also failed to show that the trial court abused its discretion in refusing to allow into evidence statements made by Credle.

The trial court erred in failing to grant defendants' motion for directed verdict regarding plaintiffs' cause of action under N.C. Gen. Stat. § 128-10. The trial court also erred in failing to grant the remain-

ing commissioners' motion for a directed verdict regarding plaintiffs' common law cause of action. The trial court correctly denied Mayo's directed verdict motion as his actions directly violated the conflict of interest law causing the contracts entered into to become void. *Insulation Co.*, 243 N.C. at 255, 90 S.E.2d at 498.

We remand this case to the trial court with instructions to: (1) conduct a hearing and allow evidence pertaining to the amount of attorney's fees expended by Hyde County in defending all the commissioners, (2) grant plaintiffs' motion for a JNOV on the issue of damages against Mayo only and enter judgment against him for the full amounts Hyde County that he received on both contracts, (3) grant all defendants' motions for directed verdict as to plaintiffs' cause of action under N.C. Gen. Stat. § 128-10, and (4) grant the remaining four commissioners' motions for directed verdict on plaintiffs' common law claim.

Affirmed in part, reversed in part, and remanded with instructions.

Judges HUDSON and STEELMAN concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND OCEAN CLUB VENTURES, LLC, PETITIONERS v. BUCK ISLAND, INC., INTERVENOR-RESPONDENT

No. COA03-198

(Filed 17 February 2004)

1. Administrative Law— aggrieved party—standing

Intervenor-respondent company which was brought into the pertinent litigation against its will had standing to appeal the Utility Commission's determination that it was a public utility and that the Utilities Commission obtained the power and authority to supervise and control it, because: (1) intervenor-respondent was an aggrieved party since the Commission's jurisdiction impacted its legal rights; and (2) upon issuance of the Commission's final order, intervenor-respondent's right to appeal from the previous orders was ripe.

2. Utilities— public utility—water and sewage service

The Utilities Commission did not err by concluding that intervenor-respondent company, a real estate developer, was a public utility as defined under N.C.G.S. § 63-3(23)a, because: (1) although a service may be offered to a definable class rather than to the public at large, it still may be considered an offering of service to the public within the meaning of the regulatory statutes; (2) the statute does not require the sale of utility service, but only that utility service is furnished to or for the public for compensation; (3) evidence of the tap fees received by intervenor-respondent is substantial, competent, and material evidence supporting the Commission's conclusion that appellant receives compensation for the utility services; and (4) intervenor-respondent and another company own and control the backbone water and sewer facilities, they have continuing responsibility in regard to maintenance and expansion of the facilities, they control the manner in which the facilities are used, and purchasers of the pertinent lots have access to the utilities as a matter of right.

3. Utilities— public utility—expansion of backbone facilities

The Utilities Commission did not err by modifying the Utility Systems Operating Agreement to require it to expand the backbone facilities that provided the water supply and wastewater treatment systems of the pertinent developments upon demand by Carolina Water Service (CWS), because: (1) rather than granting CWS authority to demand expansion of the backbone facilities to serve the pertinent development, the Commission ordered the pertinent developer to obtain the capacity needed for the development before CWS was required to serve it; (2) public utilities have an obligation to provide adequate, efficient, and reasonable service; and (3) the Commission has the power and authority to modify or abrogate contracts of a public utility if they do not serve the public welfare.

4. Constitutional Law— taking of property—impairment of contractual rights—expansion of backbone facilities

The Utilities Commission's 20 March 2001 and 1 April 2002 orders requiring intervenor-respondent company to expand the backbone facilities that provided the water supply and wastewater treatment systems of the pertinent developments did not constitute an unlawful taking of property nor an unlawful impairment of its contractual rights, because: (1) intervenor-respondent

was not required to use the pertinent property in any manner inconsistent with its previous obligations under the Utility Systems Operating Agreement; (2) the Commission did not force a change in intervenor-respondent's contractual commitments; (3) the Commission's orders did nothing to deprive intervenor-respondent of the beneficial enjoyment of the land on which the backbone facilities are located; (4) intervenor-respondent is a de facto public utility and the Commission has authority to regulate the services and operations of public utilities; and (5) impairment of the contract was reasonable and necessary to serve the public interest, and therefore, does not violate the contracts clause.

5. Utilities— water and sewer facilities—interlocutory orders

The Utilities Commission's conclusion that complainant-cross-appellant company must provide its own water and sewer facilities was not inconsistent with the Commission's prior interlocutory orders and was not arbitrary or capricious.

6. Utilities— water and sewer facilities—public utility law

The Utilities Commission's conclusion that complainant-cross-appellant company must provide its own water and sewer facilities was not inconsistent with prevailing principles of public utility law, because: (1) the Commission's order did not leave the company without options, but only required that it pay the owners of the backbone facilities to provide additional capacity or build its own facilities; and (2) once adequate capacity is present, the pertinent water company is still required to provide reasonable utility service.

7. Utilities— water and sewer service—jurisdiction

The Utilities Commission's 19 August 2002 order did not constitute an effective abandonment of the Commission's jurisdiction over the provision of water and sewer utility service within the pertinent development, because the Commission can still take action if the two pertinent companies fail to comply with any of the Commission's orders since the Commission may at any time rescind, alter, or amend any order or decision after notice to the parties and a hearing.

Appeal by Buck Island, Inc. from orders entered 20 March 2001, 1 April 2002, 19 August 2002 and 19 December 2002 by North Carolina Utilities Commission. Heard in the Court of Appeals 16 September 2003.

Public Staff Chief Counsel Antoinette R. Wike and Staff Attorney Elizabeth D. Szafran, for intervenor/appellee North Carolina Utilities Commission.

Hunton & Williams, by Edward S. Finley, Jr., for appellee Carolina Water Service, Inc.

John S. O'Connor for intervenors/appellee Monteray Shores, Inc. and Robert R. and Laurie T. DeGabrielle.

Trimpi, Nash & Harman, L.L.P., by Thomas P. Nash, IV and John G. Trimpi, for appellant Buck Island, Inc.

Nelson Mullins Riley & Scarborough, L.L.C., by James H. Jeffries IV, for complainant/cross appellant Ocean Club Ventures, LLC.

MARTIN, Judge.

Appellant Buck Island, Inc. ("Buck Island"), successor in interest to Ship's Watch, Inc., and Monteray Shores, Inc. ("Monteray Shores"), developers of residential and commercial developments known as Buck Island and Monteray Shores, near Corolla, North Carolina, constructed and installed a water and sewage system to jointly serve their developments. In 1988, Buck Island and Monteray Shores entered into a Utility System Operating Agreement ("USOA") with Carolina Water Service, Inc. of North Carolina ("CWS") giving CWS title to the water mains and lines while retaining ownership of what was referred to as the "backbone facilities," the water supply and treatment system and the central wastewater treatment and disposal system. CWS, a public utility, was the exclusive operator of the system. Pursuant to the agreement, Buck Island and Monteray Shores were not responsible for any future construction of facilities in the event of any delay or cessation of development of the service area.

Monteray Shores, whose only shareholders were Robert and Laurie DeGabrielle, was to be developed in three phases. Phases I and II were developed as planned, but the Phase III property was foreclosed on by the original owners, Whalehead Properties. In May 1999, Ocean Club Ventures, L.L.C. ("OCV") acquired an interest in this portion of the property, calling its new development Corolla Shores.

In March 2000, OCV requested water and sewer service from CWS through an interconnection with the backbone facilities of Monteray

Shores and Buck Island. With the existing facilities, there was insufficient capacity to serve the customers in Corolla Shores at its anticipated full build-out of 224 residential units. After failed negotiations with Monteray Shores to expand the backbone facilities, OCV petitioned the Utilities Commission on 26 May 2000 to require CWS to provide water and sewer service to Corolla Shores. CWS, although willing to serve Corolla Shores, explained that because it did not own the backbone facilities it was unable to expand them to accommodate Corolla Shores. On 4 August 2000, the Commission allowed a motion to intervene, filed by Monteray Shores and Robert and Laurie DeGabrielle, over objections by OCV.

On 20 March 2001, the Utilities Commission ordered Monteray Shores and Buck Island to develop a plan to extend service to Corolla Shores under reasonable terms and to bring the facilities used to provide water and sewer service in Buck Island and Monteray Shores under common ownership and control. The order also required the parties to determine the amount OCV should pay for construction of the expanded facilities. In addition, the Commission concluded that Monteray Shores was a public utility as defined by N.C. Gen. Stat. § 62-3(23)a.2, and that Buck Island "appeared to be in the same category."

After additional filings, hearings and comments from OCV, CWS, Monteray Shores and Buck Island, the Utilities Commission issued an order on 1 April 2002 addressing contracts and related issues. The order declared that Buck Island was a public utility by virtue of its part ownership and control of the backbone facilities and thus, Buck Island was subject to the jurisdiction of the Commission. In addition, the order, *inter alia*, designated CWS as the public utility authorized to provide service to Buck Island, Corolla Shores and Monteray Shores, and that the facilities available to provide service in all three developments should be operated in a unified fashion.

Buck Island appealed from the 20 March 2001 and 1 April 2002 orders of the Utilities Commission declaring it to be a public utility. This Court dismissed the appeal as interlocutory on 17 June 2003. *State ex rel. Utils. Comm'n v. Buck Island, Inc.*, 158 N.C. App. 536, 581 S.E.2d 122 (2003).

After receiving additional motions and comments from the parties in response to the 1 April 2002 order, the Commission concluded, in an order dated 19 August 2002, that it was reasonable to intercon-

nect the facilities serving the three developments and for CWS to operate them as a single system, that CWS had no obligation to serve Corolla Shores until OCV built or obtained the required capacity, and that OCV had the choice of whether to construct its own facilities or whether to negotiate with Monteray Shores and Buck Island to expand the existing facilities. OCV filed a motion for reconsideration of the order, claiming the Commission, in requiring OCV to obtain the expansion needed to serve Corolla Shores, had effectively reversed its prior orders on the issue without explanation. After allowing responses, the Commission denied the motion, explaining that its decision was not inconsistent with previous orders.

Buck Island appeals from the 19 August 2002 order which affirmed the Commission's prior 1 April 2002 decision declaring Buck Island a public utility. In addition, Buck Island appeals from the 20 March 2001 order, contending the Commission modified its contractual rights and obligations and unconstitutionally confiscated its property.

OCV cross appeals, contending the Commission's order was inconsistent with its previous orders as well as contrary to prevailing principles of utility law. OCV also asserts that the Commission did not resolve the issues and thus abandoned its jurisdiction.

Appeal of Buck Island, Inc.

I.

[1] Contending that Buck Island has not been aggrieved by the Commission's decision, appellees raise the threshold issue of whether appellant Buck Island has standing to appeal. "In order to have standing to appeal, a party must not only file notice of appeal within 30 days, but must also be aggrieved." *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 104 N.C. App. 216, 218, 408 S.E.2d 876, 877 (1991), *disc. review denied*, 330 N.C. 618, 412 S.E.2d 95 (1992); N.C. Gen. Stat. § 62-90(a) (2003). Although the phrase "aggrieved party" has no technical meaning and "depends on the circumstances involved," *In re Assessment of Sales Tax*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963), the Administrative Procedure Act provides guidance as to the intent of the General Assembly in its definition of "person aggrieved" as "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C.

Gen. Stat. § 150B-2(6) (2003). In addition, in *Assessment of Sales Tax*, the North Carolina Supreme Court defined an "aggrieved person" as one "adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *Assessment of Sales Tax*, 259 N.C. at 595, 131 S.E.2d at 446.

Buck Island, although admittedly not a party to the original proceeding before the Utilities Commission, was brought into the litigation between OCV and CWS against its will. By declaring Buck Island a public utility, the Utilities Commission obtained the power and authority to supervise and control it, N.C. Gen. Stat. § 62-30 (2003), including, *inter alia*, reserving the right to determine whether the agreement between Buck Island, Monteray Shores and CWS should be recognized, abrogated, or modified. Subjecting Buck Island to the Commission's jurisdiction impacted its legal rights; therefore, Buck Island is an aggrieved party.

An appeal of right lies from any final order of the Utilities Commission. N.C. Gen. Stat. § 7A-29(a) (2003). Buck Island appeals from the orders of 20 March 2001, 1 April 2002, and the final judgment of 19 August 2002 which disposed of all the issues and left nothing to be judicially determined between the parties. *See Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Upon issuance of this final order, Buck Island's right to appeal from the previous orders is ripe. N.C. Gen. Stat. § 62-90(a) (2003).

II.

The scope of appellate review of the decisions of the North Carolina Utilities Commission is codified in N.C. Gen. Stat. § 62-94 (2003). Pursuant to § 62-94(b), the reviewing court:

> may reverse or modify the decision [of the Utilities Commission] if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

On appeal, findings of fact made by the Utilities Commission are considered prima facie just and reasonable. N.C. Gen. Stat. § 62-94(e) (2003). The role of the appellate court is to determine, after reviewing the entire record, "whether the Commission's findings and conclusions are supported by substantial, competent, and material evidence." *State ex rel. Utilities Comm. v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 569, 488 S.E.2d 591, 598 (1997). However, the Court "may not replace the Commission's judgment with its own when there are two reasonably conflicting views of the evidence." *State ex rel. Utilities Comm. v. Public Staff*, 123 N.C. App. 43, 46, 472 S.E.2d 193, 196 (1996). Having determined the appropriate standard of review, we turn now to the merits of the case.

III.

[2] Buck Island first argues that the Utilities Commission erred in concluding that it is a public utility. N.C. Gen. Stat. § 62-3(23)a (2003) defines a "public utility" as, *inter alia*:

> a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:
>
> . . .
>
> 2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation; or operating a public sewerage system for compensation . . .

The plain language of the statute encompasses both the ownership and operational elements of the utility service.

Buck Island does not challenge the findings of fact contained in any of the Commission's orders from which they appeal. "The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal." N.C. Gen. Stat. § 62-94(c) (2003). Therefore, the findings of fact are binding on appeal. In its findings of fact, the Commission determined, *inter alia*, that Buck Island owned a twenty-two percent interest in the facilities used to produce water and treat sewage in the Buck Island and Monteray Shores developments and that the existence of

these systems heightened its real estate development activities. In addition, the Commission found that Buck Island received tap fees from purchasers of lots within the Buck Island development.

Buck Island argues that these findings of fact do not support the Commission's conclusion that it is a public utility. Buck Island concedes it is part owner of the backbone facilities but contends that because it does not sell water and sewer service to the public, it does not meet the statutory definition of a public utility.

Although Chapter 62 of the North Carolina General Statutes does not define "public," our Supreme Court has examined the meaning of "public" in previous cases. In *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 268, 148 S.E.2d 100, 109 (1966), the Court concluded that:

> One offers service to the "public" within the meaning of this statute when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that his service is limited to a specified area and his facilities are limited in capacity.

The Court has reasoned that "although a service may be offered only to a definable class, rather than to the public at large, it still may be considered an offering of service to the 'public' within the meaning of the regulatory statutes." *State ex rel. Utilities Comm. v. Mackie*, 79 N.C. App. 19, 26, 338 S.E.2d 888, 893-94 (1986), *modified*, 318 N.C. 686, 351 S.E.2d 289 (1987). In *Simpson*, the Court determined,

> whether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of "public" to be thereafter universally applied. What is "public" in any given case depends rather on the regulatory circumstances of that case. Some of these circumstances are (1) nature of the industry sought to be regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of nonregulation or exemption from regulation of one or more persons engaged in the industry. The meaning of "public" must in the final analysis be such as will, in the context of the regulatory circumstances, . . . accomplish "the legislature's purpose and comport with its public policy."

Simpson, 295 N.C. 519, 524, 246 S.E.2d 753, 756-57 (1978) (citation omitted).

Looking at the circumstances of the case under the *Simpson* factors, water production and sewer treatment, both classic utility functions, are usually considered monopolies because of the intensive capital investment required. In the present case, the Commission found that although service is offered to a definable area, anyone purchasing a lot in the Buck Island development is entitled to connect to the water and sewer systems as long as sufficient capacity exists. Non-regulation of the utility services owned by Buck Island and Monteray Shores would allow these owners to take any action they desired including rate changes, denying access to end users in the developments or abandonment of the service. Thus, analyzed under the *Simpson* factors, Buck Island is a public utility.

In addition, the statute does not require the sale of utility service, only that utility service is furnished "to or for the public for compensation." N.C. Gen. Stat. § 62-3(23)a.2 (2003). Evidence of the tap fees received by Buck Island is substantial, competent, and material evidence supporting the Commission's conclusion that appellant receives compensation for the utility services.

Buck Island relies on *Utilities Commission v. Water Company,* 248 N.C. 27, 102 S.E.2d 377 (1958), in which the Supreme Court held that the New Hope Water Company ("New Hope") was not a public utility even though it owned water pipes connecting areas outside the city limits to Gastonia's water distribution system. New Hope owned the lines and charged a tap-in fee but did not provide or charge for water service through the lines. The Court held that New Hope was not a public utility because it did not sell water for compensation.

Although New Hope owned the distribution lines, it did not own the backbone facilities that provided the actual service through the lines. Furthermore, New Hope could refuse service through their lines. "A public utility must serve alike all who are similarly circumstanced with reference to its system, and favor cannot be extended to one which is not offered to another, nor can a privilege given one be refused another." *Id.* at 30, 102 S.E.2d at 379. Thus, New Hope was not providing service to the public, only to those it allowed to tap into the system.

CWS, like New Hope, owns the distribution lines. However, unlike New Hope, CWS cannot refuse access to the water and sewer systems as every purchaser of property in the Buck Island development is entitled to access to the utilities system. In addition, Buck Island and Monteray Shores own and control the backbone water and

sewer facilities and have continuing responsibility in regards to maintenance and expansion of the facilities. Since Buck Island and Monteray Shores control the manner in which the facilities are used, and since the purchasers of the lots in Buck Island have access to the utilities as a matter of right, Buck Island provides service to the public.

In the 4 October 2001 hearing, Mr. DeGabrielle stated that the owners of the backbone facilities would take whatever action was needed to meet the obligations of the contract with CWS and to conform to the requirements of the State in order to meet the spikes in demand. Therefore, as found by the Commission, Buck Island and Monteray Shores exercise "control over the availability of capacity in the system, which, in turn, affects the manner in which the system is operated." This finding further distinguishes Buck Island from *New Hope*, since New Hope, unlike Buck Island, had no involvement in providing future capacity to the public through the backbone facilities.

The Commission's conclusion in the 2002 order that Buck Island is a public utility was supported by substantial, competent, and material evidence. Therefore, we hold that Buck Island is a public utility as defined in N.C. Gen. Stat. § 62-3(23) and thus, is subject to regulation by the North Carolina Utilities Commission.

IV.

[3] Buck Island next argues that the Commission erred in modifying the USOA to require it to expand the backbone facilities upon demand by CWS. The 1 April 2002 order did state that CWS "should use its existing contractual rights . . . to ensure that any needed expansion of facilities necessary to provide adequate and reliable water and sewer utility service in Buck Island, Corolla Shores and Monteray Shores is accomplished in the most efficient and equitable manner possible . . . ." However, since the Commission found that the USOA required sufficient capacity for Buck Island and Monteray Shores, they believed no significant modification of the agreement was necessary. The order further stated that "Buck Island and Monteray Shores are obligated to expand the existing 'backbone' facilities upon reasonable demand . . . *to end users located in Buck Island and Monteray Shores*." (Emphasis added). Since the obligation did not extend to Corolla Shores, this statement was consistent with the USOA.

Moreover, as determined by this Court, the 1 April order was an interlocutory order. *Buck Island, Inc.*, 158 N.C. App. at 538-39, 581 S.E.2d at 122. In the final order on 19 August 2002, the Commission found that CWS had

> no obligation to serve until Ocean Club builds or obtains the capacity it needs. The Commission leaves to Ocean Club the choice of whether to construct its own water and wastewater facilities and, if so, where, or whether to negotiate with Intervenors to expand and utilize the existing facilities within Monteray Shores.

Therefore, appellant has misconstrued the orders. Rather than granting CWS authority to demand expansion of the backbone facilities to serve Corolla Shores, the Commission ordered OCV to obtain the capacity needed for Corolla Shores before CWS was required to serve it. Pursuant to the USOA, Buck Island was required to provide adequate capacity for end users in Monteray Shores and Buck Island only.

In any event, public utilities have an obligation to provide "adequate, efficient and reasonable service." N.C. Gen. Stat. § 62-131(b) (2003). In order to meet this obligation, our legislature gave the Utilities Commission the power and authority to supervise and control the rates charged and the services rendered by a public utility. N.C. Gen. Stat. §§ 62-30, 62-31, 62-32, 62-131 (2003). Although appellant misunderstood the orders, the Commission, nevertheless, has the power and authority to modify or abrogate contracts of a public utility if they do not serve the public welfare. N.C. Gen. Stat. §§ 62-30 and 62-32 (2003); *In re Application by C&P Enterprises, Inc.*, 126 N.C. App. 495, 499, 486 S.E.2d 223, 226, *disc. review denied*, 347 N.C. 136, 492 S.E.2d 36 (1997). Therefore, regardless of the fact that appellant misinterpreted the agreement, their argument is without merit.

V.

[4] Buck Island also contends the Commission's 20 March 2001 and 1 April 2002 orders requiring it to expand the backbone facilities constitute an unlawful taking of property prohibited by the North Carolina Constitution and an impairment of their contractual rights in violation of the United States Constitution. Article 1 Section 19 of the North Carolina Constitution provides: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or

property, but by the law of the land." N.C. Const. art. I, § 19. Though the clause does not expressly prohibit the taking of private property for public use without just compensation, our Supreme Court has "inferred such a provision as a fundamental right integral to the 'law of the land.' " *Piedmont Triad Reg'l Water Auth. v. Unger*, 154 N.C. App. 589, 592, 572 S.E.2d 832, 834 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003) (citation omitted).

"Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). A 'taking' is defined as

> entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.

Eastern Appraisal Services v. State of North Carolina, 118 N.C. App. 692, 695, 457 S.E.2d 312, 313, *appeal dismissed, disc. review denied*, 341 N.C. 648, 462 S.E.2d 509 (1995) (citation omitted). When property is taken for a public use, just compensation must be paid. *In re Trusteeship of Kenan*, 261 N.C.1, 134 S.E.2d 85 (1964).

As previously discussed, even though the Commission had the authority to modify or abrogate the USOA, N.C. Gen. Stat. §§ 62-30 and 62-32 (2003); *C&P Enterprises*, 126 N.C. App. at 499, 486 S.E.2d 223 at 226, the final order on 19 August 2002 did not require Buck Island to expand the facilities upon demand by CWS. Despite the Commission's finding that it was "reasonable for the facilities serving the three developments to be interconnected and operated" by CWS, Buck Island was not required to use the property in any manner inconsistent with its previous obligations under the USOA. Moreover, the Commission did not force a change in Buck Island's contractual commitments with Monteray Shores or CWS.

The Commission's orders did nothing to deprive Buck Island of the beneficial enjoyment of the land on which the backbone facilities are located and thus, cannot be considered a taking. If at some point in the future, Buck Island is deprived of the use of its land, it must be adequately compensated. Until the State deprives Buck Island of the use of its property, and has denied compensation, a taking without just compensation has not occurred.

Buck Island also argues that N.C. Gen. Stat. § 62-32 (2003), which gives the Commission the power to require Buck Island to use the backbone facilities consistent with Commission rules, unlawfully impairs its contract in violation of Article I, Section 10 of the United States Constitution which provides in pertinent part, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1. Although this "provision limits the power of the states to amend or abolish the obligations of a contract," *Citicorp v. Currie, Comr. of Banks*, 75 N.C. App. 312, 315, 330 S.E.2d 635, 637, *appeal dismissed, disc. review denied*, 314 N.C. 538, 335 S.E.2d 15 (1985), it does not "strip the states of their police power to protect the general welfare of the people." *Id.*

"In determining whether a contractual right has been unconstitutionally impaired, we are guided by the three-part test set forth in *U.S. Trust Co. of N.Y. v. New Jersey*," *Bailey v. State of North Carolina*, 348 N.C. 130, 140-41, 500 S.E.2d 54, 60 (1998), and adopted by the North Carolina Supreme Court in *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd*, 323 N.C. 362, 372 S.E.2d 559 (1988). This test requires the court "to ascertain: (1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey* at 141, 500 S.E.2d at 60.

We have previously concluded that Buck Island is a *de facto* public utility; it is subject to regulation under Chapter 62 of the North Carolina General Statutes. Moreover, the statutes give the Commission authority to regulate the services and operations of public utilities, N.C. Gen. Stat. § 62-2(b) (2003), including the right to modify or abrogate private agreements between parties with respect to the operation of a public utility, "upon a showing that the contracts do not serve the public welfare." *State of N.C. ex rel. Utils. Comm'n v. Carolina Water Serv., Inc.*, 149 N.C. App. 656, 657, 562 S.E.2d 60, 62 (2002). Therefore, a contractual obligation was present and Buck Island's rights were impaired to the extent that their contract was subject to modification by the Commission.

In the 20 March 2001 order, the Commission concluded that the existing contractual arrangements under which water and sewer service are provided to Buck Island and Monteray Shores were not consistent with the public interest because Monteray Shores could exercise unilateral control of the utility service in CWS's franchised

service territory. This subject was not thereafter at issue and thus, was not addressed in the 1 April 2002 order. Impairment of the contract was reasonable and necessary to serve the public interest and therefore, does not violate the contracts clause.

Cross Appeal of Ocean Club Ventures

I.

[5] Complainant-cross-appellant, OCV, cross appeals claiming that the Commission's final ruling that OCV must provide its own water and sewer facilities is contrary to the Commission's prior determination. Complainant also argues that the change in the Commission's analysis was made without explanation.

Although the 20 March 2001 order concluded that CWS should extend service to Corolla Shores, the Commission did not determine who should provide the additional capacity, deciding only that CWS should provide the service under "reasonable terms and conditions" as outlined by the Commission. According to the order, the extent to which OCV should be allowed to utilize the existing backbone facilities depended on whether the existing facilities were adequate to serve Corolla Shores and still provide sufficient capacity to serve Buck Island and Monteray Shores at full buildout.

Although evidence showed that the existing facilities were intended to serve all three phases of Monteray Shores and Buck Island, other evidence established that actual residential consumption of water in Buck Island and Monteray Shores was at least forty percent greater than anticipated when the facilities were built. This increased consumption indicated that almost all of the capacity would be needed to serve Buck Island and Monteray Shores at full buildout. Because OCV did not meet its burden of proving that the existing facilities were adequate to serve all three areas at completion, the Commission concluded CWS's obligation to provide service to Corolla Shores depended on OCV's willingness to pay for the facilities needed to increase capacity.

Finally, the Commission ordered the parties to develop a plan for obtaining the additional capacity as well as an estimate for the amount OCV should be required to contribute. The Commission would then "conduct further proceedings and issue any additional orders." Clearly, the Commission considered the 20 March 2001 order interlocutory.

In the 17 August 2001 order, the Commission ordered CWS to interconnect with the existing facilities and provide interim service to Corolla Shores. However, the Commission, in an effort to protect end users in Buck Island and Monteray Shores, qualified its order to provide that CWS could, after proper notice, sever or block the interconnection should demand in the three developments outstrip capacity. As with the previous order, the Commission considered this order interlocutory as it specifically stated that additional proceedings and orders may be necessary to implement a final solution.

OCV contends that in the 1 April 2002 order the Commission required CWS to "take all steps reasonably necessary to ensure the provision of safe, reliable and adequate water and utility service to customers in Buck Island, *Corolla Shores*, and Monteray Shores." (Emphasis added). However, OCV fails to point out that the Commission required that this be done "in a manner consistent with the Commission's rules and the Commission's decisions in this proceeding." The Commission also states that "[t]he issue of how best to provide service to Corolla Shores is reserved for the next stage in these proceedings." These conclusions do not indicate that the Commission made any final determination of how service should be provided to Corolla Shores.

Despite OCV's assertion that the only issue left to resolve in the 19 August 2002 order was how to extend service to Corolla Shores, our review of the record reveals clearly that the previous orders were interlocutory. OCV concedes the Commission found that CWS should provide the service under "reasonable terms and conditions," but fails to recognize that the previous orders were not inconsistent as the conditions were not permanently established until the final 19 August 2002 order.

OCV relies on *Colorado Interstate Gas Co. v. F.E.R.C.*, 850 F.2d 769 (D.C. Cir. 1988), where the court found that the Federal Energy Regulatory Commission's dissimilar treatment of two similar cases was arbitrary and capricious. However, this decision can be distinguished because those two cases were each final determinations rather than, as here, one case with interlocutory rulings prior to a final order.

The Commission's conclusion that OCV must provide its own water and sewer facilities is not inconsistent with the Commission's prior interlocutory orders and is not arbitrary or capricious. Accordingly, this assignment of error is overruled.

II.

[6] Next, OCV contends the Commission's ruling that OCV must provide its own water and sewer capacity is inconsistent with prevailing principles of public utility law. In order to protect the public from poor service and exorbitant charges which are normal consequences of a monopoly, *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 335-36, 189 S.E.2d 705, 717 (1972), our legislature has given the Utilities Commission the authority to supervise and control public utilities. N.C. Gen. Stat. §§ 62-30, 62-31, 62-32, 62-131 (2003). The Commission may not, however, authorize a practice which is forbidden by statute. *Utilities Comm. v. Merchandising Corp.*, 288 N.C. 715, 722, 220 S.E.2d 304, 309 (1975).

Commission rules provide that a utility company may refuse service to an applicant, if, in the judgment of the utility, it does not have adequate capacity to provide the service requested. N.C. Admin. Code tit. 4, r. 11.R7-17 and 11.R10-13. In addition, a water or sewer utility can require an applicant requesting the extension of water or sewer service to a subdivision to pay in advance for additional pressure or storage facilities. N.C. Admin. Code tit. 4, r. 11.R7-17(c) and 11.R10-13(c).

The Utilities Commission, in its 1 April 2002 order, required CWS to determine the amount of capacity needed to provide service in all three developments and to develop a plan for "obtaining the needed capacity in the most economic, efficient and equitable manner possible." CWS, in its 15 May 2002 response to the Commission's order, concluded that existing capacity was insufficient to meet the demand in Buck Island, Monteray Shores and Corolla Shores. Therefore, CWS offered three proposals detailing the advantages and disadvantages of each and acknowledging that because of the complicated issues, it was impossible to find a solution that met the interests of all parties.

After considering the proposed solutions, the Utilities Commission reiterated in its 19 August 2002 order that it was reasonable for the utilities in the three developments to interconnect and operate as a single system. However, the Commission chose the third option, leaving to OCV "the choice of whether to construct its own water and wastewater facilities, . . . or whether to negotiate with Intervenors [Buck Island and Monteray Shores] to expand and utilize the existing facilities within Monteray Shores." Because the backbone facility capacity was inadequate to serve Corolla Shores in addition to

Buck Island and Monteray Shores, CWS was authorized to decline service to OCV until sufficient capacity was provided. N.C. Admin. Code tit. 4, r. 11.R7-17 and 11.R10-13. In addition, CWS was authorized to require OCV to prepay for the additional facilities needed. N.C. Admin. Code tit. 4, r. 11.R7-17(c) and 11.R10-13. The Commission's order did not leave OCV without options; it only required that OCV pay the owners of the backbone facilities to provide additional capacity or build its own facilities. Once adequate capacity is present, CWS is still required to provide reasonable utility service. For these reasons, the Commission's order is not inconsistent with prevailing principles of public utility law and is supported by competent evidence.

III.

[7] Finally, OCV asserts that the 19 August 2002 order constitutes an effective abandonment of the Commission's jurisdiction over the provision of water and sewer utility service within Corolla Shores. The Commission's authority to order OCV to construct facilities or to negotiate with Monteray Shores and Buck Island to expand the existing facilities is established in N.C. Gen. Stat. § 62-42(a) (2003) which states, *inter alia:*

> [W]henever the Commission, after notice and hearing had upon its own motion or upon complaint, finds:
>
> . . .
>
> (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
>
> . . .
>
> 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, in choosing the service extension option, effectively exercised its jurisdiction as provided by the above statute.

OCV contends that it is in the same position as it would be if there were no certificated utility obligated to provide service to Corolla Shores. However, CWS is obligated to provide service to Corolla Shores once the necessary capacity has been added by OCV. Once OCV provides sufficient capacity, the systems will interconnect and operate as a single system, thus providing a solution to the need for water and sewer service within Corolla Shores.

By not taking steps to control Monteray Shores and Buck Island and by not amending the portion of the agreements that are inconsistent with the public interest, OCV maintains that the final order leaves issues unresolved. Since Buck Island and Monteray Shores were declared to be public utilities, the Commission may exercise jurisdiction at any time. On the other hand, the Commission appears to anticipate that once additional facilities are in place and CWS has exercised complete control over the operation of all facilities, Buck Island and Monteray Shores may no longer qualify as public utilities. However, the Commission may still exercise jurisdiction since after notice to the parties and a hearing, the Commission may at any time "rescind, alter or amend any order or decision." N.C. Gen. Stat. § 62-80 (2003). Thus, the Commission can take action if Buck Island or Monteray Shores fail to comply with any of the Commission's orders. The Commission has not abandoned its jurisdiction over water and sewer utilities; this assignment of error is overruled.

IV.

Complainant's remaining assignments of error were not brought forward in the brief and are therefore deemed abandoned. N.C. R. App. P. 28(a).

The Final Order of the Utilities Commission is affirmed.

Affirmed.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. ANTIONE DENARD ALLEN

No. COA02-1624

(Filed 17 February 2004)

1. Homicide— premeditation and deliberation—evidence sufficient

There was sufficient evidence for a jury to find premeditation and deliberation in a first-degree murder prosecution where defendant played a critical role in developing a robbery plan; armed himself with an assault rifle as part of that plan; provided transportation and directions for others to the victim's apartment; entered the apartment with no attempt to conceal his weapon; and was in the apartment only a brief time before the victim was shot.

2. Evidence— hearsay—excited utterance exception

Testimony relating statements made to an officer by two witnesses to a robbery and shooting were admissible as excited utterance exceptions to the hearsay rule. The statements were made twenty minutes after the shooting, both witnesses were upset, and the arrival of the Spanish-speaking officer gave the witnesses their first opportunity to tell what they had seen. N.C.G.S. § 8C-1, Rule 803(2).

3. Evidence— hearsay—unavailable witness

The trial court correctly deemed unavailable a witness who would not return from Mexico, and the six prongs of the inquiry required by N.C.G.S. § 8C-1, Rule 804(b)(5) were satisfied.

4. Constitutional Law— Confrontation Clause—unavailable witness—independent assessment of trustworthiness

The Court of Appeals conducted an independent assessment of the trustworthiness of a statement by an unavailable witness and concluded that admission of the statement was consistent with the Confrontation Clause.

5. Evidence— character of victims—not placed in issue by defendant—evidence not prejudicial

Admission of testimony about the character of homicide victims before defendant called their character into issue was not prejudicial in light of the overwhelming evidence against defendant.

6. Appeal and Error— preservation of issues—constitutional issue not raised at trial—no offer of proof

Defendant waived appeal of limits on his cross-examination of witnesses by not raising constitutional issues at trial and or making an offer of proof.

7. Criminal Law— flight—evidence sufficient

There was sufficient evidence for an instruction on flight where defendant fled the scene of a robbery and shooting, going first to the apartment of an acquaintance, then calling a cab to go to a cousin's home and later to his home; he stayed there overnight, but left for a friend's home in a near-by town after hearing that a child had died; and he remained at the friend's home for two days before returning to speak with police.

8. Appeal and Error— prosecutor's argument—no objection or plain error assertion

A defendant waived appeal of the State's argument about his exercise of his right to remain silent by not specifying grounds for his sole objection, raising his constitutional concerns at the trial court, or asserting plain error.

9. Criminal Law— prosecutor's argument—plea bargain with accomplices

There was no plain error in the prosecutor's argument about the State's plea bargain with a first-degree murder defendant's accomplices. The argument did not intimate an opinion on the witness's credibility by the trial court or the Supreme Court.

10. Homicide— first-degree murder—short-form indictment—constitutional

The short-form indictment for first-degree murder is constitutional.

Appeal by defendant from judgment dated 1 March 2002 by Judge Melzer A. Morgan, Jr. in Superior Court, Forsyth County. Heard in the Court of Appeals 9 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.

Reita P. Pendry for defendant.

McGEE, Judge.

Antione Denard Allen (defendant) appeals from a judgment sentencing him to life imprisonment without parole, entered after a jury found him guilty of the first degree murder of Feliciano Noyola.[1]

The State's evidence tended to show that during the afternoon of 27 January 1998, Marshall Gillespie (Gillespie) visited Stephen Hairston (Hairston) at Hairston's home. Gillespie asked Hairston to help him rob "some Mexicans" living at 1231-B Gholson Street, Winston-Salem, North Carolina. Hairston agreed, retrieved his gun, and got into a car with Gillespie. Steven Gaines (Gaines) and defendant were already seated in the car. Defendant was armed with an assault rifle. While the four men rode in the car to the home of defendant's aunt, they planned the robbery.

At the home of defendant's aunt, they switched cars, getting into defendant's aunt's car and driving to Old North Village to pick up Kenyon Grooms (Grooms). Grooms got into the driver's seat of the car and defendant directed him to the apartment complex on Gholson Street.

When the five men reached the apartment complex on Gholson Street, Hairston, Gaines and defendant got out of the car. Gaines went to the rear of the apartment at 1231-B. Hairston and defendant, who was carrying an assault rifle, walked toward the apartment. Gillespie also exited the car and approached the apartment. Hairston then walked away from the apartment complex, abandoning the robbery. Gillespie and defendant entered the apartment. Defendant shot Feliciano Noyola (Feliciano) and Gillespie shot Esmeralda Noyola (Esmeralda), a six-year-old child. Gaines also entered the apartment. Grooms drove away from the scene.

Officer T.G. Brown (Officer Brown) of the Winston-Salem Police Department responded to a call reporting gunfire. Officer Brown found two Hispanic women, Maria Santos (Santos) and Justina Dominguez (Dominguez), in the apartment. The two women were crying and were unable to speak English. Officer Brown found Feliciano still breathing, on the floor in the kitchen in a pool of blood. He found Esmeralda's body on the floor near the entrance to a bedroom. Officer Brown requested backup officers and emer-

1. In *State v. Allen*, 353 N.C. 504, 546 S.E.2d 372 (2001), our Supreme Court reversed defendant's convictions on two counts of first degree murder. Defendant was awarded a new trial. The subsequent trial is the subject of this appeal.

gency medical services (EMS). Before the EMS arrived, Feliciano stopped breathing.

Officer Rafael Barros (Officer Barros) of the Winston-Salem Police Department arrived approximately ten minutes after Officer Brown. Officer Barros spoke fluent Spanish. He found Santos and Dominguez in one of the bedrooms. Santos, who was the mother of Esmeralda, reported that three black men had entered the apartment through the front door and demanded money. Dominguez, who was Feliciano's wife, said that she had been in a bedroom with her baby when one of the intruders kicked the door open and ripped a gold chain from her neck. She heard gunshots but she never left the bedroom.

Officer Barros showed a photographic lineup to Santos and Dominguez on 28 January 1998. Officer Barros testified that Santos identified Gillespie as the man who shot Esmeralda, but admitted that Santos was not positive in her selection. Dominguez did not identify Gillespie, and neither woman identified defendant.

At trial, Hairston and Grooms testified as witnesses for the State. Both men admitted their participation in the robbery. They testified that defendant, armed with an assault rifle, had entered the apartment at 1231-B Gholson Street, along with Gillespie.

Defendant testified at trial that he had gone with the others to the apartment at 1231-B Gholson Street with the intent to sell Feliciano guns as payment for drugs. When defendant entered the apartment, Feliciano pulled a gun. Feliciano fired a shot toward defendant's head and defendant accidently pulled the trigger on the gun he was holding. Shots were fired and defendant and Gillespie fled the apartment. Defendant testified that when he heard the following day that a child had been killed in the apartment, he went to Kernersville. He remained in Kernersville with friends for two days.

I.

[1] Defendant first argues that the evidence at trial was insufficient to prove the elements of premeditation and deliberation for first degree murder. The trial court denied defendant's motions to dismiss at the close of the State's evidence and again at the close of all the evidence. In order to submit the charge of first degree murder to the jury, the State must have presented substantial evidence from which the jury could conclude that defendant shot and killed Feliciano with malice, premeditation, and deliberation.

When a trial court considers a motion to dismiss on the ground of insufficiency of the evidence, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "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." *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). The trial court may consider evidence that is direct, circumstantial, or both. *Id.* Furthermore, the trial court must consider the evidence in the light most favorable to the State and the State is given the benefit of all reasonable inferences therefrom. *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721 (2001). In reviewing a motion to dismiss, "[t]he defendant's evidence is not considered unless favorable to the State." *Id.*

"First degree murder is the unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991) (citations omitted); N.C. Gen. Stat. § 14-17 (2003). The intentional use of a deadly weapon which proximately causes death raises the presumption that the killing was unlawful and performed with malice. *State v. Myers*, 299 N.C. 671, 677, 263 S.E.2d 768, 772 (1980). Premeditation and deliberation are generally established by circumstantial evidence, "because they ordinarily are not susceptible to proof by direct evidence." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Premeditation means a defendant formed the specific intent to kill the victim some time beforehand, however brief the period of time may have been before the killing. *Id.* "Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design." *Myers*, 299 N.C. at 677, 263 S.E.2d at 772.

Circumstances from which premeditation and deliberation can be implied include:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing

of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

State v. Olson, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992).

Considering the evidence in the light most favorable to the State, the evidence tended to show that on 27 January 1998, defendant armed himself with a loaded assault rifle as part of a plan to rob Feliciano. Defendant played a critical role in developing that plan. Defendant provided transportation and directions to the apartment at 1231-B Gholson Street. Once in the apartment parking lot, defendant approached and entered the apartment without any attempt to conceal his weapon. Only a very brief time passed between the time defendant entered the apartment and the time Feliciano was shot. This was substantial evidence which a jury could accept as adequate to conclude that defendant intentionally killed Feliciano with premeditation and deliberation. *See State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986) (the defendant was found guilty of murder in the first degree based on premeditation and deliberation where the defendant planned to rob a store and shot the cashier with a gun he had been told was inoperable). Defendant's assignments of error two, three, and four are without merit.

II.

[2] Defendant next argues that the trial court erred in admitting hearsay statements made by Dominguez and Santos conveyed through the testimony of Officer Barros. Defendant contends that the statements of Santos and Dominguez do not meet any exception to the hearsay rule. At issue are the statements of Santos and Dominguez on the evening of the shootings and Santos' identification of Gillespie as Esmeralda's killer.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2003). Hearsay is only admissible as provided by statute or under the Rules of Evidence. N.C.G.S. § 8C-1, Rule 802. "[E]ven if an out-of-court statement falls within an exception to the hearsay rule, it nonetheless must be excluded at a criminal trial if it infringes upon the defendant's constitutional right to confrontation." *State v. Rogers*, 109 N.C. App. 491, 499, 428 S.E.2d 220, 224-25, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993), *cert. denied*, 511 U.S. 1008, 128 L. Ed. 2d 54 (1994). However, "Rule 803 provides that certain statements are

not excluded as hearsay regardless of the availability of the declarant for purposes of testifying." *State v. Pickens*, 346 N.C. 628, 644, 488 S.E.2d 162, 171 (1997). One such exception is an excited utterance. *Id.*; *see* N.C. Gen. Stat. § 8C-1, Rule 803(2) (2003).

Defendant objected to the admission of the statements of Santos and Dominguez on the evening of the shootings as excited utterances, pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(2). The trial court, in an extensive written ruling, detailed its decision to admit the statements. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803(2). For a statement to properly fall within this exception, there must be " '(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.' " *Pickens*, 346 N.C. at 644, 488 S.E.2d at 171 (quoting *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985)). The trial court noted that both witnesses were under extreme stress when they spoke with Officer Barros approximately twenty minutes after the shooting. Because Officer Barros spoke Spanish, his arrival at the scene offered the women their first opportunity to convey the events of the shootings. Officer Barros testified that it appeared that Santos had been crying and that Dominguez stopped crying when speaking with Officer Barros. We conclude that because Santos' and Dominguez's statements were made only twenty minutes after the shootings and the statements related to the startling events at issue, the testimony was properly admitted pursuant to N.C.G.S. § 8C-1, Rule 803(2).

[3] Defendant further argues the trial court erred in admitting Santos' identification of Gillespie in a photographic line-up on 28 January 1998. The trial court concluded that no specific hearsay exception applied under either N.C. Gen. Stat. § 8C-1, Rule 803(1) or Rule 804(b)(1)-(4). After finding Santos to be unavailable and then methodically utilizing a six-part inquiry, the trial court made findings of fact and conclusions of law that Santos' statement was relevant and admissible under N.C. Gen. Stat. § 8C-1, Rule 804(b)(5).

In order to admit hearsay testimony under Rule 804(b)(5), the trial court must first find the declarant to be unavailable. After reviewing the State's evidence detailing its repeated attempts to obtain the attendance of Santos and Dominguez for defendant's first trial in July 1999 and his retrial in 2002, the trial court found the witnesses to be unavailable for purposes of testifying. Officer Barros,

then working for the U.S. Department of Treasury, contacted Santos and Dominguez by telephone on numerous occasions in a remote location in Mexico, promising to pay all expenses and to arrange for transportation for the women to return to testify. Both women refused to return to Forsyth County for the first trial. As to the second trial, Officer Barros was unable to locate Santos and Dominguez was uncooperative.

Rule 804(a)(5) provides that unavailability as a witness includes a situation where the declarant "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." N.C. Gen. Stat. § 8C-1, Rule 804(a)(5) (2003). After a thorough review of the record, we find no error in the trial court's conclusion that Santos and Dominguez were unavailable to testify.

The second step in assessing the admissibility of hearsay statements under Rule 804(b)(5) is to conduct a six-prong inquiry. The trial court is to consider:

> (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and of its particulars;
>
> (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
>
> (3) That the statement possesses "equivalent circumstantial guarantees of trustworthiness";
>
> (4) That the proffered statement is offered as evidence of a material fact;
>
> (5) Whether the hearsay is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means"; and
>
> (6) Whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statement into evidence."

State v. Fowler, 353 N.C. 599, 609, 548 S.E.2d 684, 693 (2001) (citations omitted), *cert. denied*, 535 U.S. 939, 152 L. Ed. 2d 230 (2002); *see* N.C.G.S. § 8C-1, Rule 804(b)(5).

The trial court must first determine whether the State, as proponent of the hearsay testimony, provided adequate written notice to

defendant, the adverse party, regarding its intent to offer the hearsay testimony and the particulars of the testimony. N.C.G.S. § 8C-1, Rule 804(b)(5). The purpose of such notice is to provide the adverse party with a fair opportunity to prepare to address the evidence. N.C.G.S. § 8C-1, Rule 804 (b)(5). Defendant does not contend notice was inadequate; therefore, we proceed with our review of the necessary inquiry.

The trial court next considered whether Santos' identification of Gillespie fell within any other hearsay exception listed in Rule 804(b)(1)-(4). *See Fowler*, 353 N.C. at 609, 548 S.E.2d at 693. The trial court concluded the identification was not covered by any other hearsay exception. Defendant does not challenge the trial court's conclusion.

Under the third prong, the trial court considered whether the statement at issue possessed "guarantees of trustworthiness" that are equivalent to other exceptions contained in Rule 804(b). *Id.* Factors to be considered in assessing whether the hearsay statements possess sufficient indicia of trustworthiness are:

> (1) assurance of personal knowledge of the declarant of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination.

State v. Castor, 150 N.C. App. 17, 26, 562 S.E.2d 574, 580 (2002) (citations omitted), *cert. denied*, 357 N.C. 508, 587 S.E.2d 885 (2003).

In the case before us, the trial court found that Santos' identification possessed sufficient guarantees of trustworthiness. The trial court based its conclusion on the following findings of fact: (1) Santos was an eyewitness to the shooting and thus had personal knowledge of the event; (2) Santos was motivated to speak the truth to Officer Barros in order to aid in the apprehension of her daughter's killer; (3) Santos never recanted her identification of Gillespie as the individual who shot her daughter; and (4) Santos was extremely difficult to contact in Mexico and her address was unknown at the time of the second trial. She was resolute in her resistance to return to the United States for defendant's trial despite the State's offer to provide for her expenses and to make all necessary arrangements. Accordingly, these findings support the trial court's conclusion that the identification was trustworthy.

Under the inquiry's fourth prong, the trial court found that the identification by Santos was relevant. The evidence pertained to the material facts at issue. Santos' statement identified one of the killers and provided details of the crime, satisfying the fourth requirement.

The fifth prong mandates that the trial court consider whether Santos' statement was more probative on the point for which it was offered than any other evidence the proponent could produce through reasonable means. *Fowler*, 353 N.C. at 613, 548 S.E.2d at 695. "Th[is] requirement imposes the obligation of a dual inquiry: were the proponent's efforts to procure more probative evidence diligent, and [was] the statement more probative on the point than other evidence that the proponent could reasonably procure?" *Smith*, 315 N.C. at 95, 337 S.E.2d at 846. At the outset, the trial court found that Santos was the only person in the apartment capable of identifying any of the intruders who possessed guns. She alone was able to identify Gillespie as the individual who shot Esmeralda. The trial court also concluded that the State had been diligent in its attempt to obtain Santos' presence for trial, but Santos refused to return for the trial and later her precise whereabouts in Mexico were unknown. Santos' identification is as probative on the issue of the identification of Esmeralda's shooter as any other evidence the State could procure through reasonable efforts. Based on these conclusions, the two-part inquiry outlined in *Smith* was met by the State.

The trial court finally considered whether, under the sixth prong, the admission of the hearsay statements of Santos served the interest of justice and the general purpose of the rules of evidence. *Fowler*, 353 N.C. at 614, 548 S.E.2d at 696. The trial court determined that the admission of Santos' identification would serve the interest of justice. The trial court noted that defendant was free to raise inconsistencies in Santos' statements during cross-examination of Officer Barros. Defendant has failed to show any error in the trial court's analysis.

The trial court correctly deemed Santos to be unavailable and satisfied all six prongs of the necessary inquiry. We find no error in the admission of Santos' identification of Gillespie.

[4] Defendant lastly argues that this Court, in analyzing "whether the admission of the declarant's out-of-court statements violate the Confrontation Clause, . . . should independently review whether the government's proffered guarantees of trustworthiness satisfy the

demands of the Clause." *Lilly v. Virginia*, 527 U.S. 116, 137, 144 L. Ed. 2d 117, 134 (1999). We have therefore conducted an independent assessment to determine whether Santos' statement possesses sufficient "particularized guarantees of trustworthiness" in compliance with the mandate of the Confrontation Clause. *Id.* at 125, 144 L. Ed. 2d at 127; *see also*, *Fowler*, 353 N.C. at 616, 548 S.E.2d at 697. After a careful review, we conclude that the admission of Santos' statement is consistent with the Confrontation Clause. Santos received no benefit in exchange for her statement, nor was it made in order to avoid prosecution. She was the sole eyewitness to the murder of her daughter by Gillespie and never recanted her statement. There is no evidence she bore any ill will towards Gillespie. Finally, defendant was free to discredit Santos' identification based on any inconsistencies in her statement. Therefore, we reject defendant's contention that the admission of Santos' identification of Gillespie in the photographic line-up violated the Confrontation Clause. Accordingly, defendant's assignments of error five and seven are overruled.

III.

[5] By defendant's assignments of error six and nine, defendant argues that the trial court erred in admitting certain testimony that depicted the character of decedents, Feliciano and Esmeralda. Defendant asserts that the character evidence was admitted even though defendant had not placed the character of either victim at issue.

At trial, Susan Moretz (Moretz), Esmeralda's English As A Second Language (ESL) teacher, described Esmeralda as having overcome an initial language barrier. According to Moretz, Esmeralda enjoyed school and sharing with her fellow students. Moretz testified that she saw Esmeralda in the school cafeteria on 27 January 1998 washing tables. Esmeralda smiled and greeted Moretz and appeared to be in good health.

James Lambert (Lambert), Feliciano's supervisor at the K-Mart Distribution Center, testified at trial about Feliciano's language difficulties and his ability to get along well with his co-workers. Lambert remarked that Feliciano was a good worker and that he appeared happy in a photograph introduced for identification purposes.

The admissibility of evidence concerning a victim's character is set forth in N.C. Gen. Stat. § 8C-1, Rule 404(a)(2) (2003):

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (2) *Character of victim.*—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

The rule thus permits the State to introduce evidence of a victim's character solely "to rebut defendant's evidence calling it into question." *State v. Quick*, 329 N.C. 1, 26, 405 S.E.2d 179, 194 (1991). In the case before us, at the time of the testimony of Moretz and Lambert, defendant had not challenged the character of Esmeralda or Feliciano, nor had he presented evidence that either was the aggressor. Therefore, the admission of testimony as to character was in error.

However, "the admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded." *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987). The State presented overwhelming evidence of defendant's guilt and defendant has failed to show that the exclusion of the character testimony would have impacted the jury's verdict.

IV.

[6] Defendant further contends that the trial court's decision to limit defendant's cross-examination of Moretz and Lambert was in error. Defendant wanted to ask Moretz whether she was aware of any illegal drug activity at 1231-B Gholson Street and to ask Lambert whether he was aware of Feliciano's conviction for possession of marijuana. Defendant argued at trial that these questions were relevant to Santos' fear of returning to testify and were relevant to address the extent of Lambert's knowledge of Feliciano's character. The trial court sustained the State's objection to this line of cross-examination.

First we note that our Supreme Court has clearly announced that constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal. *State v. Benson*, 323 N.C. 318,

322, 372 S.E.2d 517, 519 (1988); N.C.R. App. P. 10(b)(1). Therefore, we will not address defendant's assertion upon appeal that the trial court violated his right to cross-examine witnesses as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

Furthermore, "[i]t is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). In order to preserve for appellate review the exclusion of evidence, the "significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *Id.* Our Supreme Court has held that in order to conclude that prejudicial error has occurred, the essential content or substance of the witness's testimony must be shown. *Id.*

In this case, the trial court expressly asked defendant whether he wished to make an offer of proof or reserve the right to make an offer of proof regarding the excluded line of questioning. Defendant made no such offer of proof, and thus defendant has waived this argument on appeal. Defendant's assignments of error eight and ten are overruled.

V.

[7] By his assignment of error eleven, defendant argues that the trial court erred in instructing the jury on defendant's flight. Defendant argues the instruction was inappropriate in the absence of evidence supporting the instruction.

The trial court gave the State's requested instruction on flight:

> The State in this case contends and the defendant . . . denies that the defendant . . . fled. Evidence of flight may be considered by you together with all other facts and circumstances in these cases in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish . . . guilt.
>
> Further, this circumstance has no bearing on the question of whether defendant . . . acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation and deliberation.

An instruction on flight is appropriate where " 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime[.]' " *State v. Kornegay*, 149 N.C. App. 390, 397, 562 S.E.2d 541, 546 (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)), *disc. review denied*, 355 N.C. 497, 564 S.E.2d 51 (2002). " '[M]ere 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.' " *State v. Lloyd*, 354 N.C. 76, 119, 552 S.E.2d 596, 625-26 (2001) (quoting *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991)).

The evidence is undisputed that defendant fled the scene of the crime following the shooting and ran to the apartment of an acquaintance, where defendant called a cab to take him to his cousin's house. Defendant later returned home where he remained overnight. Defendant heard the following morning that a child had been killed during the robbery and he then left Winston-Salem for a friend's home in Kernersville. He remained there for two days before returning to Winston-Salem to speak with the police about the events of 27 January 1998.

Under these facts, we conclude the trial court did not err in its instruction to the jury. *See State v. Eubanks*, 151 N.C. App. 499, 565 S.E.2d 738 (2002) (flight instruction was appropriate where the defendant left the scene of the crime without providing assistance to the victim, disposed of the gun, and did not turn himself into police). There is sufficient evidence to support an inference that defendant sought to escape apprehension. Defendant's assignment of error eleven is without merit.

VI.

[8] In defendant's assignment of error fifteen, he contends that the State improperly commented on defendant's invocation of his right to silence during closing arguments. The State, on four occasions during its closing argument, referred to defendant as waiting four years to tell his account of the events on the night of 27 January 1998. Defendant asserts that the State's comments can only be construed to refer to defendant's failure to testify at his first trial in June 1999.

Defendant objected only once to such remarks by the State during closing argument and the objection was overruled. Defendant

fails to argue plain error upon appeal as to those instances where defendant raised no objection at trial. The Rules of Appellate Procedure provide that in a criminal case, a defendant may raise a question, not properly preserved by rule or law for appellate review, by specifically and distinctly arguing plain error. N.C.R. App. P. 10(c)(4). Because defendant has failed to argue plain error, this Court will not review the merits of his argument as to the remarks made by the State without objection by defendant.

In the instance of defendant's sole objection to the State's comment, defendant did not state the specific grounds for the requested ruling. Upon appeal, defendant asserts the State violated his right to silence as guaranteed by the Fifth Amendment to the United States Constitution.

Defendant failed to raise his constitutional concerns before the trial court. As we noted previously, because defendant did not raise the constitutional issue before the trial court, defendant is barred from presenting the issue on appeal. N.C.R. App. P. 10(b)(1); *State v. Wiley*, 355 N.C. 592, 624, 565 S.E.2d 22, 44 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Thus, although troubled by the State's remarks, we conclude that defendant has waived the issue upon appeal. Defendant's assignment of error is dismissed.

VII.

[9] In defendant's assignment of error sixteen, he contends that the trial court erred in failing to intervene *ex mero motu* during the State's closing argument regarding the testimony of the State's two immunized witnesses, Hairston and Grooms. Defendant failed to object at trial to any of the remarks he now claims are improper. Upon appeal, he contends that the State's argument was outside the record in violation of N.C. Gen. Stat. § 15A-1230. "Where a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *State v. Mitchell*, 353 N.C. 309, 324, 543 S.E.2d 830, 839, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001). "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). "[T]he appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is

clearly calculated to prejudice the jury in its deliberations." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979).

In this case, the State explained to the jury that the State had entered into a plea agreement with Hairston and Grooms in order to obtain their testimony at defendant's trial. The State explicitly referred to Hairston and Grooms as "thugs." Citing our Supreme Court's holding in *State v. Woodson*, 287 N.C. 578, 215 S.E.2d 607 (1975), the State explained that based on public policy, it is the common and accepted practice that a State may contract with a criminal for his exemption from prosecution if by so bargaining, the State obtains the honest and fair testimony as to the crime in the case. Defendant contends that the State's tactic serves to inform the jury that the trial court has already made a positive determination as to the credibility of the two witnesses.

Trial counsel is provided wide latitude in presenting jury arguments and thus counsel is "entitled to argue the law, the facts, and all reasonable inferences therefrom." *State v. Rose*, 339 N.C. 172, 203, 451 S.E.2d 211, 229 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). Contrary to defendant's argument, this Court does not interpret the State's remarks at issue to present an intimation as to the trial court's opinion or our Supreme Court's opinion as to the credibility of either witness. Accordingly, we conclude that defendant has failed to show error or an abuse of discretion by the trial court. Defendant's assignment of error sixteen is overruled.

VIII.

[10] In defendant's final assignment of error, he argues that the trial court lacked jurisdiction to try defendant on the indictment for first degree murder because the indictment failed to allege all the elements of the offense. He maintains the trial court violated his federal and State constitutional rights.

As defendant acknowledges, 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." *Barden*, 356 N.C. at 384, 572 S.E.2d at 150. "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, this assignment of error is overruled.

After a careful review of defendant's remaining assignments of error, we find each to be without merit. As for those assignments of error for which defendant failed to present any supporting argument, they are deemed abandoned. N.C.R. App. P. 28(b)(6).

No prejudicial error.

Judges HUNTER and CALABRIA concur.

FANTASY WORLD, INC., PETITIONER v. GREENSBORO BOARD OF ADJUSTMENT AND CITY OF GREENSBORO, RESPONDENTS

No. COA03-52

(Filed 17 February 2004)

1. Zoning— privilege license—zoning compliance required

The City of Greensboro had the authority to deny a business privilege license to an adult business based on zoning determinations by the tax collector. The City may require evidence of compliance with applicable laws before approving an application for a privilege license, and the City charter provided the authority to delegate zoning compliance assessment to the tax collector.

2. Zoning— denial of privilege license—appeal to board of adjustment

The Greensboro City Charter and ordinances properly gave the Board of Adjustment the authority to hear appeals from the denial of a business privilege license.

3. Collateral Estoppel and Res Judicata— prior motions to show cause and for permanent injunction—denial not on the merits

Res judicata and collateral estoppel did not bar the City of Greensboro from asserting that a company was violating local zoning ordinances as the reason for denying a privilege license. The denial of a prior motion to show cause was not on the merits, and a permanent injunction was denied based on lack of jurisdiction.

4. Zoning— amended ordinances—applicability

There was competent evidence for findings and conclusions that amended development ordinances were applicable to a petitioner engaged in a longstanding dispute with the City of Greensboro over the operation of adult businesses.

5. Zoning— adult business—zoning violations

There was competent and sufficient evidence to support findings and conclusions that petitioner violated the city's zoning requirements in its operation of adult mini-motion picture booths.

6. Constitutional Law— adult business—privilege license denied—not a prior restraint on free expression

The denial of a privilege license for an adult business pursuant to a zoning ordinance was not an unconstitutional prior restraint of free expression.

Appeal by petitioner from judgment entered 2 May 2002 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 15 October 2003.

Loflin & Loflin, by Thomas F. Loflin III; and Sirkin, Pinales, Mezibov & Schwartz, L.L.P., by H. Louis Sirkin and Jennifer M. Kinsley for petitioner-appellant.

Office of the City Attorney, City of Greensboro, by A. Terry Wood, Becky Jo Peterson-Buie, and Clyde B. Albright, for respondents-appellees.

LEVINSON, Judge.

Petitioner-appellant Fantasy World, Incorporated, appeals from a superior court order upholding a decision by the City of Greensboro, North Carolina to deny the company a business privilege license. We affirm.

I.

The present appeal arises out of a lengthy dispute between the parties over the legality of Fantasy World's use of the building located at 4018 West Wendover Avenue in Greensboro, North Carolina. Prior to 1994, the building housed two separate types of commercial enterprises. A "topless" bar occupied one portion of the building, and a space, which had formerly been a restaurant that was not a sexually oriented business, occupied the other portion. Petitioner-appellant

Fantasy World took possession of both portions of the building sometime before June 1994.

On 15 June 1994, the City issued a license to Fantasy World to operate a business at the location. Fantasy World continued to use the "topless" bar portion of the building for live adult entertainment and subsequently sought to use the former restaurant space for lingerie sales. On 1 September 1994, the Greensboro Planning Department attached a note to the building plans specifying that no adult entertainment would be permitted in the former restaurant portion of the building. Adult-oriented uses of the former restaurant space were prohibited because the topless bar was a legal "non-conforming use" and a City development ordinance did not permit non-conforming uses to be "enlarged, increased, or extended to occupy a greater area of land or floor area[.]" Greensboro Code of Ordinances § 30-4-11.2.

Following visits to the property by zoning enforcement officers, the Greensboro Zoning Enforcement Division issued a Notice of Violation to Fantasy World on 27 December 1994, instructing the business to cease all adult sales and use of the "adult mini-motion picture theater" on the premises because (1) such uses did not comply with the development ordinance requiring a five hundred foot spacing from residentially zoned property and a twelve hundred foot spacing from another adult use, or alternatively (2) such uses violated the ordinance prohibiting enlarging, increasing, or extending a non-conforming use to occupy a greater floor area. The Greensboro Zoning Board of Adjustment upheld the Notice of Violation.

The superior court heard the matter on a petition for *certiorari* pursuant to N.C.G.S. § 160A-388(e). Judge Ben F. Tennille issued an order affirming the Board of Adjustment on 18 July 1996. Judge Tenille ruled that sufficient evidence existed for the Board to conclude that Fantasy World was operating an "adult mini motion picture theater," which constituted a violation of the prohibition against enlarging, increasing, or extending a nonconforming use. This Court affirmed Judge Tennille's order in *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 128 N.C. App. 703, 496 S.E.2d 825, *disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998).

On 25 September 1998, the City filed a motion requesting the superior court to issue an order requiring Fantasy World to show cause why it should not be held in contempt for violating Judge Tennille's order. Judge Henry E. Frye, Jr., denied this motion. In an

unpublished opinion, *Fantasy World, Inc. v. Greensboro Board of Adjustment*, COA99-438, slip op. at 5 (N.C. App. Mar. 7, 2000), this Court vacated Judge Frye's order denying the City's motion to show cause, and directed him to clarify whether his decision was based on the merits of the controversy. On 19 June 2000, Judge Frye entered an order stating that his denial of the City's motion to show cause had not been a decision based on the merits.

On 10 November 1998, after an appeal of Judge Frye's initial order had been perfected, the City filed a motion for a permanent injunction in superior court, requesting that Fantasy World be ordered to comply with the City's development ordinance and to cease operation of an "adult mini motion picture theater" establishment at 4018 West Wendover Avenue. On 20 January 1999, the superior court ruled that it was without jurisdiction to issue the injunction because N.C.G.S. § 1-294 stayed further proceedings while Judge Frye's order was on appeal.

The 27 December 1994 Notice of Violation cited Fantasy World for operating an "adult mini motion picture theater" at 4018 West Wendover. The City Code defined the term "adult mini motion picture theater" to mean a mini motion picture theater in which "a preponderance of [the movies shown were] distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas." Greensboro Code of Ordinances § 30-2-2.7 (definition deleted 17 April 1995) (emphasis added). The court proceedings between 1996 and 2000, including the two previous appeals heard by this Court, were based on the 27 December 1994 Notice of Violation employing the "preponderance" of materials test.

Sometime prior to 2000, the City replaced many of its definitions relating to adult entertainment with new definitions. Specifically, the City defined the term "sexually oriented business" to include "adult arcades" and "adult bookstores," which were further defined as follows:

> (1) Adult arcade (also known as "peep show"). Any place to which the public is permitted or invited, wherein coin-operated or token-operated or electronically, electrically, or mechanically controlled . . . motion picture machines . . . are maintained to show images to persons in booths or viewing rooms where the images so displayed depict or describe specified sexual activities and/or specified anatomical areas.

(2) Adult bookstore or adult video store. A commercial establishment which as one (1) of its principal business purposes offers for sale or rental, for any form of consideration, any one (1) or more of the following:

a. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations that depict or describe specified sexual activities and/or specified anatomical areas; or

b. Instruments, devices, or paraphernalia that are designed for use in connection with specified sexual activities.

Greensboro Code of Ordinances § 30-2-2.7. The Greensboro development ordinances were amended to prohibit the location of a "sexually oriented business" within one thousand two hundred feet of another "sexually oriented business." Greensboro Code of Ordinances § 30-2-2.73.5.

In 2000, Fantasy World submitted an application for a business privilege license to the City tax collector. The application requested a license for a business operating under the name "Xanadu" at 4018 West Wendover Avenue to engage in business associated with retail sales, amusement machines, sale of sundries, and movie sales and rentals. The tax collector visited the business and, by letter dated 14 September 2000, denied Fantasy World's application for a privilege license to operate Xanadu. The letter indicated that the tax collector himself had made the determination that the business was a sexually oriented business, as defined by the amended City development ordinances. The letter further indicated that the tax collector had determined that Fantasy World's operation was in violation of the City's zoning requirement that sexually oriented businesses be at least one thousand two hundred feet apart because it was "under the same roof as" and had "an entry door . . . not more than ninety feet from" another business which the tax collector had determined to be a sexually oriented business. On the basis of this determination, the tax collector denied the privilege license. The letter indicated that the tax collector's decision could be appealed to the City's Zoning Board of Adjustment.

Fantasy World's appeal was heard by the Greensboro Zoning Board of Adjustment in October and November of 2000. At the hear-

ings, the City introduced evidence of inspections of Fantasy World conducted by City Zoning Officers in 1995, 1998, and 2000. The inspection reports showed that sometime in 1998, Fantasy World began offering the option of viewing sixteen "general release" films and fifteen "sexually oriented films" in their mini motion picture theaters. Fantasy World did not call any witnesses to testify at the hearing. The Board made findings of fact and concluded that the tax collector had properly denied Fantasy World's business privilege license on the grounds that its business at 4018 West Wendover Avenue was not in compliance with the City's current zoning requirements applicable to sexually oriented businesses.

Fantasy World filed a petition for *certiorari* in superior court pursuant to N.C.G.S. § 160A-388(e) seeking review of the decision by the Board of Adjustment. Following a hearing on the petition, Judge W. Douglas Albright concluded that the Board's decision was supported by competent, material, and substantial evidence and was not the result of an error in law, and entered an order affirming the Board. From this order, Fantasy World appeals.

II.

The trial court's order was entered pursuant to petitioner's appeal from a zoning board of adjustment, which upheld the decision of the City tax collector. A trial court's review of a zoning board of adjustment is as follows: "Every decision of the [zoning] board [of adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C.G.S. § 160A-388(e) (2003). The trial court sits as an appellate court and its scope of review includes:

> (1) Reviewing the record for errors in law,
>
> (2) Insuring that procedures specified by law in both statute and ordinance are followed,
>
> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of . . . boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Fantasy World, Inc. v. Greensboro Bd. of Adjustment, 128 N.C. App. 703, 706-07, 496 S.E.2d 825, 827 (citation omitted), *disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998).

On an appeal to this court from a superior court's review of a municipal zoning board of adjustment, the standard of review is limited to "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102-03, 535 S.E.2d 415, 417, (2000), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001). The scope of our review is the same as that of the trial court. *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 627, 265 S.E.2d 379, 383 (1980). Questions of law are to be considered by both the superior court and by this Court *de novo*. *Westminster Homes, Inc.*, 140 N.C. App. at 103, 535 S.E.2d at 417.

III.

[1] We first address Fantasy World's contention that the City lacked the authority to deny it a privilege license based on zoning determinations made by the City tax collector. Given the facts and circumstances of the present controversy, we conclude that the City possessed the authority to allow the City tax collector to assess zoning compliance as part of the administration of the privilege license tax and to deny Fantasy World's privilege license on this basis.

"The law is well-settled that a municipality has only such powers as the legislature confers upon it." *Homebuilders Ass'n v. City of Charlotte*, 336 N.C. 37, 41, 442 S.E.2d 45, 49 (1994) (citation and internal quotation marks omitted). In determining what authority a municipality possesses, "the powers granted [to a municipal corporation] in [its] charter will be construed together with those given under the general statutes." *Laughinghouse v. City of New Bern*, 232 N.C. 596, 599, 61 S.E.2d 802, 804 (1950) (citation and quotation marks omitted). "[T]he provisions of [N.C.G.S.] Chapter [160A] and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. . . ." N.C.G.S. § 160A-4 (2003). "[Our courts] treat [160A-4] as a legislative mandate that we are to construe in a broad fashion the provisions and grants of power contained in Chapter 160A." *Homebuilders Ass'n*, 336 N.C. at 44, 442 S.E.2d at 50 (citation and internal quotation marks omitted).

The Legislature has conferred upon the City the authority to impose a privilege license tax on businesses and the authority to regulate land use through zoning. N.C.G.S. § 160A-211 (2003) (privilege license tax); Greensboro City Charter ch. IV, § 4.61 (privilege license tax); N.C.G.S. § 160A-381(a) (2003) (zoning); Greensboro City Charter ch. V, § 5.61 (zoning). In addition, N.C.G.S. § 181.1(c) (2003) explicitly permits a municipality to regulate sexually-oriented businesses through local zoning ordinances.

The City has elected to exercise its taxation powers by enacting an application procedure for obtaining a privilege license, Greensboro Code of Ordinances § 13-36; and a prohibition against operating a business without a privilege license where required, *id.* § 13-32. The City has elected to exercise its land use powers to, *inter alia*, prohibit the location of sexually oriented businesses within one thousand two hundred feet of other sexually oriented businesses, or within five hundred feet of residential neighborhoods. *Id.* § 30-2-2.73.5. Furthermore, the City has enacted an ordinance providing its tax collector with the limited authority to assess zoning compliance before issuing a privilege license:

> If it shall be made to appear to the tax collector and the tax collector shall determine that any licensee or applicant for a [privilege] license is conducting or desires to conduct a business activity pursuant to his privilege license which activity would be in violation of any provision of [the City development ordinances] with respect to permitted and prohibited uses . . . he shall:
>
> (1) Refuse to issue a license to such applicant and so notify him in writing.

Greensboro Code of Ordinances § 13-48. The foregoing ordinance places initial zoning compliance determinations concerning business privilege license applicants in the hands of the tax collector. The present appeal raises a question as to whether the City may give the tax collector this authority.

The privilege license is not a regulatory license of the sort which municipalities may issue pursuant to N.C.G.S. §§ 160A-194 and 181.1(c). Rather, "[t]he privilege license tax is a revenue-generating measure and should not be used to regulate otherwise legitimate business." William A. Campbell, North Carolina City and County Privilege License Taxes 2 (Institute of Government 5th ed. 2000); *see also* G.S. § 160A-211 (located within Article 9 of Chapter 160A, titled "taxa-

tion"). Therefore, although the power to impose a privilege license tax must be construed broadly to include incidental powers, G.S. § 160A-4, the privilege license tax, standing alone, is only a tax and does not carry with it any powers wholly unrelated to its imposition or administration.

"The power to impose a tax . . . include[s] the power to provide for its administration[.]" N.C.G.S. § 160A-206 (2003). The power to administer the privilege license tax includes the authority to require that an application for a privilege license be submitted. *See* Campbell, *supra*, at 2, 45. This application may include questions designed to gather general information about an applicant. *See id.* at 45. Before approving an application, a municipal taxing authority may require that an applicant provide evidence of compliance with applicable law. *See id.* at 3. It follows that a city may require proof that a determination of appropriate usage has been made by the proper zoning authority before issuing a privilege license.[1] Thus, a city may, as part of the administration of the privilege license tax: (1) require that an applicant submit documentation issued by zoning authorities, (2) permit a municipal taxing authority to refer the matter to municipal zoning officials, and/or (3) afford the taxing authority the freedom to make inquiries of zoning officials concerning whether an applicant's business complies with applicable laws.

In the instant case, in addition to the powers which generally accompany the privilege license tax, the City is given the following authority in its Charter:

> The Council may create, combine, consolidate and abolish; may assign functions to; and may organize as it sees fit the work of:
>
> (1) Other offices and positions in addition to [mayor, mayor pro tem, city manager, city clerk, city treasurer, city attorney, chief of police, tax collector, fire chief, and building inspector]; and
>
> (2) Such departments, boards, commissions and agencies as it deems appropriate.

Greensboro City Charter ch. IV, § 4.01(b) (emphasis added). This Charter provision provides the City with the authority to designate zoning compliance assessment responsibilities to its tax collector.

1. For a discussion of this issue, see *Mom N Pops, Inc. v. Charlotte*, 979 F.Supp. 372, 385 (W.D.N.C. 1997) (ruling that a city's practice of referring all privilege license applicants to the city zoning administrator did not convert the privilege license into a regulatory scheme), *aff'd*, 162 F.3d 1155 (4th Cir. 1998).

Accordingly, the City possesses the authority to require its tax collector to assess a privilege license applicant's zoning compliance as part of the administration of the privilege license tax. The City validly exercised this authority in Greensboro Ordinance § 13-48.

Fantasy World contends that this consolidation of privilege license tax administration and zoning administration is a violation of State law. Specifically, Fantasy World argues that the denial of a business privilege license is not a valid remedy for enforcing local zoning ordinances because N.C.G.S. § 160A-175, which sets forth the exclusive ordinance-enforcement remedies available to cities, does not contain the authority to deny a privilege license. We are unpersuaded by this argument.

N.C.G.S. § 160A-175(a) (2003) provides "[a] city shall have power to impose fines and penalties for violation of its ordinances, and may secure injunctions and abatement orders to further insure compliance with its ordinances . . . ." As an initial matter, we note that the denial of a privilege license is, at best, an indirect method of zoning ordinance enforcement and is, therefore, to be distinguished from the remedies set forth in G.S. § 160A-175, which provide for direct enforcement of city regulatory ordinances. Moreover, it is unnecessary to analyze the instant case under G.S. § 160A-175 because we conclude that the City possessed the authority to deny Fantasy World's privilege license on the basis of zoning non-compliance pursuant to the power to administer the privilege license tax. In administering the privilege license tax, the City had the authority to require confirmation of Fantasy World's zoning compliance and the authority to reject Fantasy World's privilege license application where zoning compliance was found wanting.

This assignment of error is overruled.

IV.

[2] We address next Fantasy World's argument that N.C.G.S. § 160A-388(b), which empowers local zoning boards of adjustment to hear zoning appeals, does not confer jurisdiction upon the Greensboro Zoning Board of Adjustment to hear an appeal from the denial of a business privilege license. We do not agree.

The North Carolina General Statutes confer the following appellate authority on a city zoning board of adjustment:

> The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination

> made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part [zoning]. . . . [T]he board shall have all the powers of the officer from whom the appeal is taken.

N.C.G.S. § 160A-388(b) (2003) (emphasis added). The Greensboro City Charter authorizes the City to make the tax collector an official charged with assessing zoning compliance. Greensboro City Charter ch. IV, § 4.01(b). The City has elected to exercise this authority by enacting an ordinance which provides that if the City tax collector denies a privilege license on the basis of an alleged zoning violation, the Zoning Board of Adjustment must hold a hearing and make a final determination with respect to any zoning violations. Greensboro Code of Ordinances § 13-48(b). Thus, the Greensboro Zoning Board of adjustment had jurisdiction to hear an appeal taken from the municipal tax collector's denial of Fantasy World's privilege license based upon his assessment that the business was in violation of local zoning laws.

This assignment of error is overruled.

V.

[3] We next address Fantasy World's argument that Greensboro is barred from asserting that the company is violating local zoning ordinances by the doctrines of *res judicata* and collateral estoppel. This contention lacks merit.

In asserting claim and issue preclusion, Fantasy World relies on the superior court orders denying the City's motion to show cause and denying the City's motion for a permanent injunction. However, neither order amounts to a final judgment on the merits of any issue or claim involved in the present suit, as is required for *res judicata* or collateral estoppel to apply. *See Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986) (setting forth elements of each doctrine). The superior court indicated that its order denying the City's motion to show cause was not on the merits, and the order denying the City's motion for a permanent injunction was based on a lack of jurisdiction.

This assignment of error is overruled.

VI.

[4] We next address Fantasy World's argument that the City erroneously classified Fantasy World's business as a "sexually oriented

business" as the term is defined in Greensboro Code of Ordinances § 30-2-2.7, set forth *supra* at 606-07, 592 S.E.2d at 208, because the business became a legally existing non-conforming use prior to the enactment of the definition the City seeks to apply. The gravamen of this argument is that there is no competent record evidence that the business had not come into compliance with previously existing zoning requirements applicable to adult businesses. *See* Greensboro Code of Ordinances § 30-4-11.2 (permitting continuation of legally existing non-conforming uses). We do not agree.

At the hearing before the Board of Adjustment, a zoning enforcement officer testified that he had inspected Xanadu in 1998 and on September 6, 2000; he described the materials found on the premises on both occasions, which included mostly adult-oriented materials and products, and stated that the premises was essentially the same on both occasions. Moreover, a 1998 report prepared by zoning officers indicated that, although each motion picture viewing booth which was inspected purported to offer one additional "general release" film than "adult content" film, some of the listed "general release" films were not available for viewing. Moreover, nothing in the record indicates that the City ever determined that Fantasy World's present use of 4018 West Wendover Avenue was in full compliance with past or current City development ordinances applicable to sexually oriented businesses.

Thus, there is competent record evidence to support the Board's findings, which in turn support the Board's conclusion that the City's amended development ordinances are applicable to Fantasy World. This assignment of error is overruled.

VII.

[5] We address next Fantasy World's argument there was insufficient evidence presented to the Greensboro Zoning Board of Adjustment to support its conclusion that Fantasy World's business at 4018 West Wendover Avenue violated the City's development ordinances. We disagree.

The function of the reviewing court is "to determine whether the findings of fact made by the Board [of Adjustment] are supported by the evidence before the Board and whether the Board made sufficient findings of fact." *Shoney's v. Bd of Adjustment*, 119 N.C. App. 420, 421, 458 S.E.2d 510, 511 (1995) (citation and quotation marks omitted).

> When the specific issue raised on appeal to this court is whether a Board's decision was supported by competent, material and substantial evidence, our Supreme Court has further held that this court is to inspect all of the competence evidence which comprises the "whole record" so as to determine whether there was indeed substantial evidence to support the Board's decision. Substantial evidence is that which a reasonable mind would regard as sufficiently supporting a specific result.

Appalachian Outdoor Adver. Co., Inc. v. Town of Boone Bd. of Adjustment, 128 N.C. App. 137, 140, 493 S.E.2d 789, 792 (1997) (internal citations omitted).

In the present case, the record upon which the Greensboro Board of Adjustment based its decision contained a report prepared by Zoning Enforcement Officers Barry Levine and Richard Parham following a visit to Fantasy World's business on 18 October 2000. That report contained the following information:

> On entering, we observed a cubicle with lingerie for sale on the left and the customer service counter on the right. Once inside we observed sexually oriented video tapes for sale on the side, rear wall and on three display racks in the middle of the room. We also observed sexually oriented magazines on the walls and stacked on the floor. We also observed erotic devices and miscellaneous marital aids on the back wall and on the right wall near the customer service counter. A rack of adult greeting cards was near the right wall of the erotic devices.

The report also described the mini motion picture theater booths and the titles of movies available for viewing in those booths. According to the report, movies were available on two separate channels: a red channel and a green channel. Each channel offered both "general release" and "sexually oriented" film selections. The report indicated that zoning officers "viewed all of the selections for the red and green channels, both the sexually oriented and general release videos[, and] found all of the adult oriented movies . . . to depict specified sexual activities and/or anatomical areas." Officer Levine also testified about the inspections, and the tax collector, John Rascoe, provided information tending to show that the business was located within one thousand two hundred feet of another sexually oriented business.

Thus, there is competent and sufficient evidence to support the findings of fact made by the Board, which in turn support the Boards's conclusion that Fantasy World, doing business as Xanadu,

was in violation of the City's zoning requirements. This assignment of error is overruled.

VIII.

[6] Finally, we address Fantasy World's constitutional arguments. Fantast World contends that the City's denial of its privilege license constituted an unconstitutional prior restraint against free expression in violation of the First and Fourteenth Amendments of the United States Constitution because: (1) the City's licensing scheme vests unchecked discretion in the City tax collector to deny a business privilege license, and (2) the judicial review of a denial is not sufficiently prompt. We disagree.

Localities may permissibly make adult establishments subject to zoning requirements:

> [A] municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances.

Young v. American Mini Theatres, Inc., 427 U.S. 50, 62, 49 L. Ed. 2d 310 (1976). Zoning ordinances that do not ban adult entertainment altogether but instead place only spacing limitations on such businesses are "properly analyzed as a form of time, place, and manner regulation." *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46, 89 L. Ed. 2d 29, 37 (1986). " '[C]ontent-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47, 89 L. Ed. 2d at 37. A city's interest in attempting to preserve the quality of its urban life meets the "substantial governmental interest" standard. *Id.* at 50, 89 L. Ed. 2d at 39. A city does not "limit alternative avenues of communication" by dispersing or concentrating adult oriented business through valid zoning requirements. *Id.* at 52, 89 L. Ed. 2d at 41.

However, "[l]icensing schemes directed at sexually oriented businesses engaged in protected expressive activity pose special problems because of the risks of censorship and suppression associated with prior restraints on speech." *Chesapeake B & M v. Harford County*, 58 F.3d 1005, 1010 (4th Cir. 1995). "A licensing [scheme] plac-

ing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 100 L. Ed. 2d 771, 782 (1988). "Unbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor's discretion." *Chesapeake B & M*, 58 F.3d at 1009. There is a significant distinction between "exercis[ing] discretion by passing judgment on the content of any protected speech" and "review[ing] the general qualifications of each license applicant"; the latter is "a ministerial action that is not presumptively invalid." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229, 107 L. Ed. 2d 603, 621 (1990) (plurality opinion). In addition, a licensing scheme must not only require a timely decision by the licensing authority but also must "assure a prompt final judicial decision to immunize the deterrent effect of an interim and possibly erroneous denial of a license." *Freeman v. Maryland*, 380 U.S. 51, 58-59, 13 L. Ed. 2d 649, 654-55 (1965).

In the present case, the City tax collector denied Fantasy World's application for a business privilege license pursuant to Greensboro Ordinance § 13-48, set forth *supra* at 610, 592 S.E.2d at 210. We conclude that this ordinance does not create a prior restraint on free expression, and that sufficient procedural safeguards exist to satisfy the applicable constitutional requirements.

To the extent that Greensboro Ordinance § 13-48 involves application of City zoning ordinances, it does not run afoul of constitutional principles. The General Assembly has found that "sexually oriented businesses can and do cause adverse secondary impacts on neighboring properties" and has authorized municipalities to enact location restrictions for such businesses. N.C.G.S. §§ 160A-181.1(a), (c)(1) (2003). Greensboro has enacted restrictions pursuant to this statute. Greensboro Code of Ordinances § 30-2-2.7 (definitions), 30-2-2.73.5 (spacing requirements). The zoning requirements set forth by the City's zoning ordinances, and imposed upon the City tax collector by Greensboro Ordinance § 13-48, easily comport with the Constitutional requirements established in *Renton*, 475 U.S. at 50, 52, 89 L. Ed. 2d at 38, 41.

To the extent that Greensboro Ordinance § 13-48 involves administration of the privilege license tax, it neither places unbridled discretion in tax collection officials, nor denies appropriate judicial relief. The tax collector is authorized to inquire into the zoning compliance of privilege license applicants and is directed to deny the application if an applicant is operating or seeks to operate in violation

of local zoning requirements. Greensboro Code of Ordinances § 13-48. Accordingly, the City tax collector performs the "ministerial function" of applying valid privilege license application processing guidelines and zoning compliance guidelines. The vesting of such authority in a government official is not presumptively invalid, and we discern no constitutional infirmities with the tax collector's application of Greensboro Ordinance § 13-48.

With respect to the requirement for prompt judicial review, the tax collector's zoning decision is immediately appealable to the City Zoning Board of Adjustment, and the Board's decision may be reviewed in superior court upon the filing of a petition for *certiorari*. *See* N.C.G.S. § 160A-388(b),(e) (2003). Fantasy World relies on authority from the United States Sixth Circuit Court of Appeals holding that the possibility of a discretionary writ is insufficient to ensure appropriate judicial review. *See Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County*, 274 F.3d 377, 401 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073, 152 L. Ed. 2d 855 (2002). This case is not binding authority upon this Court, and we decline to extend its reasoning to declare the judicial relief provided in G.S. § 160A-388 to be constitutionally insufficient. Rather, in the instant case, we are persuaded that Fantasy World was afforded the possibility of sufficiently prompt judicial review.

This assignment of error is overruled.

Affirmed.

Chief Judge MARTIN and Judge STEELMAN concur.

JACQUELYNE JONES, PLAINTIFF v. LAKE HICKORY R.V. RESORT, INCORPORATED, DEFENDANT

No. COA02-1114

(Filed 17 February 2004)

1. Negligence— property owner—failure to supervise—parade—not intrinsically dangerous

The trial court erred by instructing a jury that it could find that a resort owner's failure to supervise a 4th of July parade was negligence and rendered it liable to a 14-year old burned by a

rollerblading twelve-year-old boy dressed as the Statue of Liberty and carrying a tiki torch. A parade of golf carts at 5 m.p.h. is not intrinsically dangerous and identical parades had been held for many years without injury.

2. Agency— lessee association as agent of owner—evidence insufficient

The trial court erred by submitting agency to the jury and instructing the jury that it could find a resort owner liable for injuries suffered in a parade conducted by a lessee association based on notice to the association where there was insufficient evidence that the resort owner exercised control over the details of the work of the association.

3. Premises Liability— injury during parade—hazardous condition—evidence of notice by landowner

There was sufficient evidence to permit a jury to find that a resort owner had notice of a hazardous condition in testimony that the assistant manager of the resort could see a twelve-year-old boy rollerblading as the Statue of Liberty with a tiki torch.

4. Negligence— jury verdict for plaintiff—basis not distinguished

A jury verdict for plaintiff against a resort owner arising from a 4th of July parade was remanded where the jury did not distinguish between liability based on the resort owner's failure to supervise the parade, the lessee association as the owner's agent and the associations's notice of the hazard, and notice of the hazard by the owner's assistant manager.

5. Premises Liability— property owner—obvious hazard—warning given

The obviousness of a hazard and a warning given were not enough to preclude submission to the jury of a resort owner's liability where a rollerblading twelve-year-old boy dressed as the Statue of Liberty and carrying a tiki torch lost control and burned plaintiff.

6. Premises Liability— property owner—parade—injury foreseeable

The evidence was sufficient to permit a jury to find that a resort owner could have foreseen an injury from a rollerblading

twelve-year-old boy dressed as the Statue of Liberty and carrying a tiki torch in a 4th of July parade.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgment entered 16 April 2002 and order entered 3 June 2002 by Judge W. Robert Bell in Catawba County Superior Court. Heard in the Court of Appeals 16 April 2003.

Pipkin, Knott, Clark, & Berger, L.L.P., by Bruce W. Berger and Michael W. Clark, for plaintiff-appellee.

Golding, Holden, Cosper, Pope & Baker, L.L.P., by John G. Golding, for defendant-appellant.

GEER, Judge.

A jury awarded $600,000.00 to plaintiff Jacquelyne Jones for serious burns sustained during an annual Fourth of July parade at defendant's Lake Hickory R.V. Resort when she was set aflame by a 12-year-old boy dressed up as the Statue of Liberty, carrying a lit "tiki" torch, and skating on "in-line" roller blades. The parade had been organized by a "Lessee Association" formed of long-term lessees at the campground. Defendant Lake Hickory R.V. Resort, Inc. (the "Resort") argues on appeal primarily that the trial court erred in denying its motions for directed verdict, judgment notwithstanding the verdict, and a new trial because: (1) there did not exist any evidence that the Lessee Association was the agent of the Resort, (2) the Resort had no duty to supervise the parade, and (3) the "tiki" torch accident was not foreseeable. We agree that the Resort had no duty to supervise the parade and that the record contains insufficient evidence of control by the Resort over the Lessee Association's activities to support a finding that the Lessee Association was the Resort's agent. Because, however, the record contains evidence that would permit a jury to find that the Resort's Assistant Manager saw the roller-blading Statue of Liberty and yet took no action to eliminate the foreseeable hazard of the lit "tiki" torch, the trial court properly submitted the question of the Resort's liability to the jury. Since we cannot determine whether the jury based its verdict on its finding that the Lessee Association was the Resort's agent or on the inaction of the Assistant Manager, we must remand for a new trial.

The Resort leased individual lots or campsites at Lake Hickory on both a short-term and a long-term basis. The Resort's rules provided

for a Lessee Association that was responsible for planning and conducting social activities for lessees or campers. For a number of years, the Lessee Association had arranged for a Fourth of July parade composed of decorated golf carts with the Lessee Association awarding prizes for the best decorations.

On 4 July 1996, members of the Lessee Association directed the golf cart drivers how and where to line up their golf carts. Plaintiff, who was 14 years old, her mother, and another young girl drove to the assembly area in their decorated cart and waited to join the procession.

Michael Morris, a 12-year-old camper, was dressed as the Statue of Liberty. He wore in-line roller blades and carried a "tiki" torch. His grandmother planned to pull him behind her golf cart with a water skiing rope. After lighting his torch, Michael began skating around the assembly area in order to display his costume for the best-decorated golf cart competition. He testified that at one point he saw Ernie Melton, the Resort's Assistant Manager, watching from in front of his house. No one told Michael to extinguish the torch.

While the golf carts were lining up, Michael skated toward plaintiff's golf cart. He lost control of the torch, causing it to set plaintiff and her clothes on fire. Plaintiff suffered severe burns to her neck, chin, chest, shoulders, and wrists and received lengthy and painful treatment for her burns at Frye Hospital, Baptist Hospital, and Shriner's Burn Hospital.

Plaintiff brought suit against the Resort for negligence. The case was tried at the 25 March 2002 civil session of Catawba County Superior Court with the Honorable W. Robert Bell presiding. After denying the Resort's motions for a directed verdict, the trial court submitted three issues to the jury:

1. Was the Lessee Association the agent of the defendant, Lake Hickory RV Resort, Inc., at the time of the July 4, 1996 accident, wherein the plaintiff, Jacquelyne Jones, was injured?

2. Was the plaintiff injured by the negligence of the defendant?

3. What amount is the plaintiff entitled to recover for personal injury?

The jury answered the first two questions "yes" and awarded plaintiff $600,000.00.

The trial court denied defendant's motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. In addition, over defendant's objection, the court awarded plaintiff costs in the amount of $7,010.87, including reimbursement for the cost of copies of deposition transcripts, expenses for taking depositions, expert witness fees, and the cost of trial exhibits.

Defendant assigns error to the trial court's denial of its motion for a directed verdict and motion for judgment notwithstanding the verdict. Since defendant chose to offer evidence, defendant waived its motion for a directed verdict made at the close of plaintiff's evidence. *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923, *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998). The question presented by this appeal is whether the evidence of both plaintiff and defendant, when considered in the light most favorable to the plaintiff, was sufficient to submit the first two issues on the verdict sheet to the jury. *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 137, 539 S.E.2d 331, 333 (2000). A trial court should deny a motion for directed verdict and judgment notwithstanding the verdict when it finds more than a scintilla of evidence to support plaintiff's prima facie case. *Lee v. Bir*, 116 N.C. App. 584, 588, 449 S.E.2d 34, 37 (1994), *cert. denied*, 340 N.C. 113, 454 S.E.2d 652 (1995).

As an initial matter, plaintiff argues that defendant did not properly preserve its arguments for appellate review because defendant limited its motion for a directed verdict at the close of plaintiff's evidence to the issue of proximate cause. *See Lee*, 116 N.C. App. at 587, 449 S.E.2d at 37 (because defendant failed to assert certain arguments in connection with his motion for a directed verdict, "defendant has waived his right to appellate review of these issues"). Based on our review of the transcript of the argument on defendant's motion for a directed verdict at the close of plaintiff's evidence, we conclude that defendant did sufficiently raise the arguments that it now asserts on appeal.

Plaintiff contended and the trial court instructed the jury that defendant could be found negligent under two theories: (1) Defendant failed to supervise the parade adequately; or (2) defendant, after having actual notice of Michael Morris' conduct, failed to eliminate the hazard. Defendant argues on appeal that the evidence presented at trial fails to support liability under either theory.

Failure to Supervise the Parade

[1] According to plaintiff, defendant had a duty to ensure that the Fourth of July parade on its property was conducted in a safe manner. Plaintiff relies upon *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977) (operator of recreational facility with swimming area could be held liable for failure to guard against potentially dangerous activities in the lake because water poses inherent danger); *Dockery v. World of Mirth Shows, Inc.*, 264 N.C. 406, 142 S.E.2d 29 (1965) (carnival operator liable for defects in ride operated by independent contractor because the ride was inherently dangerous); *Smith v. Cumberland County Agric. Soc'y.*, 163 N.C. 346, 79 S.E. 632 (1913) (operator of fair liable for failure to protect public from injury during balloon ascension performed by independent contractor).

This Court held in *Blevins v. Taylor*, 103 N.C. App. 346, 350, 407 S.E.2d 244, 246 (citations omitted; quoting *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 259, 17 S.E.2d 125, 128 (1941) and *Deitz v. Jackson*, 57 N.C. App. 275, 280-81, 291 S.E.2d 282, 286 (1982)), *cert. denied*, 330 N.C. 193, 412 S.E.2d 678 (1991), that this line of authority

> does not recognize the existence of a duty to undertake safety precautions unless and until the activity is "sufficiently dangerous." Differently stated, the duty exists only if "harm will likely result if precautions are not taken" by the person with general oversight over the activities. Despite injury to [a lawful visitor], the landowner does not have a duty to inspect or protect against harm where the injury is caused by "a danger collaterally created" by the negligence of another.

This Court " 'may pass upon the intrinsic dangerousness of an activity as a matter of law.' " *Id.* at 351, 407 S.E.2d at 247 (quoting *Deitz*, 57 N.C. App. at 280, 291 S.E.2d at 286). In making that determination, the Court must decide whether there is a " 'recognizable and substantial danger inherent' " in the activity by considering the known conditions under which the activity was carried out and the time, place, and circumstances of the activity. *Id.* (quoting *Deitz*, 57 N.C. App. at 279, 291 S.E.2d at 286). "Intrinsic dangerousness is not 'the ordinary dangerousness which accompanies countless activities when they are negligently performed.' " *Id.* (quoting *Deitz*, 57 N.C. App. at 281, 291 S.E.2d at 286).

In this case, the activity at issue was a parade of decorated golf carts traveling during the day along the Resort's road that had a speed limit of 5 m.p.h. This activity, standing alone, is not intrinsically dangerous. We cannot say that harm was likely to occur during the parade without oversight by the Resort. *See Adamczyk v. Zambelli*, 25 Ill. App. 2d 121, 125, 166 N.E.2d 93, 96 (1960) ("A parade is of itself not a dangerous instrumentality . . . ."). *But see Morbillo v. Board of Educ.*, 269 A.D.2d 506, 507, 703 N.Y.S.2d 241, 242 (2000) ("Here, the school district furnished and invited the public to approach the moving floats, an activity that may be hazardous if left unsupervised.").

Further, the undisputed evidence established that the campers had conducted identical parades for many years without any injuries or dangerous occurrences. Plaintiff has pointed to no evidence that would have placed defendant on notice that hazardous conduct such as that of Michael Morris might occur at the parade. Without such notice, the golf cart parade cannot be considered sufficiently dangerous to require the defendant as the landowner to supervise the parade. The trial court, therefore, erred in instructing the jury that defendant could be found negligent based on a failure to supervise the parade.

Negligence Based on Notice of Hazardous Conduct

Alternatively, plaintiff seeks to impose liability on the Resort for its failure to stop the hazardous conduct of Michael Morris once the Resort knew or reasonably should have known of that conduct. The general duty imposed upon a landowner, such as defendant, "is not to insure the safety of his [lawful visitors], but to exercise ordinary care to maintain his premises in such a condition that they may be used safely by [lawful visitors] in the manner for which they were designed and intended." *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981).

This duty is not limited to conditions on the property, but can require a landowner to protect visitors from the acts of third parties. *Id.* at 638-39, 281 S.E.2d at 38 (when "circumstances existed which gave the owner reason to know that there was a likelihood of conduct on the part of third persons which endangered the safety of his invitees, a duty to protect or warn the invitees could be imposed"). When, however, the danger "arises out of the negligent or intentional act of a third person, the owner or occupier [of property] will not be held liable for negligence if he did not know of the danger and it had not

existed long enough for him to have discovered it, corrected it or warned against it." *Blevins*, 103 N.C. App. at 349, 407 S.E.2d at 246. *See also Aaser v. City of Charlotte*, 265 N.C. 494, 499-500, 144 S.E.2d 610, 615 (1965) (quoting 4 Am. Jur. 2d, Amusements and Exhibitions § 59) (" 'The proprietor is liable for injuries resulting from the horseplay or boisterousness of others, regardless of whether such conduct is negligent or malicious, if he had sufficient notice to enable him to stop the activity. But in the absence of a showing of timely knowledge of the situation on his part, there is no liability.' ").

A. Liability Based on Notice to the Lessee Association.

[2] Plaintiff argues first that the Resort had actual notice through notice to the Lessee Association. Notice to the Lessee Association would constitute notice to the Resort only if the Lessee Association was acting as an agent of the Resort. *See Roberts v. William N. & Kate B. Reynolds Memorial Park*, 281 N.C. 48, 60, 187 S.E.2d 721, 728 (1972) (holding that "[a] principal is chargeable with and bound by the knowledge of or notice to his agent, received while the agent is acting as such within the scope of his authority and in reference to which his authority extends"). We must, therefore, first address whether the record contains sufficient evidence to submit to the jury the question of the Lessee Association's agency.

Ordinarily, the question whether an agency relationship existed between two parties is a question of fact for the jury. *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001). If, however, "only one inference can be drawn from the facts then it is a question of law for the trial court." *Id.*

As this Court has previously stated, "[t]here are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Vaughn v. N.C. Dep't of Human Resources*, 37 N.C. App. 86, 91, 245 S.E.2d 892, 895 (1978), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979). More recently, this Court has confirmed that " '[t]he critical element of an agency relationship is the right of control . . . .' " *Wyatt v. Walt Disney World Co.*, 151 N.C. App. 158, 166, 565 S.E.2d 705, 710 (2002) (quoting *Williamson v. Petrosakh Joint Stock Co.*, 952 F. Supp. 495, 498 (S.D. Tex. 1997)). Specifically, " 'the principal must have the right to control *both the means and the details of the process* by which the agent is to accomplish his task in

order for an agency relationship to exist.' " *Id.* (quoting *Williamson*, 952 F. Supp. at 498; emphasis added). *See also Hylton*, 138 N.C. App. at 636, 532 S.E.2d at 257 (whether or not a party has retained the right of control "as to details" is the "vital test" in determining whether an agency relationship exists); *Hoffman v. Moore Regional Hosp.*, 114 N.C. App. 248, 251, 441 S.E.2d 567, 569 (the principal must have "control and supervision over the details of the [agent's] work"), *disc. review denied*, 336 N.C. 605, 447 S.E.2d 391 (1994).

The parties do not dispute that the Resort granted the Lessee Association authority over "social function[s] for the over all use of residents of Lake Hickory R.V. Resort." The critical question is whether the Resort had the right to control the details of the manner in which the Lessee Association accomplished its purpose of arranging social functions for the Resort's campers.

The Resort's rules provided for the existence of the Lessee Association and specified that the Association's officers had to be long-term lessees. The evidence also established, however, that the officers were nominated and elected by the lessees, the Resort played no role in the selection of the members of the Lessee Association, and no one from the Resort's management was allowed to be a member of the Association. The Lessee Association was self-sustaining financially; it raised money from bingo and other activities.

With respect to how the Lessee Association operated, the Resort's rules provided generally:

> The Association will work in conjunction with management to provide activities, socials, entertainment, etc. for the enjoyment and use of all. . . .
>
> . . . All functions and activities shall be correlated and reviewed by management.
>
> The Association will remain viable only as long as [a] majority of lessees wish for it to do so, and the Association works in harmony with management and residents of Lake Hickory R.V. Resort.

More specifically, the undisputed evidence indicated that the Lessee Association would meet regularly, discuss possible activities, and then vote on those activities. The Lessee Association would submit a list of the activities to the Resort, which would review those activities and, if approved, advertise them in a newsletter distributed to the campers. The evidence is in dispute whether the Resort's review was

limited to scheduling or whether the Resort could veto activities for reasons unrelated to scheduling.

As for the conduct of the activities themselves, the record contains no evidence suggesting that the Resort exercised any control over how the Lessee Association conducted the approved activities. Plaintiff's witness, the wife of the former Assistant Manager and a former employee of the Resort, testified: "The [Lessee Association's] committee members were the ones to control what was done, how it was done, and they had the right to tell someone they could not do something if they thought that it was an endangerment." With respect to the Fourth of July parade, the evidence was undisputed that the Resort did not participate in arranging for the parade or in overseeing the conduct of the parade.

The above evidence does not establish any right of the Resort to control the details of how the Lessee Association accomplished its work in arranging and conducting social activities for campers. A general authority to veto activities does not establish control over the details of the Lessee Association's work. That authority is consistent with a landlord's right to limit how its tenants use the common areas over which the landlord has retained control. Nor are the requirements that the Lessee Association work in conjunction and harmony with the Resort sufficient to establish the degree of control required for an agency relationship. Such a general requirement of cooperation is comparable to other general rules that this Court has found insufficient to support a finding of agency. *See Hylton*, 138 N.C. App. at 636-37, 532 S.E.2d at 257-58 (rules imposed by hospital on doctors were "general in nature" not addressing the details of the doctors' daily work and did not create agency relationship); *Miller v. Piedmont Steam Co.*, 137 N.C. App. 520, 525, 528 S.E.2d 923, 926-27 (2000) (franchise agreement's detailed standards were adopted to ensure quality service and "did not rise to the level of daily control" over the franchisee's operations); *Hayman v. Ramada Inn, Inc.*, 86 N.C. App. 274, 278, 357 S.E.2d 394, 397 (a franchise agreement did not give rise to an agency relationship even though it required the franchisee to comply with certain standards in order to maintain the premises in a clean, safe, and orderly manner and even though the franchisor retained the right to make inspections of the hotel), *disc. review denied*, 320 N.C. 631, 360 S.E.2d 87 (1987). Because of the lack of evidence that the Resort exercised control over the details of the Lessee Association's work, the trial court erred in submitting the issue of agency to the jury and erred in

instructing the jury that it could find defendant liable based on notice to the Lessee Association.[1]

B. Liability Based on Notice to the Resort's Assistant Manager.

[3] The conclusion as to the Lessee Association does not, however, mandate judgment for defendant if defendant received actual notice of the hazardous conduct through some other means. Plaintiff has also contended that the Resort received notice of the hazard through its Assistant Manager, Ernie Melton. The parties stipulated that Melton was an agent of the Resort and that he was acting within the course of his employment on 4 July 1996. If plaintiff offered evidence suggesting that Melton had notice of Michael Morris' conduct, that notice could provide a basis for imposing liability on defendant.[2]

Michael testified that when he was skating with his lit torch, he saw Melton sitting in front of his house. Michael's view of Melton was unobstructed. In arguing that this evidence was insufficient, defendant attacks Michael's credibility and suggests that Michael's ability to see Melton does not establish that Melton saw Michael. These arguments addressing credibility and weight are properly presented to a jury. *State v. Hovis*, 233 N.C. 359, 363, 64 S.E.2d 564, 566 (1951). They are not properly asserted in connection with a motion for a directed verdict or for judgment notwithstanding the verdict. *Freeman v. St. Paul Fire & Marine Ins. Co.*, 72 N.C. App. 292, 299, 324 S.E.2d 307, 311, *disc. review denied*, 313 N.C. 599, 330 S.E.2d 609 (1985). Michael's testimony was sufficient to permit the jury to find that defendant had actual notice of Michael's conduct.

[4] We cannot, however, affirm the jury's verdict finding defendant negligent based on this testimony. Because the jury verdict form did not distinguish between liability based on a failure to supervise, liability based on notice to the Lessee Association, and liability based on notice to Melton, we cannot determine upon which basis the jury found defendant liable. We must, therefore, remand for a new trial. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) ("Where

1. Plaintiff has argued on appeal that defendant may alternatively be held liable based on the theory that defendant and the Lessee Association were acting as a joint enterprise. Since it does not appear that this theory was presented to the trial court or the jury, we will not address it on appeal.

2. While a landowner may be held liable for constructive knowledge of a hazardous condition, plaintiff has not argued that defendant "should have known" of Michael Morris' conduct either because of prior, similar events or because the conduct lasted for such an extended period of time that defendant's employees should have become aware of the conduct.

the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence and the other which is, and, as here, it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict, the error entitles defendant to a new trial.").

Duty to Warn Versus Duty to Correct

[5] Defendant also argues that it could not be held liable because the hazard was obvious and because the President of the Lessee Association warned plaintiff's mother to leave room between her golf cart and Michael Morris. Under the circumstances of this case, however, a jury could conclude that a warning was not adequate and that defendant, upon learning of Michael's conduct, was negligent in not requiring Michael to douse the torch.

In some instances, neither a warning nor the obvious nature of the hazard will be sufficient for the landlord to avoid liability for negligence. A warning will not satisfy a landowner's duty "[i]f a reasonable person would anticipate an unreasonable risk of harm to a visitor on his property, notwithstanding the lawful visitor's knowledge of the danger or the obvious nature of the danger . . . ." *Martishius v. Carolco Studios, Inc.*, 142 N.C. App. 216, 223, 542 S.E.2d 303, 308 (2001), *aff'd*, 355 N.C. 465, 562 S.E.2d 887 (2002). The landowner then "has a duty to take precautions to protect the lawful visitor." *Id.* In addition, this Court held in *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646, *cert. denied*, 351 N.C. 107, 541 S.E.2d 148 (1999), "[w]hen a reasonable occupier of land should anticipate that a dangerous condition will likely cause physical harm to the lawful visitor, notwithstanding its known and obvious danger, the occupier of the land is not absolved from liability."

Here, the lit "tiki" torch was not a fixed object that could readily be avoided. Rather, Michael Morris was skating about on roller blades and, therefore, the direction that the hazard would move could not be predicted. Melton, defendant's Assistant Manager, testified as to the danger, confirming that had he known about Michael's plan in advance, he would have vetoed it because "it's dangerous. It was ridiculous, stupid. . . . To carry a lighted torch on a pair of skates, do you not think that's stupid or dangerous[?]" Given the nature of this hazardous condition, a jury could find that the Resort would satisfy its duty only through elimination of the hazard by requiring that Michael extinguish his torch.

Proximate Cause

[6] Melton's candid testimony also disposes of defendant's argument regarding proximate cause. Michael's conduct was, in Melton's words, "stupid or dangerous" precisely because it created the risk that someone would be burned by the torch. Although the critical issue with respect to proximate cause is the foreseeability of the plaintiff's injury, the law does not require that the precise injury be foreseeable to the defendant. *Martishius*, 355 N.C. at 479, 562 S.E.2d at 896. Instead, the plaintiff is only required to prove that the defendant "might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565 (1984) (internal quotation marks omitted). The evidence in this case is sufficient to permit a jury to find that defendant could have foreseen or expected that an injury might occur if Michael was allowed to continue to roller-blade with the lit "tiki" torch.

Conclusion

We therefore conclude that the record contains sufficient evidence for a jury to find defendant liable for plaintiff's injuries. Because this liability may not be based on the theories that defendant failed to supervise the golf cart parade or that the Lessee Association was defendant's agent, we must remand for a new trial. Given our disposition of this case, we do not address defendant's remaining assignments of error.

New trial.

Judge TIMMONS-GOODSON concurs.

Judge BRYANT concurs in part and dissents in part in a separate opinion.

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

I fully concur in the majority opinion with respect to the issue of duty to supervise and liability based on notice to the Resort's assistant manager but dissent as to the majority's application of the law on agency.

The majority opinion analyzes the element of control by looking for evidence of *actual* control exerted by the Resort. The case law, however, including every case cited in the majority opinion, focuses on the "*right* to control." *See Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 166, 565 S.E.2d 705, 710 (2002) (" '[t]he critical element of an agency relationship is the right of control, and the principal must have the right to control both the means and the details of the process by which the agent is to accomplish his task in order for an agency relationship to exist' ") (citation omitted); *Hylton v. Koontz*, 138 N.C. App. 629, 636, 532 S.E.2d 252, 257 (2000) ("[t]he 'vital test' in determining whether an agency relationship exists 'is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details' ") (citation omitted); *Hoffman v. Moore Reg'l Hosp.*, 114 N.C. App. 248, 250, 441 S.E.2d 567, 569 (1994) ("[t]he key factor is whether the alleged employer has the right to supervise and control the details of the work performed by the alleged employee"); *see also Hodge v. McGuire*, 235 N.C. 132, 136, 69 S.E.2d 227, 230 (1952) (noting that "possession of the right to exercise control over the servant may be quite as determinative of the relation of master and servant as is the actual exercise of such control" and deeming evidence of right to control sufficient to establish such a relationship).

In this case, there is evidence that the Resort delegated the duty to hold social functions on the Resort property to the Lessee Association and retained the right to review all those functions. In addition, there was testimony from employees that the Resort retained the power to deny activities, that employees would sit in on committee meetings held by the Lessee Association, that the committee would supply the Resort with a list of activities on a monthly basis, and that the Resort enforced its rules to keep the grounds safe. Thus, the majority opinion errs in concluding that there was no evidence on the element of control over the details of the activities by the Lessee Association, and the Resort is not entitled to judgment notwithstanding the verdict on the issue of agency.

Based on the foregoing, I would affirm the trial court's denial of the motion for judgment notwithstanding the verdict as to the issue of agency.

STATE OF NORTH CAROLINA v. ARTHUR DICKENS

No. COA03-99

(Filed 17 February 2004)

1. **Assault— firearm on law officer—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the offense of assault with a firearm on a law enforcement officer regarding Officer Brown, because: (1) defendant knew or had reasonable grounds to know that Officer Brown was a law enforcement officer when defendant's conduct, including his question to the officer as to why he was being arrested, his physical resistance to the arrest, his attempt to frustrate the officer's call for assistance, and his assault against the officer, indicated defendant's knowledge of Officer Brown's status; and (2) defendant assaulted the officer, with a gun when he grabbed another officer's gun, raised it toward Officer Brown, and fired a shot.

2. **Assault— firearm on law officer—lesser-included offenses—assault by pointing a gun—assault with a deadly weapon**

The trial court did not commit plain error by failing to instruct the jury on the offenses of assault by pointing a gun and assault with a deadly weapon as lesser-included offenses of assault with a firearm on a law enforcement officer, because: (1) assault by pointing a gun was not a lesser-included offense when it does not include the element of pointing a gun at a person; and (2) the evidence indicated that defendant knew or had reasonable grounds to know that the pertinent individual was an officer, and the mere possibility that a jury might reject the evidence that defendant knew he was an officer does not require submission of assault with a deadly weapon as a lesser-included offense.

3. **Constitutional Law— double jeopardy—assault with deadly weapon—assault with firearm on law officer**

The trial court committed plain error by failing to arrest judgment on the assault with a deadly weapon conviction because this conviction and the conviction for assault with a firearm on a law enforcement officer amounted to double jeopardy.

4. Sentencing— Level VI offender—out-of-state offenses

The trial court did not err by sentencing defendant as a Level VI offender even though defendant contends the State did not prove his out-of-state offenses were substantially similar to the North Carolina offenses, because: (1) defendant did not object to the introduction of evidence of his prior record level worksheet and in fact admitted his prior record level at sentencing; and (2) defendant's failure to object meant he did not preserve this issue for appellate review.

5. Constitutional Law— effective assistance of counsel—failure to request jury instruction—failure to request proof of out-of-state offenses

Defendant was not denied the right to effective assistance of counsel based on his counsel's failure to request jury instructions on the offenses of assault with a deadly weapon and assault by pointing a gun, and his failure to request proof that defendant's out-of-state offenses were substantially similar to the North Carolina offenses, because: (1) it was not error for the trial court to fail to instruct the jury on the offenses of assault with a deadly weapon and assault by pointing a gun, and thus, counsel's failure to request such instructions cannot be considered prejudicial; (2) defendant failed to show the probability of a different result at trial had counsel not committed the alleged errors; and (3) counsel successfully defended defendant by obtaining acquittals on two of the five charges.

On writ of certiorari to review judgments dated 23 August 2001 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 29 October 2003.

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

Beaver, Holt, Sternlicht, Glazier, Carlin, Britton & Courie, P.A., by Haral E. Carlin, for defendant-appellant.

BRYANT, Judge.

Arthur Dickens (defendant) seeks review by writ of certiorari of judgments dated 23 August 2001 entered consistent with a jury verdict[1] finding him guilty of assault with a firearm on a law enforce-

1. We note that the jury verdict sheets caption defendant as Arthur Dickens AKA: Arthur Thomas Dickens.

ment officer, assault with a deadly weapon, and resisting a public officer. This Court granted writ of certiorari on 1 October 2002.

The evidence at trial indicates that on 16 November 2000, Officers Thomas Wilder and B. Greg Brown of the City of Rocky Mount, North Carolina were assigned to execute an arrest warrant for defendant, believed to be in Rocky Mount, based on his probation violation in New York. At about 7:00 p.m., the officers, dressed in plain clothes, drove an unmarked vehicle to the Rocky Mount home of defendant's aunt and uncle. There, the aunt informed the officers that defendant was living in her home and that her son, who was driving a black Corsica, was on his way to pick up defendant from his workplace.

After waiting for defendant on the street outside the aunt's home for thirty minutes, the officers left. They decided to stop at a nearby store to get a drink. As their vehicle approached the store, they observed a black Corsica in the parking lot. The officers pulled into the parking lot, checked a photograph of defendant, and recognized him as one of the customers inside the store.

After the officers entered the store, Officer Wilder approached defendant and asked for his name. When defendant stated a fictitious name, Officer Wilder displayed his police badge and identified himself as a police officer. Following defendant's examination of the badge, Officer Wilder asked defendant for his home address, date of birth, and age. Defendant's answers were inconsistent with information in the officers' possession. Officer Wilder then told defendant he was under arrest, and both officers attempted to handcuff him. Defendant pulled his hands away from the officers while demanding the reason for his arrest. The officers replied they were executing an arrest warrant based on a probation violation in New York. Defendant continued to pull away his hands. Officer Wilder told Officer Brown, "[L]et's take him to the ground," to which Officer Brown replied, "I can't get a hold of him." Officer Wilder then forced defendant to the ground and ordered him to stop resisting, while Officer Brown simultaneously attempted to hold on to defendant's legs. Officer Brown also radioed for assistance, stating "602 to Central, officer needs assistance in Battleboro," at which time defendant grabbed the radio from Officer Brown and slid it across the floor. Defendant continued to resist, trying to flee through the store's front door as the officers struggled to handcuff him. Officer Brown informed two store employees and another civilian to stay away. At one point, defendant stood up, but Officer Wilder pushed defendant back to the ground and got

on top of him. While wrestling with defendant, Officer Wilder's gun slipped from his belt, whereupon defendant reached out and grasped it. Officer Wilder screamed, "[H]e's got my gun, he's got my gun," and using both hands, Officer Wilder pushed down on the gun in defendant's hand as it was "coming in [Officer Brown's] direction." Defendant fired one shot, which hit drinks in a display case. Officer Brown stood up and got in front of defendant. Officer Wilder jumped back, and Officer Brown fired three shots at defendant, hitting him in the chest, arm, and leg. Most of the incident was recorded by video surveillance cameras inside the store, and the recording was admitted into evidence.

While defendant was treated at the hospital for his wounds, he told the officers guarding him he had resisted arrest because he did not want to go to prison in New York and that he had intended to use the gun to harm himself, not the arresting officers.

At the close of the State's evidence, defendant moved to dismiss the charges, and the trial court denied the motion. Defendant did not present any evidence at trial. The trial court instructed the jury on the following offenses: (1) assault with a firearm on a law enforcement officer, (2) assault with a deadly weapon with intent to kill and (3) the lesser-included offense of assault with a deadly weapon, and (4) resisting arrest. The jury subsequently convicted defendant of: (1) assault with a firearm on a law enforcement officer as to Officer Brown, (2) assault with a deadly weapon as to Officer Brown, and (3) resisting arrest as to Officer Wilder. The defendant was found not guilty of assault with a firearm on a law enforcement officer as to Officer Wilder and assault with a deadly weapon with intent to kill as to Officer Wilder.

The issues are whether: (I) the trial court erred in denying defendant's motion to dismiss the offense of assault with a firearm on a law enforcement officer as to Officer Brown; (II) the trial court committed plain error by failing to instruct the jury on the offenses of assault by pointing a gun and assault with a deadly weapon as lesser-included offenses of assault with a firearm on a law enforcement officer; (III) the trial court committed plain error by not arresting judgment on the assault with a deadly weapon conviction; (IV) the trial court erred in sentencing defendant as a Level VI offender; and (V) defendant was denied the right to effective assistance of counsel.

I

[1] Defendant first argues the trial court erred in denying his motion to dismiss the offense of assault with a firearm on a law enforcement officer as to Officer Brown.[2] We disagree.

A defendant's motion to dismiss challenging the sufficiency of the evidence to sustain a conviction is properly denied if the evidence and reasonable inferences therefrom are such that a rational trier of fact could find beyond a reasonable doubt the existence of each essential element of the crime charged and that defendant was the perpetrator of the offense. *State v. Abraham*, 338 N.C. 315, 328, 451 S.E.2d 131, 137 (1994). The motion is to be considered in the light most favorable to the State. *Id.*

The elements of the offense of assault with a firearm on a law enforcement officer are: (1) an assault; (2) with a firearm; (3) on a law enforcement officer; (4) while the officer is engaged in the performance of his duties. *State v. Haynesworth*, 146 N.C. App. 523, 531, 553 S.E.2d 103, 109 (2001); *see* N.C.G.S. § 14-34.5(a) (2003). "An assault is 'an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which *show of force or violence* must be sufficient to put a person of reasonable firmness in fear of immediate physical injury.' " *State v. Childers*, 154 N.C. App. 375, 382, 572 S.E.2d 207, 212 (2002) (emphasis in original) (citation omitted). In proving the element of assault, the State does not have to show the defendant pointed a firearm at a law enforcement officer. *Id.* Furthermore, to be guilty of this offense, the defendant must have known or had reasonable grounds to know that the victim was a law enforcement officer. *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985).

Viewed in the light most favorable to the State, the evidence in the instant case was sufficient to sustain a conviction of assault with a firearm on a law enforcement officer. The evidence shows defendant knew or had reasonable grounds to know that Officer Brown was a law enforcement officer: Officers Wilder and Brown entered the store together, with Officer Brown "slightly behind [and to the] right side" of Officer Wilder when Officer Wilder presented his badge, iden-

2. Defendant also argued the trial court erred in: (1) denying his motion to dismiss the charges of assault with a deadly weapon with intent to kill and (2) failing to set aside the verdict on the conviction of assault with a deadly weapon. We do not address these arguments because: (1) defendant was acquitted of the charges of assault with a deadly weapon with intent to kill and (2) we hold at a later part of the opinion that the judgment on assault with a deadly weapon is to be vacated.

tified himself as a law enforcement officer,[3] and announced that defendant was under arrest.[4] Defendant asked Officer Brown why he was under arrest, and Officer Brown explained a warrant for his arrest had been issued for a probation violation in New York. Officer Brown assisted in the struggle to subdue and handcuff defendant, including telling civilians to stay back. Officer Brown radioed the police department, and defendant grabbed his radio to throw it away. Finally, defendant raised a gun toward Officer Brown. Defendant's conduct, including his question to Officer Brown, his physical resistance to the arrest, his attempt to frustrate Officer Brown's call for assistance, and his assault against Officer Brown, indicates knowledge of Officer Brown's status as a law enforcement officer.

The evidence also shows defendant assaulted Officer Brown with a firearm when he grabbed Officer Wilder's gun, raised it toward Officer Brown, and fired a shot. *See Haynesworth*, 146 N.C. App. at 530, 553 S.E.2d at 109 (in a prosecution for assault with a firearm on a law enforcement officer where the evidence showed that the defendant removed the officer's handgun from its holster, took aim at the officer, and fired a shot at the officer, the element of assault was properly proven). Therefore, this assignment of error is overruled.

II

[2] Defendant next contends the offenses of assault by pointing a gun and assault with a deadly weapon are lesser-included offenses of assault with a firearm on a law enforcement officer, and that the trial court committed plain error by failing to instruct the jury on the lesser-included offenses. We disagree.

> "[A]ll of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser[-]included offense. The determination is made on a *definitional*, not a factual basis."

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3. Although the surveillance videotape did not show Officer Wilder's display of his badge and self-identification, the evidence demonstrates that the surveillance camera recorded at a three-second interval and, as a result, certain acts during the arrest were not recorded.

4. The arresting officers' testimony that Officer Wilder announced to defendant that he was under arrest was affirmed by Charles Hawkins, the store employee who witnessed the arrest. The testimony of Monica Pittman, the other store employee, was neutral and not favorable to defendant's position because she did not hear the conversation between Officer Wilder and defendant.

State v. Hudson, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997) (emphasis in original) (citation omitted).

The elements of the offense of assault with a firearm on a law enforcement officer are: (1) an assault; (2) with a firearm; (3) on a law enforcement officer; (4) while the officer is engaged in the performance of his duties. *Haynesworth*, 146 N.C. App. at 531, 553 S.E.2d at 109; *see* N.C.G.S. § 14-34.5(a).

The elements of the offense of assault by pointing a gun are: (1) pointing a gun at a person; (2) without legal justification. *See* N.C.G.S. § 14-34 (2003); *In re J.A.*, 103 N.C. App. 720, 724, 407 S.E.2d 873, 875 (1991). Assault by pointing a gun is not a lesser-included offense of assault with a firearm on a law enforcement officer because the latter offense does not include the element of pointing a gun at a person. *See Childers*, 154 N.C. App. at 382, 572 S.E.2d at 212 (in proving the element of assault for the offense of assault with a firearm on a law enforcement officer, the State does not have to show the defendant pointed a firearm at a law enforcement officer).

The elements of the offense of assault with a deadly weapon are: (1) an assault of a person; (2) with a deadly weapon. *See* N.C.G.S. § 14-33(c)(1) (2003). Assault with a deadly weapon is a lesser-included offense of assault with a firearm on a law enforcement officer as a firearm is considered a deadly weapon. *State v. Partin*, 48 N.C. App. 274, 282, 269 S.E.2d 250, 255 (1980). Consequently, we proceed to determine whether the trial court erred in failing to instruct the jury on the lesser-included offense of assault with a deadly weapon.

Preliminarily, we note defendant failed to object to the jury instructions before the jury retired to deliberate, and thus, we review for plain error only. *See State v. Thomas*, 153 N.C. App. 326, 337, 570 S.E.2d 142, 149, *disc. review denied*, 356 N.C. 624, 575 S.E.2d 759 (2002). Plain error is "a fundamental error so prejudicial that justice cannot have been done." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602-03 (2003). "To prevail, the 'defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result.' " *Id.* (citations omitted).

> "[T]he trial court is not . . . obligated to give a lesser[-]included instruction if there is 'no evidence giving rise to a reasonable inference to dispute the State's contention.' " "The mere possibil-

ity that a jury might reject part of the prosecution's evidence does not require submission of a lesser[-]included offense."

Thomas, 153 N.C. App. at 337, 570 S.E.2d at 149 (citations omitted).

In this case, the trial court instructed the jury on the following offenses: assault with a firearm on a law enforcement officer (as to both officers), assault with a deadly weapon with intent to kill (as to both officers), assault with a deadly weapon (as a lesser-included offense of assault with a deadly weapon with intent to kill, as to both officers), and resisting arrest (as to Officer Wilder).

We hold the trial court did not commit plain error in failing to instruct the jury on assault with a deadly weapon as a lesser-included offense of assault with a firearm on a law enforcement officer. As stated previously, the evidence indicates defendant knew or had reasonable grounds to know Officer Brown was a law enforcement officer. "The mere possibility that a jury might reject [the evidence that defendant knew Brown was an officer] does not require submission of [assault with a deadly weapon] as a lesser[-]included offense." *Id.* Therefore, the trial court did not commit error in failing to instruct the jury on the lesser-included offense of assault with a deadly weapon. *See id.* at 338, 570 S.E.2d at 149. Accordingly, this assignment of error is overruled.

III

[3] Defendant next argues the trial court committed plain error by not arresting judgment on the assault with a deadly weapon conviction as to Officer Brown because this conviction and the conviction for assault with a firearm on a law enforcement officer amounted to double jeopardy. We agree.

"[T]he constitutional guaranty against double jeopardy protects a defendant from multiple *punishments* for the same offense." *Partin*, 48 N.C. App. at 281, 269 S.E.2d at 255 (emphasis in original). In *Partin*, this Court held that "[a]ssault and the use of a deadly weapon (in this case, a firearm) are necessarily included in the offense of assault on a law enforcement officer with a firearm . . . , for which [the] defendants were convicted[; t]his result punishes [the] defendants[] twice for the offense." *Id.* at 282, 269 S.E.2d at 255. The Court in *Partin* then vacated the judgment on the assault with a deadly weapon conviction. *Id.*; *see also State v. Summrell*, 282 N.C. 157, 172-74, 192 S.E.2d 569, 578-79 (1972) (finding double jeopardy and vacating judgment on the assault on an officer conviction where that

conviction and a conviction of resisting an officer were based on the same conduct); *State v. Ezell*, — N.C. App. —, —, 582 S.E.2d 679, 684 (2003) (finding double jeopardy and vacating judgment on assault inflicting serious injury conviction where defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious bodily injury and assault inflicting serious bodily injury based on the same conduct).

In the instant case, defendant was convicted of assault with a firearm on a law enforcement officer and assault with a deadly weapon based on the same conduct. Because assault with a deadly weapon, a firearm, is necessarily included in the offense of assault with a firearm on a law enforcement officer, the judgment on assault with a deadly weapon should have been arrested by the trial court. *See id.* Therefore, we vacate the judgment as to the assault with a deadly weapon conviction.

IV

[4] Defendant further contends the trial court erred in sentencing him as a Level VI offender. Specifically, defendant contends the State did not prove his out-of-state offenses were substantially similar to the North Carolina offenses and thus the prior record level points were improperly computed.

At sentencing, the State, defendant through counsel, and the trial court engaged in the following colloquy:

[STATE]: . . . [F]or purposes of sentencing, here's a worksheet, Your Honor.

. . . .

[COUNSEL]: I'd like to see the worksheet . . . .

[COURT]: Sure you may see the worksheet.

. . . .

[COUNSEL]: . . . . I'm not challenging the efficacy of the worksheet. . . . I move the court for a verdict, notwithstanding the jury's verdict, based on the evidence.

[COURT]: Motion denied. . . .

. . . .

[COUNSEL]: . . . [Defendant] has been convicted of an A1 misdemeanor I do believe, and a Class E felony. He's

got a prior record. I'm not disputing that he's a Level VI for punishment purposes. . . .

. . . .

[STATE]: . . . I think [defendant] should serve the maximum sentence available under the law.

. . . .

[COUNSEL]: . . . . If the court is inclined to give him the maximum sentence, I would request that we have a certified copy of that New York record here prior to sentencing. Outside of that, then I move the court to consider the North Carolina record alone. Without a certified copy of the record for the court's consideration I've got a problem with it.

Defendant did not object to the introduction of evidence of his prior record level worksheet and in fact admitted his prior record level at sentencing. Because the record indicates defendant did not preserve this issue for appellate review by objection, it is deemed abandoned. *See* N.C.R. App. P. 10(b)(1). This assignment of error is overruled.

V

[5] Defendant finally argues he was denied the right to effective assistance of counsel because defense counsel failed to request (1) jury instructions on the offenses of assault with a deadly weapon and assault by pointing a gun and (2) proof that his out-of-state offenses were substantially similar to the North Carolina offenses.

A defendant's counsel is presumed to act with reasonable professional judgment. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002). "Reviewing courts should avoid the temptation to second-guess the actions of trial counsel, and judicial review of counsel's performance must be highly deferential." *Id.* at 113, 558 S.E.2d at 488.

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. First, he must show that counsel's performance fell below an objective standard of reasonableness. Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different.

Id. (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984) and *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985)). Further, the reviewing " 'court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies[, for t]he object of an ineffectiveness claim is not to grade counsel's performance.' " *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248-49 (citation omitted).

As we concluded earlier, it was not error for the trial court to fail to instruct the jury on the offenses of assault with a deadly weapon and assault by pointing a gun. Therefore, counsel's failure to request such instructions cannot be considered prejudicial. Further, defendant fails to show the probability of a different result at trial had counsel not committed the errors of which he complains. In fact, we note that of the five charges submitted to the jury, counsel successfully defended defendant by obtaining acquittals on two charges. Therefore, this assignment of error is overruled.

No error in part and vacate judgment as to assault with a deadly weapon.

Judges McCULLOUGH and TYSON concur.

STATE OF NORTH CAROLINA v. ROBERT CHARLES POSTON, DEFENDANT

No. COA02-1745

(Filed 17 February 2004)

1. Sexual Offenses— first-degree—times specified in indictments—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of first-degree sexual offense even though defendant contends there was a lack of evidence that the offenses were committed during the periods specified in the indictments, because: (1) the general rule is that where time is not of the essence of the offense charged and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal; (2) in sexual abuse cases involving young

children, some leniency surrounding the child's memory of specific dates is allowed; (3) defendant did not assert an alibi defense regarding the dates of the first-degree sexual offenses or rely in any other manner upon the dates in the indictments in preparing his defense; and (4) there was no double jeopardy concern when the number of first-degree sexual offense incidents corresponded to the number of indictments issued and the evidence supported the contention that the jury was careful in distinguishing among dates.

2. Sentencing— Fair Sentencing Act—Structured Sentencing Act—first-degree sexual offense—indecent liberties

Defendants' consolidated sentences for two first-degree sexual offenses and indecent liberties are vacated, and 00 CRS 55038 is remanded for resentencing under the Structured Sentencing Act whereas 00 CRS 55036 is remanded for resentencing in accord with the Fair Sentencing Act, because the evidence introduced at trial and during the sentencing hearing was insufficient to permit the trial court to sentence defendant for the 1994 first-degree sexual offense under the Fair Sentencing Act when testimony that the incident occurred when the victim was around seven, a time frame arguably covering more than a year with the critical date at its center, supports only a suspicion or conjecture that the crime occurred prior to 1 October 1994.

3. Criminal Law— jury request for portion of transcript—improper emphasis on one portion of evidence

The trial court did not abuse its discretion in a first-degree statutory sexual offense and indecent liberties case by denying the jury's request that it be read a portion of the transcript of defendant's testimony, because the trial court expressed a legitimate concern that allowing the jury to hear defendant's testimony, but not his wife's, would improperly emphasize one portion of the evidence over another. N.C.G.S. § 15A-1233(a).

Appeal by defendant from amended judgments entered 21 February 2002 by Judge W. Robert Bell in Cleveland County Superior Court. Heard in the Court of Appeals 27 October 2003.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Daniel Shatz, for defendant-appellant.

GEER, Judge.

Defendant Robert Charles Poston appeals from two first degree statutory sexual offense convictions (based on events allegedly occurring in 1994 and 1997) and one conviction of committing indecent liberties. We affirm defendant's convictions, but reverse defendant's sentence as to the 1994 first degree sexual offense because the State failed to establish that the incident occurred prior to 1 October 1994 and thus failed to establish that defendant should be sentenced under the Fair Sentencing Act (in effect only until 1 October 1994) as opposed to the currently applicable Structured Sentencing Act.

Facts

Both the State and defendant offered evidence. The State called as witnesses the victim H.P.; H.P.'s mother and defendant's former wife, Patricia Welch; Detective Beaver, who had taken statements from H.P. and her mother; and Dr. Christopher Cerjan, who had examined and interviewed H.P. Defendant testified on his own behalf, recalled Ms. Welch as a witness, and offered the testimony of three character witnesses.

The evidence viewed in the light most favorable to the State tended to show the following. H.P. lived with her mother and defendant (who was her father) at three different locations. Until she was age seven, they lived on Artree Road; from age seven until age ten, they lived at Juniper Terrace; from sometime in 1997 until August 1999, they lived on Padgett Road; and from August 1999 through October 1999, they lived on Gaffney Road. The transcript does not reveal H.P.'s date of birth, but the record on appeal states: "Although it is unclear from the transcript, [H.P.]'s date of birth, as established by the documentary evidence[,] is October 8, 1987."

H.P. testified that when she was living on Artree Road, at "[a]round 5 or 6" years of age, defendant on one occasion touched her breasts and between her legs. H.P. testified that when she was "[a]round seven" and living at Juniper Terrace, defendant digitally penetrated her. H.P. also testified about three separate occasions on which defendant forced her to squeeze his penis. Detective Beaver testified that H.P. had told him about a second instance in which defendant digitally penetrated her.

After H.P. moved to Padgett Road (when she was age ten or eleven), defendant engaged in sexual intercourse with her and then inserted his tongue in her vagina. She testified about a subsequent

second instance of sexual intercourse also when she was "[a]round 10." Detective Beaver testified that H.P. reported to him that defendant had, on other subsequent occasions at Padgett Road, squeezed her breast, digitally penetrated her, and performed cunnilingus.

H.P. testified that defendant again engaged in sexual intercourse with her after they moved to Gaffney Road in August 1999. Her parents subsequently separated, but she and her brothers visited defendant at his apartment. H.P. testified that one day in January 2000, H.P., her brothers, and defendant were all lying on the same bed in defendant's apartment. Defendant touched her on top of her clothes.

Detective Beaver testified, without any objection or limiting instruction, about H.P.'s statements to him. He confirmed that H.P. had told him about some of the incidents to which she testified and that she had reported to him some additional events to which she did not testify at trial.

Dr. Cerjan, a pediatrician, was accepted by the trial court as an expert in pediatrics and child sexual abuse. Dr. Cerjan took a history from H.P. and performed a full physical examination. Dr. Cerjan testified, without any objection or limiting instruction, that H.P. had told him about the incident at Artree Road when she was age five, about two incidents "[a]round age 7" when defendant forced her to touch his "privates," about two incidents of sexual intercourse (one at Padgett Road and one at Gaffney Road), and about defendant's touching her in January 2000. During the physical examination, Dr. Cerjan observed: "She had some tissue where the skin around her privates was somewhat thickened and what we would call redundant. On closer examination, her hymen was missing on the right side with some irregular borders of the hymen that was from about 4 to 6 o'clock." Dr. Cerjan expressed his opinion, without any objection, that H.P. had been sexually abused with some form of penetration.

Defendant was originally indicted on fifteen separate charges arising out of the alleged sexual abuse of his daughter H.P. from 1993 through January 2000. At the close of the State's evidence, the State dismissed three charges of first degree sexual offense and six charges of indecent liberties with a child. Two charges of rape, two charges of first degree sexual offense, and two charges of indecent liberties were submitted to the jury. The jury acquitted defendant of both rape charges and one indecent liberties charge. It convicted him of both charges of first degree sexual offense (alleged in the indictments as occurring between 1 June 1994 and 31 July 1994 and between 8

October 1997 and 16 October 1997) and the remaining indecent liberties charge (alleged in the indictment as occurring between 1 May 1993 and 31 December 1993).

The trial court initially sentenced defendant to a consolidated sentence of 230 to 285 months in accordance with the Structured Sentencing Act. *See* N.C. Gen. Stat. § 15A-1340.17(c), (e) (2003). Approximately three and a half months later, the State moved to resentence defendant on the grounds that the indecent liberties conviction and one of the first degree sexual offense convictions were based on events occurring before the Structured Sentencing Act went into effect on 1 October 1994. *See* N.C. Gen. Stat. § 15A-1340.10 (2003). The State argued that as to these two convictions, defendant should instead have been sentenced under the Fair Sentencing Act as in effect prior to 1 October 1994. *See* N.C. Gen. Stat. § 14-1.1(a)(2) (1993) (repealed 1993 N.C. Sess. Laws ch. 538, § 2). The court granted the State's motion and entered an amended judgment, consolidating the indecent liberties conviction and the first degree sexual offense conviction based on the 1994 acts, and imposing a life sentence. The court also imposed a concurrent sentence of 230 months to 285 months for the second first degree sexual offense conviction.

I

[1] Defendant argues first that the trial court erred in denying his motion to dismiss the charges of first degree sexual offense. A trial court properly denies a defendant's motion to dismiss "[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it . . . ." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988). "Substantial" evidence is such "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). If, however, the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the perpetrator, the motion to dismiss should be allowed. This is true even though the suspicion is strong." *State v. Alston*, 310 N.C. 399, 404, 312 S.E.2d 470, 473 (1984) (citations omitted). The evidence must be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. *Locklear*, 322 N.C. at 358, 368 S.E.2d at 382.

Defendant does not contend that the record lacks substantial evidence that he committed the offenses, but rather argues that dis-

missal was appropriate because of a lack of evidence that the offenses were committed during the periods specified in the indictments. While an indictment must include a designated date or period of time within which it alleges the offense occurred, N.C. Gen. Stat. § 15A-924(a)(4) (2003), our courts have recognized the general rule that "[w]here time is not of the essence of the offense charged and the statute of limitations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal." *State v. Locklear*, 33 N.C. App. 647, 653-54, 236 S.E.2d 376, 380, *disc. review denied*, 293 N.C. 363, 237 S.E.2d 851 (1977). Nevertheless, as our Supreme Court has stressed,

> [t]his general rule, which is intended to prevent "a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill [of indictment] and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense."

State v. Stewart, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001) (quoting *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961)).

Our courts have also adopted a principle of leniency regarding dates when the case involves a child's testimony. The Supreme Court explained in *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 (citations and internal quotation marks omitted), "[i]n sexual abuse cases involving young children, some leniency surrounding the child's memory of specific dates is allowed. Unless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs."

A. Application of the General Rule

Indictment 00 CRS 55038 charged defendant with first degree sexual offense and alleged that the acts took place during the period 1 June 1994 through 31 July 1994. At trial, H.P. testified that the incident occurred when she was "[a]round seven" while she was living at Juniper Terrace, her residence from age seven until she was approximately age ten. Detective Beaver testified that H.P. had told him that the incident occurred when she "was seven years old." H.P. turned seven years old on 8 October 1994.

Indictment 00 CRS 55042 alleged the occurrence of a first degree sexual offense between 8 October 1997 and 16 October 1997. The par-

ties agree that this instance of first degree sexual offense occurred at the same time as the first alleged rape. The victim H.P. testified that it occurred when she was "[a]round 10" and maybe at age eleven, while the family was living at Padgett Road. H.P. turned ten on 8 October 1997. Defendant testified that they lived at Padgett Road from 1997 until August 1999.

Defendant did not assert an alibi defense regarding the dates of the first degree sexual offenses or rely in any other manner upon the dates in the indictments in preparing his defense. Under the general rule, any variance between the dates in the indictments and the evidence would, therefore, not be material. *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569. Moreover, this Court has already held that evidence comparable to that presented in this case is sufficient given the principle of leniency for child witnesses in sexual abuse cases. *State v. Blackmon*, 130 N.C. App. 692, 697, 507 S.E.2d 42, 46 (when date of offense was not material, testimony of minor child that sexual acts "occurred when she was seven years old and that some of those acts happened when it was cold outside and some when it was warm outside" was sufficient for an indictment specifying the time frame of 1 January 1994 through 12 September 1994), *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998).

Defendant argues, however, that the dates of the offenses are material because of the effect of the Double Jeopardy Clause and, as to indictment 00 CRS 55038, because of the need to determine whether defendant should be sentenced under the Fair Sentencing Act or the Structured Sentencing Act. We consider these arguments separately.

B. Double Jeopardy

Defendant contends that the State's dismissal of nine of the fifteen indictments made the dates of the offenses material. According to defendant, unless the date alleged in the indictment is deemed material, the jury could have convicted him of an offense already dismissed in violation of the Double Jeopardy clause. Defendant is correct that jeopardy attached with respect to the charges dismissed by the State at the close of its evidence. *See State v. Vaughan*, 268 N.C. 105, 107, 150 S.E.2d 31, 32-33 (1966) (jeopardy attaches as soon as a defendant in a criminal prosecution is placed on trial on a valid indictment, before a court of competent jurisdiction, after arraignment, after plea, and when a competent jury has been empaneled and

sworn). We do not, however, believe that this fact requires dismissal of indictments 00 CRS 55038 and 00 CRS 55042.

The State dismissed three first degree sexual offense indictments: 00 CRS 55049 alleging occurrence between 8 October 1994 and 7 October 1995, 00 CRS 55048 alleging occurrence between 1 January 1997 through 7 October 1997, and 00 CRS 55043 alleging occurrence between 1 November 1997 and 31 December 1997. That dismissal left only 00 CRS 55038 alleging occurrence between 1 June 1994 and 31 July 1994 and 00 CRS 55042 alleging occurrence between 8 October 1997 and 16 October 1997.

The evidence reflected five separate incidents amounting to first degree sexual assault. H.P. testified about an initial incident of digital penetration occurring while she lived at Juniper Terrace when she was approximately seven years of age. She testified that when she was living at Padgett Road, there was a second incident of first degree sexual assault involving cunnilingus, which occurred at the same time she was raped. Detective Beaver and Dr. Cerjan provided corroborating testimony regarding the first instance of sexual assault at Juniper Place as well as the rape and cunnilingus at Padgett Road. Detective Beaver, however, also reported a subsequent, separate instance of first degree sexual assault at Juniper Terrace involving digital penetration and two subsequent, separate instances at Padgett Road involving digital penetration and cunnilingus.

In other words, the number of first degree sexual offense incidents corresponded to the number of indictments issued. As a result, the circumstances of this case do not present a double jeopardy concern. If, as the general rule provides, the date of the offense is not material, then the critical issue is whether there is an indictment for each alleged offense. When, as here, there is a corresponding number of indictments and offenses, then double jeopardy would only be a concern if the dates on the indictment were material. Defendant's argument becomes circular.

If, hypothetically, more indictments had been issued than incidents, then defendant's contention might be valid. As Judge McCrodden noted in her concurring opinion in *State v. McKinney*, 110 N.C. App. 365, 375, 430 S.E.2d 300, 306 (McCrodden, J., concurring) (quoting *State v. Wise*, 66 N.C. 120, 124 (1872)), *appeal dismissed and disc. review denied*, 334 N.C. 437, 433 S.E.2d 182 (1993), absent evidence of the same number of incidents as indictments "time would have a 'most important effect upon the punishment,' because

defendant would have received two consecutive [terms of imprisonment] for identical offenses based upon the same act, in violation of defendant's Fifth Amendment right not to be twice tried for the same offense."

With respect to indictment 00 CRS 55042, defendant also argues that the State dismissed the wrong indictment, pointing to the fact that the indictment for rape bore the time frame of 1 January 1997 through 7 October 1997, the same period specified in the dismissed indictment 00 CRS 55048 for first degree sexual offense. The jury's verdict of not guilty as to that rape charge, however, supports the State's contention that the jury was careful in distinguishing among dates. The jury could reasonably conclude, based on the trial court's instructions, that the State had failed to prove that a rape occurred during the period 1 January 1997 through 7 October 1997 if it also concluded that the contemporaneous sexual offense occurred on another date.

Accordingly, we find that double jeopardy concerns do not, under the circumstances of this case, render the dates of the offenses material.

C. Fair Sentencing Act

[2] As to indictment 00 CRS 55038, defendant contends that the date of the offense is material because that date is dispositive in deciding whether defendant should be sentenced under the Fair Sentencing Act or the Structured Sentencing Act. Structured sentencing "applies to criminal offenses in North Carolina . . . that occur on or after October 1, 1994." N.C. Gen. Stat. § 15A-1340.10. If the offense occurred prior to 1 October 1994, defendant was required to be sentenced to life in prison as a Class B felon under the Fair Sentencing Act. On the other hand, if the crime took place on or after 1 October 1994, the trial court was required to sentence defendant as a Class B1 felon to a term of months under the Structured Sentencing Act.

We disagree that this fact rendered the date of the offense material for purposes of reviewing defendant's conviction. The date does not have any bearing on whether or not defendant committed the offense. Defendant's argument addresses only whether defendant was properly sentenced.

When a defendant challenges the trial court's sentence, the "standard of review is 'whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.' " *State v. Deese*,

127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997) (quoting N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996)). We hold that the evidence introduced at trial and during the sentencing hearing was insufficient to permit the trial court to sentence defendant under the Fair Sentencing Act. *See State v. Branch*, 134 N.C. App. 637, 639-40, 518 S.E.2d 213, 215 (1999) (trial court was required to apply the Fair Sentencing Act to crimes committed on 19 September 1994 and the Structured Sentencing Act to crimes committed on 4 October 1994 "as a matter of law").

The victim H.P. testified that the incident occurred when she was "[a]round seven"; Detective Beaver testified twice that H.P. reported to him that "at this time [she] was seven years old." The record contains no other evidence as to the date of the occurrence. Since H.P. turned seven years old on 8 October 1994, a week after structured sentencing went into effect, H.P.'s statement to Detective Beaver would indicate that the incident occurred after 1 October 1994. The testimony that it occurred when H.P. was "[a]round seven"—a time frame arguably covering more than a year with the critical date at its center—supports only a suspicion or conjecture that the crime occurred prior to 1 October 1994.

This testimony is not sufficient to meet the State's burden of establishing that defendant should be sentenced under the Fair Sentencing Act. *See United States v. Knowles*, 66 F.3d 1146, 1164 (11th Cir. 1995) (In order for the defendant to be sentenced under the Federal Sentencing Guidelines, in effect for offenses occurring after 1 November 1987, "[t]he government was required to prove that the conspiracy continued after November 1, 1987, and . . . they failed to carry their burden. We therefore vacate the defendants' sentences, and remand for resentencing pursuant to pre-Guidelines law."), *cert. denied sub nom. Wright v. United States*, 517 U.S. 1149, 134 L. Ed. 2d 568, 116 S. Ct. 1449 (1996); *United States v. Harrison*, 942 F.2d 751, 760 (10th Cir. 1991) ("The government simply has not met its burden of establishing that the . . . conspiracy continued past the effective date of the sentencing guidelines."). Because the State has failed to meet its burden of demonstrating that the more severe sentencing statute is applicable, we remand 00 CRS 55038 for resentencing under the Structured Sentencing Act. *See Bell v. United States*, 349 U.S. 81, 83, 99 L. Ed. 905, 910, 75 S. Ct. 620, 622 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

II

[3] As to all three convictions, defendant contends that the trial court erred in denying the jury's request that it be read a portion of the transcript of defendant's testimony. We hold that the trial court did not abuse its discretion.

During deliberations, the jury submitted a request in writing: "Could we have read, to us the transcript when Mr. Poston stated to his wife, that he may have done something to [H.P.] that he should not have done. Or have a copy of his testimony?" In his testimony, Mr. Poston had denied any such statement, but his wife had testified that he told her, "I think I done something to [H.P.] that I shouldn't have done." Counsel for defendant had no objection to submitting Mr. Poston's testimony to the jury, but resisted the State's request that the court also provide the jury with his wife's testimony. The trial court expressed concern about emphasizing one portion of the evidence over another and stated, "In the exercise of my discretion, I'm going to tell them that they need to rely upon their memory of the evidence as presented."

Under N.C. Gen. Stat. § 15A-1233(a) (2003), the decision whether to allow a jury to review trial testimony lies within the discretion of the trial court. This Court reviews the trial court's exercise of discretion to determine whether the ruling " 'was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Perez*, 135 N.C. App. 543, 555, 522 S.E.2d 102, 110 (1999) (quoting *State v. Dial*, 122 N.C. App. 298, 308, 470 S.E.2d 84, 91, *disc. review denied*, 343 N.C. 754, 473 S.E.2d 620 (1996)), *appeal dismissed and disc. review denied*, 351 N.C. 366, 543 S.E.2d 140 (2000). When, as here, the trial court expressed concern that allowing the jury to hear Mr. Poston's testimony, but not his wife's, would emphasize one portion of the evidence over another, we hold that the trial court did not abuse its discretion. *Id.*

Conclusion

We affirm defendant's convictions. We vacate defendant's consolidated sentence as to indictments 00 CRS 55036 and 00 CRS 55038 and remand 00 CRS 55036 (indecent liberties) for resentencing in accordance with the Fair Sentencing Act and 00 CRS 55038 (first degree sexual offense) for resentencing in accordance with the Structured Sentencing Act.

No error, vacated and remanded as to 00 CRS 55036 and 00 CRS 55038 for resentencing.

Chief Judge EAGLES concurred prior to 31 January 2004.

Judge HUNTER concurs.

IN THE MATTER OF RHOLETTER, ELIZABETH, A MINOR CHILD, DOB: 6-27-87; IN THE MATTER OF RHOLETTER, GLORIA, A MINOR CHILD, DOB: 2-2-89; MACON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER V. BOBBY RHOLETTER, SHIRLEY M. RHOLETTER, SHERRY L. HEATON, RESPONDENTS

No. COA02-1753

(Filed 17 February 2004)

1. Child Abuse and Neglect— neglect—findings of fact

The trial court did not err in a juvenile neglect adjudication by finding that there was clear, cogent, and convincing evidence to support its dispositional findings of fact including that the children's biological mother completed construction of her home and that respondent stepmother informed DSS that she would continue to be part of respondent father's life, because: (1) a DSS social worker testified that the biological mother had done some construction to the home and it was finished a couple of months ago; (2) a DSS summary references the pertinent conversation between the social worker and the stepmother; and (3) even though the father contends the stepmother's statements are unreliable due to her mental illness, it is the trial court's role to assess witness credibility.

2. Child Abuse and Neglect— neglect—findings of fact—conclusions of law—best interest of child

The trial court did not err in a juvenile neglect adjudication by concluding that it was in the best interest of the juveniles for the biological mother to be awarded custody, because: (1) the trial court made uncontested findings of fact that respondent father had knowledge that his minor daughters were abused by their stepmother and failed to protect them; (2) respondent had no plans to divorce his wife and has had a difficult time believing that the juveniles have been abused; and (3) the trial court found

no adjudications of abuse or neglect of any juveniles by the biological mother.

3. Child Abuse and Neglect— *Petersen* presumption—best interests of child standard

Although respondent father contends the trial court erred in a juvenile neglect adjudication by using the *Petersen* presumption to award custody of the juveniles to their biological mother, any misapplication of the presumption is without consequence because the trial court used the best interest of the child standard to award custody of the juveniles to their biological mother.

4. Child Abuse and Neglect— neglect—findings of fact—conclusions of law—reasonable efforts of DSS

The trial court did not err in a juvenile neglect adjudication by concluding that DSS made reasonable efforts to prevent the need for the placement of the juveniles and to reunify them with respondent father, because DSS completed two family services case plans with respondent father outlining what needed to be accomplished, provided supervised visits between respondent and the juveniles, and provided family counseling to the parties involved in addition to other services.

5. Child Abuse and Neglect— custody restored to parent—periodic judicial reviews of placement not required

The trial court was not required to conduct a hearing pursuant to N.C.G.S. § 7B-905 within 90 days of placing the juveniles with their biological mother, because N.C.G.S. § 7B-906 provides that if at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

6. Child Abuse and Neglect— neglect—findings of fact—conclusions of law—proper care and supervision

The trial court did not err in a juvenile neglect adjudication by concluding as a matter of law that the juveniles' biological mother is willing and able to provide proper care and supervision of the juveniles in her home, because: (1) the court found as fact that she has never been convicted of child abuse or neglect of any juveniles and maintains a clean and appropriate home; (2) supervised and unsupervised visits between the mother and the juveniles have gone well and both DSS and the guardian ad litem recommend the mother be awarded custody; and (3) although

respondent father contends the mother's male friend poses a threat to the juveniles based on the fact that the friend's daughter alleged he sexually assaulted her, the mother was ordered by the court to prohibit her friend from visiting her home or having any contact with the juveniles under any circumstances.

7. Child Abuse and Neglect— Interstate Compact on Placement of Children—failure to adopt home study recommendation

The trial court did not err in a juvenile neglect adjudication by placing the juveniles with their biological mother in South Carolina without following the mandates of the Interstate Compact on the Placement of Children (Compact) under N.C.G.S. § 7B-3800, because: (1) the trial court was not obligated to follow the mandates of the Compact when it did not place the juveniles in foster care or as a preliminary to adoption; and (2) the trial court was not obligated to follow the South Carolina DSS home study recommendation.

8. Trials— incomplete transcript—juvenile dispositional hearing

Respondent father's due process rights and statutory right to meaningful appeal review were not violated based on an incomplete transcript of the juvenile neglect dispositional hearing, because respondent failed to show that the transcript was altogether inaccurate and inadequate.

Appeal by respondent Bobby Rholetter from dispositional orders entered 27 February 2002 by Judge Bradley B. Letts in Macon County District Court. Heard in the Court of Appeals 8 October 2003.

Jones, Key, Melvin & Patton, P.A., by Chester M. Jones, for petitioner-appellee.

Mary G. Holliday for Guardian ad Litem-appellee, Catherine Wright.

Kay S. Murray for respondent-appellant.

TIMMONS-GOODSON, Judge.

Respondent Bobby Rholetter ("respondent") appeals the dispositional orders of the trial court awarding custody of two minor children to their biological mother, Sherry L. Heaton ("Heaton"). For the reasons stated herein, we affirm the orders of the trial court.

The pertinent factual and procedural history of the instant appeal is as follows: On 16 May 2001, the Macon County Department of Social Services ("DSS") filed a petition alleging that Elizabeth Rholetter ("Elizabeth") and Gloria Rholetter ("Gloria") (collectively as "the juveniles") were abused and neglected by respondent and Shirley M. Rholetter ("Shirley"), respondent's wife. An adjudication hearing was held wherein the trial court made the following pertinent findings of fact:

> 7. That on April 30, 2001, [Elizabeth] and [Shirley] did argue and fuss and [Elizabeth] was sent to her room. Thereafter, [Shirley] did go to [Elizabeth's] room and a fight broke out between [Elizabeth] and [Shirley]. [Elizabeth] did not start the fight. In the course of the fight, [Shirley] did hit [Elizabeth] with her open hand and her fist. She hit [Elizabeth] in [the] stomach and arm. She also pulled out a "hunk" of [Elizabeth's] hair.
>
> 8. That on this same occasion, [Gloria] did assist in trying to break up the fight, as aforesaid. She advised the Court that [Shirley] did have a hold of [Elizabeth's] hair and did have her legs around the neck of [Elizabeth], choking [her]. [Gloria] called law enforcement about the incident. [Gloria] saw [Shirley] swing at her and [Shirley] did hit [Gloria] in the side of the head and shoulder with a cookie jar, causing the cookie jar to break.
>
> . . . .
>
> 10. That after this April 30, 2001, incident as aforesaid, [DSS] attempted, without success, to work with [respondent] to address the situation and he met its representatives at the end of the Rholetter driveway and was very belligerent and hostile. [DSS] attempted to work with him on three occasions after the April 3, 2001, incident above-referenced before filing a Petition herein and securing a nonsecure custody order. On one occasion, [respondent] did not even answer the door or otherwise acknowledge [DSS] despite being present at his home when [DSS] attempted to discuss the matter with him. At no time prior to the filing of the Petition was [respondent] cooperative with [DSS] in its efforts to address the April 30, 2001, incident above-referenced.
>
> . . . .
>
> 12. That shortly after Christmas, 2000, [Shirley] did have another physical confrontation with [Elizabeth] in which [Shirley] did

choke [Elizabeth] and hit her above her eye leaving a bruised eye. Additionally, she kicked [Elizabeth] in the back. [Elizabeth] did tell [respondent] of the same the next day after it occurred in an effort to get the same stopped. [DSS] did investigate this incident and [respondent] delayed and obstructed [DSS's] investigation of the same.

. . . .

14. That [Shirley] hits [Elizabeth] or [Gloria] sometimes daily and sometimes only two times per week.

. . . .

19. [Shirley] was arrested on or about April 30, 2001, for two counts of misdemeanor child abuse and two counts of simple assault as a result of the April 30, 2001, incident above referenced, and went to jail.

20. That when [Shirley] was arrested as aforesaid, she was intoxicated and very belligerent.

. . . .

22. That [respondent], the biological father of [the juveniles] did not respond to the charges against his wife arising out of the April 30, 2001, incident above-referenced.

23. That [respondent] knew or should have known all the physical violence that was going on between [the juveniles] and [Shirley] and should have taken appropriate steps to stop the same. However, [respondent] has failed to take appropriate steps to prevent or eliminate the same and as a result, the physical violence toward [the juveniles] has continued, culminating in the April 30, 2001, incident above-referenced.

. . . .

28. That [Shirley] has smoked crack cocaine in the presence of [the juveniles]. She has advised [the juveniles] that it was crack cocaine.

29. That on [Gloria's] birthday, [Shirley] did take the $400.00 which was to be used for [Gloria's] birthday and she did buy crack cocaine with the same, causing [Gloria] to cry.

. . . .

> 33. That [respondent] knew or should have known of the serious drug and/or alcohol abuse problems of [Shirley], but took no steps or took insufficient steps to deal with the same and continued to allow [Shirley] to serve as the caretaker for [the juveniles] while he knew or should have known that she was abusing alcohol and/drugs [sic] while caring for [the juveniles] and while he was at work.

Based on the trial court's findings of fact, the court concluded that respondent neglected the juveniles and that Shirley neglected and abused the juveniles. The trial court entered an order awarding DSS the legal and physical care, custody and control of the juveniles. The court further ordered that the juveniles' placement was within DSS's discretion pending a dispositional hearing. Respondent did not appeal this order.

On 19 November 2001, a dispositional hearing was held in which the trial court made the following findings of fact, to which respondent assigns error and argues on appeal.

> 26. The construction of the house of [Heaton] has been completed and that there will be a bedroom for [the juveniles].
>
> 27. That the concern raised by the second home study of contact with Mr. David McAlister is not a sufficient concern to rebut the constitutional presumption that [Heaton] is a fit and proper person to exercise custody of her minor children pursuant to Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994) and those decisions of the Courts of the State of North Carolina applying Petersen.
>
> . . . .
>
> 29. On August 23, 2001, [DSS] had a conversation with [Shirley], the step-mother and caretaker for [the juveniles]. She advised [DSS] that she is very much in the picture. She informed [DSS] that she was going to "take care of business here" (i.e. her time sentenced to jail) and then come back to Franklin, N.C. She informed [DSS] that this was the best thing that ever happened to [respondent] and those girls, because he never spent time with them and at least now he was having to. She went on to inform [DSS] that since the girls have lived with someone else other people will see how the girls really are.
>
> . . . .

37. That the biological mother of [the juveniles] is willing and able to provide proper care and supervision for [the juveniles] and that the residence of the biological mother is a safe home to [the juveniles].

Based on these findings and others not reproduced above, the trial court concluded as a matter of law the following to which respondent assigns error:

2. That pursuant to the provisions of N.C. Gen. Stat. Section 7B-903(a)(2)(b), the Court is of the opinion that the best interests of [the juveniles] would be served by the Court placing custody of [the juveniles] with [Heaton], the biological mother of [the juveniles], and should be ordered at this time.

3. That [Heaton], the biological mother of [the juveniles] has the constitutional presumption of fitness pursuant to Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994) and its progeny, the presumption that she is a fit and proper person to exercise custody of [the juveniles].

4. That [DSS] has made reasonable efforts to prevent or eliminate the need for placement of [the juveniles] and reunify [the juveniles] with [their] family.

5. [DSS] is no longer required to make reasonable efforts to prevent or eliminate the need for placement of [the juveniles] and to reunify [them] with [their] family.

6. That [Heaton], the biological mother of [the juveniles] is willing and able to provide proper care and supervision of [the juveniles] in a safe home for [the juveniles].

The trial court thereafter entered an order placing the legal care, custody, and control of the juveniles with Heaton. Respondent appeals the dispositional order.

The issues on appeal are whether: (I) there is clear and convincing evidence to support the trial court's dispositional findings of fact; (II) the dispositional findings of fact support the conclusions of law; (III) the trial court was required to follow the recommendation of the South Carolina Department of Social Services; and (IV) the transcript of the dispositional hearing adequately represents the evidence and testimony therein.

The trial court found as a fact and concluded as a matter of law that Heaton retains her constitutional presumption of fitness pursuant to *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), and that Heaton is willing and able to provide proper care and supervision of Elizabeth and Gloria in a safe home. These determinations, however, are more properly designated as conclusions of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997). Any determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law. *Id.* As such, the trial court's determination that Heaton retains her *Petersen* presumption and that she is willing and able to provide proper support in a safe home for Elizabeth and Gloria are more properly delineated as conclusions of law. *See id.*

I.

The North Carolina General Statutes define an abused juvenile as follows:

> [A]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker:
>
> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means . . .

N.C. Gen. Stat. § 7B-101(1) (2003). The statutes further define a neglected juvenile as follows:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker . . . or who lives in an environment injurious to the juvenile's welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where . . . another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2003).

In a neglect adjudication, the trial court's findings of fact must be supported by clear and convincing, competent evidence. *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676. If supported by clear and convincing, competent evidence, the findings of fact are deemed conclu-

sive, even if some evidence supports contrary findings. *Id.*; *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984).

[1] In the case *sub judice*, clear and convincing, competent evidence supports the trial court's findings of fact that Heaton completed the construction on her home and that Shirley informed DSS that she would continue to be part of respondent's life. Stacey Jenkins ("Jenkins"), a DSS social worker, testified that Heaton had "done some construction to the home and it was finished a couple of months back." The record also includes a DSS summary which references the conversation between Jenkins and Shirley at issue in this appeal. Respondent does not argue that the conversation never took place, instead, he argues that the court should have found Shirley's statements unreliable due to her mental illness. It is the trial court's role to assess witness credibility. *In re Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996). Accordingly, we conclude that the findings of fact contested by respondent are indeed supported by clear and convincing, competent evidence. Thus, this assignment of error is overruled.

II.

Respondent next assigns error to the numerous conclusions of law drawn by the trial court from the findings of fact. Our review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact. *Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

A.

[2] A neglected juvenile may be placed in the custody of the noncustodial parent if the trial court determines such disposition to be in the best interests of the child. N.C. Gen. Stat. § 7B-903 (2003). There is no burden of proof at the dispositional hearing. *In re Dexter*, 147 N.C. App. 110, 114, 553 S.E.2d 922, 924 (2001). The court must only consider the best interests of the child. *Id.* In the case *sub judice*, the trial court made uncontested findings of fact that respondent had knowledge that his minor daughters were abused by Shirley and failed to protect them. The trial court further found that respondent had no plans to divorce Shirley and "has had a difficult time believing that [the juveniles have] been abused . . . ." Conversely, the court found no adjudications of abuse or neglect of any juvenile by Heaton. The conclusion of law that it is in the best interest of the juveniles for Heaton to be awarded custody is supported by the findings of fact.

B.

[3] Respondent next contends that the trial court improperly used the *Petersen* presumption to award custody of the juveniles to their mother. In *Petersen*, the North Carolina Supreme Court found that in custody disputes between parents and third parties, parents have a constitutionally-protected paramount right to the custody, care, and control of their children. *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). The Supreme Court based this principle on the presumption that a fit parent will act in the best interest of their child. *Brewer v. Brewer*, 139 N.C. App. 222, 229, 533 S.E.2d 541, 547 (2000). When the *Petersen* presumption is not implicated, the court must use the best interest of the child standard to determine the proper placement of the child. *See Jones v. Patience*, 121 N.C. App. 434, 440, 466 S.E.2d 720, 723-24 (1996). As the trial court in the case *sub judice* used the best interest of the child standard to award custody of the juveniles to Heaton, any misapplication of the *Petersen* presumption is without consequence. *Id.*

C.

[4] Respondent next assigns error to the trial court's conclusion that DSS made "reasonable efforts" to prevent the need for the placement of the juveniles and to reunify them with respondent. We find no error by the trial court.

"Reasonable efforts" is defined by the Juvenile Code as "diligent and timely use of permanency planning services by [DSS] to develop and implement a permanent plan" for the juveniles. N.C. Gen. Stat. § 7B-101 (2003). In this case, DSS completed two family services case plans with respondent "outlining what needs to be accomplished," provided supervised visits between respondent and the juveniles, and provided family counseling to the parties involved in addition to other services provided by DSS which are enumerated in the record. This evidence supports the conclusion that DSS made reasonable efforts to prevent the juvenile's removal from respondent's home. *See Helms*, 127 N.C. App. at 512-13, 491 S.E.2d at 676-77.

D.

[5] Respondent argues that the trial court was required to conduct a hearing within 90 days of placing the juveniles with Heaton pursuant to General Statutes § 7B-905. However, Section 7B-906 provides that "if at any time custody is restored to a parent, . . . the court shall be relieved of the duty to conduct periodic judicial reviews of

the placement." N.C. Gen. Stat. § 7B-906(d) (2003). While the trial court did not return custody of the children to respondent, it did restore custody of the children to their mother, Heaton. Thus, by restoring custody of the children to a parent, the trial court was relieved of the duty to conduct periodic judicial reviews of the placement pursuant to N.C. Gen. Stat. § 7B-906(d). *See Dexter*, 147 N.C. App. at 115, 553 S.E.2d at 925.

E.

[6] Respondent further argues that the trial court erred by concluding as a matter of law that Heaton is willing and able to provide proper care and supervision of the juveniles in her home. We disagree.

In the present case, the court found as fact that Heaton has never been convicted of child abuse or neglect of any juvenile and maintains a clean and appropriate home. The court further found that supervised and unsupervised visits between Heaton and the juveniles have gone well and that both DSS and the Guardian ad Litem recommend Heaton be awarded custody of said juveniles. Respondent argues that Heaton's friend, Mr. David McAlister, poses a threat to the juveniles because McAlister's daughter alleged he sexually assaulted her, yet the record does not suggest that there has been a court finding of abuse or neglect on the part of McAlister. Heaton was ordered by the court to prohibit McAlister from visiting her home or having any contact with the juveniles under any circumstances. These findings of fact support the conclusion of law that Heaton is willing and able to provide proper care and supervision of the juveniles in a safe home. *See Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676.

III.

[7] Respondent next assigns error to the trial court's placement of the juveniles with their biological mother in South Carolina. Respondent asserts that the trial court was obligated to follow the mandates of the Interstate Compact on the Placement of Children ("Compact") as set forth in General Statutes § 7B-3800 (2003). We disagree.

The purpose of the Compact is to promote cooperation between party states in the interstate placement of children. N.C. Gen. Stat. § 7B-3800 (2003). As a condition for placement, the Compact reads in pertinent part that "[n]o sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement

in *foster care* or as a *preliminary to a possible adoption* unless the sending agency shall comply with each and every requirement set forth in this Article . . . ." Art. III(a) (emphasis added). When the statutory language is clear and unambiguous, there is no room for judicial construction and the courts must give the words of the statute their plain meaning. *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). We hold that the language in General Statutes § 7B-3800 is clear and unambiguous.

In the case *sub judice*, the trial court did not place the juveniles in foster care or as a preliminary to adoption. The trial court granted custody of the juveniles to their biological mother. Thus, under the plain meaning of the statute, the trial court was not obligated to follow the mandates of the Compact.

On 4 June 2001, the trial court ordered the South Carolina Department of Social Services to complete a home study on Heaton. An employee of the South Carolina Department of Social Services met with Heaton in August and October of 2001 but declined to recommend placement of the juveniles with Heaton at either time. It is clear from the trial court's findings of fact that the court reviewed said studies in determining the best interests of the juveniles, but declined to follow South Carolina's recommendation.

Our Supreme Court has held that "[t]he essential requirement[] at the dispositional hearing . . . is that sufficient evidence be presented to the *trial court* so that *it* can determine what is in the best interest of the child." *In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984) (emphasis added). Furthermore, North Carolina caselaw is replete with situations where the trial court declines to follow a DSS recommendation. *See, e.g., In re Shermer*, 156 N.C. App. 281, 288, 576 S.E.2d 403, 408 (2003). Therefore, the trial court was not obligated to follow the home study recommendation. For the aforementioned reasons, we overrule respondent's assignment of error.

IV.

[8] In his last argument, respondent asserts that the transcript of the dispositional hearing is incomplete and therefore his constitutional right to due process and his statutory right to meaningful appellate review is denied. We disagree.

If a transcript is altogether inaccurate and no adequate record of what transpired at trial can be reconstructed, the court must remand for a new trial. *In re Hartsock*, 158 N.C. App. 287, 293, 580 S.E.2d 395,

399 (2003). Respondent specifically argues that the failure to properly record part of Jenkins' testimony at the dispositional hearing violates his rights to due process and meaningful appellate review. However, none of the nine findings of fact and conclusions of law in which respondent assigns error are supported solely on Jenkins' testimony. Thus, we conclude that respondent fails to evidence that the transcript is altogether inaccurate and inadequate. *See id.*

Affirmed.

Judges HUDSON and ELMORE concur.

STATE OF NORTH CAROLINA v. ALVIN TERRILL FOSTER, JR.

No. COA03-348

(Filed 17 February 2004)

1. Drugs— trafficking in cocaine by possession—possession with intent to manufacture, sell, or deliver cocaine—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 possession with intent to manufacture, sell, or deliver cocaine, because: (1) knowledge of the weight of the cocaine was not an element of the trafficking charge, and as long as the amount found in defendant's possession is equal to or greater than 28 grams, a conviction for trafficking may be obtained; and (2) there was evidence from which a reasonable mind could conclude that defendant was purchasing the cocaine as a dealer with the intent to manufacture, sell, or deliver.

2. Criminal Law— entrapment—failure to instruct plain error

The trial court committed plain error in a trafficking in cocaine by possession and possession with intent to manufacture, sell, or deliver cocaine case by failing to instruct the jury on the defense of entrapment, because: (1) based on defendant's version of the controlled sale by the police, it was possible that defendant was tricked by law enforcement into buying a larger

amount of cocaine than he intended; and (2) there was a reasonable possibility that given an entrapment instruction the jury, considering defendant's previous "user" purchase, the determination of the police to target someone for at least an ounce of cocaine, the immediate arrest following defendant's acceptance of the squeezed-up package, and the fact that the informant was never called to testify, would have come out in defendant's favor and only found him guilty of the lesser-included offense of simple possession.

Appeal by defendant from judgment dated 7 August 2002 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 3 December 2003.

Attorney General Roy Cooper, by Assistant Attorney General J. Bruce McKinney, for the State.

The Kelly Law Firm, by George E. Kelly, III, for defendant-appellant.

BRYANT, Judge.

Alvin Terrill Foster, Jr. (defendant) appeals a judgment dated 7 August 2002 entered consistent with a jury verdict finding him guilty of trafficking in cocaine by possession and of possession with intent to manufacture, sell or deliver cocaine.

On 14 May 2002, defendant was indicted for "traffic[king] by possessing 28 grams or more but less than 200 grams of cocaine" and "possess[ing] cocaine, with the intent to manufacture, sell and deliver a controlled substance." At trial, Michael Washington, a law enforcement officer with the narcotics unit of the Onslow County Sheriff's Department, testified that, on 31 October 2001, he had begun working on an arrangement with a drug dealer (the informant), who had just been taken into custody, to identify potential purchasers for one ounce (approximately 28.3 grams) of cocaine as targets in an undercover operation. While the informant was at the police station talking to Officer Washington, the informant received a call on his cellular telephone from defendant seeking to purchase some cocaine. The informant and defendant talked on the cellular telephone two or three more times that day, setting up the deal. Officer Washington testified he did not hear the terms of the arranged deal but was told by the informant that defendant had agreed to buy one ounce of powder cocaine for $800.00, with $500.00 to be paid upon delivery of the

cocaine and $300.00 at a later time. A meeting for the payment of the second installment was not arranged.

Officer Washington testified that the street value of one ounce of cocaine, sold a gram at a time, could be $2,800.00 or more. The price, however, depends on whether the purchaser is a user or a dealer. A user would likely pay $100.00 per gram whereas "[a] dealer w[ould] not pay that." In this case, "the subject agreed to $800[.00]," which to Officer Washington indicated a "seller amount" as opposed to a "user amount."

Around 6:00 p.m. on 31 October 2001, Officer Washington drove the informant to a prearranged location to meet defendant. Upon arrival, the informant spotted defendant standing in a parking lot. The informant exited the vehicle and walked over to defendant, talking to him for a few minutes outside of Officer Washington's earshot. The two men then returned to the vehicle. The informant sat down in the front passenger seat, and defendant got into the back seat. After the informant told Officer Washington defendant wanted to see the cocaine, Officer Washington handed defendant a plastic bag of cocaine along with a digital scale. Officer Washington testified he showed defendant how to turn on the scale and then watched defendant weigh the cocaine. In response to the officer's question if "that [was] good," defendant answered "yeah" and handed the cocaine and scale back to Officer Washington. Defendant subsequently exited the vehicle to get the purchase money. Five minutes later, defendant returned to the vehicle, handed Officer Washington $500.00, and received the cocaine in exchange. As defendant stepped out of the vehicle, Officer Washington gave the "take-down signal," and defendant was arrested. When defendant was searched incident to arrest, the plastic bag, later determined to contain 32.2 grams of cocaine hydrochloride (also known as powder cocaine), was found in his pocket. The informant did not testify at trial.

Defendant testified that he knew the informant as a drug dealer and admitted to having bought 5 grams of cocaine for $500.00 when the informant approached him at a football game about a month prior to the events on 31 October 2001. On 31 October 2001, the informant again contacted defendant, this time by telephone, offering to sell him drugs. Defendant agreed to another purchase of 5 grams of cocaine for $500.00 from the informant to help relieve the stress he was experiencing due to marital problems. The two men talked a few more times on the telephone that day to arrange the time and location for the transaction. After the informant's arrival at the prearranged loca-

tion that evening, the informant got out of a vehicle driven by Officer Washington and walked over to defendant, talking to him for a moment. Defendant testified that the informant "knew what I wanted": 5 grams of cocaine, the same as the previous purchase. The two men then got into the vehicle, with the informant taking the front passenger seat and defendant sitting down in the back. Officer Washington handed defendant a plastic bag of cocaine together with a scale, which defendant set on the back seat. Defendant looked at the items for only "two or three seconds" before handing them back to Officer Washington. Defendant did not weigh the bag and testified that when he exited the vehicle to get the $500.00 purchase money, they were supposed to cut the 5 gram portion for him. After his return with the money, defendant did not have a chance to observe the size of the bag handed to him because it was "squeezed up" and he was arrested the moment he held the bag in his hand. Defendant further testified that he was just a user who had only started because of marital problems and never intended to buy an ounce of cocaine. When defendant told Officer Washington in the vehicle that "it was good," defendant only meant that "it looked like the same stuff [he] had [bought] before." The comment was not directed toward the weight of the cocaine.

At the close of the State's evidence and at the close of all the evidence, defendant moved to dismiss the charges against him. The trial court denied the motions. During the charge conference, defendant argued for the trial court to include, based on the evidence presented at trial, a jury instruction on trafficking that defendant's possession of *more than 28 grams of cocaine* had to be knowing. The trial court was sympathetic to defendant's argument and allowed both sides time to find case law on the issue. When no relevant case law was found, the trial court, in interpreting N.C. Gen. Stat. § 90-95(h)(3), ruled that the knowledge requirement referred only to the controlled substance and not its quantity. Defendant's objection to the verdict sheet was noted for the record. As to the charge of trafficking in cocaine, the trial court instructed the jury that for a guilty verdict it had to find beyond a reasonable doubt that "defendant knowingly possessed cocaine" and "that the amount of cocaine which . . . defendant possessed was 28 or more grams." After deliberations had begun, the trial court received a note from the jury requesting permission to examine the scale and the bag containing the controlled substance. The trial court denied the request and instructed the jury to continue its deliberations.

The issues are whether the trial court: (I) erred in denying defendant's motion to dismiss the charges and (II) committed plain error in failing to instruct the jury on entrapment.

I

[1] Defendant first contends because he did not know that the bag of cocaine he bought contained more than 5 grams of cocaine, and a weight of 28 grams or more is (1) an element of trafficking in cocaine and (2) acceptable evidence from which intent to manufacture, sell or deliver can be inferred, his motions to dismiss the trafficking and possession with intent to manufacture, sell or deliver charges should have been granted. *See* N.C.G.S. § 90-95(h)(3) (2003) ("[a]ny person who . . . possesses 28 grams or more of cocaine . . . shall be guilty of . . . 'trafficking in cocaine' "); *State v. Morgan*, 329 N.C. 654, 660, 406 S.E.2d 833, 836 (1991) (holding the full ounce of cocaine the defendant conspired to possess " 'was more than an individual would possess for his personal consumption' " and the "quantity alone, therefore, was sufficient evidence to support the inference that [the] defendant intended to deliver or sell the cocaine") (citation omitted). We disagree.

In reviewing a motion to dismiss, the court determines whether (1) there is substantial evidence of each essential element of the offense charged and (2) the defendant was the perpetrator of the offense. *State v. Mooneyhan*, 104 N.C. App. 477, 481, 409 S.E.2d 700, 703 (1991). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

Defendant's argument with respect to the trafficking charge rests on the proposition that knowledge of the weight of the cocaine was an element of the offense under N.C. Gen. Stat. § 90-95(h)(3). Defendant was unable to find any authority on this point, but since the filing of the briefs in this case, the Court of Appeals has unequivocally rejected this argument in *State v. Shelman*, —— N.C. App. ——, ——, 584 S.E.2d 88, 93, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003). This Court held "that to convict an individual of drug trafficking the State is *not* required to prove that [the] defendant had knowledge of the weight or amount of [the drug] which he knowingly possessed . . . . Instead, the statute requires only that the defendant knowingly possess . . . the controlled substance[]." *Id.* (emphasis in original). Thus, as long as the amount found in the defendant's possession is equal to or greater than 28 grams, a conviction for traffick-

ing may be obtained. *Id.* Consequently, defendant's contention as to the trafficking charge is without merit.[1]

Defendant further argues his lack of knowledge as to the weight of the cocaine warrants dismissal of the possession with intent to manufacture, sell or deliver charge because he lacked the requisite intent as a dealer. In ruling on a motion to dismiss, however, the evidence must be considered in the light most favorable to the State, giving it the benefit of every reasonable inference. *Mooneyhan*, 104 N.C. App. at 481, 409 S.E.2d at 703. Furthermore, "inconsistencies or contradictions[, as presented by defendant's testimony,] are disregarded" because "[t]he credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury." *Id.* Therefore, so long as the State presented substantial evidence of intent, the motion to dismiss was properly denied.

In this case, Officer Washington testified that the informant had arranged with defendant for the purchase of one ounce of cocaine for $800.00, $500.00 of which was to be paid at the time of the transaction and $300.00 sometime thereafter. Officer Washington explained $800.00 was the price a dealer would pay for this amount whereas a user would pay around $100.00 per gram. There was thus evidence from which a reasonable mind could conclude that defendant was purchasing the cocaine as a dealer with the intent to manufacture, sell or deliver. *Id.*; *see Morgan*, 329 N.C. at 660, 406 S.E.2d at 836. Accordingly, the trial court did not err in failing to dismiss the charge.

II

[2] Defendant next contends the evidence presented at trial warranted an instruction to the jury on the defense of entrapment.

Entrapment is defined as " 'the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him.' " *State v. Stanley*, 288 N.C. 19, 27, 215 S.E.2d 589, 594 (1975) (citation omitted). To establish entrapment, a defendant must show (1) "acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime," and (2) a "criminal design [that] originated in the minds of the government officials, rather

1. Based on this Court's holding in *Shelman*, we also overrule defendant's assignment of error that the trial court erred in failing to instruct the jury that it had to find defendant "to knowingly possess 28 grams or more of cocaine" to find him guilty of trafficking in cocaine.

than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities." *State v. Walker*, 295 N.C. 510, 513, 246 S.E.2d 748, 750 (1978). Thus, " '[t]he defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials.' " *State v. Thompson*, 141 N.C. App. 698, 706, 543 S.E.2d 160, 165 (2001) (citation omitted). Although in order to raise the defense of entrapment "[a] defendant also must admit to having committed the acts underlying the offense with which he is charged in order to receive an entrapment instruction[,] . . . an entrapment defense may be employed by a defendant who denies having the *intent* required for the commission of a crime." *State v. Sanders*, 95 N.C. App. 56, 61, 381 S.E.2d 827, 830 (1989) (emphasis in original). The defendant carries the burden of proving entrapment to the satisfaction of the jury, *Thompson*, 141 N.C. App. at 706, 543 S.E.2d at 165, and "is entitled to a jury instruction on entrapment whenever the defense is supported by [the] defendant's evidence, viewed in the light most favorable to the defendant," *State v. Jamerson*, 64 N.C. App. 301, 303, 307 S.E.2d 436, 437 (1983). Because defendant failed to request an instruction on entrapment in this case, he is subject to plain error analysis on appeal and must therefore further establish that, but for the error, the jury would likely have reached a different conclusion. *See State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983) ("[i]n deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt").

In the case *sub judice*, defendant argues he was entrapped into committing the offenses of trafficking in cocaine and possession with intent to manufacture, sell or deliver cocaine, as opposed to the offense of simple possession he intended to commit, and as a result was subjected to an enhanced criminal penalty. Entrapment affecting the severity of the punishment imposed for a criminal act has been recognized by other states and in federal court. *See United States v. Si*, 343 F.3d 1116, 1128 (9th Cir. 2003) ("[s]entencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped into committing a more significant crime that is subject to more severe punishment because of government conduct"); *Leech v. State*, 66 P.3d 987, 990 (Okla. 2003) (holding that "[a] defendant who intended to possess small amounts of an illegal drug could be entrapped by officers into possessing a trafficking quantity or even a

quantity sufficient to support a charge of intent to distribute"). Recognition of sentencing entrapment as a form of entrapment under North Carolina law is consistent with the definition of entrapment adopted in this State. *See* 2 N.C.P.I.—Crim. 309.10 (2001) (elements of the defense in this case require that "the criminal intent to commit [trafficking in cocaine and possession with intent to manufacture, sell or deliver cocaine] did not originate in the mind of the defendant" and "persuasion or trickery [was used] to cause the defendant to commit [*these*] crime[s] which he was not otherwise willing to do").

Defendant did not deny having committed the essential elements of trafficking in cocaine and only asserts that he lacked the requisite intent to commit either of the charges against him. The evidence presented by defendant at trial, viewed in the light most favorable to him, indicates that defendant was merely a user, not a dealer, and that the 31 October 2001 purchase was only the second time in defendant's adult life that he had procured drugs.[2] In addition, defendant testified the amount previously purchased was restricted to 5 grams for $500.00. As this testimony, which went unchallenged by the State, served to show that defendant was not predisposed to trafficking in cocaine or possession with intent to manufacture, sell or deliver cocaine, he was not foreclosed from receiving an entrapment instruction if the evidence further established "acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce [him] to commit [the] crime[s]." *Walker*, 295 N.C. at 513, 246 S.E.2d at 750.

As to this element of the defense, the State's evidence showed that the police had already decided to target someone for a one-ounce buy before the telephone contact between the informant and defendant occurred. According to defendant, it was the informant who telephoned him and suggested a drug purchase. Defendant agreed to 5 grams for $500.00, the user rate for this amount of cocaine, just as he had done the month before, but the bag of cocaine ultimately delivered to him contained more than an ounce of cocaine. Although the bag handed to defendant in the vehicle appeared bigger than his previous purchase from the informant, defendant testified that Officer Washington and the informant were supposed to cut his share of the cocaine while he stepped outside to get the purchase money. When defendant returned, the deal was consummated so quickly that he did not have time to observe the "squeezed[-]up" plastic bag

2. Defendant has no criminal record except for a conviction of simple possession of marijuana when he was fourteen years old.

Officer Washington handed him. Based on defendant's version of the controlled sale by the police, it is thus possible that defendant was tricked by law enforcement into buying a larger amount of cocaine than he had intended, entitling him to an instruction on the defense of entrapment.

We now consider whether, in light of defendant's failure to request such an instruction, he is entitled to a new trial under a plain error analysis. As held in *Shelman*, knowledge of the weight of a controlled substance is not an essential element of trafficking in cocaine. *Shelman*, 159 N.C. App. at 306, 584 S.E.2d at 93. Since the trial court instructed the jury accordingly, the jury could not consider defendant's belief about the amount of cocaine purchased in reaching its verdict on the trafficking charge. In addition, the large amount of cocaine found on defendant was sufficient by itself for the jury to find that defendant had the requisite intent for the offense of possession with intent to manufacture, sell or deliver. *See Morgan*, 329 N.C. at 660, 406 S.E.2d at 836. Finally, it seems that defendant's testimony had an impact on both the judge and the jury. During the charge conference, the judge appeared sympathetic to defendant's version of the events and allowed defendant extended time to research legal authority on whether intent as to the weight of a controlled substance constitutes an element of trafficking. The jury in turn requested the trial court's permission to see the bag of cocaine and the scale during deliberations despite uncontradicted evidence from the State that the cocaine found on defendant weighed 32.2 grams. This request indicates that the weight and appearance of the bag remained an issue for the jury. As such, there is a reasonable possibility that given an entrapment instruction the jury, considering defendant's previous "user" purchase, the determination of the police to target someone for at least an ounce of cocaine, the immediate arrest following defendant's acceptance of the "squeezed[-]up" package, and the fact that the informant was never called to testify, would have come out in defendant's favor and only found him guilty of the lesser-included offense of simple possession. *See Leech*, 66 P.3d at 991 (Johnson, P.J., concurring) (observing that "[t]he justice system should look with a jaundiced eye upon reverse sting operations"). We thus reverse and remand this case for a new trial in accordance with this opinion.

New trial.

Judges CALABRIA and ELMORE concur.

R. BRADFORD LEE, PLAINTIFF v. JOHN C. SCARBOROUGH AND EB COMP, INC., A NORTH CAROLINA CORPORATION (SUCCESSOR TO E.B. COMP SERVICES, INC. AND TO E.B. SERVICES, INC., FORMER NORTH CAROLINA CORPORATIONS), DEFENDANTS

No. COA02-1632

(Filed 17 February 2004)

1. Corporations— breach of stock option and restriction agreement

The trial court did not err by granting partial summary judgment in favor of plaintiff against defendant company and defendant individual on the issue of defendants' alleged breach of a stock option and restriction agreement, because: (1) merger pursuant to N.C.G.S. §§ 55-11-01 to -11-10 effects a change in the capitalization of a company, and thus, defendant company breached its obligation in the agreement not to change the capitalization of the company by approving a merger of the company without the prior written consent of plaintiff; (2) defendant individual also breached the stock option and restriction agreement by voluntarily participating in a merger he knew would extinguish plaintiff's stock options under the agreement; (3) this case involves a contractual promise by defendant individual to hold open an option to purchase his shares in the company for a specified period of time rather than merely involving restrictions on a shareholder's ability to transfer or convey his shares without prior approval; and (4) the corporate act of merger in this case could not have been accomplished without the solitary actions of defendant individual sole shareholder and sole director.

2. Contracts— restriction agreement—parol evidence

The trial court did not err by granting summary judgment in favor of plaintiff even though defendants allege the parties' restriction agreement was not supported by consideration, because: (1) parol evidence is not competent to contradict the terms of a subsequently entered into contract; and (2) the recital on the face of the agreement specifically recites that the contract is supported by adequate consideration.

3. Damages and Remedies— option contract—willingness and ability to exercise option

The trial court erred by excluding evidence during the trial on the issue of damages regarding whether plaintiff was ready, willing, and able to exercise the pertinent stock option during the

period specified in the option contract, and by refusing to submit to the jury the issue of plaintiff's willingness and ability to exercise the option.

Appeal by defendants from order filed 1 June 2001 by Judge Marcus L. Johnson; order filed 28 January 2002 by Judge Timothy S. Kincaid; order filed 1 March 2002 by Judge Robert P. Johnston; order filed 18 March 2002 by Judge Clarence E. Horton, Jr.; and judgment dated 28 March 2002 and orders filed 25 April 2002 and 10 May 2002 by Judge C. Preston Cornelius in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 September 2003.

Helms Mulliss & Wicker, PLLC, by E. Osborne Ayscue, Jr. and John H. Cobb, for plaintiff-appellee.

Bishop, Capitano & Abner, P.A., by J. Daniel Bishop and Joseph W. Moss, Jr., for defendants-appellants.

MARTIN, Judge.

Plaintiff-appellee, R. Bradford Lee ("Lee") brought this action against defendants-appellants, John C. Scarborough ("Scarborough") and E.B. Comp., Inc. alleging defendants' breach of a stock option and restriction agreement. Briefly summarized, the record discloses the following facts relevant to the issues raised on appeal: Both Lee and Scarborough worked in the insurance industry. Lee owned a consulting business and Scarborough was the majority owner and director of E.B. Services, Inc. ("Services"), a group health benefit plan management business. In mid-1992, Lee helped Scarborough form a company known as E.B. Comp Services, Inc. ("Comp Services"). Comp Services engaged in business as a third-party administrator ("TPA") of workers compensation insurance plans. Scarborough was the sole shareholder and sole director of Comp Services. Around the time of Comp Services' formation, Scarborough signed individually and as president of Comp Services, a Stock Option and Restriction Agreement ("Agreement") dated 16 July 1992. The Agreement, effective for five years, included the following terms:

2. Stock to be Purchased

(a) [Plaintiff] shall have an option to purchase from Stockholder that number of shares of stock equal to 50% of all the issued and outstanding shares of Company, it being the intent of the parties that should [plaintiff] fully exercise this

> option, [plaintiff] will have a fifty percent (50%) ownership in Company. . . .
>
> . . . .
>
> 5. Restriction on Stockholder's Transfer of Shares. Stockholder shall not assign, encumber or dispose of any portion of his stock interest in the Company, by sale or otherwise, except upon compliance with the terms and conditions of this Agreement. . . .
>
> 6. Sale of Additional Shares by Company. Company agrees not to issue any stock, by sale or otherwise, without first obtaining [plaintiff's] written approval and without first offering such shares to [plaintiff] . . . . There shall be no split, reclassification or other change in the capitalization of Company without the prior written consent of [plaintiff].

Effective 1 January 1995, without notice to Lee, Comp Services merged into Services, which is now defendant E.B.Comp., Inc. ("Comp"). Lee filed this action alleging breach of the Agreement. Defendants answered, denying the material allegations of breach and asserting affirmative defenses. Following discovery, plaintiff and defendants moved for summary judgment; Lee was granted summary judgment on the issue of breach. The issue of damages was tried to a jury, which returned a verdict awarding Lee damages in the amount of $565,901.01. The trial court entered judgment upon the verdict and awarded prejudgment interest in the amount of $327,695.45. Defendants appeal.

I.

[1] In their first two arguments, defendants contend the trial court erred when it granted partial summary judgment in favor of plaintiff against defendant Comp and against defendant Scarborough, individually, on the issue of breach. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003). The issue of contract interpretation is a question of law. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 534 S.E.2d 653 (2000). While both option contracts and restrictions on the alienation of property interests are strictly construed, the clear intent of the parties as expressed on the face of

the contract controls. *See Lagies v. Myers*, 142 N.C. App. 239, 247-48, 542 S.E.2d 336, 341-42, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001); *Bryan-Barber Realty, Inc. v. Fryar*, 120 N.C. App. 178, 181-82, 461 S.E.2d 29, 31-32 (1995).

We first address the issue of Comp's breach of the Agreement. The Agreement expressly restricted Comp Services from, *inter alia*, splitting, reclassifying, or making any other changes in the capitalization of the company without the prior written consent of plaintiff. While this restriction was still in effect, Comp Services approved the merger of itself into Services pursuant to §§ 55-11-01-11-10 of the North Carolina General Statutes.

Restrictions on the alienation or transfer of property are not favored and therefore, must be strictly construed. *See Duncan v. Duncan*, 147 N.C. App. 152, 156, 553 S.E.2d 925, 928 (2001), *disc. review denied*, 355 N.C. 211, 559 S.E.2d 800 (2002). Whether a company's approval of a merger pursuant to §§ 55-11-01-11-10 is clearly prohibited by a restriction in an agreement prohibiting a change in the capitalization of a company is an issue of first impression in North Carolina.

Capitalization is defined by Black's Law Dictionary as "[t]he total amount of long-term financing used by a business, including stocks, bonds, retained earnings, and other funds." Black's Law Dictionary 202 (7th ed. 1999). When a merger takes effect, the merging corporation ceases to exist; all assets and liabilities of the merging corporation are vested in the surviving corporation, and the shares of the merging corporation are thereupon converted into "shares, obligations, or other securities of the surviving . . . corporation or into the right to receive cash or other property . . . ." N.C. Gen. Stat. § 55-11-06 (a)(1), (2), (6) (2003).

Consolidation of two companies' assets, liabilities, and stocks pursuant to a merger necessarily involves a change in the amount and character of "stocks, bonds, retained earnings, and other funds," Black's Law Dictionary 202 (7th ed. 1999), possessed by the businesses participating in the merger. *Cf.* N.C. Gen. Stat. § 55-14A-01(a)(5) (2003) (financial reorganization of a company pursuant to bankruptcy or insolvency may include participating in a merger). We hold, therefore, that merger pursuant to §§ 55-11-01-11-10 clearly effects a change in the capitalization of a company and thus, Comp Services breached its obligation in the Agreement not to change the capitalization of the company by

approving a merger of the company without the prior written consent of plaintiff.

Moreover, Scarborough, individually, also breached the stock option and restriction agreement by voluntarily participating in a merger he knew would extinguish the plaintiff's stock options under the agreement. Principles of contract law are generally applied to the interpretation of options. *Lagies v. Myers*, 142 N.C. App. 239, 247, 542 S.E.2d 336, 341 (2001). "[B]ecause the other party is not bound to perform, and is under no obligation to buy," options are construed strictly in favor of the maker. *Id.* at 248, 542 S.E.2d at 342. However, "[i]f the option terms are clear and unambiguous, 'it must be enforced as it is written, and the court may not disregard the plainly expressed meaning of its language.' " *Id.* at 247, 542 S.E.2d at 342. (citation omitted).

In this case, Scarborough, as the sole shareholder of Comp Services, had a contractual obligation to plaintiff to hold open an option to purchase shares of Comp Services for a period of five years. It is undisputed that before the five year period expired, Scarborough, in his capacity as the sole shareholder and the sole director of Comp Services, decided to merge the company into Services, of which he was a 90% owner. *See* N.C. Gen. Stat. § 55-11-01(a) (2003) ("One or more corporations may merge into another corporation if the board of directors of each corporation adopts and its shareholders . . . approve a plan of merger."). When a merger takes place, the merging company, as well as its shares, cease to exist. N.C. Gen. Stat. § 55-11-06(a)(1), (6) (2003). Thus, there is no question that the merger extinguished the plaintiff's option to buy shares of Comp Services. A breach of the agreement by Comp Services imposes liability therefor upon the surviving corporation, defendant Comp. N.C. Gen. Stat. § 55-11-06(a)(3) ("[s]urviving corporation has all liabilities of each corporation party to the merger.").

Nevertheless, defendant Scarborough argues that even though the merger extinguished plaintiff's options, he was not liable for breach of contract since a merger is essentially a corporate act, not a shareholder act. It is true that conversion of shares pursuant to a merger is initiated by corporate act and accomplished by operation of law, and not through any transfer or conveyance by a shareholder. *See* N.C. Gen. Stat. §§ 55-11-01, 55-11-06 (2003). The official comment to N.C. Gen. Stat. § 55-11-06 (2003), listing the effects of merger, states:

> ***A merger is not a conveyance or transfer***, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. (emphasis added).

Based on this principle, other jurisdictions have found that restriction agreements which prohibit the voluntary transfer of shares by a shareholder are not violated when parties to the agreement vote their shares in favor of a merger. *See Seven Springs Farm, Inc. v. Croker*, 801 A.2d 1212, 1216 (Pa. 2002); *Shields v. Shields*, 498 A.2d 161, 167 (Del. Ch. 1985); *But see Bruns v. Rennebohm Drug Stores, Inc.*, 442 N.W.2d 591, 595 (Wis. Ct. App. 1989) (holding that substance must control over form when interpreting stock restriction agreements).

However, this case is distinguishable on several grounds. First, this case involves a contractual promise by Scarborough to hold open an option to purchase his shares in the company for a specified period of time. In contrast, the cases in the other jurisdictions merely involved restrictions on a shareholder's ability to transfer or convey his or her shares without prior approval. Second, the corporate act of merger in this case could not have been accomplished without the solitary actions of shareholder and director Scarborough. As both the sole shareholder and sole director of Comp Services, Scarborough was the only person who could vote for and approve the merger. In contrast, in order to effectuate the mergers in the other cases, more than one person was required to vote for and approve the transaction. *See Seven Springs Farm*, 801 A.2d 1212; *and Shields*, 498 A.2d 161. Thus, the line between a corporate act and a shareholder act is virtually indistinguishable in this case.

The clear intent of the parties as expressed on the face of the Agreement in this case was to prevent the intentional extinguishment by Scarborough or Comp Services of plaintiff's option to purchase shares. This intent is evidenced in an affidavit submitted by Scarborough, stating that he merged Comp Services into Services "[i]n order to deal with the problem of [plaintiff's] perverse incentives under the existing arrangement and to provide flexibility to award [another party] part ownership of E.B. Comp Services . . . ." Given the fact that only Scarborough, and no other parties, had the power to enter into the merger, and the fact that we are bound to effectuate the clear intent and purpose of binding contractual agreements, we find that Comp Services breached its obligation under the Agreement to plaintiff not to change the capitalization of the company when it approved a merger of itself into Services and that Scarborough breached his obligation to plaintiff under the Agreement to hold open

shares of Comp Services for a period of five years when he voted for and approved the merger of the company. Thus, we affirm the trial court's grant of partial summary judgment in plaintiff's favor on the issue of both defendants' breach of the stock option and restriction agreement.

II.

[2] Defendants next argue the trial court erred in granting summary judgment in plaintiff's favor because the Agreement was not supported by consideration. The Agreement states the following:

> 3. Stockholder acknowledges that Lee, in the course of formation of the Company, has provided Stockholder with invaluable assistance with regard to forming the Company and employing key personnel. Without this assistance, Stockholder acknowledges that the Company would not have been formed; Stockholder also acknowledges that such assistance is the consideration for Stockholder granting to Lee the option and right of first refusal contained herein. Stockholder further acknowledges that such assistance is adequate consideration for the restrictions on general operations of the Company contained herein.
>
> . . . .
>
> NOW, THEREFORE, for and in consideration of the premises and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged . . . .

Defendants presented evidence that plaintiff had previously been compensated $30,000 for his assistance in "establishing a company to handle Worker's Compensation claims as a TPA . . . ." Thus, they argue that the recital in the contract was insufficient to constitute adequate consideration since plaintiff had already performed and been compensated for these services. *See Penley v. Penley*, 314 N.C. 1, 18-19, 332 S.E.2d 51, 61-62 (1985) (absent certain circumstances, past services do not constitute adequate consideration for a new contract).

However, it is well established that parol evidence is not competent to contradict the terms of a subsequently entered into contract. *Thompson v. First Citizens Bank & Trust Co.*, 151 N.C. App. 704, 708-09, 567 S.E.2d 184, 188 (2002). The recital on the face of the Agreement in this case specifically recites that the contract is supported by adequate consideration. Thus, evidence to the contrary was not competent to contradict this recital with regard to the validity of

the contract. *See id.* at 709-10, 567 S.E.2d at 188-89; *Weiss v. Woody*, 80 N.C. App. 86, 92, 341 S.E.2d 103, 107 (1986) ("Although it is always competent to contradict the recital in the deed as to the amount paid . . . it is not competent to contradict the acknowledgment of a consideration paid in order to affect the validity of the deed . . . ."). Defendants' assignment of error is overruled.

III.

[3] Defendants assign error to the exclusion of evidence, during the trial on the issue of damages, regarding whether plaintiff was ready, willing, and able to exercise the option during the period specified in the option contract and to the trial court's refusal to submit to the jury the issue of plaintiff's willingness and ability to exercise the option. We agree.

"An option is not a contract to sell, but it is transformed into one upon acceptance by the optionee in accordance with its terms." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976). In order to be entitled to more than nominal damages, the optionee must show that he was ready, willing, and able at all times to exercise the option. *See id.* at 364, 222 S.E.2d at 407.

During the trial on the issue of damages, defendants attempted to present evidence showing that plaintiff could not have exercised the option, due to a state administrative regulation, while he was still employed as a trustee for NCME, a workers' compensation insurer. The tendered evidence would have shown that plaintiff was paid approximately $75,000 for his services as trustee for NCME in 1995 and would have had to resign his position and forego these benefits had he chosen to exercise the option. Such evidence is relevant to the issue of whether plaintiff was ready, willing, and able to exercise the option had it been available to him during the period specified in the option contract and should have been submitted to the jury in order to properly determine the issue of damages. *See* N.C. Gen. Stat. § 8C-1, Rules 401, 402. Moreover, the admission of such evidence would have required the trial court to submit to the jury the issue of whether plaintiff was ready, willing, and able to exercise the option. *In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 798 (1999) (where substantial evidence exists in support of an issue, the trial court is required to submit the issue to the jury, upon request). If the jury should determine from such evidence that plaintiff was not ready, willing, and able to exercise his rights under the option, he would be entitled to no more than nominal damages for its breach.

Hocutt v. Western Union Telegraph Co., 147 N.C. 186, 60 S.E. 980 (1908). The exclusion of such evidence and the resulting failure of the trial court to submit the issue arising therefrom entitle defendant to a new trial on the issue of damages.

In light of our award of a new trial on the issue of damages, we need not address the remaining assignments of error brought forward in defendants' brief relating to the trial and judgment as they may not recur at retrial. In addition, those assignments of error not brought forward in defendants' brief are deemed abandoned. N.C. R. App. P. 28(a).

Affirmed in part, reversed and remanded for a new trial on the issue of damages.

Judges BRYANT and GEER concur.

STATE OF NORTH CAROLINA v. WATSON CARLOS DREW, DEFENDANT

No. COA02-1481

(Filed 17 February 2004)

Homicide— involuntary manslaughter—sufficiency of evidence

The trial court did not commit plain error by submitting to the jury the charge of involuntary manslaughter even though defendant stabbed the victim with a knife, because: (1) there was sufficient evidence to permit the jury to find that when defendant stabbed the victim, he did not act with any intent to kill or inflict serious bodily injury; and (2) contrary to defendant's assertion, there was no indication in the record that he stipulated to intentionally killing the victim.

Appeal by defendant from judgment entered 13 June 2002 by Judge W. Douglas Albright in Columbus County Superior Court. Heard in the Court of Appeals 10 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General P. Bly Hall, for the State.

Poyner & Spruill, L.L.P., by Joseph E. Zeszotarski, Jr., for appellant-defendant.

GEER, Judge.

Defendant Watson Carlos Drew appeals from his conviction of involuntary manslaughter, arguing that the State offered insufficient evidence to warrant submitting to the jury a charge of involuntary manslaughter as well as voluntary manslaughter. Because the record contains sufficient evidence to permit the jury to find that when defendant stabbed the victim, he did not act with any intent to kill or inflict serious bodily injury, we hold that there was no error.

Facts

The State's evidence tended to show the following. Defendant lived with his fiancée, Addie Nealey, and her three children in a mobile home in Whiteville, North Carolina. On the night of 27 April 2001, while defendant was working out of state and was not expected home for a day or more, Tony Langley visited Ms. Nealey at the mobile home. Defendant and Mr. Langley had had several altercations over Ms. Nealey. Ms. Nealey allowed Mr. Langley to stay at the mobile home with her and at some point he joined her in her bed under circumstances that are disputed.

At approximately 11:00 p.m., defendant unexpectedly returned home, entering through the back door of the pitch-dark home. Mr. Langley hid in the bathroom while Ms. Nealey intercepted defendant in another part of the mobile home. Ms. Nealey attempted to persuade defendant to drive her to her grandmother's home so that she could pick up two nieces to spend the weekend with them. She explained that she did not want to drive herself because she had taken cold medication and was drowsy.

In a statement given to the Columbus County Sheriff's Department, defendant said that he walked into the kitchen, told Ms. Nealey she was acting funny, and asked her if anyone was in the mobile home. Ms. Nealey first denied anyone else was present, then said she did not know.

Ms. Nealey did not see what happened next and defendant gave conflicting statements. It is, however, undisputed that defendant entered the master bathroom holding a knife. In one statement, defendant claimed he was using the knife to make a sandwich when he heard a noise and went to investigate. In a second statement, defendant claimed that when Ms. Nealey twice suspiciously denied anyone was in the house, he "grabbed the knife and went into the bedroom and looked around[.]"

In the bathroom, defendant saw no one, flipped a cigarette butt into the toilet, and left. When, however, he was just outside the bathroom, he heard a noise. Defendant re-entered the bathroom and saw a man standing behind the door. In his statements, defendant claimed the man lunged or swung at him. Defendant ducked and swung his knife. Defendant then turned and ran out of the mobile home because, according to his statement, he was scared. Ms. Nealey reported that defendant yelled, "Addie, the 'MF' jumped at me. The 'MF' jumped at me."

Defendant later returned to the mobile home and found Ms. Nealey trying to hold Mr. Langley upright. Defendant accused Ms. Nealey of protecting Mr. Langley and started hitting them until Ms. Nealey forced defendant to stop. Defendant then told Ms. Nealey, "I didn't know I stabbed him."

Ms. Nealey left to seek help. When the rescue squad arrived, defendant ran into the woods near the mobile home. As the deputies escorted him in handcuffs out of the woods, defendant told the deputies, "I didn't mean to kill him[.]" Police officers described defendant as "very upset, scared, shaking" and "hysterical."

Mr. Langley died of a single stab wound to the chest and defendant was indicted on a charge of voluntary manslaughter. At trial, defendant did not present any evidence, but asserted a claim of self-defense. The judge submitted to the jury three possible verdicts: guilty of voluntary manslaughter, guilty of involuntary manslaughter, and not guilty. The record does not reveal if the State or defendant requested the involuntary manslaughter instruction or whether the trial court gave the instruction *sua sponte*. Defendant did not, however, express any objection to that instruction. The jury found defendant guilty of involuntary manslaughter and the trial court sentenced defendant to a minimum term of 24 months and a maximum term of 29 months.

Defendant asserted eight assignments of error, but failed to bring forth and argue six of them in his brief to this Court. Those assignments of error are therefore deemed abandoned. N.C.R. App. P. 28(b)(6).

Defendant argues that the trial court erred in submitting to the jury a charge of involuntary manslaughter, contending that all the evidence showed that his act in stabbing Mr. Langley was intentional. We apply the plain error standard of review to this assignment of error as

the record does not indicate that defendant objected to the instruction at trial. N.C.R. App. P. 10(c)(4). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983).

Although acknowledging the lack of objection, defendant argues that plain error review is inappropriate, citing *State v. Ataei-Kachuei*, 68 N.C. App. 209, 314 S.E.2d 751, *disc. review denied*, 311 N.C. 763, 321 S.E.2d 146 (1984). In *Ataei-Kachuei*, however, the question of which standard of review to apply did not arise. On the other hand, *State v. Blue*, 115 N.C. App. 108, 112, 443 S.E.2d 748, 750 (1994), specifically holds that the plain error standard applies when reviewing the submission to the jury, without objection, of a lesser included offense. As this Court explained, "[T]o allow a defendant who does not so object to then use his choice at trial to gain reversal on appeal would afford a criminal defendant the right to appellate review, predicated on invited error." *Id.* The lack of an objection is of particular concern because of the possibility, not precluded by the record in this case, that trial counsel for defendant actually wanted the instruction to be given.

In deciding whether to charge the jury as to a lesser included offense, "the trial judge must make two determinations. The first is whether the lesser offense is, as a matter of law, an included offense of the crime for which defendant is indicted. . . . The second is whether there is evidence in the case which will support a conviction of the lesser included offense." *State v. Thomas*, 325 N.C. 583, 590-91, 386 S.E.2d 555, 559 (1989). Since defendant accepts that involuntary manslaughter is a lesser included offense of voluntary manslaughter, the question before this Court is whether the record contains evidence from which the jury could find that defendant committed involuntary manslaughter.

Involuntary manslaughter has been defined by our Courts in two ways:

> 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. Involuntary manslaughter may also be defined as the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor

naturally dangerous to human life, or (2) a culpably negligent act or omission.

State v. Powell, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994) (citations omitted). Involuntary manslaughter is distinguished from murder or voluntary manslaughter by "the absence of malice, premeditation, deliberation, intent to kill, and intent to inflict serious bodily injury . . . ." *State v. Greene*, 314 N.C. 649, 651, 336 S.E.2d 87, 89 (1985).

Although the crime in this case involved a deadly weapon—a knife—defendant may still be found guilty of involuntary manslaughter if he acted without any intent to kill or inflict serious injury. As the Supreme Court has held, "involuntary manslaughter can be committed by the wanton and reckless use of a deadly weapon such as a firearm or a knife." *State v. Buck*, 310 N.C. 602, 605, 313 S.E.2d 550, 552 (1984) (citations omitted).

In *State v. Daniels*, 87 N.C. App. 287, 360 S.E.2d 470 (1987), as here, the defendant argued that the trial court erred in submitting involuntary manslaughter as a possible verdict when the defendant had stabbed the victim. In *Daniels*, the defendant, who was in a fight with the victim, "stuck at him, trying to get him away from [her]", but "she did not intend to either stab or hurt [the victim.]" *Id.* at 288, 360 S.E.2d at 470. The Court also observed that the defendant had claimed, in her statements, that she did not mean to hurt the victim. This Court held that "[e]vidence indicating that [the victim's] death was caused by defendant inadvertently stabbing him in the chest while not attempting or intending to do so clearly meets [the] requirement" that the killing was the result of an act done in a culpable or criminally negligent way. *Id.* at 289, 360 S.E.2d at 471.

The evidence in this case is comparable. There were no eyewitnesses to the actual stabbing; the sole evidence of what occurred in the bathroom is found in defendant's statements to the Sheriff's Department. From those statements, a jury could find that defendant, who had been told that no one was in the house, was surprised in the bathroom by a man whom he did not immediately recognize; that the intruder lunged or swung at him; that he immediately swung back holding the knife; and that he ran away out of fear. The jury could also find, based on defendant's statements and the testimony of the officers, that defendant did not know that he had stabbed Mr. Langley and that he did not intend to kill him. Officers confirmed that defendant was "hysterical" and "very upset" when they found him.

From this evidence, the jury could have further concluded that defendant panicked after discovering Langley and either (1) intended to strike at Mr. Langley to keep him away, but did not intend to kill or seriously injure him; or (2) simply reacted instinctively without any intent to strike Mr. Langley at all. Either scenario would support a verdict of involuntary manslaughter under *Daniels*. *See also Buck*, 310 N.C. at 606, 313 S.E.2d at 553 (involuntary manslaughter was properly submitted to the jury when the defendant testified that he grabbed a knife because he was scared of the victim who also had a knife, that defendant threw the victim to the floor, that the victim was stabbed with the defendant's knife as the defendant fell on top of him while holding the knife, and that defendant did not intend to stab the victim).

Defendant, however, claims that he stipulated at the outset of the trial that he intentionally killed Langley. Our review of the record reveals that defendant never made such a stipulation. Instead, out of the hearing of the jury, counsel for defendant, documented on the record that defendant had consented to counsel's conceding at trial, if he chose to do so, that "the stab wound was administered." Counsel was acting pursuant to *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985) ("[W]e conclude that ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent."), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672, 106 S. Ct. 1992 (1986). When the trial court asked whether defendant was stipulating that he intentionally stabbed the deceased, counsel stated unambiguously, "I am not so stipulating at this point." There is no indication in the record that defendant ultimately at trial ever stipulated or otherwise admitted that he intentionally stabbed Mr. Langley.

Although defendant also points to *Ataei-Kachuei* as precluding submission of the instruction, all of the evidence in *Ataei-Kachuei* established that the defendant, who fired multiple gunshots into a car, intentionally shot the victim. No such dispositive evidence was presented in this case. We therefore hold that the trial court did not err in submitting the issue of involuntary manslaughter to the jury. *See also State v. Lytton*, 319 N.C. 422, 427, 355 S.E.2d 485, 488 (1987) (even though, during a struggle, defendant had his finger on the trigger of a loaded pistol and intentionally shot a warning shot, the trial court should have instructed the jury on involuntary manslaughter when defendant testified that he did not intend to pull the trigger on

the second and third shots, did not aim the pistol, and did not intend to shoot the victim).

Our holding that sufficient evidence existed to support submission of the issue of involuntary manslaughter to the jury resolves defendant's second argument that the ultimate verdict was unsupported by the evidence.

No error.

Chief Judge MARTIN and Judge BRYANT concur.

BOBBY L. ROBERTS, EMPLOYEE/PLAINTIFF v. CENTURY CONTRACTORS, INC., EMPLOYER, AND ROYAL & SUNALLIANCE INSURANCE COMPANY, CARRIER/DEFENDANTS

No. COA03-93

(Filed 17 February 2004)

1. Workers' Compensation— mediated settlement agreement—mutual mistake—maximum medical improvement

The Industrial Commission did not err in a workers' compensation case by voiding the parties' mediated settlement agreement based on mutual mistake of fact, and the Commission's opinion and award filed 18 September 2002 is affirmed because: (1) the Commission made explicit findings that the parties believed that plaintiff had reached maximum medical improvement and, further, that they materially relied upon this fact in reaching a settlement; and (2) there was competent record evidence to support the Commission's findings that the parties were mistaken as to whether plaintiff had reached maximum medical improvement and that this mistaken fact was material.

2. Workers' Compensation— jurisdiction—appeal to Court of Appeals

The Industrial Commission's opinion and award in a workers' compensation case issued on 10 March 2003 must be vacated, because: (1) an appeal to the Court of Appeals divests the Industrial Commission of jurisdiction to issue opinions and awards; (2) although an appeal is not perfected until docketed in the Court of Appeals, perfection relates back to the time that

notice of appeal is given; and (3) defendants gave notice of appeal of the Commission's 18 September 2002 award, thus divesting the Commission of jurisdiction to issue its 10 March 2003 award.

Appeal by defendants from Opinions and Awards filed 18 September 2002 and 10 March 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 2003.

Richard W. Rutherford for plaintiff-appellee.

McAngus, Goudelock & Courie, by Robert B. Starnes, for defendants.

LEVINSON, Judge.

Plaintiff (Bobby Roberts) suffered a compensable injury by accident on 28 July 1993 when he was struck by a pipe while working for Century Contractors, Incorporated, causing trauma to his neck and back. Defendants admitted liability, and plaintiff sought treatment for his injuries with Dr. James Markworth of Southeastern Orthopaedic Clinic. Dr. Markworth diagnosed plaintiff as having some narrowing of the cervical spinal canal and some degeneration of multiple levels of the cervical disks, with bulging of some of the discs. Dr. Markworth performed an anterior cervical discectomy infusion at C3-4, C4-5, C5-6, and C6-7 with bone grafts being placed at each location.

Following this surgery, Dr. Markworth reviewed plaintiff's x-rays and determined that while the films showed a line at the inferior margins of the C3-4 graft, C5-6 graft, and maybe the C6-7 graft, these areas appeared to be remolding nicely. Dr. Markworth subsequently indicated that plaintiff was at maximum medical improvement and stopped treating plaintiff. A physician's assistant at Southeastern Orthopaedic Clinic continued to treat plaintiff. Because he was still experiencing pain, plaintiff issued a request for a second medical opinion on 3 April 1998.

On 2 June 1998, plaintiff saw Dr. Allen Friedman for a second medical opinion. Dr. Friedman noted that there was a question of lucency below the graft at C5-6 and that x-rays needed to be repeated to be sure that the fusion was stable. Dr. Friedman indicated his concern to plaintiff that current x-rays needed to be obtained to be certain as to whether the fusion was solid.

The parties attended a mediation on 13 May 1998. The negotiation resulted in a settlement amount of $125,000 and payment of related

medical expenses. Following his visit to Dr. Friedman, plaintiff executed the settlement agreement that had been negotiated on 13 May 1998. The settlement agreement contained a waiver of any right to make further claims in regard to plaintiff's injury. The settlement agreement was approved by the North Carolina Industrial Commission on 25 June 1998.

Plaintiff subsequently filed a claim for Workers' Compensation, seeking compensation and medical benefits for the same injuries which were addressed in the settlement agreement. Plaintiff alleged that the Commission should set aside the settlement agreement pursuant to N.C.G.S. § 97-17 due to mutual mistake of fact. In support of this allegation, plaintiff offered Dr. Markworth's deposition testimony that his office's diagnosis of maximum medical improvement was a mistake.

The Full Commission found that the parties had mistakenly relied on Dr. Markworth's diagnosis of maximum medical improvement and that this fact was material to the settlement agreement. The Full Commission set aside the agreement and awarded plaintiff compensation and medical benefits in an Opinion and Award filed on 18 September 2002. Defendants gave Notice of Appeal, which was received by the Industrial Commission on 8 October 2002. While the appeal was pending, the Full Commission filed another Opinion and Award on 10 March 2003, which also set aside the settlement agreement due to mutual mistake.

Defendants appeal from both Opinions and Awards, contending (1) the first Opinion and Award must be reversed because the Full Commission erred in setting aside the parties' mediated settlement agreement on the basis of mutual mistake of fact, and (2) the second Opinion and Award must be vacated because the Full Commission lacked jurisdiction to issue it. We affirm the 18 September 2002 Opinion and Award, and vacate the 10 March 2003 Opinion and Award.

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[1] We first address defendants' argument that the Commission committed reversible error when it voided the parties' settlement agreement due to mutual mistake of fact.

On appeal from an opinion and award of the North Carolina Industrial Commission, the standard of review is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support

the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Industrial Commission's findings of fact "are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Murray v. Associated Insurers, Inc.*, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995). "[T]he full Commission is the sole judge of the weight and credibility of the evidence. . . ." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. "[T]his Court is not at liberty to reweigh the evidence and to set aside the findings . . . simply because other . . . conclusions might have been reached." *Baker v. City of Sanford*, 120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (citation and quotation marks omitted). This Court reviews the Commission's conclusions of law *de novo*. *Griggs v. E. Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

The North Carolina Workers' Compensation Act permits parties to enter into settlement agreements, subject to approval by the Commission, "so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of [the Act]." N.C.G.S. § 97-17(a) (2003).

> No party to any agreement for compensation approved by the Commission shall deny the truth of the matters contained in the settlement agreement, unless the party is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Commission may set aside the agreement.

Id. (emphasis added). "Compromise settlement agreements, including mediated settlement agreements [in Workers' Compensation cases], are governed by general principles of contract law." *Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (citation and internal quotation marks omitted).

"It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711, 714 (1995). Therefore, where a mistake is common to both parties and concerns a material past or presently existing fact, such that there is no meeting of the minds, a contract may be avoided. *Howell v. Waters*, 82 N.C. App. 481, 486, 347 S.E.2d 65, 69 (1986).

To afford relief, the mistake must be of a certain nature. The fact about which the parties are mistaken must be "an existing or past

fact." *Id.* (citation omitted). The mistaken fact must also be material, which has been described to mean the following:

> [I]t must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the *sine qua non*, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties.

Id. (quoting *MacKay v. McIntosh*, 270 N.C. 69, 73-74, 153 S.E.2d 800, 804 (1967)). *See also Caudill v. Chatham Mfg. Co.*, 258 N.C. 99, 128 S.E.2d 128 (1962) (discussing, but not applying, the doctrine of mutual mistake of fact in a Workers' Compensation case one year before the General Assembly amended the Act to include mutual mistake as a ground for avoiding a settlement agreement).

Additionally, relief from a contract due to mistake of fact will be had only where both parties to an agreement are mistaken. *Thompson-Arthur Paving Co. v. Lincoln Battleground Assocs., Ltd.*, 95 N.C. App. 270, 278, 382 S.E.2d 817, 822 (1989). "Thus, as a general rule relief will be denied where the party against whom it is sought was ignorant that the other party was acting under a mistake and the former's conduct in no way contributed thereto." *Id.* (citation and quotation marks omitted). Likewise, a party who assumed the risk of a mistaken fact cannot avoid a contract. *Id.*

> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Restatement (Second) Contracts, § 154 (1979) (quoted and applied in *Howell*, 82 N.C. App. at 488, 347 S.E.2d at 70).

What a party believes the facts and circumstances to be and whether those beliefs induce a party to act are questions concerning that party's mental state. Such questions about the operation of a party's mind have been held to be questions of fact. *See Farmers Bank v. Michael T. Brown Distribs., Inc.*, 307 N.C. 342, 348, 298

S.E.2d 357, 360 (1983). Likewise, "[w]hether [a party] has assumed the risk of mistake is a question of fact . . . ." *Thompson-Arthur Paving Co.*, 95 N.C. App. at 278, 382 S.E.2d at 822.

In the instant case, the Commission made the following findings of fact:

> 10. The x-rays taken in April 1998, six months after Dr. Markworth or Southern Orthopaedic Clinic had last treated plaintiff, indicated Dr. Markworth's diagnosis of maximum medical improvement . . . was a mistake. Dr. Markworth testified, and the Full Commission finds as fact, that advising plaintiff that he was at maximum medical improvement at that time was a mistake.
>
> . . .
>
> 13. The Full Commission finds as fact, based on reasonable inference drawn from the evidence before it, that the finding of maximum medical improvement and the impairment rating given by Dr. Markworth were material to the settlement of this claim and that both parties relied on this information in entering into settlement negotiations.
>
> 14. Plaintiff testified, and the Full Commission finds as fact, that being told he was at maximum medical improvement was material to his decision to settle his case and that he would not have settled his case had he known there was a non-union of his cervical spine and that he was not at maximum medical improvement.
>
> 15. On April 3, 1998, plaintiff had requested a second opinion from Alan Friedman, M.D. During mediation, the parties agreed to plaintiff getting the second opinion.
>
> 16. Dr. Friedman saw plaintiff on June 2, 1998. This appointment was eight days prior to the signing of the settlement agreement. Plaintiff did not provide Dr. Friedman with his past medical records. Dr. Friedman reviewed x-rays from October but was not certain as to the date of the x-rays. Dr. Friedman indicated x-rays needed to be repeated and [sic] to be sure the fusion was stable. Dr. Friedman indicated his concern to plaintiff that current x-rays needed to be obtained to be sure the fusion was solid or not; however, the carrier would not authorize the taking of new x-rays. Dr. Friedman testified, and the Full Commission finds as fact, that plaintiff was not at maximum

medical improvement with regard to his cervical spine when he examined plaintiff on June 2, 1998.

. . . .

20. The greater weight of the evidence indicates there was a mutual mistake with regard to plaintiff's medical condition at the time of the signing of the settlement agreement.

Thus, the Commission made explicit findings that the parties believed that plaintiff had reached maximum medical improvement and, further, that they materially relied upon this fact in reaching a settlement. Defendants' essential argument on appeal is that because plaintiff either knew that there was a possibility that his fusion was not solid or was negligent in not declining to sign the settlement agreement, "mutual mistake is a legal impossibility" in this case. As the facts also support a contrary conclusion, we do not agree.

In making its findings, the Commission necessarily had to consider the issue of whether plaintiff assumed the risk that he may not have reached MMI and/or that he may have had an unsatisfactory fusion. Plaintiff's primary physician advised him that he had reached maximum medical improvement, and another physician expressed possible doubt about that conclusion. The doubt expressed by the second physician was never confirmed or investigated due to circumstances which may not necessarily be attributed to the plaintiff. The plaintiff testified that he based his decision to sign the settlement agreement on Dr. Markworth's diagnosis and that he would not have settled his case if Dr. Friedman had told him that there was no fusion in the back of his neck. Thus, there is competent record evidence to support the Commission's findings that the parties were mistaken as to whether plaintiff had reached maximum medical improvement and that this mistaken fact was material. These findings are, therefore, binding on appeal. *Murray*, 341 N.C. at 714, 462 S.E.2d at 491.

We note that when a party asserts assumption of risk as a defense to recision of a compromise settlement on the grounds of mutual mistake under G.S. § 97-17(a), it is the better practice for the Industrial Commission to make a specific finding detailing the reason(s) the Commission rejects or accepts this contention.

This assignment of error is overruled. We affirm the Commission's Opinion and Award filed 18 September 2002.

[2] We next address defendants' contention that the Commission's Opinion and Award issued 10 March 2003 must be vacated because the Commission was without authority to issue it.

An appeal to this Court divests the Industrial Commission of jurisdiction to issue opinions and awards. N.C.G.S. § 1-294 (2003); *Andrews v. Fulcher Tire Sales & Serv.*, 120 N.C. App. 602, 606-07, 463 S.E.2d 425, 428 (1995). Though an appeal is not perfected until docketed in this Court, perfection relates back to the time that Notice of Appeal is given. *Woodard v. North Carolina Local Governmental Employees' Retirement Sys.*, 110 N.C. App. 83, 87, 428 S.E.2d 849, 851 (1993).

In the instant case, the Commission filed an Opinion and Award on 18 September 2002. Defendants gave Notice of Appeal of that Opinion and Award, which was received by the Commission on 8 October 2002. At this point, the Commission was divested of jurisdiction in the matter. Nevertheless, on 10 March 2003, the Commission filed another Opinion and Award even though the appeal of the first order was still pending. Therefore, the second Opinion and Award was issued without jurisdiction, and is hereby vacated.

The Opinion and Award filed 18 September 2002 is affirmed; the Opinion and Award filed 10 March 2003 is vacated.

Chief Judge EAGLES concurred prior to 31 January 2004.

Chief Judge MARTIN concurs.

STATE OF NORTH CAROLINA v. MICHAEL O'BRIAN JACKSON

No. COA03-169

(Filed 17 February 2004)

1. Motor Vehicles— felonious breaking and entering of a motor vehicle—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of felonious breaking and entering of a motor vehicle under N.C.G.S. § 14-56 at the close of all the evidence, because: (1) there was no evidence regarding the element that the vehicle must contain goods, wares, freight, or anything of value;

(2) there was strong circumstantial evidence that the car was in fact empty of all goods or wares of even the most trivial value; and (3) the State's only offer of evidence were the keys to the car and the parts of the car.

2. Criminal Law— shackling of defendant at trial—adequate findings required

The general rule is that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances, and should the trial court in its sound discretion decide shackling is a necessary means for a safe and orderly trial, the determination must be supported by adequate findings.

Appeal by defendant from judgment entered 24 July 2002 by Judge Zoro J. Guice in the Criminal Session of Henderson County Superior Court. Heard in the Court of Appeals 12 November 2003.

Attorney General Roy Cooper, by Assistant Attorney General Clara D. King, for the State.

Appellate Defender Staple Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant appellant.

McCULLOUGH, Judge.

Michael O'Brian Jackson (defendant) was found by a jury to be not guilty of the charges of felonious breaking and entering and felonious larceny, but guilty of the charge of felonious breaking and entering of a motor vehicle. The verdict of the jury was based upon the following facts of record: On the night and early morning of 28 February-1 March 2002, the temperature was approximately forty degrees in Hendersonville, North Carolina. During that night, defendant was in the neighborhood of a detailing business owned by Mr. Anthony Tavcar. He was allegedly waiting in the cold for his girlfriend to get home.

Officer Samuel Ball of Hendersonville Police Department testified that while on patrol during his 7:00 p.m. to 7:00 a.m. shift of 28 February-1 March 2002, he observed active brake lights on a vehicle on Tavcar's property. When he drove onto Tavcar's property, Ball testified he observed a white male, later identified to be defendant, in the vehicle. Officer Ball further testified that the engine of this 1998 Honda was running and defendant was in the driver's seat. By the

time Officer Ball walked up to the vehicle, he stated that defendant had fully reclined in the driver's seat.

There is disputed evidence as to how defendant got into the vehicle where he was found by Officer Ball. The State asserted that defendant had unlawfully entered the auto detailing shop and removed the vehicle keys. Defendant asserted that the keys were inside the vehicle when he got inside to keep warm. The jury acquitted defendant on the charges of felonious breaking and entering and felonious larceny.

After the guilty charge of breaking and entering a motor vehicle, defendant pled guilty to being an habitual felon. The trial court found him to be an habitual felon, and entered a judgment and commitment on the underlying conviction as a Class C felony in accord with the habitual felon statute. Defendant was sentenced to a term of 133-169 months' imprisonment.

On appeal, defendant raises two issues. First, defendant claims the State produced insufficient evidence to prove that defendant committed the crime of breaking and entering a motor vehicle. Second, defendant claims his constitutional guarantees to a fair trial were abridged when defendant was shackled during the trial.

The Elements of N.C. Gen. Stat. § 14-56

[1] Defendant contends that there was insufficient evidence to support a conviction of breaking and entering of a motor vehicle, pursuant to N.C. Gen. Stat. § 14-56 (2003). At the close of the evidence at trial, defendant moved for a dismissal, arguing that the State had failed to prove its case. The trial court denied the motion. We conclude that this denial was error, and reverse defendant's conviction.

Due process as applied to the states via the Fourteenth Amendment " 'protects the accused against conviction except upon proof beyond a *reasonable doubt of every fact necessary* to constitute the crime with which he is charged.' " *State v. Wallace*, 351 N.C. 481, 507, 528 S.E.2d 326, 343 (2000) (emphasis added) (quoting *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970)), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001). However, where there is substantial evidence of each element of the offense charged, the fact that there is only a modicum of physical evidence, or inconsistencies in the evidence, is for the jury's consideration. *State v. Baker*, 338 N.C. 526,

559, 451 S.E.2d 574, 594 (1994); *see State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

For the State to successfully obtain a conviction for breaking and entering a motor vehicle, the State must prove the following five elements beyond a reasonable doubt: (1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) *containing goods, wares, freight, or anything of value*; and (5) with the intent to commit any felony or larceny therein. *See* N.C. Gen. Stat. § 14-56 (2003).

Defendant claims there is not even a modicum of evidence on the fourth element of the offense, and on that basis the trial court committed error in not granting their motion to dismiss at the close of all evidence. In *State v. McLaughlin*, 321 N.C. 267, 270, 362 S.E.2d 280, 282 (1987), our Supreme Court held that where the record was devoid of evidence that the victim's vehicle contained any items of even "trivial value" that belong to the victim or to anyone else, the trial court erred in submitting the issue of defendant's guilt of this offense to the jury. The "trivial value" test of this fourth element has been met by such items as: the vehicle registration card and hubcap key, *State v. Goodman*, 71 N.C. App. 343, 349-50, 322 S.E.2d 408, 413 (1984); citizen band radio, *State v. Kirkpatrick*, 34 N.C. App. 452, 456, 238 S.E.2d 615, 617 (1977); and papers, cigarettes, and shoe bag, *State v. Quick*, 20 N.C. App. 589, 591, 202 S.E.2d 299, 301 (1974).

In their brief, the State submits evidence that the key which started the car is a thing of value and meets the mere "trivial value" test of *McLaughlin*. The State further contends that the accouterments of a vehicle's interior are of value to meet the *McLaughlin* requirement: seats, carpeting, visors, handles, knobs, cigarette lighters, and radios.

We do not agree with either of these contentions. First of all, in *McLaughlin* the Supreme Court found there to be insufficient evidence on the fourth element of breaking and entering a vehicle when the defendant in that case had taken the victim's car keys and used them to move defendant's *own* goods and wares in the victim's car. *McLaughlin*, 321 N.C. at 270-72, 362 S.E.2d 280, 282-83. In the cases mentioned above, the trivial effects found in the vehicle which were sufficient to go to the jury on the fourth element were effects not inherently a part of the functioning vehicle. The one common feature of the items mentioned in these cases was that they were akin to the

cargo of the vehicle: "goods, wares, freight, or anything of value." *See* N.C. Gen. Stat. § 14-56.

Adopting the State's reading of N.C. Gen. Stat. § 14-56, and specifically the fourth element of that offense, would render that element redundant and superfluous. Our Supreme Court has repeatedly held that "[i]t is a well settled principle of statutory construction that words of a statute are not to be deemed merely redundant if they can be reasonably so as to add something to the statute which is in harmony with its purpose." *In Re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 6-7 (1968). The statute clearly requires that the larceny element of the breaking and entering pertain to objects within the vehicle, separate and distinct from the functioning vehicle. Our reading of the statute is supported by the North Carolina Legislature's definition of misdemeanor tampering with a vehicle that requires some purpose not necessarily having to do with a larceny. *See* N.C. Gen. Stat. § 20-107 (2003).

The transcript shows that defendant in this case broke and entered a 1988 Honda which was owned by an auto dealership. The car was being detailed for resale. This is strong circumstantial evidence that the car was in fact empty of all goods or wares of even the most trivial value. Furthermore, the State's only offer of evidence on this element were the keys to the car, and the parts of the car. Thus, the record lacks any evidence sufficient to carry the fourth element of this case to the jury.

We cannot remand this case for resentencing under a lesser included offense, because there are no such offenses within N.C. Gen. Stat. § 14-56. In *State v. Carver*, 96 N.C. App. 230, 385 S.E.2d 145 (1989), our Supreme Court found N.C. Gen. Stat. § 20-107(a) (2003) not to be a lesser included offense of N.C. Gen. Stat. § 14-56:

> A lesser included offense is "one composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense." Black's Law Dictionary 812 (5th ed. 1979).
>
> G.S. sec. 20-107(a) prohibits "[a]ny person . . . [from] willfully injur[ing] or tamper[ing] with any vehicles or break[ing] or remov[ing] any part or parts of or from a vehicle without the consent of the owner." However, G.S. sec. 14-56 prohibits "any person, with the intent to commit any felony or larceny therein, [from] break[ing] or enter[ing] any . . . motor

> vehicle." While most of the elements of G.S. sec. 20-107(a) are present in G.S. sec. 14-56, neither injuring or tampering with the vehicle itself nor breaking or removing a part of it (the car) are part of the greater offense.

Carver, 96 N.C. App. at 233-34, 385 S.E.2d at 147. We hold the same is true for N.C. Gen. Stat. § 20-107(b), as this subsection has additional elements not included in N.C. Gen. Stat. § 14-56.

We thus reverse defendant's guilty verdict under N.C. Gen. Stat. § 14-56, and also the trial court's finding of defendant as an habitual felon.

Shackling Defendant During Court Proceedings

[2] As we reversed above on the sufficiency of the evidence issue, we use this portion of the opinion only to caution trial courts in the practice of shackling a defendant during court proceedings. The general rule is that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances. *State v. Tolley*, 290 N.C. 349, 365, 226 S.E.2d 353, 366 (1976). The reasons being: (1) it may interfere with the defendant's thought processes and ease of communication with counsel; (2) it intrinsically gives affront to the dignity of the trial process, and most importantly; (3) it tends to create prejudice in the minds of the jurors by suggesting that the defendant is an obviously bad and dangerous person whose guilt is a foregone conclusion. *Id.* at 366, 226 S.E.2d at 367. *Tolley* and N.C. Gen. Stat. § 15A-1031 (2003) enumerate a non-exhaustive list of twelve material circumstances which a trial judge should consider before shackling a defendant. These include the seriousness of the current charges; evidence of a present plan to escape; threats to harm others or cause a disturbance; and risk of mob violence.

Should the trial judge, in his sound discretion, decide shackling is a necessary means for a safe and orderly trial in his or her courtroom, the determination must be supported by adequate findings. The Supreme Court stated:

> Whatever the basis for his decision, however, the unquestioned rule is that when the trial judge, in jury cases, contemplates the necessity of employing unusual visible security measures such as shackles, he should state for the record, out of the presence of the jury, the particular reasons therefor and give counsel an opportunity to voice objections and persuade the

> court that such measures are unnecessary. While the cases have established no definitive rule as to the exact form of evidentiary hearing to determine whether shackling of the defendant is necessary, the most prevalent conclusion is that the hearing may be informal and that the ordinary rules of evidence need not be observed, although the trial judge may decide, particularly where the need for physical restraint is controverted, to conduct a full evidentiary hearing with sworn testimony and formal findings of fact. In any event, a record must be made which reflects the reasons for the action taken by the court and which indicates that counsel have been afforded an opportunity to controvert these reasons and thrash out any resulting factual questions. Only in this manner can there be preserved a meaningful record from which a reviewing court may determine whether the trial court abused its discretion.

Tolley, 290 N.C. at 368-69, 226 S.E.2d at 368. While this Court will generally respect the discretion of a trial court in the governance of their courtroom, we do "require a meaningful record" evidencing the basis of this discretion. This is especially true in instances where a defendant's presumption of innocence is implicated. We caution trial courts to adhere to the proper use of their discretion and provide the rationale for that discretion, via some finding substantiated in the record.

This obligation is not excused when attempts are made to conceal from the jury the fact that the defendant is shackled as the trial court did in this case. Assuming the shackles could successfully be kept from the jury's awareness, the concerns that shacking interferes with the defendant's thought processes and communications with counsel, and affronts the dignity of the trial process, are not cured by mere concealment from the jury. For meaningful review of his discretion, the trial judge must still provide the record with the "particular reasons" for his determination to shackle the defendant. *Id.*

For the reasons stated in the first analytical section of this opinion, we hold it was error for the trial court not to grant defendant's motion to dismiss at the close of all evidence. We hereby,

Reverse.

Judge BRYANT concurs.

Judge TYSON concurs in the result only.

HAROLD DEAN VENABLE AND STATE OF NORTH CAROLINA, EX REL., HAROLD DEAN VENABLE, PLAINTIFFS-APPELLANTS V. C.D. VERNON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF ROCKINGHAM COUNTY, NORTH CAROLINA AND U.S. FIDELITY & GUARANTY COMPANY, DEFENDANTS-APPELLEES

No. COA03-230

(Filed 17 February 2004)

Public Officers and Employees— deputy sheriff—wrongful discharge

The trial court did not err in an action arising out of the alleged wrongful discharge of a deputy sheriff by granting summary judgment in favor of defendants, because: (1) defendants met their burden to demonstrate that plaintiff was fired on grounds unrelated to politics in order to shift the burden to plaintiff; and (2) plaintiff's evidence to support his claim is based solely on his deposition that asserted he was subjected to political coercion, which amounted to mere conjecture.

Appeal by plaintiff[1] from an order entered 20 November 2002 by Judge W. Douglas Albright in Superior Court, Rockingham County. Heard in the Court of Appeals 19 November 2002.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by James R. Morgan, Jr., for defendants-appellees.

Hafer & Caldwell, P.A., by Edmond W. Caldwell, Jr., for North Carolina Sheriffs' Association, amicus curiae.

McGEE, Judge.

Plaintiff appeals from summary judgment granted in favor of defendants. Plaintiff brought this civil action seeking to recover damages from C.D. Vernon (defendant Vernon), individually and as Sheriff of Rockingham County, and from U.S. Fidelity & Guaranty Company as surety upon the official bond of defendant Vernon.

1. Under N.C. Gen. Stat. § 58-76-5 (2003), "every person injured by the neglect, misconduct, or misbehavior in office of any . . . sheriff . . . may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the State . . . ." Thus, the State of North Carolina is listed as a plaintiff in this case. However, in an effort to simplify matters, we will refer to plaintiff in the singular, indicating only Harold Venable.

Defendant Vernon terminated plaintiff's employment as a deputy sheriff with a position title of detective with the Rockingham County Sheriff's Department (the Department) effective 15 July 1994. At that time, defendant Vernon also terminated the employment of six other deputy sheriffs. Plaintiff had been employed as a deputy sheriff by the Department since February 1990.

According to defendant Vernon, he dismissed plaintiff because plaintiff's job performance was unsatisfactory. Defendant Vernon's decision was based in part on Captain Gene Nelson's (Captain Nelson) assessment of plaintiff's performance. In a performance appraisal conducted on 11 March 1994 by the Department, plaintiff was rated "below expectations" in four out of twenty-two categories, resulting in a performance grade of 2.87. An employee who met expectations in all categories received a performance grade of 3.0. At the time of plaintiff's assessment, the average performance grade of appointees and employees of the Department was 3.42. Plaintiff was one of only two appointees or employees, and the only detective, in the Department to receive an average performance grade below the "meeting expectations" mark.

Captain Nelson wrote a "memorandum to the file" on 3 June 1992, detailing a conversation he had with plaintiff regarding plaintiff's "continued tardiness on recontacts and poor arrest record." In a memorandum to plaintiff from Captain Nelson dated 14 October 1993, Captain Nelson emphatically stated that when he directed plaintiff to perform an assignment such as to check on the possible location of a fugitive, plaintiff was to attend to that assignment immediately. Plaintiff received a written reprimand on 15 November 1993 from Sergeant Wayne Wright (Sergeant Wright), for failing to immediately investigate a case of sex abuse involving a juvenile. Another memorandum to plaintiff from Captain Nelson dated 8 March 1994 listed cases assigned to plaintiff that remained outstanding and included the admonishment that "Sheriff Vernon requires the assigned [d]etective to recontact the victim within [seven] days. Two of the above cases are from January! Get these late reports caught up immediately!"

Plaintiff alleges he was wrongfully discharged from his position as deputy sheriff for political reasons, which he contends is a violation of public policy. Plaintiff testified at his deposition that he was repeatedly subjected to political pressure from others within the Department, with the exception of defendant Vernon, to support defendant Vernon in the Democratic primary and in his 1994

reelection campaign. Plaintiff stated that Sergeant Wright and Captain Nelson routinely referred to him as "Sam's boy," a reference to Sam Page, a friend of plaintiff's and former co-worker in the Department, who ran against defendant Vernon in the 1994 primary. According to plaintiff, Sergeant Wright, along with other detectives, suggested plaintiff should remove Sam Page's campaign sign from a location across the street from the church at which plaintiff's father was the pastor.

Sheriff Vernon's campaign manager stipulated that fifty-six of the one hundred appointees and employees of the Department contributed money to defendant Vernon's 1994 reelection campaign. Three of the seven individuals discharged by defendant Vernon in July 1994 contributed money to the campaign. Thirty of the Department's appointees and/or employees neither contributed to nor worked the polls during the campaign, and twenty-six of those thirty individuals were not terminated in July 1994.

Plaintiff initially filed an action in the United States District Court for the Middle District of North Carolina seeking monetary damages and reinstatement to his position within the Department. Plaintiff stipulated to the dismissal of his federal lawsuit and subsequently filed a complaint in state court asserting he was wrongfully discharged in violation of N.C. Gen. Stat. § 153A-99 and the North Carolina Constitution, in addition to a claim under defendant Vernon's official sheriff's bond. The trial court granted defendants' motion for summary judgment on or about 20 November 2002. Plaintiff appeals.

"The party moving for summary judgment must establish the lack of any triable issue by showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999) (quoting *Branks v. Kern*, 320 N.C. 621, 623, 359 S.E.2d 780, 782 (1987)); N.C. Gen. Stat. § 1A-1, Rule 56 (2003). An issue is genuine "if it is supported by substantial evidence." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002). "A genuine issue of material fact is of such a nature as to affect the outcome of the action." *Salter v. E & J Healthcare, Inc.*, 155 N.C. App. 685, 689, 575 S.E.2d 46, 49 (2003) (quoting *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C. App. 676, 681, 535 S.E.2d 357, 361, *disc. review denied*, 353 N.C. 265, 546 S.E.2d 102 (2000)).

In order to prevail on a motion for summary judgment, the moving party must prove that an "essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Once the moving party has met that burden, the non-moving party must produce a forecast of evidence sufficient to demonstrate that a *prima facie* case will be established at trial. *Prior v. Pruett*, 143 N.C. App. 612, 617, 550 S.E.2d 166, 170 (2001), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 571 (2002). All evidence, including any inference therefrom, is to be considered in the light most favorable to the non-moving party. *Id.*

In North Carolina, "in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason." *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991), *cert. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992). Our Courts and the General Assembly have recognized exceptions to this common law rule. In *Coman v. Thomas Manufacturing Co.*, our Supreme Court recognized that an employee may not be terminated for a reason offensive to public policy.

> "While there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent."

Coman, 325 N.C. 172, 175, 381 S.E.2d 445, 446-47 (1989), (quoting *Sides v. Duke University*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985)). The Court defined "public policy" as the "principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.*

Plaintiff argues that he is a county employee and therefore is entitled to the protections afforded by N.C. Gen. Stat. § 153A-99. The express purpose of N.C. Gen. Stat. § 153A-99 is "to ensure that county employees are not subjected to political or partisan coercion while performing their job duties[.]" N.C. Gen. Stat. § 153A-99 (2002). In *Vereen v. Holden*, this Court noted that if a county employee was fired due to his political affiliations and activities, "this would con-

travene rights guaranteed by our State Constitution. . . . and the prohibition against political coercion in county employment stated in N.C. Gen. Stat. § 153A-99," hence violating North Carolina public policy. *Vereen*, 121 N.C. App. 779, 784, 468 S.E.2d 471, 475 (1996) (citations omitted), *remanded on other grounds*, 345 N.C. 646, 483 S.E.2d 719 (1997). However, the issue before this Court is whether plaintiff presented sufficient evidence to defeat defendant's motion for summary judgment. We do not determine as to whether plaintiff is a county employee as defined by N.C. Gen. Stat. § 153A-99.

In response to plaintiff's complaint, defendants maintained that plaintiff's dismissal was not politically motivated and instead was based on plaintiff's poor job performance. In an affidavit, Assistant County Manager Ben Neal stipulated to plaintiff's below par performance grade on plaintiff's performance appraisal completed in 1994. Department Staff Sergeants Michael Campbell and Ralph Campbell and Sergeant Cathy Luke stated in affidavits that they did not contribute to or participate in defendant Vernon's 1994 political campaign and that they felt no pressure to act otherwise. Defendant Vernon's 1994 campaign treasurer averred in an affidavit that a little over half the appointees and employees of the Department contributed financially to defendant Vernon's campaign and that three of the six individuals discharged along with plaintiff in July 1994 contributed financially to Sheriff Vernon's reelection campaign. Finally, defendant Vernon asserted at his deposition that plaintiff was fired due to poor performance and not for political reasons.

Defendants, having met their burden to demonstrate that plaintiff was fired on grounds unrelated to politics and therefore no genuine issue of material fact existed, the burden then shifted to plaintiff to establish a forecast of evidence sufficient to support his complaint alleging wrongful discharge. Plaintiff's evidence to support his claim is based solely on his deposition in which he asserted he was subjected to political coercion instigated by Sergeant Wright, Detective Kendrick and Captain Nelson, as well as other employees, of the Department. Plaintiff alleges that they were acting as agents of defendant Vernon. Even after providing plaintiff with all favorable inferences reasonably drawn from the evidence, plaintiff's allegations amount to mere conjecture.

"Although evidence of retaliation in a case . . . may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation." *Lenzer v. Flaherty*, 106 N.C. App. 496, 510, 418 S.E.2d 276, 284, *disc.*

review denied, 332 N.C. 345, 421 S.E.2d 348 (1992). "A cause of action must be something more than a guess. A resort to a choice of possibilities is guesswork not decision." *Kinlaw v. Willetts*, 259 N.C. 597, 603-4, 131 S.E.2d 351, 355 (1963) (citations omitted). Where causation is rooted in mere speculation and surmise, "it is insufficient to present a question of causation to the jury." *Ellington v. Hester*, 127 N.C. App. 172, 175, 487 S.E.2d 843, 845, *disc. review denied*, 347 N.C. 397, 494 S.E.2d 409 (1997) (citations omitted).

In the case before us, plaintiff produced insufficient evidence to defeat defendants' motion for summary judgment. Plaintiff provided no indication that should the case proceed, he would be able to produce evidence that his discharge was for any unlawful reason, thereby making a determination as to whether plaintiff is a county employee as defined by N.C. Gen. Stat. § 153A-99 unnecessary. Thus, we find plaintiff's assignment of error number one to be without merit.

Because we conclude that the trial court acted properly in granting summary judgment to defendants, we need not address plaintiff's assignments of error numbers two, three, four, five, and seven. Further, plaintiff has failed to present any argument in support of his assignment of error number six and it is thus deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

Affirmed.

Judges HUNTER and HUDSON concur.

STATE OF NORTH CAROLINA v. MONICA D. BRANCH, DEFENDANT

No. COA03-350

(Filed 17 February 2004)

Search and Seizure— motion to suppress drugs—license and registration checkpoint—dog sniff

The trial court erred in a misdemeanor possession of marijuana and felony possession of cocaine case by denying defendant's motion to suppress evidence of the drugs found in a search at a license and registration checkpoint, because: (1) an officer's

prior knowledge and present observations were not sufficient to justify a dog sniff and search of defendant's car, but were merely enough to justify the license check; (2) once the officers stopped defendant and she had given them her valid license and registration, some further particularized suspicion was necessary to justify a longer detention; (3) a reasonable and articulable suspicion is required before a dog sniff is valid even though it is not a search; and (4) the time needed to verify defendant's credentials is not a time during which officers may investigate any possible criminal activity while the defendant is immobilized.

Appeal by defendant from order denying her motion to suppress entered 29 August 2002 by Judge Anthony M. Brannon in Rockingham County Superior Court. Heard in the Court of Appeals 3 December 2003.

Attorney General Roy Cooper, by Special Deputy Attorney General J. Allen Jernigan for the State.

Assistant Appellate Defender, Barbara S. Blackman for the defendant-appellant.

ELMORE, Judge.

Monica D. Branch (defendant) was stopped at a "license and registration" checkpoint by Deputy Marshall of the Rockingham County Community-Oriented Policing Unit. Defendant produced a duplicate driver's license and a registration. Deputy Marshall was suspicious of the duplicate license, and suspected that she had outstanding warrants based on his prior knowledge of the defendant and that her license may have been revoked. Deputy Marshall pulled defendant out of the checkpoint and called in a license and warrant check. Deputy Marshall called over Deputy Howell to make inquiry of defendant while the checks were being performed. Deputy Howell, a K-9 officer, walked his dog around the perimeter of defendant's car while the checks were being performed. The dog alerted to the presence of narcotics. Deputies Marshall and Howell ordered defendant and her passenger out of the car and searched the car. Deputy Howell found marijuana stems and butts in the ashtray. He seized a purse lying on the front seat, which defendant denied was hers. Defendant later acknowledged ownership of the purse when Deputy Howell found marijuana in a non-transparent plastic container in the purse. Deputy Howell asked a female officer to search

defendant, as he believed, based on prior contact with her, that defendant carried cocaine in her brassiere. The officer found a packet of cocaine in defendant's brassiere. At no time did defendant consent to the searches.

Defendant was charged with misdemeanor possession of marijuana and felony possession of cocaine. Defendant moved to suppress the evidence of the drugs found in the search. The motion was denied by the trial court. Defendant preserved her right of appeal before she pled guilty to the charges. She now brings this appeal.

We note that the trial court's ruling on a motion to suppress is afforded great deference upon appellate review, as the trial court has the duty to hear testimony and weigh the evidence. *State v. Johnston*, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994). But while the trial court's findings of fact may be binding on appeal, we review its conclusions of law *de novo*. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). We must not disturb the court's conclusions if they are supported by the court's factual findings. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982).

Defendant assigns error to the denial of the motion to suppress, arguing first that her seizure at an unconstitutional checkpoint and illegal detention following her presentation of a valid driver's license deprived her of her freedom from unreasonable searches and seizures under the United States and North Carolina Constitutions. We agree.

The trial court made the following findings of fact relevant to the issue before us:

> 5. That all vehicles entering the intersection, from both directions, on each road, were stopped and all drivers were required [to] produce a valid driver's license and registration.
>
> . . . .
>
> 8. That Deputy Marshall testified a K-9 unit is normally available at the checkpoint to assist in the investigation and detect controlled substances if necessary.
>
> . . . .
>
> 10. That the process of checking the drivers license and registration of each vehicle usually took about 40 seconds.
>
> 11. That at some point, at approximately 11:00 p.m., the Defendant, Monica Branch, came through the checkpoint and

was asked to produce her driver's license and registration. That she produced a duplicate driver's license. She also produced a registration or other information which indicated the registered owner of the vehicle was the Defendant's sister.

. . . .

14. That based upon Deputy Marshall's experience with Ms. Branch, and the fact that she presented a duplicate license, Deputy Marshall suspected that she did not have a valid permit and he decided to check and verify that her driver's license was valid.

15. That in Deputy Marshall's experience, persons who have lost their driving privileges frequently display duplicate permits.

16. That Deputy Marshall was acquainted with Mr. [sic] Branch and had reason to believe that her privilege to drive a motor vehicle was suspended.

17. That Deputy Marshall was acquainted with Mr. [sic] Branch and had reason to believe that there were outstanding warrants for her arrest.

18. That Deputy Marshall directed Ms. Branch to pull her vehicle off the roadway while he contacted the Rockingham County Sheriff's Department communications center to verify her driver's license status and to check for any outstanding warrants.

19. That Deputy Marshall spoke to Ms. Branch for approximately 40 seconds prior to directing her to pull over to the shoulder.

20. That during the time Deputy Marshall was contacting the Rockingham County Sheriff's Department communication and performing these checks, Deputy Howell approached her vehicle with his K-9 dog.

21. That Deputy Marshall and Deputy Howell had spoken briefly after Deputy Marshall made the decision to contact communications.

22. That Deputy Marshall had related to Deputy Howell that he had known Ms. Branch to be in possession of controlled substances in the past. Specifically, that he knew that she had, in the past, carried controlled substance on her person. That Deputy

Howell was also acquainted with Ms. Branch and was aware of her criminal history.

. . . .

26. Deputy Howell testified that at the time Ms. [Branch] [sic] passed through the checkpoint, he believed that Ms. Branch did not have a valid operating permit and that he communicated this information to Deputy Marshall. This belief was based upon the fact that he had previously charged Ms. Branch with a moving violation and that to his knowledge, she had failed to appear [in court] in January of 2000. Normally, this would result in the operating privilege being suspended or revoked.

27. That independent of any request from Deputy Marshall, and based upon his prior dealing with Ms. Branch, Deputy Howell decided to approach Ms. Branch's vehicle with his K-9, "Toon". That at the time that Deputy Howell approached the vehicle it was parked on a public roadway.

. . . .

31. That during the time that Deputy Howell was conducting his investigation, Deputy Marshall was in his vehicle checking the status of Ms. Branch's driver's license and checking for possible outstanding process for Ms. Branch.

32. That the Defendant was required to remain in her vehicle for less than 5 minutes while the officers continued their investigation.

33. After the dog alerted Deputy Howell returned the dog to his patrol car and informed Ms. Branch and her passenger that the dog had detected the odor of a controlled substance in the vehicle. Based upon that information, Deputy Howell advised the Defendant that he intended to search the vehicle.

Deputy Howell went on to find 0.6 grams of marijuana in the vehicle, more marijuana in a purse within the vehicle, and a 0.3 gram rock of crack cocaine in the defendant's brassiere.

The trial court concluded as a matter of law:

6. That the detention of all vehicles, including the Defendant's vehicle was reasonable in scope and duration.

7. That Deputies Marshall and Howell had specific articulable reasons to continue the investigation of the Defendant after the initial stop. Specifically, the continued detention of the Defendant was necessary to determine if she has a valid driver's license, and to determine if there were outstanding warrants for the Defendant.

8. That the duration of her detention to continue the investigation was reasonable and not excessive.

9. That Deputy Howell's conduct in taking his K-9 around the Defendant's vehicle did not constitute a search of an area to which the Defendant had a reasonable expectation of privacy. *State v. Fisher*, 141 N.C. App. 448 . . . 539 S.E.2d 677. Citing *Place*, 462 U.S. at 707, 77 L. Ed. 2d at 121.

10. For the purpose of the sniff, the Deputies did not need to justify the Defendant's detention with reasonable suspicion, based on objective, specific, and articulable facts because the detention did not exceed that which was already necessary to determine if the Defendant had a valid driver's license and to determine if there were outstanding warrants for the Defendant. *State v. McClendon*, 130 N.C. App. 368, 502 S.E.2d 902 (1998), aff'd, 350 N.C. 630, 517 S.E.2d 128 (1999), and *State v. Falana*, 129 N.C. App. 813, [817,] 501 S.E.2d 358[,] [360] (1998)[.]

This Court has upheld the constitutionality of a checkpoint which stops for a specified purpose every vehicle that passes, so long as the checks are not random and subject to the officer's unbridled discretion. *State v. Grooms*, 126 N.C. App. 88, 483 S.E.2d 445 (1997); *State v. Sanders*, 112 N.C. App. 477, 435 S.E.2d 842 (1993). The checkpoint in question was a checkpoint designated to check licenses and registrations, and if further evidence was detected of impaired driving or illegal activity, further investigation was conducted according to the instructions given the officers. This is within the constitutional mandates.

The trial court found as fact that the officers had previous knowledge of the defendant and also observed that she had given a duplicate license. According to the case of *State v. Briggs*, 140 N.C. App. 484, 536 S.E.2d 858 (2000), it is proper for an officer's prior knowledge of a defendant, combined with present observations and not taken alone, to constitute a reasonable suspicion justifying fur-

ther investigation. In *Briggs*, the officer had previously arrested the defendant for possession of controlled substances and knew defendant was on probation at the time of the stop. The officer smelled burned cigar in defendant's vehicle and on defendant, and was aware that burning cigars were commonly used to mask the smell of illegal substances. Defendant had previously stated he did not smoke cigars. His eyes were red and glassy, and his behavior suggested possible usage of a controlled substance. *Briggs*, 140 N.C. App. at 493-94, 536 S.E.2d at 863-64. These observations added to the officer's prior knowledge of the defendant to justify a patdown search and the confiscation of the fruit of that search, which was a cigar holder containing crack cocaine.

In the case at bar, the prior knowledge and present observations of the officers were not sufficient to justify a dog sniff and search of defendant's car, but were enough to justify the license check. Both deputies suspected that Defendant was carrying a duplicate license because in their memory she had been charged with an offense which would result in the revocation of her license. They had observed in their experience that sometimes when an individual's license had been revoked, the individual may drive with an invalid duplicate which was made prior to the revocation. Prior knowledge of the defendant alone would not constitute such a reasonable suspicion. Neither would the presentation of a duplicate license, standing alone. Both together, however, may form reasonable suspicion to justify investigation of the validity of the license. Such was the case here, and the suspicion related to her driving privileges alone. At that point there were no further observations indicating other illegal conduct by the defendant.

Once the officers had stopped defendant, and she had given them her valid license and registration, some further particularized suspicion was necessary to justify a longer detention. In addition, a reasonable and articulable suspicion is required before a dog sniff, even though it is not a search, is valid. *State v. Falana*, 129 N.C. App. 813, 817, 501 S.E.2d 358, 360 (1998).

Likewise, since the canine sniff would not be appropriate beyond the detention because the defendant presented what proved to be a valid license and registration, the canine sniff during the time license and registration checks were conducted is also inappropriate. The time needed to verify defendant's credentials is not a time during which officers may investigate any possible criminal activity while

the defendant is immobilized. This would present officers with a free-for-all race against the clock for evidence, guided only by their unbridled discretion, which is unconstitutional.

The U.S. Supreme Court has ruled that:

> [A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. . . . It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

Florida v. Royer, 460 U.S. 491, 501, 75 L. Ed. 2d 229, 238 (1983) (citations omitted).

That same reasoning has been applied in cases such as *State v. McClendon*, 130 N.C. App. 368, 502 S.E.2d 902 (1998) by this Court. Allowing the dog sniff of defendant while she was detained on suspicion of carrying an invalid license would not be consistent with this reasoning.

We therefore determine that the initial stop was justified, as found by the trial court. The trial court erred, however, in finding that no reasonable suspicion was necessary to conduct the dog sniff and subsequent searches. Because this conclusion is contrary to our caselaw, we must reverse the ruling of the trial court. We do not reach the second issue raised by the defendant concerning the location of the signing of the order because the first issue is dispositive. The order denying the motion to suppress is therefore

Reversed.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA v. JOSEPH L. CUSTIS

No. COA02-1579

(Filed 17 February 2004)

Sexual Offenses— first-degree—indecent liberties—motion to dismiss—sufficiency of evidence—fatal variance from indictment

The trial court erred by denying defendant's motion to dismiss the charges of two counts of first-degree sexual offense and two counts of indecent liberties with a child, because: (1) the State failed to present evidence that the charged offenses occurred on or about 15 June 2001 as alleged in the indictment; (2) defendant relied on the language in the indictment to build his alibi defense for the 15 June 2001 weekend; and (3) all of the evidence presented at trial went to sexual encounters over a period of years ending some time prior to the date listed in the indictment, and such a dramatic variance between the indictment date and the evidence adduced at trial prejudiced defendant by denying him the opportunity to present an adequate defense.

Appeal by defendant from judgment dated 13 March 2002 by Judge Timothy L. Patti in Lincoln County Superior Court. Heard in the Court of Appeals 17 September 2003.

Attorney General Roy Cooper, by Assistant Attorney General Sue Y. Little, for the State.

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

BRYANT, Judge.

Joseph L. Custis (defendant) appeals a judgment dated 13 March 2002 entered consistent with a jury verdict finding him guilty of two counts of first-degree sexual offense and two counts of indecent liberties with a child.

The indictments against defendant were issued on 13 August 2001 and alleged that "on or about [15 June 2001]" defendant engaged in two counts of first-degree statutory sexual offense and two counts of indecent liberties with T.H., defendant's eleven-year-old step-

grandson. At trial, the State's evidence tended to show that defendant began living with T.H.'s grandmother two years prior to their marriage in March 2001.[1] Before and after March 2001, T.H. stayed overnight at his grandparents' home almost every other weekend and on some weekdays. T.H. testified that during those visits, defendant routinely sexually abused him. T.H. could not recall the exact date of his last stay at his grandparents' home. T.H.'s mother testified that T.H. last spent the night at the grandparents' home on the weekend "around June 15th[, 2001]" but did not state whether defendant was at home on that date. The trial court took judicial notice that 15 June 2001 was a Friday.

At the close of the State's evidence, defendant moved for a dismissal of the charges and a directed verdict on the basis that the State had failed to present evidence that the charged offenses occurred on or about 15 June 2001. The trial court denied the motions, and defendant proceeded with his defense. The defense evidence indicated defendant had been admitted to a hospital at 4:00 a.m. on 15 June 2001. Hospital records showed he had remained there until 22 June 2001. According to defendant, T.H. "had [a] lot of problems" when they first met and seemed to have been abused. T.H. looked up to defendant as a father figure and a grandfather. Defendant further testified that, on 12 July 2001, when T.H. told his mother and uncle he had been sexually abused by defendant, T.H. had been to defendant's home. During that visit, T.H. had acted as though he wanted defendant to kiss him. Defendant had slapped T.H. on the hand and told him not to repeat such behavior. Upset, T.H. had stomped his feet, gone outside, and pushed his younger brother. In addition, T.H.'s grandmother testified that T.H. did not spend time at her home on 15 June 2001, and Latasha Surratt, T.H.'s babysitter, stated he had been troublesome and had told lies in the past. Two other witnesses testified to defendant's good character and cordial relationship with T.H.

At the close of all the evidence, defendant renewed his motions to dismiss and for a directed verdict, which the trial court again denied. According to a stipulation by the parties contained in the record on appeal, the State argued to the jury during its unrecorded closing argument "that it did not matter if the State failed to prove that [T.H.] was sexually assaulted on June 15, 2001, for if he had not been sexu-

1. This opinion will refer to defendant and T.H.'s grandmother jointly as the "grandparents."

ally assaulted on June 15, he had been sexually assaulted during the previous weekend."

The dispositive issue is whether a fatal variance existed between the date of the offenses charged in the indictments and the State's evidence at trial so as to deprive defendant of the opportunity to present an adequate defense. Specifically, defendant contends the trial court erred in failing to dismiss the charges against him because the State's evidence presented at trial did not establish he committed the charged offenses on or about 15 June 2001 as alleged in the indictments.

Although "[a]n indictment must include a designated date or period of time within which the alleged offense occurred," a judgment will not be reversed because an indictment states an incorrect date or time frame if (1) time is not of the essence of the offense and (2) the error or omission did not mislead the defendant to his prejudice. *State v. Stewart*, 353 N.C. 516, 517, 546 S.E.2d 568, 569 (2001). "Generally, the time listed in the indictment is not an essential element of the crime charged." *Id.* at 517-18, 546 S.E.2d at 569 (citing *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E.2d 396, 403 (1961)). Furthermore, in child sexual abuse cases our Courts have adopted a policy of leniency with regard to differences in the dates alleged in the indictment and those proven at trial. *State v. McGriff*, 151 N.C. App. 631, 635, 566 S.E.2d 776, 779 (2002).

Even in child sexual abuse cases, however, "[a] variance as to time . . . becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense." *State v. Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984); *see Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 (applying this principle in a child sexual abuse case). "The purpose of the rule as to variance is to avoid surprise, and the discrepancy must not be used to ensnare the defendant or to deprive him of an opportunity to present his defense." *State v. Guffey*, 39 N.C. App. 359, 362, 250 S.E.2d 96, 98 (1979) (citation omitted). As this Court further explained in *State v. Booth*:

> Time variances do not always prejudice a defendant so as to require dismissal, even when an alibi is involved. Thus, a defendant suffers no prejudice when the allegations and proof substantially correspond; when [a] defendant presents alibi evidence relating to neither the date charged nor the date shown by the State's evidence; or when a defendant presents an alibi defense

> for both dates. However, when the defendant relies on the date set forth in the indictment and the evidence set forth by the State substantially varies to the prejudice of [the] defendant, the interests of justice and fair play require that [the] defendant's motion for dismissal be granted.

State v. Booth, 92 N.C. App. 729, 731, 376 S.E.2d 242, 244 (1989) (citations omitted); *see Stewart*, 353 N.C. at 518, 546 S.E.2d at 569 (citing *Booth*).

In *Stewart*, our Supreme Court, finding a dramatic and fatal variance between the indictment and the evidence presented at trial, noted that the defendant had prepared and presented alibi evidence in direct reliance on the indictment listing the date of the offense as "7-01-1991 to 7-31-1991." *Stewart*, 353 N.C. at 518, 546 S.E.2d at 569. The indictment noted only the month of July 1991 as the period of time of the sexual assaults charged, and the defendant presented evidence of his whereabouts for each day of that month. During its case-in-chief, the State introduced evidence concerning sexual encounters between the victim and the defendant over a two-and-one-half-year period but failed to present any evidence of a specific act occurring during July 1991. Although the victim testified that the assaults began in 1989 and continued for two and a half years, he also did not testify to any offense occurring in July 1991. *Id.* at 519, 546 S.E.2d at 570. Based on this evidence and the defendant's reliance thereon for purposes of shaping his alibi defense, the Supreme Court held that "[u]nder the unique facts and circumstances of this case, . . . the dramatic variance between the date set forth in the indictment and the evidence presented by the State prejudiced defendant by depriving him 'of an opportunity to adequately present his defense.' " *Id.* (citation omitted).

The case *sub judice* appears to involve almost the same "unique facts and circumstances" as *Stewart*. In the instant case, there was no evidence presented of sexual acts or indecent liberties occurring on or about June 15. The language in the indictment, on which defendant obviously relied in building his alibi defense for the 15 June 2001 weekend, was not supported by the evidence. Instead, T.H. testified that the sexual abuse occurred during weekend visits to his grandparents' home and that he had begun staying with his grandparents on weekends two years prior to their marriage in March 2001. The mother in turn testified that T.H. had stayed at the grandparents' home on the weekend around 15 June 2001, but neither the mother nor T.H. testified that defendant was present at the time or that any

sexual abuse occurred on that date. Thus, all of the evidence presented at trial went to sexual encounters over a period of years ending some time prior to the date listed in the indictment. As in *Stewart*, we hold that such a dramatic variance between the indictment date and the evidence adduced at trial prejudiced defendant by denying him the opportunity to present an adequate defense. *Id.*; *see also State v. Christopher*, 307 N.C. 645, 650, 300 S.E.2d 381, 384 (1983) (finding fatal variance where the defendant relied on the indictment in shaping his alibi defense and "the State's 'bait and switch' routine" forced the defendant "to defend his actions over a period of time much greater than the time specified in the indictment"). As the trial court erred in failing to dismiss the charges, we vacate the judgment.

Vacated.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. KEVIN WAYNE PHILLIPS

No. COA03-364

(Filed 17 February 2004)

1. **Indictment and Information— fatal defect—raised at any time**

   The question of a fatal defect in an indictment was properly before the Court of Appeals even though it was raised for the first time on appeal.

2. **Larceny— indictment—allegation of ownership—insufficient**

   Indictments were fatally defective where Count I of each alleged larceny from "Parker's Marine," did not allege that Parker's Marine was a legal entity capable of ownership, and did not incorporate by reference information about Parker's Marine in Count II. Each count should be complete in itself, although allegations in another count may be incorporated by reference.

Appeal by defendant from judgments entered 20 September 2002 by Judge Michael E. Beale in Richmond County Superior Court. Heard in the Court of Appeals 14 January 2004.

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

Osborn & Tyndall, P.L.L.C., by Amos Granger Tyndall, for defendant-appellant.

CALABRIA, Judge.

Kevin Wayne Phillips ("defendant") was arrested and indicted on five counts each of felonious possession of stolen property and felonious larceny based upon his alleged involvement in the theft of five four-wheelers in early December 2001 from Parker's Marine and Outdoors. Defendant was separately indicted for having attained the status of habitual felon. At trial, defendant moved to dismiss the charges at the close of the State's case and specifically argued as to one of the larceny charges that it should be dismissed on the grounds that one of the stolen four-wheelers did not belong to the dealership and there had been no testimony concerning permission by the owner to take it. The trial court denied defendant's motion. Defendant presented no evidence and renewed his motions to dismiss, which the trial court again denied. After the jury returned verdicts of guilty on all charged counts, defendant pled guilty to having attained the status of habitual felon. The trial court arrested judgment on the five counts of felonious possession of stolen property and consolidated four of the five counts of felonious larceny into a single judgment. On the remaining count and the consolidated counts of felonious larceny, the trial court sentenced defendant to two consecutive terms of 167 to 210 months' imprisonment.

[1] On appeal, we consider only defendant's assertion that the trial court erred in failing to dismiss the larceny charges due to defects in the indictments. Specifically, defendant contends the indictments are fatally defective in charging felonious larceny because they lack sufficient indication of the four-wheelers' legal ownership. While defendant failed to contest the sufficiency of the indictments on this ground before the trial court, it is well established that, when a fatal defect is present in the indictment charging the offense, "a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal." *State v. Wilson*, 128 N.C. App. 688, 691, 497 S.E.2d 416, 419 (1998). Accordingly, this issue is properly before the Court.

[2] "To be sufficient, an indictment for larceny must allege the owner or person in lawful possession of the stolen property." *State v.*

Downing, 313 N.C. 164, 166, 326 S.E.2d 256, 258 (1985). If the entity named in the indictment is not a person, it must be alleged "that the victim was a legal entity capable of owning property[.]" *State v. Woody*, 132 N.C. App. 788, 790, 513 S.E.2d 801, 803 (1999). "An indictment that insufficiently alleges the identity of the victim is fatally defective and cannot support conviction of either a misdemeanor or a felony." *Id.*

In the instant case, a separate indictment was handed down by the Richmond County Grand Jury for each of the five four-wheelers stolen. Count I of each indictment involved the larceny of a four-wheeler and identified it as "the personal property of Parker's Marine." Parker's Marine is not an individual. Moreover, count I fails to allege that Parker's Marine was a legal entity capable of ownership. As we have previously held, "[b]ecause the indictment lacks any indication of the legal ownership status of the victim (such as identifying the victim as a natural person or a corporation), it is fatally defective and cannot support defendant's conviction." *State v. Norman*, 149 N.C. App. 588, 593, 562 S.E.2d 453, 457 (2002). Accordingly, we must vacate the judgments entered on the counts of felonious larceny.

The State contends count II in each indictment states Parker's Marine is a "person, corporation, and other legal entity," and the two counts should be read together. We disagree. "[I]t is settled law that each count of an indictment containing several counts should be complete in itself. It is also settled that allegations in one count may be incorporated by reference in another count." *State v. Moses*, 154 N.C. App. 332, 336, 572 S.E.2d 223, 226-27 (2002) (internal citations and quotation marks omitted). In the instant case, count I in the indictment is neither complete in itself for failure to identify the victim as a legal entity capable of ownership, nor does count I incorporate by reference information contained in count II.

The State asserts, for preservation of the issue, that the appropriate analysis for a fatally defective indictment is to determine whether the error was harmless. We have previously rejected this analysis in favor of our standing precedent. *State v. Partridge*, 157 N.C. App. 568, 570, 579 S.E.2d 398, 399, *disc. rev. improvidently allowed*, 357 N.C. 572, —— S.E.2d —— (2003). We hold accordingly.

Vacated.

Judges BRYANT and ELMORE concur.

CASES WITHOUT PUBLISHED OPINIONS

McHARGUE v. McHARGUE No. 03-344	Iredell (98CVD2337)	Affirmed in part, vacated in part and remanded for further consideration
MICHAEL W. STRICKLAND & ASSOCS., P.A. v. ABOUL-HOSN No. 03-507	Wake (00CVD13910)	Reversed
MURPHY v. DOMBROSE No. 02-1652	Mecklenburg (00CVS1962)	Affirmed
ROZIER v. HAWORTH, INC. No. 03-157	Ind. Comm. (I.C.680073)	Dismissed
STATE v. FORD No. 03-140	Robeson (01CRS16412) (01CRS16413) (01CRS16414) (01CRS16415) (01CRS16418) (02CRS498)	Affirmed in part and remanded in part for resentencing
STATE v. GILES No. 03-675	Wake (01CRS104377) (02CRS11636)	No error in part, reversed in part and remanded for new trial
STATE v. JACOBS No. 03-136	Johnston (01CRS52565) (02CRS6538)	No error
STATE v. LYONS No. 03-208	Wake (01CRS112990) (01CRS112994)	Affirmed
STATE v. SHARPE No. 03-366	Yadkin (01CRS50848) (01CRS50849) (01CRS50850) (01CRS50851) (01CRS50852) (01CRS50853) (01CRS50854) (01CRS50855) (01CRS50856) (01CRS50857) (01CRS50858) (01CRS50859) (01CRS50860) (01CRS50861)	No error

	(01CRS50862) (01CRS50863) (01CRS50864) (01CRS50865) (01CRS50866) (01CRS50867)	
STATE v. SMITH No. 02-1494	Scotland (99CRS6271)	No error

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Request for portion of transcript—improper emphasis on one portion of evidence—The trial court did not abuse its discretion in a first-degree statutory sexual offense and indecent liberties case by denying the jury's request that it be read a portion of the transcript of defendant's testimony. **State v. Poston, 642.**

Requested instruction—eyewitness identification—given in substance—There was no error in not giving a requested instruction on eyewitness identification in an assault and larceny prosecution where the instructions given contained the substance of the requested instruction. **State v. Skinner, 434.**

Securing attendance of incarcerated defendant—not a speedy trial motion—N.C.G.S. § 15A-711 does not guarantee a prisoner the right to a speedy trial within a specified period of time, and this defendant's request under the statute should not have been treated as a speedy trial motion. A prosecutor complies with the statute by making a written request to secure defendant's presence at the trial within 6 months of defendant's request that he do so, whether or not the trial actually takes place during the statutory period. **State v. Doisey, 447.**

Shackling of defendant at trial—adequate findings required—The general rule is that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances, and should the trial court in its sound discretion decide shackling is a necessary means for a safe and orderly trial, the determination must be supported by adequate findings. **State v. Jackson, 695.**

ENVIRONMENTAL LAW

Stormwater permit—NPDES Committee—final agency decision—The National Pollutant Discharge Elimination System Committee of the Environmental Management Commission was properly delegated the authority to render a final agency decision under N.C.G.S. § 143-215.3(a)(4). **N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 467.**

EVIDENCE

Article search—foundation—plain error analysis—The trial court did not commit plain error in a larceny, felonious breaking and entering, and resisting a public officer case by failing to intervene ex mero motu when testimony of an officer regarding an article search performed by him and his K-9 partner was admitted allegedly without a proper foundation. **State v. Cathey, 350.**

Auto accident—injuries of non-party—There was no error in denying a new trial to determine damages from an auto accident based on the admission of testimony about the injuries of another occupant of plaintiff's vehicle. The evidence was admitted for the limited purpose of proving the force of the impact. **Dunn v. Custer, 259.**

Character—establishing elements of charged crimes—The trial court did not err in a possession of drug paraphernalia, possession with intent to sell and deliver cocaine, and maintaining a place to keep controlled substances case by allowing a deputy's testimony that he had seen defendant at the pertinent residence on previous occasions even if the testimony suggested that defendant had a prior record or bad character because it was admissible to establish elements of the charged crimes. **State v. Moore, 268.**

Character of victims—not placed in issue by defendant—evidence not prejudicial—Admission of testimony about the character of homicide victims before defendant called their character into issue was not prejudicial in light of the overwhelming evidence against defendant. **State v. Allen, 587.**

Competency of witness—unconscious assault victim—There was no plain error in an assault and larceny prosecution in allowing the victim to testify that defendant had taken $75 from her. She saw defendant in her house when she had the money in her pocketbook, defendant struck her and left, and the money was found to be missing. **State v. Skinner, 434.**

Employment after accident—not speculative—There was no error in the denial of a new trial on damages from an auto accident based on defendant's contentions that testimony about plaintiff's employment as a dentist was speculative due to a medical condition existing before the accident. **Dunn v. Custer, 259.**

Expert testimony—foundation—There was a proper foundation for medical testimony in a child abuse and neglect case. **In re Mashburn, 386.**

Expert testimony—hypothetical questions—The trial court did not err in an indecent liberties with a minor and attempted first-degree rape case by allowing a child psychologist to testify about hypothetical evidence because the fact that the expert's testimony took the form of hypothetical questions and was based on information related to her by others goes only to the weight of her testimony. **State v. McCall, 64.**

EVIDENCE—Continued

Hearsay—state of mind—other evidence admitted—There was no error in the court admitting hearsay testimony in a first-degree murder prosecution where other testimony was admitted to the same effect or the evidence concerned the victim's state of mind. These statements explained the victim's conditions as shown in photographs and tended to disprove the nonabusive relationship defendant described. An express declaration of fear is not required. **State v. Dawkins, 231.**

Hearsay—unavailable witness—The trial court correctly deemed unavailable a witness who would not return from Mexico, and the six prongs of the inquiry required by N.C.G.S. § 8C-1, Rule 804(b)(5) were satisfied. **State v. Allen, 587.**

Hearsay—unavailable witness—statements against interest—catchall exception—The trial court did not abuse its discretion by refusing to admit the testimony of a former county manager made at an earlier hearing in a different case and statements made to an SBI agent after the former county manager asserted his Fifth Amendment privilege against self-incrimination, because: (1) although the former county manager was unavailable under N.C.G.S. § 8C-1, Rule 804(a)(1) based on his invocation of the right against self-incrimination, his statements did not fall within the exceptions under Rule 804(b)(1) when the issues from the previous case from which plaintiffs wanted to introduce testimony were far different from the issues here; (2) his statements during his deposition and testimony did not meet the N.C.G.S. § 8C-1, Rule 804(b)(3) statements against interest exception when he avoided any and all incriminating statements against himself by repeatedly asserting his Fifth Amendment privilege against self-incrimination; and (3) the statements were not admissible under the N.C.G.S. § 8C-1, Rule 804(b)(5) catchall exception when the motivation for his statements was to exculpate himself from any wrongdoing by attempting to blame it on the board of commissioners, and the statements did not meet the circumstantial guarantees of trustworthiness when he was strongly motivated to protect his own interests. **Gibbs v. Mayo, 549.**

Impeachment—reversed conviction—The trial court did err in an accessory after the fact to voluntary manslaughter case by excluding evidence of the principal husband's significantly higher sentence after his jury trial in comparison to the sentence later imposed pursuant to a plea agreement even though defendant contends it prevented her from impeaching the principal's testimony. **State v. Jordan, 308.**

Results of DNA and enzyme test—motion in limine—Although defendant contends the trial court erred in an indecent liberties with a minor and attempted first-degree rape case by granting the State's motion in limine allowing the suppression of the results of DNA and enzyme tests performed on the minor victim's underwear, this assignment of error is dismissed because the trial court reversed its ruling and stated that the laboratory report could be admitted into evidence if defendant chose to do so, but defendant never offered the report into evidence. **State v. McCall, 64.**

Subsequent DWI conviction—credibility—The trial court did not abuse its discretion in a wrongful death case arising out of a motor vehicle accident by excluding evidence of defendant's subsequent unrelated DWI conviction on the ground that its probative value was outweighed by its prejudicial nature. **Headley v. Williams, 300.**

NEGLIGENCE—Continued

ciations's notice of the hazard, and notice of the hazard by the owner's assistant manager. **Jones v. Lake Hickory R.V. Resort, Inc., 618.**

Property owner—failure to supervise—parade—not intrinsically dangerous—The trial court erred by instructing a jury that it could find that a resort owner's failure to supervise a 4th of July parade was negligence and rendered it liable to a 14-year old burned by a rollerblading twelve-year-old boy dressed as the Statue of Liberty and carrying a tiki torch. A parade of golf carts at 5 m.p.h. is not intrinsically dangerous and identical parades had been held for many years without injury. **Jones v. Lake Hickory R.V. Resort, Inc., 618.**

Sudden emergency—request for instruction—denied—Defendant's request for an instruction on sudden emergency was properly denied where defendant did not establish that the emergency was not created by his own negligence. **Overton v. Purvis, 241.**

Surveying—judicial notice of statutes—Judicial notice of statutes was not error in a bench trial on a negligent surveying claim where the findings indicate that the court viewed the statutes as setting forth the nature of defendant's profession. Any error in regarding certain statutes as setting a specific standard of care was harmless because plaintiff presented sufficient evidence of the standard of care and because the standard of care was within the common knowledge and experience of the trial court. **Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc., 405.**

Surveying—standard of care—Plaintiff's offer of testimony of a surveyor who was employed by defendant with ten years experience was sufficient to establish the standard of care in a claim for negligent surveying. Moreover, expert testimony is not required where the trier of fact is able to decide the issues based on common knowledge and experience. **Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc., 405.**

Surveyors—evidence sufficient—There was sufficient evidence to find a surveyor negligent in a bench trial, despite evidence to the contrary. **Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc., 405.**

PHARMACISTS

Board of Pharmacy—due process—specific identified errors—Respondent Board of Pharmacy's final decisions in three cases where pharmacists employed by petitioner dispensed the wrong medications did not violate petitioner's due process rights based on alleged unlawful procedures. **CVS Pharm., Inc. v. N.C. Bd. of Pharm., 495.**

Dispensing wrong medications—final agency decision—arbitrary and capricious standard—Respondent Board of Pharmacy's final decisions in three cases where pharmacists employed by petitioner dispensed the wrong medications were not arbitrary and capricious. **CVS Pharm., Inc. v. N.C. Bd. of Pharm., 495.**

Pharmacies—disciplinary authority of Board of Pharmacy—Respondent Board of Pharmacy did not exceed its authority by attempting to reprimand, regulate, and limit the operations of three pharmacies of CVS pursuant to N.C.G.S. § 90-85.38 involving three cases where pharmacists employed by peti-

SEXUAL OFFENSES—Continued

defendant's motion to dismiss the charges of two counts of first-degree sexual offense and two counts of indecent liberties with a child, because: (1) the State failed to present evidence that the charged offenses occurred on or about 15 June 2001 as alleged in the indictment; (2) defendant relied on the language in the indictment to build his alibi defense for the 15 June 2001 weekend; and (3) all of the evidence presented at trial went to sexual encounters over a period of years ending some time prior to the date listed in the indictment, and such a dramatic variance between the indictment date and the evidence adduced at trial prejudiced defendant by denying him the opportunity to present an adequate defense. **State v. Custis, 715.**

First-degree—times specified in indictments—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of first-degree sexual offense even though defendant contends there was a lack of evidence that the offenses were committed during the periods specified in the indictments where defendant did not assert an alibi defense or rely upon the dates in the indictments in preparing his defense, and there was no double jeopardy concern when the number of first-degree sexual incidents corresponded to the number of indictments issued and the jury was careful in distinguishing among dates. **State v. Poston, 642.**

Indecent liberties—statutory sex offense—sexual activity by a custodian—instructions—The trial court did not commit plain error in an indecent liberties with a child, statutory sex offense, and sexual activity by a custodian case by its failure to instruct the jury on the elements of each offense for each date that the crime charged allegedly occurred where the trial court took care to instruct the jury that the charge for each individual count of a particular offense was identical, and the same law applies for each charge. **State v. Evans, 540.**

Indecent liberties—statutory sex offense—sexual activity by a custodian—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of indecent liberties with a child, statutory sex offense, and sexual activity by a custodian because there was both direct and circumstantial evidence supporting those charges. **State v. Evans, 540.**

Sex offender registration requirements—knowledge—instruction—The trial court did not err in a case concerning a failure to comply with the sex offender registration requirements under N.C.G.S. § 14-208.11 by failing to instruct the jury that the State was required to prove defendant's knowledge of the requirements. **State v. White, 183.**

Taking or attempting to take indecent liberties with a child—motion to dismiss—sufficiency of evidence—The trial court erred by denying defendant's motion to dismiss the charges of taking or attempting to take indecent liberties with a child where the conversations between defendant and the child were not sexually graphic or explicit and were not accompanied by other actions showing that defendant's purpose was sexually motivated. **State v. Brown, 333.**

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tion case by voiding the parties' mediated settlement agreement based on mutual mistake of fact that plaintiff had reached maximum medical improvement, and the Commission's opinion and award filed 18 September 2002 is affirmed. **Roberts v. Century Contr'rs, Inc., 688.**

Motion to withdraw or stay opinion—subrogation lien—The Industrial Commission did not err in a workers' compensation case by denying defendants' motion to withdraw or to stay the effect of the opinion and award of the full Commission on the basis of defendants' subrogation claims because a final award has not been entered in this matter, and jurisdiction over defendants' subrogation lies in the superior court until the award becomes final. **Childress v. Fluor Daniel, Inc., 524.**

Payment of medical expenses—equitable subrogation—Plaintiff health insurer's claim against the Insurance Guaranty Association (IGA) on behalf of an insolvent workers' compensation carrier for payment of an insured's medical expenses after a work-related heart attack constituted a claim for equitable subrogation for which the IGA was liable where plaintiff paid the medical expenses in good faith without knowledge that the heart attack was a compensable workers' compensation injury, and the health insurance policy excluded from coverage compensable workers' compensation injuries. **John Alden Life Ins. Co. v. N.C. Ins. Guar. Ass'n, 167.**

Payment of medical treatment—*Hyler* benefits—res judicata—The Industrial Commission did not err in a workers' compensation case by denying defendant employer's motion to dismiss and by concluding that res judicata did not bar plaintiff's claims for additional medical benefits under *Hyler v. GTE Products Co.*, 333 N.C. 258 (1993), because while res judicata might bar relitigation of compensation for other loss, *Hyler* allows plaintiff to recover for new or additional medical expenses even if there has been no material change in the employee's condition or in available medical treatments. **McAllister v. Wellman, Inc., 146.**

Permanent injury award—lung damage—The Industrial Commission did not abuse its discretion in a workers' compensation case by awarding plaintiff employee $40,000 for his lung damage because the lungs are not a single organ entitling plaintiff to a maximum award of $20,000 but are two separate organs. **Childress v. Fluor Daniel, Inc., 524.**

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Directed verdict—contributory negligence—The trial court erred in a wrongful death case arising out of a motor vehicle accident by granting a directed verdict in favor of defendant on the ground that decedent was contributorily negligent based upon the changed opinion of a highway trooper. **Headley v. Williams, 300.**

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Adult business—zoning violations—There was competent and sufficient evidence to support findings and conclusions that petitioner violated the city's zoning requirements in its operation of adult mini-motion picture booths. **Fantasy World, Inc. v. Greensboro Bd. of Adjust., 603.**

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